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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT (OCTOBER 28, 2019)

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JIMMY DEAN HARRIS,

Petitioner-Appellant,

v.

TOMMY SHARP, INTERIM WARDEN, OKLAHOMA STATE PENITENTIARY,*

Respondent-Appellee.

No. 17-6109

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:08-CV-00375-F)

Jack Fisher, Fisher Law Office, Edmond, Oklahoma, and Emma V. Rolls, Assistant Federal Public Defender, Oklahoma City, Oklahoma, on behalf of the Petitioner-Appellant.

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* Pursuant to Fed. R. App. P. 42(c)(2), Mike Carpenter is replaced by Tommy Sharp, as the Interim Warden of the Oklahoma State Penitentiary.

Jennifer L. Crabb, Assistant Attorney General (Mike Hunter, Attorney General of Oklahoma, with her on the briefs), Oklahoma City, Oklahoma, on behalf of the Respondent-Appellee.

Before: TYMKOVICH, Chief Judge, BACHARACH, and McHUGH, Circuit Judges.

BACHARACH, Circuit Judge

Mr. Jimmy Dean Harris was convicted of first-degree murder and sentenced to death. He appealed, and the Oklahoma Court of Criminal Appeals (OCCA) reversed his sentence and remanded for a retrial at the penalty phase. After the retrial, the state district court reimposed the death penalty. Mr. Harris appealed and sought post-conviction relief in state court. When these efforts failed, he brought a habeas petition in federal district court. The court denied relief, and Mr. Harris appeals.

On appeal, Mr. Harris argues in part that his trial counsel was ineffective in failing to seek a pretrial hearing on the existence of an intellectual disability, which would have prevented the death penalty.[1] The federal district court rejected this claim. In our view, the district court should have conducted an evidentiary hearing to decide this claim, so we reverse and remand for further consideration. Given the need to

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[1] Older opinions often used the term "mentally retarded." *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 (2002). But more recently, we have used the term "intellectually disabled." *See Postelle v. Carpenter*, 901 F.3d 1202, 1210 n.4 (10th Cir. 2018); *cf.* Rosa's Law, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (changing references in federal law from "mental retardation" and "mentally retarded" to "intellectual disability" and "intellectually disabled").

remand on this issue, we also remand for the district court to reconsider the claim of cumulative error. But we affirm the denial of habeas relief on Mr. Harris's other claims.

BACKGROUND[2]

Jimmy Dean Harris and Pam Harris were married for about twenty years. Mr. Harris repaired transmissions, as did Pam, who worked for Mr. Merle Taylor. With the passage of time came marital strain between Mr. Harris and Pam.

In 1999, Pam obtained a divorce and restraining order, requiring Mr. Harris to move out of their house. He complied, moving his belongings into a storage shed, but he grew distraught—crying, drinking, and taking Valium.

The next day, Pam returned home and discovered that Mr. Harris had vandalized the house and moved some of her belongings into the storage shed. This incident led Pam to change the locks and to obtain a second restraining order, which required Mr. Harris to stay away from the house.

Mr. Harris repeatedly asked Pam to allow him to retrieve his tools. After a few days, Mr. Harris went to Pam's workplace and shot at her, Mr. Taylor, and his daughter (Jennifer Taylor). Mr. Taylor died, Pam was wounded, and Jennifer Taylor escaped without injury.

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[2] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), we defer to the OCCA's factual findings absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). We thus state the facts as the OCCA found them unless noted otherwise.

At a 2001 trial, the jury found Mr. Harris guilty of first-degree murder in the death of Merle Taylor and recommended the death penalty, finding one aggravating circumstance (creation of a substantial risk of death to more than one person).[3] As noted above, the death sentence was vacated by the OCCA in a prior appeal. At the 2005 retrial on the penalty, the prosecution alleged two aggravating factors:

1. Mr. Harris created a substantial risk of death to more than one person.
2. Mr. Harris posed a continuing threat to society.

The jury found both aggravating factors and again recommended the death penalty. The trial court agreed with the recommendation and resentenced Mr. Harris to the death penalty.

THE STANDARD OF REVIEW

We engage in de novo review of the federal district court's legal analysis. *Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013). In district court, review is deferential when the state appellate court rejects a claim on the merits. After rejection of the claim in state court, the federal district court can reach the merits only if the state appellate court's decision was

- contrary to, or involving an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

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[3] The jury also found Mr. Harris guilty of attempted murder as to Pam.

- based on an unreasonable determination of the facts given the evidence presented in state court.

Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d).

To determine whether a state-court decision was contrary to, or involved an unreasonable application of, clearly established law, we engage in a two-step process. *Budder v. Addison*, 851 F.3d 1047, 1051 (10th Cir.), *cert. denied*, 138 S. Ct. 475 (2017). We first determine the clearly established law by considering Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 379 (2000). We then ask whether the state court's decision was contrary to, or involved an unreasonable application of, that precedent. *Id.*

We must defer to the state court's factual findings unless "the state court[] plainly misapprehend[ed] or misstate[d] the record in making [its] findings, and the misapprehension goes to a material factual issue that is central to [the] petitioner's claim." *Ryder* ex rel. *Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir. 2016) (quoting *Byrd v. Workman*, 645 F.3d 1159, 1171–72 (10th Cir. 2011)). To overcome the state appellate court's factual findings, the petitioner must show that they are objectively unreasonable. *Smith v. Aldridge*, 904 F.3d 874, 880 (10th Cir. 2018).

If the state's highest court acted unreasonably in applying Supreme Court precedent or finding facts, the district court must decide whether the conviction or sentence violated the Constitution. *See Fry v. Pliler*, 551 U.S. 112, 119 (2007) (stating that 28 U.S.C. § 2254 (d) provides "precondition[s] to the grant of habeas relief . . . , not an entitlement to it"); *Hancock v. Tram-*

mell, 798 F.3d 1002, 1010 (10th Cir. 2015) ("[E]ven when petitioners satisfy the threshold in § 2254(d), they must establish a violation of federal law or the federal constitution.").

APPELLATE ARGUMENTS COVERED IN AN EXISTING CERTIFICATE OF APPEALABILITY

Our court previously granted a certificate of appealability on Mr. Harris's appellate arguments involving ineffective assistance of counsel, an improper jury instruction on mitigation evidence, improper closing arguments about the mitigation evidence, improper victim testimony recommending a particular sentence, and cumulative error. We reverse and remand for further consideration of the claims involving (1) ineffective assistance in the failure to seek a pretrial hearing on an intellectual disability and (2) cumulative error.

I. Ineffective Assistance of Counsel

The Sixth Amendment entitles a defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Invoking this amendment, Mr. Harris argues that his attorney at the 2005 retrial was ineffective for failing to

- seek a pretrial hearing on the existence of an intellectual disability, which would have precluded the death penalty,
- present additional trial evidence for mitigation based on an intellectual disability, and
- present additional mitigation evidence at trial regarding a lesser intellectual impairment or mental illness.

A. The *Strickland* Standard

To address Mr. Harris's arguments, the district court needed to apply the two-part test set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

Under the first part of the test, the court was to determine whether Mr. Harris's attorney was deficient. Attorneys are deficient when their mistakes are so serious that they stop functioning as "counsel" for purposes of the Sixth Amendment. *Id.* at 687. In making this determination, the court ordinarily presumes that counsel's performance is reasonable and might entail a sound strategy. *Newmiller v. Raemisch*, 877 F.3d 1178, 1196 (10th Cir. 2017). In capital cases, however, courts scrutinize attorney performance particularly closely in the sentencing phase. *Littlejohn v. Trammel*, 704 F.3d 817, 859 (10th Cir. 2013).

To overcome this presumption, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This inquiry is "highly deferential," and courts should avoid "the distorting effects of hindsight." *Id.* at 689. Strategic decisions after a "thorough investigation" are afforded even greater deference and are "virtually unchallengeable." *Id.* at 690. "Even under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

When a habeas petitioner alleges ineffective assistance of counsel, deference exists both in the underlying constitutional test (*Strickland*) and the AEDPA's standard for habeas relief, creating a "doubly deferential judicial review." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). Under this double deference, we

consider "whether there is *any reasonable argument* that counsel satisfied *Strickland*'s deferential standard." *Ellis v. Raemisch*, 872 F.3d 1064, 1084 (10th Cir. 2017) (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (emphasis in original)).

The petitioner must show not only a deficiency in the representation but also prejudice. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). For prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

B. Failure to Seek a Pretrial Hearing on Intellectual Disability as a Bar to Execution

Mr. Harris argues that his counsel was ineffective for failing to seek a pretrial hearing on an intellectual disability that would render him ineligible for the death penalty. This argument is based on *Atkins v. Virginia*, 536 U.S. 304 (2002), where the Supreme Court concluded that the execution of intellectually disabled persons violates the Eighth Amendment's prohibition on cruel-and-unusual punishment. 536 U.S. at 317, 321.[4]

Despite this conclusion, the Supreme Court allowed states to establish their own standards for an intellectual disability. *Id.* at 317 n.22. We thus focus on the content of Oklahoma law (when Mr.

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[4] In the first direct appeal, Mr. Harris's appellate counsel invoked *Atkins*, urging the OCCA to remand for the state trial court to determine the existence of an intellectual disability. But the OCCA vacated the sentence without reaching this issue. *Harris v. State*, 84 P.3d 731, 757 (Okla. Crim. App. 2004).

Harris's retrial took place). At that time, Oklahoma law allowed consideration of an intellectual disability only if the defendant had at least one IQ score under 70. *See Murphy v. State*, 54 P.3d 556, 567–68 (Okla. Crim. App. 2002), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). Upon such a showing, the defendant could then establish an intellectual disability by proving intellectual and adaptive deficits and manifestation before age eighteen. *Id.*; *see* p. 31, below.

Mr. Harris argues that his attorney was ineffective by failing to ask for a pretrial hearing on intellectual disability. To address this argument, we consider and apply the standard of review.

1. The Standard of Review

In denying relief on this claim, the OCCA explained that "[Mr.] Harris must [1] show that counsel's performance was so deficient that he did not have counsel as guaranteed by the Sixth Amendment, and that [2] the deficient performance created errors so serious as to deprive him of a fair trial with reliable results." *Harris v. State*, 164 P.3d 1103, 1114 (Okla. Crim. App. 2007). The OCCA rejected this claim on the ground that Mr. Harris could not establish prejudice. *See id.* at 1115–16 (concluding that "Harris cannot show he was prejudiced by counsel's failure" because "[w]e cannot conclude there was a reasonable probability that, but for counsel's omission, the results of this resentencing proceeding would have been different").

The State nevertheless argues that the OCCA implicitly decided the deficiency prong on the merits. The State's argument conflates two of the OCCA's determinations: One involves Mr. Harris's claim that

his counsel failed to seek a pretrial hearing on the existence of an intellectual disability; the other determination involves Mr. Harris's claim that his counsel failed to adequately present mitigating evidence at the trial. *See Harris v. State*, 164 P.3d 1103, 1118 (Okla. Crim. App. 2007). For the second claim (failure to adequately present mitigating evidence at the trial), the OCCA addressed the merits of the deficiency prong. But the OCCA did not address the deficiency prong on the first claim (failure to seek a pretrial hearing on intellectual disability). For this claim, the OCCA expressly rested on the prejudice prong without any mention of the deficiency prong. *Harris v. State*, 164 P.3d 1103, 1115–16 (Okla. Crim. App. 2007).

Because the OCCA did not adjudicate the merits of the deficiency prong on this claim, we engage in de novo review of this part of the district court's ruling. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005) (reviewing de novo the prejudice prong of an ineffective-assistance claim because the state court had not reached this prong); *Smith v. Sharp*, 935 F.3d 1064, 1072 (10th Cir. 2019) ("[I]n cases in which a state court addresses only one prong of a multi-prong analysis, the Supreme Court requires that federal habeas courts address the other prongs *de novo*.").

But the OCCA did reach the merits of the prejudice prong, rejecting Mr. Harris's arguments. Still, Mr. Harris argues that we should engage in de novo review on this prong because the OCCA did not

- sufficiently consider Dr. Callahan's report or
- permit an evidentiary hearing.

Mr. Harris did not raise his first argument (insufficient consideration of the evidence by the OCCA)

in district court. Even in habeas cases involving the death penalty, we consider arguments forfeited or waived when they are raised for the first time on appeal. *See Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015) (forfeited); *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015) (waived).[5]

Mr. Harris's second argument (the OCCA's denial of an evidentiary hearing) is based on *Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009) (en banc), where we considered the OCCA's denial of an evidentiary hearing and rejection of an ineffective-assistance claim without considering material non-record evidence. In these circumstances, we concluded that the denial did not constitute an adjudication on the merits under § 2254(d). *Wilson*, 577 F.3d at 1300.

After we issued this opinion, however, the OCCA clarified its procedures for deciding these claims. *Simpson v. State*, 230 P.3d 888 (Okla. Crim. App. 2010). Given this clarification, we concluded in *Lott v. Trammell* that

- *Wilson* no longer applies and

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[5] Our precedents are inconsistent in discussing preservation in cases involving 28 U.S.C. § 2254. We sometimes treat unpreserved issues as waived, sometimes as forfeited. *See Harmon v. Sharp*, 936 F.3d 1044, 1085–91 (10th Cir. 2019) (Holmes, J., concurring) (discussing this inconsistency in our case law). The difference here is academic. If the issue involves forfeiture rather than waiver, we could consider the issue under the plain-error standard. *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007). But Mr. Harris has not argued plain error, so we would not entertain the issue even if it had been forfeited rather than waived. *See Hancock*, 798 F.3d at 1011.

- any denial of a request for an evidentiary hearing on an ineffective-assistance claim constitutes an adjudication on the merits.

705 F.3d 1167, 1213 (10th Cir. 2013). Mr. Harris's argument is thus foreclosed by *Lott*.

Mr. Harris contends that (1) the panel in *Lott* could not overrule the *en banc* opinion in *Wilson* and (2) the OCCA's clarification of the standard came after the OCCA had rejected Mr. Harris's argument. We reject both contentions.

It is true that a panel typically cannot overrule an earlier precedent. *United States v. White*, 782 F.3d 1118, 1123 n.2 (10th Cir. 2015). But a panel is not bound by precedents that have been superseded by a change in state law. *Wankier v. Crown Equip. Corp.*, 353 F.3d 862, 867 (10th Cir. 2003). Our interpretation of state law changed when the OCCA clarified the standard for adjudicating a request for an evidentiary hearing. *Lott*, 705 F.3d at 1213.

As Mr. Harris points out, the OCCA had rejected his argument before the OCCA clarified the state-law standard. But the same was true in *Lott*, and we relied there on the OCCA's clarification in deciding that the denial of an evidentiary hearing constituted an adjudication on the merits. *Id.* This approach makes sense because the OCCA was clarifying what its rules had already been and didn't suddenly start adjudicating the merits when denying evidentiary hearings. *Wilson v. Trammell*, 706 F.3d 1286, 1311 (10th Cir. 2013) (Gorsuch, J., concurring). Before *Lott*, we had simply misunderstood Oklahoma law. *See id.* ("[T]he OCCA has explained that *Wilson* was mistaken in its understanding of Oklahoma law."). Under

Lott, we thus consider the OCCA's denial of an evidentiary hearing on an ineffective-assistance claim as an adjudication on the merits.

We thus engage in de novo review of the OCCA's ruling on the deficiency prong, but we apply § 2254(d)'s deferential standard of review on the prejudice prong.

2. Deficiency Prong

Applying de novo review, we conclude that Mr. Harris's attorney was deficient in failing to request a pretrial hearing to assess an intellectual disability.

The State argues that defense counsel strategically decided to forgo a pretrial hearing after a thorough investigation. Strategic decisions draw considerable deference when the attorney has thoroughly investigated the law, the facts, and the plausible alternatives. *Strickland v. Washington*, 466 U.S. 668, 690 (1984). But merely calling something a strategy does not prevent meaningful scrutiny. We must still determine (1) whether an attorney has chosen to forgo a course of action and (2) whether that choice was reasonable under the circumstances. *Brecheen v. Reynolds*, 41 F.3d 1343, 1369 (10th Cir. 1994).

In assessing the reasonableness of an attorney's investigation, we engage in close scrutiny during the penalty phase of capital cases. *Littlejohn v. Trammell*, 704 F.3d 817, 859 (10th Cir. 2013). In these cases, "we refer to the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases." *Id.* These guidelines require that "[c]ounsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client." ABA Guide-

lines § 10.11(L). One appropriate opportunity involved a pretrial hearing on the existence of an intellectual disability.[6] *State* ex rel. *Lane v. Bass*, 87 P.3d 629, 633 (Okla. Crim. App. 2004), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). Had Mr. Harris been found intellectually disabled, he would have been ineligible for the death penalty. *Id.* at 632.

When the 2005 retrial took place, Oklahoma law permitted pretrial evidentiary hearings before a judge on the existence of an intellectual disability. *See State* ex rel. *Lane v. Bass*, 87 P.3d 629, 633–35 (Okla. Crim. App. 2004), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). If the defendant preferred a jury, he or she could also opt for a jury finding on the existence of an intellectual disability. If the jury found no intellectual disability, the defendant could ask the judge to revisit the issue after the trial. *Id.* at 635.

So if the judge or jury found no intellectual disability, the defense would have lost nothing. But if either the judge or jury found an intellectual disability, the death penalty would have vanished as a possibility. Defense counsel thus had a risk-free opportunity to avoid the death penalty. *Frazier v. Jenkins*, 770 F.3d 485, 501 (6th Cir. 2014)[7]; *see Clinkscale v.*

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[6] Alternatively, Mr. Harris could have asked the trial jury to determine the existence and impact of an intellectual disability. *Lane*, 87 P.3d at 632. But Mr. Harris argues only that his attorney should have requested a pretrial hearing.

[7] The *Frazier* court explained: "[W]e fail to see the downside in having a non-frivolous *Atkins* hearing, and it is difficult to ascertain a strategic reason for withdrawing the motion [for an *Atkins* hearing] in this case." 770 F.3d at 501.

Carter, 375 F.3d 430, 443 (6th Cir. 2004) (holding that defense counsel was deficient by failing to file a timely notice of an alibi defense when counsel had "everything to gain" and "nothing to lose"); *see also Browning v. Baker*, 875 F.3d 444, 473 (9th Cir. 2017) ("[T]he obligation to investigate, recognized by *Strickland*, exists when there is no reason to believe doing so would be fruitless or harmful.").[8]

Though no downside existed,[9] a pretrial hearing had considerable upside. The evidence of an intellectual disability was ready-made. For example, Mr. Harris had IQ scores under the 70-point threshold necessary for a determination of intellectual disability under Oklahoma law. *Murphy v. State*, 54 P.3d 556, 567–68 (Okla. Crim. App. 2002), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). One expert witness, Dr. Martin Krimsky, had already diagnosed Mr. Harris with a mild intellectual disability. And other evidence of Mr. Harris's difficulties in intellectual and adaptive functioning had already been introduced at a competency hearing and the 2001 trial.

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[8] At oral argument, the State also suggests that Mr. Harris might have wanted to avoid the delay from a pretrial hearing on intellectual disability. But the State had never before argued in state or federal court that Mr. Harris wanted to expedite his capital proceedings. *See United States v. Gaines*, 918 F.3d 793, 800–801 (10th Cir. 2019) ("We typically decline to consider an appellee's contentions raised for the first time in oral argument.").

[9] We do not suggest that counsel should always argue points lacking any downside. *See Knowles v. Mirzayance*, 556 U.S. 111, 121–22 (2009) (stating that counsel may not be ineffective by declining to assert a defense even when there is nothing to lose).

The State contends that defense counsel did not request a pretrial hearing because he believed that Mr. Harris was not intellectually disabled.[10] For this contention, the State points to the voir dire, where defense counsel conceded that Mr. Harris was not intellectually disabled. We do not know why defense counsel made this concession,[11] and there is nothing to suggest that he had investigated the possibility of an intellectual disability. Before this concession, Dr. Krimsky had already testified that Mr. Harris *was* intellectually disabled. Even if defense counsel had disagreed with Dr. Krimsky's assessment, the ABA guideline required him to take advantage of every opportunity to argue against a death sentence. One such opportunity existed for a pretrial hearing on an intellectual disability, and the failure to request this hearing fell outside the acceptable range of reasonable performance. *See Williamson v. Ward*, 110 F.3d 1508, 1517–18 & n.12 (10th Cir. 1997) (concluding that the petitioner's counsel was ineffective in failing to

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[10] In oral argument, the State also argues for the first time that a pretrial hearing on intellectual disability might have generated new evidence for the State to support an aggravating circumstance. This argument was omitted in the briefs. *See* note 8, above. But even if we were to consider this argument, the State does not explain what new evidence would have been elicited at the pretrial hearing that had not already been fully aired in the 2001 proceedings. Those proceedings included a competency hearing and trial, and both included considerable evidence of Mr. Harris's mental state. In fact, the State ultimately conceded that any resulting evidence in aggravation had already been created in the 2001 proceedings. We thus reject the State's eventual argument that the pretrial hearing might have generated additional evidence of an aggravating circumstance.

[11] When defense counsel made the concession, he was supposed to be asking questions to the venirepersons.

seek a competency hearing given the existing evidence of incompetency and the lack of any strategic advantage).

[* * *]

Defense counsel had nothing to lose by requesting a pretrial hearing on an intellectual disability. Prevailing would have eliminated the possibility of the death penalty, and losing would have left Mr. Harris precisely where he would be anyway, free to urge acquittal and a life sentence upon a conviction. Given the evidence already developed in the 2001 proceedings, any reasonable defense attorney would have sought a pretrial hearing on the existence of an intellectual disability. By failing to seek a pretrial hearing, Mr. Harris's attorney bypassed a risk-free opportunity to avoid the death penalty. Bypassing this opportunity constituted a deficiency in the representation.

3. Prejudice Prong

Because the OCCA adjudicated the prejudice prong on the merits, the federal district court could have reached the merits of the prejudice issue only if Mr. Harris had cleared the hurdle under 28 U.S.C. § 2254(d). *See* pp. 3–5, above. Section 2254(d) prevents consideration of the merits unless the OCCA's decision on prejudice was (1) contrary to, or an unreasonable application of, clearly established federal law or (2) based on an unreasonable determination of fact in light of the evidence presented in state court. 28 U.S.C. § 2254(d)(1)–(2).

In our view, the OCCA's decision on prejudice was based on an unreasonable factual determination, so we consider the merits.[12]

(a) Unreasonable Determination of Fact

Mr. Harris contends that the OCCA's decision was based on an unreasonable factual determination under 28 U.S.C. § 2254(d)(2). He points to this passage in the OCCA's decision: "All Harris's experts, including the ones who testified at his [2001] trial and competency hearing, considered these scores along with Harris's other characteristics and concluded he was not mentally retarded." *Harris v. State,* 164 P.3d 1103, 1115 (Okla. Crim. App. 2007). Mr. Harris contends that this passage reflects an unreasonable determination of fact because Dr. Krimsky had assessed an intellectual disability.[13]

The State argues that Mr. Harris failed to preserve this contention in district court by limiting his argument to Dr. Callahan's affidavit. We disagree.

To preserve the issue in district court, Mr. Harris needed only to alert the court to the issue and seek a ruling. *See Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1141 (10th Cir. 2007) ("An issue is preserved for appeal if a party alerts the district court to the issue and seeks a ruling."); *United States v. Harrison*, 743 F.3d 760, 763 (10th Cir. 2014)

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[12] Given this conclusion, we need not decide whether the OCCA's decision on prejudice was contrary to, or an unreasonable application of, clearly established federal law.

[13] Dr. Krimsky actually used the term "mentally retarded." But in analyzing Mr. Harris's claim, we use the term "intellectually disabled." *See* note 1, above.

(stating that the test for specificity of an objection in district court "is whether the district court was adequately alerted to the issue"). We thus consider whether Mr. Harris's argument in district court encompassed Dr. Krimsky's opinion. The State answers "no;" we answer "yes."

In district court, Mr. Harris treated Dr. Callahan's opinion as significant new evidence of intellectual disability. But Mr. Harris did not confine his argument to Dr. Callahan's opinion. Mr. Harris's argument on prejudice spanned roughly 32 pages. Within this discussion lay Mr. Harris's challenge to the OCCA's characterization of the expert opinions. Mr. Harris prefaces this discussion by explaining why the OCCA's decision was unreasonable under § 2254(d)(2). *See* Habeas Pet. at 107 ("Below is a discussion of the three (3) criteria, the impact of Dr. Callahan's report and argument why the OCCA decision was unreasonable under both prongs of § 2254 (d)."). In the ensuing section, Mr. Harris extensively discusses all of the prior expert opinions on the existence of an intellectual disability.

For example, in discussing the criterion of significant sub-average intellectual functioning, Mr. Harris discusses Dr. Callahan's references to IQ tests administered by herself, Dr. Martin Krimsky, and Dr. Nelda Ferguson. Mr. Harris notes that the IQ tests by Dr. Ferguson and Dr. Krimsky would have met the state-law criterion for IQ test results below 70. And Mr. Harris underscores Dr. Krimsky's test results and assessment of mild intellectual disability:

> Dr. Krimsky concluded the IQ scores indicated that Mr. Harris was mildly mentally retarded. He did not believe Mr. Harris was

> malingering or "trying to fool the test." He again confirmed Jimmy Dean Harris "an individual with mental retardation."

Id. at 110 (citations omitted).

Mr. Harris also discusses the expert opinions by Dr. John Smith, Dr. Wanda Draper, and Dr. Ray Hand. In this discussion, Mr. Harris points out that Dr. Smith confirmed Dr. Krimsky's testing as an indication of intellectual disability. *Id.* at 112.

Despite this broad record-based attack on the OCCA's factual determination, the State points to two pages in which Mr. Harris discusses his reliance on Dr. Callahan's opinion. The State's reliance on these two pages disregards the other 30 pages in Mr. Harris's argument as well as the nature of Dr. Callahan's report. In this report, Dr. Callahan relied not only on her own examination and testing but also on the prior testing and diagnoses. For example, Dr. Callahan noted that Dr. Krimsky, Dr. Ferguson, and Dr. Smith had separately diagnosed Mr. Harris as having a mild intellectual disability.

The State also argues that Mr. Harris was relying solely on Dr. Callahan's opinion. We disagree. Mr. Harris addressed all of the expert witnesses, including both Dr. Krimsky and Dr. Callahan. On appeal, Mr. Harris narrows his focus to Dr. Krimsky. This narrower argument is subsumed by the broader argument that Mr. Harris had presented in district court. The district court was thus alerted to Mr. Harris's appellate argument, which sufficed for preservation. *See Joseph A.* ex rel. *Wolfe v. N.M. Dep't of Hum. Servs.*, 28 F.3d 1056, 1060 (10th Cir. 1994) (concluding that the appellants had preserved their appellate argument

because it had been subsumed by the argument presented in district court); *accord PCTV Gold, Inc. v. Speednet, LLC*, 508 F.3d 1137, 1144 n.5 (8th Cir. 2007) (concluding that an appellate argument was preserved because it had been encompassed in a more general argument presented in district court). Because Mr. Harris preserved the issue, we consider the merits of his challenge to the reasonableness of the OCCA's factual determination.

We conclude that the OCCA was clearly mistaken as to Dr. Krimsky. The OCCA concluded that all of the defense experts had opined that Mr. Harris was not intellectually disabled. *Harris v. State*, 164 P.3d 1103, 1115 (Okla. Crim. App. 2007). But Dr. Krimsky had opined that Mr. Harris *was* intellectually disabled.

In our appeal, the State appears to acknowledge expert testimony that Mr. Harris is intellectually disabled: "The only experts who have opined that Petitioner is mentally retarded have relied upon unreliable test results that contradict the experts' experiences with him." Appellee's Resp. Br. at 32–33. In oral argument, the State elaborates on this argument, insisting that the OCCA could reasonably reject Dr. Krimsky's test results because Mr. Harris was psychotic at the time of testing. But this was not the OCCA's rationale. The OCCA reasoned that all defense experts had opined that Mr. Harris was not intellectually disabled, and this was simply not true of Dr. Krimsky. *Harris*, 164 P.3d at 1115.

The State also denies that the OCCA misunderstood Dr. Krimsky's opinion. The State points to a footnote where the OCCA

- noted that one expert had believed that he "had" to say that Mr. Harris's test scores indicated an intellectual disability but
- added that it "was not his conclusion" after examining Mr. Harris.

Id. at 1115 n.55.

The State's argument misstates the testimony. Dr. Krimsky testified that he had administered two IQ tests: (1) the Slossen Intelligence Test Revised ("SIT") and (2) the Wechsler Adult Intelligence Scale, Revised ("WAIS-R"). Mr. Harris scored a 66 on the SIT and a 68 on the WAIS-R, and Dr. Krimsky regarded these scores as proof of mild intellectual disability.

He explained that "[t]here was an ambiguity comparing the result of the first test [the SIT] . . . and [Mr. Harris's] occupation of having been involved in repair of auto transmissions." 2001 Comp. Hearing, vol. 1, at 63. But Dr. Krimsky noted that the second test [the WAIS-R] was "much more comprehensive" with "a high validity in relation to occupational and socio-economic status." *Id.* at 64. Dr. Krimsky ultimately considered both sets of results to be consistent and accurate.

Dr. Krimsky also testified that Mr. Harris's mechanical skills could have been acquired by someone who was mildly intellectually disabled, pointing out that Mr. Harris had spent "a long period of time . . . observing his father and other people fix transmissions." *Id.* at 65. Given this lengthy period of observation, Dr. Krimsky opined that Mr. Harris's low IQ was consistent with his skill in fixing transmissions.

Dr. Krimsky thus testified that Mr. Harris's skills did not undermine the assessment of mild intellectual disability. In fact, Dr. Krimsky corrected an attorney who had referred to Mr. Harris as "borderline," with Dr. Krimsky repeating his characterization of Mr. Harris as having "mild mental retardation."[14] *Id.* The OCCA thus made an unreasonable factual finding that all of Mr. Harris's experts had opined that he was not intellectually disabled. Dr. Krimsky was one of Mr. Harris's experts, and he specifically opined that Mr. Harris *was* intellectually disabled.

The State also argues that even if the OCCA's factual determination had been unreasonable, this factual determination had not formed the basis for the OCCA's decision. As the State points out, it is not enough for Mr. Harris to show an unreasonable factual determination; the state court's decision must

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[14] At one point, Dr. Krimsky was asked, "[W]hat conclusions did you come to regarding [Mr. Harris's] mental state as far as his IQ and the mental retardation?" *Id.* He answered that the "mental retardation" was "incidental." *Id.* In Dr. Krimsky's view, Mr. Harris was "in a psychotic status and in need of mental health treatment, psychiatric treatment." *Id.* at 65–66. Dr. Krimsky used the term "mental state" to refer to Mr. Harris's competency and his ability to retain consistent contact with his "outer situation." *Id.* at 66–67. With respect to this mental state, Dr. Krimsky concluded that Mr. Harris was delusional and not competent, adding that Mr. Harris's competency could probably be restored within a reasonable period of time. But Dr. Krimsky did *not* testify that the delusions had affected the IQ scores or that Mr. Harris was trying to manipulate the results. Indeed, Dr. Krimsky's assessment of Mr. Harris's intellectual disability remained consistent throughout the competency hearing. In Dr. Krimsky's unchanging view, Mr. Harris had mild intellectual disability.

have also been "based on" the unreasonable factual determination. *Byrd v. Workman*, 645 F.3d 1159, 1172 (10th Cir. 2011).

In our view, however, the OCCA did indeed base its decision on the unreasonable factual determination. The OCCA explained that it had found no prejudice:

> Nothing in this record shows that, had counsel made [a request for a pretrial hearing], evidence would have shown by a preponderance of the evidence that Harris was mentally retarded. There is a great deal of evidence in the record to show otherwise, including the opinion of several experts who testified that Harris was not mentally retarded. We cannot conclude that there was a reasonable probability that, but for counsel's omissions, the results of this resentencing proceeding would have been different.

Harris v. State, 164 P.3d 1103, 1116 (Okla. Crim. App. 2007) (emphasis added).[15] By highlighting the expert

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[15] In assessing the evidence, the OCCA disregarded the fact that the controlling Oklahoma definition of intellectual disability was set forth in a case decided after the competency hearing and the first trial. *Murphy v. State*, 54 P.3d 556, 567-68 (Okla. Crim. App. 2002), *overruled in part on other grounds by Bloomer v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). Accordingly, none of the 2001 testimony applied the controlling standard for an intellectual disability. We have no way of knowing what the expert witnesses would have said if they had applied the standard for an intellectual disability that governed at the time of the 2005 retrial. For example, Dr. Ray Hand testified at the first trial that Mr. Harris had exhibited "borderline intellectual functioning" but was not "mentally retarded." 2001 Tr., v. 15, at 133–34. But Dr. Hand based that conclusion in part on

opinions rejecting an intellectual disability, the OCCA suggested that this was the critical evidence on prejudice. The OCCU thus based its decision on its perception of the various expert opinions, including its mistaken perception of Dr. Krimsky's opinion.

(b) The Need for an Evidentiary Hearing

We thus must tackle the prejudice prong in the first instance. *Magnan v. Trammell*, 719 F.3d 1159, 1175 (10th Cir. 2013). To do so, we must consider the evidence of intellectual disability.

Mr. Harris contends that a pretrial hearing could have led to a finding of intellectual disability, pointing to his history of IQ testing, Dr. Callahan's report, expert testimony, and evidence of difficulties in adaptive functioning. In response, the State focuses on Mr. Harris's older IQ tests, the testimony of other experts, and Mr. Harris's employment history.

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his view about which IQ scores were "more realistic and more representative of [Mr. Harris's] actual abilities." *Id.* at 131. In contrast, the controlling standard does not require the parties or the court to identify the more realistic or representative score. The question is instead whether the defendant has "an intelligence quotient of seventy or below, as reflected by at least one scientifically recognized, scientifically approved, and contemporary intelligence quotient test." *Murphy*, 54 P.3d at 568. Dr. Hand did not apply this test.

Dr. Hand also testified about various deficits in Mr. Harris's adaptive functioning. But Dr. Hand was not asked whether Mr. Harris had "significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics; health and safety; use of community resources; and work." *Murphy*, 54 P.3d at 568.

The issue of prejudice turns on whether a reasonable factfinder could find an intellectual disability. With this issue hotly disputed and the lack of a factual finding, the district court could not grant habeas relief. *See Littlejohn v. Trammell*, 704 F.3d 817, 856 (10th Cir. 2013) (stating that even though counsel's conduct may have been prejudicial, the court could not grant habeas relief "[a]t this juncture" because the persuasiveness of particular expert testimony was disputed and the claim was "highly fact-bound").

Nor could the district court deny habeas relief, for no factfinder has considered Mr. Harris's evidence of intellectual disability based on the Oklahoma test that applied during Mr. Harris's retrial. Without a factual finding based on the applicable test, a court could not properly assess the extent of the prejudice.

To decide the issue of prejudice, the district court needed to assess the likelihood that defense counsel could have proven the existence of an intellectual disability. Like us, the district court had only a cold record containing conflicting evidence on Mr. Harris's intellectual status. Dr. Krimsky assessed an intellectual disability; Dr. Callahan assessed borderline intellectual functioning; and Dr. Draper considered Mr. Harris to be intellectually impaired but not intellectually disabled.[16]

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[16] Dr. Hand and Dr. Smith supplied other assessments. Dr. Hand did not believe that Mr. Harris was mentally retarded (under his definition of mental retardation) but thought that he had "mixed specific learning disabilities" and was likely "slow" or had "borderline intellectual functioning." 2001 Tr., v. 15, at 133–

No court has had the opportunity to hear these experts testify and apply the Oklahoma test on intellectual disability. If these experts had testified in a pretrial hearing focused on that test, which experts would have swayed the factfinder? To provide at least a meaningful prediction, a court must at least hear the conflicting evidence, apply Oklahoma's test for an intellectual disability, and determine which expert witnesses to believe. *See Smith v. Sharp*, 935 F.3d 1064, 1077 (10th Cir. 2019) (stating that "*Atkins* clearly establishes that intellectual disability must be assessed, at least in part, under the existing clinical definitions applied through expert testimony" and recognizing "the centrality of expert testimony to our review of *Atkins* verdicts"). No court has engaged in this scrutiny, so any court would need an evidentiary hearing to predict the outcome of a pretrial hearing on an intellectual disability.

We addressed a similar situation in *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013). There we concluded that the availability of habeas relief turned on a disputed factual issue that prevented a meaningful decision based on the cold record alone. *Littlejohn*, 704 F.3d at 856. We directed the district court to conduct an evidentiary hearing on the issue of prejudice. *Id.* Here we have the same need for an evidentiary hearing.

An evidentiary hearing is ordinarily unavailable when the petitioner failed to diligently develop the factual bases of the claim in state court. *Williams v.*

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34. And Dr. Smith believed that Mr. Harris had "normal intelligence." Comp. Hearing, v. 1, at 215.

Taylor, 529 U.S. 420, 432 (2000).[17] Here, however, Mr. Harris diligently tried to develop the factual foundations of his claim when he was in state court. For example, he argued that his trial counsel had failed to seek a pretrial hearing on intellectual disability. With this argument, Mr. Harris requested an evidentiary hearing and supported the request with Dr. Callahan's affidavit. The OCCA denied this request.

