No. _____

In The
Supreme Court of the United States

ANITA TRAMMELL, Warden,
Oklahoma State Penitentiary,

Petitioner,

v.

STERLING B. WILLIAMS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Beck v. Alabama, 447 U.S. 625 (1980) holds that a death sentence cannot be imposed for capital murder where a jury was precluded from considering a lesser offense that was supported by the evidence. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) holds that state court adjudications reviewed under 28 U.S.C. § 2254(d) be "given the benefit of the doubt" and that a federal habeas court's "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law."

The questions presented by the case sub judice are:

1. Whether the Court of Appeals exceeded its authority to grant a writ of habeas corpus when it completely disregarded and ignored this Court's well established precedent of *Visciotti* and its progeny, by finding a state court's application of *Beck* contrary to United States Supreme Court precedent, although the state court expressly recognized, cited and applied the appropriate federal standard of review but its analysis was not a model of clarity.

2. Whether the decision of the Court of Appeals finding error under *Beck* based solely on speculative and non-existent evidence is so clearly erroneous, and in conflict with other lower federal courts, that this Court

QUESTIONS PRESENTED – Continued

should, if not grant plenary review, at least grant certiorari, vacate the Court of Appeals's decision, and remand with instructions to deny habeas corpus relief.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATE CASES

TABLE OF AUTHORITIES – Continued

FEDERAL STATUTES

STATE STATUTES

CONSTITUTIONAL AUTHORITY

Anita Trammell, Warden, Oklahoma State Penitentiary respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The unpublished Order and Judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") is reported as *Williams v. Trammell*, No. 11-5048, 2013 WL 4504774 (10th Cir. Aug. 26, 2013) and is reprinted at pages 1 through 27 of the appendix accompanying this petition ("Pet'r App."). The Order of October 4, 2013, denying the Petition for Rehearing and Suggestion for Rehearing En Banc has not been reported. It is reprinted at page 228 of the appendix.

The District Court's Order, entered March 7, 2011, is also unpublished but is reported as *Williams v. Workman*, No. 02-CV-377-JHP-FHM, 2011 WL 841064 (N.D. Okla. Mar. 7, 2011). It is reprinted at pages 28 through 149 of the appendix.

The Opinion of the Oklahoma Court of Criminal Appeals ("OCCA") is published as *Williams v. State*,

22 P.3d 702 (Okla. Crim. App. 2001).[1] It is reprinted at pages 150 through 227 of the appendix.

STATEMENT OF JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on August 26, 2013. The Order denying panel rehearing and en banc rehearing was entered on October 4, 2013. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (permitting the review of judgments of courts of appeals).

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[1] The question presented for certiorari review by Respondent from the OCCA's direct appeal decision was whether the OCCA erred in finding no evidence supported an instruction on the lesser offense of murder in the second degree. *See* 10/15/2001 Petition for Writ of Certiorari (No. 01-6958, *Williams v. Oklahoma*, 534 U.S. 1092 (2002)). This is the same issue on which the Court of Appeals granted habeas relief in this case.

U.S. Const. amend. XIV(1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(d):

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

Okla. Stat. tit. 21, § 701.7(A):

> A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

Okla. Stat. tit. 21, § 701.8 (in pertinent part):

> Homicide is murder in the second degree in the following cases: . . . When perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual[.]

STATEMENT OF THE CASE

A. State Court Proceedings.

On May 14, 1997, the Respondent, Sterling Williams murdered LeAnna Hand in her Tulsa, Oklahoma home, a duplex which she shared with Elizabeth Hill. Respondent was an independent contractor for the Colorado Choice Meat Company. He had sold Ms. Hand meat on prior occasions. Respondent phoned Ms. Hand and told her he would bring her some free meat. Respondent came to Ms. Hand's home with a box from the Colorado Choice Meat Company containing a roll of duct tape, a butcher

knife and a pair of gloves. Respondent murdered Ms. Hand by plunging the knife seven inches into her chest. The knife cut through her ribs, through a portion of her left lung, through her heart and into her right lung.

Respondent then turned his attention toward Ms. Hill. Ms. Hill was attempting to call 911 when Respondent kicked in her bedroom door and knocked the phone from her hand. Ms. Hill escaped from her bedroom, but Respondent tackled her in the hallway. Respondent put both hands around her neck. Ms. Hill fought back and was able to escape and run out of the duplex.

Respondent was tried in the District Court of Tulsa County, Oklahoma, in Case No. CF-1997-2385 and was convicted of Murder in the First Degree (Count I) and Assault and Battery with Intent to Kill, After Former Conviction of Two or More Felonies (Count II). During trial, Respondent requested an instruction on the lesser offense of murder in the second degree. This request was denied. Respondent also requested an instruction on the crime of assault and battery as a lesser offense to assault and battery with intent to kill. This request was granted.

In a separate penalty phase proceeding, the jury found the existence of four statutory aggravating circumstances: (1) Respondent was previously convicted of a felony involving the use or threat of violence; (2) Respondent knowingly created a great risk of death to more than one person; (3) the murder was

committed to prevent lawful arrest or prosecution;[2] and (4) there existed a probability that Respondent would commit criminal acts of violence that would constitute a continuing threat to society. Respondent was sentenced to death.[3]

Respondent appealed his convictions and sentences to the OCCA. On direct appeal, Respondent raised numerous claims, including the trial court's alleged error in failing to instruct the jury on the lesser crime of murder in the second degree.[4] The OCCA found this proposition of error to be without merit. *Williams*, 22 P.3d at 712; Pet'r App. at 161-62.

Pursuant to Oklahoma law, to support a finding of murder in the second degree, the evidence must reveal the accused had no design to effect the death of the victim. Okla. Stat. tit. 21, § 701.8(1).

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[2] The OCCA subsequently found this aggravating circumstance to be invalid. *Williams*, 22 P.3d at 723; Pet'r App. at 193-94.

[3] Respondent was sentenced to ninety-nine (99) years imprisonment for assault and battery with intent to kill.

[4] Respondent also alleged that instructions were warranted on second degree felony murder and first degree manslaughter. *Williams*, 22 P.3d at 711; Pet'r App. at 160. In the district court, Respondent alleged the court erred in denying his requested jury instructions on murder in the second degree and manslaughter. *Williams*, 2011 WL 841064, at *5; Pet'r App. at 38. In the Court of Appeals, Respondent limited his claim to his requested second degree murder instruction. *Williams*, 2013 WL 4504774, at *1; Pet'r App. at 2.

> The essential difference between First and Second Degree Murder is intent to kill. First Degree Murder requires deliberate intent to end human life, which can be instantly formed and inferred from the fact of the killing. Second Degree Murder requires an eminently dangerous act, committed by one with a depraved mind. It does not require intent to kill. A Second Degree Murder instruction demands evidence that the defendant did not intend to kill the victim.

Jones v. State, 134 P.3d 150, 154 (Okla. Crim. App. 2006) (footnotes omitted).

Citing to the appropriate standard of review in determining whether a lesser offense instruction should be granted, the OCCA specifically stated "[i]n determining the sufficiency of the evidence to support a lesser offense we look at whether the evidence might allow a jury to acquit the defendant of the greater offense and convict him of the lesser." *Williams*, 22 P.3d at 711 (citing *Hogan v. Gibson*, 197 F.3d 1297, 1305 (10th Cir. 1999)); Pet'r App. at 160-61. The OCCA determined that the evidence was sufficient to support a finding of premeditation but not sufficient to support a finding that the defendant had no design to effect death. Thus, instructions for second degree murder were not supported by the evidence and were unwarranted. *Id*. at 712; Pet'r App. at 161-62.

B. Federal District Court Proceedings.

On January 6, 2003, Respondent filed a Petition for Writ of Habeas Corpus with the District Court. The petition was subject to the requirements of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). The jurisdiction of the District Court was based on 28 U.S.C. § 2241.

Respondent again claimed that the trial court erred in failing to instruct the jury on the lesser crime of murder in the second degree. The District Court, giving full AEDPA deference to the decision of the OCCA, held that the OCCA's finding that second degree murder instructions were not supported by the evidence was not contrary to, or an unreasonable application of, *Beck v. Alabama*, 447 U.S. 625 (1980). *Williams*, 2011 WL 841064, at **5-10; Pet'r App. at 38-52. *See* 28 U.S.C. § 2254(d). Under *Beck*, a death sentence cannot be imposed where a jury was precluded from considering a lesser offense and the evidence supported such lesser offense. *Beck*, 447 U.S. at 627.

C. Federal Court of Appeals Proceedings.

Respondent timely appealed from the District Court's Order denying his Petition for Writ of Habeas Corpus. The Court of Appeals reversed the decision of the District Court solely on its finding that Respondent was entitled to an instruction on the lesser offense of murder in the second degree. *Williams v. Trammell*, No. 11-5048, 2013 WL 4504774, at **3-9

(10th Cir. Aug. 26, 2013); Pet'r App. at 7-24. The Court of Appeals reviewed the claim de novo, finding that the OCCA's decision was contrary to *Beck. Williams*, 2013 WL 4504774, at **5-6; Pet'r App. at 12-17.

On September 6, 2013, Petitioner filed a petition for rehearing and suggestion for rehearing en banc. On October 4, 2013, the Court of Appeals denied panel and en banc rehearing. Pet'r App. at 228.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS THAT THE MERITS DECISION OF THE OCCA WAS NOT ENTITLED TO DEFERENCE PURSUANT TO 28 U.S.C. § 2254(d) IS IN CONFLICT WITH OTHER LOWER COURTS, AS WELL AS ESTABLISHED PRECEDENT OF THIS COURT.

As this Court has consistently held, "federal habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a license to penalize a state court for its opinion-writing technique." *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1396 (2012) (quoting *Harrington v. Richter*, 526 U.S. ___, 131 S. Ct. 770, 786 (2011) (internal quotes omitted)). The purpose of the AEDPA is to promote "comity, finality, and federalism by giving state courts the first opportunity to review [a] claim, and to

correct any constitutional violation in the first instance." *Cullen v. Pinholster*, ___ U.S. ____, 131 S. Ct. 1388, 1401 (2011) (quoting *Jimenez v. Quarterman*, 555 U.S. 113, 120 (2009) (internal quotes omitted)). Therefore, when state courts make ambiguous or unclear rulings susceptible to alternative interpretations, reviewing courts must presume that the state court acted properly. In *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002), this Court stated that 28 U.S.C. § 2254(d) imposes a "'highly deferential standard for evaluating state-court rulings,' *Lindh v. Murphy*, 521 U.S. 320, 333, n.7 (1997), which demands that state-court decisions be given the benefit of the doubt." This Court further stated that the "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Visciotti*, 537 U.S. at 24. *See also Lafler*, 132 S. Ct. at 1396; *Bell v. Cone*, 543 U.S. 447, 456 (2005) ("absent an affirmative indication to the contrary," federal habeas courts must presume the state court properly followed the law); *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (reaffirming the requirement explained in *Visciotti* that state court decisions should be given the benefit of the doubt).

In the present case, the Court of Appeals readily found the OCCA failed to follow the guidelines of *Beck v. Alabama* although the OCCA expressly recognized, and has consistently applied, the correct standard of

review.[5] Thus, the Court of Appeals's decision is inconsistent with the presumption that state courts "know and follow the law." It is also inconsistent with "the settled view that [ ] judges of our state courts are fully competent to decide federal constitutional issues, and that their decisions must be respected by federal [ ] judges in processing habeas corpus applications pursuant to 28 U.S.C. § 2254." *Swain v. Pressley*, 430 U.S. 372, 383 (1977). *See also Burt v. Titlow*, No. 12-414, slip op. at 5-6 (U.S. Nov. 5, 2013) (recognizing the authority, duty, and the presumptive competence of state courts to adjudicate constitutional claims).

In finding de novo review appropriate, the Court of Appeals found the OCCA's analysis "offered no explanation *why* the evidence did not support [a second degree murder] conviction, except that the evidence supported the first-degree [murder] conviction." *Williams*, 2013 WL 4504774, at *5; Pet'r App. at 13. The Court of Appeals interpreted the OCCA's analysis to be that "an instruction on second-degree

[5] *See Wilson v. Sirmons*, 536 F.3d 1064, 1103-04 (10th Cir. 2008) (applying AEDPA deference to OCCA's consideration of a *Beck* claim); *Gilson v. Sirmons*, 520 F.3d 1196, 1234-39 (10th Cir. 2008) (same); *Brown v. Sirmons*, 515 F.3d 1072, 1085-88 (10th Cir. 2008) (same); *Young v. Sirmons*, 486 F.3d 655, 670-74 (10th Cir. 2007) (same); *Malicoat v. Mullin*, 426 F.3d 1241, 1252-54 (10th Cir. 2005) (same). *But see Phillips v. Workman*, 604 F.3d 1202, 1211-13 (10th Cir. 2010); *Taylor v. Workman*, 554 F.3d 879, 888 (10th Cir. 2009); *Hogan v. Gibson*, 197 F.3d 1297, 1308-12 (10th Cir. 1999).

murder was not warranted *because* the evidence supported the conviction of first-degree murder." *Id.* at *6; Pet'r App. at 14. Thus, the Court of Appeals found the OCCA's analysis contrary to *Beck*. The District Court, however, found just the opposite. The District Court, in finding the OCCA's analysis was not contrary to *Beck*, determined the language used by the OCCA, although containing "some irrelevant discussion pertaining to the sufficiency of the evidence supporting the first-degree murder charge," was not contrary to *Beck*. *Williams*, 2011 WL 841064, at *7; Pet'r App. at 44-45.