Mr. Harris did all that he could to develop the factual foundation for a showing of prejudice. By denying the opportunity for an evidentiary hearing, the OCCA left us with only a cold record and no factual findings for the innately fact-intensive issue of prejudice.

Because Mr. Harris was diligent, we consider whether Mr. Harris's proof of allegations would entitle him to habeas relief. *See Hammon v. Ward*, 466 F.3d 919, 927 (10th Cir. 2006). That inquiry turns on the issue of prejudice. Defense counsel's deficient performance would be prejudicial if a pretrial hearing would create a reasonable probability of a lesser sentence. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

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[17] Exceptions exist when the habeas claim is based on

- a new constitutional rule that the Supreme Court has made retroactive on collateral review or
- a factual predicate not reasonably discoverable earlier through reasonable diligence, along with clear and convincing evidence showing that no reasonable fact-finder would have found guilt without the constitutional error.

28 U.S.C. § 2254(e)(2)(A)(i)–(ii).

Mr. Harris argues that if his trial attorney had requested a pretrial hearing, the trial court would have granted the request and found Mr. Harris intellectually disabled, rendering him ineligible for execution. We thus gauge the likelihood that the state court would have found an intellectual disability.

As noted, the Supreme Court has prohibited the execution of intellectually disabled individuals, but allowed the states to define the term "intellectual disability." *Atkins v. Virginia*, 536 U.S. 304, 317 (2002). When Mr. Harris appealed his conviction, Oklahoma law required a defendant to show at least one IQ score under 70. *Murphy v. State*, 54 P.3d 556, 567–68 (Okla. Crim. App. 2002), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). If the defendant produced at least one score under 70, he or she would need to satisfy three elements:

1. The person "functions at a significantly subaverage intellectual level that substantially limits his or her ability to understand and process information, to communicate, to learn from experience or mistakes, to engage in logical reasoning, to control impulses, and to understand the reactions of others."
2. The disability "manifested itself before the age of eighteen."
3. The disability "is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication; self-care; social/interpersonal skills; home living; self-direction; academics;

> health and safety; use of community resources; and work."

Id.; *see* p. 8, above.

Mr. Harris's counsel could have satisfied the threshold requirement for at least one IQ score below 70. And the State does not challenge the second element (manifestation before the age of eighteen). The dispute exists on the first and third elements, which address Mr. Harris's intellectual and adaptive deficits.

Mr. Harris's evidence on intellectual deficits involves three categories:

1. his history of IQ testing,
2. the testimony of an expert witness, and
3. the affidavit of an expert witness.

First, Mr. Harris's IQ testing began in his childhood. Two childhood IQ tests yielded scores of 87 and 83. After the murder, new IQ tests yielded scores of 63, 66, 68, and 75. And after Mr. Harris's retrial, Dr. Jennifer Callahan tested Harris's IQ and obtained scores ranging from 67–75 and 72–77.

Date	Type of Test	By	Score
1964	Stanford-Binet Revised	Dr. Teresa Costiloe at University of Oklahoma Hospital	87
1964	WISC	Dr. Teresa Costiloe at University of Oklahoma Hospital	83
The Murder			
Oct. 20, 2000	WAIS-III	Dr. Nelda Ferguson	63
March 8, 2001	SIT-R	Dr. Martin Krimsky	66
March 21, 2001	WAIS-R	Dr. Martin Krimsky	68
July 20, 2001	WAIS-III	Dr. Elizabeth Grundy at Eastern State Hospital	75
Sentencing, Resentencing, and Direct Appeal			
March 13, 2006	WASI-I	Dr. Jennifer Callahan	67-75
March 13, 2006	Woodcock-Johnson III	Dr. Jennifer Callahan	72-77

Second, Mr. Harris points to Dr. Krimsky's testimony about his two IQ tests. Dr. Krimsky testified in the 2001 competency hearing, explaining that his testing showed "mild mental retardation." *See* 2001

Comp. Hearing, v. 1, at 58. When asked whether Mr. Harris's occupation was consistent with borderline intellectual disability, Dr. Krimsky corrected the attorney, pointing out that Mr. Harris was "not borderline" and reiterated that he had "mild mental retardation." *Id.* at 65.

Third, Mr. Harris points to an affidavit and report by Dr. Callahan, who concluded that Mr. Harris's IQ fell in the "impaired to borderline impaired range." R. at 287. On one test, Mr. Harris's scaled score was 67–75; on another test, the scaled scored was 72–77, which Dr. Callahan said would approximate the mental status of a child only 6 years and 10 months old. Dr. Callahan explained the disparity in Mr. Harris's IQ scores, concluding that "greater consistency" existed in the scores than "one may appreciate initially" because IQ is ideally viewed as a range and IQ scores change over time based on a phenomenon known as the "Flynn effect." *Id.* at 288.

The Flynn effect is designed to account for two facts:

1. IQ tests measure intelligence relative to the contemporaneous general population, not as an absolute number.

2. IQ scores tend to increase over time.

Given these two facts, an older IQ test would typically yield a higher figure than a more recent test for the same individual. For example, Mr. Harris took one of the IQ tests in 1964. By the time of Mr. Harris's test, the grading scale was roughly fifteen years old. So Dr. Callahan lowered Mr. Harris's score from 83 +/-5 to 75.5 +/-5.

Dr. Callahan concluded that her findings indicated "borderline intellectual functioning," but she acknowledged that Mr. Harris's cognitive abilities were "not uniformly at this level." *Id.* at 289.[18]

Mr. Harris also presented six forms of evidence involving adaptive deficits:

1. Dr. Callahan's testing showed adaptive strengths, including Mr. Harris's "visual-spatial thinking abilities," which explained how he could work. But his "relative weakness[es]" included the inability to quickly process information, difficulty in learning and recalling new information, and impairment in his ability to "plan and organize." *Id.* at 289–90.

2. Mr. Harris had a history of poor academic performance. Even with tutors, he dropped out of high school and experienced problems in recognizing words, spelling, and doing mathematics. These problems led Dr. Callahan to regard Mr. Harris as functionally illiterate, with abilities approximating those of a first or second grader.

3. Though Mr. Harris worked as a mechanic, he was "slow" and his wife needed to read the technical manuals and call hotlines for help. 2005 Tr., v. 5, at 55–56, 58, 157.

4. A former employer testified about difficulty in communicating with Mr. Harris, stating that "[h]e would start one sentence and end

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[18] Dr. Callahan added that Mr. Harris was not malingering.

it with a different sentence." 2001 Tr., v. 12, at 28–29.

5. Mr. Harris engaged in very risky behavior as a child and teen, leading to injuries.

6. Mr. Harris had a lifelong addiction to alcohol and narcotics, showing difficulties in self-care (a feature of adaptive functioning).

This combination of evidence could lead to a reasonable finding that Mr. Harris had satisfied the first and third elements of an intellectual disability (impairments in intellectual and adaptive functioning).

The State disagrees, relying on Mr. Harris's childhood IQ tests and employment history. But the tests and employment history invoked by the State are controverted by

1. Dr. Callahan's discussion of the Flynn effect, which would contextualize the IQ scores stressed by the State,

2. expert testimony that an intellectual disability would not necessarily prevent work as a mechanic, and

3. OCCA decisions in other cases stating that similar evidence of adaptive functioning and borderline intellectual functioning did not preclude relief.[19]

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[19] For example, in *Pickens v. State*, 126 P.3d 612 (Okla. Crim. App. 2005), the OCCA concluded that a petitioner was intellectually disabled as a matter of law when his IQ testing indicated borderline intellectual functioning and showed some ability to function adaptively. 126 P.3d at 618–20.

Thus, proof of Mr. Harris's allegations would support the finding of an intellectual disability. Given the potential for this finding, a habeas court could view defense counsel's failure to request a pretrial hearing as prejudicial.

Ultimately, however, we cannot accurately resolve the dispute over the first and third elements of an intellectual disability. Mr. Harris and the State point to evidentiary disputes on these elements, and these disputes have not been presented to a factfinder for resolution under Oklahoma's test for an intellectual disability. So a decision on the prejudice prong should await an evidentiary hearing in district court. *See* p. 29, above (discussing *Littlejohn v. Trammell*, 704 F.3d 817, 856–57 (10th Cir. 2013)); *accord Sasser v. Hobbs*, 735 F.3d 833, 850 (8th Cir. 2013) (concluding that "misconceptions about the Arkansas legal standard [for identifying an intellectual disability] led the district court to answer the wrong factual questions, leaving the pertinent questions unanswered" and that "[t]he proper course . . . [was] to vacate the district court's finding that [the defendant] [was] not mentally retarded and remand so that the district court [could] answer the critical factual questions in the first instance according to the correct legal standard"); *Allen v. Buss*, 558 F.3d 657, 663 (9th Cir. 2009) (observing that "the [state] trial court did not determine whether [the petitioner] is mentally retarded under Indiana's test for mental retardation" and remanding the case to the federal district court for an evidentiary hearing).

(c) Conclusion

Engaging in de novo review, we conclude that Mr. Harris has

- shown a deficiency in defense counsel's performance and
- alleged a theory of prejudice that, if true, could justify habeas relief.

Although factual disputes preclude us from deciding the issue of prejudice, Mr. Harris is entitled to an evidentiary hearing. We thus remand for an evidentiary hearing as to prejudice. At this hearing, the parties should be able to present expert testimony on whether Mr. Harris satisfied Oklahoma's test for an intellectual disability. *Smith v. Sharp*, 935 F.3d 1064, 1077 (10th Cir. 2019) (noting our prior recognition of "the centrality of expert testimony to our review of *Atkins* verdicts").

C. Failure to Adequately Present Mitigation Evidence

The Supreme Court has recognized that attorneys in death-penalty cases are ineffective if they bypass evidence that might have altered the jury's selection of a penalty. *Williams v. Taylor*, 529 U.S. 362, 398 (2000). Mr. Harris invokes this case law, arguing that his attorney failed to adequately present mitigation evidence on intellectual impairments and mental illness.

Mr. Harris's arguments encompass evidence that would show not only an intellectual disability but also lesser intellectual impairments that the jury could regard as mitigating. Mr. Harris also points to evidence of other mental illnesses.[20]

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[20] We consider three categories of mitigating evidence. The first is an "intellectual disability," meaning evidence that meets

1. The Legal Standard and the Standard of Review

For these arguments, we consider whether the OCCA unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). To assess prejudice, we must evaluate the totality of the evidence, including

1. the aggravating circumstances found by the jury,
2. the mitigation evidence,
3. the mitigation evidence that might have been introduced, and
4. "what the prosecution's response to that evidence would have been."

Littlejohn v. Royal, 875 F.3d 548, 553 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 102 (2018). Applying both prongs of *Strickland* (deficiency and prejudice), the OCCA rejected the mitigation-related claims on the merits.[21] *Harris v. State,* 164 P.3d 1103, 1118 (Okla. Crim. App. 2007). We thus apply the standard set out in 28 U.S.C. § 2254(d). *See* pp. 3–4, above.

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the Oklahoma test at the time of the 2005 retrial. The second is "borderline intellectual functioning," which consists of lesser cognitive and adaptive impairments that might be mitigating. *See* 2001 Tr., v. 15, at 133–36 (testimony of Dr. Hand). The third category consists of other mental illnesses that might be mitigating.

[21] Mr. Harris insists that the OCCA's denial of an evidentiary hearing could not have constituted a denial on the merits. But as we explain above, this argument is based on a misunderstanding of Oklahoma law. *See* pp. 11–13, above.

2. Intellectual Impairment as a Mitigating Factor

Mr. Harris argues that his attorney performed deficiently by calling only one expert witness (Dr. Draper) to testify about an intellectual impairment involving either an intellectual disability or borderline intellectual functioning. According to Mr. Harris, his attorney should have presented better mitigation evidence of an intellectual impairment. In our view, however, the OCCA acted reasonably in rejecting this claim based on a failure to show either deficient performance or prejudice.

(a) Evidence of Intellectual Impairments

In the 2005 retrial, defense counsel presented testimony by seven of Mr. Harris's family, friends, and associates. But Mr. Harris's attorney called only one expert witness, Dr. Wanda Draper. Dr. Draper was not an expert in intellectual impairments; her expertise instead involved development, an interdisciplinary field involving psychology, sociology, and other disciplines. She testified mainly about Mr. Harris's "life path," which included his childhood, education, and personal relationships. 2005 Tr., v. 5, at 35.

Some of Dr. Draper's testimony concerned Mr. Harris's intellectual impairments. For example, Dr. Draper testified that Mr. Harris had "[p]oor [s]chool [p]erformance," was "[s]low [i]n school," had an IQ score in the 80s, suffered from "[d]yslexia," had a "[c]ompulsive personality," and experienced a "[p]erception disorder." Def. Exh. 2. Dr. Draper added that (1) Mr. Harris's dyslexia had impeded his ability to read and write and (2) he had suffered from a "perception

disorder," which led to compulsiveness and an inability to see things in perspective. 2005 Tr., v. 5, at 43.

Dr. Draper explained that Mr. Harris "was not retarded, but he was slow and he had to do things very slowly and with help." *Id.* at 58. According to Dr. Draper, the need to act slowly rendered him dependent on Pam. Dr. Draper also explained the unevenness in Mr. Harris's IQ test results:

> Q: [H]e was given IQ tests, for lack of a better term, intelligence test, after the fact, after he was arrested.
>
> A: Right.
>
> Q: And there was a scatter in those IQ tests?
>
> A: Yes, they were relatively low, but there was a scatter. And because he had what we would call high level of spatial and visual intelligence he was able to do that transmission work. He had good eye/hand coordination. And he was able to look at a three-dimensional object and figure how it goes together in a car. And all of that comes from a pretty high level of spatial intelligence. But his other intelligences were much lacking.

Id. at 68. On cross-examination, Dr. Draper supplied greater detail about Mr. Harris's history of intelligence testing:

> [W]hen he was tested during his early school years it was low/normal IQ, I believe, in the low 80s as a full scale. And it was only later, after the fact, after the incident, I think he was given a battery of tests by several different examiners and he was found to

> have an IQ that ranged from the 60s to the 80s.

Id. at 133.

Both sides presented closing arguments on Mr. Harris's intellectual functioning. In their arguments, the prosecutors acknowledged that Mr. Harris had a low IQ, but questioned the reliability of Dr. Draper's testimony about past IQ tests. The prosecutors also pointed out that another expert witness had opined that Mr. Harris was malingering and told the jury:

> Who ever told you that he had a low IQ and that made it difficult for him to solve problems? He can solve problems. He just doesn't solve them in a way that we think is appropriate. Jimmy Dean Harris doesn't have any problem with the way he solves problems. It's the rest of us that need to fear him for his problem-solving abilities.

2005 Tr., v. 6, at 935.

The defense countered with Dr. Draper's testimony. Defense counsel urged the jury to focus on

> [t]he images of a kid who falls behind in school because he just can't read. He's got dyslexia, but he's also close to mentally retarded. We don't have an exact number, but Dr. Draper testified that 75 was the best consensus of all the numbers that she looked at in the 60 hours that she prepared, talking to everybody in this case, looking into his life.

Id. at 944. The attorney later emphasized Mr. Harris's "75 IQ and real lack of problem-solving skills," noting

that Dr. Draper had "talked about [how] a person with a little better makeup, a little better development," would have been able to navigate the marital conflict without resorting to murder. *Id.* at 960.

(b) Mitigation Evidence Involving an Intellectual Disability

On appeal, Mr. Harris argues that his trial counsel was ineffective in failing to present mitigation evidence involving both an intellectual disability and borderline intellectual functioning. But in the OCCA, Mr. Harris did not argue that defense counsel should have presented mitigation evidence involving an intellectual disability.

In briefing the issue to the OCCA, defense counsel was specific, confining his argument to mitigation evidence involving borderline intellectual functioning. In making this argument, defense counsel considered intellectual disability an issue that could be addressed only in a pretrial hearing. If the defendant prevailed, he would be ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). If the defendant lost on this issue, defense counsel apparently assumed that he would have been barred from urging mitigation based on an intellectual disability. *Cf. Blonner v. State*, 127 P.3d 1135, 1144 (Okla. Crim. App. 2006) (stating that if the pretrial hearing results in a finding of no intellectual disability, "[t]he issue of mental retardation shall not be relitigated at the capital first degree murder trial").[22]

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[22] At oral argument, Mr. Harris contends the opposite, insisting that he could have urged mitigation based on an intellectual disability even if the state trial court had found no intellectual

Defense counsel thus acknowledged that he was not alleging a failure to present additional mitigation evidence involving "mental retardation." He was instead confining the argument to additional evidence of a lesser intellectual impairment that he called "borderline mental retardation," presumably a synonym for Dr. Callahan's preferred term "borderline intellectual functioning":

> Appellant is not here claiming only to be borderline mentally retarded–his claim of mental retardation is addressed in Proposition I. However, given the procedural posture of this case, counsel could not have argued that Mr. Harris was mentally retarded since the mentally retarded are exempt from the death penalty. If counsel had simply taken the previous testimony at face value and not conducted an independent investigation into Mr. Harris' mental deficiencies, then he would have had overwhelming evidence that Mr. Harris was borderline mentally retarded. On the other hand, had defense counsel independently investigated his client's mental condition and determined that a sufficient basis existed for a jury determination of the mental retardation issue, it is likely that such a hearing would have been held. In such a case, either Mr. Harris would have been determined to be retarded, or not, by a jury. In this scenario, counsel would have

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disability as a bar to execution. But the OCCA did not have the benefit of this argument. In the OCCA, Mr. Harris had disclaimed any argument that he could relitigate the existence of an intellectual disability at the penalty phase.

> argued borderline mental retardation because had a jury determined Mr. Harris to be mentally retarded, then there would have been no capital sentencing at all.

Appellant's Opening Br. at 16–17 n.15, No. D-2005-117 (Okla. Crim. App. May 18, 2006).

Given Mr. Harris's framing of the issue, the OCCA never referred to an issue involving an intellectual disability. *See Strelecki v. Okla. Tax Comm'n*, 872 P.2d 910, 925 n.1 (Okla. 1993), *clarified on reh'g* (Okla. Mar. 23, 1994) ("[C]ourts are not free to act as advocates and to raise claims that should be raised by the parties."). The court instead referred to "diminished mental capacity," presumably as a synonym for defense counsel's term "borderline mental retardation" or Dr. Callahan's preferred term "borderline intellectual functioning." So the OCCA addressed only the lack of mitigation evidence involving borderline intellectual functioning (not an intellectual disability).

Mr. Harris's failure to present the OCCA with his current argument would ordinarily constitute nonexhaustion of state-court remedies. *See* 28 U.S.C. § 2254 (b)(1)(A). But exhaustion is unnecessary when it would be futile. *Selsor v. Workman*, 644 F.3d 984, 1026 (10th Cir. 2011). And exhaustion now would be futile because the OCCA would undoubtedly consider the claim waived. *See Slaughter v. State,* 105 P.3d 832, 833 (Okla. Crim. App. 2005).[23] Mr. Harris's claim

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[23] Mr. Harris has already pursued a direct appeal and post-conviction proceedings in which he could have (but failed to) raise this argument.

is thus subject to a procedural default,[24] and consideration of the merits would be available only if Mr. Harris shows cause and prejudice. *Banks v. Workman*, 692 F.3d 1133, 1144 (10th Cir. 2012). Because Mr. Harris cannot show cause and prejudice, we apply an anticipatory procedural bar and decline to consider this claim. *See Pavatt v. Carpenter*, 928 F.3d 906, 924 (10th Cir. 2019) (en banc) (holding that the habeas petitioner's appellate argument was subject to an anticipatory procedural bar because the argument had not been fairly presented to the OCCA).[25]

(c) Mitigation Evidence Involving Borderline Intellectual Functioning

We also reject Mr. Harris's claim that his counsel was ineffective in presenting mitigation evidence on borderline intellectual functioning.

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[24] The State contends that even if the claim is unexhausted, the court could deny relief on the merits under the AEDPA. It's true that unexhausted claims can be denied on the merits. 28 U.S.C. § 2254(b)(2). But if the OCCA had not decided the claim on the merits, the AEDPA would not apply. *See* pp. 3–4, 10, above.

[25] Mr. Harris contends that the State failed to preserve its current argument that defense counsel had not acted deficiently in failing to urge mitigation based on an intellectual disability. But we ordinarily consider an appellee's arguments for affirmance even if they had not been presented in district court. *See United States v. Mosley*, 743 F.3d 1317, 1324 & n.2 (10th Cir. 2014) (considering an argument for affirmance made by the government for the first time on appeal even though the argument conflicted with the government's position in district court); *see also United States v. Bagley*, 877 F.3d 1151, 1154 (10th Cir. 2017) ("Though the government did not raise this argument in district court, we can affirm on alternative grounds when the district court record is adequately developed.").

i. The OCCA's Reliance on Both Prongs (Deficient Performance and Prejudice)

On this claim, the OCCA concluded that Mr. Harris had not shown either deficient performance or prejudice. *Harris v. State*, 164 P.3d 1103, 1116–18 (Okla. Crim. App. 2007). On the prong of deficient performance, the court

- noted that counsel had presented some evidence that involved intellectual impairments,
- discussed the virtually unchallengeable nature of strategic decisions, and
- concluded that defense "[c]ounsel's choice of mitigating evidence did not amount to ineffective assistance."

Id. at 1103, 1116, 1118. In this discussion, the OCCA rejected the claim at least partly based on Mr. Harris's failure to show a deficiency in the representation.

On the prejudice prong, the OCCA referred to Mr. Harris's argument "that that the prejudice from this decision is evident." *Id.* at 1118. The OCCA rejected this argument, finding that the jurors at the retrial had chosen the death sentence even after hearing some of this mitigating evidence. *Id.*

ii. Deficient Performance

Mr. Harris claims that defense counsel should have presented additional mitigation evidence on his borderline intellectual functioning. For this claim, Mr. Harris argues that the OCCA made an unreasonable determination of fact under § 2254(d)(2). According to Mr. Harris, the OCCA unreasonably found that Mr. Harris's attorney had strategically chosen to bypass

additional mitigation evidence. Mr. Harris argues that if his attorney had conducted a reasonable investigation, he would have learned of the evidence presented in the 2001 proceedings and would have used a better expert witness to explain the evidence of borderline intellectual functioning. The OCCA concluded that trial counsel's performance was neither deficient nor prejudicial. *Harris v. State*, 164 P.3d 1103, 1116–18 (Okla. Crim. App. 2007). These conclusions were reasonable under § 2254(d)(2).

We begin with the OCCA's determination that defense counsel's selection of evidence had been strategic. Mr. Harris argues that the OCCA made an unreasonable factual determination because the state-court record shows that defense counsel had not made a strategic decision. For this argument, Mr. Harris states that

- nothing in the record supported the OCCA's determination that Mr. Harris's attorney had made a strategic decision and
- after the penalty phase in the 2005 retrial, the attorney continued to list Mr. Harris's low IQ and inadequate problem-solving skills as mitigating factors.

But we do not regard a factual finding as unreasonable if "'[r]easonable minds reviewing the record might disagree' about the finding in question." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (quoting *Rice v. Collins*, 546 U.S. 333, 341–42 (2006) (alteration in original)).

Reasonable minds could conclude that Mr. Harris's attorney had strategically decided how to present the evidence. For example, the record indicated that the attorney was aware of the evidence that had been

presented in the state-court proceeding. In a colloquy with the judge, the attorney said: "I'm not calling any shrinks, I'm not calling any psychiatrists or all of the other people that testified last time." 2005 Tr., v. 5, at 150. The OCCA could reasonably infer from this testimony that defense counsel

- had known of the evidence in the 2001 trial and
- had deliberately declined to present additional evidence of intellectual deficiencies.

See Wood v. Allen, 558 U.S. 290, 301–02 (2010) (holding that evidence that counsel had known about omitted evidence and chosen not to present it to a jury could "fairly be read to support" the state court's judgment that counsel had acted strategically).[26]

In the alternative, Mr. Harris argues that even if the OCCA had reasonably found that counsel acted strategically, this strategy would not have involved a reasonable investigation. This argument fails because the OCCA reasonably applied Supreme Court decisions in finding that defense counsel had not performed deficiently. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

To assess this argument, we consider the investigation underlying the strategy. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). Mr. Harris argues that the

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[26] Mr. Harris also incorporates other arguments regarding an unreasonable determination of fact. These arguments are addressed elsewhere. For instance, Mr. Harris's other arguments about the scope of the investigation are better understood as arguments for reversal under 28 U.S.C. § 2254(d)(1); we thus consider these in our discussion of Mr. Harris's arguments under § 2254(d)(1).

investigation was unreasonable because the attorney had

- known of evidence, presented in the 2001 trial, that Mr. Harris was intellectually disabled and
- engaged Dr. Draper (instead of another expert witness with better qualifications) to discuss intellectual impairments.

The OCCA concluded that Mr. Harris's attorney had decided not to highlight the diagnoses and testing, choosing to focus instead on Mr. Harris's development throughout his life. *Harris v. State*, 164 P.3d 1103, 1118 (Okla. Crim. App. 2007). This conclusion was supported by the record: Dr. Draper testified about Mr. Harris's intellectual development and his IQ testing. And in closing argument, defense counsel emphasized Dr. Draper's testimony about Mr. Harris's overall development. Counsel used that testimony to argue that an adult with greater development would not have committed the murder.

This was not a case in which an attorney failed to investigate or present any mitigation evidence on intellectual impairments. Rather, the defense attorney pursued a strategy focusing on childhood development rather than Mr. Harris's mental state after the crime. And in implementing this strategy, the attorney used a witness with expertise in personal development. Applying the deferential AEDPA standard, we conclude that defense counsel's performance fell within the broad range of acceptable strategies. *See Doyle v. Dugger*, 922 F.2d 646, 652 (11th Cir. 1991) (concluding that defense counsel was not deficient for

presenting only some of the available evidence about the defendant's mental state).

iii. Prejudice

Mr. Harris urges prejudice from his attorney's failure to call an expert on intellectual impairments, focusing on the "inherently mitigating" nature of evidence of intellectual impairments when the death penalty is at stake. Supp. Mem. Br. of Petitioner at 8 (quoting *Tennard v. Dretke*, 542 U.S. 274, 287 (2004)). The OCCA found no prejudice from defense counsel's failure to present additional mitigation evidence involving borderline intellectual functioning. This finding was based on a reasonable determination of facts and Supreme Court precedent.[27]

We addressed an analogous issue in *Grissom v. Carpenter*, 902 F.3d 1265 (10th Cir. 2018). In *Grissom*, the petitioner claimed that his trial attorneys had been ineffective by failing to investigate and present evidence of organic brain damage because of "red flags" pointing to a potentially fruitful defense on mitigation. 902 F.3d at 1272–73. We affirmed the denial of habeas relief, explaining that the petitioner could not show prejudice partly because his attorney

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[27] We assume, for the sake of argument, that other evidence of intellectual impairments would have been mitigating. In *Tennard v. Dretke*, the Supreme Court recognized the inherently mitigating nature of evidence involving intellectual impairments. 542 U.S. 274, 287 (2004). But in *Atkins v. Virginia*, the Supreme Court noted that "reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." 536 U.S. 304, 321 (2002). That risk was arguably present here because the State had alleged an aggravating circumstance of future dangerousness.

had already presented a robust mitigation case and the omitted report had "largely reflect[ed] the mitigating narrative already presented at trial." *Id.* at 1279 (quoting *Grissom v. State*, 53 P.3d 969, 995 (Okla. Crim. App. 2011)).

This explanation is equally fitting here. Although a cognition expert might have better emphasized the extent of an intellectual impairment, defense counsel did not present the kind of "paradigmatic halfhearted mitigation case" that we've regarded as constitutionally defective. *Littlejohn v. Royal*, 875 F.3d 548, 563 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 102 (2018). Instead, defense counsel presented seven fact witnesses who testified about

- Mr. Harris's need for Pam's help in reading technical information, doing paperwork, and calling hotlines,
- Mr. Harris's difficulties in school because he was a slow learner,
- Mr. Harris's dependable work, verbal combat between Mr. Harris and Pam,
- Pam's berating of Mr. Harris, childhood suffering of parental abuse, and
- Mr. Harris's loving relationship with his siblings and daughters.

Defense counsel also presented Dr. Draper, who testified that Mr. Harris was "slow," had trouble in school, and needed help in working and functioning in society. 2005 Tr., v. 5, at 58. Dr. Draper added that Mr. Harris's IQ scores were low, reflecting a high visual and spatial intelligence that facilitated work as a transmission

mechanic despite shortcomings in other intellectual abilities. *Id.* at 68.

This testimony was not qualitatively different than Dr. Callahan's affidavit. Dr. Callahan assessed Mr. Harris's intellectual status as "borderline intellectual functioning." R. at 289. And like Dr. Draper, Dr. Callahan explained that Mr. Harris had strengths that allowed him to work despite his intellectual deficits.

In closing argument, defense counsel also used Dr. Draper's testimony to emphasize Mr. Harris's low intellectual ability and poor problem-solving skills. Given the evidence and closing argument, the OCCA could reasonably attribute little value to additional mitigation evidence on borderline functioning. We thus conclude that the OCCA reasonably applied Supreme Court precedents in finding no prejudice from the failure to present greater evidence of borderline intellectual functioning.

(d) Mitigation Evidence Involving Mental Illness[28]

Mr. Harris also argues that his attorney was ineffective by failing to

- call an expert witness specializing in mental health,
- highlight diagnoses of mental illness, and

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[28] As noted above, we use the term "mental illness" to refer to various cognitive and behavioral deficits not included in the other categories of intellectual impairments (intellectual disability and borderline intellectual functioning). *See* note 20, above.

- show how mental illness might have contributed to the murder. According to Mr. Harris, these shortcomings were prejudicial because the additional evidence might have convinced at least one juror to vote for life in prison rather than the death sentence. We reject this argument.

i. Mental-Health Evidence in the 2005 Retrial

At the 2005 retrial, defense counsel presented some evidence of mental-health problems. But Mr. Harris argues that defense counsel should have presented additional evidence from the 2001 trial and the competency hearing.

At the 2005 retrial, defense counsel urged mitigation based on Mr. Harris's mental condition, alcoholism, drug abuse, and strong emotions. But defense counsel did not call an expert witness specializing in mental health; most of the evidence involving these mitigating factors came from Dr. Draper.

Dr. Draper testified about three facets of mitigation:

1. When Mr. Harris had been a child, he suffered parental abuse and saw his father abuse his mother.
2. As a teenager, Mr. Harris had obtained narcotics and alcohol from his father, which led to a lifelong pattern of substance abuse.
3. Mr. Harris had tried to commit suicide.

Dr. Draper added that eight to ten other doctors had found "serious psychological problems":

Q: You have been given various psychological tests that have been administered to Jimmy Dean Harris over the years. Have there been reports in there of any mental illnesses?

A: Well, there were. This was—I think these were tests that were administered after the incident.

Q: And approximately how many different doctors?

A: Well, there were probably eight or ten. I listed those in my report; although, I did not pursue that area with any diligence because that was after the fact. The significance of that is all of those found that he had some serious psychological problems.

2005 Tr., v. 5, at 67–68. Dr. Draper also testified that Mr. Harris was taking medication to control his mental illness:

Q: And have you seen any records of medications given to him in the jail?

A: Yes. I think he's taking some psychotropic drugs and some other medications for general health problems.

Q: And you're not a physician, but you do know that the drugs are for controlling mental illness?

A: Yes.

Id. at 68–69.

ii. Other Existing Evidence of Mr. Harris's Mental Illness

In the prior proceedings, counsel for both parties elicited additional evidence of Mr. Harris's mental illness.

For example, Dr. John Smith testified that before the murder, Mr. Harris had suffered from bipolar II disorder with psychosis. But Dr. Smith conceded that it was difficult to pinpoint when Mr. Harris had experienced the effects of drugs and alcohol.

An expert witness for the prosecution testified that Mr. Harris had

- suffered from a major depressive episode with associated psychotic features and
- stabilized through medication.

And a jail counselor diagnosed Mr. Harris with schizoaffective disorder. Dr. Smith and the jail counselor described Mr. Harris after the murder as erratic, delusional, psychotic, and suicidal.

Other evidence suggested that Mr. Harris was responsive to medication. Dr. Smith described these medications and opined that they had helped, allowing Mr. Harris to attend the trial and testify with focus.

iii. Claim of Ineffective Assistance of Counsel

Mr. Harris argues that defense counsel was ineffective for failing to call a mental-health expert and present this evidence in the penalty phase. The OCCA rejected this claim without specifying whether the court was relying on (1) the failure to show deficient representation or (2) prejudice. *Harris v. State*, 164 P.3d 1103, 1116–19 (Okla. Crim. App. 2007). Given

this ambiguity, we apply 28 U.S.C. § 2254(d) on both prongs (deficient performance and prejudice). *Premo v. Moore*, 562 U.S. 115, 123 (2011).[29]

a. Deficiency Prong

Mr. Harris contends that the OCCA unreasonably determined the facts and applied Supreme Court precedents.

(i) Unreasonable Factual Determinations

Mr. Harris argues that the OCCA based its decision on two unreasonable determinations of fact:

1. that defense counsel had presented evidence of a mental illness and
2. that defense counsel had strategically decided to downplay the evidence of mental illness.

We reject both arguments.

Mr. Harris first points out that the OCCA said that "[w]hile Harris's specific diagnoses of mental illness [had not been] presented to the jury," jurors had been told that he was diagnosed as mentally ill. *Harris v.*

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[29] On this claim, Mr. Harris contends that the district court should have conducted an evidentiary hearing. But the reasonableness of the OCCA's conclusion must be based on the existing state-court record. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (holding "that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits"); *Hooks v. Workman*, 689 F.3d 1148, 1163 (10th Cir. 2012) (stating that habeas review under § 2254(d)(2) is also confined to the record in state court). Thus, the district court could not consider evidence newly presented in federal court to determine whether the OCCA had unreasonably applied federal law or determined the facts.

State, 164 P.3d 1103, 1118 (Okla. Crim. App. 2007). According to Mr. Harris, this statement constituted an unreasonable determination of fact because the State had denied the existence of any evidence of a mental illness.

We reject Mr. Harris's argument. The OCCA observed that the jury "had been told" of a diagnosis. *Id.* This observation was accurate, for Dr. Draper had testified about a prior diagnosis of "serious psychological problems." 2005 Tr., v. 5, at 67–68; *see* p. 54, above. The OCCA's statement was thus reasonable based on the evidence presented.

The OCCA also stated that defense counsel had strategically decided to downplay the evidence of mental illness. Mr. Harris argues that this statement entailed an unreasonable factual determination. *See* 28 U.S.C. § 2254(d)(2). For this argument, he points to three facts:

1. Defense counsel asked Dr. Draper whether Mr. Harris's medications were for a mental illness, but defense counsel was unable to obtain a response.
2. Defense counsel then tried to call an expert witness regarding Mr. Harris's medications, but the trial court sustained an objection based on inadequate notice.
3. Despite the inability to obtain a response or call an expert witness on medications, defense counsel continued to list Mr. Harris's "mental condition" as a mitigating factor.

Mr. Harris argues that these three facts show that defense counsel had tried to prove a mental illness

through an expert witness but couldn't because counsel had violated evidentiary and disclosure requirements.

A state appellate court's finding may be reasonable even if we would have decided the issue differently. *Grant v. Trammell*, 727 F.3d 1006, 1024 (10th Cir. 2013). The test is whether the state appellate court had evidentiary support for its view. *Id.*

Under this test, the OCCA finding was reasonable. When defense counsel called an expert witness to testify about Mr. Harris's medications, the judge asked the relevance. The attorney explained: "It goes to mitigation, that he has something wrong with him and we don't know what it is." 2005 Tr., v. 5, at 152. The attorney added that "[a]ll he is going to do is say these are his medications and one, two, three, and four are mental health medicines the other ones are for something else. And that's all he is going to say." *Id.* at 149.

The OCCA could reasonably find that defense counsel was trying to present limited evidence on mental health, informing the jury of a mental illness without enough detail to spark concern about continued dangerousness. The attorney couldn't ultimately execute this strategy, but the OCCA could view the strategy itself as reasonable. We thus conclude that the OCCA acted reasonably in viewing defense counsel's effort as strategic.

(ii) Unreasonable Application of Supreme Court Precedents

The OCCA also reasonably applied Supreme Court precedents on the deficiency prong. The ultimate failure of the attorney's effort does not undermine

the reasonableness of the OCCA's conclusion. *United States v. Haddock*, 12 F.3d 950, 956 (10th Cir. 1993).

Mr. Harris contends that his attorney failed to present expert testimony on the nature, extent, and significance of the mental illness. Again, however, the OCCA acted reasonably in rejecting this contention. As we discuss below, the excluded evidence constituted a "double-edged sword" with substantial aggravating potential. *See* p. 62, below. Given this potential for aggravation, the OCCA justifiably concluded that defense counsel had acted reasonably.

b. Prejudice

Even if Mr. Harris could satisfy the deficiency prong, the claim would have foundered on the prejudice prong. Mr. Harris argues that his counsel's failure to present mitigation evidence of mental illness (1) opened the door to evidence of malingering and (2) bypassed powerful mitigation evidence that would have explained Mr. Harris's violent actions and why, with proper treatment, he would be unlikely to repeat this crime.