A review of the OCCA's opinion reveals that the OCCA properly analyzed the issue of whether the evidence was sufficient to support the giving of an instruction on second degree murder. In deciding the claim, the OCCA recognized the appropriate standard of review, citing to *Hogan v. Gibson*, 197 F.3d 1297, 1305 (10th Cir. 1999).[6] The OCCA specifically stated

[6] In *Hogan v. Gibson,* the Court of Appeals described its view of the proper inquiry under *Beck*. The Court found that *Beck* "requires a court to consider whether there is sufficient evidence to warrant instructing the jury on a lesser included offense, not whether there is sufficient evidence to warrant conviction on the greater offense." *Hogan*, 197 F.3d at 1305. The Court of Appeals further explained:

> A *Beck* claim is not the functional equivalent of a challenge to the sufficiency of the evidence for conviction; rather, *Beck* focuses on the constitutionality of the procedures employed in the conviction of a defendant in a capital trial and is specifically concerned with the enhanced risk of an unwarranted capital conviction

(Continued on following page)

"[i]n determining the sufficiency of the evidence to support a lesser offense we look at whether the evidence might allow the jury to acquit the defendant of the greater offense and convict him of the lesser." *Williams*, 22 P.3d at 711; Pet'r App. at 160. In its analysis of the evidence, the OCCA held:

> The evidence in the present case does not support the conclusion that [Respondent] acted without any premeditated design to effect death. [Respondent] took a butcher knife from his home, placed it in a box with a pair of gloves and a roll of duct tape and went to the deceased's home to meet her at the appointed time. [Respondent] and the deceased had met previously and would recognize each other on sight. The deceased was stabbed within five minutes of [Respondent's] arrival at her home. The butcher knife was driven approximately seven inches into the deceased's body. The ensuing wound was the

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where the defendant's life is at stake and a reasonable jury could have convicted on a lesser included offense. Given these concerns, the sufficiency of the evidence of the greater offense is distinct from the *Beck* inquiry into whether the evidence might allow a jury to acquit a defendant of the greater of the offenses and convict him or her of the lesser.

Id. (citations omitted). The Court of Appeals's finding that the OCCA did not apply this standard assumes that the OCCA cannot be trusted to follow the law and threatens the "vital relation of mutual respect and common purpose existing between the States and the federal courts." *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

> result of a rapid, hard thrust of the knife into the body with only the handle of the knife visible. This evidence is sufficient for any rational trier of fact to find [Respondent] acted with the premeditated intent to kill the deceased.
>
> [Respondent] disputes the conclusion of premeditation and argues the evidence showed no reason for the victims to feel threatened when he entered their home, therefore there was no evidence to suggest that he formed the intent to kill in advance. Premeditation sufficient to constitute murder may be formed in an instant, or it may be formed instantaneously as the killing is being committed. *Phillips*, 989 P.2d at 1029. It may be inferred from the fact of the killing, unless circumstances raise a reasonable doubt whether such design existed. *Freeman v. State*, 876 P.2d 283, 287 (Okl.Cr.), *cert. denied,* 513 U.S. 1022, 115 S. Ct. 590, 130 L. Ed. 2d 503 (1994). The evidence clearly supports a finding that when [Respondent] stabbed the deceased, he did so with the intent to kill her, regardless of whether that intent was formed prior to or after arriving at her home. Accordingly, instructions on second degree depraved mind murder were not warranted, as that crime was not supported by the evidence.

Id. at 712; Pet'r App. at 161-62. Clearly, the OCCA was specifically addressing the evidence Respondent

alleged supported an instruction on second degree murder,[7] and addressing the argument of the Respondent, being that the instruction was warranted because "there was no evidence to suggest that he formed the intent to kill in advance." *Id*.[8] Responding to such position, it was clearly appropriate for the OCCA to discuss that premeditation can be formed in an instant; thus, discrediting Respondent's argument and explaining *why* no instruction for murder in the second degree was warranted.

Under Oklahoma law, "[t]he essential difference between First and Second Degree Murder is intent to kill." *Jones*, 134 P.3d at 154. "A Second Degree Murder instruction demands evidence that the defendant did not intend to kill the victim." *Id.* Thus, a ruling by the OCCA that the evidence only supported an intent

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[7] On direct appeal, Respondent argued that the evidence supported an instruction on second degree murder because (1) the victim had no reason to feel threatened when she opened the door to him; (2) his initial plan (to rape or kidnap) went awry; and (3) the victim was stabbed only once. *See* 7/3/2000 Brief of Appellant, at pp. 28-29 (OCCA No. D-1999-654).

[8] The OCCA was responding solely to the argument advanced by Respondent that the intent to kill was not formed in advanced. This was the only argument the OCCA could rule upon. *Knox v. Serv. Employees Int'l Union, Local 1000*, ___ U.S. ___, 132 S. Ct. 2277, 2298 (2012) (Sotomayor, J., concurring) (acknowledging the "fundamental premise of our adversarial system: 'that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'" (quoting *NASA v. Nelson*, 562 U.S. ___, ___, n.10, 131 S. Ct. 746, 757, n.10 (2011)).

to kill is an explanation as to *why* an instruction on murder in the second degree was not warranted – such an instruction could not be supported by the evidence.

As previously noted, this Court has acknowledged that one purpose of the AEDPA is "to enhance the States' capacities to control their own adjudications." *Lindh*, 521 U.S. at 333 n.7. "[F]ederal habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a license to penalize a state court for its opinion-writing technique." *Lafler*, 132 S. Ct. at 1396. Further, the Court has emphasized that state courts, when they address claims on the merits, are presumed to "know and follow the law." *Visciotti*, 537 U.S. at 24. This presumption is borne out here by the OCCA's recitation of the correct standard of review. The Court of Appeals's finding of error in the OCCA's review is inconsistent with this presumption. "It is also incompatible with § 2254(d)'s 'highly deferential standard for evaluating state-court rulings,' *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, which demands that state-court decisions be given the benefit of the doubt." *Visciotti,* 537 U.S. at 24.[9] While the OCCA's opinion may not be a model of judicial clarity, it plainly did not review the evidence only for the sufficiency of the evidence supporting the first degree murder conviction.

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[9] The District Court followed this precedent by finding some of the OCCA's language irrelevant, yet not contrary to *Beck*. *Williams*, 2011 WL 841064, at *7; Pet'r App. at 44-45.

The Court of Appeals's decision conflicts with other lower courts that follow this Court's mandate in *Visciotti*. For example, the Eleventh Circuit has specifically held:

> In *Wright v. Moore*, 278 F.3d 1245 (11th Cir. 2002), this court stressed that under § 2254(d)(1) we review the state court's "decision" and not necessarily its rationale. *Id*. at 1255 ("The statutory language [of § 2254(d)(1)] focuses on the result, not on the reasoning that led to the result. . . ."). We cautioned that overemphasis on the language of a state court's rationale would lead to "a 'grading papers' approach that is outmoded in the post-AEDPA era." *Id.* at 1255; *see also Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997) (rejecting the approach that § 2254(d)(1) would have federal habeas courts judge the quality of the state court's reasoning, because such an approach "would place the federal court in just the kind of tutelary relation to the state courts that the recent amendments are designed to end"). Although a state court opinion containing a "conspicuous misapplication of Supreme Court precedent" would not be entitled to deference under the AEDPA, "[w]e will not presume that a state court misapplied federal law, and absent indication to the contrary will assume the state courts do understand 'clearly established Federal law . . . as determined by the Supreme Court of the United States.'"

Parker v. Sec'y for Dep't of Corrections, 331 F.3d 764, 785-86 (11th Cir. 2003) (quoting *Wright*, 278 F.3d at 1256, n.3). *See also Ferguson v. Sec'y of Fla. Dep't of Corrections*, 716 F.3d 1315, 1337 (11th Cir. 2013) (same). In *Parker*, the Court was discussing the state court's application of the standard for prejudice as established by *Strickland v. Washington*, 466 U.S. 668 (1984) for claims of ineffective assistance of counsel. Following *Visciotti*, the Court found the state court's decision was not "contrary to" *Strickland*, stating "[d]espite the imprecise language used by the Florida Supreme Court, we conclude the court understood and applied the correct prejudice standard from *Strickland*. *Id*. 331 F.3d at 786. *See also Holland*, 542 U.S. at 654-55.

Further, the Court of Appeals's decision is in direct conflict with the Sixth Circuit's decision in *Smith v. Bradshaw*, 591 F.3d 517 (6th Cir. 2010). In *Smith*, a habeas petitioner alleged the state court decision was contrary to *Beck* because it concluded that "no reasonable juror could have found that Smith did not intend to kill her." *Id*. at 524. The petitioner had argued to the Ohio Supreme Court that he was entitled to an instruction on the lesser offense of involuntary manslaughter. After discussing the evidence which revealed petitioner's intent to kill, the Ohio Supreme Court denied petitioner's *Beck* claim stating, very similarly to the OCCA in the present case, that "the evidence reveals Smith purposely killed Autumn while raping or attempting to rape her." *State v. Smith*, 97 Ohio St. 3d 367, 371, 789

N.E.2d 221, 228 (2002).[10] Finding that petitioner had failed to rebut the presumption that state courts know and follow the law, the Sixth Circuit found that "while the state court's opinion is not ideal," the opinion "properly recited *Beck's* rule, it relied on three cases that properly applied *Beck*, and its analysis is consistent with *Beck*." *Id*.

The decision is also in direct conflict with the Fourth Circuit's decision in *Winston v. Kelly*, 592 F.3d 535, 545-46 (4th Cir. 2010). In *Winston*, the Fourth Circuit afforded the state court's decision AEDPA deference because there was no "material distinction" between the Virginia rule and the federal rule for when a lesser instruction is warranted. Winston had

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[10] The Ohio Supreme Court stated, in pertinent part:

> Contrary to Smith's contention, he presented no evidence at trial indicating that he intended to sexually assault, rather than kill, Autumn. Instead, the evidence reveals that Smith purposely killed Autumn while raping or attempting to rape her. Medical testimony found that the weight and pressure of Smith's body on top of the sixteen-pound baby was one of the direct causes of her death. The violence of the attack, which was estimated by the coroner to have lasted between ten and thirty minutes, resulted in hemorrhages to her brain and retina and caused her to sustain brain contusions and other contusions on her body. Witnesses testified that these injuries showed an intent to kill. Consequently, we reject Smith's argument that evidence of purpose was lacking. Accordingly, we find that the court did not err in denying Smith's request for an involuntary manslaughter instruction.

Smith, 97 Ohio St.3d at 371, 780 N.E.2d at 228.

argued that testimony from a witness suggested that he was not the triggerman and, thus, he was entitled to lesser offense instructions for first and second degree murder and accessory after the fact. The Supreme Court of Virginia held "[i]n light of the overwhelming evidence indicating that Winston was the triggerman responsible for [the victim's] death, we cannot say that a short passage excerpted from [the witness's] testimony was sufficient to merit jury instructions on first or second degree murder, or accessory after the fact." *Winston v. Commonwealth*, 268 Va. 564, 605, 604 S.E.2d 21, 44 (2004). The Virginia Supreme Court recognized that lesser offense instructions "are proper only when there is sufficient evidence to support them." *Id.* Although the Fourth Circuit did not provide much discussion in its finding that the state court's decision was not contrary to *Beck*, it is apparent the Court based its decision on the state court's recognition of the correct standard. Thus, the Fourth Circuit gave the state court the benefit of the doubt, presuming that the state court knew and followed the law.

Likewise, in the present case, the OCCA properly recited *Beck's* rule, and relied on the Court of Appeals's language in *Hogan*[11] which explained the proper application of *Beck*. *Williams,* 22 P.3d at 711-12; Pet'r App. at 160-61. Further, the OCCA's analysis was consistent with *Beck*. *Id*. However, instead of

[11] *See* footnote 6, *supra*.

following *Visciotti,* and in conflict with lower courts, the Court of Appeals presumed the OCCA did not know and follow the law although it specifically cited it and based its analysis upon it. As this Court stated in *Titlow*, this Court "has refused to sanction any decision that would 'reflec[t] negatively upon [a] state court's ability to [safeguard constitutional rights].'" *Titlow*, slip op. at 5 (quoting *Trainor v. Hernandez*, 431 U.S. 434, 443 (1977)). Especially, this Court continued, in a case where the constitutional claim has been adjudicated countless times by the state court – *Beck* is such a claim.[12]

The OCCA was aware of the appropriate standard and, in finding no evidence to support murder in the second degree discussed the evidence concerning Petitioner's intent – the only distinguishing element between the two crimes – to show that the evidence did not in any way negate that the Petitioner had the specific intent to kill. *See Hopper v. Evans*, 456 U.S. 605, 613 (1982) (to warrant lesser included offense instruction, the evidence must affirmatively negate intent to kill).

The Court of Appeals's finding that the OCCA's decision was contrary to *Beck*, is inconsistent with lower courts that follow this Court's well-established law which demands that state court decisions be given the benefit of the doubt. *Visciotti*, 537 U.S. at 24. The Court of Appeals's decision jeopardizes state

[12] *See* footnote 5, *supra*.

court convictions based solely on a federal court's perception of the quality of the state court's written opinion. The Court of Appeals's decision is so clearly erroneous that this Court should grant certiorari, vacate the Court of Appeals's decision, and remand with instructions to review the *Beck* claim, giving the OCCA's decision full AEDPA deference. Alternatively, this Court should remand with instructions to deny habeas corpus relief because the OCCA's adjudication of the *Beck* claim was neither contrary to, nor an unreasonable application of, *Beck* – a fact made apparent by Petitioner's discussion of the lesser offense instruction issue in section II, *infra*. Simply, if Respondent is not entitled to habeas relief for his *Beck* claim on de novo review (as discussed in section II), he is not entitled to relief for that same claim under § 2254(d)'s "difficult to meet" unreasonableness standard. *Richter*, 131 S. Ct. at 786.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH LOWER COURTS AS ITS DECISION RESTED ON A FINDING THAT RESPONDENT WAS ENTITLED TO A LESSER OFFENSE INSTRUCTION BASED SOLELY ON SPECULATIVE AND NON-EXISTENT EVIDENCE.

This Court's decision in *Beck*, and its progeny, established the requirement that entitlement to jury instructions on lesser offenses to capital murder was conditioned on the existence of evidence to support a

lesser offense. *Beck* itself imposed no particular standard for what kind of evidence, or what quantum of evidence, is necessary to satisfy *Beck's* "supported by the evidence" requirement. This Court in *Beck* said, "[a]lthough the states vary in their descriptions of the quantum of proof necessary to give rise to a right to a lesser included offense instruction, they agree that it must be given when supported by the evidence." *Beck*, 447 U.S. at 637 n.12. The question of what kind, or how much, evidence will meet *Beck's* requirement is a question that must be resolved. The evidence cannot be sufficient if, as in the present case, the lesser offense is supported by mere speculation. As acknowledged by this Court, the lower courts have different requirements. The lower courts vary on the quantum of evidence necessary ranging from weak and contradicted evidence to substantial evidence.[13] A resolution of this issue must be obtained to

[13] The Tenth Circuit has found an instruction required even when the evidence allegedly supporting the lesser offense is "weak and contradicted." *United States v. Brown*, 287 F.3d 965, 974-77 (10th Cir. 2002). Other courts have found differently: *Goodwin v. Johnson*, 632 F.3d 301, 316-18 (6th Cir. 2011) (although there was conflicting evidence on intent, it was not enough to justify a lesser instruction); *Winston v. Kelly*, 592 F.3d 535, 546 (4th Cir. 2010) (a "short passage" from a witness's testimony did not provide sufficient reliable evidence supporting an inference that Winston was not the triggerman); *Smith v. Bradshaw*, 591 F.3d 517, 523-27 (6th Cir. 2010) ("It is well established that a lesser-included-offense instruction is not required where the facts of a murder so strongly indicate intent to kill that the jury could not rationally have a reasonable doubt as to the defendant's intent."); *People v. Verdugo*, 50 Cal. 4th

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maintain uniformity among the lower courts and to promote comity and respect for the finality of state court convictions. In addressing the principles of comity, finality, and federalism, this Court expressed:

> There is no doubt Congress intended AEDPA to advance these doctrines. Federal habeas corpus principles must inform and shape the historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts. In keeping

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263, 293, 236 P.3d 1035, 1061 (2010) (there must be "substantial evidence" to support a lesser instruction; the "substantial evidence" requirement cannot be satisfied by "*any* evidence . . . no matter how weak"). *See also Cook v. Schriro*, 538 F.3d 1000, 1024 (9th Cir. 2008) (interpreting *Beck* not to require a lesser offense instruction where evidence of intent to kill is overwhelming and the petitioner's defenses are not directed at negating such intent); *Aguilar v. Dretke*, 428 F.3d 526, 531 (5th Cir. 2005) ("The question is whether the evidence would permit a reasonable jury to make a contrary finding"); *United States v. Wright*, 131 F.3d 1111, 1112 (4th Cir. 1997) (to receive a lesser offense instruction, the element must be "sufficiently in dispute", meaning either the evidence must be sharply conflicting, or the lesser offense must be "fairly inferable" from the evidence); *United States v. Medina*, 755 F.2d 1269, 1273 (7th Cir. 1985) (to warrant a lesser offense instruction usually "sharply conflicting testimony" must have been presented, but an instruction may be warranted even though there is no conflict if the lesser offense "fairly may be inferred" from the evidence); *State v. Womble*, 225 Ariz. 91, 98, 235 P.3d 244, 251 (2010) (must show the jury could rationally fail to find the distinguishing element of the greater offense); *State v. Leazer*, 353 N.C. 234, 240, 539 S.E.2d 922, 926 (2000) ("'mere speculation [as to the rationales for defendant's behavior] is not sufficient to negate evidence of premeditation and deliberation.'" (quoting *State v. Gary*, 348 NE 510, 524, 501 S.E.2d 57, 67 (1998))).

> this delicate balance we have been careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the State's interest in the integrity of their criminal and collateral proceedings.

Williams v. Taylor, 529 U.S. 420, 436 (2000). In order to promote the doctrines of comity, finality and federalism and "safeguard the State's interest in the integrity of their criminal" proceedings, a standard must be established that will be applied by all state and federal courts when determining whether the evidence is sufficient to support a lesser offense.

This Court explained in *Hopper* that "due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Hopper*, 456 U.S. at 611. In *Hopper*, this Court determined that no lesser offense instruction was required where the evidence not only supported the claim that the defendant intended to kill the victim, but affirmatively negated any claim that he did not intend to do so. *Hopper*, 456 U.S. at 613. Thus, it would appear that a lesser offense instruction would only be required when an element was sufficiently in dispute and "any rational trier of fact could have found the essential elements of the [lesser] crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). An approach clearly in line with the *Jackson* standard, and accepted by this Court in *Hopper*, is that the

instruction should only "be given if 'there is any reasonable theory from the evidence which would support the position.'" *Hopper*, 456 U.S. at 611 (finding this standard in line with the federal rule that a lesser offense instruction "should be given 'if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater.'") (quoting *Keeble v. United States*, 412 U.S. 205, 208 (1973)). This, however is not the standard employed by the Court of Appeals here.

In the case sub judice, as expressly found by the OCCA, no evidence was presented that the Respondent did not have an intent to kill; thus, no evidence was presented to support an instruction on murder in the second degree. *Williams*, 22 P.3d at 712; Pet'r App. at 161-62. Further, the Respondent's intent to kill Ms. Hand was not in dispute as clearly shown by Respondent's opening and closing remarks. In opening, counsel for Respondent merely asked the jury to pay attention to the evidence and advised the jury that the decision of guilt or innocence would only "be the first important decision you'll have to make." (Tr. 623-24).[14] Further, in closing, counsel did not

[14] The entirety of defense counsel's opening statement reads:

> We'll make one now. Thank you, Judge. Good morning, ladies and gentlemen. You've just heard [the prosecutor] tell you about the evidence he intends to show you to prove or try to prove that on the morning of May 14th, 1997, my client, Sterling Williams, killed LeAnna Hand and attacked Elizabeth Hill. I'm going

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challenge the State's evidence of malice aforethought. Indeed, defense counsel did little more than urge the jury to hold the State to its burden of proof (Tr. 1022-23).[15] Respondent's counsel wholly failed to direct the

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to ask you to pay very close attention to that evidence, and I'm sure you will. That evidence is going to be very important to you, all of the evidence you hear.

You're going to have to make some serious decisions about some serious issues in this trial. And by the time you have heard this evidence, you'll be ready to make perhaps the first decision, as to whether or not Sterling Williams killed LeAnna Hand on May 14th, 1997. That will be the first important decision you'll have to make. But once you've made that decision after you've heard all this evidence, by the time this trial is over, you will realize that there is a lot more going on with the facts of this case and with Sterling Williams than what the district attorney has just told you. Thank you.

(Tr. 623-24)

[15] The entirety of defense counsel's closing statement reads:

Thank you, Your Honor. Good afternoon, ladies and gentlemen. I want to thank you for your week's worth of patience and the attention you've paid to this evidence. All through voir dire and all through this evidence, we have never once said to you, Sterling Williams didn't do this. But we don't have to. It's up to the State to prove to you beyond a reasonable doubt that he did, and that's your job now. He's charged with murder in the first degree. He's charged with assault and battery with intent to kill. And you've got instructions on those charges, and you've also got an instruction on assault and battery. And now it is your job to retire back there and decide, based on the evidence you've heard, which, if any, of those crimes Sterling

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jury's attention to *any* evidence to support an inference, however slight, that Respondent did not have the intent to kill. Plainly, because he could not. Clearly no reasonable jury could have found beyond a reasonable doubt that Respondent lacked such intent, thus, no instruction on second degree murder was warranted.

The Court of Appeals, however, based its decision on speculative and non-existent facts that no reasonable jury could use to find beyond a reasonable doubt that Respondent committed murder in the second degree. The Court of Appeals based its decision on the following: (1) the evidence of a struggle, with a single stab wound to the chest; (2) the fact Respondent

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> Williams committed. That's your job. That's what we're asking you to do now.
>
> That may be the easy part. But when we were doing voir dire, we spent a lot of time talking about sentencing and appropriate sentences. And that is not your job now. Withhold any thought at this point about sentences, because it would be easy for you to do, is to think, I'm convinced Sterling Williams did these things, and here's what I think ought to happen to him because of it. But that's not your job now. Resist that temptation. Don't do it. Determine guilt, if any, but not sentencing, because as I told you in opening statement, there is a lot more to this story. If you determine Sterling is guilty of these crimes, there is a lot more to this story than what the district attorney has told you. And don't determine sentencing until you have heard the whole story. Thank you very much.

(Tr. 1022-23).

brought with him a butcher knife, gloves and duct tape; (3) the allegation Respondent let Elizabeth Hill go; and (4) the allegation Respondent left the duplex, where the crimes were committed, before Ms. Hill.[16]

The evidence that Respondent struggled with Ms. Hand and forcefully, with a "rapid, hard thrust of the knife," *Williams*, 22 P.3d at 712; Pet'r App. at 162,[17] stabbed her with a butcher knife he surreptitiously brought into her duplex is not disputed.[18] The

[16] The Court of Appeals, in its opinion, also mentioned Respondent's alleged remorse. As found by the OCCA, after the murder, Respondent "phoned his employer and said he had just killed a girl and had to go to Chicago to hide out." *Williams*, 22 P.3d at 709; Pet'r App. at 153. Although Respondent may have voiced some remorse, the evidence does not indicate the reason for such remorse, nor support a reasonable inference that Respondent lacked the intent to kill. First, the evidence revealed Respondent did not go to Chicago, but instead fled to Louisiana. *Id*. Thus, the purpose of the call may have been to evade capture. Second, the purpose of the call was to tell his employer that his "run is over" or his "race for the crown is over" (Tr. 806-07); revealing remorse for himself, rather than his commission of the murder. Third, his alleged remorse may also have stemmed from his unsuccessful attempt to kill Ms. Hill and his knowledge that he would be easily identified. The alleged remorse of Respondent does not support a rational inference that he lacked the intent to kill Ms. Hand.

[17] As noted by the Court of Appeals, the facts, as found by the OCCA, were not disputed by Respondent. *Williams*, 2013 WL 4504774, at *3; Pet'r App. at 8. The facts are presumed correct. 28 U.S.C. § 2254 (e)(1).

[18] Ms. Hand "suffered a seven inch stab wound to her chest. The knife cut through her ribs, through a portion of her left lung, completely through her heart and into her right lung." *Williams*, 22 P.3d at 709; Pet'r App. at 152-53.

evidence revealed that Respondent was a meat salesman who had sold Ms. Hand meat on prior occasions. On the day of the murder, Respondent contacted Ms. Hand and made an appointment to bring her some free meat. *Williams*, 22 P.3d at 708; Pet'r App. at 151. Instead of bringing her meat, Respondent brought a butcher knife, duct tape and gloves. *Id.* at 709; Pet'r App. at 153. In support of its finding that the struggle, the single stab wound and the implements brought by Respondent support a finding of no intent to kill, the Court of Appeals stated:

> Although the medical examiner opined that the knife was thrust forcefully into Hand, Hill testified that she heard a struggle, and a forceful movement with a knife could have occurred in that circumstance absent an intent to deal a fatal blow. Supporting this possibility is the evidence that whatever it was that Williams had planned, that is not what happened. He brought with him not only the knife but also duct tape and gloves that he never used. The struggle with Hand, which began promptly after his arrival at the duplex, was apparently unforeseen. Perhaps the knife was to be used to coerce Hand into something else.

Williams, 2013 WL 4504774, at *8; Pet'r App. at 22. The issue, however, is not what Respondent intended when he entered the duplex, but what he intended when he forcefully thrust the butcher knife seven inches into Ms. Hand's side. As noted by the OCCA,

intent to kill under Oklahoma law may be formed instantaneously. *Williams*, 22 P.3d at 712; Pet'r App. at 162. Thus, assuming arguendo Respondent's initial intent when he entered the duplex was to rape or kidnap Ms. Hand, when he forcefully thrust the knife into Ms. Hand his only intent was to kill.

Further, the fact that Respondent knew Ms. Hand and could readily be identified by her supports only Respondent's planned intent to kill – nothing else can be reasonably inferred. The only purpose for having gloves would be to hide his identity. Any speculation that Respondent intended to rape or kidnap and leave Ms. Hand alive to identify him is absurd. Respondent's intent from the time he entered the duplex to the time he forcefully drove the knife into Ms. Hand was the intent to kill.

This evidence not only supported the claim that Respondent intended to kill Ms. Hand, but affirmatively negated any claim that he did not intend to kill her. *See Hopper,* 456 U.S. at 613. In *Hopper*, the respondent, Evans, testified that his initial intent when committing a robbery was not to hurt anybody. However, he testified that, if necessary, he was always prepared to kill. *Id*. at 612-13. This Court held "[t]he evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim." Likewise, in this case, the evidence relied on by the Court of Appeals negates any claim that Respondent did not have the intent to kill. A *rational*

jury could *reasonably* conclude *only* that Petitioner intentionally killed Ms. Hand.

Concerning the Court of Appeals's remaining findings, there is no evidence, nor any *reasonable* inference, to support the allegations that Respondent "allowed her to go," *Williams*, 2013 WL 4504774, at *8; Pet'r App. at 23, or that he left the duplex before Ms. Hill, the surviving victim. *Id.* The Court of Appeals found:

> Williams' treatment of Hill also could suggest the absence of an intent to kill. Although Hill testified that Williams placed both his hands around her neck and squeezed hard enough that she could not breathe, there is evidence that he relented and allowed her to go. Hill said that she did not recall how she escaped and that Williams might have let her go. And a neighbor testified that he saw Williams leave the duplex before Hill did, not what one would do if intent on eliminating the witness who remained inside.

Id. First, there is no evidence that Respondent "relented and allowed her to go." *Id.* Instead, this statement is based on sheer speculation.[19] Speculation that

[19] The Court of Appeals had previously held "[s]peculation about what might have happened, rather than evidence of what really did happen, does not constitute sufficient evidence to require a lesser included offense instruction under *Beck*." *Robedeaux v. Gibson*, No. 98-6021, 189 F.3d 478, 1999 WL 672305, at *7 (10th Cir. July 8, 1999) (unpublished). *See also*

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is not supported by the record, or by the jury's verdict on the crime of assault and battery with intent to kill.