In analyzing the prejudice prong, we consider not only the mitigation evidence that defense counsel should have presented but also what the prosecution would have presented in response. *Wilson v. Trammell*, 706 F.3d 1286, 1306 (10th Cir. 2013). To identify that evidence, we can consider the 2001 trial as a useful guide. At that trial, the prosecution had used Dr. John Call, who testified that

- a "strong possibility" existed that Mr. Harris was a psychopath and

- psychopaths were more violent than other individuals.

2001 Tr., v. 16, at 75–78.

This testimony was supported by Mr. Harris's own expert at the 2001 trial, Dr. Smith. Dr. Smith regarded Mr. Harris as bipolar and acknowledged that bipolar individuals share traits with psychopaths. After acknowledging the sharing of these traits, Dr. Smith refused to rule out Dr. Call's diagnosis of Mr. Harris as a psychopath or as someone with antisocial personality disorder, admitting the presence of "elements" of these conditions in Mr. Harris's history and in his current psychological status. 2001 Tr., v. 18, at 182. Dr. Smith thus admitted that Mr. Harris presented a substantial risk of violence. *Id.* at 183. On cross-examination, Dr. Smith added that Mr. Harris had antisocial traits:

> Q: But you don't disagree with the diagnosis that [Mr. Harris] has an antisocial personality disorder?
>
> A: As long as you mix it with a mixed personality disorder with narcissistic, obsessive-compulsive, and antisocial traits. I do believe he does have that.

Id. at 192. Dr. Smith also acknowledged that Mr. Harris had each clinical trait associated with antisocial personality disorder.

Given this prior testimony, the OCCA could reasonably conclude that further mitigation testimony involving mental illness would have opened the door to evidence of psychopathy with antisocial personality disorder. "[C]ourts have characterized antisocial person-

ality disorder as the prosecution's 'strongest possible evidence in rebuttal.'" *Littlejohn v. Royal*, 875 F.3d 548, 564 (10th Cir. 2017) (quoting *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013)), *cert. denied*, 139 S. Ct. 102 (2018).

We addressed a similar issue in *Littlejohn v. Royal*, 875 F.3d 548 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 102 (2018). There the petitioner presented evidence of organic brain disorder. The State responded with evidence of a diagnosis involving antisocial personality disorder, and the defense expert admitted that the petitioner had displayed traits consistent with the diagnosis. *Id.* at 565. Given the nature of antisocial personality disorder, we concluded that the evidence of an organic brain disorder was likely to be aggravating rather than mitigating. *Id.*

The same is true here. Like organic brain damage, mental illness can be mitigating; but the OCCA could reasonably view this possibility as outweighed by the risk of rebuttal evidence of psychopathy and antisocial personality disorder.

Mr. Harris argues that the jury at the 2005 retrial heard testimony about his violent past with no explanation involving his mental illness. But the OCCA could reasonably find that the aggravating nature of the omitted evidence had outweighed the mitigation value.

By focusing on Mr. Harris's development rather than his mental illness, defense counsel also kept other possibly aggravating evidence from the jury. For instance, the presence of an untreatable condition could have suggested future dangerousness. *Littlejohn*, 875 F.3d at 565. And Dr. Smith admitted that

- he could not be confident that Mr. Harris would refrain from violence while on medication,
- Mr. Harris had probably been properly medicated during his 2001 competency trial (when he attacked a detention officer), and
- Mr. Harris had probably not been in a psychotic state when he committed the murder.

With these admissions, Dr. Smith could not say whether Mr. Harris's mental illness was connected to the crime.

Finally, Mr. Harris argues that his counsel's actions opened the door to evidence of malingering. Even if defense counsel had presented additional mental-health evidence, however, the State could still have presented evidence of malingering. Indeed, at the 2001 trial, a prosecution witness had testified that Mr. Harris was exaggerating the symptoms of any mental illness. So the OCCA could reasonably consider evidence of malingering as available irrespective of defense counsel's strategy.

In sum, the OCCA acted reasonably in concluding that the omissions were not prejudicial.[30]

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[30] Mr. Harris points out that

- the jury at the 2001 trial had declined to find the aggravator of future dangerousness after hearing evidence of mental illness and
- the jury at the 2005 retrial did find this aggravator without hearing that evidence.

But other possible explanations may account for the juries' different findings on future dangerousness. For example, the 2001 jury was erroneously instructed on the availability of housing in a minimum-security prison, and the jury at the 2005 retrial

II. Jury Instructions and Closing Arguments on Mitigation Evidence

In capital cases, the Eighth and Fourteenth Amendments ordinarily prevent the trial court from barring consideration of any of the defense evidence on mitigation. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).[31] Mr. Harris argues that the State violated this right in two ways:

1. The trial court instructed the jury too narrowly on the evidence that could be considered mitigating.

2. In closing argument, the first prosecutor exploited this instruction by telling the jury that it should consider mitigation evidence only if it diminished Mr. Harris's moral culpability.

These errors, according to Mr. Harris, created a reasonable likelihood that one or more jurors believed

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heard new evidence about Mr. Harris's violent actions. Given these differences, we decline to speculate about why either jury found as it did.

[31] The *Lockett* plurality stated:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett, 438 U.S. at 604 (emphasis in original) (footnote omitted). A majority of the Supreme Court later adopted this view in *Eddings v. Oklahoma*, 455 U.S. 104, 113–15 (1982).

themselves unable to consider some of Mr. Harris's mitigation evidence.

A. The Standard of Review

The OCCA rejected this claim. Because Mr. Harris did not object to the instruction or the closing argument, the OCCA reviewed for plain error. *Harris v. State*, 164 P.3d 1103, 1113 (Okla. Crim. App. 2007). Applying the plain-error standard, the OCCA relied on its precedent to find the jury instruction constitutional. *E.g.*, *Williams v. State*, 22 P.3d 702, 727 (Okla. Crim. App. 2001), *cited with approval in Harris*, 164 P.3d at 1113 n.40. The OCCA thus focused on the prosecutors' arguments, considering how they might have affected the jury's ability to consider mitigation evidence. In considering this effect, the OCCA found that

- the first prosecutor's argument had been improper and
- the second prosecutor's argument and the jury instruction had rendered the first prosecutor's argument harmless.

Harris, 164 P.3d at 1113–14.

We treat the OCCA's decision under the plain-error standard as an adjudication on the merits. *Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015); *see* pp. 3–4, above. We thus review this decision under 28 U.S.C. § 2254(d). *Hancock*, 798 F.3d at 1011–12; *see* pp. 3–4, above.[32]

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[32] As noted above, the OCCA stated that the first prosecutor's argument was improper but harmless. *Harris v. State*, 164 P.3d 1103, 1113–14 (Okla. Crim. App. 2007). But the test (discussed

This review comprises two parts. We first ask "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Underwood v. Royal*, 894 F.3d 1154, 1169 (10th Cir. 2018) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)), *cert. denied*, 139 S. Ct. 1342 (2019). We then ask whether a reasonable likelihood exists that "arguments by the prosecutor . . . reinforced an impermissible interpretation of [the challenged jury instruction] and made it likely that jurors would arrive at such an understanding." *Id.* (quoting *Boyde*, 494 U.S. at 384).

B. The Jury Instruction

Mr. Harris challenges Instruction Number 8, which stated in part: "Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." R. at 1607. Mr. Harris argues that this instruction improperly prevented the jury from considering all available mitigation evidence.

We rejected this argument in *Hanson v. Sherrod*, where we considered the constitutionality of the same instruction. 797 F.3d 810 (10th Cir. 2015). When faced with this argument, we addressed the instructions as a whole. *Id.* at 851 (quoting *Boyde v. California*, 494 U.S. 370, 378 (1990)). Viewing them as a whole, we noted that three other jury instructions had

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in the text) determines whether a constitutional violation took place, not whether an error was harmless. *See Calderon v. Coleman*, 525 U.S. 141, 146 (1998) (stating that *Boyde*'s test of "reasonable likelihood" is used to determine whether a constitutional error took place, not to determine harmlessness).

suggested that the jury would recognize its ability to consider all of the defendant's mitigation evidence:

1. The trial court had instructed the jury that it was to decide which "circumstances [were] mitigating . . . under the facts and circumstances of this case."
2. Another jury instruction had identified many mitigating circumstances, and some did not involve moral culpability.
3. The trial court had also instructed the jury that it "may decide that other mitigating circumstances exist, and if so, [the jury] should consider those circumstances as well."

Id. Given these instructions, we concluded in *Hanson* that a jury would not "have felt precluded from considering any mitigation evidence, including the testimony of the four testifying witnesses." *Id.*

The same three instructions were given here. So under *Hanson*, we conclude that the OCCA reasonably determined that the jury would have understood its ability to consider all of Mr. Harris's mitigation evidence. *Hanson*, 797 F.3d at 851; *see Simpson v. Carpenter*, 912 F.3d 542, 578 (10th Cir. 2018).

Mr. Harris argues that the OCCA has

- expressed concern about the way that Oklahoma prosecutors have used the jury instruction and
- ordered revision of the jury instruction to minimize future abuses.

Harris v. State, 164 P.3d 1103, 1114 (Okla. Crim. App. 2007). But we have twice rejected the same argument,

reasoning that the OCCA's concern over the wording of the instruction did not suggest that it was unconstitutional. *Hanson v. Sherrod*, 797 F.3d 810, 851 (10th Cir. 2015); *Grant v. Royal*, 886 F.3d 874, 934–35 (10th Cir. 2018). Given these prior decisions, we conclude that the OCCA's concern over the instruction did not render its constitutional holding unreasonable.

C. The Prosecutors' Closing Arguments

Mr. Harris argues that even if the jury instruction itself had been constitutional, one of the prosecutors improperly exploited the jury instruction to urge disregard of Mr. Harris's mitigation evidence, violating the Eighth and Fourteenth Amendments. The OCCA rejected this argument. The court acknowledged that the first prosecutor's arguments had been improper; however, the court considered the impropriety harmless because the jury instructions on mitigating circumstances were proper and the second prosecutor had invited the jury to consider all of the mitigating circumstances. *Harris v. State*, 164 P.3d 1103, 1113 (Okla. Crim. App. 2007).[33] In the OCCA's view, the "second

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[33] At oral argument, the State defends the first prosecutor's arguments, stating that they invited the jury to consider mitigation evidence and to give it little weight. For example, the first prosecutor acknowledged that the jury

- could consider "sympathy or sentiment for the defendant" and
- needed to determine the importance of the mitigating circumstances.

2005 Tr., v. 6, at 909. And this prosecutor acknowledged the jury's need to balance the mitigating and aggravating circumstances.

prosecutor invited jurors to consider all Harris's mitigation evidence, weigh it against the aggravating circumstances, and find that the death penalty was appropriate." *Id.* Mr. Harris contends that the OCCA acted unreasonably in finding facts and applying Supreme Court precedents. We disagree because

- the OCCA could reasonably view this part of the closing argument as an invitation to consider all of the evidence on mitigation and find it overridden by the horrific nature of the crime and
- Mr. Harris has not shown that the OCCA based its decision on an erroneous interpretation of the prosecutor's closing argument.

1. Applicability of 28 U.S.C. § 2254(d)

The threshold issue is whether § 2254(d) applies. It ordinarily would apply if the OCCA adjudicated the merits of Mr. Harris's constitutional claim. *See* pp. 3–4, 10, above. The OCCA wasn't explicit. It characterized the first prosecutor's closing argument as improper, but didn't say whether this impropriety rose to the level of a constitutional violation. Regardless of the basis for characterizing the argument as improp-

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Id. at 940–41. But the OCCA found that the first prosecutor's arguments had been improper:

> One prosecutor did consistently argue in closing that jurors should not consider Harris's second stage evidence as mitigating, since it did not extenuate or reduce his guilt or moral culpability. This argument improperly told jurors not to consider Harris's mitigating evidence.

Harris v. State, 164 P.3d 1103, 1113 (Okla. Crim. App. 2007).

er, the OCCA ultimately regarded the impropriety as harmless. *Harris*, 164 P.3d at 1113–14.

The district court characterized the OCCA's reasoning as an adjudication on the merits, triggering § 2254(d). D. Ct. Dkt. 77 at 49. In his appeal briefs, Mr. Harris doesn't question this characterization. We thus decline to *sua sponte* revisit the district court's application of § 2254(d). *See Grant v. Royal*, 886 F.3d 874, 931–32 n.20 (10th Cir. 2018) (concluding that the Court should not *sua sponte* reject the applicability of the AEDPA on a claim involving the prosecutor's improper exploitation of a jury instruction defining the proper use of mitigating evidence).

2. Unreasonable Determination of Fact

In his rebuttal argument, the second prosecutor told the jury:

> I'm asking you to make a decision that I believe is based upon principal [sic], to examine the evidence, determine whether you believe beyond a reasonable doubt one or both of these aggravators are in existence, and I submit to you, and then to make a determination of whether these—these mitigation issues that [Mr. Harris's attorney] has brought up really override the day of terror, and a day that took a couple of weeks to think through.

2005 Tr., v. 6, at 982–83. In our view, the OCCA could reasonably construe this statement as an invitation to weigh all of the mitigation evidence against the aggravation evidence and decide that the death sentence was appropriate.

The prosecutor did contend that the defense's arguments on mitigation would not "override the day of terror." The term "override" refers to the act of weighing one item against another. *See Override*, *Oxford English Reference Dictionary* 1038 (Judy Pearsall & Bill Trumble eds., 2d ed. rev. 2006) (providing a primary definition of "override" as "have a claim precedence or superiority over"). Given this meaning of "override," the OCCA could reasonably conclude that the second prosecutor had urged the jury to consider all of the mitigation evidence and to find that it paled in comparison to the terrible nature of the crime itself. Under this interpretation, the second prosecutor's rebuttal argument would not have restricted the universe of circumstances that could be considered mitigating. *Grant v. Royal*, 886 F.3d 874, 938 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 925 (2019).

Mr. Harris notes that the second prosecutor also referred to moral culpability: "Do not reward this man for the things that he claims are somehow supposed to not make this as blameful, if you will, these things that he says somehow lessen his blame, lessen his moral responsibility." 2005 Tr., v. 6, at 983. According to Mr. Harris, this statement reflects further efforts to restrict mitigating circumstances to those bearing on moral culpability. This argument bears defects that are both procedural and substantive.

The argument is procedurally defective because

- in the state-court appeal, defense counsel never criticized the second prosecutor's reference to moral culpability and

- in our appeal, defense counsel did not criticize this statement in their opening brief.

Defense counsel instead referred to this excerpt only in their reply brief, when the State no longer had an opportunity to respond. Making the argument in the reply brief was too late. *See Byrd v. Workman*, 645 F.3d 1159, 1166 n.8 (10th Cir. 2011).

Even if we were to consider the second prosecutor's reference to moral culpability, however, it would not render the OCCA's interpretation unreasonable. The second prosecutor was responding to what defense counsel had argued. Defense counsel had argued that Mr. Harris was not a cold-blooded terrorist and was reacting to setbacks involving divorce and unemployment. The second prosecutor characterized this argument as an effort to minimize blame and moral culpability. With this characterization, the prosecutor attributed the statement about blame and moral culpability to defense counsel, arguing that "the [defense counsel] says [these things] somehow lessen [Mr. Harris's] blame, lessen his moral responsibility." 2005 Tr., v. 6, at 983. The prosecutor himself was not suggesting that the universe of mitigating circumstances should be limited to those that diminish blame or moral culpability; he was saying that defense counsel's argument involved an effort to downplay blame and moral culpability. We thus do not regard the OCCA's interpretation of the rebuttal argument as objectively unreasonable.

Even if the OCCA had unreasonably interpreted the rebuttal argument, however, § 2254(d)(2) would prevent the district court from reaching the merits. Under § 2254(d)(2), the habeas court can consider the merits only if the petitioner shows that the OCCA

based its decision on the factual error. 28 U.S.C. § 2254(d)(2); *see Lott v. Trammell*, 705 F.3d 1167, 1177 (10th Cir. 2003) (stating that "the burden rests on [the petitioner] to establish that the OCCA's analysis was 'based on an unreasonable determination of the facts'" (quoting 28 U.S.C. § 2254(d)(2))).

In deciding that the first prosecutor's improper arguments were harmless, the OCCA gave two reasons:

1. The second prosecutor told the jury to consider all of Mr. Harris's mitigating circumstances and find that the death penalty was appropriate based on the greater strength of the aggravating circumstances.
2. The trial court properly instructed the jury on the definition of mitigation evidence, Mr. Harris's evidence, and the jurors' duties.

Harris v. State, 164 P.3d 1103, 1113 (Okla. Crim. App. 2007).

Mr. Harris challenges the first reason, but not the second. Let's assume, for the sake of argument, that the first reason was objectively unreasonable. Given this assumption, the OCCA's second reason would remain valid and provide sufficient support for the OCCA's finding of harmlessness:

> [E]ven 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).

Lambert v. Blackwell, 387 F.3d 210, 235–36 (3d Cir. 2004). Indeed, the OCCA has elsewhere found improper closing arguments harmless when the jury was

properly instructed. *E.g.*, *Miller v. State*, 313 P.3d 934, 977 (Okla. Crim. App. 2013); *Ake v. State*, 663 P.2d 1, 9 (Okla. Crim. App. 1983), *rev'd on other grounds*, 470 U.S. 68 (1985). So even if the OCCA had unreasonably interpreted the second prosecutor's closing argument, Mr. Harris would have failed to show that the decision itself had been based on this factual error.

[* * *]

In sum, Mr. Harris has not satisfied his burden of showing that the OCCA based its decision on an unreasonable factual determination. The OCCA could reasonably interpret the second prosecutor's argument as an invitation to consider all of the mitigation evidence and find it overridden by the aggravating circumstances. The second prosecutor did mention moral culpability, but Mr. Harris did not address this statement in the state-court appeal or in his opening appellate brief. And the second prosecutor referred to moral culpability only when he paraphrased defense counsel's argument. In these circumstances, Mr. Harris has not overcome § 2254(d)(2).

3. Unreasonable Application of Supreme Court Precedent

Mr. Harris also argues that the OCCA's decision entailed an unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). We reject this argument.

Like Mr. Harris and the OCCA, we view the first prosecutor's comments as improper. The first prosecutor told the jury that a mitigating circumstance was something that "extenuates or reduces the degree

of moral culpability or blame of [Mr.] Harris for murdering Merle Taylor." 2005 Tr., v. 6, at 929. The prosecutor then pointed to each alleged mitigating circumstance and asked if it reduced or extenuated Mr. Harris's moral culpability. *Id.* at 929–40. The prosecutor then proposed a two-part test:

> One, is it true? Is what they have listed here true? Did it really happen? And, two, if it is true, does it make a difference? Does it extenuate or reduce his culpability for the murder of Merle Taylor? Because it's got to be both.

Id. at 930 (emphasis added). Through these statements, the prosecutor effectively told the jury that the mitigation evidence mattered only if it tended to reduce Mr. Harris's culpability, creating a risk that one or more jurors believed that they could not consider constitutionally relevant evidence of mitigation. *See Underwood v. Royal*, 894 F.3d 1154, 1169 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 1342 (2019).

We thus inquire whether "the OCCA could reasonably conclude that it was not reasonably likely that the [first] prosecutor's comment[s] precluded the jury from considering mitigation evidence, in light of the jury instructions and the other unchallenged comments of the prosecution." *Grant v. Royal*, 886 F.3d 874, 939 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 925 (2019). Under this inquiry, a court could grant habeas relief only if "no fairminded jurist would agree with the OCCA's conclusion that the jury was not precluded from considering the evidence offered by [the petitioner] in mitigation." *Simpson v. Carpenter*, 912 F.3d 542, 582 (10th Cir. 2018). In our view, fair-minded jurists could have agreed with the OCCA's conclusion

in light of the jury instructions and the second prosecutor's rebuttal argument.

When the petitioner argues that a prosecutor exploited a jury instruction to improperly restrict what could be mitigating, we consider the extent to which the jury was properly instructed. *See, e.g.*, *Grant*, 886 F.3d at 939; *Hanson v. Sherrod*, 797 F.3d 810, 852 (10th Cir. 2015). The jury at the 2005 retrial received virtually all of the jury instructions that we have regarded as curative. For example, the trial court instructed the jury that

- "the determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case" and
- evidence had been introduced on a long list of mitigating circumstances (many of which bore no relationship to moral culpability).

See pp. 66–67, above. In detailing the mitigating circumstances, the trial court reminded the jury of evidence that Mr. Harris

- had a "sister and a brother who love him" and "daughters who love[d] and need[ed] him,"
- had a "low I.Q.,"
- had been addicted to drugs and alcohol, and had lost his mother to cancer when he was young.

R. at 1608–10. These instructions served to broaden the first prosecutor's language, suggesting to the jury that it could consider all of the mitigation evidence regardless of whether it related to moral culpability. *Hanson*, 797 F.3d at 851; *see Brown v. Payton*, 544

U.S. 133, 144 (2005) ("[F]or the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all.").

In similar circumstances, we have often held that prosecutors' improper arguments on mitigation evidence are ameliorated by the jury instructions. *E.g.*, *Grant v. Royal*, 886 F.3d 874, 939–42 (10th Cir. 2018); *Underwood v. Royal*, 894 F.3d 1154, 1171–73 (10th Cir. 2018); *Simpson v. Carpenter*, 912 F.3d 542, 581–82 (10th Cir. 2018); *Cuesta-Rodriguez v. Carpenter*, 916 F.3d 885, 911–12 (10th Cir. 2019); *Johnson v. Carpenter*, 918 F.3d 895, 907–08 (10th Cir. 2019); *Harmon v. Carpenter*, 936 F.3d 1044, 1074–77 (10th Cir. 2019). For example, in *Cuesta-Rodriguez v. Carpenter*, the trial court instructed the jury on numerous mitigating circumstances, told the jury that it was to determine what was mitigating, and stated to the jury that it could consider sympathy for the defendant. *Cuesta-Rodriguez*, 916 F.3d at 911–12. Given these instructions, we held that the OCCA had reasonably applied Supreme Court decisions in rejecting a similar constitutional claim. *Id.* at 912. All of these instructions were given here.

Mr. Harris contends that in one of our prior cases, *Grant v. Royal*, the trial court had given two instructions that were omitted here:

1. that the jury instructions contained all of the law and rules for the jury to follow and
2. that the prosecutor's closing arguments were arguments only and for purposes of persuasion.

We reject these contentions.

Mr. Harris contends that the *Grant* panel found it "critically ameliorative" that the trial court had told the jury that the instructions contained all of the law and rules to be followed. Appellant's Reply Br. at 32. Though the *Grant* panel did consider this instruction, along with others, the panel did not suggest that this instruction was "critical" to the outcome. Instead, the *Grant* panel simply mentioned this instruction "[i]n addition" to others. *Grant*, 886 F.3d at 941. Indeed, many of our opinions recognize the ameliorative impact of other jury instructions with no indication that the jury had been told that the instructions constituted all of the law and rules to be followed. *E.g.*, *Simpson*, 912 F.3d at 581–82; *Cuesta-Rodriguez*, 916 F.3d at 911–12; *Johnson*, 918 F.3d at 907–08.

But even if this instruction had been critical, it *was* given to Mr. Harris's jury. Just after voir dire, the trial court instructed Mr. Harris's jury that its responsibility was "to follow the law as stated in the instruction that [the trial court] will give [the jury]." 2005 Tr., v. 2, at 427. The trial court returned to the subject later, explaining what would likely happen if the jury were to ask questions during its deliberations. 2005 Tr., v. 6, at 984. The court explained that it would likely answer that the jury has "all the law and evidence necessary to reach a verdict." *Id.* The court explained that this answer would mean that all of the necessary information is in the jury instructions or the evidence. *Id.* at 984–85. Thus, Mr. Harris's jury was ultimately told that all of the applicable law was in the instructions.

Mr. Harris also observes that the jury in *Grant* had been told that the prosecutor's remarks constituted only argument and were offered only for persuasion.

886 F.3d at 941–42. Mr. Harris says that this instruction was "critical" in *Grant*. Appellant's Reply Br. at 32. We are not sure why Mr. Harris regards this instruction as critical, for the Grant panel attached no particular importance to this instruction. In any event, Mr. Harris's jury was instructed to confine itself to the evidence and reminded that "[n]o statement or argument of the attorneys [was] itself evidence." 2005 Tr., v. 2, at 428.

Along with the ameliorating jury instructions, some of the second prosecutor's arguments also mitigated the risk from the first prosecutor's improper arguments. For example, the second prosecutor told the jury to weigh the defense's evidence against the aggravating evidence to see if the mitigation evidence outweighed the aggravating evidence.[34] And both prosecutors spent considerable time rebutting the

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[34] Mr. Harris insists that the second prosecutor did not suggest to the jury that it consider any of the mitigation evidence. According to Mr. Harris, the absence of such a suggestion distinguishes *Simpson v. Carpenter* and *Grant v. Royal*. We disagree. As noted above, the OCCA reasonably concluded that the second prosecutor had invited the jury to consider all of the evidence, both mitigating and aggravating. *See* pp. 71–74, above. But this factor was *not* present in *Simpson*. There we described the prosecutor's improper arguments as "pervasive," "extensive," and "recurring." 912 F.3d 542, 581, 588 (10th Cir. 2018), *petition for cert. filed* (U.S. July 24, 2019) (No. 19-5298). Nowhere did we rely on arguments inviting the jury to weigh the mitigation evidence. *See id.* at 585–87. The same is true in *Grant*. 886 F.3d 874, 943 (10th Cir. 2018) ("To be sure, unlike *Hanson*, there were no further statements from the prosecution—*i.e.*, Ms. Elliott—in rebuttal closing that could reasonably suggest that 'the prosecutor encouraged the jury to consider all sorts of mitigating evidence.'" (quoting *Hanson v. Sherrod*, 797 F.3d 810, 852 (10th Cir. 2015))).

defense's mitigation evidence even when it had not involved moral culpability. The prosecutors attacked this evidence not only because it bore no relationship to moral culpability but also on grounds that the evidence lacked reliability or trustworthiness. For example, the first prosecutor attacked the reliability of Mr. Harris's evidence on an intellectual impairment. From this attack, the jury could "logically infer from this presentation that the evidence actually did legally qualify as mitigating evidence, and that the question before them" involved the accuracy, credibility, and weight of this evidence. *Grant v. Royal*, 886 F.3d 874, 943 (10th Cir. 2018) (emphasis in original).

Mr. Harris underscores the repeated nature of the first prosecutor's improper comments. But we've upheld the reasonableness of a similar conclusion by the OCCA even when the prosecutor had made at least "nine separate statements which either generally defined mitigating evidence as reducing moral culpability or blame or specifically compared [the petitioner's] mitigating factors to that definition." *Simpson v. Carpenter*, 912 F.3d 542, 578 (10th Cir. 2018). And there the prosecutor had not said anything to encourage consideration of all mitigating factors. *Id.* at 580; *see* note 34, above.

Given the ameliorating jury instructions and the closing arguments as a whole, fair-minded jurists could agree with the OCCA's conclusion that the jury had understood its ability to consider Mr. Harris's mitigation evidence. We thus conclude that the OCCA did not unreasonably apply Supreme Court precedent.

III. Victim-Impact Testimony

Mr. Harris also contends that the prosecution improperly elicited victim-impact testimony. Though some of the testimony was unconstitutional, the constitutional violation was harmless.

A. The Constitutional Limit on Victim-Impact Testimony

Mr. Harris's contention stems from the interplay between two Supreme Court opinions: *Booth v. Maryland* and *Payne v. Tennessee*. In *Booth v. Maryland*, the Supreme Court held that the introduction of victim-impact testimony at a capital-sentencing proceeding violated the Constitution. 482 U.S. 496, 509 (1987). In *Payne v. Tennessee*, the Supreme Court overruled part of *Booth*, holding that "evidence and argument relating to the victim and the impact of the victim's death on the victim's family are []admissible at a capital sentencing hearing." 501 U.S. 808, 830 n.2 (1991). But the *Payne* Court did not overrule *Booth*'s recognition that the Constitution forbids "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Id.* Thus, *Booth* continues to ban the families of murder victims from requesting a particular sentence. *Bosse v. Oklahoma*, 580 U.S. ___, 137 S. Ct. 1, 2 (2016) (per curiam).

B. The Victim-Impact Testimony and the Issue of Harmlessness

In Mr. Harris's case, two of Mr. Taylor's family members requested the death penalty. Mr. Harris argues that allowing this testimony violated the Constitution. The OCCA rejected this argument. *Harris v.*

State, 164 P.3d 1103, 1110 (Okla. Crim. App. 2007). The OCCA was wrong: Introduction of this testimony was unconstitutional under *Booth* and *Payne*, and the OCCA's decision was contrary to clearly established Supreme Court precedent. *Dodd v. Trammell*, 753 F.3d 971, 996 (10th Cir. 2013).

The remaining question is whether the constitutional error was prejudicial or harmless. On this question, we engage in de novo review. *Lockett v. Trammell*, 711 F.3d 1218, 1238 (10th Cir. 2013). We regard the improper testimony as prejudicial only if it had a substantial and injurious effect or influence in determining the jury's verdict. *Id.*

Mr. Taylor's son testified for the State, asking for the death penalty: "On behalf of myself, my entire family, I respectfully ask that you impose the maximum allowable punishment and, in my mind, the only acceptable punishment, and sentence [Mr.] Harris to death." 2005 Tr., v. 4, at 891. Mr. Taylor's widow also testified, asking the jury to impose the death penalty: "It grieves me that my husband went to his grave not knowing why he had to die. My sons, grandchildren, and I ask you to sentence [Mr.] Harris to death." *Id.* at 901.

In her closing argument, the first prosecutor did not refer to the family members' requests for the death penalty. She instead urged the jury: "Do not be guilted into making your decision because . . . the Taylors are going to be upset, frankly. Make your decision because it is right, it is just, it is what is appropriate." 2005 Tr., v. 6, at 935. Similarly, the second prosecutor did not explicitly mention the family members' requests for the death penalty. But this prosecutor did quote extensively from the family

members' testimony, urging the jury not to reward Mr. Harris by sparing his life. Right after asking the jury one more time not to "reward [Harris]," the second prosecutor continued, "Toby Taylor [the son] and Carolyn Taylor [the widow] said this." *Id.* at 979. The prosecutor then summarized the family members' testimony on how they were affected by the murder.

C. Structural or Harmless Error

The threshold issue is whether a habeas court can review for harmlessness when the trial court improperly allows victim-impact testimony. Mr. Harris opposes review for harmlessness and urges us to treat the requests for the death penalty as structural error, contending that

- Oklahoma prosecutors regularly elicit family requests for the death penalty and
- the OCCA has improperly tolerated this pattern of improper conduct.[35]

But we have rejected the same arguments in *Underwood v. Royal*, holding that erroneous introduction of victim-impact testimony is reviewable for harmless-

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[35] Until 2017, the Oklahoma Court of Appeals had interpreted *Payne* to overrule *Booth* in its entirety. *Bosse v. State*, 360 P.3d 1203, 1226 (Okla. Crim. App. 2015). The Supreme Court expressly rejected the OCCA's view in *Bosse v. State*, reiterating that *Payne* had left intact *Booth*'s prohibition against a family member's request for a particular sentence. *Bosse v. Oklahoma*, 580 U.S. ___, 137 S. Ct. 1, 2 (2016) (per curiam). On remand, the OCCA overruled its prior cases and held that the Constitution forbids victim-impact testimony recommending a particular sentence. *Bosse v. State*, 400 P.3d 834, 855 (Okla. Crim. App. 2017).

ness. 894 F.3d 1154, 1177 (10th Cir. 2018). We are bound by this precedent. *Leatherwood v. Albaugh*, 861 F.3d 1034, 1042 n.6 (10th Cir. 2017). Given this precedent, we consider whether the error was harmless.[36]

D. Harmlessness

We regard the erroneous introduction of victim-impact testimony as harmless.

For harmlessness, we consider whether the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). On one occasion, we concluded that improper victim-

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[36] The Supreme Court has noted that an unusual case might involve a pattern of prosecutorial misconduct so egregious that habeas relief might be appropriate even without prejudice. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993). But when the 2005 retrial took place in an Oklahoma courtroom, Oklahoma's highest criminal court had held that the Constitution did not forbid victim testimony requesting a particular sentence. *E.g.*, *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *overruled in part on other grounds by Blonner v. State*, 127 P.3d 1135, 1139 (Okla. Crim. App. 2006). We had said the opposite. *Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002). But Oklahoma prosecutors were simply following what Oklahoma's highest criminal court had said on the issue.

Even if we were to regard the prosecutor's conduct as egregious, however, a habeas court could avoid the issue of harmlessness only if the victim-impact testimony had rendered the trial fundamentally unfair. *Underwood v. Royal*, 894 F.3d 1154, 1178 (10th Cir. 2018). As discussed elsewhere, the improper testimony consisted of two sentences in a five-day trial. Though the two sentences were emotional and powerful, they did not render the entire trial fundamentally unfair.

impact testimony had a substantial and injurious effect or influence. *Dodd v. Trammell*, 753 F.3d 971, 997 (10th Cir. 2013). There we relied on three factors:

1. The prosecution had elicited a "drumbeat" consisting of six to seven witnesses requesting the death penalty.
2. The jury had rejected the State's arguments for aggravating circumstances involving a "heinous, atrocious, or cruel" murder or the existence of a "continuing threat."
3. The case for the defendant's guilt had not been clear-cut.

Id. at 997–98. None of these factors are present here. Only two testifying witnesses requested death, far from a "drumbeat."[37] The jury also found the aggravator of a continuing threat, and Mr. Harris has not challenged his guilt.

Other factors also point to harmlessness, including the ameliorating influence of the jury instructions, the brevity of the improper testimony, and the absence of any mention in the prosecutors' closing arguments. For example, the trial court instructed the jury that

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[37] Even when the prosecution presents a "drumbeat" of improper victim testimony, the constitutional violation may be harmless. In *Bush v. Carpenter*, for example, "sentence recommendations were lengthy [and] egregious." 926 F.3d 644, 668 (10th Cir. 2019); *see also id.* at 680 ("[T]he victim impact statements were numerous, emotional, and in at least one instance, egregious. . . . "). Still, we held that the constitutional violation was harmless "given the circumstances of the murder, the presence of the aggravating factors, and the substantial evidence presented in support of those aggravating factors." *Id.* at 681.

it could consider the evidence "in determining an appropriate punishment," but only as "a moral inquiry into the culpability of the defendant" and not based on an "emotional response to the evidence." R. at 1616. The jury was also told that it *could* consider "sympathy or sentiment for the defendant." *Id.* at 1618 (emphasis in original). These instructions mitigated the prejudicial impact of the improper victim-impact testimony. *DeRosa v. Workman*, 679 F.3d 1196, 1240 (10th Cir. 2012). We consider not only the ameliorating instructions but also the brevity of the improper testimony, which consisted of only two sentences. *See Lockett v. Trammell*, 711 F.3d 1218, 1239 (10th Cir. 2013) (considering the error to be harmless when the family's requests for death consisted of "a single, concise sentence").[38] And in their closing arguments, the prosecutors did not explicitly refer to the family members' requests for the death penalty.

Mr. Harris argues that the State presented a weak case on aggravation.[39] We disagree. The jury found two aggravators:

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[38] Mr. Harris argues that the son's request was expansive, consisting of seventeen pages of argument on why the death penalty was the only appropriate punishment. But the son's testimony mainly concerned the effect of the crime, which was permissible. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed.").

[39] For this argument, Mr. Harris relies on *Dodd v. Trammell*, 753 F.3d 971, 998 (10th Cir. 2013), where we discounted the aggravating factors because they had added little beyond the findings of guilt. *Dodd*, 753 F.3d at 998. There the jury's finding

1. great risk of death to more than one person and
2. continuing threat.

Mr. Harris does not challenge the sufficiency of the evidence on either aggravator, and the State presented powerful evidence on both.

First, to show a great risk of death to more than one person, the State presented evidence that Mr. Harris had not only killed Mr. Taylor but also fired multiple times at Pam Harris and Jennifer Taylor. Pam Harris testified that she had suffered a gunshot to her hip and had seen the gun aimed at her head. She struggled as Mr. Harris tried to reload the gun, which he then used to smash her on the head and face.

Second, the State presented considerable evidence of the aggravator involving a continuing threat. This evidence included

- bar fights,
- physical abuse of Pam Harris,
- intimidating tactics, and
- threats against Pam Harris's family.

Given this evidence, the OCCA reasonably found "a lifelong pattern of using violence to solve problems and react to situations which is likely to continue."

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of an aggravator involving a prior conviction had been based on a decades-old conviction, and the aggravator for great risk of death to more than one person had been based on the fact that the defendant had murdered two people. *Id.*

Harris v. State, 164 P.3d 1103, 1111 (Okla. Crim. App. 2007).