Ms. Hill testified that Respondent kicked in her bedroom door, tackled her, got on top of her, and placed both of his hands on her neck. (Tr. 644, 665-66). When asked how she escaped, Ms. Hill testified:

Q What did you do?

A I guess I fought.

Q Do you remember how you fought?

A No.

Q Do you remember anything about what you did?

A (Witness shakes head.)

Q Tell me what happened.

A The next thing I knew, I got up and ran out the door.

Q Where was he when you got up?

A I'm assuming right behind me. I don't know.

Q Do you have any idea how you got away from him?

Darks v. Mullin, 327 F.3d 1001, 1011 (10th Cir. 2003) (any inference of provocation was mere speculation and therefore insufficient to support an instruction on the lesser offense of heat of passion manslaughter). The Court of Appeals, however, ignored such precedent in the present case.

A No.

Q Were you struggling?

A Yes, I had to have been. I had to have been.

Q Where did you go?

A Out the front door.

Q Do you know where he was when you went out the front door?

A Behind me. I felt like he was behind me. I didn't turn around to look.

(Tr. 645-46). On cross-examination, Ms. Hill was asked:

Q And you don't recall how you got away?

A No.

Q So it's possible that Mr. Williams let you go?

A Possibly.

(Tr. 670). On redirect, Ms. Hill testified:

Q Did you believe, at the time, he let you go?

A No.

Q Why is that?

> A He's got his hands around my neck. Why else would you choke somebody? I just didn't feel like he was being nice to me and let me go.

(Tr. 675).

This testimony does not establish Respondent let Ms. Hill go. The evidence revealed that Respondent's hands were wet with blood (Tr. 646, 872). A reasonable inference is not that Respondent let Ms. Hill go, but that she fought and was able to escape due to the moisture on his hands. This inference is confirmed by the evidence from second stage that Respondent told defense expert, Dr. Peterson, that Ms. Hill escaped due to the moisture and that she fought her way out (Tr. 1318). Further evidence that Respondent did not let Ms. Hill go is the fact that he attempted to remove the knife from the body of Ms. Hand before he attacked Ms. Hill, evidencing his intent to kill Ms. Hill (Tr. 736).

In addition, the evidence does not support any finding that Respondent left the duplex before Ms. Hill. In fact, the evidence proved quite the contrary. As shown through the above testimony, Ms. Hill fled her duplex and ran to the duplex next door. The evidence revealed that Ms. Hill then ran across the street to Carol Gorman, Dorothy Gregory and Boyd Hardin (Tr. 646, 679-80, 695-97). Respondent's car was still in the driveway after Ms. Hill fled her duplex (Tr. 652, 680, 696).

The Court of Appeals placed reliance on the testimony of Boyd Hardin, a construction worker who was working on the parking lot, cutting concrete, when the crimes occurred.[20] Mr. Hardin testified that Ms. Hill ran from the duplex, directly to him. He also testified that he saw Respondent leave the duplex seconds before he saw Ms. Hill (Tr. 701-02, 704, 706).

When Mr. Hardin's testimony is placed in context of the total record evidence, it becomes clear that his testimony was consistent with the testimony of Ms. Gorman and Ms. Gregory – he simply did not see or hear Ms. Hill when she initially ran out of her duplex. Both Ms. Gorman and Ms. Gregory testified that upon hearing Ms. Hill scream, they ran outside toward her. At that point, they observed Ms. Hill run from her duplex to the duplex next door screaming for help (Tr. 678-79; 694-95). Ms. Gorman, who remained outside,[21] testified that after Ms. Hill ran next door, Respondent walked out of the duplex, got in his car and left (Tr. 679-80). Mr. Hardin testified that he did not hear any screaming – he was running a very loud, high-powered saw (Tr. 704, 707). Instead, the first event he saw was Respondent leaving.[22] The evidence

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[20] Mr. Hardin was not a neighbor as stated by the Court of Appeals (Tr. 700-01).

[21] Upon hearing and seeing Ms. Hill scream and run from her duplex to the duplex next door, Ms. Gregory went inside to call the police. Ms. Gregory testified, however, that Respondent's car was in the victims' driveway when she saw Ms. Hill exit the duplex (Tr. 679-80).

[22] Mr. Hardin answered in the affirmative when asked "when this saw is going, if you can't hear and you're looking at

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clearly revealed that Mr. Hardin, distracted by his work, simply did not see Ms. Hill exit her duplex and run next door before Respondent exited the duplex. Accordingly, no evidence was presented to support any finding that Respondent left the duplex before Ms. Hill. The Court of Appeals's decision is based on a clear misstatement of the evidence in the state court record.

Further, to any extent that the Respondent's actions toward Ms. Hill would impact his intent toward Ms. Hand, the jury was faced with the decision of whether Respondent was guilty of simple assault and battery toward Ms. Hill or whether he had the specific intent to kill Ms. Hill (Tr. 990). The jury found Respondent guilty of assault and battery with intent to kill (Tr. 1031). Accordingly, it is clear that the evidence did not support any inference, reasonable or otherwise, that Respondent merely let Ms. Hill go. Finally, this speculative and non-existent evidence does not support *any* inference that Respondent did not have intent to kill LeAnna Hand. Based on these unsupported, speculative allegations, no *rational* jury could *reasonably* conclude Respondent did *not* have the intent to kill Ms. Hand.

Compared to the overwhelming evidence of intent to kill, the evidence and allegations relied upon by the Court of Appeals would not allow a rational jury to acquit Respondent of murder in the first degree.

[the concrete], is it fair that things can go on out there that you didn't see or hear?" (Tr. 707).

All of the evidence and reasonable inferences to be drawn therefrom lead to one conclusion: Respondent had the intent to kill. Again, the Court of Appeals's decision is so clearly wrong that this Court should grant certiorari, vacate the Court of Appeals's decision, and remand with instructions to deny habeas corpus relief. In the alternative, this Court should grant certiorari review to resolve the conflict in the lower courts and correct such error.

CONCLUSION

For the reasons stated above, the Petitioner, Anita Trammell, respectfully request this Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

STERLING B. WILLIAMS, Petitioner-Appellant, v. ANITA TRAMMELL, Warden, Oklahoma State Penitentiary,* Respondent-Appellee.	No. 11-5048 (D.C. No. 4:02-CV-00377-JHP-FHM) (N.D. Oklahoma)

ORDER AND JUDGMENT**

(Filed Aug. 26, 2013)

Before **HARTZ**, **MURPHY**, **HOLMES**, Circuit Judges.

An Oklahoma jury convicted Applicant Sterling Williams of the first-degree murder of LeAnna Hand

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* Pursuant to Fed. R. App. 43(c)(2), Anita Trammell, who was appointed Warden of the Oklahoma State Penitentiary on February 28, 2013, is automatically substituted for Randall G. Workman as Respondent in this case.

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.

and assault and battery with intent to kill her roommate Elizabeth Hill. On the recommendation of the jury, Williams received a sentence of death for the murder and 99 years' imprisonment for the assault and battery.

After unsuccessfully appealing to the Oklahoma Court of Criminal Appeals (OCCA), *see Williams v. State*, 22 P.3d 702, 733 (Okla. Crim. App. 2001), and unsuccessfully pursuing postconviction relief in state court, *see Williams v. State*, 31 P.3d 1046, 1054 (Okla. Crim. App. 2001), Williams filed an application for relief under 28 U.S.C. § 2254 in the United States District Court for the Northern District of Oklahoma. He claimed, among other things, that the trial court had violated *Beck v. Alabama*, 447 U.S. 625 (1980), by failing to instruct the jury on either of the lesser-included offenses of second-degree murder and first-degree manslaughter. The district court denied relief but granted a certificate of appealability (COA) on Williams's *Beck* claim. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal the denial of a § 2254 application). Williams obtained a COA from this court on two additional issues. He now appeals the district court's denial of relief (although limiting his *Beck* claims to his requested second-degree-murder instruction) and renews his request for a COA on additional issues.

We hold that Williams was entitled to an instruction on second-degree depraved-mind murder. Following this circuit's precedent in *Phillips v. Workman*, 604 F.3d 1202 (10th Cir. 2010), we decide that the

OCCA applied a rule contrary to that set forth in *Beck*, and we therefore owe its decision no deference under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). And, again following our precedent, primarily *Phillips*, we hold that the evidence would permit a rational jury to acquit Williams of first-degree murder and convict him of second-degree murder. Because our ruling on this issue will require a new trial on the charge of first-degree murder, all other issues that relate solely to that conviction are moot. That leaves only Williams's request for a COA on the claim that he received ineffective assistance of counsel at the guilt phase, which we deny because reasonable jurists would not debate the district court's resolution of the claim.

I. FACTUAL BACKGROUND

We begin with the OCCA's description of the pertinent events, as Williams does not challenge that court's factual findings and we must presume them to be correct, *see* 28 U.S.C. § 2254(e)(1):

> ¶ 2 . . . In May of 1997, [Williams] worked as an independent contractor for Willard Enterprises Colorado Choice Meat Company. He had sold [LeAnna] Hand meat on prior occasions. On May 14, 1997, [Williams] phoned Hand and said he had some free meat he was going to give away and that he would bring it by her home. At approximately 11:00 a.m., [Hand's roommate Elizabeth] Hill was in her room dressing when she heard a knock at the

front door. A moment later, she heard the answering machine on the telephone click on. Hill picked up the phone in her bedroom and discovered Hand's mother on the line. Hill spoke for just a moment, then she heard Hand call her name from the other room. She opened her bedroom door and saw Hand struggling with [Williams]. Hill heard Hand fall to the floor and saw [Williams] standing over her body. Hill immediately shut her bedroom door and locked it. She tried to call 9-1-1 but could not get an open phone line. [Williams] then kicked down her bedroom door and knocked the phone out of her hand. He told Hill to be quiet. Instead, she screamed and tried to run out of the room. She escaped from her room, but [Williams] tackled her in the hallway. He threw her to the ground, climbed on top of her, and put both hands around her neck. Despite [Williams's] attempts to choke Hill, she fought back and was able to free herself and run out of the front door of the duplex.

¶ 3 Hill was running to a neighbor's home when the manager of a nearby apartment complex, Carol Gorman, saw her and waved her over. Gorman observed bloody hand prints on Hill's neck. Meanwhile, as soon as Hill ran out of the duplex, [Williams] also left. He walked to his car parked in the driveway of the duplex and drove away.

¶ 4 The police arrived at the scene to find Hand dead in her living room. She had suffered a seven inch stab wound to her

chest. The knife cut through her ribs, through a portion of her left lung, completely through her heart and into her right lung. The knife was still in her body, tangled in her clothes. Near the victim the police found a box from the Colorado Choice Meat Company, a roll of duct tape, a baseball cap with the company logo, and a pair of gloves. Nothing was missing from the duplex, including cash Hill had left on her bed.

¶ 5 On the same day, [Williams] phoned his employer and said he had just killed a girl and had to go to Chicago to hide out. [Williams] withdrew money from his back [sic] account. [Williams] also phoned his girlfriend, Consuela Drew, and told her he was going to jail. An all points bulletin was issued containing a description of [Williams's] car. The next day, May 15, 1997, Ms. Drew again spoke with [Williams] and told him to turn himself in to the police. That same day [Williams] was stopped by authorities in Alexandria, Louisiana. He had a serious cut to the index finger on his left hand, and scratches on his neck, face and chest. [Williams] cooperated with the officers and asked that the $121 dollars taken from him be given to his children.

¶ 6 A t-shirt retrieved from [Williams] later tested positive for Hand's DNA. The knife found at the murder scene was found to match a butcher block set of knives in [Williams's] home.

Williams, 22 P.3d at 708-09.

Williams presented no evidence at the guilt phase of his trial. Much of the OCCA's account of these events is taken from the testimony of Hill, the only person present in the home who testified at trial. Hill testified that she knew there was a struggle between Williams and Hand in part because she heard Hand call out her name in a distressed voice shortly before hearing a thump, which she believed to be Hand's body hitting the floor. Hill also provided details of her own confrontation with Williams after he tackled her in the hallway. She recalled that he placed both hands around her neck and squeezed hard enough that she could not breathe. But she did not remember whether she fought back or how she was able to escape. She testified that it was possible that Williams had let her go.

Further suggesting a struggle between Williams and Hand was the testimony of Dr. Robert L. Hemphill, the medical examiner who performed the autopsy on Hand. Dr. Hemphill testified that he observed "'defensive wounds'" on Hand, which, he explained, often occur when a victim "is trying to ward off blows being struck by a sharp instrument, [or] attempt[ing] to grab the hand that has the instrument in it or to grab the instrument itself." R., Vol. II (Tr. of Jury Trial Proceedings, Vol. IV at 769 (*State v. Williams*, No. CF-97-2385 (D. Okla. April 22, 1999) (internal quotation marks omitted)). He said that the fatal wound was caused by a knife that entered the left side of Hand's chest and was still entangled in Hand's clothing at the time of the examination;

its blade measured eight inches in length by one-and-three-quarters inches at its widest point. Dr. Hemphill estimated that the knife wound was approximately six to seven inches deep and was inflicted by a single, rapid thrust of considerable force.

Also, Mark Willard, Williams's employer at Colorado Choice Meat Company, testified that he received a phone call from Williams shortly after the events at the home of Hand and Hill. Williams told Willard he had "just killed a girl" but did not provide any additional details. *Id.* at 806. According to Willard, Williams "seemed very upset," *id.* at 807; he "sounded like he was crying" and was "basically" sobbing, *id.* at 810.

II. DISCUSSION

A. Second-Degree Depraved-Mind Murder Instruction

1. Standard of Review

We first consider whether 28 U.S.C. § 2254(d) requires that we defer to the OCCA's adjudication of Williams's *Beck* claim. Williams observes that § 2254(d)'s bar to habeas relief applies only to claims "adjudicated on the merits in State court proceedings." He then argues, "Because neither the OCCA nor the federal district court properly adjudicated this claim on the merits, there is no finding to give deference to." Aplt. Br. at 18; *see Davis v. Workman*, 695 F.3d 1060, 1073 (10th Cir. 2012) ("Because there has been no state-court adjudication on the merits of the

claim, AEDPA's § 2254(d) does not apply."). We reject this argument. "An adjudication on the merits occurs when the state court resolves the case on substantive grounds, rather than procedural grounds." *Matthews v. Workman*, 577 F.3d 1175, 1180 (10th Cir. 2009) (internal quotation marks omitted). Williams presented his *Beck* claim to the OCCA, which rejected the claim not on procedural grounds, but on the substantive ground that the second-degree depraved-mind murder instruction was not warranted. *See Williams*, 22 P.3d at 712-14. Even if, as Williams asserts, the OCCA's substantive analysis "engaged in the wrong inquiry," Aplt. Br. at 17, it nevertheless constituted a rejection of his claim on the merits.

Because the OCCA adjudicated Williams's *Beck* claim on the merits, we are precluded from granting relief unless the adjudication "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," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding," *id.* § 2254(d)(2). Williams does not challenge the facts found by the OCCA. If, however, the OCCA reached a legal conclusion that was contrary to or involved an unreasonable application of *Beck*, we review de novo the issue of whether the state trial court should have instructed the jury on second-degree depraved-mind murder. *See Phillips*, 604 F.3d at 1213 (reviewing

Beck claim de novo because OCCA applied legal standard contrary to *Beck*).

The Supreme Court has explained that the "contrary to" and "unreasonable application of" clauses of § 2254(d)(1) should be accorded independent meaning. *See Williams v. Taylor*, 529 U.S. 362, 404-05 (2000). A decision is contrary to Supreme Court precedent if (1) "the state court applies a rule that contradicts the governing law set forth in [the Court's] cases," or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [the Court's] precedent." *Id.* at 405-06. In contrast, a decision involves an unreasonable application of Supreme Court precedent if the "state-court decision . . . correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407-08. We now turn to whether the OCCA reached a decision that was contrary to or involved an unreasonable application of *Beck*.

Under *Beck*, "a sentence of death [may not] be constitutionally imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and *when the evidence would have supported such a verdict.*" 447 U.S. at 627 (emphasis added) (internal quotation marks omitted). We have described the proper inquiry under *Beck* as follows:

> *Beck* requires a court to consider whether there is sufficient evidence to warrant instructing the jury on a lesser included offense, not whether there is sufficient evidence to warrant conviction on the greater offense. A *Beck* claim is not the functional equivalent of a challenge to the sufficiency of the evidence for conviction; rather, *Beck* focuses on the constitutionality of the procedures employed in the conviction of a defendant in a capital trial and is specifically concerned with the enhanced risk of an unwarranted capital conviction where the defendant's life is at stake and a reasonable jury could have convicted on a lesser included offense. Given these concerns, the sufficiency of the evidence of the greater offense is distinct from the *Beck* inquiry into whether the evidence might allow a jury to acquit a defendant of the greater of the offenses and convict him or her of the lesser.

Hogan v. Gibson, 197 F.3d 1297, 1305 (10th Cir. 1999) (citations omitted).

On three occasions we have held that the OCCA applied a rule that contradicts *Beck* because it focused on the sufficiency of evidence to support the *capital* offense instead of the sufficiency of evidence to support the *lesser-included* offense. *See Phillips*, 604 F.3d at 1211-13; *Taylor v. Workman*, 554 F.3d 879, 888 (10th Cir. 2009); *Hogan*, 197 F.3d at 1308-12. (We note that of these three, only *Hogan* predated the OCCA's decision in this case.) In *Hogan* the § 2254 applicant had killed the victim by stabbing her. *See*

197 F.3d at 1301. After testifying that the victim initially attacked him with a knife, he requested a first-degree manslaughter instruction, which the court denied. *See id.* at 1303. He was convicted of first-degree murder and sentenced to death. *See id.* at 1302. The OCCA affirmed the conviction and sentence, holding "that a manslaughter instruction was not necessary because there was sufficient evidence to support a finding of premeditation." *Id.* at 1305 (internal quotation marks omitted). We described the OCCA's reasoning as "squarely contrary to" and "a gross deviation from, and disregard for, the Court's rule in *Beck*." *Id.* at 1305. Although the OCCA had "cited a standard consistent with *Beck,*" the analysis that followed "*never* engag[ed] in the correct inquiry as to whether [the applicant] presented sufficient evidence to warrant a first-degree manslaughter instruction." *Id.* at 1306.

We identified the same error in *Taylor.* The applicant had shot and injured three people, then shot and killed another victim, but testimony supported the claim that he was merely flailing the gun around without aiming when he shot the victim who died. *See Taylor*, 554 F.3d at 882-83. The trial court submitted instructions on first-degree murder and second-degree murder, but the second-degree instruction was deficient because it improperly required that the defendant have no intent to harm any particular individual. *See id.* at 886. The OCCA held that this error was harmless because a second-degree instruction was unnecessary. *See id.* It reasoned that the

"facts suggest a design to effect the death of [the victim] and *therefore* do not support a second degree murder instruction." *Id.* (internal quotation marks omitted). We ordered habeas relief. *See id.* at 894. We explained that the OCCA had committed "essentially the same" error as it had committed in *Hogan* when it failed to consider whether the jury could have convicted of second-degree murder, instead determining that the evidence supported first-degree murder. *Id.* at 887-88.

In *Phillips* the OCCA had again affirmed the trial court's refusal to give a second-degree murder instruction. *See* 604 F.3d at 1208. The § 2254 applicant had stabbed the victim in the chest with a pocketknife, and the OCCA ruled that the evidence did not support an instruction on second-degree depraved-mind murder. *See id.* at 1207, 1211. We once more granted relief, because "[t]he OCCA's assessment of the lack of evidence supporting a second-degree murder instruction appears to be based largely on its view that the evidence *did* support [the applicant's] conviction for first-degree malice aforethought murder." *Id.* at 1212. We held that "[b]y relying upon the evidence that supported the conviction for first-degree murder, the OCCA committed the same error we identified in *Hogan* and *Taylor*" and therefore reached a decision that was contrary to *Beck*. *Id.* at 1213.

In this case the OCCA has repeated the error we identified in *Hogan, Taylor*, and *Phillips*. The court ruled that the evidence did not support a second-degree murder conviction. *See Williams*, 22 P.3d at

712. But it offered no explanation *why* the evidence did not support such a conviction, except that the evidence supported the first-degree conviction. Its analysis was as follows:

> ¶ 24 The evidence in the present case does not support the conclusion that [Williams] acted without any premeditated design to effect death. [Williams] took a butcher knife from his home, placed it in a box with a pair of gloves and a roll of duct tape and went to the deceased's home to meet her at the appointed time. [Williams] and the deceased had met previously and would recognize each other on sight. The deceased was stabbed within five minutes of [Williams's] arrival at her home. The butcher knife was driven approximately seven inches into the deceased's body. The ensuing wound was the result of a rapid, hard thrust of the knife into the body with only the handle of the knife visible. *This evidence is sufficient for any rational trier of fact to find [Williams] acted with the premeditated intent to kill the deceased.*
>
> ¶ 25 [Williams] disputes the conclusion of premeditation and argues the evidence showed no reason for the victims to feel threatened when he entered their home, therefore there was no evidence to suggest that he formed the intent to kill in advance. Premeditation sufficient to constitute murder may be formed in an instant, or it may be formed instantaneously as the killing is being committed. It may be inferred from the fact of the killing, unless circumstances raise

> a reasonable doubt whether such design existed. *The evidence clearly supports a finding that when [Williams] stabbed the deceased, he did so with the intent to kill her, regardless of whether that intent was formed prior to or after arriving at her home. Accordingly, instructions on second degree depraved mind murder were not warranted, as that crime was not supported by the evidence.*

Id. (emphasis added) (citations omitted). Thus, the court ruled that an instruction on second-degree murder was not warranted *because* the evidence supported the conviction of first-degree murder.

The OCCA's analysis in this case is strikingly similar to its analysis in *Phillips*. In both cases the OCCA cited *Beck* and set forth the proper standard. Likewise, in both cases the OCCA made specific rulings that the evidence did not support the lesser-included second-degree-murder instruction. *Compare Williams*, 22 P.3d at 712 ("The evidence in the present case does not support the conclusion that [Williams] acted without any premeditated design to effect death."), *with Phillips v. State*, 989 P.2d 1017, 1035 (Okla. Crim. App. 1999) ("[T]he evidence in the present case did not support a second degree murder instruction."). But in this case, as in *Phillips*, the OCCA based these findings "largely on its view that the evidence *did* support [the applicant's] conviction for first-degree malice aforethought murder." 604 F.3d at

1212.[1] In affirming Williams's conviction, the OCCA did not address whether evidence potentially supported a

[1] The relevant paragraphs of the OCCA's opinion in *Phillips* read, in full:

> ¶ 58 Appellant further argues he was entitled to an instruction on second degree depraved mind murder under case law which states that the trial court is to instruct on every degree of homicide which the evidence tends to prove. A defendant is entitled to an instruction on every degree of homicide which is a lesser included offense of the primary charge and which is supported by the evidence. Here, second degree depraved mind murder was not a lesser included offense and *the evidence did not support the giving of an instruction on second degree murder.*
>
> ¶ 59 Murder in the second degree occurs when perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. We have held that this statute is applicable where there is no premeditated intent to kill any particular person. Appellant argues that given the fact he stabbed the victim, only once, with a small pocket knife, and that he did so while he was angry with his father, a reasonable juror could have found that his acts were imminently dangerous and evinced a depraved mind but were committed without the design to effect death. Appellant specifically relies on testimony by the medical examiner that the type of wound suffered by the victim was survivable.
>
> ¶ 60 Appellant fails to note that the medical examiner testified that such a wound was survivable only if the victim got to a chest surgeon quickly enough. *As discussed in Proposition I, we find the evidence showed Appellant acted with the specific intent to effect the death of the victim. Therefore, the evidence*

(Continued on following page)

does not support the giving of a jury instruction on second degree depraved mind murder, even if it were a lesser included offense.

¶ 61 Appellant further argues he was entitled to the second degree depraved mind murder instruction as it was his theory of defense. However, a defendant is only entitled to an instruction on a theory of defense if that theory is supported by the evidence and is tenable as a matter of law. If there is no evidence in the record to support an instruction, it should not be given. As discussed above, the evidence did not support giving the instruction.

¶ 62 Finally, Appellant argues that by failing to instruct the jury on second degree murder, the trial court failed to provide the jury with the option of convicting him of a non-capital offense as required by *Beck v. Alabama*, 447 U.S. 625 (1980). This same argument was raised and rejected in *Valdez v. State*, 900 P.2d 363, 378-379 (Okl. Cr. 1995), *cert. denied*, 516 U.S. 967 (1995) wherein we stated:

> Neither *Beck v. Alabama* nor *Schad v. Arizona*, 501 U.S. 624 (1991) require that a jury in a capital case be given a third, non-capital option where the evidence absolutely does not support that option. The evidence in this case did not support a second degree murder instruction and the jury was thus properly precluded from considering that particular non-capital option.

¶ 63 Similarly, *the evidence in the present case did not support a second degree murder instruction.* Therefore, for the reasons discussed above, we find the trial court did not err in omitting an instruction on second degree depraved mind murder. This assignment of error is denied.

(Continued on following page)

second-degree-murder instruction, but instead surveyed the evidence of intent to kill and simply observed that such intent "may be formed in an instant, or may be formed instantaneously as the killing is being committed." *Williams*, 22 P.3d at 712.

We cannot distinguish this case from our binding precedent. Accordingly, we do not defer to the OCCA's decision. We review de novo whether a second-degree depraved-mind murder instruction was required under *Beck*.

2. Merits

To recapitulate, *Beck* instructs that "a sentence of death constitutionally [may not] be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict[.]" 447 U.S. at 627 (internal quotation marks omitted). The *Beck* inquiry can be divided into two components. *See Phillips*, 604 F.3d at 1210. First, Williams "must establish that the crime on which the trial court refused to instruct was actually a lesser-included offense of the capital crime of which he was convicted." *Id.* That component is not controverted. It is undisputed that second-degree depraved-mind murder is a

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Phillips v. State, 989 P.2d 1017, 1034-35 (Okla. Crim. App. 1999) (emphasis added) (brackets, citations, and internal quotation marks omitted).

lesser-included offense of the capital offense of which Williams was convicted. As the OCCA observed in its opinion on Williams's direct appeal, "All lesser forms of homicide are necessarily included and instructions on lesser forms of homicide should be administered if they are supported by the evidence." *Williams*, 22 P.3d at 711 (brackets and internal quotation marks omitted).

Second, Williams "must show that the evidence presented at trial could permit a rational jury to find him guilty of the lesser included offense and acquit him of first degree murder." *Phillips*, 604 F.3d at 1210 (internal quotation marks omitted). As we have explained, "*Beck* requires a court to consider whether there is sufficient evidence to warrant instructing the jury on a lesser included offense, not whether there is sufficient evidence to warrant conviction on the greater offense." *Hogan*, 197 F.3d at 1305 (citation omitted). Thus, "[o]ur question is not whether the evidence pointing to the lesser offense was weak" or "whether a jury was more likely to convict on first or second degree grounds." *Phillips*, 604 F.3d at 1213 (ellipses, brackets, and internal quotation marks omitted). Rather, "[d]ue process demands that a jury be permitted to consider a lesser-included offense of first-degree murder before imposing death so long as the evidence would have supported such a verdict." *Id.* (internal quotation marks omitted). We now turn to whether the evidence presented at Williams's trial would have supported a verdict of second-degree depraved-mind murder.