Mr. Harris, of course, would have been imprisoned for life if he had avoided the death penalty. But even while he was in jail, Mr. Harris had assaulted a guard. In this incident, Mr. Harris covered his cell window and surprised the guard, repeatedly pummeling him.

Mr. Harris attributes this assault to his need for medication. But Dr. Smith acknowledged that Mr. Harris had probably been medicated at the time of the assault.[40]

[* * *]

We conclude that the constitutional error did not substantially affect the jury's sentencing recommendation, so the district court acted correctly in rejecting this habeas claim.

IV. Cumulative Error

Mr. Harris also urges cumulative error. In our view, the district court should revisit this issue on remand.

A cumulative-error analysis aggregates all errors that are individually harmless, analyzing whether

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[40] Mr. Harris suggests that county officers might have "messed up" his medications, stating that the Oklahoma Department of Corrections is much more reliable in administering medication. Appellant's Reply Br. at 23. For this suggestion, however, Mr. Harris relies on evidence from the 2001 trial, not the 2005 retrial involved in this appeal. In the 2005 retrial, no one presented evidence of an error in medicating Mr. Harris before this assault.

the cumulative effect undermines confidence in the fairness of the retrial and reliability of the verdict. *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003). We consider cumulative errors to be separate constitutional violations. *Hanson v. Sherrod*, 797 F.3d 810, 852 n.16 (10th Cir. 2015).

When we reject a claim of ineffective assistance based on a lack of prejudice, we can aggregate the prejudice from the deficient performance. *Cargle v. Mullin*, 317 F.3d 1196, 1207 (10th Cir. 2003). As a result, the claim of cumulative error would ordinarily include the prejudice from two claims:

1. any prejudice from counsel's failure to seek a pretrial hearing on an intellectual disability and
2. an error in admitting the victim-impact testimony.

On the claim of cumulative error, the OCCA also included any incremental prejudice from the first prosecutor's closing argument about the jury's consideration of mitigation evidence. *Harris v. State*, 164 P.3d 1103, 1119 (Okla. Crim. App. 2007). We have held that Mr. Harris failed to show an unreasonable legal or factual determination on the constitutionality of the closing arguments. *See* pp. 67–81, above. Though we have not recognized a constitutional violation involving the closing arguments, the constitutional test bears a close resemblance to the test for harmlessness. *See Boyde v. California*, 494 U.S. 370, 393 (1990) (Marshall, J., dissenting) ("[T]he 'reasonable likelihood' standard should be understood to be an equivalent of the 'harmless error' standard adopted in *Chapman v. California*."). Arguably, then, any incre-

mental prejudice from this claim may need to be combined with the prejudice from defense counsel's failure to seek a pretrial hearing on an intellectual disability and a constitutional error in allowing the victim-impact testimony.

But the parties have not briefed whether this claim should be considered in the mix on the claim of cumulative error. We thus leave consideration of this threshold issue to the district court on remand. *See Greystone Const., Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F.3d 1272, 1290 (10th Cir. 2011) ("[T]he better practice on issues raised [below] but not ruled on by the district court is to leave the matter to the district court in the first instance." (quoting *Apartment Inv. & Mgmt. Co. v. Nutmeg Ins. Co.*, 593 F.3d 1188, 1198 (10th Cir. 2010))).

The State also contends that in analyzing the claim of cumulative error, the court should not include any prejudice from the failure to request a pretrial hearing on an intellectual disability, asserting that the prejudice would have arisen before the trial and could not "accumulate with trial errors." Appellee's Resp. Br. at 96. But all we have are two sentences without any explanation, authority, or response. So we also leave this second threshold issue for the district court to decide in the first instance. *See Greystone Const., Inc.*, 661 F.3d at 1290.

MOTION TO EXPAND THE CERTIFICATE OF APPEALABILITY

Mr. Harris moves to expand the certificate of appealability to include whether "trial counsel breached his duty to Mr. Harris by his failure to present as mitigation a psychological risk assessment to diminish

the evidence presented by the State that Mr. Harris posed a continuing threat to society." Appellant's Mot. for Modification of Certificate of Appealability at 2 (text case changed).

At the 2005 retrial, the State urged an aggravating circumstance involving Mr. Harris's continued threat. The defense countered with Dr. Draper, who testified that

- Mr. Harris had been incarcerated for over 1800 days with only one incident,
- Mr. Harris would not be dangerous in the structured environment of a prison,
- the availability of proper medication would remove any possible danger, and
- murderers are generally less likely than others to act violently while in prison.

Mr. Harris argues that defense counsel should have presented expert testimony of a risk assessment. In state court, for example, Mr. Harris presented a risk assessment by J. Randall Price, Ph.D. The OCCA rejected this argument, concluding that defense counsel had acted reasonably at the 2005 retrial. *Harris v. State*, 164 P.3d 1103, 1118–19 (Okla. Crim. App. 2007).

We could grant a certificate of appealability on this issue only if the district court's ruling were debatable among reasonable jurists. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Because the OCCA adjudicated the merits of the deficiency prong, the federal district court would need to apply § 2254(d) on this prong. *See* pp. 55–56, above. Mr. Harris could thus obtain a certificate of appealability on this claim only by showing that reasonable jurists could debate his

ability to clear the hurdle of § 2254(d). *See Dunn v. Madison*, 583 U.S. ___, 138 S. Ct. 9, 11 (2017) (per curiam).

No reasonable jurist would regard this issue as debatable. As the OCCA noted, defense counsel

- had countered the prosecution with Dr. Draper, who testified that Mr. Harris would not pose a significant risk of future violence in a structured environment, and
- had strategic reasons to limit the evidence of future dangerousness.

Mr. Harris contends that Dr. Price could have provided more persuasive evidence. But Dr. Price's opinion created two risks:

1. His opinion could have backfired.
2. Dr. Price had diagnosed Mr. Harris as bipolar with psychotic features, which could have led to further evidence of dangerousness.

Dr. Price opined that even in a maximum-security prison, Mr. Harris had "an 18.8% probability of violent conduct." Appl. for Evid. Hearing, Exh. B-2 at 7. In stating this opinion, Dr. Price defined "violent" conduct as an "assaultive or dangerous" act creating an imminent threat of serious bodily injury. *Id.* at 6. The OCCA could reasonably infer that defense counsel might have regarded an 18.8% risk of future violence as high. Indeed, Dr. Price acknowledged that this percentage exceeded the base rate for capital murderers (16.4%). *Id.* at 7.

Second, Dr. Price noted that Mr. Harris had "been diagnosed as bipolar with psychotic features."

Id. at 8. An acknowledgment of psychotic features could have led the State to present additional evidence of future dangerousness. In the 2001 trial, for example, Dr. Smith acknowledged that bipolar disorder and psychopathy share many of the same characteristics. 2001 Tr., v. 18, at 179–80. This sort of testimony in the 2005 retrial could have been "devastating." *See United States v. Barrett*, 797 F.3d 1207, 1232 (10th Cir. 2015).

Given the possibility that a risk assessment might backfire, defense counsel could reasonably focus instead on Mr. Harris's difficult upbringing and on his generally positive conduct while in prison. *See Lott v. Trammell*, 705 F.3d 1167, 1209 (10th Cir. 2013) (stating that defense counsel was not ineffective for failing to present a risk assessment because cross-examination could have yielded negative information increasing the chances for a death sentence). "In fact, counsel would have been ineffective if the door to the damaging Risk Assessment Report and evidence contained therein had been opened and the State had been able to exploit it to their advantage." *Id.* We thus deny Mr. Harris's motion to expand the certificate of appealability.

CONCLUSION

We reverse on Mr. Harris's claim of ineffective assistance in defense counsel's failure to seek a pretrial hearing on an intellectual disability. On remand, the district court should revisit the issue of prejudice after conducting an evidentiary hearing.

We also vacate the district court's judgment on the claim of cumulative error. On this claim, the dis-

trict court should first consider the threshold issues of whether it can consider the prejudice arising from

- the lack of a request for a pretrial hearing on intellectual disability and
- the first prosecutor's exploitation of the jury instruction on Mr. Harris's mitigation evidence.

On the claim of cumulative error, the court should also consider the prejudice resulting from the constitutional error in allowing victim-impact testimony recommending the death penalty.

We affirm the district court's ruling in all other respects and deny Mr. Harris's motion to expand the certificate of appealability.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (APRIL 19, 2017)

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

JIMMY DEAN HARRIS,

Petitioner,

v.

TERRY ROYAL[1], WARDEN, OKLAHOMA STATE PENITENTIARY,

Respondent.

Case No. CIV-08-375-F

Before: Stephen P. FRIOT, Unites States District Judge.

Petitioner, a state prisoner currently facing execution of a sentence of death, appears with counsel and petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his convictions in the District Court of Oklahoma County, Case No. CF-1999-

[1] During previous proceedings, Anita Trammell was the warden of the Oklahoma State Penitentiary. However, Terry Royal has since assumed that office. According to Fed. R. Civ. P. 25(d)(1), Mr. Royal is automatically substituted as a party.

5071, of one count of first-degree murder, one count of shooting with intent to kill, and one count of assault and battery with a dangerous weapon. Respondent has responded to Petitioner's *Petition for a Writ of Habeas Corpus* (hereinafter "Petition"),[2] and Petitioner has replied. The State court record has been supplied.[3]

PROCEDURAL HISTORY

Petitioner was convicted by a jury in the District Court of Oklahoma County of one count of first-degree murder, one count of shooting with intent to kill, and one count of assault and battery with a dangerous weapon. For the crime of first-degree murder, the jury recommended the imposition of a sentence of death, finding the existence of the aggravating circumstance that Petitioner knowingly created a great risk of death to more than one person. He was also sentenced to life in prison for shooting with intent to kill and ten years in prison for assault and battery with a dangerous weapon.

Petitioner appealed his convictions and sentences to the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"). The OCCA affirmed Petitioner's convictions and the non-capital sentences, but reversed the death sentence and remanded for a new sentencing

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[2] References to the parties' pleadings shall be as follows: Petitioner's *Petition for a Writ of Habeas Corpus* shall be cited as (Pet. at __.); Respondent's *Response in Opposition to Petition for Writ of Habeas Corpus* shall be cited as (Resp. at __.); and, Petitioner's *Reply To Respondent's Response to Petition for Writ of Habeas Corpus* shall be cited as (Reply at __.).

[3] The trial court's original record shall be cited as (O.R. at __.). The trial transcript shall be cited as (Tr., Vol. ___, p. __.).

trial for the first-degree murder conviction. *Harris v. State*, 84 P.3d 731 (Okla. Crim. App. 2004). At the resentencing trial the jury found the existence of two aggravating circumstances: (1) Petitioner knowingly created a great risk of death to more than one person; and (2) the existence of a probability Petitioner would commit criminal acts of violence that would constitute a continuing threat to society. The trial court sentenced Petitioner to death on the jury's recommendation. Petitioner's direct appeal from the resentencing trial was denied by the OCCA. *Harris v. State*, 164 P.3d 1103 (Okla. Crim. App. 2007). Certiorari was denied on March 24, 2008. *Harris v. Oklahoma*, 552 U.S. 1286 (2008). Petitioner filed an Application for Post-Conviction Relief which was denied by the OCCA in a published opinion. *Harris v. State*, 167 P.3d 438 (Okla. Crim. App. 2007).

FACTUAL BACKGROUND

Under 28 U.S.C. § 2254(e), when a federal district court addresses "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). For the purposes of consideration of the present Petition, the Court provides and relies upon the following synopsis from the OCCA's opinion summarizing the evidence presented at Petitioner's trial. Following review of the record, trial transcripts, and the admitted exhibits, the Court finds this summary by the OCCA to be adequate and accurate. The Court therefore adopts the following summary of the facts as its own:

Harris, who was a skilled transmission mechanic, and his wife, Pam, worked in front office positions in transmission shops. Throughout their relationship the two often worked together. Despite being business partners as well as husband and wife, they had a stormy relationship. This worsened significantly when Pam was hired, but Harris was not, to work in Merle Taylor's AAMCO transmission shop in Oklahoma City. Harris commuted to work in Texas for several months, during which time the marriage suffered. After Harris had a work-related accident, he returned to Oklahoma. By the summer of 1999, Pam told him the marriage was over. While Harris agreed to a divorce, he was angry and upset, and continued to hope Pam would return to him. In mid-August of 1999, Harris called Pam, threatening to kill her, her parents, their daughter, her coworkers, and Merle Taylor. Pam got a protective order against Harris and filed for divorce. The divorce was granted on August 25, 1999, and Harris was ordered to leave the home without removing any property. Harris and Pam had previously taped an agreement dividing the house property. On the evening of the 25th, Harris moved out of the home, taking furniture and many of Pam's personal possessions. He also vandalized the house. Pam discovered the damage the next day, found out where Harris had stored her furniture and his tools, and had a lock put on that shed. In the succeeding days Harris called Pam often demanding

that she remove the lock. Each time, she explained she could neither talk to him nor remove the lock, and told him to call her attorney. He refused, explicitly stating he would talk to her. He continued to threaten her and others. On August 31, 1999, he threatened to kill Pam and was seen driving by the AAMCO shop.

On the morning of September 1, 1999, Harris called the AAMCO shop several times, demanding that she remove the lock on the storage shed and threatening Pam and Merle Taylor. At approximately 9:00 a.m. Harris arrived at the shop and asked for Pam, who was standing with Merle Taylor and his daughter-in-law Jessica. He shot Taylor twice at close range, and shot at Jessica. Harris shot Pam, chased her when she ran, and pistol-whipped her when he ran out of bullets and could not quickly reload his gun. When Pam escaped, Harris fled, discarded the gun and his van, and hid in a friend's garage. Harris claimed he was angry and upset, and could not make good decisions because he was of low intelligence, was under the influence of alcohol and drugs, and was mentally ill (although not legally insane).

To support the aggravating circumstances, the State presented the evidence of the circumstances of the crimes. There was also evidence that, during the ongoing difficulties in mid-August, Pam had called police and Harris had resisted arrest. The State presented evidence that Harris assaulted a

> jailer while awaiting trial, and had physically, verbally and emotionally abused Pam throughout their relationship. The State also presented victim impact evidence. In mitigation, Harris presented evidence from his family and former co-workers, as well as expert evidence, regarding his traumatic and abusive childhood, history of substance abuse, low intelligence, emotional instability, and possible mental illness.

Harris, 164 P.3d at 1106-07.

PETITIONER'S CLAIMS FOR RELIEF

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), in order to obtain federal habeas relief once a State court has adjudicated a particular claim on the merits, Petitioner must demonstrate that the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1-2).

The Supreme Court has defined "contrary to" as a State court decision that is "substantially different from the relevant precedent of this Court." *Williams*

v. Taylor, 529 U.S. 362, 405 (2000) (O'Connor, J., concurring and delivering the opinion of the Court). A decision can be "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [Supreme Court] precedent." *Id.* at 405-06. The "unreasonable application" prong comes into play when "the state court identifies the correct governing legal rule from [Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner's case" or "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. In ascertaining clearly established federal law, this Court must look to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decisions." *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (quoting *Williams*, 529 at 412.

The "AEDPA's purpose [is] to further the principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). "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). The deference embodied in Section 2254(d) "reflects the view that

habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 10203 (2011) (citation omitted).

GROUNDS FOR RELIEF

Ground 1: Mental Health Rebuttal Evidence.

During the first stage of trial, and after Petitioner had testified, the defense presented expert psychological and psychiatric testimony regarding Petitioner's intelligence and state of mind to support his diminished capacity defense of mental illness. Subsequent to the defense's notice that Petitioner intended to present such a defense, the State obtained permission to have Dr. John Call, a psychologist, interview Petitioner to determine if he was malingering. Dr. Call testified that Petitioner appeared to be feigning or exaggerating cognitive, memory, and emotional disorders. He also testified that Petitioner exhibited many traits of a psychopath.

Petitioner claims that the testimony of Dr. Call deprived him of a fundamentally fair trial as his testimony was a surprise and that the defense was not presented with a report prior to the testimony, that a prior determination was not made regarding scientific reliability and acceptability of the substance of Dr. Call's testimony, that "psycopath" is not a mental illness or disease, and as such, was only proper for indications of future behavior and improper evidence in the first stage of trial, that the testimony should have been excluded as being more prejudicial than probative, that evidence of bad character is barred

under State law and admission of such was a violation of Petitioner's liberty interest, and that the OCCA's determination was an unreasonable determination of the facts in light of the evidence presented. In short, Petitioner's claim is that the OCCA's determination that Dr. Call's testimony was properly admitted is unreasonable.

After noting that the State presented Dr. Call as a rebuttal witness subsequent to Petitioner's testimony and the defense presentation of expert testimony of mental illness, the OCCA rejected Petitioner's claim of surprise and failure to excluded Dr. Call's testimony as a discovery sanction:

> First, we reject Appellant's contention that Dr. Call's testimony should have been excluded as a discovery sanction. Generally, the State need not give advance notice of rebuttal evidence, because it cannot know before trial what evidence will be relevant in rebuttal. *Goforth v. State*, 1996 OK CR 30, ¶ 3, 921 P.2d 1291, 1292. Dr. Call only interviewed Appellant after the defense gave notice that it intended to present a defense based on Appellant's mental health. Defense counsel was present when Dr. Call interviewed Appellant. Appellant had access to his own mental-health experts to review Dr. Call's notes and testimony. After Dr. Call testified on direct examination, the trial court granted Appellant's request for additional time to prepare for cross-examination. Appellant was not unfairly surprised by Dr. Call's testimony.

Harris, 84 P.3d at 745.

Dr. Call was called by the State in rebuttal to a defense based on a claim of diminished mental health. Defense counsel was present during Dr. Call's examination and testing of Petitioner and during the trial court's in camera hearing on Dr. Call's techniques and the information utilized in reaching his conclusions. Counsel was given the opportunity during the in camera hearing to question Dr. Call and was permitted to re-call him for cross-examination after the defense expert reviewed his work. Further, as noted by the OCCA, after Dr. Call's testimony the trial court granted defense counsel's request for additional time to prepare for cross-examination. Considering the above, Petitioner has not demonstrated the OCCA's determination to be unreasonable.

Petitioner further claims it was error for the trial court to not hold a prior hearing on the scientific reliability and acceptability of the substance of Dr. Call's methods and testimony consistent with *Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579 (1993). Although lengthy, the OCCA's determination denying the claim is set forth here in its entirety to set forth the facts and procedure regarding Dr. Call's testimony and to demonstrate the state court's thorough and well considered review:

> We next consider whether the trial court erred by not holding a hearing on the reliability of Dr. Call's methods consistent with *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). In *Daubert*, the Supreme Court recognized a trial court's important responsibility, as well as its broad discretion, in assessing the admissibility of novel scientific evidence. The

Court identified several factors which may aid trial judges in determining whether expert evidence is scientifically valid, and thus reliable enough, to be admissible under the permissive guidelines of the Federal Rules of Evidence. The Court stressed that its list of relevant factors was not exhaustive, and that whether any of the factors mentioned were applicable could only be determined on a case-by-case basis. In essence, the Court held that while not all evidence deemed "scientific" had to earn general acceptance in the scientific community before being admissible, all such evidence should bear some indicia of traditional scientific method. The focus should be "solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595, 113 S. Ct. at 2797. The Court subsequently extended *Daubert's* principles to non-scientific but otherwise technical and specialized expert testimony in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150–51, 119 S. Ct. 1167, 1175, 143 L.Ed.2d 238 (1999). We adopted the *Daubert* analysis in *Taylor v. State*, 1995 OK CR 10, ¶ 15, 889 P.2d 319, 328–29, and have likewise extended it (per *Kumho)* to other types of expert testimony. *Harris v. State*, 2000 OK CR 20, ¶ 9, 13 P.3d 489, 493.

Before Dr. Call testified, the trial court held an in camera hearing on the techniques he used and the reasonableness of his reliance on certain information to reach his conclu-

sions. The hearing was consistent with our holding in *Lewis v. State*, 1998 OK CR 24, ¶ 21, 970 P.2d 1158, 1167, that the trial court should determine the admissibility of expert testimony before it is presented to the jury. At that hearing, Dr. Call stated that the Hare Psychopathy Checklist was "the most widely respected technique to assess psychopathy." He testified as to his experience in administering the technique, and explained that the Checklist necessarily required him to obtain information from immediate family which, in this case, included the surviving victim, Mrs. Harris. Dr. Call testified that he did not tell Mrs. Harris the purpose of his inquiry, and that he took her potential for bias into account. He also stated that not all of Mrs. Harris's observations about Appellant were negative, and that many of her observations were corroborated by others, including Appellant himself. The defense cross-examined Dr. Call about his methods, but did not present any evidence of its own. The trial court found Dr. Call's methods reliable and his testimony admissible. Defense counsel did not claim this hearing was insufficient under *Daubert* until after Dr. Call had testified on direct examination. Based on the information developed at the original *"Lewis"* hearing, the trial court concluded that no further *Daubert* inquiry was necessary.

Appellant complains that the *Lewis* hearing was not tantamount to a *Daubert* hearing,

because it did not address either "relevancy or reliability of psychopathy opinion testimony in the guilt/innocence phase of a criminal trial," and claims that the Hare technique is "clearly irrelevant and unreliable in this context" (emphasis added). We view these concerns as a matter of general relevance, not affecting the soundness of Dr. Call's methods themselves. There was no evidence that Dr. Call modified the Hare technique in any way, or that he used it to assess anything but Appellant's psychopathic tendencies. Appellant's complaint is not that the Hare Psychopathy Checklist is unreliable per se, but that the Checklist did not assist the trier of fact, *see* 12 O.S.2001, § 2702, because it was not a reliable indicator of anything relevant to Appellant's guilt. We conclude that it was.

Appellant correctly notes that the Hare Psychopathy Checklist is routinely used to determine whether a person poses a threat to others generally; thus, the Checklist is often employed in capital-sentencing proceedings (*e.g.* to show the defendant is a continuing threat to society) and civil commitment proceedings (*e.g.* to justify involuntarily commitment of a sexual predator). However, merely because psychopathy evidence is relevant for these purposes does not render it irrelevant for any other purpose. Any ability of the Checklist to predict future behavior must necessarily be based on its ability to indicate tendencies presently existing in the

subject's personality–which in turn is based, in part, on an examination of the subject's past behavior.

Appellant's own experts–also relying in part on Appellant's past behavior–testified to support the defense theory that Appellant's mental functioning was impaired, and ultimately, that Appellant was (at least at the time of the crime) unable to form a specific intent to kill. In turn, the State was entitled to offer alternative explanations of Appellant's behavior. Appellant points out that psychopathy is not a recognized mental disorder. This, of course, is exactly why the State introduced the evidence in question: to show that Appellant's behavior was not the result of a diminished mental capacity, but rather the product of a generally violent personality for which he should be held accountable. We have repeatedly held that the State may present rebuttal evidence on mental-health issues raised by the defense. *See Lockett v. State*, 2002 OK CR 30, ¶¶ 22–25, 53 P.3d 418, 425; *Van White v. State*, 1999 OK CR 10, ¶ 52, 990 P.2d 253, 268–69; *Maghe v. State*, 1980 OK CR 100, ¶ 7, 620 P.2d 433, 435; *see also* 12 O.S.2001, § 2404(A)(1) (where accused presents evidence of a pertinent character trait, the prosecution may present evidence to rebut the same). Dr. Call's opinions, and prosecutor commentary on this evidence as bearing on Appellant's ability to form an intent to kill, were not improper.

> Finally, we note that the jury was well aware of the limitations on Dr. Call's testimony. Dr. Call made it clear that while Appellant exhibited many behaviors associated with psychopathy, he also exhibited many behaviors inconsistent with psychopathy. Dr. Call admitted he could not conclusively state that Appellant was a psychopath, and conceded that even a psychopath may suffer from some other recognized mental illness. The trial court's limiting instruction, which Appellant did not object to, was patterned after the one used by the trial court in *Lewis v. State*, and we find it appropriate here as well. Proposition 2 is denied.

Harris, 84 P.3d at 744-47 (footnotes omitted).

Rather than apply *Daubert* to the facts in the record, this Court must determine whether the OCCA's decision was an unreasonable determination that Petitioner received a fair trial. In *Wilson v. Simons*, 536 F.3d 1064 (10th Cir. 2008), the Tenth Circuit considered a claim that admission of certain DNA results without a *Daubert* hearing violated the petitioner's Eighth and Fourteenth Amendment rights. Denying the claim, the Tenth Circuit held:

> "As a general matter, federal habeas corpus relief does not lie to review state law questions about the admissibility of evidence. . . . " *Moore v. Marr*, 254 F.3d 1235, 1246 (10th Cir.2001) (internal citations omitted). Absent a showing that the admission of the evidence violated a specific constitutional guarantee, a federal court on habeas review will not disturb the state court's evidentiary ruling

> unless it was "so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000) *(quoting Williamson v. Ward*, 110 F.3d 1508, 1522 (10th Cir. 1997)); *Milone v. Camp*, 22 F.3d 693, 702 (7th Cir. 1994). Because *Daubert* does not set any specific constitutional floor on the admissibility of scientific evidence, the only relevant question is whether the PCR test rendered the trial fundamentally unfair. *Milone*, 22 F.3d at 702; *see also Norris v. Schotten*, 146 F.3d 314, 335 (6th Cir. 1998).

Id. at 1101-02.

As stated above, Dr. Call testified in camera before his rebuttal testimony and was subjected to defense counsel's questioning. The trial court granted defense counsel's request for additional time to review Dr. Call's testimony and was permitted to re-call Dr. Call for cross-examination after the defense expert reviewed his work. The Hare checklist utilized by Dr. Call was not novel. It was utilized to not only predict future dangerousness but also as a diagnostic tool for treatment and management. Dr. Call's opinion was based on the results of this recognized diagnostic tool and offered to rebut the claim that Petitioner was not capable of intending to kill Mr. Taylor. In fact, his opinion was corroborated by Petitioner's own second stage expert who agreed Petitioner had many of the traits of an individual with psychopathy or antisocial personality disorder. (Tr., Vol. XVIII, pp. 181-82, 192-93).

Petitioner has not demonstrated the determination of the OCCA's was contrary to, or an unreasonable application of, clearly established Supreme Court law. Nor has Petitioner demonstrated that the admission of Dr. Call's testimony rendered the trial fundamentally unfair. Petitioner's first ground for relief is denied.

Ground 2: Mental Capacity Jury Instruction.

Petitioner next claims that the trial court erred when it instructed the jury, over defense objection, that mental retardation was a defense to the charged offenses only if it rendered him incapable of knowing the wrongfulness of the offenses because of his mental retardation. Petitioner claims this instruction denied him the right to present a defense to the intent element of malice aforethought murder in violation of his Sixth and Fourteenth Amendment rights.[4]

On appeal, the OCCA determined no prejudice existed and no violation of Petitioner's rights:

> In Proposition 5, Appellant contends that the trial court's instructions to the jury relating to his defense were confusing, improper, and denied him a fair trial. Appellant offered evidence that "low intelligence, mental illness, and drug and alcohol induced intoxication" combined to give him "limited control" over his actions at the time of the crimes. The goal of Appellant's defense was to show that

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[4] Petitioner adds the absence of an instruction on second degree depraved mind murder compounded the denial of his rights. *See* Ground 3, *infra*.

at the time of the shootings, he could not have formed a specific intent to kill.

He requested and received a jury instruction on a lesser form of homicide, First–Degree Manslaughter, arguably compatible with his defense. However, because Appellant had attempted to show that he was at least "borderline" mentally retarded, the trial court also instructed the jury, over defense objection but consistent with Oklahoma law, that mental retardation was a complete defense to culpability if it rendered the accused incapable of knowing the wrongfulness of his acts. *See* 21 O.S.2001, § 152(3).

Appellant claims the trial court's instruction on mental retardation as a complete exculpatory defense was not supported by the evidence. We agree. The accused is entitled to instructions on any defense theory, whether it be mitigating or exculpatory, if the law and evidence reasonably support that theory. *Cipriano v. State*, 2001 OK CR 25, ¶ 30, 32 P.3d 869, 876. Because, as Appellant concedes, the evidence failed to suggest he was mentally retarded to the extent he could not appreciate the wrongfulness of his actions, the trial court's instruction on mental retardation as an exculpatory defense was unwarranted.

We fail to see how this instruction prejudiced Appellant. The instruction actually saddled the State with the additional preliminary burden of proving that Appellant was not mentally retarded before he could be convicted of any crime. Even though the outcome

> might have been unlikely, the instruction gave the jurors the option of finding Appellant not guilty of any crime, if they believed his intellectual capacity was so diminished that he could not distinguish right from wrong. Finally, the instruction in no way discouraged the jury from fully considering Appellant's intellectual abilities, along with his alleged mental illness and substance abuse, on the issue of whether he lacked the ability to form a specific intent to kill. Because the instruction could only have worked to Appellant's benefit, we find no violation of his substantial rights. *McGregor v. State*, 1994 OK CR 71, ¶ 23, 885 P.2d 1366, 1380; *Allen v. State*, 1994 OK CR 13, ¶ 33, 871 P.2d 79, 93. Proposition 5 is denied.

Harris, 84 P.3d at 749-50.

A petitioner seeking collaterally to attack a state court conviction based on an erroneous set of jury instructions "bears a heavy burden of proof." *Shafer v. Stratton*, 906 F.2d 506, 508 (10th Cir. 1990). "Habeas proceedings may not be used to set aside a state conviction on the basis of erroneous jury instructions unless the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial in the constitutional sense," *Shafer*, 906 F.2d at 508 (quotation omitted), or "so infected the entire trial that the resulting conviction violates due process," *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) *(quoting Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).

Petitioner has not demonstrated the trial court's instruction had a substantial and injurious effect or influence on the jury's verdict, *Brecht v. Abraham-*

son, 507 U.S. 619, 631 (1993), or that the OCCA's determination was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. Accordingly, Petitioner's ground for relief is denied in its entirety.

Ground 3: Failure to Instruct on Lesser Offense.

In *Beck v. Alabama*, 447 U.S. 625 (1980), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment sometimes requires a state charging a defendant with a capital offense to permit the jury to consider alternative, lesser included offenses that do not carry with them the prospect of a death sentence. *Id.* at 627; *see also Schad v. Arizona*, 501 U.S. 624, 647 (1991). At the first stage of trial the State charged Petitioner with first-degree malice aforethought murder. The trial court denied defense counsel's request to instruct the jury on second-degree depraved mind murder, but did instruct on a lesser offense of first-degree manslaughter. Petitioner claims here that the denial of his requested instruction on the lesser offense of second-degree depraved mind murder violated his Sixth, Eighth, and Fourteenth Amendment rights.

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." *Id.* at 627 (emphasis added). On appeal, the OCCA determined the evidence did not warrant an instruction on second degree murder:

In Proposition 10, Appellant claims error in the trial court's rejection of his proposed instructions on the lesser offense of Second Degree (Depraved Mind) Murder, as well as his proposed instruction attempting to define "reasonable doubt." As to the first claim, the trial court was required to instruct on every degree of homicide reasonably supported by the evidence. *Shrum v. State*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036. To warrant an instruction on Second Degree (Depraved Mind) Murder, the evidence must reasonably support the conclusion that the defendant committed an act so imminently dangerous to another person as to evince a depraved mind in disregard for human life. *Williams v. State*, 2001 OK CR 9, ¶ 23, 22 P.3d 702, 712.

Appellant shot Taylor twice at close range, immediately after pushing him down to the ground. Appellant testified that he shot Taylor "accidentally," "without thinking or knowing" what he was doing. Instructions on depraved-mind murder are unwarranted when the defense claims the fatal gunshots were fired accidentally. *Crumley v. State*, 1991 OK CR 72, ¶ 13, 815 P.2d 676, 678–79. Furthermore, in determining the sufficiency of the evidence to support a lesser offense, we look to whether the evidence might allow a jury to acquit the defendant of the greater offense and convict him of the lesser. *Cipriano*, 2001 OK CR 25 at ¶ 14, 32 P.3d at 873. Given the substantial evidence

> that Appellant drove to the transmission shop to do violence (see discussion of Proposition 6), we do not believe any rational trier of fact could have found Appellant evinced a depraved mind but lacked an intent to kill. *Cf. Young v. State*, 2000 OK CR 17, ¶¶ 61–62, 12 P.3d 20, 39–40 (instructions on depraved-mind murder correctly refused where defendant entered restaurant with intent to rob its occupants with firearm, stood directly in front of victim, raised gun, demanded money, and fatally shot victim in the back of the chest when victim tried to defend himself), *cert. denied*, 532 U.S. 1055, 121 S. Ct. 2200, 149 L.Ed.2d 1030 (2001); *Boyd v. State*, 1992 OK CR 40, ¶ 11, 839 P.2d 1363, 1367–68, *cert. denied*, 509 U.S. 908, 113 S. Ct. 3005, 125 L.Ed.2d 697 (1993) (instructions on depraved-mind murder correctly refused where defendant shot victim a second time in the chest at close range).

Harris, 84 P.3d at 750.

In *Shad v. Arizona*, 501 U.S. 624, 645-48 (1991), the Supreme Court held that *Beck's* requirement is satisfied so long as the jury is instructed on at least one lesser included offense that is supported by the evidence. Here, the trial court instructed on the lesser included offense of first-degree manslaughter.

The OCCA's determination that the evidence did not warrant an instruction on second degree murder was neither contrary to, nor an unreasonable application of, clearly established federal law. As detailed by the OCCA, Petitioner's testimony that he "accidently" and "without thinking or knowing" what he was

doing does not warrant an instruction on second degree depraved mind murder under Oklahoma law. The OCCA further determined that substantial evidence existed that Petitioner intentionally went to the transmission shop to do violence such that no rational trier of fact could have found Petitioner evinced a depraved mind but lacked the intent to kill–*i.e.*, that the evidence did not support the lesser instruction of second degree depraved mind murder.

As *Beck's* requirements were met, and the OCCA's determination was not contrary to, or a unreasonable application of, federal law, Petitioner has not demonstrated that failure to instruct on second degree depraved mind murder rendered his trial fundamentally unfair. *See James v. Gibson*, 211 F.3d 543, 555 (10th Cir. 2000). Accordingly, Petitioner's third ground for relief is denied.

Ground 4: Impartial Jury Claim.

Petitioner claims the prosecution utilized four of its nine peremptory challenges to remove venire persons without sufficient race neutral reasons and that the trial court's acceptance of the reasons and dismissal of those prospective jurors was a violation of his Fifth, Sixth, and Fourteenth Amendment rights as provided in *Batson v. Kentucky*, 476 U.S. 79 (1986).

In *Batson*, the Supreme Court held that although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be

unable impartially to consider the State's case against a black defendant." *Id.* at 89 (internal citations omitted). Subsequently, the Supreme Court articulated Batson's three-step process for evaluating claims that a prosecutor used peremptory challenges in violation of the Equal Protection Clause:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. 476 U.S., at 96-97, 106 S. Ct. 1712. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. *Id.*, at 97-98, 106 S. Ct. 1712. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. *Id.*, at 98, 106 S. Ct. 1712.

Miller-El v. Cockrell, 537 U.S. 322, 328-29 (2003).

On appeal, Petitioner raised his claim as to four minority veniremen excused by the prosecution's use of its peremptory challenges. Petitioner asserts his claim here, however, only as to one venire person, stating "[d]ue to the limitations of the AEDPA only the peremptory strike as to juror Carol Gray is being pursued in this Petition." (Pet. at 39) The OCCA identified *Batson* as controlling authority and set forth its three part inquiry, analyzed all four of Petitioner's claims, and denied relief. *Harris*, 84 P.3d at 743. As to the claim raised here, the OCCA stated:

> The prosecutor moved to strike Ms. Gray because her answers to questions were unclear, and because she made several comments suggesting she would be sympathetic

> to Appellant's defense. Appellant's claim that the prosecutor deliberately asked Ms. Gray confusing questions is not supported by the record. Ms. Gray stated that in her opinion, people who acted under the influence of alcohol were less responsible for their actions. The prosecutor's concern about Ms. Gray's ability to assimilate the facts and follow the law was a plausible, race-neutral reason for removing her. In conclusion, we find no evidence that the prosecutor's stated reasons for striking these panelists were so fantastic or incredible as to warrant relief. Proposition 8 is denied.[5]

Harris, 84 P.3d at 743.

"The disposition of a *Batson* claim is a question of fact. . . . " *Saiz v. Ortiz*, 392 F.3d 1166, 1175 (10th Cir. 2004). As long as the state court applied *Batson*, Petitioner is entitled to relief only if the state court's rejection of his claim "was 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Black v. Workman*, 682 F.3d 880, 896 (10th Cir. 2012) (quoting 28 U.S.C. § 2254(d)(2)).

Petitioner challenges the removal of Ms. Gray claiming that the prosecutor utilized a peremptory

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[5] As an initial matter, we note that Appellant is Caucasian, his victims were Caucasian, and that there were no identifiable race-related issues in the trial itself; that one of the panelists complained of here (Ms. King) was not, according to the trial court, of a minority race; that several members of the final jury panel were of a minority race; and that the prosecutor did not use every peremptory challenge to remove a minority panelist. (Footnote 8 original)

challenge to excuse her because she was a black woman. The prosecutor's expressed reasons for excusing Ms. Gray included Ms. Gray's inability to understand many of the questions presented to her and her multiple non-responsive answers. The prosecutor's reasons for exercising a peremptory challenge, and the trial court's acceptance of those stated reasons, are supported by review of the record. Many of Ms. Gray's responses to pointed questions were often confusing. When asked what things in life caused her to think about the death penalty, Ms. Gray's response reflected thought about guilt and innocence as well as statements regarding the media's inaccurate reporting of facts. She did not respond concerning the death penalty. (Tr., Vol. 3, pp. 150-51) When asked whether in her opinion Timothy McVeigh deserved the death penalty, Ms. Gray responded: "I only know by people that were there that told me. They would tell me something that were actually there. They couldn't have seen everything, just certain. They, you know, were here at the same time. They just tell me about their situation." (*Id.*) Ms. Gray responded to almost every question presented to her about the whether she could impose the death penalty as a sentence by referring to evidence and the fact that she did not know all the details prevented her from knowing if any sentence of death had ever been appropriate or justified. (Tr., Vol. 3, pp. 147-51) Ms. Gray further stated that in her opinion people under the influence of alcohol were less responsible for their actions because they were not aware of what they were doing. (Tr., Vol. 3, pp. 161-62)

The prosecutor provided several race-neutral reasons to strike Ms. Gray from serving on the jury.

The OCCA determined from its review that the prosecutor's concern about Ms. Gray's ability to assimilate the facts and follow the law was plausible, and that there was no evidence to support granting Petitioner's claim for relief. Petitioner has not satisfied his burden of demonstrating that the OCCA's determination was either contrary to, or an unreasonable application of, clearly established federal law, nor has he demonstrated that the OCCA's determination was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Accordingly, Petitioner's claim for relief is denied.

Ground 5: Ineffective Assistance of Appellate Counsel in 2001 Direct Appeal.

Petitioner claims he was denied effective assistance of appellate counsel in his 2001 direct appeal when propositions of error were not presented regarding prosecutorial misconduct in the first stage of trial, failure to claim ineffective assistance of trial counsel for not obtaining micro-cassette tapes, failure by appellate counsel to interview jurors and raise the issue of ineffective assistance of trial counsel regarding Petitioner being seen by the jury wearing restraints, and failure to raise the claim on appeal that the trial court did not instruct the jury the prosecution must prove beyond a reasonable doubt the absence of heat of passion.

To prevail on a claim of ineffective assistance of counsel under the Sixth Amendment, Petitioner must first show that his counsel "committed serious errors in light of 'prevailing professional norms'" in that the representation fell below an objective standard of

reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984). In so doing, Petitioner must overcome the "strong presumption" that his counsel's conduct fell within the "wide range of reasonable professional assistance" that "'might be considered sound trial strategy,'" *Strickland*, 466 U.S. at 689, *quoting Michel v. Louisiana*, 350 U.S. 91, 101 (1955). He must, in other words, overcome the presumption that his counsel's conduct was constitutionally effective. *United States v. Haddock*, 12 F.3d 950, 955 (10th Cir. 1993). A claim of ineffective assistance "must be reviewed from the perspective of counsel at the time," *Porter v. Singletary*, 14 F.3d 554, 558 (11th Cir.), *cert. denied*, 513 U.S. 1009 (1994), and, therefore, may not be predicated on "'the distorting effects of hindsight.'" *Parks v. Brown*, 840 F.2d 1496, 1510 (10th Cir. 1987), *quoting Strickland*, 466 U.S. at 689.

If constitutionally deficient performance is shown, Petitioner must then demonstrate that "there is a 'reasonable probability' the outcome would have been different had those errors not occurred." *Haddock*, 12 F.3d at 955; *citing Strickland*, 466 U.S. at 688, 694; *Lockhart v. Fretwell*, 506 U.S. 364, 369-70 (1993). In the specific context of a challenge to a death sentence, the prejudice component of *Strickland* focuses on whether "the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *quoted in Stevens v. Zant*, 968 F.2d 1076, 1081 (11th Cir. 1992), *cert. denied*, 507 U.S. 929 (1993). Petitioner carries the burden of establishing both that the alleged deficiencies unreasonably fell beneath prevailing norms of professional conduct and that such deficient performance prejudiced his defense.

Strickland, 466 U.S. at 686; *Yarrington v. Davies*, 992 F.2d 1077, 1079 (10th Cir. 1993). In essence, "[t]he 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." *Strickland*, 466 U.S. at 686. "Counsel's performance must be 'completely unreasonable' to be constitutionally ineffective, 'not merely wrong.'" *Welch v. Workman*, 639 F.3d 980, 1011 (10th Cir. June 7, 2010) (quoting *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997)). "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010).

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *[Strickland]* at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S., at 123, 129 S. Ct. at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S. Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254 (d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable

> argument that counsel satisfied *Strickland's* deferential standard.

Harrington v. Richter, 562 U.S. 86, 105 (2011).

Demonstrating deficient performance of appellate counsel can often be more difficult:

> In *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L.Ed.2d 987 (1983), we held that appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal. Notwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent. *See*, *e.g.*, *Gray v. Greer*, 800 F.2d 644, 646 (C.A.7 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome").

Smith v. Robbins, 528 U.S. 259, 288 (2000).

In analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, "we look to the merits of the omitted issue," *Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir.2001).

> If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case

> for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance. *See*, *e.g.*, *Smith [v. Robbins]*, 528 U.S. [259], 288, 120 S. Ct. 746; *Banks v. Reynolds*, 54 F.3d 1508, 1515-16 (10th Cir. 1995); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994).

Cargle v. Mullin, 317 F.3d 1196, 1202-03 (10th Cir. 2003).

1. Failure to Present a Prosecutorial Misconduct Claim.

Petitioner claims appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct. He claims the prosecutor improperly denigrated the defense, defense counsel, defense witnesses, and made improper comments during cross-examination. Petitioner raised this claim in his 2005 post-conviction proceeding. After the OCCA noted that appellate counsel is not required to raise every non-frivolous claim, the OCCA determined Petitioner's claim did not form the basis of a finding of ineffective assistance of appellate counsel:

> Harris first argues appellate counsel should have claimed that prosecutorial misconduct occurred in the first stage of Harris's trial. A thorough review of the record does not support Harris's claims. He first cites instances where, he claims, the prosecutor denigrated the defense, defense counsel and

> witnesses, and made improper comments to the jury. Many of the prosecutor's statements or questions were proper: Harris's objections to some improper questions were sustained; and Harris fails to show how he was prejudiced by comments which might have crossed the line. Harris also argues that the prosecutor attempted to incite societal alarm by referring to the missing murder weapon. Specific references to evidence relevant to this case, or Harris's own actions regarding potential evidence, do not constitute societal alarm. Harris suggests that the alleged misconduct in first stage closing argument amounts to structural error. Without engaging in an analysis of structural error, the record does not support his suggestion that this argument contained errors which prejudiced Harris; thus, the argument certainly could not have constituted structural error. Harris has not demonstrated prejudice from appellate counsel's failure to raise first stage prosecutorial misconduct, and this claim cannot form the basis for a finding of ineffective assistance of appellate counsel.

Harris, 167 P.3d at 442.

The deferential standard of review under 28 U.S.C. § 2254(d) is required since the OCCA adjudicated Petitioner's prosecutorial misconduct claim on the merits. *See Walker v. Gibson*, 228 F.3d 1217, 1241 (10th Cir. 2000), *abrogated on other grounds by Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001). Petitioner does not demonstrate that the asserted prosecutorial misconduct denied him a specific con-

stitutional right. The appropriate standard for a prosecutorial misconduct habeas claim, therefore, is "'the narrow one of due process, and not the broad exercise of supervisory power.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) *(quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). Accordingly, "it is not enough that the prosecutor's remarks were undesirable or even universally condemned." *Darden*, 477 U.S. at 181 (citation omitted). A prosecutor's improper remarks require reversal of a conviction or sentence only if the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643, 645 (1974). The fundamental fairness inquiry requires an examination of the entire proceedings and the strength of the evidence against the petitioner, both as to the guilt stage and the sentencing phase. *Id.* at 643.

As stated by the OCCA, a majority of the complained of questions by the prosecutor were proper and addressed discrepancies in the testimony of witnesses and the Petitioner. Further, as to any comments directed toward Petitioner's defense, experts testified Petitioner had borderline mental functioning that would have diminished his capacity to reason and solve problems. The jury was aware of this testimony, and any claimed "denigration" of Petitioner's defense by the prosecution would cause little to no prejudice compared to the information and opinions provided by both sides' experts and additional facts and testimony presented at trial. Most importantly, Petitioner has not demonstrated the complained of comments by the prosecutor so infected the trial with unfairness as to rise to a denial of due process.

Appellate counsel is not required to raise every non-frivolous claim, and the fact appellate counsel did raise a second stage prosecutorial claim is suggestive of a thorough review of the record and reasoned determination in support of a strategic decision to not include a first stage prosecutorial claim. Petitioner has failed to demonstrate the OCCA's determination was contrary to, or an unreasonable application of, clearly established Supreme Court law.

2. Trial Counsel's Failure to Obtain Micro-Cassette Tapes.

Petitioner next claims ineffective assistance of appellate counsel for failing to raise the claim of trial counsel ineffectiveness. Petitioner claims trial counsel was ineffective for failing to conduct pre-trial discovery to obtain micro-cassette tapes belonging to Petitioner. The tapes were seized out of Petitioner's van pursuant to a search warrant and reportedly contained recorded conversations between Petitioner and his wife regarding what property she agreed he could take from their house upon their separation. Petitioner argues the tapes were relevant to show he was acting in conformity with their agreement and that Ms. Harris's failure to live up to that agreement and the withholding of his tools was the provocation that led to Petitioner going to Ms. Harris's place of business on the day of the homicide. Petitioner claims trial counsel knew the tapes were material and was ineffective for failing to formally request the tapes and for failing to issue a subpoena duces tecum to Ms. Harris.

> Harris next argues that appellate counsel failed to claim trial counsel was ineffective.

> He fails to show that he was prejudiced by appellate counsel's omission. None of these separate claims of ineffective assistance of trial counsel, which were not raised on Harris's direct appeal, form a basis for a finding of ineffective assistance of appellate counsel.
>
> Harris first argues that counsel failed to find or produce microcassette tapes which he alleges were seized by the State in Harris's van. Harris raises the issue of these tapes in his motion for discovery as well. He argues the tapes, allegedly a record of his conversations with his wife Pam concerning what he could take from their home, would show he was acting in accordance with her wishes when he moved certain things from the house. Harris suggests this would have explained why he was so angry when Pam locked up his tools after he moved. Even if this were true, it completely fails to account for the evidence showing Harris took other things which Pam testified were not part of that agreement, and that Harris also defaced the home as he left. In addition, this evidence goes to Harris's relationship with Pam and his reason for being at the AAMCO transmission shop. However, Harris killed a third party, with whom he had no quarrel. Harris fails to show how introduction of the microcassette tapes would have resulted in a different outcome.

Harris, 167 P.3d at 442.

Petitioner testified he had taped several conversations between himself and Ms. Harris about the division of their marital property. Two other witnesses, Petitioner's daughter and Petitioner's brother, testified they had listened to the tapes. Petitioner's brother testified Ms. Harris stated on the tapes that Petitioner could take everything in the house except a couple of large items of furniture and her family photographs.

Subsequent to the recording of these conversations, Ms. Harris obtained a court order giving her the house and all of its contents. The court also verbally ordered Petitioner not to remove anything from the house. Petitioner took items from the house and put them in a storage unit. Ms. Harris, thereafter, obtained a court order to lock the storage unit. The day before, and the day of, the murder Petitioner demanded Ms. Harris remove the lock. Petitioner blamed the shootings on her failure release the property in the storage unit he believed to belong to him.

Petitioner has not demonstrated how trial counsel was deficient for failing to obtain the tapes or how he was prejudiced by their absence. Extensive testimony was received explaining the contents of the recorded conversations, as well as the subsequent legal proceedings regarding the marital property. Petitioner learned of the court-ordered lock on the storage unit five days before the murder. Although Petitioner testified he blamed the shootings on Ms. Harris's failure to give him his property from the storage unit, he has not demonstrated, especially in light of the court orders concerning the property, what additional information not presented at trial was contained on the

tapes or how they would have supported legal provocation regarding the murder of a third person.

As the claim of ineffective assistance of trial counsel in insufficient to warrant relief, appellate counsel cannot be determined ineffective for failing to raise the claim on appeal. Petitioner has not demonstrated the OCCA's determination to be contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.

3. Failure to interview jurors.

Petitioner claims appellate counsel was ineffective for failing to interview and investigate jurors from his first trial. He contends had counsel conducted interviews it would have been discovered that the jurors saw Petitioner in handcuffs, and that failure to do so was deficient performance. He asserts that one juror stated the jurors who came to court early would see Petitioner being escorted in handcuffs from the elevator to the courtroom, and that upon the pronouncement of the guilty verdict a deputy sheriff "popped out his handcuffs and they made such a loud noise that everyone on the jury and in the courtroom jumped." (Pet. at 64)

> Harris argues that appellate counsel should have claimed trial counsel was ineffective because jurors at his first trial saw Harris in restraints as he was escorted to and from the courtroom and after the guilty verdict was pronounced. While Harris likens this to cases in which a person is tried while shackled, the record shows that Harris was not tried while in restraints. He fails to

> show any prejudice from any inadvertent view of him handcuffed before trial.
>
> Harris claims appellate counsel was ineffective for failing to interview Harris's jurors from the first trial. He suggests appellate counsel would have discovered that some jurors saw Harris in handcuffs. Harris completely fails to show how he was prejudiced by this omission; nor does he show that, as a matter of prevailing professional norms, appellate counsel must interview every trial juror.

Harris, 167 P.3d at 442-43 (footnote omitted).

Petitioner's reliance on *Deck v. Missouri*, 544 U.S. 622 (2005), is misplaced.[6] *Deck* held that the use of visible shackles during the guilt and penalty phase of trial was forbidden unless it was "'justified by an essential state interest'–such as the interest in courtroom security–specific to the defendant on trial." *Id.* at 629. The juror's affidavit provided by Petitioner states Petitioner was seen coming off of the elevator in handcuffs and that the handcuffs were never seen being used during trial. (Petitioner's Exhibit 9) Secondly, securing a criminal defendant while being transported to the courtroom serves a reasonable state security interest.

Petitioner has not demonstrated that a juror's brief glimpse of a defendant in handcuffs outside of the courtroom is fundamentally prejudicial. Nor has

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[6] The Supreme Court decided *Deck* in 2005—after Petitioner's trial and direct appeal–and cannot, therefore, be considered in support of prevailing professional norms of appellate counsel.

Petitioner demonstrated the OCCA's determination of the absence of both deficient performance and of prejudice was unreasonable.

4. Failure to Instruct That State Must Prove Absence of Heat of Passion.

Petitioner next claims appellate counsel was ineffective for failing to assert on direct appeal that a defense to first-degree murder is an affirmative defense of heat of passion, and that the jury should have been instructed that the State had the burden of proving the absence of heat of passion beyond a reasonable doubt.

Petitioner raised his ineffective assistance of appellate counsel claim on post-conviction:

> Harris next claims that appellate counsel was ineffective for failing to raise as error several rulings of the trial court. He first claims the trial court should have instructed jurors that the affirmative defense of heat of passion is a defense to murder in the first degree. This jury instruction was not adopted until 2006, several years after Harris's trial. Beyond claiming that he "is not guilty of malice murder", [Application at 35] Harris fails to show any prejudice from the lack of this instruction.

Harris, 167 P.3d at 443.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the Supreme Court, construing a Maine murder statute allowing any intentional or criminally reckless killing to be punished as murder unless the defendant proves that it was committed in the heat of passion on

sudden provocation, in which case it is punished as manslaughter, stated that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." *Id.* at 704.

> Two years after issuing the decision in *Mullaney*, however, the Supreme Court clarified that its holding should be narrowly construed. In *Patterson v. New York*, 432 U.S. 197, 214, 97 S. Ct. 2319, 53 L.Ed.2d 281 (1977), the defendant argued that *Mullaney* prohibited a state from permitting guilt or punishment "to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt." The Court rejected that interpretation. Although it acknowledged that *Mullaney* requires a state to prove "every ingredient of an offense beyond a reasonable doubt" and prohibits a state from "shift[ing] the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense," the Court declared it "unnecessary" to have gone further in *Mullaney*. *Id.* at 215, 97 S. Ct. 2319. *Patterson* thereby limited *Mullaney* to situations where a fact is presumed or implied against a defendant. *See id.* at 216, 97 S. Ct. 2319; *United States v. Molina-Uribe*, 853 F.2d 1193, 1203-04 (5th Cir. 1988), *overruled in part on other grounds by United States v. Bachynsky*, 934 F.2d 1349 (5th

> Cir. 1991) (en banc). Because the written instructions did not permit the jury to presume malice aforethought, required the State to prove malice aforethought beyond a reasonable doubt, and defined malice and heat of passion as mutually exclusive, the instructions provided to the jury in Mr. Bland's case did not violate *Patterson. See Davis v. Maynard*, 869 F.2d 1401, 1406-07 (10th Cir. 1989) (rejecting a *Mullaney* challenge to substantially similar jury instructions), vacated sub nom., *Saffle v. Parks*, 494 U.S. 484, 110 S. Ct. 1257, 108 L.Ed.2d 415 (1990), opinion reinstated in part, 911 F.2d 415 (10th Cir. 1990) (per curiam).

Bland v. Sirmons, 459 F.3d 999, 1013 (10th Cir. 2006).

Petitioner relies on *U.S. v. Lofton*, 776 F.2d 918 (10th Cir. 1985), to support his claim that in state court, as in federal criminal trials, a defendant is entitled to an instruction on heat of passion as a defense. This claim was also raised in *Bland*, *supra*, and rejected by the Tenth Circuit, stating:

> If this Court's decision in *Lofton* were controlling, Mr. Bland might well be entitled to relief. Under the AEDPA standard of review, however, a habeas petition shall not be granted unless the state-court 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) (emphasis added). The decisions of lower federal courts applying Supreme Court precedent are not determinative, *see*

> *Williams*, 529 U.S. at 406, 120 S. Ct. 1495, and in this case the lower federal courts have in fact divided as to the proper scope of *Mullaney* after *Patterson. Compare Lofton*, 776 F.2d at 920-21, with *Molina-Uribe*, 853 F.2d at 1203-04. Because the OCCA's decision reasonably applies the correct legal rule from *Mullaney*, as the Supreme Court construed that rule in *Patterson*, the OCCA decision is neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent, notwithstanding the interpretation of that rule in this Circuit.

Bland, 459 F.3d at 1014.

Petitioner had failed to demonstrate the OCCA's determination to be contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. Petitioner's fifth ground for relief is denied in its entirety.

Ground 6: Cumulative Error.

Petitioner next claims that more than one constitutional error occurred in the first stage of his trial and this Court should consider those errors cumulatively and grant habeas relief.

It is true as a general principle of law that "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *United States v. Oberle*, 136 F.3d 1414, 1423 (10th Cir. 1998) (quoting *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990)). However, "'[a] cumulative-error analysis merely aggregates all the errors that

individually have been 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.' The analysis, however, 'should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.'" *Id. (quoting Rivera*, 900 F.2d at 1470-71). *See also Newsted v. Gibson*, 158 F.3d 1085, 1097 (10th Cir. 1998); *Castro v. Ward*, 138 F.3d 810, 832-33 (10th Cir. 1998); *United States v. Trujillo*, 136 F.3d 1388, 1398 (10th Cir. 1998).

"In death penalty cases, we review whether the errors so infected the trial with unfairness as to make the resulting conviction a denial of due process, or rendered the sentencing fundamentally unfair in light of the heightened degree of reliability demanded in a capital case." *Wilson v. Sirmons*, 536 F.3d 1064, 1122 (10th Cir. 2008).

Upon review of the entire trial transcript and the evidence and testimony presented, the Court does not find the cumulation of those errors determined to be harmless had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Because this Court has concluded that no error occurred during the first stage of trial, the only matters considered here are the errors found by the OCCA. The error regarding the trial court's instruction on the defense of mental retardation found by the OCCA does not constitute constitutional error, but rather an error of state law. Cumulative error analysis applies only to constitutional errors. *Young v. Sirmons*, 551 F.3d 942, 972 (10th Cir. 2008). The other errors regarding com-

ments made by the prosecutors were of minor. *See Alvarez v. Boyd*, 225 F.3d 820, 825 (7th Cir. 2000) ("courts must be careful not to magnify the significance of errors which had little importance"). The errors were not so egregious or numerous as to prejudice Petitioner to the same extent as a single reversible error. The cumulative effect of the errors, when compared with the evidence and testimony presented at trial, did not significantly strengthen the state's case or diminish Petitioner's case. No reasonable probability exists that the jury would have acquitted Petitioner absent the errors. Accordingly, Petitioner's sixth ground for relief is denied.

Ground 7: Ineffective Assistance of Trial and Appellate Counsel in 2005 Penalty Re-Trial and First Direct Appeal.

Petitioner claims trial counsel was ineffective for failing to investigate and then to seek a pre-trial determination that Petitioner was mentally retarded and thus ineligible for the death penalty.[7] As set

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[7] The Court acknowledges that "[i]n 2006, the American Association on Mental Retardation [] changed its name to the American Association on Intellectual and Developmental Disabilities []. 'Intellectual disability,' rather than 'mental retardation,' is now the preferred terminology. [Citation omitted.] Also, previously enacted federal legislation known as Rosa's Law, Pub. L. No. 111–256, 124 Stat. 2643 (2010), mandates the use of the term 'intellectual disability' in place of 'mental retardation' in all federal enactments and regulations. Nonetheless, throughout this opinion, the Court will use the old terminology because the legal sources relevant to its analysis, including Oklahoma law, prior opinions, and the opinions of the Supreme Court, use the terms 'mental retardation' and 'mentally retarded.'" *Howell v. Trammell*, 728 F.3d 1202, 1206 n.1 (10th Cir. 2013), *quoting Hooks v. Workman*, 689 F.3d 1148, 1159 n. 1 (10th Cir. 2012).

forth in Ground 5, to prevail on a claim of ineffective assistance of counsel, Petitioner must overcome the strong presumption of reasonable professional assistance and demonstrate both deficient performance and resulting prejudice viewed in light of prevailing professional norms. *See Strickland*, 466 U.S. at 689. In the instant case, Petitioner must also demonstrate the determination of the OCCA to be contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d).

Petitioner raised this issue on appeal from his resentencing trial. After setting forth the requirements of *Strickland* and its progeny for evaluating an ineffectiveness claim, the OCCA determined that no prejudice resulted from counsel's failure to request a pre-trial determination of mental retardation:

> A capital defendant who wishes to claim mental retardation must raise that claim with the trial court before the trial begins. A threshold requirement for such a claim is one IQ test of 70 or below; such a test will not itself guarantee a finding of mental retardation but may begin the process by which the court determines whether a defendant is mentally retarded. Harris had two IQ test scores, obtained during the pretrial process, of 66 and 68. He complains that counsel did not use these scores to initiate this process and attempt to determine whether he was mentally retarded before trial began. Harris argues that, given his test scores, if counsel had asked for a hearing to determine mental retardation

the trial court would have been required to hold that hearing. At that hearing Harris might or might not have been found mentally retarded, but if he were found to be retarded, he would avoid the death penalty. Thus, Harris claims, he had nothing to lose and everything to gain by raising the issue, and counsel was ineffective for failing to do so.

Harris cannot show he was prejudiced by counsel's failure. To prevail on a pretrial claim of mental retardation, Harris would have to show (1) significantly subaverage intellectual functioning; (2) manifested before the age of 18; (3) accompanied by significant limitations in adaptive functioning in at least two of nine enumerated skill areas. All the evidence in the record, including the evidence from the first trial and competency hearing, indicates that Harris could not meet this test. Despite these two IQ scores, all Harris's other IQ scores were over 70. All Harris's experts, including the ones who testified at his first trial and competency hearing, considered these scores along with Harris's other characteristics and concluded he was not mentally retarded.[8] Harris's expert, Dr. Draper, testified at his trial that he was not mentally retarded. She and other experts stated in this and other pro-

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[8] "One expert did testify at the competency hearing that, based on the two low scores, he believed he had to say Harris was mildly mentally retarded, but that was not his conclusion after examining Harris and he found the scores surprising." (n. 55 in original).

ceedings that Harris was "slow" or of low intelligence, but all agreed that his employment history, aptitude as a transmission mechanic, and other characteristics were not those of a mentally retarded person.

Harris argues that this Court cannot dispose of this claim using the prejudice analysis above. He admits the test for ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different. Regarding this claim, the different result would have been a finding of mental retardation and ineligibility for the death penalty. Thus, the Court is required to review the record to see whether, had counsel requested a hearing, Harris would have prevailed on his claim of mental retardation. There is no support in the record for such a conclusion. However, Harris argues that only a jury, not this Court, may make a determination of a defendant's possible mentally retarded status under any circumstances. Harris has misunderstood this Court's jurisprudence on this issue. In a series of cases involving retroactive capital post-conviction procedures, this Court has declined to make an initial finding of fact regarding mental retardation, remanding for jury determination the question of whether a capital defendant, convicted and currently on Death Row, is mentally retarded. That is not the issue here. The issue is whether, on this record,

> Harris's counsel was ineffective for failing to ask for a pretrial determination of mental retardation. Nothing in this record shows that, had counsel made that request, evidence would have shown by a preponderance of the evidence that Harris was mentally retarded. There is a great deal of evidence in the record to show otherwise, including the opinion of several experts who testified that Harris was not mentally retarded. We cannot conclude there was a reasonable probability that, but for counsel's omission, the results of this resentencing proceeding would have been different.

Harris, 164 P.3d at 1115-16 (footnotes omitted-except n. 55 in original).[9]

This Court's review is not to determine whether the OCCA's determination was incorrect or wrong. Rather, it is to determine if it was unreasonable to find trial counsel was not ineffective. Petitioner argues trial counsel failed to conduct a reasonable investigation and failed to request a trial to present evidence establishing mental retardation. He claims trial counsel should have retained a psychologist to test and

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[9] "We found in Propositions I and II that counsel was not ineffective for failing to claim Harris was mentally retarded, or for failing to present the evidence of mental status and mental illness raised in his first trial and competency proceedings. Relying on the issues raised in Propositions I and II, Harris claims that counsel failed to independently investigate the case as previously developed in order to satisfactorily conclude that the extant evidence was viable and reliable. This appears to be speculation, as the record does not support this allegation." *Id.* at 1118.

assess retardation, that the psychologist would have provided an intelligence quotient (IQ) test result similar to the one submitted on direct appeal–an IQ of 67-75–and would have also explained standard errors of measurement and the "Flynn Effect" and their impact on IQ scores. He further argues that the second and third prong of the standard for determination of mental retardation, manifestation before the age of 18 and significant limitations in adaptive functioning, have been met through expert testimony presented in his 2001 trial.[10]

The issue, however, is whether the OCCA was unreasonable in concluding counsel's performance did not result in prejudice. Review of the record shows Petitioner's first IQ test at age seven resulted in a score of 87. Although he subsequently was retested in 2000 and 2001 with scores below 70, testimony was presented questioning those test results as having been influenced by decades of drug and alcohol abuse along with the stress of incarceration and mental

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[10] In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court declared the execution of mentally retarded individuals unconstitutional. Although the Court set out some guidelines for such determination, it left to the states to decide what criteria to use to determine who is mentally retarded. In *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002), the OCCA followed the *Atkins'* guidelines and held that person is mentally retarded if (1) he or she functions at a significantly sub-average intellectual level, (2) that such mental retardation manifested itself before the age of eighteen, and (3) the mental retardation is accompanied by significant limitations in adaptive functioning in at least two of nine enumerated skill areas. The OCCA further held that no person shall be eligible to be considered mentally retarded unless he or she has an IQ of seventy or below as reflected by at least one scientifically recognized and approved contemporary intelligent quotient test. *Id.* at 567-68.

illness with accompanying hallucinations and delusions. One additional test administered at Eastern State Hospital in 2001 resulted in a test score of 75. This test was administered in a more therapeutic environment and at a time when Petitioner was not abusing alcohol and his psychoses were controlled.

Petitioner testified at his first trial. The record reflects that he was coherent, responsive, and demonstrated a strong vocabulary with a good memory for details. The OCCA found Petitioner's testimony showed his ability to process and understand information, communicate well, and to engage in logical reasoning. *Howell v. State*, 138 P.3d 549, 564 (Okla. Crim. App. 2006). Considerable evidence was also presented at his first trial contrary to allegations of significant limitations in adaptive functioning. Testimony from both lay and expert witness was presented regarding Petitioner's ability to be self-directed, of his ability to diagnose and re-build transmissions, his lengthy work history, and his ability to care for himself and for others.

Based on the record available to the state court, the OCCA's determination that Petitioner was not prejudiced–and thus counsel was not ineffective–by trial counsel's failure to request a pre-trial determination of mental retardation was neither contrary to or an unreasonable application of clearly established federal law, nor an unreasonable determination of facts in light of the evidence presented. Accordingly, Petitioner's seventh claim for relief is denied.

Ground 8: Ineffective Assistance of Trial Counsel Regarding Mental Illness and Impairment Evidence in 2005 Penalty Retrial.

Petitioner next claims trial counsel was ineffective for failing to present mitigating evidence that he suffers from mental illness and for failing to present expert testimony to rebut the continuing threat aggravating circumstance. On appeal from Petitioner's re-sentencing trial, the OCCA held:

> In Proposition II Harris claims that trial counsel was ineffective for failing to present evidence of diminished mental capacity and probable mental illness. This evidence was available to counsel or easily discoverable, and much of it was presented at Harris's first trial. Trial counsel has a duty to investigate and present relevant mitigating evidence. However, where counsel makes an informed decision to pursue a particular strategy to the exclusion of other strategies, this informed strategic choice is "virtually unchallengeable". We have noted that among counsel's basic duties is "to make informed choices among an array of alternatives, in order to achieve the best possible outcome for the client." The United States Supreme Court has found counsel ineffective where the failure to thoroughly investigate and present mitigating evidence "resulted from inattention, not reasoned strategic judgment."
>
> At Harris's resentencing trial, defense counsel presented mitigating evidence through Harris's sister, brother, former co-worker and employer, son-in-law, and two daughters. His

most extensive mitigating evidence was presented through Dr. Draper, an expert witness in developmental analysis. Dr. Draper testified extensively regarding the developmental processes that led Harris to commit these crimes. She began by discussing his tumultuous and abusive childhood. She described his medical problems throughout childhood as well as his learning disabilities, low intelligence, and academic and social problems in school, including schoolyard fights. Dr. Draper described how, during Harris's teenage years, his father taught him to be a transmission mechanic but also taught him to use drugs and alcohol regularly. Dr. Draper discussed the very negative effect on Harris of his mother's lingering death from cancer, the death of his grandparents, and the family's separation. She testified regarding Harris's brief first marriage. Dr. Draper noted that Harris's first wife had alleged he was abusive and filed for a victim's protective order and divorce, but said Harris's first wife told her that Harris did not abuse her and she had said otherwise because she wanted to leave him. Dr. Draper told jurors of Harris's attempt at suicide when his first wife left him. She explained that for several years Harris and Pam had custody of his daughters, and described his love for his daughters as well as his inability to engage emotionally as a parent. She described his relationship with Pam, including a mutual pattern of verbal and emotional abuse. Dr.

Draper showed jurors how Harris depended on Pam emotionally and professionally.

Throughout her testimony Dr. Draper emphasized that Harris's chaotic and troubled background resulted in extreme emotional instability. She discussed how his low intelligence and chronic substance abuse contributed to his inability to handle stress or resolve problems. She described Harris's reliance on Pam, and his feelings of despair and devastation when Pam left him. Dr. Draper also emphasized Harris's anger at his situation, and at the loss of his tools, and his inability to control or appropriately express his anger. She testified that this inability was caused by Harris's immaturity, emotional instability, poor judgment, and confusion. She noted his expressions of remorse for Merle Taylor's death, while agreeing that Harris still blamed Pam for leaving him and causing him to commit the crimes. She discussed psychological methods of predicting future violence, and testified that in a controlled environment, medicated, without access to controlled substances and without a romantic partner, she did not believe Harris would be dangerous. Dr. Draper testified that Harris had been diagnosed as mentally ill and was on psychotropic medications in jail. She stated that she did not further explore the area of mental illness because those diagnoses had been made after the crimes occurred, and her focus was on explaining Harris's actions and

symptoms of underlying difficulties which led to the crimes. However, her observations of Harris's behavior were consistent with the diagnoses.

After Dr. Draper testified, counsel attempted to have a representative from the jail testify regarding the medications Harris took for his mental conditions. Counsel failed to give notice of this testimony to the State. The trial court noted that mere evidence Harris was on medication would encourage jury speculation regarding Harris's mental condition. Harris argues that this attempt shows counsel realized he had erred in failing to present evidence of mental illness.

Harris complains that counsel failed to present extensive evidence regarding his mental state and diagnoses of mental illness. Most of this evidence was presented at Harris's first trial or his competency proceedings, and was readily available to counsel. A significant portion of this evidence was presented at the first stage of Harris's original trial, to argue his mental state could not support a finding of malice, rather than as evidence in mitigation. After the crimes, questions were raised regarding Harris's competency. At one point he was sent to Eastern State Hospital, received treatment and medication, and was declared competent. Doctors representing the court, the State, and the defense examined Harris throughout the pretrial proceedings. He received several diagnoses of mental illness: bipolar disorder with psychotic

features, schizo-affective disorder, depressive with psychotic features. Experts agreed at the very least Harris was clinically depressed. They all also noted his low intelligence. One expert for the State, and the doctors at Eastern State Hospital, suspected Harris was either malingering or exaggerating his mental condition. One defense expert testified that, based on his contact with Harris shortly after the crimes, Harris was probably suffering from mental illness at the time of the crimes. Nobody believed that Harris's mental illness, even if present when the crimes were committed, rendered him legally insane; the experts agreed that Harris knew right from wrong and understood the consequences of his actions. Harris's experts described the connection his mental illness and chronic substance abuse may have had with the crimes. They testified that as a consequence of his mental state, Harris was low functioning and emotionally unstable, unable to solve problems or take action towards goals, highly agitated and angry. At the first trial, Harris's expert on future dangerousness testified that he could not say Harris would not be a danger to society; he did say that, in a controlled environment and with medication, Harris would present less danger than otherwise.

After thoroughly considering the evidence which was presented at Harris's resentencing trial, and the evidence which was presented earlier and could have been presented,

this Court concludes that counsel was not ineffective. Counsel was aware of the evidence of mental condition and status. Rather than rely on it to persuade jurors that Harris's mental state and after-diagnosed mental condition were mitigating circumstances, counsel chose a different path. He called Dr. Draper to testify regarding Harris's development over his life. This evidence was comprehensive. It included Harris's troubled and abusive childhood, his low IQ and trouble in school, his difficulty with marital relationships, his relationships with his family and daughters, his dependency on Pam, the mutually abusive nature of that relationship. Dr. Draper also discussed Harris's chronic substance abuse which began when he was a teenager with his father, his poor judgment, anger and inability to solve problems, and his extreme emotional instability. She also discussed the likelihood that, based on his past behavior and mental state, Harris would be a danger in the future. While Harris's specific diagnoses of mental illness were not presented to the jury, jurors were told he had been diagnosed as mentally ill. Those diagnoses were made after the crimes, and Dr. Draper did describe the highly emotional mental state Harris was in at the time of the crimes. Dr. Draper used all this evidence to explain why Harris could not accept his circumstances and resorted to murder.

Harris claims that the prejudice from this decision is evident. At the first trial, jurors

> heard much of this evidence. During deliberations, they asked a question about the type of prison in which Harris might serve a sentence of imprisonment. The trial court's answer to this question, which was inaccurate as a matter of law, resulted in the case's reversal and this resentencing trial. Harris contends this indicates that his first jury seriously considered imposing a sentence of less than death, and claims that, had the evidence been presented again, his resentencing jury would have done the same. This Court cannot speculate as to why Harris's first jury asked their question, or what its sentencing intent might have been. Counsel chose to provide Harris's resentencing jury with a thorough picture of his life, intelligence, and emotional state, including his anger, grief and despair immediately preceding the crimes. Through Dr. Draper, jurors heard evidence which encompassed or incorporated some of the evidence presented at the first trial. We will not second-guess counsel's reasoned strategic judgment. Counsel's choice of mitigating evidence did not amount to ineffective assistance.

Harris, 164 P.3d at 1116-18 (footnotes omitted).

As set forth previously, Petitioner must demonstrate deficient performance and resulting prejudice to prevail on a claim of ineffective assistance of counsel, and demonstrate the determination of the state court was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. Petitioner claims that evidence of

his mental deficiencies presented in his 2001 trial and his competency trial, along with evidence of his mental retardation, should have been presented to his re-sentencing jury as mitigating evidence to explain his violent behavior the day of the murder. Petitioner admits trial counsel's use of Dr. Draper to introduce evidence of his developmental and life paths was a sound strategic decision. He claims, however, that trial counsel recognized that mental illness was a valuable mitigating tool but his plan to use Dr. Draper to the exclusion of other mental health experts was unreasonable.