Second-degree depraved-mind murder is committed "[w]hen [a homicide is] perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." Okla. Stat. tit. 21, § 701.8(1) (1976). As we explained in *Phillips*:

> The elements of second-degree depraved mind murder are: (1) the death of a human; (2) caused by conduct which was imminently dangerous to another person; (3) the conduct was that of the defendant; (4) the conduct evinced a depraved mind in extreme disregard of human life; and (5) the conduct was not done with the intention of taking the life of any particular individual.

604 F.3d at 1211. Thus, a defendant may be convicted of this offense only if he lacked the premeditated intention of killing any particular person, *see Williams*, 22 P.3d at 712, and an instruction on the offense "demands evidence that the defendant did not intend to kill the victim," *Jones v. State*, 134 P.3d 150, 154 (Okla. Crim. App. 2006).

We hold that an instruction on second-degree depraved-mind murder was warranted because the evidence supported a conviction for that offense. We think our decision in *Phillips* controlling on the issue. The § 2254 applicant in that case had approached the victim at a gas station and stabbed him in the chest with a pocket knife without provocation after the victim had backed up and asked the applicant to leave

him alone. *See* 604 F.3d at 1205. The force of the blow knocked the victim onto a nearby car. *See id.* The blade penetrated the victim's chest two to three inches deep, slicing a 1.2 centimeter incision in the anterior surface of his heart, and he bled to death at the scene. *See id.* at 1205, 1207. After the stabbing the applicant walked inside the convenience store, at which point the store clerk observed him become "'real emotional.'" *Id.* at 1214; *see id.* at 1205. He then left the store, walked past the victim (who was lying on the ground still conscious but unable to speak), and taunted the victim with a racial slur. *See id.* at 1205. Later the same day, the applicant expressed regret to a bartender, repeatedly saying "'I'm sorry.'" *Id.* at 1214. The applicant presented no evidence during the guilt phase of trial, *see id.* at 1207, and the trial court refused his request to instruct the jury on second-degree murder, *see id.* at 1211.

Reviewing de novo the OCCA's decision affirming the trial court, we "conclude[d] that a jury could rationally find [the applicant] guilty of the lesser offense and acquit him of the greater." *Id.* at 1213-14. We explained that "the facts here show that [the applicant] may have been severely emotionally disturbed and raise doubts whether he had the requisite mental state for first-degree murder." *Id.* at 1213. We pointed to medical testimony that the knife wound could potentially have been survivable if treated quickly and that the more typical injury from such a wound "would be to a lung, which is more easily treated." *Id.* at 1214. We also noted evidence that the

applicant became emotional and expressed regret shortly after the incident. *See id.* at 1214. The mere fact that the applicant had forcefully stabbed the victim in the chest was inadequate to conclusively negate an inference that he had not intended to kill the victim.

As in *Phillips*, here we have a confrontation with an unarmed victim, culminating in a single stab wound to the chest. In each case the fatal wound was inflicted by a forceful blow with a knife, which damaged the victim's heart and caused death within minutes. Moreover, in each case the assailant became emotional and expressed regret shortly after the killing. And both applicants presented no evidence at the guilt phase of trial but relied wholly on doubt raised by the state's evidence of his mental state. In light of these similarities, our conclusion in *Phillips* compels the same conclusion here.

We recognize that the knife was bigger and the wound was deeper in this case than in *Phillips.* But the operative fact is the defendant's state of mind when he committed the homicide, not the depth of the fatal wound. *See Jones*, 134 P.3d at 154 ("The essential difference between First and Second Degree Murder is intent to kill."). We cannot say that the severity of the wound in this case, standing alone, is enough to distinguish this case from *Phillips.*

Indeed, an inference of an unintentional killing may be more reasonable here than in *Phillips.* First, eyewitnesses observed the assailant in *Phillips*

approach the victim with a knife and forcefully shove him in the chest. *See* 604 F.3d at 1205, 1214. In contrast, no witness testified to seeing Williams stab Hand. Although the medical examiner opined that the knife was thrust forcefully into Hand, Hill testified that she heard a struggle, and a forceful movement with a knife could have occurred in that circumstance absent an intent to deal a fatal blow. Supporting this possibility is the evidence that whatever it was that Williams had planned, that is not what happened. He brought with him not only the knife but also duct tape and gloves that he never used. The struggle with Hand, which began promptly after his arrival at the duplex, was apparently unforeseen. Perhaps the knife was to be used to coerce Hand into something else.[2]

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[2] The dissenting opinion in the OCCA pointed out:

> Williams entered the victim's house with her consent, purportedly to deliver meat. Indeed, his possession of a steak box containing a knife, gloves, and duct tape suggests an entry was prompted by criminal intent – Rape, Kidnapping or Murder. The prosecution's theory was that he planned to rape the victim. The evidence indicates that during Williams's struggle to subdue the victim, he fatally stabbed her once in the chest. Did he intend to kill her? Perhaps. By contrast, his single stab could have been a defensive reaction to her struggle, intended to subdue her further, prevent his own injury, or facilitate his flight from the scene.

Williams v. State, 22 P.3d 702, 734 (Okla. Crim. App. 2001) (Chapel, J., dissenting) (footnote omitted).

Williams's treatment of Hill also could suggest the absence of an intent to kill. Although Hill testified that Williams placed both his hands around her neck and squeezed hard enough that she could not breathe, there is evidence that he relented and allowed her to go. Hill said that she did not recall how she escaped and that Williams might have let her go. And a neighbor testified that he saw Williams leave the duplex before Hill did, not what one would do if intent on eliminating the witness who remained inside.[3]

Finally, the record in this case lacks the evidence of racial animus toward the victim that was presented in *Phillips*. *See* 604 F.3d at 1205.

The state cites *Bryson v. Ward*, 187 F.3d 1193, 1208 (10th Cir. 1999), as support for the proposition

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[3] We need not quarrel with the OCCA's apparent factual findings that Hill "saw Hand struggling with [Williams]," that she "fought back and was able to free herself," or that, "as soon as Hill ran out of the duplex, [Williams] also left." *Williams v. State*, 22 P.3d 702, 708-09 (Okla. Crim. App. 2001). Although we must presume the state court's *factual* findings to be correct, *see* 28 U.S.C. § 2254(e)(1), we are permitted in our de novo review of Williams's *Beck* claim to reach the *legal* determination that the evidence would have supported rational jury findings contrary to the state court's factual findings, *see Gilson v. Sirmons*, 520 F.3d 1196, 1234 (10th Cir. 2008) ("[A] state court's determination of whether the evidence presented at trial was sufficient under the *Beck* standard to justify a lesser-included instruction is not a finding of historical fact, but rather a legal determination reached after assessing a body of evidence in light of the elements of the alleged lesser-included offense.").

that evidence of intent may be so strong that an instruction on second-degree murder is inappropriate. But that case is easily distinguishable because of the evidence of planning. We wrote:

> The evidence overwhelmingly established that Bryson and Marilyn Plantz plotted to kill the victim for approximately one month prior to the murder. They contacted a number of people in an effort to get someone either to kill the victim or to help them carry out the murder. They also devised a variety of murder schemes and attempted to carry out several of those plans prior to the actual murder. The evidence, therefore, overwhelmingly establishes that this murder was intentional and premeditated.

Id. There was no such overwhelming evidence here.

Having identified an error under *Beck* in failing to allow the jury to consider the noncapital offense of second-degree depraved-mind murder, we must grant relief. When, as here, the defendant requested an instruction on the lesser offense, "[a] *Beck* error can never be harmless." *Taylor*, 554 F.3d at 893 (internal quotation marks omitted).

B. Ineffective Assistance of Counsel at Guilt Phase

Our decision on the *Beck* issue moots all the claims for which Williams seeks an expanded COA except one: ineffectiveness of trial counsel in failing to

subject the state's case to meaningful adversarial testing at the guilt phase. Were Williams to prevail on this claim, he would be entitled to relief on his conviction for assault and battery, which our ruling on the *Beck* issue leaves undisturbed. We therefore consider whether the claim warrants a COA. A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). Moreover, the OCCA rejected this claim on the merits, *see Williams*, 22 P.3d at 728-30, and "AEDPA's deferential treatment of state court decisions must be incorporated into our consideration of a habeas petitioner's request for COA." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004).

To establish a claim of ineffective assistance of counsel, Williams had to demonstrate that his counsel's performance fell below "an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 688 (1984), and "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. Williams argues that his counsel failed to subject the state's case to meaningful

adversary testing at the guilt phase, because (1) counsel's short opening statement "was nothing more than a general 'hello' and request to 'pay attention' to the evidence"; (2) counsel repeatedly referred to Hand's death as a "murder" during a cross-examination; (3) counsel effectively conceded guilt during his closing argument; and (4) counsel presented no guilt-phase evidence. Appellant's Mot. for Modification of COA at 10-11, *Williams v. Workman*, No. 11-5048 (10th Cir. May 26, 2011) (internal quotation marks omitted). He further contends that counsel's complete failure to subject the state's case to adversarial testing triggers a presumption of prejudice. *See United States v. Cronic*, 466 U.S. 648, 659 (1984) (no specific showing of prejudice necessary when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing").

The OCCA rejected this claim on the merits. In particular, it stated that defense "[c]ounsel's decision to limit his first stage opening statement and closing argument was a reasonable strategy decision to maintain credibility with jurors for sentencing." *Williams*, 22 P.3d at 730. The decision to limit closing argument made particular sense in light of the denial of a lesser-included-offense instruction on the murder charge. Conviction of first-degree murder was therefore almost inevitable, and focusing on sentencing was appropriate.

The district court ruled that the OCCA had reasonably applied the appropriate Supreme Court precedents. It explained that Williams is not entitled

to the *Cronic* presumption of prejudice, because counsel had not conceded guilt and had "cross-examined the State's first stage witnesses, made objections to the State's evidence, and made opening and closing arguments." R., Vol. 2 at 309-10. And it further concluded that Williams had failed to demonstrate prejudice under *Strickland*, opining that in light of the overwhelming evidence of guilt, the challenged actions of counsel had unlikely altered the outcome of the guilt phase. No reasonable jurist would debate the court's determination that the OCCA's decision was not an unreasonable application of Supreme Court precedent. We therefore deny a COA.

III. CONCLUSION

We REVERSE the district court's denial of Williams's application for a writ of habeas corpus on his conviction for first-degree murder and REMAND with instructions to conditionally grant the application, subject to the state's right to retry Williams within a reasonable time. We DENY Williams's request for an expanded COA.

ENTERED FOR THE COURT

Harris L Hartz
Circuit Judge

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

STERLING B. WILLIAMS, Petitioner vs. RANDALL WORKMAN, Warden, OKLAHOMA STATE PENITENTIARY, Respondent.	)	Case No. 02-CV-0377-JHP-FHM

OPINION AND ORDER

This matter comes before the Court on a Petition for Writ of Habeas Corpus (Dkt.#25) filed by Oklahoma death row inmate Sterling B. Williams, pursuant to 28 U.S.C. § 2254. Petitioner, who appears through counsel, challenges his conviction and sentencing in Tulsa County District Court Case No. CF-97-2385. Respondent filed a response to the Petition denying its allegations (Dkt.#31), Petitioner filed an Amendment to his Petition for Writ of Habeas Corpus (Dkt.#37), Respondent filed a Response to Petitioner's Amendment to his Petition for Writ of Habeas Corpus (Dkt.#41) and Petitioner filed a Reply (Dkt.#48). For the reasons discussed below, the Court finds the Petition should be denied.

The Court has reviewed: (1) the Petition for Writ of Habeas Corpus, the Response to the Petition, the Amendment to the Petition, the Response to the

Amendment and the Reply; (2) transcripts of the motion hearings held on August 18 and October 6, 1997, December 28, 1998, and April 15, 1999; (3) transcript of jury trial proceedings (including voir dire, and first and second stage proceedings), held April 19-23, 26-28, 1999 (eight volumes) (hereinafter referred to as "Tr. ___"); (4) all documents and exhibits (photographs of certain items of physical evidence submitted in lieu of actual items) admitted in jury trial proceedings; (5) transcript of the sentencing proceedings held on May 10, 1999; (6) Original Record (O.R.) in Tulsa County Case No. CF-97-2385; and (7) all other records before the Oklahoma Court of Criminal Appeals which were transmitted to this Court and certified by the parties.

BACKGROUND

I. FACTUAL HISTORY

Petitioner was convicted of the first-degree murder of LeAnna Hand and of the assault and battery with intent to kill on her roommate Elizabeth Hill. Pursuant to 28 U.S.C. § 2254(e)(1), the historical facts as found by the state court are presumed correct. In Petitioner's state court direct appeal, the Oklahoma Court of Criminal Appeals adopted the following facts:

> In May of 1997, [Williams] worked as an independent contractor for Willard Enterprises Colorado Choice Meat Company. He had sold Hand meat on prior occasions. On May 14,

1997, [Williams] phoned Hand and said he had some free meat he was going to give away and that he would bring it by her home. At approximately 11:00 a.m., Hill was in her room dressing when she heard a knock at the front door. A moment later, she heard the answering machine on the telephone click on. Hill picked up the phone in her bedroom and discovered Hand's mother on the line. Hill spoke for just a moment, then she heard Hand call her name from the other room. She opened her bedroom door and saw Hand struggling with [Williams]. Hill heard Hand fall to the floor and saw [Williams] standing over her body. Hill immediately shut her bedroom door and locked it. She tried to call 9-1-1 but could not get an open phone line. [Williams] then kicked down her bedroom door and knocked the phone out of her hand. He told Hill to be quiet. Instead, she screamed and tried to run out of the room. She escaped from her room, but [Williams] tackled her in the hallway. He threw her to the ground, climbed on top of her, and put both hands around her neck. Despite [Williams]'s attempts to choke Hill, she fought back and was able to free herself and run out of the front door of the duplex.

Hill was running to a neighbor's home when the manager of a nearby apartment complex, Carol Gorman, saw her and waved her over. Gorman observed bloody hand prints on Hill's neck. Meanwhile, as soon as Hill ran out of the duplex, [Williams] also left. He

walked to his car parked in the driveway of the duplex and drove away.