Petitioner's claim is myopic and ignores the totality of the evidence and testimony presented in his first trial. Expert testimony was presented that none of the possible mental health issues developed until after the crimes. The evidence presented was conflicting and did not with any certainty provide a reason for any possible mental illness to be a contributor to the crimes.[11] As the OCCA identified, counsel presented mitigating evidence through Petitioner's sister, brother, former co-worker and employer, son-in-law, and two daughters. Most extensively, he presented testimony and evidence through Dr. Draper–an expert in developmental analysis–that not only described and explained Petitioner's development process but also incorporated opinions of other experts that had previously testified in other proceedings. By avoiding the conflicting diagnoses offered in his first trial of possible mental illness–discovered after the crimes–and preventing the introduction of Petition-

[11] Additionally, by not claiming mental illness as a mitigating factor, the jury was not informed that two experts had previously considered Petitioner to be a psychopath.

er's violent tendencies, trial counsel's presentation of a more sympathetic explanation of his life history was reasonable, as was the OCCA's conclusion on this point.

As set forth previously regarding claims of ineffective assistance of counsel, counsel's performance must be not merely wrong, but constitutionally unreasonable. "The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Here, Petitioner has failed to meet his burden of demonstrating the requirements of *Strickland*, and failed to demonstrate the determination of the OCCA was contrary to, or an unreasonable application of, clearly established Supreme Court law. Review of the underlying issue of the performance of trial counsel demonstrates a lack of merit in Petitioner's claim. As such, appellate counsel's decision to not include the claim in the appeal, given the necessary deferential consideration, does not constitute deficient performance.

As to his claim of ineffective assistance of counsel for failure to present expert testimony to rebut the continuing threat aggravating circumstance, the OCCA held:

> Harris also claims that counsel failed to present evidence directly bearing on the continuing threat aggravating circumstance. In fact, Dr. Draper did discuss methods for predicting future dangerousness, and gave her opinion that Harris would not be a future danger to society. Harris argues that counsel should have presented an expert on risk assessment, who could have provided

an accurate and scientifically sound analysis of the exact likelihood that Harris would be a future danger. The experts who testified at Harris's first trial, and Dr. Draper, all testified that he was in fact likely to pose a risk of future danger. Harris's experts testified that, under particular circumstances likely to be found in prison, that risk was significantly lessened, but they all agreed that Harris posed more risk to the general population than the average person. Given this evidence, we will not say counsel was unreasonable for choosing not to stress the issue of Harris's potential for danger to society by using risk assessment evidence.

This proposition is accompanied by an Application for Evidentiary Hearing. To support his claim that counsel did not conduct a thorough independent investigation, Harris provides an affidavit with a psychological evaluation conducted after the trial ended. As he notes in his brief, this evaluation is consistent with other psychological evaluations which were available to counsel. To support his claim that counsel failed to present evidence bearing on the continuing threat aggravating circumstance, Harris offers an affidavit containing a risk assessment profile. This profile reaches a similar conclusion to that of Dr. Draper and other experts-in a controlled, structured environment, medicated, without access to controlled substances, and without a romantic relationship such as that with Pam, Harris

> poses little threat to society. The application for evidentiary hearing and supplemental materials do not contain sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to use or identify the evidence. Harris's Application for Evidentiary Hearing is denied.

Id. at 1118-19 (footnotes omitted).

As identified by the OCCA, the risk assessment provided by Petitioner in support of his Application for Evidentiary Hearing in state court contains an opinion regarding future dangerousness consistent with evidence and expert opinion presented at trial. The consensus opinion was that although Petitioner did present a risk of future dangerousness, the threat is lessened in a controlled and structured environment, free from the influences of a relationship like that with his ex-wife and free of controlled substances and alcohol. Considering the strength of the State's case and the overwhelming evidence supporting the continuing threat aggravating circumstance–evidence of a history of fighting, destruction of family member's property, physical and mental abuse of his spouse, threats against other individuals, resisting arrest, and an altercation with detention officer while in jail–the OCCA's determination was not unreasonable. Petitioner has failed to demonstrate counsel was ineffective and failed to demonstrate the determination of his claims by the OCCA was contrary to, or an unreasonable application of, clearly established Supreme Court law. Accordingly, this claim and Petitioner's entire ground for relief is denied.

Ground 9: Oklahoma's Uniform Jury Instruction on Mitigating Circumstances.

In his ninth ground for relief, Petitioner claims the definition of mitigating circumstances contained in the Oklahoma Uniform Jury Instructions (OUJI) impermissibly limits consideration of mitigating evidence and fails to make consideration of mitigating evidence mandatory in violation of the Eighth and Fourteenth Amendments. He argues that the first sentence of the instruction on mitigating circumstances–"Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame"–is grammatically flawed in that it only applies to the extent the mitigating circumstances extenuate or reduce the defendant's moral culpability.

The OCCA determined the instruction did not unconstitutionally limit the jury's ability to consider mitigating evidence:

> Harris argues that the plain language of the uniform instruction's first sentence itself limits the jury's consideration of mitigating evidence. That sentence reads: "Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame." Harris admits this Court has rejected this line of argument. However, he suggests that the language is ambiguous at best, and, combined with prosecutorial argument, foreclosed the jury's consideration of mitigating evidence. He failed to object to either the instruction or argument at trial. Reviewing for plain error, we find none. We do not

find that the current uniform jury instruction prohibits jurors from considering mitigating evidence. One prosecutor did consistently argue in closing that jurors should not consider Harris's second stage evidence as mitigating, since it did not extenuate or reduce his guilt or moral culpability. This argument improperly told jurors not to consider Harris's mitigating evidence. However, in final closing a second prosecutor invited jurors to consider all Harris's mitigating evidence, weigh it against the aggravating circumstances, and find that the death penalty was appropriate. The jury was properly instructed on the definition of mitigating evidence, the evidence Harris presented, and its duties. For that reason, the initial prosecutorial argument was harmless.

This Court is troubled, however, by the consistent misuse of the language in this instruction in the State's closing arguments. This Court noted in *Frederick v. State* that the prosecutor could argue mitigating evidence did not reduce a defendant's moral culpability or blame. However, we did not intend to suggest that prosecutors could further argue that evidence of a defendant's history, characteristics or propensities should not be considered as mitigating simply because it does not go to his moral culpability or extenuate his guilt. This would be an egregious misstatement of the law on mitigating evidence. After careful consideration, this Court has determined that an

amendment to the language of the instruction will clarify this point, and discourage improper argument. We emphasize that the language of the current instruction itself is not legally inaccurate, inadequate, or unconstitutional. Cases in which the current OUJI-CR (2d) 4-78 has been used and applied are not subject to reversal on this basis.

In conjunction with this case, the Court will refer this issue to the Oklahoma Uniform Jury Instruction Committee (Criminal) for promulgation of a modified jury instruction defining mitigating circumstances in capital cases. To delineate the various purposes of mitigating evidence, this Court suggests including both (a) that mitigating circumstances may extenuate or reduce the degree of moral conduct or blame, and separately, (b) that mitigating circumstances are those which in fairness, sympathy or mercy would lead jurors individually or collectively to decide against imposing the death penalty.

The uniform jury instruction given in this case did not unconstitutionally limit the jury's ability to consider mitigating evidence. The prosecutor's improper argument on this issue was cured by further argument and instruction. Harris's claim for relief is denied. However, this Court finds that the current uniform jury instruction defining mitigating circumstances, OUJI-CR (2d) 4-78, should be modified to clarify the constitutional scope of mitigating evidence and discourage improper argument.

Harris, 164 P.3d at 1113-1114 (footnotes omitted).

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process", *Cupp v. Naughten*, 414 U.S., at 147, 94 S. Ct., at 400, 38 L.Ed.2d 368, not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned, ... '"

Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (citations omitted); *see also Cummins v. Sirmons*, 506 F.3d 1211, 1240 (10th Cir. 2007).

In *Boyde v. California*, 494 U.S. 370 (1990), the Supreme Court considered a claim that the wording of an instruction prevented the jury from considering the evidence of the defendant's character and background as such evidence did not extenuate the gravity of the crime. The Supreme Court reiterated that the jury must be able to consider all relevant mitigating evidence. It held that the proper test is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380. The Court found it unlikely that the instruction prevented the jury from considering the mitigating evidence:

All of the defense evidence presented at the penalty phase—four days of testimony consuming over 400 pages of trial transcript—related to petitioner's background and character, and we think it unlikely that reasonable jurors would believe the court's instructions transformed all of this "favorable testimony into a virtual charade." *California v. Brown*, 479 U.S., at 542, 107 S. Ct., at 840. The jury was instructed that it "shall consider all of the evidence which has been received during any part of the trial of this case," App. 33 (emphasis added), and in our view reasonable jurors surely would not have felt constrained by the factor (k) instruction to ignore all of the evidence presented by petitioner during the sentencing phase. Presentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence. But the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous. This case is unlike those instances where we have found broad descriptions of the evidence to be considered insufficient to cure statutes or instructions which clearly directed the sentencer to disregard evidence. *See*, *e.g.*, *Hitchcock v. Dugger*, 481 U.S. 393, 398–399, 107 S. Ct. 1821, 1824–1825, 95 L.Ed.2d 347 (1987) ("[I]t could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence

> of nonstatutory mitigating circumstances . . . ").

Id. at 383-84.

As in *Boyde*, the instruction complained of by Petitioner did not limit the jury's consideration of the evidence presented in support of the mitigating circumstances. The jurors were instructed they should consider any evidence they found mitigating and that they were not required to impose a sentence of death, even if the aggravating circumstances outweighed the mitigating circumstances. In fact, the jurors were instructed that they could not impose a sentence of death unless they determined the aggravating circumstances outweighed the mitigating circumstances. The jury was given an instruction listing thirteen mitigating circumstances. In addition to trial counsel's opening statements and closing argument, Petitioner presented six witnesses in support of the mitigating circumstances. Petitioner has not demonstrated the jury was prevented from considering his mitigating evidence because of the instruction. Even if the instruction was improper, Petitioner has not shown that the error so infected the entire sentencing trial that it violated due process. Additionally, Petitioner has not demonstrated the OCCA's determination to be contrary to, or an unreasonable application of, clearly established Supreme Court law. Accordingly, Petitioner's ground for relief is denied.

Ground 10: Prosecutor's Closing Argument Regarding Mitigating Evidence.

Petitioner next claims that prosecutorial misconduct during closing argument prevented the jury from considering mitigation evidence when one of the

prosecutors argued that the jury should not consider mitigating evidence because it didn't reduce Petitioner's culpability or responsibility.[12] During initial closing, the prosecutor argued several times that the mitigating circumstances listed by the Petitioner did not reduce his culpability or responsibility for the crimes. The OCCA determined the prosecutor's comments were improper, but that the comments were harmless in light of later comments made in final closing arguments inviting the jury to consider all the evidence and in light of the proper instructions submitted to the jury. *Harris*, 164 P.3d at 1113.[13]

The deferential standard of review under 28 U.S.C. § 2254(d) is required since the OCCA adjudicated Petitioner's prosecutorial misconduct claim on the merits. *See Walker v. Gibson*, 228 F.3d 1217, 1241 (10th Cir. 2000), *abrogated on other grounds by Neill v. Gibson*, 278 F.3d 1044, 1057 (10th Cir. 2001). Petitioner does not demonstrate that the prosecutor's misconduct denied him a specific constitutional right. The appropriate standard for a prosecutorial misconduct habeas claim, therefore, is "'the narrow one of due process, and not the broad exercise of supervisory power.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974)). Accordingly, "it is not enough that the prosecutor's remarks were undesirable or even universally condemned." *Darden*, 477 U.S. at 181

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[12] This claim is closely related to Petitioner's claim raised in Ground 9 regarding the language of the jury instruction regarding mitigating circumstances.

[13] The entire portion of the OCCA's opinion addressing this issue is set forth in Ground 9, *supra*.

(citation omitted). A prosecutor's improper remarks require reversal of a conviction or sentence only if the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643, 645 (1974). The fundamental fairness inquiry requires an examination of the entire proceedings and the strength of the evidence against the petitioner, both as to the guilt stage and the sentencing phase. *Id.* at 643. "Any cautionary steps–such as instructions to the jury–offered by the court to counteract improper remarks may also be considered. Counsel's failure to object to the comments, while not dispositive, is also relevant to a fundamental fairness assessment." *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) (citations omitted).

Petitioner has not demonstrated that his due process rights were violated by any or all of the prosecutor's statements. *See Thornburg v. Mullin*, 422 F.3d 1113, 1124-25 (10th Cir. 2005) (holding that the OCCA had adjudicated the merits of a due process claim because the OCCA's analysis of plain error involved the same test used to determine whether there was a denial of due process).

> Unlike in *Boyde* the prosecutor here argued to jurors during his closing that they should not consider Payton's mitigation evidence, evidence which concerned postcrime as opposed to precrime conduct. Because Boyde sets forth a general framework for determining whether a challenged instruction precluded jurors from considering a defendant's mitigation evidence, however, the California Supreme Court was correct to structure

> its own analysis on the premises that controlled *Boyde.* The *Boyde* analysis applies here, and, even if it did not dictate a particular outcome in Payton's case, it refutes the conclusion of the Court of Appeals that the California Supreme Court was unreasonable.
>
> [* * *]
>
> *Boyde*, however, mandates that the whole context of the trial be considered. And considering the whole context of the trial, it was not unreasonable for the state court to have concluded that this line of prosecutorial argument did not put Payton's mitigating evidence beyond the jury's reach.
>
> The prosecutor's argument came after the defense presented eight witnesses, spanning two days of testimony without a single objection from the prosecution as to its relevance. As the California Supreme Court recognized, like in *Boyde*, for the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all.

Brown v. Payton, 544 U.S. 133, 143-44 (2005).

Upon review of the entire proceedings, the Court determines that, considered alone or together, the prosecutor's remarks did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. For the reasons set forth in the previous claim for relief, and for the rationale as articulated by the Supreme Court in *Boyde* and *Payton*,

the jury was not prevented from considering the evidence presented in support of Petitioner's mitigating circumstances. Petitioner has not demonstrated that the OCCA's determination was contrary to, or an unreasonable application of, clearly established federal law. Accordingly, this claim is denied.

Ground 11: Victim Impact Witnesses.

Petitioner claims that the decedent's son and wife both expressed their opinion that death was the appropriate sentence in violation of his Due Process rights to a fair and reliable re-sentencing trial and the clearly established Supreme Court precedent of *Booth v. Maryland*, 482 U.S. 496 (1987) and *Payne v. Tennessee*, 501 U.S. 808 (1991). Respondent responds recognizing previous court opinions binding this court's review, but asserts the recommendations of punishment were harmless in light of the evidence presented.

In Petitioner's resentencing trial, the decedent's son, Toby Taylor, and the decedent's wife, Carolyn Taylor, both expressed their opinions that death was the appropriate sentence. On appeal, the OCCA refused to reconsider its position that witnesses giving a short, straight-forward recommendation for the imposition of the death penalty was statutorily permitted.

> Merle Taylor's son and wife each gave victim impact evidence, and asked jurors to impose the death penalty. Harris argues in Proposition VII that this recommendation was unconstitutional and denied him his right to a fair trial. Harris admits that this Court has held that family members of the victim may recommend a sentence in a capital sentencing

> trial, but urges us to reconsider. We decline this invitation.

Harris, 164 P.3d at 1110 (by footnote basing its determination on *DeRosa v. State*, 2004 OK CR 19, 89 P.3d 1124, 1151-52; *Conover v. State*, 1997 OK CR 6, 933 P.2d 904, 920; *Ledbetter v. State*, 1997 OK CR 5, 933 P.2d 880, 890-91, and stating "Harris does not claim that the victim impact evidence itself was improper, other than the recommendation of punishment.").

In *Hooper v. Mullins*, 314 F.3d 1162 (10th Cir. 2002), the Tenth Circuit considered an identical claim where the trial court permitted three members of the victim's family to testify they believed the defendant deserved to die. The OCCA, as it has here, concluded the trial court properly admitted the testimony. Despite that determination, the Tenth Circuit agreed with the petitioner that the OCCA's determination was contrary to clearly established Supreme Court precedent:

> The Supreme Court has held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L.Ed.2d 720 (1991). In so holding, the Court overruled its earlier decisions in *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L.Ed.2d 440 (1987), and *South Carolina v. Gathers*, 490 U.S. 805, 109 S. Ct. 2207, 104 L.Ed.2d 876 (1989). *See Payne*, 501 U.S. at 811, 817, 830, 111 S. Ct. 2597. Nonetheless, we have recognized that " *Payne* left one significant portion of *Booth* untouched. . . . [T]he portion

> of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid.'" *Hain*, 287 F.3d at 1238-39 *(quoting Payne*, 501 U.S. at 830 n. 2, 111 S. Ct. 2597). Therefore, the trial court erred by admitting this victim-impact testimony during Petitioner's capital sentencing proceeding. *See id.* at 1239. Nonetheless, this constitutional error was harmless because it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637, 113 S. Ct. 1710 (further quotation omitted); *see also Willingham*, 296 F.3d at 931 (applying *Brecht's* harmless-error analysis to similar claim).
>
> *Payne* also provides that victim-impact evidence that is "so unduly prejudicial that it renders the trial fundamentally unfair" deprives a capital defendant of due process. 501 U.S. at 825, 111 S. Ct. 2597. Because the victim-impact evidence did not have that effect here, however, the OCCA reasonably denied Petitioner relief on this due-process claim. *See Willingham*, 296 F.3d at 931; *United States v. Chanthadara*, 230 F.3d 1237, 1273-74 (10th Cir. 2000).

Hooper v. Mullins, 314 F.3d 1162, 1174 (10th Cir. 2002).

It was error, in respect to *Booth* and *Payne*, for the witnesses to give their opinion of an appropriate

sentence. This error alone will not provide a basis for habeas relief unless it can be determined the error was not harmless. Before a harmless error analysis can be undertaken, it must first be determined what type of error occurred-"trial error" or "structural" error. Here, the error complained of by Petitioner is "trial error" and a harmless error analysis is proper:

> Trial error "occur[s] during the presentation of the case to the jury," and is amenable to harmless-error analysis because it "may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]". . . . At the other end of the spectrum of constitutional errors lie "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards". . . . The existence of such defects--deprivation of the right to counsel, for example--requires automatic reversal of the conviction because they infect the entire trial process.

Brecht v. Abrahamson, 507 U.S. 619, 629-30 (1993) (citations and footnote omitted).[14]

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[14] The Court's decision that this error is "trial error," not requiring automatic reversal, is supported by the list of sixteen cases set forth as example by the Supreme Court in *Arizona v. Fulimante*, 499 U.S. 279, 306-308 (1991) (Rehnquist, J.) detailing a wide range of errors to which harmless error analysis has been applied. Cases in which constitutional rights were so basic as to preclude harmless error include: *Payne v. Arkansas*, 356 U.S. 560 (1958) (coerced confession); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); and *Tumey v. Ohio*, 273 U.S. 510 (1927) (impartial judge).

Admission of the witnesses' sentence recommendation of death was error and this Court must, therefore, assess the prejudicial impact of the error under the "substantial and injurious effect" standard set forth in *Brecht. See Fry v. Pliler*, 551 U.S. 112, 121-22 (2007).

In *Brecht*, the Supreme Court held that an error is harmless unless it "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht*, 507 U.S. at 631(quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Although improper, it is doubtful the witnesses' concisely stated opinions had much inflammatory impact compared to the nature of the murder, the strength of the state's case, and the extensive evidence supporting the aggravating circumstances. Petitioner shot and killed a man who had placed himself between Petitioner and Ms. Harris and attempted to convince Petitioner he should not be at the transmission shop. Petitioner also shot Ms. Harris and shot at an innocent bystander. When he ran out of bullets and experienced difficulties reloading his gun, Petitioner used the weapon to beat Ms. Harris. These facts, together with evidence of Petitioner's long history of violence, strongly support the jury's finding of the two aggravating circumstances.

Here, the witnesses' opinions regarding sentencing did not have a substantial and injurious effect on the jury's determination to recommend death as the appropriate sentence. Accordingly, Petitioner's claim is denied.

Ground 12: Re-allegation of the Continuing Threat Aggravating Circumstance.

At his re-sentencing trial, the State re-alleged the continuing threat to society aggravating circumstance. The jury in Petitioner's first trial did not choose continuing threat as one of the aggravating circumstances. Petitioner claims this re-allegation is a violation of his double jeopardy and due process rights.

> In Proposition VIII Harris argues that the State improperly re-alleged the continuing threat aggravating circumstance. In Harris's original trial and again at resentencing, the State alleged that Harris would constitute a continuing threat to society. At Harris's first trial, jurors did not find this aggravating circumstance. Harris claims that this failure is equivalent to an acquittal, and that the State was barred from re-alleging that he would be a continuing threat in the resentencing proceedings. This Court recently considered and rejected this claim in *Hogan v. State* [, 139 P.3d 907, 929-30 (Okla. Crim. App. 2006)]. We will not reconsider it in this case.

Harris, 164 P.3d at 1110 (footnote omitted).

Petitioner first claims that the OCCA's determination is based solely on state law and its refusal to apply Supreme Court law is, therefore, contrary to clearly established federal law as determined by the Supreme Court. Petitioner's assertion is mistaken for two reasons. First, the OCCA relied on its previous decision in *Hogan v. State*, as case in which it did discuss and rely on federal law. Second, a state court

need not even be aware of Supreme Court precedent so long as neither the reasoning nor the result contradicts it. *Early v. Packer*, 537 U.S. 3, 8 (2002).

Petitioner asserts that the first jury "acquitted" him of the great risk of death aggravating circumstance by not checking that box on the form in his first trial, and that when the state subsequently sought that aggravating circumstance in his resentencing trial it violated the Eighth Amendment Double Jeopardy clause and Petitioner's Due Process rights.

In *Poland v. Arizona*, 476 U.S. 147 (1986), the Supreme Court rejected a claim identical to the one Petitioner presents here:

> We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. *Bullington* indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" *that the death penalty is appropriate*. We are not prepared to extend *Bullington* further and view the capital sentencing hearing as a set of mini-trials on the existence of each aggravating circumstance. Such an approach would push the analogy on which *Bullington* is based past the breaking point.

Poland v. Arizona, 476 U.S. at 155-56 (footnote omitted) (emphasis in original).

Petitioner acknowledges *Poland* is contrary to his claim, but argues nonetheless that the subsequent Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and especially *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), entitle him to relief.[15] Petitioner relies on the following passage to argue that he was acquitted of "'murder plus two aggravating circumstances' and convicted of the lesser offense of 'murder plus one aggravating circumstance' because the jury found the state had not met their burden of proof beyond the reasonable doubt and 'double jeopardy protections attach to that 'acquittal' on the offense of murder plus [two] aggravating circumstance(s).'" (Pet. at 189):

> In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)." Thus, Rumsey was correct to focus on whether a factfinder had made findings that constituted an "acquittal" of the aggravating circumstances; but the reason that issue was central is not that a capital-sentencing proceeding is "comparable to a trial," 467 U.S., at 209,

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[15] Petitioner recognizes, however, that the procedural facts in *Sattazahn* are different than those involved here. (Pet. at 188)

> 104 S. Ct. 2305 *(citing Bullington*, *supra*, at 438, 101 S. Ct. 1852), but rather that "murder plus one or more aggravating circumstances" is a separate offense from "murder" simpliciter.

Sattazahn, 537 U.S. at 111-12. The Supreme Court continued, however, in the next paragraph:

> For purposes of the Double Jeopardy Clause, then, "first-degree murder" under Pennsylvania law-the offense of which petitioner was convicted during the guilt phase of his proceedings-is properly understood to be a lesser included offense of "first-degree murder plus aggravating circumstance(s)." *See Ring*, *supra*, at 609, 122 S. Ct. 2428. Thus, if petitioner's first sentencing jury had unanimously concluded that Pennsylvania failed to prove <u>any</u> aggravating circumstances, that conclusion would operate as an "acquittal" of the greater offense-which would bar Pennsylvania from retrying petitioner on that greater offense (and thus, from seeking the death penalty) on retrial. *Cf. Rumsey*, *supra*, at 211, 104 S. Ct. 2305.

Id. (emphasis added).

Here, Petitioner was not acquitted of the death penalty. The jury in Petitioner's first case found one aggravating circumstance and sentenced him to death. Thus, the first jury found the prosecution had proven its case that the death penalty was appropriate. Petitioner has failed to demonstrate that the determination of the OCCA was contrary to, or an unreasonable application of, clearly established Federal law as

determined by the Supreme Court. This ground for relief is denied.

Ground 13: Ineffective Assistance of Counsel in the 2005 Resentencing Trial and Appeal.

The authority for establishing and determining an ineffective assistance claim is set forth in detail in Ground 5, *supra*, and need not be repeated here except to reiterate that it is difficult to establish ineffective assistance of appellate counsel, because counsel should not raise every non-frivolous claim, but select among them to maximize the likelihood of success. *Miller v. Mullin*, 354 F.3d 1288, 1298 (10th Cir. 2004); *see also Smith v. Robbins*, 528 U.S. 259, 288 (2000) (only when ignored claims are clearly stronger than those raised will the presumption of effective performance be overcome).

1. Appellate counsel effectiveness regarding *Atkins'* claim.

Petitioner claims appellate counsel was ineffective for failing to claim that Petitioner's Equal Protection and Due Process rights were violated when he was "arbitrarily" denied a jury determination regarding his mental retardation.

> Finally, Harris argues in Proposition I that resentencing appellate counsel was ineffective for failing to claim that his denial of a jury determination of mental retardation denied him equal protection and due process. Harris's appeal after resentencing contained a claim that resentencing counsel was ineffective for failing to seek a determination that he was mentally retarded. We found that

this decision did not support a finding of ineffective assistance because, as nothing in the record suggested Harris is retarded and much suggests he is not, Harris failed to show he was prejudiced by counsel's omission. Harris argues on post-conviction that resentencing appellate counsel should have separately raised the constitutional claims. He argues that he is similarly situated to other defendants who have been granted jury determination of this issue. As in his direct resentencing appeal, Harris again misunderstands the Court's jurisprudence on this issue. He cites cases in which post-conviction defendants already on Death Row, with no other recourse, filed post-conviction claims of mental retardation. These defendants had already been sentenced to death and sought an after-the-fact determination that they were ineligible for that sentence. As this Court does not engage in initial fact-finding, those cases were remanded for jury determination. Harris, by contrast, had not yet received the death penalty or any other sentence. He had the opportunity to raise his claim of mental retardation in the trial court, according to the procedures in effect at that time. Harris is not similarly situated to the capital post-conviction defendants and was not entitled to the procedures used in those cases. Neither his equal protection nor due process rights were denied by the procedures appropriate to his case. Harris was not prejudiced by resentencing appel-

> late counsel's failure to raise this constitutional claim.

Harris, 167 P.3d at 444-45 (footnotes omitted).

There is debate between the parties regarding whether this claim has been exhausted. This court need not make that determination as the claim can be denied on the merits. This claim is closely related to Petitioner's claim in Ground 7. Here, however, Petitioner claims that when the Supreme Court decided *Atkins*, it created a "class" of people–criminal defendants charged with a capital crime who are mentally retarded and may not be subject to execution. Petitioner makes this claim based on *Cleyburne v. Cleyburne Living Center, Inc.*, 473 U.S. 432 (1985), where the Supreme Court determined that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Id.* at 439.

The OCCA's determination that Petitioner was not similarly situated to other inmates allowed to return to state court to raise their *Atkins'* claims is not unreasonable. As the OCCA identified, those inmates had already been sentenced to death and sought an "after-the-fact" determination they were ineligible to receive a sentence of death because of their mental retardation. Petitioner's resentencing occurred after the Supreme Court's decision in *Atkins*, providing him the opportunity to raise his claim that the other death row inmates did not have. Petitioner also was not denied due process as he had the opportunity to present his claim in the trial court. The fact it was not presented is discussed in the disposition of Petitioner's Ground 7.

For the reasons set forth above, and those in Ground 7, *supra*, Petitioner has failed to demonstrate either deficient performance or prejudice by appellate counsel. Additionally, he has failed to demonstrate the decision of the OCCA was contrary to, or an unreasonable application of, clearly established Supreme Court law.

2. Failure to present additional mitigation evidence.

Petitioner claims that appellate counsel was ineffective for failing to raise on direct appeal that trial counsel was ineffective for failing to present mitigating evidence from Petitioner's daughters that would have humanized him and shown that his life was worth saving. Although his daughters did testify at the resentencing trial, Petitioner complains that the testimony was presented in a leading fashion and without the substance and specifics with which his daughters testified in his first trial.

> Harris suggests resentencing trial counsel failed to conduct reasonable investigation when he did not allow Harris's daughters to testify as fully as they had in the first trial. This claim is contradictory on its face; resentencing trial counsel was familiar with the record of the first trial, and made a strategic choice not to use all the testimony used in mitigation the first time. This is not a failure to investigate.

Harris, 167 P.3d at 443, n. 19.

The OCCA's determination is not unreasonable. Petitioner's daughters testified at the resentencing

trial that they loved their father, were never abused by him, that he was a good father to them and provided for them, that they would visit him in prison and stay in touch with him, and that they had provided information to Dr. Draper who correctly described their home life with their father. They also asked the jury to spare his life. Trial counsel presented the jury with a humanizing description of Petitioner's life and of his relationship with his daughters. Petitioner has not demonstrated that trial counsel was either deficient or that his performance was prejudicial.[16] As such, appellate counsel was not ineffective for failing to raise this issue.

3. Failure to raise additional instances of prosecutorial misconduct.

Petitioner next claims appellate counsel was ineffective for failing to raise additional claims–other than that raised on direct appeal–of prosecutorial misconduct. Petitioner claims the prosecutor made several statements in closing argument improperly raising societal alarm, stated facts not in evidence, and improperly argued victim impact testimony.

> Harris also claims that resentencing appellate counsel failed to raise the issue of prosecutorial misconduct. Harris's resentencing appellate brief has no separate proposition claiming prosecutorial misconduct, but misconduct issues are raised in Propositions VI. Harris offers other examples of mis-

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[16] It is noteworthy that including the extra testimony of Petitioner's daughters in the first trial still resulted in the jury sentencing Petitioner to death.

> conduct which he claims resentencing appellate counsel should have raised, emphasizing the prosecutor's use of the victim impact statements in argument. Harris has not claimed in this Application or on appeal that the victim impact evidence itself was improper, and the record does not suggest otherwise. He has failed to show with this example or other references that prosecutorial argument deprived him of a fair trial with reliable results, or that an objection to the argument would have resulted in a different outcome.

Harris, 167 P.3d at 443-44.

As set forth in Petitioner's tenth ground for relief, *supra*, a prosecutor's improper remarks require reversal of a conviction or sentence only if the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly*, 416 U.S. at 643, 645 (1974).

Petitioner first claims the prosecutor incited societal alarm and argued facts not in evidence when in his first closing argument he argued the similarities between Petitioner's actions and a terrorist, and stated it was fortunate Petitioner didn't have an automatic weapon. Petitioner does not identify any facts improperly argued other than that there was no evidence presented that he was a terrorist or that he had or wanted an automatic rifle. He only describes the prosecutor's closing argument at satirical and causing societal alarm. The prosecutor's argument was in response to defense counsel's question to the jury in his closing asking if they saw differences between Petitioner and a terrorist. *See Thornburg v*

Mullin, 422 F.3d 1113, 1131 (10th Cir. 2005) (argument invited or in response to defense counsel easily falls within the wide latitude of argument allowed to prosecutors). Evidence was presented that Petitioner emptied his pistol and then attempted to reload it. In addition to shooting Mr. Taylor and Ms. Harris, he also shot at a third person that happened to be in the building. When he couldn't reload his pistol, he physically beat Ms. Harris. The prosecutor argued when considering the events that it was fortunate Petitioner didn't have an automatic weapon. A prosecutor may comment on and draw reasonable inferences from evidence presented at trial. *Hooper v. Mullin*, 314 F.3d 1162, 1172 (10th Cir. 2002).

Regarding the victim impact testimony, Petitioner claims the prosecutor's reading almost verbatim the victim impact statements served to inflame the passions of the jury and improperly invoke sympathy. Victim impact is evidence properly admitted in the trial and the prosecutor is permitted to discuss the evidence during closing argument. Petitioner has not demonstrated, other than summarily concluding that the comments were improper and inflamed the jury, the prosecutor's arguments so infected the trial with unfairness as to make the resulting conviction a denial of due process. He has also failed the demonstrate the OCCA's determination to be unreasonable.

4. Claim Regarding Handcuffs and Restraints Worn in Courtroom.

Petitioner claims appellate counsel was ineffective for failing to interview jurors from his resentencing trial and failing to present a claim that he was

observed wearing handcuffs and restraints in the presence of jurors in violation of his due process rights.

> Harris argues that resentencing appellate counsel should have raised the issue that resentencing jurors saw him in handcuffs as he was escorted into the courtroom before trial. He fails to demonstrate any prejudice, and this will not support a claim of ineffective assistance of resentencing appellate counsel.

Harris, 167 P.3d at 444 (footnote omitted).

This claim is virtually identical to Petitioner's previous claim raised in subpart three of his fifth ground for relief.[17] The differences are minor. This claim involves his resentencing jury and his argument involves juror statements claiming they would arrive early to court and would see the deputy escorting Petitioner into the courtroom with handcuffs or restraints. This issue has been addressed in Petitioner's fifth ground for relief and will not be repeated here. The argument and authority set out previously is incorporated here. Petitioner has not demonstrated that appellate counsel was ineffective.

5. Claim regarding continuing threat aggravating circumstance.

Finally, Petitioner claims appellate counsel was ineffective for failing to raise the issue that the jury's finding of the continuing threat aggravating circumstance was not unanimous as required by Oklahoma law. Petitioner relies on two affidavits to claim that

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[17] Comparison between the two reveals a majority of the argument and authority presented is an exact reproduction.

the jury did not reach a unanimous verdict on the aggravating circumstance.

> Harris claims resentencing appellate counsel was ineffective for failing to raise the issue of the validity of the continuing threat finding. The record reflects that the jury found Harris was a continuing threat to society and that, when polled, each juror affirmed that finding and the sentence of death. Harris relies on juror affidavits to suggest that not all jurors were unanimous regarding the continuing threat aggravating circumstance. A juror may not testify to any matter or statement made during deliberations which influenced his mental processes or verdict, other than extraneous prejudicial information or outside influences. We cannot consider these juror affidavits, and this claim cannot support a finding of ineffective assistance of resentencing appellate counsel.

Harris, 167 P.3d at 444 (footnote omitted).

Petitioner claims the OCCA's determination of each juror's affirmation of the verdict was an unreasonable determination in light of the record. The record reveals, however, that the trial court asked the foreperson if the verdict was unanimous as to both aggravating circumstances and as to the sentence of death. The trial court then asked each individual juror if that was their verdict. Petitioner has not demonstrated that the OCCA's factual determination that the jurors were polled regarding the aggravating circumstances was unreasonable.

Petitioner has also not demonstrated the OCCA's inability under state law to consider the affidavits to be unreasonable. Tit. 12 O.S. 2001, sec. 2606(B) precludes offering evidence regarding a juror's mental processes during deliberations. Petitioner asserts that the corresponding federal rule, Fed. R. Evid. 606(b), permits testimony about an error in entering the verdict onto the verdict form. Reliance on the federal evidence rule is misplaced, however, because that rule relates only to the determination of the admissibility of evidence in federal cases. Petitioner has provided no Supreme Court authority requiring the consideration of juror affidavits to impeach a verdict, nor has he demonstrated the OCCA's determination to be contrary to, or an unreasonable application of, clearly established law.

For the foregoing reasons, Petitioner's thirteenth ground for relief is denied in its entirety.

Ground 14: Cumulative Error.

Petitioner claims that the accumulation of errors in his resentencing trial violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Petitioner raised this issue in his 2005 direct appeal from his resentencing trial. The OCCA determined the accumulation of errors did not warrant relief:

> In Proposition XII Harris claims that the accumulation of errors in the preceding propositions requires relief. In Proposition III, we found the trial court erred in failing to bring the jury into open court when a question was presented in deliberations, but that error was harmless. In Proposition VI we found that error in argument was cured by instructions.

> Even taken together, these errors do not require relief.

Harris, 164 P.3d at 1119 (footnote omitted).

Petitioner also requested cumulative review in his 2005 post-conviction proceedings:

> Harris claims in Proposition III that the accumulation of error on appeal and in post-conviction require relief. No authority allows this Court to consider, on post-conviction, errors raised on direct appeal which were not also raised as error in the post-conviction claim. We have determined that trial, resentencing, and appellate counsel were not ineffective. There is no cumulative error to consider.

Harris, 167 P.3d at 445 (footnotes omitted).

Authority regarding cumulative review was set forth in consideration of Petitioner's sixth ground for relief and need not be repeated here. Upon review of the entire trial transcript and the evidence and testimony presented, the Court does not find the cumulation of those errors determined to be harmless had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). In addition to the errors found by the OCCA, the only error found by this court was the victim impact statements making sentence recommendations. That error was determined to be harmless. The errors were not so egregious or numerous as to prejudice Petitioner to the same extent as a single reversible error. The cumulative effect of the errors, when compared with the evidence and testimony presented at trial, did not significantly

strengthen the state's case or diminish Petitioner's case. No reasonable probability exists that the jury would have sentenced Petitioner differently absent the errors. Accordingly, Petitioner's fourteenth ground for relief is denied.

CONCLUSION

After a complete review of the transcripts, trial records, appellate record, record on post-conviction proceedings, briefs filed by Petitioner and Respondent, and the applicable law, the Court finds Petitioner's request for relief in his *Petition For Writ of Habeas Corpus* (Dkt. No. 32) should be denied. ACCORDINGLY, habeas relief is DENIED on all grounds. An appropriate judgment will be entered.

IT IS SO ORDERED this 19th day of April, 2017.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING (DECEMBER 24, 2019)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JIMMY DEAN HARRIS,

Petitioner-Appellant,

v.

TOMMY SHARP, INTERIM WARDEN,
OKLAHOMA STATE PENITENTIARY,

Respondent-Appellee.

No. 17-6109

Before: TYMKOVICH, Chief Judge,
BACHARACH, and McHUGH, Circuit Judges.

Appellant's petition for rehearing is denied.

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

Entered for the Court

/s/ Elisabeth A. Shumaker
Clerk

OPINION OF THE COURT OF CRIMINAL APPEALS OF OKLAHOMA (JULY 19, 2007)

COURT OF CRIMINAL APPEALS OF OKLAHOMA

JIMMY DEAN HARRIS,

Appellant,

v.

STATE OF OKLAHOMA,

Appellee.

No. D-2005-117

Before: CHAPEL, Judge.

CHAPEL, Judge

¶ 1. Jimmy Dean Harris was tried by jury and convicted of Murder in the First Degree in violation of 21 O.S. 1991, § 701.7, in the District Court of Oklahoma County, Case No. CF-1999-5071. On appeal, this Court reversed the punishment of death recommended by the jury and imposed by the trial court, and remanded the case for resentencing.[1] The jury at

[1] *Harris v. State*, 2004 OK CR 1, 84 P.3d 731. Harris was also convicted of Shooting with Intent to Kill and Assault and Battery with a Dangerous Weapon, and sentenced to life and ten years imprisonment. These convictions and sentences were upheld on appeal.

Harris's resentencing trial found that Harris knowingly created a great risk of death to more than one person, and constituted a continuing threat to society. In accordance with the jury's recommendation, the Honorable Virgil C. Black imposed the death penalty. Harris appeals from this sentence.

¶ 2. Harris, who was a skilled transmission mechanic, and his wife, Pam, worked in front office positions in transmission shops. Throughout their relationship the two often worked together. Despite being business partners as well as husband and wife, they had a stormy relationship. This worsened significantly when Pam was hired, but Harris was not, to work in Merle Taylor's AAMCO transmission shop in Oklahoma City. Harris commuted to work in Texas for several months, during which time the marriage suffered. After Harris had a work-related accident, he returned to Oklahoma. By the summer of 1999, Pam told him the marriage was over. While Harris agreed to a divorce, he was angry and upset, and continued to hope Pam would return to him. In mid-August of 1999, Harris called Pam, threatening to kill her, her parents, their daughter, her co-workers, and Merle Taylor. Pam got a protective order against Harris and filed for divorce. The divorce was granted on August 25, 1999, and Harris was ordered to leave the home without removing any property. Harris and Pam had previously taped an agreement dividing the house property. On the evening of the 25th, Harris moved out of the home, taking furniture and many of Pam's personal possessions. He also vandalized the house. Pam discovered the damage the next day, found out where Harris had stored her furniture and his tools, and had a lock put on that shed. In the

succeeding days Harris called Pam often demanding that she remove the lock. Each time, she explained she could neither talk to him nor remove the lock, and told him to call her attorney. He refused, explicitly stating he would talk to her. He continued to threaten her and others. On August 31, 1999, he threatened to kill Pam and was seen driving by the AAMCO shop.

¶ 3. On the morning of September 1, 1999, Harris called the AAMCO shop several times, demanding that she remove the lock on the storage shed and threatening Pam and Merle Taylor. At approximately 9:00 a.m. Harris arrived at the shop and asked for Pam, who was standing with Merle Taylor and his daughter-in-law Jessica. He shot Taylor twice at close range, and shot at Jessica. Harris shot Pam, chased her when she ran, and pistol-whipped her when he ran out of bullets and could not quickly reload his gun. When Pam escaped, Harris fled, discarded the gun and his van, and hid in a friend's garage. Harris claimed he was angry and upset, and could not make good decisions because he was of low intelligence, was under the influence of alcohol and drugs, and was mentally ill (although not legally insane).

¶ 4. To support the aggravating circumstances, the State presented the evidence of the circumstances of the crimes. There was also evidence that, during the ongoing difficulties in mid-August, Pam had called police and Harris had resisted arrest. The State presented evidence that Harris assaulted a jailer while awaiting trial, and had physically, verbally and emotionally abused Pam throughout their relationship. The State also presented victim impact evidence. In mitigation, Harris presented evidence from

his family and former co-workers, as well as expert evidence, regarding his traumatic and abusive childhood, history of substance abuse, low intelligence, emotional instability, and possible mental illness.

Issues Regarding Jury Selection

¶ 5. In Proposition V Harris claims that the trial court's failure to provide the jury with cautionary instructions on the taking and use of notes during trial and deliberation deprived him of his rights to a fair trial and due process. The trial court allowed jurors to take notes during the course of the trial and provided them with notebooks and pencils. The court told jurors that any notes they took were for their personal use, and would not become part of the public record. However, the trial court did not instruct jurors on the taking and use of notes during trial or deliberations. Harris claims this omission deprived him of a right to a fair trial and due process. He neither requested these instructions at trial, nor objected to the trial court's failure to give them, and has waived all but plain error. There is none.

¶ 6. In *Cohee v. State* we held that a trial court may, in its discretion, allow jurors to take notes.[2] While Cohee explained why note-taking may be beneficial, and set forth guidelines for the trial court's consideration, it did not promulgate or require any specific instructions on the process of note-taking.[3] The Uniform Jury Instructions include instructions on note-taking which are based on the comments and

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2 *Cohee v. State*, 1997 OK CR 30, 942 P.2d 211, 213.

3 *Cohee*, 942 P.2d at 214-15.

guidelines in *Cohee*.[4] The Notes on Use to the Uniform Jury Instructions (revised) note that, in keeping with *Cohee*, these instructions are recommended, not mandatory. Trial courts should use both mandatory and recommended uniform instructions which accurately state the applicable law.[5] However, the failure to use recommended instructions does not require reversal where the jury is accurately instructed on the law. In *Hanson v. State*,[6] this Court previously considered the failure to use the recommended instructions on jury note-taking. We determined that this omission was not plain error, where the instructions to the jury, "taken as a whole, fairly and accurately stated the applicable law, channeling juror's discretion in their use of notes."[7] The trial court told jurors that notes were for their personal use only. Jurors were otherwise properly instructed on their function, the definition of evidence, and the trial and deliberations process. Taken together, these instructions properly narrowed the jury's discretion to use notes taken during trial. The trial court's omission was not plain error.

Issues Relating to the Sentencing Stage of Trial

¶ 7. Harris argues in Proposition III that the trial court's failure to provide a complete record of the proceedings leading to his death sentence violated his constitutional rights. In a capital case, the State

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[4] OUJI-CR (2d) 1-9, 10-8A.

[5] 12 O.S. 2001, § 577.2.

[6] 2003 OK CR 12, 72 P.3d 40, 46.

[7] Hanson, 72 P.3d at 46.

has the burden to ensure a complete record of the trial is provided, which will enable the Court to conduct its mandatory sentence review.[8] However, failure to provide a complete record is not per se reversible error.[9] In *Pickens v. State*, private conversations with two jurors during voir dire were not recorded. The Court found that, as no errors were alleged during jury selection and the potential jurors were excused for cause, no error was shown and our ability to conduct the mandatory sentence review was not affected.[10] By contrast, in *Van White* the parties completely failed to transcribe *voir dire* proceedings. This deprived the Court of the ability to consider potential juror bias or other questions of improper juror prejudice as part of our mandatory sentence review, and required reversal.[11] The defendant must show that the failure to transcribe a portion of the trial resulted in error and affects this

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[8] *Van White v. State*, 1988 OK CR 47, 752 P.2d 814, 820-21.

[9] *Pickens v. State*, 2001 OK CR 3, 19 P.3d 866, 881. In Pickens, private conversations with two jurors during voir dire were not recorded. The Court found that, as no errors were alleged during jury selection and the potential jurors were excused for cause, no error was shown and our ability to conduct the mandatory sentence review was not affected.

[10] *Pickens*, 19 P.3d at 881. *See also Mooney v. State*, 1999 OK CR 34, 990 P.2d 875, 884 (failure to transcribe competency hearing was cured when an evidentiary hearing determined application for competency had been denied); *Cannon v. State*, 1998 OK CR 28, 961 P.2d 838, 848 (failure to transcribe reading of instructions to the jury not error where written instructions are included in record on appeal); *Parker v. State*, 1994 OK CR 56, 887 P.2d 290, 294 (failure to transcribe bench conferences did not require reversal);

[11] *Van White*, 752 P.2d at 821.

Court's ability to conduct a mandatory sentence review.[12] Harris fails to meet this standard. As our discussion shows, this record is complete enough for this Court to determine whether the jury's verdict was imposed under the influence of passion, prejudice, or any other arbitrary factor, and whether sufficient evidence supports the aggravating circumstances.[13]

¶ 8. During deliberations, Harris's jury asked for a dictionary. The trial court responded in writing by asking what word the jury wanted defined. Jurors replied that they wanted definitions for "probability" and "possibility". The trial court sent typewritten dictionary definitions of those words to the jury room. While this exchange of notes is physically preserved, the trial record makes no mention of them. There is no indication whether the trial court discussed these requests with the parties, or if so, whether defense counsel agreed to the trial court's resolution of the question.[14]

¶ 9. Harris first claims that this Court cannot determine whether the trial court appropriately answered the jury by supplying the requested dictionary definitions without knowing the context for the jury's request. Harris suggests that a dictionary definition would be inappropriate for "some words" which are legal terms of art, but fails to show that

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[12] *Pickens*, 19 P.3d at 881.

[13] 21 O.S. 2001, § 701.13.

[14] The State argues that there is no record Harris objected to these instructions, so the issue is waived. The lack of record is Harris's point. As the Court cannot determine from this record whether Harris had an opportunity to object, we will not consider the claim waived.

either "probability" or "possibility" falls within that category. The word "possibility" is found in every instruction which mentions the punishment alternatives "imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole."[15] "Probability" occurs in the context of the continuing threat aggravating circumstance, "a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[16] These are the only contexts in which these words are mentioned in the jury instructions. Harris would have this Court speculate on other contexts within which the jury might have wanted definitions of the words, but does not show any context in which a dictionary definition would be improper. Harris recognizes that we have recently warned trial courts against allowing jurors any outside reference material in deliberations, including dictionaries.[17] The trial court here acted appropriately in refusing the jury's request to have a dictionary in the room during deliberations. However, the trial court attempted to be responsive to the jury's request, as we encourage trial courts to do,[18] and provided the exact information jurors requested. Neither the record before us, nor Harris's argument, suggests that this decision was an abuse of discretion. As counsel could not have been ineffective had counsel

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[15] Instructions 1, 3, 6, 10, 16; O.R. IX, 1598, 1601, 1604, 1611, 1619.

[16] Instructions 2, 4, 5, 7; O.R. IX, 1599, 1602, 1603, 1605.

[17] *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597, 605.

[18] *Cohee*, 942 P.2d at 215 (trial court should attempt to answer juror questions as fully as the law permits).

failed to object to this decision, the incomplete record on this issue does not impede our ability to conduct a review.

¶ 10. Harris also claims that the trial court violated statutory procedures in handling the jury's questions. If jurors express disagreement regarding testimony or have a question on a point of law, they should be brought into court and the trial court should answer their question only in the presence of all parties, or after they have been called.[19] Harris suggests this Court must presume prejudice from the trial court's failure to follow this procedure, because the circumstances surrounding the trial court's receipt of and answer to the questions were not transcribed. However, the record, in the form of the written notes, shows that the trial court did not abuse its discretion in answering jurors by giving them what they requested, without allowing a dictionary into the jury room. On this record, the trial court's failure to follow the statutory procedure is harmless.[20]

¶ 11. Here, as the State notes, the appellate record contains the written notes exchanged between trial court and jury. The record does not show whether defense counsel had an opportunity to object to the trial court's instruction defining the words "probability" and "possibility". However, this Court is able to review the exchange itself.[21] We have done so, and

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[19] 22 O.S. 2001, § 894.

[20] *Welch v. State*, 1998 OK CR 54, 968 P.2d 1231, 1245.

[21] *Cannon*, 961 P.2d at 848 (ability to review not impeded where Court can determine from the record what instructions were given to jury).

concluded that (a) the trial court did not abuse its discretion in providing dictionary definitions to jurors, and (b) the trial court's failure to bring the jury into open court upon receiving the request did not prejudice Harris. The record is sufficient to allow this Court to conduct its mandatory sentence review.

¶ 12. Merle Taylor's son and wife each gave victim impact evidence, and asked jurors to impose the death penalty. Harris argues in Proposition VII that this recommendation was unconstitutional and denied him his right to a fair trial. Harris admits that this Court has held that family members of the victim may recommend a sentence in a capital sentencing trial,[22] but urges us to reconsider. We decline this invitation.

¶ 13. In Proposition VIII Harris argues that the State improperly re-alleged the continuing threat aggravating circumstance. In Harris's original trial and again at resentencing, the State alleged that Harris would constitute a continuing threat to society. At Harris's first trial, jurors did not find this aggravating circumstance. Harris claims that this failure is equivalent to an acquittal, and that the State was barred from re-alleging that he would be a continuing threat in the resentencing proceedings. This Court recently considered and rejected this

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22 *See, e.g., DeRosa v. State*, 2004 OK CR 19, 89 P.3d 1124, 1151-52; *Conover v. State*, 1997 OK CR 6, 933 P.2d 904, 920; *Ledbetter v. State*, 1997 OK CR 5, 933 P.2d 880, 890-91. Harris does not claim that the victim impact evidence itself was improper, other than the recommendation of punishment.

claim in *Hogan v. State*.[23] We will not reconsider it in this case.

¶ 14. Harris claims in Proposition IX that insufficient evidence supported the jury's finding of the continuing threat aggravating circumstance. The jury found that there existed a probability that Harris would commit criminal acts of violence which would constitute a continuing threat to society. Harris claims the State presented insufficient evidence that he presented a continuing threat to society. To support this aggravating circumstance, the State must show that Harris's past behavior, through convictions or unadjudicated crimes, showed a pattern of criminal conduct which will probably continue to exist in the future.[24] On appeal, we will uphold the jury's finding if, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could find the charged aggravating circumstance beyond a reasonable doubt.[25]

¶ 15. Harris admits that the State offered four separate types of evidence to prove this aggravating circumstance. All were admissible to show a pattern of violence which was likely to continue. This Court has upheld use of both the circumstances of the crime and unadjudicated offenses to support this aggravating

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[23] *Hogan v. State*, 2006 OK CR 19, 139 P.3d 907, 929-30, cert. denied, 549 U.S. 1139, 127 S. Ct. 994, 166 L.Ed.2d 751 (2007). I dissented on this issue in Hogan, and yield my vote on the basis of stare decisis.

[24] *Malicoat v. State*, 2000 OK CR 1, 992 P.2d 383, 397.

[25] *Warner v. State*, 2006 OK CR 40, 144 P.3d 838, 878; *DeRosa*, 89 P.3d at 1153; *Malicoat*, 992 P.2d at 397.

circumstance.[26] Common evidence used to prove that a defendant is a continuing threat to society includes "the defendant's history of violent conduct, the facts of the homicide at issue, threats made by the defendant, lack of remorse, attempts to prevent calls for help, mistreatment of family members and testimony of experts."[27] While Harris claims that, at best, the State's evidence shows he was a danger to Pam, in fact the evidence taken as a whole shows Harris has a lifelong pattern of using violence to solve problems and react to situations which is likely to continue.

¶ 16. Through Pam, family members, and coworkers, the State offered evidence of ongoing domestic violence, including Harris's physical, verbal and mental abuse of Pam, which lasted throughout the course of their relationship. Among other things, Harris dislocated Pam's jaw, kicked her in the face, slammed her legs in a car door, and pushed and shoved her. Due to arguments, his drinking, and the threat of violence, Pam left Harris between eighty and 100 times during the course of their marriage, only to return after each episode ended. Some witnesses also testified that Pam instigated arguments with Harris, got the better of him in verbal arguments, and even pushed him. Harris characterizes all this as evidence of a dysfunctional marriage. However, where the evidence conflicts, this Court will not substitute its

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[26] *See, e.g., Hooper v. State*, 2006 OK CR 35, 142 P.3d 463, and cases cited therein. I continue to believe that evidence of unadjudicated offenses should not be admitted to support the continuing threat aggravating circumstance. I find that, even without this evidence, sufficient evidence supports the finding of this aggravating circumstance beyond a reasonable doubt.

[27] *Malicoat*, 992 P.2d at 397.

judgment regarding the weight and credibility of the evidence for that of the jury's.[28]

¶ 17. The State also presented evidence of other violent episodes in Harris's life. His own expert and a brother testified that he had been in fights as a child and bar fights throughout his life. Harris claims without citation that this evidence was inadmissible to support the continuing threat aggravating circumstance as no details were given regarding the fights. He did not object to this testimony at trial and we review for plain error only. There is none. Harris himself told Dr. Draper that he had fought in school, had been expelled for fighting, and got in bar fights. Dr. Draper relied on this information in forming her opinion, and was required to testify regarding it if asked on cross-examination.[29] His brother testified about the beginnings of bar fights he had witnessed, and about a particular bar fight in which Pam was involved or present.[30] Harris argues that these episodes have no bearing on his potential for future dangerousness. On the contrary, Dr. Draper testified regarding Harris's emotional instability and difficulty handling stress, solving problems, and making good

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[28] *Malicoat*, 992 P.2d at 397. While the Court must independently assess the record evidence and determine that such evidence supports the jury's finding of an aggravating circumstance, *Battenfield v. State*, 1991 OK CR 82, 816 P.2d 555, 565, this merely reflects the appropriate standard of review. We will not substitute our judgment for that of the jury's where sufficient evidence is present.

[29] 12 O.S. 2001, § 2705.

[30] Mark Harris testified that he had not necessarily seen Harris commit acts of violence because "I usually leave if it gets that bad."

choices when angry. Harris's propensity for physical fights bears directly on his probable future reactions in these circumstances.

¶ 18. The State offered several episodes from August, 1999, as the difficulties between Pam and Harris escalated. On August 15, Pam called the police from her parents' house. She reported Harris was at the family home, had threatened her, her family, and her co-workers, and she believed he was armed. When police came, Harris met them in the yard. The officers asked him to lift up his loose shirt and turn around, explaining they needed to check for a weapon. He initially appeared to comply, hesitated, then ran into the house and locked the door. The police kicked in the door and ordered Harris to the floor. When he refused to comply, they subdued and handcuffed him, and arrested him for resisting an officer. Subsequently, Harris telephoned Pam several times threatening to kill her. When he left the house on August 25, he violated the trial court's order by moving furniture and Pam's personal belongings and vandalizing the house. The act of resisting arrest and death threats are relevant to Harris's future dangerousness. While vandalism, a nonviolent crime, is not in itself indicative of future danger, under the circumstances of this case it reflects the pattern of escalating violence which resulted in the crimes.

¶ 19. Harris had no prior convictions, and only one disciplinary write-up from his years of incarceration in this case. On April 11 2001, while awaiting his preliminary hearing in the Oklahoma County jail, Harris was put on suicide watch. Officer Hill was required to make visual contact with Harris through a cell window every fifteen minutes. Harris

blocked the window with paper, and refused to answer when Hill knocked on the door and called his name. As soon as Hill opened the door and stepped inside the cell, Harris attacked him. Harris did not try to escape the cell, but instead punched and kicked Hill and temporarily disabled his radio. He was eventually subdued by several jailers. Harris asserts this action has no bearing on the probability that he constitutes a continuing threat to society. On the contrary, Harris's willingness to attack a jailer, while possibly affected by his mental state, bears directly on his propensity for future violence.

¶ 20. In addition to the evidence above, the State offered the circumstances of the crimes themselves.[31] After explicitly threatening to kill Pam and Merle Taylor, Harris drove to the AAMCO shop. He was armed and carried extra ammunition. When Harris said he needed to talk to Pam, Taylor reminded him he was not supposed to be at the shop. Harris knocked Taylor down and shot him twice. He pointed the gun and shot at other workers in the area. As they fled, Harris shot Pam, hitting her once. As he continued to shoot she ran. When she tripped, he attempted to shoot her in the head, grazing her scalp. He tried unsuccessfully to reload the weapon, then pistol-whipped her. Pam fought back, pinning Harris's

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[31] I have disagreed with the use of the circumstances of the crime to support this aggravating circumstance, but yield to the majority. *Hooper v. State*, 1997 OK CR 64, 947 P.2d 1090, 1108 n. 58; *Cannon v. State*, 1995 OK CR 45, 904 P.2d 89, 106 n. 60. In addition to the circumstances of the crime and unadjudicated offenses, I find there is sufficient other evidence of continuing threat to support the jury's finding of this aggravating circumstance.

arms in his shirt, and escaped. Harris then fled the scene.

¶ 21. Evidence that Harris constitutes a continuing threat to society included ongoing domestic violence, fighting since childhood, resisting arrest, death threats, an attack on a jailer, and the circumstances of the crime. Taking the evidence in the light most favorable to the State, any rational trier of fact could find, beyond a reasonable doubt, a pattern of criminal conduct which will probably continue to exist in the future. Sufficient evidence was presented to show there exists a probability that Harris will constitute a continuing threat to society.

¶ 22. In Proposition X Harris claims that the aggravating circumstance that he would constitute a continuing threat to society is unconstitutional on its face and as applied in Oklahoma. He argues that (a) Oklahoma's statutory definition does not meet standards set forth by the United States Supreme Court; and (b) that, as applied in Oklahoma courts, the aggravating circumstance is not easily understood and fails to channel the jury's discretion. Harris admits that this Court has previously considered and rejected this claim.[32] We do not reconsider it here.

Issues Relating to Jury Instructions

¶ 23. In Proposition IV Harris argues the trial court erred in failing to instruct the jury that, if convicted of murder and sentenced to life with the possibility of parole, he would have to serve 85% of

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[32] *See, e.g., Warner*, 144 P.3d at 879; *Myers v. State*, 2006 OK CR 12, 133 P.3d 312, 333-34; *Wackerly v. State*, 2000 OK CR 15, 12 P.3d 1, 16; *Malicoat*, 992 P.2d at 400.

his sentence. Harris faced three potential sentences: death, life without the possibility of parole, or life imprisonment. By statute, any person committing an enumerated offense on or after March 1, 2000, must serve 85% of the latter sentence before being eligible to be considered for parole (the 85% Rule).[33] This Court held in *Anderson v. State* that jurors should be instructed on the 85% Rule in every case to which it applies.[34] The record does not indicate that Harris asked for an instruction on the 85% Rule, but he claims that he is entitled to relief because his jury was not so instructed. He is mistaken. Harris's crimes were committed on September 1, 1999. On its face, the 85% Rule does not apply here. This proposition is denied.

¶ 24. In Proposition VI Harris argues that the uniform jury instruction on mitigating circumstances, OUJI-CR (2d) 4-78, which was given to his jury, unconstitutionally limited the jury's ability to consider his mitigating evidence. A capital defendant "must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense."[35] "It is settled that a defendant may present in mitigation any aspect of his record or character, and any circumstances of the crime that could possibly convince a jury that he is

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[33] 21 O.S. 2001, §§ 12.1, 13.1.

[34] *Anderson v. State*, 2006 OK CR 6, 130 P.3d 273, 282.

[35] *California v. Brown*, 479 U.S. 538, 541, 107 S. Ct. 837, 839, 93 L.Ed.2d 934 (1987) (citations omitted); *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S. Ct. 869, 874, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964, 57 L.Ed.2d 973 (1978).

entitled to a sentence less than death. Likewise, a defendant is also entitled to present any evidence that may assist in rebutting an aggravating circumstance."[36] When considering whether to recommend the death penalty, jurors must look at both the circumstances of the crime and the personal characteristics and propensities of the defendant.[37] The reference to a defendants characteristics will necessarily include evidence which may be mitigating in nature, but will not extenuate or reduce his moral culpability for the crime. Given this settled law, we must agree with the Tenth Circuit's conclusion that any attempt to limit a jury's consideration of mitigating evidence only to that evidence which may make a defendant less guilty, or the crime less horrible, is unconstitutional.[38] This is true whether the attempted limitation occurs through instruction or argument.

¶ 25. Harris argues that the plain language of the uniform instruction's first sentence itself limits the jury's consideration of mitigating evidence. That sentence reads: "Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or

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[36] *Fitzgerald v. State*, 2002 OK CR 31, 61 P.3d 901, 903 (citation omitted). *See also Coddington v. State*, 2006 OK CR 34, 142 P.3d 437, 460; *Fitzgerald v. State*, 1998 OK CR 68, 972 P.2d 1157, 1168; *Skipper v. South Carolina*, 476 U.S. 1, 4, 106 S. Ct. 1669, 1670-71, 90 L.Ed.2d 1 (1986).

[37] *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Gregg v. Georgia*, 428 U.S. 153, 197, 96 S. Ct. 2909, 2936, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

[38] *Le v. Mullin*, 311 F.3d 1002, 1017 (10th Cir. 2002).

blame."[39] Harris admits this Court has rejected this line of argument.[40] However, he suggests that the language is ambiguous at best, and, combined with prosecutorial argument, foreclosed the jury's consideration of mitigating evidence. He failed to object to either the instruction or argument at trial. Reviewing for plain error, we find none. We do not find that the current uniform jury instruction prohibits jurors from considering mitigating evidence. One prosecutor did consistently argue in closing that jurors should not consider Harris's second stage evidence as mitigating, since it did not extenuate or reduce his guilt or moral culpability. This argument improperly told jurors not to consider Harris's mitigating evidence. However, in final closing a second prosecutor invited jurors to consider all Harris's mitigating evidence, weigh it against the aggravating circumstances, and find that the death penalty was appropriate. The jury was properly instructed on the definition of mitigating evidence, the evidence Harris presented, and its duties. For that reason, the initial prosecutorial argument was harmless.[41]

¶ 26. This Court is troubled, however, by the consistent misuse of the language in this instruction in the State's closing arguments. This Court noted in *Frederick v. State* that the prosecutor could argue mitigating evidence did not reduce a defendant's moral culpability or blame.[42] However, we did not

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[39] OUJI-CR (2d) 4-78, O.R. 1607.

[40] *Primeaux v. State*, 2004 OK CR 16, 88 P.3d 893, 909-10; *Williams v. State*, 2001 OK CR 9, 22 P.3d 702, 727

[41] 21 O.S. 2001, § 3001.1; Le, 311 F.3d at 1018.

[42] 2001 OK CR 34, 37 P.3d 908, 949.

intend to suggest that prosecutors could further argue that evidence of a defendant's history, characteristics or propensities should not be considered as mitigating simply because it does not go to his moral culpability or extenuate his guilt. This would be an egregious misstatement of the law on mitigating evidence. After careful consideration, this Court has determined that an amendment to the language of the instruction will clarify this point, and discourage improper argument. We emphasize that the language of the current instruction itself is not legally inaccurate, inadequate, or unconstitutional. Cases in which the current OUJI-CR (2d) 4-78 has been used and applied are not subject to reversal on this basis.

¶ 27. In conjunction with this case, the Court will refer this issue to the Oklahoma Uniform Jury Instruction Committee (Criminal) for promulgation of a modified jury instruction defining mitigating circumstances in capital cases. To delineate the various purposes of mitigating evidence, this Court suggests including both (a) that mitigating circumstances may extenuate or reduce the degree of moral conduct or blame, and separately, (b) that mitigating circumstances are those which in fairness, sympathy or mercy would lead jurors individually or collectively to decide against imposing the death penalty.[43]

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[43] As Harris notes, OUJI-CR (2d) 4-79, describing possible mitigating circumstances, was patterned after a similar New Mexico jury instruction. The language in the New Mexican instruction corresponding to OUJI-CR (2d) 4-78 reads: "A mitigating circumstance is any conduct, circumstance or thing which would lead you individually or as a jury to decide not to impose the death penalty."

¶ 28. The uniform jury instruction given in this case did not unconstitutionally limit the jury's ability to consider mitigating evidence. The prosecutor's improper argument on this issue was cured by further argument and instruction. Harris's claim for relief is denied. However, this Court finds that the current uniform jury instruction defining mitigating circumstances, OUJI-CR (2d) 4-78, should be modified to clarify the constitutional scope of mitigating evidence and discourage improper argument.

Ineffective Assistance of Counsel

¶ 29. Harris claims in Proposition I that trial counsel was ineffective for failing, before trial began, to seek a determination that he was mentally retarded and thus ineligible for the death penalty. To prevail on this claim, Harris must show that counsel's performance was so deficient that he did not have counsel as guaranteed by the Sixth Amendment, and that the deficient performance created errors so serious as to deprive him of a fair trial with reliable results.[44] We measure trial counsel's performance against an objective standard of reasonableness under prevailing professional norms.[45] There must be a reasonable probability that, without counsel's errors, the jury would have concluded that a death sentence was not

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[44] *Browning v. State*, 2006 OK CR 8, 134 P.3d 816, 830, cert. denied, 549 U.S. 963,127 S. Ct. 406, 166 L.Ed.2d 288 (2006); *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069-70, 80 L.Ed.2d 674, 693 (1984).

[45] *Rompilla v. Beard*, 545 U.S. 374, 380,125 S. Ct. 2456, 2462, 162 L.Ed.2d 360 (2005); Wiggins, 539 U.S. at 521,123 S. Ct. at 2527.

supported by the balance of aggravating and mitigating circumstances.[46] "A reasonable probability is one sufficient to undermine confidence in the outcome."[47] We give great deference to trial counsel's strategic decisions, considering the choices made from counsel's perspective at the time.[48] We will presume counsel's conduct was professional and could be considered sound strategy.[49] This Court will not find counsel ineffective if we find that Harris was not prejudiced by counsel's actions or omissions.[50]

¶ 30. A capital defendant who wishes to claim mental retardation must raise that claim with the trial court before the trial begins.[51] A threshold requirement for such a claim is one IQ test of 70 or below; such a test will not itself guarantee a finding of mental retardation but may begin the process by which the court determines whether a defendant is mentally

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46 *Browning*, 134 R3d at 831.

47 *Williams v. Taylor*, 529 U.S. 362, 394,120 S. Ct. 1495, 1513-1514, 146 L.Ed.2d 389 (2000).

48 *Rompilla*, 545 U.S. at 380-81, 125 S. Ct. at 2462; Wiggins, 539 U.S. at 523, 123 S. Ct. at 2536; Strickland, 466 U.S. at 689, 104 S. Ct. at 2065; *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 317.

49 *Browning*, 134 P.3d at 831; *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856, 874-75.

50 *Williams*, 529 U.S. at 393, 120 S. Ct. at 1513 (defendant prejudiced where counsel's actions deny him a substantive or procedural right to which he is entitled by law); *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *Hooks*, 19 P.3d at 317.

51 *Blonner v. State*, 2006 OK CR 1, 127 P.3d 1135, 1139-40; *State ex rel. Lane v. The Hon. Jerry D. Bass*, 2004 OK CR 14, 87 P.3d 629, 633; *Murphy v. State*, 2002 OK CR 32, 54 P.3d 556, 567.

retarded.[52] Harris had two IQ test scores, obtained during the pretrial process, of 66 and 68.[53] He complains that counsel did not use these scores to initiate this process and attempt to determine whether he was mentally retarded before trial began. Harris argues that, given his test scores, if counsel had asked for a hearing to determine mental retardation the trial court would have been required to hold that hearing. At that hearing Harris might or might not have been found mentally retarded, but if he were found to be retarded, he would avoid the death penalty. Thus, Harris claims, he had nothing to lose and everything to gain by raising the issue, and counsel was ineffective for failing to do so.

¶ 31. Harris cannot show he was prejudiced by counsel's failure. To prevail on a pretrial claim of mental retardation, Harris would have to show (1) significantly subaverage intellectual functioning; (2) manifested before the age of 18; (3) accompanied by significant limitations in adaptive functioning in at least two of nine enumerated skill areas.[54] All the evidence in the record, including the evidence from the first trial and competency hearing, indicates that Harris could not meet this test. Despite these two IQ scores, all Harris's other IQ scores were over 70. All Harris's experts, including the ones who testified at his first trial and competency hearing, considered

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[52] *Blonner*, 127 P.3d at 1139.

[53] All the experts for both the State and defense agreed that these IQ test results, taken during pretrial proceedings and while there were doubts raised as to Harris's competency, were less reliable than his other test scores, which were over 70.

[54] *Murphy*, 54 P.3d at 566.

these scores along with Harris's other characteristics and concluded he was not mentally retarded.[55] Harris's expert, Dr. Draper, testified at his trial that he was not mentally retarded. She and other experts stated in this and other proceedings that Harris was "slow" or of low intelligence, but all agreed that his employment history, aptitude as a transmission mechanic, and other characteristics were not those of a mentally retarded person.

¶ 32. Harris argues that this Court cannot dispose of this claim using the prejudice analysis above. He admits the test for ineffective assistance of counsel is whether there is a reasonable probability that, but for counsel's unprofessional errors, the results of the trial would have been different.[56] Regarding this claim, the different result would have been a finding of mental retardation and ineligibility for the death penalty. Thus, the Court is required to review the record to see whether, had counsel requested a hearing, Harris would have prevailed on his claim of mental retardation. There is no support in the record for such a conclusion. However, Harris argues that only a jury, not this Court, may make a determination of a defendant's possible mentally retarded status under any circumstances. Harris has misunderstood this Court's jurisprudence on this issue. In a series of cases involving retroactive capital post-conviction procedures, this Court has declined to make an initial

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55 One expert did testify at the competency hearing that, based on the two low scores, he believed he had to say Harris was mildly mentally retarded, but that was not his conclusion after examining Harris and he found the scores surprising.

56 *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

finding of fact regarding mental retardation, remanding for jury determination the question of whether a capital defendant, convicted and currently on Death Row, is mentally retarded.[57] That is not the issue here. The issue is whether, on this record, Harris's counsel was ineffective for failing to ask for a pretrial determination of mental retardation. Nothing in this record shows that, had counsel made that request, evidence would have shown by a preponderance of the evidence that Harris was mentally retarded. There is a great deal of evidence in the record to show otherwise, including the opinion of several experts who testified that Harris was not mentally retarded. We cannot conclude there was a reasonable probability that, but for counsel's omission, the results of this resentencing proceeding would have been different.

¶ 33. In Proposition II Harris claims that trial counsel was ineffective for failing to present evidence of diminished mental capacity and probable mental illness. This evidence was available to counsel or easily discoverable, and much of it was presented at Harris's first trial. Trial counsel has a duty to investigate and present relevant mitigating evidence.[58] However,

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[57] *See, e.g., Pickens v. State*, 2005 OK CR 27, 126 P.3d 612, 616; *Lambert v. State*, 2005 OK CR 26, 126 P.3d 646, 650; *Murphy v. State*, 2005 OK CR 25, 124 P.3d 1198, 1208.

[58] *Rompilla*, 545 U.S. at 380-81, 125 S. Ct. at 2462; *Wiggins*, 539 U.S. at 523, 123 S. Ct. at 2536; *Williams*, 529 U.S. at 393, 120 S. Ct. at 1513; *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2052. *See also Garrison v. State*, 2004 OK CR 35, 103 P.3d 590, 619 (appellate counsel's failure to adequately participate in evidentiary hearing on ineffective assistance of trial counsel, waiving the issue, was itself ineffective where trial counsel had failed to investigate or present mitigating evidence).

where counsel makes an informed decision to pursue a particular strategy to the exclusion of other strategies, this informed strategic choice is "virtually unchallengeable".[59] We have noted that among counsel's basic duties is "to make informed choices among an array of alternatives, in order to achieve the best possible outcome for the client."[60] The United States Supreme Court has found counsel ineffective where the failure to thoroughly investigate and present mitigating evidence "resulted from inattention, not reasoned strategic judgment."[61]

¶ 34. At Harris's resentencing trial, defense counsel presented mitigating evidence through Harris's sister, brother, former co-worker and employer, son-in-law, and two daughters. His most extensive mitigating evidence was presented through Dr. Draper, an expert witness in developmental analysis. Dr. Draper testified extensively regarding the developmental processes that led Harris to commit these crimes. She began by discussing his tumultuous and abusive childhood. She described his medical problems throughout childhood as well as his learning disabilities, low intelligence, and academic and social problems in school, including schoolyard fights. Dr. Draper described how, during Harris's teenage years, his father taught him to be a transmission mechanic but also taught him to use

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59 *Jones v. State*, 2006 OK CR 5, 128 P.3d 521, 535, cert. denied, 549 U.S. 963, 127 S. Ct. 404, ___ L.Ed.2d ___, quoting *Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066. *See also Thacker v. State*, 2005 OK CR 18, 120 P.3d 1193, 1195 (presumption of sound trial strategy has highly deferential review).