The police arrived at the scene to find Hand dead in her living room. She had suffered a seven inch stab wound to her chest. The knife cut through her ribs, through a portion of her left lung, completely through her heart and into her right lung. The knife was still in her body, tangled in her clothes. Near the victim the police found a box from the Colorado Choice Meat Company, a roll of duct tape, a baseball cap with the company logo, and a pair of gloves. Nothing was missing from the duplex, including cash Hill had left on her bed.

On the same day, [Williams] phoned his employer and said he had just killed a girl and had to go to Chicago to hide out. [Williams] withdrew money from his back [sic] account. [Williams] also phoned his girlfriend, Consuela Drew, and told her he was going to jail. An all points bulletin was issued containing a description of [Williams]'s car. The next day, May 15, 1997, Ms. Drew again spoke with [Williams] and told him to turn himself in to the police. That same day [Williams] was stopped by authorities in Alexandria, Louisiana. He had a serious cut to the index finger on his left hand, and scratches on his neck, face and chest. [Williams] cooperated with the officers and asked that the $121 dollars taken from him be given to his children.

A t-shirt retrieved from [Williams] later tested positive for Hand's DNA. The knife found at the murder scene was found to match a butcher block set of knives in [Williams]'s home.

At trial, the defense offered no evidence during the guilt stage. During the second stage of trial, the State presented evidence to support four aggravating circumstances. This evidence consisted of two Judgment and Commitment Orders from the State of Arkansas indicating [Williams]'s prior convictions for rape, kidnapping, burglary, and first degree battery. The State's evidence also showed that on separate occasions, [Williams] had attacked girlfriend, Yolanda Cunningham; broken into the home of Mike Applebury and attacked him with a baseball bat; and made obscene threatening phone calls to Michelle Sauser.

During the second stage, the defense argued [Williams] suffered from several mental health difficulties, including bipolar disorder and a sexual disorder. Expert witness testimony was offered to show that [Williams]'s family had a history of severe substance abuse and poor anger control. Evidence also showed [Williams] suffered from childhood physical abuse at the hands of his father. Expert witness testimony showed [Williams] went to Hand's home intending only to rape her, not kill her, and that his mental disorders caused him to panic when Hand resisted

> and he stabbed her only intending to silence her.

Williams v. State, 22 P.3d 702, 708-09 (Okla. Crim. App. 2001).

II. PROCEDURAL HISTORY

Petitioner, Sterling Bernard Williams, was tried by jury and convicted of First Degree Murder (Count I) and Assault and Battery with Intent to Kill, After Former Conviction of Two Felonies (Count II), in Case No. CF-97-2385, in the District Court of Tulsa County. At the conclusion of the sentencing stage, in Count I, the jury found the existence of four (4) aggravating circumstances and recommended the punishment of death. In Count II, the jury recommended as punishment ninety-nine (99) years imprisonment. On May 10, 1999, the trial court sentenced Petitioner to death on the murder conviction and to ninety-nine (99) years imprisonment on the assault and battery conviction.

Petitioner filed a direct appeal of his convictions and sentences to the Oklahoma Court of Criminal Appeals ("OCCA") in Case No. D-99-654. The OCCA rejected Petitioner's alleged errors by affirming the convictions and sentences on both counts. *Williams*, 22 P.3d at 733. The OCCA denied rehearing on May 17, 2001.

Petitioner sought post-conviction relief from the OCCA in Case No. PCD-2000-1650, but all requested

relief was denied on September 4, 2001, in a published opinion. *Williams v. State*, 31 P.3d 1046 (Okla. Crim. App. 2001) ("*Williams (PC)*"). On January 7, 2002, the United States Supreme Court rejected Petitioner's petition for writ of certiorari. *Williams v. Oklahoma*, 534 U.S. 1092 (2002).

Petitioner filed a second application for post-conviction relief from the OCCA in Case No. PCD-2002-1067, but all requested relief was denied on January 10, 2003 in an unpublished opinion.

Petitioner initiated the instant habeas corpus proceedings on May 13, 2002. He claims constitutional violations arising from the trial court's refusal to instruct on second-degree murder and/or first-degree manslaughter, error in the trial court's dismissal of a potential juror for cause, errors in the second stage jury instructions, ineffective assistance of trial counsel, the trial court's evidentiary, instructional and procedural errors, use of prior felony convictions to support more than one aggravator, insufficient evidence to support the "great risk of death to more than one person" aggravator, prosecutorial misconduct, improper victim impact evidence, unconstitutional application of continuing threat aggravator, ineffective assistance of appellate counsel, improper instruction on continuing threat aggravator, systematic risk of error in Oklahoma, cumulative errors, and improper weighing of aggravating and mitigating circumstances by the appellate court.

GENERAL CONSIDERATIONS

I. EXHAUSTION

Federal habeas corpus relief is generally not available to a state prisoner unless all state court remedies have been exhausted prior to the filing of the petition. 28 U.S.C. § 2254(b). *Harris v. Champion*, 15 F.3d 1538, 1554 (10th Cir. 1994). *See also Wainwright v. Sykes*, 433 U.S. 72, 80-81 (1977) (reviewing history of exhaustion requirement). In every habeas case, the court must first consider exhaustion. *Harris*, 15 F.3d at 1554. "[I]n a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The Supreme Court has long held that a federal habeas petitioner's claims should be dismissed if the petitioner has not exhausted available state remedies as to any of his federal claims. *Id.* (*citing Ex parte Royall*, 117 U.S. 241 (1886)); *Rose v. Lundy*, 455 U.S. 509 (1982); *Castille v. Peoples*, 489 U.S. 346 (1989); and 28 U.S.C. § 2254(b) (codifying the rule).

The exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts. Therefore, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S.

838, 845 (1999). State courts must have the rightful opportunity to adjudicate federal rights. The "[p]rinciples of exhaustion are premised upon recognition by Congress and the Court that state judiciaries have the duty and competence to vindicate rights secured by the Constitution in state criminal proceedings." *Williams v. Taylor*, 529 U.S. 420, 436-37 (2000). This Court will address the exhaustion issue as it arises in each claim.

II. PROCEDURAL BAR

The Supreme Court has also considered the effect of state procedural default on federal habeas review, giving strong deference to the important interests served by state procedural rules. *See*, *e.g.*, *Francis v. Henderson*, 425 U.S. 536 (1976). Habeas relief may be denied if a state disposed of an issue on an adequate and independent state procedural ground. *Coleman*, 501 U.S. at 750. *See also Romero v. Tansy*, 46 F.3d 1024, 1028 (10th Cir. 1995); *Brecheen v. Reynolds*, 41 F.3d 1343, 1353 (10th Cir. 1994).

A state court's finding of procedural default is deemed "independent" if it is separate and distinct from federal law. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985); *Duvall v. Reynolds*, 139 F.3d 768, 796-97 (10th Cir. 1998). If the state court finding is applied "even-handedly to all similar claims," it will be considered "adequate." *Maes v. Thomas*, 46 F.3d 979, 986 (10th Cir. 1995) (*citing Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982)).

To overcome a procedural default, a habeas petitioner must demonstrate either: (1) good cause for failure to follow the rule of procedure and actual resulting prejudice; or (2) that a fundamental miscarriage of justice would occur if the merits of the claims were not addressed in the federal habeas proceeding. *Coleman*, 501 U.S. at 749-50.

III. STANDARD OF REVIEW – AEDPA

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") specifically delineates the circumstances under which a federal court may grant habeas relief. Title 28, Section 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision 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.

Under § 2254(d), this Court may grant a writ of habeas corpus only if the state court reached a conclusion opposite to that reached by the Supreme

Court on a question of law, decided the case differently than the Supreme Court has decided a case with a materially indistinguishable set of facts, or unreasonably applied the governing legal principle to the facts of Petitioner's case. *Terry Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

PETITIONER'S CLAIMS FOR RELIEF

I. Jury Instructions on Lesser-Included Offenses

Petitioner alleges in his first claim for relief that the trial court committed constitutional error in denying Petitioner's requested jury instructions on both murder in the second-degree by one with a "depraved mind" and first-degree manslaughter pursuant to *Beck v. Alabama*, 447 U.S. 625 (1980). Petitioner contends that a second-degree murder instruction was warranted as there was evidence supporting a lack of intent to kill. In response, Respondent declares that the OCCA's rejection of this claim on direct appeal was not contrary to, nor an unreasonable application of, *Beck*.

The Due Process Clause of the Fourteenth Amendment ensures that the death penalty may not "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." *Beck*, 447 U.S. at 627. The Supreme Court explained that "when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction" and that "[s]uch a risk cannot be tolerated in a case in which the defendant's life is at stake." *Gilson v. Sirmons*, 520 F.3d 1196, 1233 (10th Cir. 2008) (*quoting Beck*, 447 U.S. at 637). The *Beck* requirement is satisfied so long as the jury had the option of at least one lesser-included offense. *Schad v. Arizona*, 501 U.S. 624, 645-46 (1991). The Supreme Court has reiterated that the goal in *Beck* was to "eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Id.* at 646-47 (*quoting Spaziano v. Florida*, 468 U.S. 447, 455 (1984)).

The Tenth Circuit Court of Appeals in *Hogan v. Gibson* cautioned:

> *Beck*, 447 U.S. at 627 . . . requires a court to consider whether there is sufficient evidence to warrant instructing the jury on a lesser included offense, not whether there is sufficient evidence to warrant conviction on the greater offense. A *Beck* claim is not the functional equivalent of a challenge to the

> sufficiency of the evidence for conviction; rather, *Beck* focuses on the constitutionality of the procedures employed in the conviction of a defendant in a capital trial and is specifically concerned with the enhanced risk of an unwarranted capital conviction where the defendant's life is at stake and a reasonable jury could have convicted on a lesser included offense. *See id.* at 637. . . . Given these concerns, the sufficiency of the evidence of the greater offense is distinct from the *Beck* inquiry into whether the evidence might allow a jury to acquit a defendant of the greater of the offenses and convict him or her of the lesser.

197 F.3d 1297, 1305 (10th Cir. 1999).

Petitioner's *Beck* claim has two components. First, Petitioner must establish that the crime on which the trial court refused to instruct was actually a lesser-included offense of the capital crime of which he was convicted. *Phillips v. Workman*, 604 F.3d 1202, 1210 (10th Cir. 2010) (*citing Hogan*, 197 F.3d at 1306). Second, he "must show that the evidence presented at trial would permit a rational jury to find him guilty of the lesser-included offense and acquit him of first degree murder." *Id.* (*quoting Young v. Sirmons*, 486 F.3d 655, 670 (10th Cir. 2007)); *see also Taylor v. Workman*, 554 F.3d 879, 888 (10th Cir. 2009) (*quoting Hogan*, 197 F.3d at 1308) ("The proper inquiry is whether the defendant presented sufficient evidence to 'allow a jury to rationally conclude' that the defendant was guilty of the lesser-included

offense"). "Only if there is evidence which tends to negate an element of the greater offense, which would reduce the charge, should instructions on a lesser included offense be given." *Gilson*, 520 F.3d at 1234 (*citing United States v. Scalf*, 708 F.2d 1540, 1546 (10th Cir. 1983) and *Fairchild v. State*, 998 P.2d 611, 627 (Okla. Crim. App. 1999)).

A. The trial court refused to instruct on a requested lesser-included offense.

"Under Oklahoma law, all lesser forms of homicide are considered lesser included offenses of first degree murder." *Id.* (*citing Shrum v. State*, 991 P.2d 1032, 1036 (Okla. Crim. App. 1999)). Thus, both of the offenses cited by Petitioner, second-degree murder and first-degree manslaughter, were and are considered lesser-included offenses of first degree murder.

It is undisputed that Petitioner sought and was denied instructions on second-degree depraved mind murder and first-degree manslaughter at trial. (*See* O.R. 231-32, 241).

B. This Court must defer to the trial court's ruling under the AEDPA.

Petitioner, citing *Hogan*, 197 F.3d at 1306, argues that the deference to the state court which is normally required under the AEDPA is not required in the situation herein because the OCCA did not reach this issue on the merits, but instead made nothing more than a conclusory finding based on an improper

inquiry. "Deference to the state court under AEDPA is only required for 'any claim that was adjudicated on the merits in State court proceedings.'" *Hogan*, 197 F.3d at 1306 (*quoting* 28 U.S.C. § 2254(d)). Likewise, the Court owes no deference to a state-court decision when it applies a legal rule that differs materially from the rule mandated by the United States Supreme Court. *Richie v. Workman*, 599 F.3d 1131, 1137 (10th Cir. 2010) (*citing Douglas v. Workman*, 560 F.3d 1156, 1170 (10th Cir. 2009)).

Here, the OCCA specifically found that "[t]he evidence in the present case does not support the conclusion that [Williams] acted without any premeditated design to effect death" and held that "instructions on second degree depraved mind murder were not warranted, as that crime was not supported by the evidence." *Williams*, 22 P.3d at 711-12. Likewise, the OCCA ruled that "an instruction on first degree manslaughter was not warranted, as it was not supported by the evidence." *Id.* at 713-14. The OCCA cited *Beck* and found that "the evidence in the present case did not support instructions on any lesser forms of homicide." *Id.* at 714.

In *Hogan*, the Tenth Circuit ruled that because the OCCA "made no findings as to whether Hogan had presented sufficient evidence to warrant a first-degree manslaughter instruction, it is axiomatic that there are no findings to which we can give deference. As such, we will consider Hogan's *Beck* claim on the merits." 197 F.3d at 1306. In contrast, in the instant case, the OCCA did make specific findings as to

whether Williams presented sufficient evidence to warrant instruction on each lesser-included offense. *See Williams*, 22 P.3d at 711-14. Thus, this Court finds that the OCCA reached a decision on the merits of this issue based upon its application of the rules of law as stated in *Beck* and *Hogan*.