60 *Jones*, 128 P.3d at 535.

61 *Wiggins*, 539 U.S. at 526, 123 S. Ct. at 2537.

drugs and alcohol regularly. Dr. Draper discussed the very negative effect on Harris of his mother's lingering death from cancer, the death of his grandparents, and the family's separation. She testified regarding Harris's brief first marriage. Dr. Draper noted that Harris's first wife had alleged he was abusive and filed for a victim's protective order and divorce, but said Harris's first wife told her that Harris did not abuse her and she had said otherwise because she wanted to leave him. Dr. Draper told jurors of Harris's attempt at suicide when his first wife left him. She explained that for several years Harris and Pam had custody of his daughters, and described his love for his daughters as well as his inability to engage emotionally as a parent. She described his relationship with Pam, including a mutual pattern of verbal and emotional abuse. Dr. Draper showed jurors how Harris depended on Pam emotionally and professionally.

¶ 35. Throughout her testimony Dr. Draper emphasized that Harris's chaotic and troubled background resulted in extreme emotional instability. She discussed how his low intelligence and chronic substance abuse contributed to his inability to handle stress or resolve problems. She described Harris's reliance on Pam, and his feelings of despair and devastation when Pam left him. Dr. Draper also emphasized Harris's anger at his situation, and at the loss of his tools, and his inability to control or appropriately express his anger. She testified that this inability was caused by Harris's immaturity, emotional instability, poor judgment, and confusion. She noted his expressions of remorse for Merle Taylor's death, while agreeing that Harris still blamed Pam

for leaving him and causing him to commit the crimes. She discussed psychological methods of predicting future violence, and testified that in a controlled environment, medicated, without access to controlled substances and without a romantic partner, she did not believe Harris would be dangerous. Dr. Draper testified that Harris had been diagnosed as mentally ill and was on psychotropic medications in jail. She stated that she did not further explore the area of mental illness because those diagnoses had been made after the crimes occurred, and her focus was on explaining Harris's actions and symptoms of underlying difficulties which led to the crimes. However, her observations of Harris's behavior were consistent with the diagnoses.

¶ 36. After Dr. Draper testified, counsel attempted to have a representative from the jail testify regarding the medications Harris took for his mental conditions. Counsel failed to give notice of this testimony to the State. The trial court noted that mere evidence Harris was on medication would encourage jury speculation regarding Harris's mental condition. Harris argues that this attempt shows counsel realized he had erred in failing to present evidence of mental illness.

¶ 37. Harris complains that counsel failed to present extensive evidence regarding his mental state and diagnoses of mental illness. Most of this evidence was presented at Harris's first trial or his competency proceedings, and was readily available to counsel. A significant portion of this evidence was presented at the first stage of Harris's original trial, to argue his mental state could not support a finding of malice, rather than as evidence in mitigation. After

the crimes, questions were raised regarding Harris's competency. At one point he was sent to Eastern State Hospital, received treatment and medication, and was declared competent.

Doctors representing the court, the State, and the defense examined Harris throughout the pretrial proceedings. He received several diagnoses of mental illness: bipolar disorder with psychotic features, schizo-affective disorder, depressive with psychotic features. Experts agreed at the very least Harris was clinically depressed. They all also noted his low intelligence. One expert for the State, and the doctors at Eastern State Hospital, suspected Harris was either malingering or exaggerating his mental condition. One defense expert testified that, based on his contact with Harris shortly after the crimes, Harris was probably suffering from mental illness at the time of the crimes. Nobody believed that Harris's mental illness, even if present when the crimes were committed, rendered him legally insane; the experts agreed that Harris knew right from wrong and understood the consequences of his actions. Harris's experts described the connection his mental illness and chronic substance abuse may have had with the crimes. They testified that as a consequence of his mental state, Harris was low functioning and emotionally unstable, unable to solve problems or take action towards goals, highly agitated and angry. At the first trial, Harris's expert on future dangerousness testified that he could not say Harris would not be a danger to society; he did say that, in a controlled environment and with medication, Harris would present less danger than otherwise.

¶ 38. After thoroughly considering the evidence which was presented at Harris's resentencing trial,

and the evidence which was presented earlier and could have been presented, this Court concludes that counsel was not ineffective. Counsel was aware of the evidence of mental condition and status. Rather than rely on it to persuade jurors that Harris's mental state and after-diagnosed mental condition were mitigating circumstances, counsel chose a different path. He called Dr. Draper to testify regarding Harris's development over his life. This evidence was comprehensive. It included Harris's troubled and abusive childhood, his low IQ and trouble in school, his difficulty with marital relationships, his relationships with his family and daughters, his dependency on Pam, the mutually abusive nature of that relationship. Dr. Draper also discussed Harris's chronic substance abuse which began when he was a teenager with his father, his poor judgment, anger and inability to solve problems, and his extreme emotional instability. She also discussed the likelihood that, based on his past behavior and mental state, Harris would be a danger in the future. While Harris's specific diagnoses of mental illness were not presented to the jury, jurors were told he had been diagnosed as mentally ill. Those diagnoses were made after the crimes, and Dr. Draper did describe the highly emotional mental state Harris was in at the time of the crimes. Dr. Draper used all this evidence to explain why Harris could not accept his circumstances and resorted to murder.

¶ 39. Harris claims that the prejudice from this decision is evident. At the first trial, jurors heard much of this evidence. During deliberations, they asked a question about the type of prison in which Harris might serve a sentence of imprisonment. The

trial courts answer to this question, which was inaccurate as a matter of law, resulted in the cases reversal and this resentencing trial.[62] Harris contends this indicates that his first jury seriously considered imposing a sentence of less than death, and claims that, had the evidence been presented again, his resentencing jury would have done the same. This Court cannot speculate as to why Harris's first jury asked their question, or what its sentencing intent might have been. Counsel chose to provide Harris's resentencing jury with a thorough picture of his life, intelligence, and emotional state, including his anger, grief and despair immediately preceding the crimes. Through Dr. Draper, jurors heard evidence which encompassed or incorporated some of the evidence presented at the first trial. We will not second-guess counsel's reasoned strategic judgment. Counsel's choice of mitigating evidence did not amount to ineffective assistance.

¶ 40. In Proposition XI Harris raises several claims of ineffective assistance of counsel. He fails to show any prejudice from counsel's alleged omissions, and we will not find counsel was ineffective.

¶ 41. Harris first notes that counsel failed to object to errors raised in previous propositions, and asks that those be reviewed for ineffective assistance of counsel. As we have found no error in the previous propositions, counsel cannot be ineffective for failing to raise objections to issues contained therein.[63] Harris also claims counsel failed to conduct a thorough and

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62 *Harris*, 84 P.3d at 757.

63 *Williams*, 529 U.S. at 393, 120 S. Ct. at 1513; *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

independent investigation of his case. We found in Propositions I and II that counsel was not ineffective for failing to claim Harris was mentally retarded, or for failing to present the evidence of mental status and mental illness raised in his first trial and competency proceedings. Relying on the issues raised in Propositions I and II, Harris claims that counsel failed to independently investigate the case as previously developed in order to satisfactorily conclude that the extant evidence was viable and reliable. This appears to be speculation, as the record does not support this allegation.

¶ 42. Harris also claims that counsel failed to present evidence directly bearing on the continuing threat aggravating circumstance. In fact, Dr. Draper did discuss methods for predicting future dangerousness, and gave her opinion that Harris would not be a future danger to society. Harris argues that counsel should have presented an expert on risk assessment, who could have provided an accurate and scientifically sound analysis of the exact likelihood that Harris would be a future danger. The experts who testified at Harris's first trial, and Dr. Draper, all testified that he was in fact likely to pose a risk of future danger. Harris's experts testified that, under particular circumstances likely to be found in prison, that risk was significantly lessened, but they all agreed that Harris posed more risk to the general population than the average person. Given this evidence, we will not say counsel was unreasonable for

choosing not to stress the issue of Harris's potential for danger to society by using risk assessment evidence.[64]

¶ 43. This proposition is accompanied by an Application for Evidentiary Hearing. To support his claim that counsel did not conduct a thorough independent investigation, Harris provides an affidavit with a psychological evaluation conducted after the trial ended. As he notes in his brief, this evaluation is consistent with other psychological evaluations which were available to counsel. To support his claim that counsel failed to present evidence bearing on the continuing threat aggravating circumstance, Harris offers an affidavit containing a risk assessment profile. This profile reaches a similar conclusion to that of Dr. Draper and other experts-in a controlled, structured environment, medicated, without access to controlled substances, and without a romantic relationship such as that with Pam, Harris poses little threat to society. The application for evidentiary hearing and supplemental materials do not contain sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to use or identify the evidence.[65] Harris's Application for Evidentiary Hearing is denied.

Cumulative Error

¶ 44. In Proposition XII Harris claims that the accumulation of errors in the preceding propositions requires relief. In Proposition III, we found the trial

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64 *Jones*, 128 P.3d at 535; Strickland, 466 U.S. at 690-91, 104 S. Ct. at 2066.

65 Rule 3.11(B)(3)(b), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App. (2007).

court erred in failing to bring the jury into open court when a question was presented in deliberations, but that error was harmless. In Proposition VI we found that error in argument was cured by instructions. Even taken together, these errors do not require relief.[66]

Mandatory Sentence Review

¶ 45. We must determine (1) whether the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor, and (2) whether the evidence supports the jury's findings of aggravating circumstances.[67] Upon review of the record, we cannot say the sentences of death were imposed because the jury was influenced by passion, prejudice, or any other arbitrary factor.

¶ 46. The jury was instructed on and found the existence of two aggravating circumstances: (1) the defendant knowingly created a great risk of death to more than one person, and (2) there existed a probability that Harris would commit criminal acts of violence which would constitute a continuing threat to society. Harris presented evidence that he was abused and neglected as a child, suffered the death of his mother as a teenager, had low intelligence, was a chronic substance abuser, was mentally ill, and was very dependent on Pam Harris; that he had no prior convictions, had no misconduct citations in prison and only one while incarcerated in jail, had a good prison record and could live within prison society; that his family loved and needed him and he was remorseful for his actions. The jury was specifically instructed

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66 *Browning*, 134 P.3d at 846.

67 21 O.S. 2001, § 701.13(C).

on thirteen mitigating factors, and invited to consider other mitigating evidence they might find.[68] Upon our review of the record, we find that the sentences of death are factually substantiated and appropriate.

¶ 47. Jimmy Dean Harris was tried by jury and convicted of Murder in the First Degree, in the District Court of Oklahoma County, Case No. CF-1999-5071, resentenced to death, and appeals. The Sentence of the District Court is AFFIRMED. Pursuant to Rule 3.15, Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch. 18, App. (2007), the MANDATE is ORDERED issued upon the delivery and filing of this decision.

LUMPKIN, P.J.: concur in results.

C. JOHNSON, V.P.J., A. JOHNSON and LEWIS, JJ.: concur.

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[68] Harris had no prior convictions; had no reported misconduct as a Department of Corrections inmate; had a lifelong addiction to drugs and alcohol beginning at age 14; Harris was continuously confined from September 9, 1999, to the date of trial, but had only one misconduct write-up in the Oklahoma County Jail; on the morning of the crimes Harris was overwhelmed by the powerful emotions of anger and fear of life without Pam Harris; was capable of living cooperatively within prison society; was diagnosed with a low I.Q. which made it difficult for him to solve problems; Harris has a sister and brother who love him; has daughters who love and need him; is remorseful for what he did and the pain he caused the Taylor family and his own family; his mental condition, alcoholism and drug abuse combined with strong emotions led to his decision to bring a gun to AAMCO Transmission and murder Taylor; as a young child Harris was beaten by his father and neglected by both parents; Harris's mother, the one adult who consistently loved him, died of cancer when he was a teenager. Instruction No. 9.

NEUROPSYCHOLOGICAL CONSULTATION REPORT ON JIMMY DEAN HARRIS, JR. BY JENNIFER L. CALLAHAN, PH.D. (EVALUATION DATE MARCH 13, 2006)

Patient Name: Jimmy Dean Harris, Jr.
Date of Birth: 10/20/1956
Date of Evaluation: 03/13/2006
Examiner: Jennifer L. Callahan, Ph.D.

The following background information was obtained via self report during clinical interview and from records provided by Mr. Harris' legal counsel.

Identifying Information and Reason for Referral

Mr. Harris is a 49-year-old, twice divorced, right-handed, Caucasian male in no apparent distress, referred for evaluation by his appointed legal counsel to assist in defining his current neurocognitive profile in comparison to other individuals of his age and educational level and to serve as a comparison with results of past, and potentially future, testing.

Brief History

Social and Family History

Mr. Harris is the youngest of three children born in an intact family unit and raised in Oklahoma City, Oklahoma. During an evaluation in childhood, Mr. Harris' mother described his birth and early developmental milestone attainment as normal. Reportedly, Mr. Harris witnessed and experienced physical abuse perpetrated by his father and his parents divorced when he was approximately 8 years old. Following the divorce, Mr. Harris remained with his mother,

who typically worked two jobs to support the children. Both parents are now deceased. Family history is remarkable for substance abuse (father and brother), cancer (mother and father), and heart disease (father).

Mr. Harris married for the first time in 1977 and this union produced two daughters, before formally dissolving in 1981. He then had another daughter with a woman, whom he later married (1989), though this marriage also ended in divorce (1999).

Educational/Occupational History

Mr. Harris reportedly participated in special education services for reading, spelling, and math during elementary school. The records are somewhat inconsistent in dating when Mr. Harris discontinued formal education. Most records state that he dropped out during the 11th grade and this is consistent with Mr. Harris' verbal self-report. However, at times it is reported that he completed 9th or 10th grade and elsewhere it indicates that he dropped out of high school only 2 credits short of meeting matriculation requirements earning mostly C's and D's in his coursework. Since discontinuing his formal education, Mr. Harris has worked inconsistently in the oilfields, laying carpet, and plumbing. However, he primarily worked repairing transmissions, a trade skill he learned from observation and informal instruction from co-workers of his father (who was a mechanic).

Psychiatric and Medical History

Mr. Harris is status post chicken pox (1961), status post appendectomy (1963), status post tonsillectomy (1963), status post measles (~1964), status post left forearm fracture (1978), and status post puncture

wound to left hand, with resultant infection, necessitating surgery (1998). A childhood accident involving a lawnmower resulted in a wire penetrating his abdomen and necessitating surgery at approximately age 7.

In approximately 1978 or 1979, while his first marriage was dissolving, Mr. Harris reportedly attempted suicide by drinking half a gallon of whiskey and another half a gallon of Raid, resulting in hospitalization at Oklahoma Memorial Hospital and a diagnosis of heart arrhythmia.

Mr. Harris sustained a crushing injury on 11/28/1984 from a transmission being dropped on the small finger of his right hand. After two surgeries, complicated by infection, amputation was completed. Mr. Harris evidently compensated well for any loss of functioning with no lasting impairment of occupational functioning ability following the procedure and recovery period.

Mr. Harris has a history of motor vehicle accident which allegedly resulted in concussion and injury to neck and back (10/15/1998 in Dallas, TX), for which he underwent treatment (11/987/99) with Dr. Bill Gentry.

On 10/12/1999, Mr. Harris was admitted to Eastern State Hospital secondary to visual and auditory hallucinations for treatment and restoration of competency. He was discharged 4/08/2000 with discharge diagnoses listed as: Major Depression, with psychotic features. Competency was considered successfully restored.

Mr. Harris was readmitted to Eastern State Hospital on 6/06/2001 due to auditory hallucinations with a goal of restoring competency. At that time his diagnosis was revised to Major Depression, recurrent,

with psychotic features. Intermittent memory problems were noted and staff considered him to be "slow" in learning and processing information. Competency was considered restored at discharge on 7/30/2001.

Finally, Mr. Harris reportedly has a long standing history of whiskey, marijuana, and valium abuse dependence, with regular usage of alcohol and marijuana beginning at age 16. During his period of greatest use, Mr. Harris was smoking 10 joints and drinking half a bottle of NyQuil daily, in addition to a case of alcohol weekly. Mr. Harris reportedly experienced repeated loss of consciousness and legal involvement (public drunkenness and several DUI incidents) as a result of his substance abuse. He has also previously reported experiencing seizure following ingest of valium on at least three occasions. Finally, Mr. Harris has a history of cigarette smoking (up to 3 packs per day during his period of greatest use).

Evaluations to Date

Psychometric consultation on 4/20/1964 recorded diagnostic impressions of compulsive personality, perception disorder, and dyslexia with further evaluation recommended at that time. As a result, Mr. Harris underwent intelligence testing (Dr. Teresa Costiloe) for, apparently, the first time at University of Oklahoma Hospital. Testing with the Stanford-Binet Revised resulted in an estimated full scale IQ of 87. On the WISC, he obtained a full scale IQ of 83, with a non-significant difference between his obtained verbal IQ of 81 and non-verbal, performance IQ of 87. He was noted to be having learning difficulties in school as well as difficulty relating to same aged children, communicating with family, and sleeping.

Bipolar Disorder with psychotic symptoms was diagnosed during serial competency evaluations by Dr. John Smith (psychiatrist) spanning the course of Mr. Harris' court involvement. Dr. Smith also diagnosed Mr. Harris as having Mild Mental Retardation, based in part on the reported test results of the intelligence testing described below.

Intelligence testing on 10/20/2000 (Dr. Nelda Ferguson) with the WAIS-III resulted in a full scale IQ of 63, without a statistically significant difference between his verbal IQ of 69 and non-verbal, performance IQ of 60. On the basis of these testing results, Mr. Harris was deemed to evidence Mild Mental Retardation. Achievement testing (WRAT-3) demonstrated impaired skills in word recognition (standard score: 66), spelling (standard score: 47), and arithmetic (standard score: 64). Projective testing coupled with a review of Mr. Harris' background were considered indicative of Bipolar Disorder and Borderline Personality Disorder. Of particular note, the examiner observed what were thought to be several petit mal seizures during the evaluation.

Another psychological evaluation was conducted from 3/08 to 3/21/2001 (Dr. Martin Krimsky) while Mr. Harris was incarcerated. Intelligence testing with the Slossen (SIT-R) resulted in an IQ equivalency of 66, while intelligence testing with the WAIS-R resulted in an IQ of 68. On this basis, Mr. Harris was considered to have Mild Mental Retardation. Symptom presentation and results of Rorschach testing were thought to be indicative of Bipolar Disorder with psychosis.

Mr. Harris was seen on 4/8/2001 for evaluation of symptom feigning with the SIRS. All scores fell within the honest or indeterminate range, with no

scales falling in the probable or definite range, which was counter to a malingering explanation for his symptom presentation.

Psychological evaluation was again performed on 7/20/2001 (Kim Burke, intern and Dr. Elizabeth Grundy) while Mr. Harris was hospitalized at Eastern State Hospital. The MMPI-2 was considered uninterpretable due to Mr. Harris having an inadequate reading ability. Evaluation of psychological symptom feigning was conducted with the SIRS with all scores falling in the "honest" to "indeterminate" range. On the Test of Memory Malingering (TOMM) he scored within normal limits. Cognitive testing with the WAIS-III, revealed borderline impaired general intellectual abilities (FSIQ: 75) with no significant discrepancy between his verbal abilities (VIQ: 79) and non-verbal, performance abilities (PIQ: 75). A relative strength in span of auditory attention was noted. However, more in-depth testing of memory (WMS-III), demonstrated borderline impaired general memory {Scaled score: 77), with subcomponents of memory ranging from the borderline impaired to low average range.

Medications

Primary medications used by Mr. Harris in the past several years, with good effect, include Risperdal, Depakote, Celexa, Sinequan, Zoloft, Vistaril and Benadryl, Ineffectiveness of Stelazine was noted. Recent medical records report no known medication allergies, but earlier records indicate a codeine allergy.

Tests Administered

- Animal Naming
- Bells Test
- Boston Naming Test
- Brief Visual Memory Test-Revised (BVMT-R): Form 1
- Brief Visual Memory Test-Revised (BVMT-R): Form 2
- California Verbal Learning Test-II (CLVT-II): Standard Form
- California Verbal Learning Test-II (CLVT-II): Alternative Form
- Clock Drawing and Time Setting tasks
- Digit Span (from Wechsler Memory Scale—III)
- Digit Symbol-Coding (from Wechsler Adult Intelligence Scale—III)
- Finger Oscillation
- Graphic Sequencing
- Greek Cross
- Grip Strength
- Grooved Pegboard
- Hooper Visual Organization Test (Hooper)
- Information and Orientation (from Wechsler Memory Scale—III)
- Judgment of Line Orientation (JOLO): Form H
- Letter Number Sequencing (from Wechsler Memory Scale—III)
- Line Bisection
- Lurian Motor Tasks

- Repeatable Battery for the Assessment of Neuropsychological Status (RBANS): Form A
- Rey-O Complex Figure Test (Rey-O)
- Ruff Figural Fluency Test (Ruff)
- Stroop Color Word Test (Stroop)
- Symbol Digit Modalities Test (SDMT)
- Symbol Search (from Wechsler Adult Intelligence Scale—III)
- Trail Making Tests (A & B)
- Wechsler Abbreviated Scale of Intelligence (WASI)
- Western Aphasia Battery (Abbreviated)
- Wide Range Achievement Test—4 (WRAT-4): Blue Form
- Wide Range Achievement Test—4 (WRAT-4): Green Form
- WISC-III Mazes
- Woodcock-Johnson III: Standard and Extended Cognitive Batteries (WJ:C)

Scoring Information

Raw score performances are converted to standard scores, represented as T-distributions with M=50 and SD=10. Lower values represent worse performance. Thus, T-values, from 40 to 31 reflect "mild" impairment *(i.e., worse than 1 SD from the mean)*, *and T-values lower than 30 reflect "significant" impairment (i.e., worse than 2 SD from the mean)*.

Results

Behavioral Observations

Mr. Harris was well groomed but appeared somewhat older than his chronological age. He was pleasant and cooperative, both upon approach and throughout the duration of the evaluation. He was alert through the evaluation, which was accomplished in a single, extended session without breaks. He ambulated without assistance or difficulty. Rate of speech rhythm and prosody were unremarkable, but mild word finding difficulty with occasional compensatory circumlocutions was evident. Mr. Harris denied experiencing current anxiety or depression and there was no indication of hallucinations or delusional thinking at the time of the evaluation. There was no evidence of noncompliance or symptom magnification and the results of this evaluation are thought to be an accurate assessment of Mr. Harris' cognitive functioning from the point of view of effort.

Orientation

Mr. Harris was alert, with no complaints of fatigue during the testing session. In assessing orientation his only error was in misidentifying the town as "Oklahoma City" (instead of McAlester). Nevertheless, he was able to properly name the correctional facility and was otherwise fully oriented. Fund of personal knowledge was adequate for the purposes of the evaluation.

Sensory-Perceptual Processes

Mr. Harris reportedly is prescribed corrective lenses, but he did not have them available during the

evaluation. However, no accommodations to testing materials or procedures were necessary and the lack of corrective lenses is therefore not thought to have significantly interfered with his performance on visually mediated tasks. On a task of line bisection he made two omissions, both in the right visual field. On a more visually challenging symbol cancellation task, Mr. Harris' performance was borderline impaired with three omissions in the left visual field and one omission in the central field, despite taking adequate time for task completion and engaging in routine self-monitoring of his performance. On a task requiring him to identify line orientations Mr. Harris performed in the impaired range, with no localization of errors.

Attention, Concentration and Working Memory

Mr. Harris' span of auditory attention fell within the below average range (T=40), and the discrepancy between his forward recall (6 digits) and reversed recall (3 digits) borders on significance suggesting that his attention may be adversely impacted by increases in complexity. This conclusion is supported by his below average WJ:C working memory index score (T-38) and impaired (T=26) performance on a more complex working memory task that requires mental manipulation of letters and numbers. Similarly his RBANS attention index score, which is partially dependent on processing speed, falls into the impaired range (T=29).

Processing Speed

On measures assessing Mr. Harris' speed of information processing, performances were consist-

ently impaired. Although impaired, Mr. Harris' best performance was on a task of rapid color naming (Stroup: T=32). On a similar task involving rapidly reading three color names (red, blue, green) he performed more poorly (T=17), which is partially reflective of his poor reading skills. On a simple visual motor processing task requiring the connection of serial numbers (Trails A), Mr. Harris again performed in the impaired range (T=22). Mr. Harris also performed in the impaired range on two different non-verbal coding tasks (Ts-26 and 23) normed with different samples (WAIS-III and SDMT). Similarly, he performed in the impaired range on a task of identifying matching symbols (T=20). Finally, Mr. Harris' decision making speed was impaired (T=24). His WAIS-Ill processing speed index score falls in the impaired range (T=23), which is identical to his index score in the WJ:C index score for processing speed (T=23).

Motor Functions

Finger Tapping

Dominant: Impaired
Nondominant: Impaired

Grooved Pegboard

Dominant: Impaired
Nondominant: Impaired

Grip Strength

Dominant: Impaired
Nondominant: Impaired

Mr. Harris demonstrated right-hand dominance and performed in the impaired range bilaterally on all motor tasks presented to him, including: simple

motor speed (Ts=24 and 28 for dominant and non-dominant hands, respectively), fine motor dexterity (Ts=33 and 28), and grip strength (Ts=27 and 22). No abnormal laterality signs were noted. No akinetic tendencies were evident, though mild tremor was evident on incidental behavior. Mr. Harris noted onset of tremor to have followed initiation of psychotropic medications and considered the tremors to be a side effect of his prescribed medications. Mildly tremulous lines were apparent on some drawing tasks as a result of his tremor.

Language Functions

Spontaneous speech was typically fluent. Though occasional word finding difficulty was demonstrated, Mr. Harris was able to convey relevant information satisfactorily. Execution of simple two-and three-step serial commands was intact, as was comprehension of simple questions. Mr. Harris made only one minor error (of eight) during repetition of high and low frequency phrases. Confrontational naming was slightly low (raw score: 51 of 60), but there were no significant circumlocutions or paraphasic errors.

Spatial Functions

Mr. Harris' copy of a Greek cross figure was grossly intact, with only mild asymmetry. His uncued clock drawing was mildly impaired due to poor spatial placement and orientation of the numerals on the clock face. He performed within normal limits on a clock copy trial. Mr. Harris made no errors on a time reading task and was also able to correctly indicate the time during time setting tasks, though the hour

and minute hands were indistinguishable on one trial (of four administered).

Complex visual perception and integration was average (T=44), after correcting Mr. Harris' score to accommodate his limited education. Visual-spatial thinking, as measured on the Woodcock-Johnson III was also average (T=48). However, his performance in copying a complex line drawing was severely impaired. This copy evidenced poor representation of details and loss of appreciation for the gestalt, raising the possibility of constructional dyspraxia.

Intellectual Functioning

Due to the possibility of practice effects or undesirable familiarity with item content stemming from previous testing sessions the WAIS-III, a common measure of intelligence, was not administered to Mr. Harris during this evaluation. Instead, Mr. Harris was administered the WASI, an abbreviated scale of intelligence from the same publishing series as the WAIS-III, to facilitate comparisons with those previous evaluations. On this brief measure, Mr. Harris' full scale IQ was estimated to fall in the impaired to borderline impaired range (SS: 67-75), with significantly better nonverbal abilities (T=36) than verbal abilities (T=26).

Intelligence was more comprehensively examined by administering both the standard and the extended cognitive batteries from the Woodcock-Johnson III. On this instrument, Mr. Harris' general intellectual abilities were found to be low (SS: 72-77), approximately equivalent to the ability level of a 6 year, 10 month old child, with broad discrepancies in the underlying abilities.

For example, Mr. Harris demonstrated strength in his comprehension-knowledge (T=43) and visual-spatial thinking (T=48), both of which fell within the average range. However, his cognitive efficiency poses a significant weakness (T=31) that undermines his general intellectual functioning. In addition, his cognitive abilities are also adversely impacted by his limited phonemic awareness (T=38), and very limited cognitive fluency (T=31), working memory capacity (T=38), and executive processes (T=29).

Functional Academic Skills

Mr. Harris was administered two parallel forms of the WRAT-4 at different points in the evaluation session. Using the "blue" form of the WRAT-4, Mr. Harris demonstrated impaired functional academic skills in word recognition (T=22), sentence comprehension (T=23), spelling (T=20), and math computations (T=22), Later in the evaluation, Mr. Harris demonstrated similar impairment on the "green" form for word recognition (T=21), sentence comprehension (T=21), spelling (T=20), and math computations (T=28). Combining this information, Mr. Harris' grade level equivalency is at the 1st grade level of spelling skills and at the 2nd grade level for word recognition, spelling comprehension, and math computations.

Memory Functions

Although still low, Mr. Harris demonstrated better memory ability for information presented in a related context for both short-term (T=41) and delayed retrieval (T=37) on the Woodcock-Johnson III than was demonstrated on recalling a list of words. Mr. Harris was administered two parallel forms of the

CVLT-II, which is a verbal list learning task, at different points in the evaluation. Learning of the list across five trials was impaired for each form (Ts=25 and 29). Spontaneous recall following a brief delay was consequently impaired (Ts=30 and 25). Cued recall was also impaired (Ts=20 and <20), though forced choice recognition was acceptable (81.2% and 75%). Mr. Harris demonstrated a clear "recency" effect with 58% and 59% of freely recalled list items coming from the final portion of each list.

Free recall across three learning trials for line drawings was also impaired on two parallel forms of the BVMT-R (Ts=<20 on each form). Free recall following a brief delay was similarly impaired (Ts=20 on each form). Mr. Harris' scores on visual memory testing are somewhat lower than those obtained on his WJ:C memory performances and also the CVLT-II list learning performances, and may partially reflect his poor visuo-constructional

Self-Regulation/Executive Functions

After correcting for Mr. Harris' limited educational background, semantic fluency (animal naming) was impaired (T=20) as was phonemic fluency (T=25). These scores might have been negatively impacted by Mr. Harris' underlying limited phonemic awareness (WJ:CT-38), though behaviorally Mr. Harris appeared to be experiencing more basic thought blocking. Some support for the possibility of thought blocking is found in Mr. Harris' impaired score for cognitive fluency on the Woodcock-Johnson III (T=31).

Non-verbal figural fluency was not substantially better, despite removing the phonemic qualities of the task, and revealed impairment (T=29). Further,

he evidenced a loss of cognitive set during one trial of the task. Although there was no significant verbal perseveration, non-verbal perseveration was prominent during both design fluency (T=31) and complex motor programming.

Complex motor programming was broadly impaired. He required extended modeling and verbal mediation to acquire the necessary set to carry out all motor programming tasks. Following acquisition, he was prone to loss of set and within task motor perseveration. Graphic sequencing evidenced perseverative tendencies, With clear perseveration at one point early in the task and more pronounced, resulting in a loss of set, at the conclusion of the task.

On a planning task in which Mr. Harris was asked to solve mazes, he performed in the impaired range (T=19). Performance on a task requiring the simultaneous tracking of, and alternation between, two mental sequences (numbers and letters) was impaired due to slowing, but Mr. Harris also loss the cognitive set required near the end of the task, necessitating reminding him of the task requirements for completion. Finally, Mr. Harris demonstrated impaired ability in executive processes (T=29) on the Woodcock-Johnson III.

CONCLUSIONS

1. Mr. Harris obtained remarkably consistent results during the current evaluation. This is despite being tested using parallel forms, without warning, at different points in the evaluation and using tests that are normatively based and standardized on unrelated groups of people. There is no indication

from Mr. Harris' behavior or the results of testing of variable effort.

2. Comparison of the current findings with prior evaluations does appear to indicate some variability in scores for intellectual ability. However, closer review of those results indicates greater consistency than one may appreciate initially.

For example in 1964, at the age of 7, it was reported that Mr. Harris obtained a full scale IQ of 83 on the WISC. This score report is complicated by two issues:

- First, an individual's IQ is not truly represented by a single number. Rather, a person's true IQ falls within a defined possible range and will vary under normal circumstances while remaining within that range. For the WISC, the IQ range for a score of 83 was from 78 to 88.
- Second, Mr. Harris was administered the WISC in 1964, which is 15 years after the test was introduced. Since that time, scholars have since found what is often referred to as the "Flynn" effect. The Flynn effect refers to the observation that the average IQ drifts upward slightly each year, which necessitates the development of new IQ tests on a regular basis. The publishers of the WISC have acknowledged that for this series of tests, the Flynn effect is most pronounced in the lower IQ ranges. In this test series, the Flynn effect equates to scores drifting 1/3 to 1/2 a scaled score point annually. For Mr. Harris, this means that a score of 83±5 in 1964 would equate to a

> score of 75.5±5 (using the more likely 1/2 point drift estimate) had the WISC not been as dated of a test at the time of administration to Mr. Harris. This range is consistent with the currently obtained findings on both the WASI and WJ:C measures.

In late 2000 and into 2001, Mr. Harris was administered intelligence tests on several occasions over a relatively brief period of time. Several of the tests appeared to reflect impaired general intelligence with a full scale IQ in the low to middle 60's. However, these tests were administered when Mr. Harris was reported to be psychotic. Acute psychosis is known to have a negative impact on one's intellectual functioning; largely, because such individual's are often unable to optimally focus on the tasks presented to them during testing. However, repeat testing in the summer of 2001, after Mr. Harris was medicated and stabilized, revealed a full scale IQ range that is again consistent with the current findings.

3. The current findings, in conjunction with past evaluations, indicate borderline intellectual functioning. However, Mr. Harris' cognitive abilities are not uniformly at this level and he demonstrates a range of strengths and weaknesses. He demonstrates a relative strength in his visual-spatial thinking abilities, which has historically been reflected in his ability to maintain employment repairing transmissions. Areas of relative weakness are more common, and these are outlined below:

- Mr. Harris' word recognition and sentence comprehension skills are impaired and he may be considered functionally illiterate. He is able to sign his name and may be vulnerable to

exploitation by signing paperwork that others misrepresent to him verbally. When information is presented to him verbally, it should be presented slowly using vocabulary understandable to Mr. Harris. This may require several repetitions due to his slowed information processing speed and poor memory (see below). His verbal comprehension skills are a relative strength and Mr. Harris is able to understand verbally presented information as long as it is put in terms that are known to him.

- Mr. Harris' speed of information processing poses a significant liability in a wide range of circumstances. People involved in his care should be aware of this and allow him additional time to process information before expecting him to respond.
- Mr. Harris experiences considerable difficulty both with learning new information and with recalling memories or previously learned information. New information should be presented in small amounts, with much repetition and extra time allowed for processing and encoding before he is expected to recall and utilize newly learned information. Memory of unrelated information, or information not presented within a meaningful framework, is likely to be particularly problematic.
- Further, Mr. Harris demonstrates rapid forgetting and set backs are to be expected as he learns new information. He is able to recall information better if provided with cues for his response, but his best performance may be

elicited by presenting him with forced choice response options (e.g., did counsel say "x option" or "y option" to you?). This format should only be used if one of the two choices presented is, in fact, accurate information while the other choice is not something Mr. Harris has ever been exposed to.

- Mr. Harris' decision making speed and ability to plan and organize is impaired. He is most likely to function optimally in settings that are clearly defined and well structured with high levels of positive reinforcement.

4. According the available records, Mr. Harris did not evidence any psychotic symptoms until considerably later than is typically observed in men. While this is a somewhat unusual course, it is not incompatible with a diagnosis of mood disorder with psychotic features (a diagnosis he presently carries) or a diagnosis of schizoaffective disorder (a diagnosis which alternatively may account for his historical presentation and cannot be ruled out from the information provided).

Yet, an alternative non-psychiatric explanation merits ruling out at this time. Some seizure disorders are strongly linked to hallucinatory experiences [e.g., temporal lobe epilepsy (TLE)] and this might account for the late onset of Mr. Harris' reported hallucinations. During this evaluation Mr. Harris appeared to display thought blocking, which is not uncommon in those with significant mood disorders or psychosis. It might be that the previous evaluator who noted what they thought were petit mal seizures was observing similar behaviors; however, it is also possible that the thought blocking episodes in this evaluation are better conceptualized as absence seizures related to seizure disorder.

In addition, mild difficulty in sensory testing and some possibility of constructional dyspraxia are found in this evaluation.

In general, the findings of the present evaluation are not strongly supportive of TLE, but seizure disorder cannot be ruled out on the basis of this evaluation alone and merits inquiry. Further evaluation by a neurologist, with consideration of possible neuroimaging (MRI) is encouraged to facilitate conceptualizing Mr. Harris' neurocognitive profile. Mr. Harris is presently taking medication from the anti-seizure class and this should be communicated to the physician prior to completing such an evaluation.

5. Based on the inconsistencies found in the medical records with respect to medication allergies, it is recommended that Mr. Harris avoid formulas containing codeine.

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