Moreover, this Court finds that the OCCA's analysis was not contrary to *Beck*. The proper inquiry is whether the evidence presented at trial would permit a rational jury to find Petitioner guilty of the lesser-included offense and acquit him of first-degree murder. *See Phillips*, 604 F.3d at 1210; *Hogan*, 197 F.3d at 1308. Petitioner urges this Court to reject the OCCA's determination because Petitioner claims the OCCA improperly considered whether there was sufficient evidence to warrant a conviction for first-degree murder as opposed to considering whether there was sufficient evidence to warrant instructing the jury on the lesser-included offenses. To the contrary, the OCCA made specific findings regarding the sufficiency of the evidence for the second-degree murder charge, *see Williams*, 22 P.3d at 711-12, and the first-degree manslaughter charge, *see id.* at 713. Moreover, the OCCA appropriately cited both *Hogan* and *Beck*. *Id.* at 711, 713. Indeed, the OCCA did discuss the evidence which Petitioner contends would support the lesser-included charges – the fact that Petitioner took a pair of gloves and a roll of duct tape with him to Ms. Hand's home. *Id.* at 712. The OCCA also noted that "[Williams] disputes the conclusion of premeditation and argues the evidence showed no

reason for the victims to feel threatened when he entered their home." *Id.* Thus, the OCCA engaged in the proper inquiry and its analysis was not contrary to *Beck*.

Recently, in *Phillips*, the Tenth Circuit addressed a claim regarding the constitutionality of a failure to give the lesser-included instruction of second-degree depraved mind murder and held that "by limiting its analysis of Mr. Phillips's *Beck* claim to the sufficiency of the evidence supporting the first-degree murder conviction, the OCCA's reasoning turns Beck on its head, and 'is in gross deviation from, and disregard for, the Court's rule in *Beck*.'" 604 F.3d at 1212 (*quoting Hogan*, 197 F.3d at 1305). As a result, the Tenth Circuit held that the OCCA's analysis was contrary to Beck and engaged in *de novo* review of whether the facts warranted a second-degree murder instruction. *See id.* at 1213-16.

The OCCA's analysis in this case can be distinguished from that of the OCCA in *Phillips*. In *Phillips*, the OCCA explicitly based its finding that the evidence did not support an instruction on second-degree murder on the fact that the evidence supported a finding of intent to kill. *See Phillips v. State*, 989 P.2d 1017, 1035 (Okla. Crim. App. 1999) ("As discussed in Proposition I, we find the evidence showed Appellant acted with the specific intent to effect the death of the victim. Therefore, the evidence does not support the giving of a jury instruction on second degree depraved mind murder, even if it were a lesser included offense."). In contrast, in this case, while the

OCCA did engage in some irrelevant discussion pertaining to the sufficiency of the evidence supporting the first-degree murder charge, *see*, *e.g.*, *Williams*, 22 P.3d at 712 (discussing evidence supporting a finding of premeditation and concluding "This evidence is sufficient for any rational trier of fact to find Appellant acted with the premeditated intent to kill the deceased."), there is no indication that this discussion formed the basis for its findings that "the evidence in the present case did not support instructions on any lesser forms of homicide." *Id.* at 714. Thus, here, in contrast to *Phillips*, the OCCA's analysis was not contrary to *Beck*.

Because the OCCA determined this issue on the merits and applied the standard set forth in *Beck*, this Court's review of the OCCA's decision on the issue is governed by the AEDPA.

C. Second-degree murder instructions were not supported by the evidence.

The Court must determine whether a jury could rationally find Petitioner "guilty of the lesser offense and acquit him of the greater" *Beck*, 447 U.S. at 635, and whether there was trial evidence which tends to negate an element of the first-degree murder charge and allow a reduced charge. *See Hogan*, 197 F.3d at 1305; *Gilson*, 520 F.3d at 1234.

In analyzing Petitioner's *Beck* claim, this Court must consider the elements of both first-degree malice aforethought murder and second-degree

depraved mind murder in light of the evidence presented at trial. *See Malicoat v. Mullin*, 426 F.3d 1241, 1253 (10th Cir. 2005). The trial court instructed Petitioner's jury that the elements of first-degree malice aforethought murder are: (1) death of a human; (2) death was unlawful; (3) death was caused by the defendant; and (4) death was caused with malice aforethought. (*See* O.R. 305). Malice aforethought was further defined as meaning "a deliberate intention to take away the life of a human being." (*Id.* at 306). The elements of second-degree depraved mind murder are: (1) death of a human; (2) caused by conduct which was imminently dangerous to another person; (3) the conduct was that of the defendant; (4) the conduct evinced a depraved mind in extreme disregard of human life; and (5) the conduct was not done with the intention of taking the life of any particular individual. Okla. Stat. tit. 21, § 701.8(1); *Taylor v. State*, 998 P.2d 1225, 1231 (Okla. Crim. App. 2000), abrogated on other grounds. The parties are in agreement that the focus is on the intent element.

Here, Petitioner argues that the same circumstantial evidence which supports a finding of malice aforethought might also support a finding that he possessed a depraved mind in extreme disregard of human life but without intent to kill at the time of the stabbing. Evidence at trial showed that Petitioner was upset and believed he was going to jail immediately before going to the victim's home. (Tr. IV 837). The evidence revealed that Petitioner went to the victim's house with a butcher knife from his home

which he placed in a box with a pair of gloves and a roll of duct tape. (*Id.* at 653-55, 726, 736; Tr. V 891). Evidence showed that thereafter a struggle ensued. During the struggle, Petitioner fatally stabbed the decedent once in her chest. (Tr. IV 640-41, 664, 766-67, 769-70, 853-55). The knife cut through her ribs, through a portion of her left lung, completely through her heart and into her right lung. (*Id.* at 758-59). Testimony established that the wound occurred quickly. (*Id.* at 789-90, 796-97). The evidence at trial revealed that after the killing Petitioner was upset and crying. He called his boss and admitted to "killing a girl." (*Id.* at 806-07, 809-10). He was also crying when he later spoke to Consuela Drew on the phone. (*Id.* at 839). Petitioner contends that when viewing this evidence a reasonable juror could find that at no point did Petitioner intend to kill the victim, but rather, Petitioner intended merely to harm or scare the victim or to rape or kidnap the victim. Petitioner argues that based on this version of events, a jury could rationally conclude that Petitioner's death was perpetrated by an act imminently dangerous to the victim and evincing a depraved mind, but without a premeditated design to effect death.

In this case, Petitioner relies on evidence that he brought gloves and duct tape with him to the victim's home and on the fact that a struggle ensued prior to the killing to support his claim that the evidence was sufficient to require the trial court to give instruction on second-degree murder. This evidence is not sufficient to negate the malice aforethought

element of the first-degree murder charge because, as discussed by the OCCA, even if there was no evidence to suggest that Petitioner formed the intent to kill in advance of going to the victim's home, premeditation sufficient to constitute murder may be formed in an instant, or as the killing is being committed. *See Williams*, 22 P.3d at 712 (*citing Phillips v. State*, 989 P.2d 1017, 1029 (Okla. Crim. App. 1999)). There simply was no evidence introduced at trial that tended to negate a finding of malice aforethought. *See Gilson*, 520 F.3d at 1234 (*citing Fairchild*, 998 P.2d at 627). This Court must conclude that no jury could rationally acquit Petitioner of first-degree murder and convict him of second-degree depraved mind murder. *See Beck*, 447 U.S. at 635.[1]

The facts of this case stand in stark contrast to others where relief has been granted on this ground. Both the *Hogan* and *Taylor* cases involved testimony from the defendant himself as to his mental state at

[1] Petitioner suggests that this case is analogous to *Willingham v. Mullin*, 296 F.3d 917 (10th Cir. 2002) where the Tenth Circuit found that the evidence presented was legally sufficient to warrant a second-degree murder charge. That case is easily distinguished from the case at bar. In *Willingham*, the defendant struck the victim in the face several times, slammed her head into a wall, let her fall backward onto the floor and kicked her in the face. *Id.* at 920. When the victim no longer resisted, the defendant left and the victim asphyxiated on blood from her injuries. *Id.* In this case, Petitioner did not merely strike and kick Ms. Hand. He plunged a large butcher knife approximately seven inches through Ms. Hand's chest including several vital organs. (*See* Tr. IV 758-59).

the time of the killing. *See Hogan*, 197 F.3d at 1301, 1308; *Taylor*, 554 F.3d at 890-91.

In the *Hogan* case, Mr. Hogan grabbed a knife from the victim, a longtime friend, who, after a dispute, had threatened to harm Mr. Hogan with it. Mr. Hogan stabbed the victim approximately twenty-five times, creating three wounds that would have been independently fatal. 197 F.3d at 1310. A tape-recorded confession from Mr. Hogan was played at trial. *Id.* at 1301. During the confession, Mr. Hogan stated that the victim initially grabbed a knife and came at him and that the murder weapon was the knife with which the victim attacked him. *Id.* at 1308. Mr. Hogan also stated that he feared the victim was retreating into the kitchen to grab another knife. *Id.* Mr. Hogan's knife injuries were corroborated by medical personnel. *Id.* The Tenth Circuit held that Mr. Hogan was entitled to a lesser-included offense instruction on first-degree manslaughter because, despite the horrific nature of the crime, and the repeated stabbings, a reasonable jury might find adequate provocation, heat of passion resulting from fear and terror, causation and immediacy, so as to warrant the manslaughter instruction. *Id.* at 1309.

In *Taylor*, a jury convicted Mr. Taylor of one count of first-degree murder and three counts of shooting with intent to kill, and sentenced him to death. *Taylor*, 554 F.3d at 883-84. During a visit with a business contact who owed him $800, Mr. Taylor became startled and shot two people in the head, shot a third person twice, and killed a fourth person, by

shooting him twice in the back. *Id.* at 882-883. The trial court gave an instruction on second-degree depraved mind murder, but the instruction was incorrect. *Id.* at 886. After Mr. Taylor was convicted of first-degree murder, the OCCA found any error in the instruction harmless, because "[Mr. Taylor] testified that as he ran through the living room, he saw movement out of the corner of his eyes and fired in that direction twice, killing [the victim]. These facts suggest a design to effect the death of [the victim] and therefore do not support a second degree murder instruction." *Taylor*, 554 F.3d at 886 (*citing Taylor v. State*, 998 P.2d 1225, 1231 (Okla. Crim. App. 2000)). Reviewing the OCCA's legal conclusions *de novo*, the Tenth Circuit concluded that if Mr. Taylor did not aim, but rather the gun was simply flailing around as he testified, such behavior would be imminently dangerous to another person, and it would evince a depraved mind with a disregard of human life, but it would not indicate any premeditated design to kill the victim. *Taylor*, 554 F.3d at 890-91. In addition, the Tenth Circuit found it significant that the trial court had found that the evidence was sufficient to give a second-degree murder instruction, even though that instruction was incorrect. *Id.* at 891.

In the instant case, unlike in *Hogan* and *Taylor*, Petitioner did not testify regarding his mental state at the time of the killing. Furthermore, during first stage, no other direct testimony was offered with respect to Petitioner's mental state at the time of the killing. Nor did the trial court in this case find that

evidence was sufficient to warrant a second-degree murder instruction unlike the *Taylor* case.

In *Phillips*, Mr. Phillips fatally stabbed the victim once in the chest with a pocketknife. 604 F.3d at 1207. The single stab went into the victim's heart. *Id.* The medical examiner testified that the more typical wound resulting from a single stab to the chest with a pocketknife would be to a lung, which is more easily treated. *Id.* at 1214. The medical examiner also stated that the wound was potentially survivable if treatment was given quickly. *Id.* In addition, there was testimony that prior to the killing Mr. Phillips was emotionally disturbed by recent events that transpired with his father "with whom he had a very troubled and violent relationship." *Id.* Likewise, there was testimony that Mr. Phillips was upset and apologetic after the killing. *Id.* The Tenth Circuit concluded, "Because the facts here show that Mr. Phillips may have been severely emotionally disturbed and raise doubts whether he had the requisite mental state for first-degree murder, we conclude that a jury could rationally find Mr. Phillips 'guilty of the lesser offense and acquit him of the greater.'" *Id.* at 1213-14. (*quoting Beck*, 447 U.S. at 635).

In this case, as distinguished from *Phillips*, there was no testimony that the wound inflicted by Petitioner might have been survivable. In fact, the medical examiner testified here that the death would have occurred within minutes. (Tr. IV 791-92). Likewise, in this case, in contrast to *Phillips*, while there was brief mention that Petitioner was "upset" before, and

"crying" after, the killing, there was no evidence that Petitioner's emotional disturbance rose to the level that it might negate the requisite intent for first-degree murder.

Because there was no evidence introduced at trial which could negate the intent element of first-degree murder and which would allow a reasonable juror to acquit Petitioner of first-degree murder, the OCCA's holding that "instructions on second degree depraved mind murder were not warranted, as that crime was not supported by the evidence" was a reasonable application of *Beck*. *Williams*, 22 P.3d at 711-12. Petitioner is not entitled to habeas relief on this claim of error.

D. First-degree manslaughter instructions were not supported by the evidence.

Under Oklahoma law, a person commits first-degree heat of passion manslaughter if the homicide is "perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide." Okla. Stat. tit. 21, § 711(2). The elements of heat of passion manslaughter are: "1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage, or resentment; 3) homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal connection between

the provocation, passion and homicide." *Charm v. State*, 924 P.2d 754, 760 (Okla. Crim. App. 1996). Adequate provocation is "any improper conduct of the deceased toward the defendant which naturally or reasonably would have the effect of arousing a sudden heat of passion within a reasonable person in the position of the defendant." *Washington v. State*, 989 P.2d 960, 968 n. 4 (Okla. Crim. App. 1999).

In considering Petitioner's direct appeal challenge to the trial court's failure to instruct on first-degree manslaughter, the OCCA rejected the claim as follows:

> [Williams] concedes "there [was] no evidence to indicate the victim conducted herself in a manner described by the provocation doctrine." Our review of the evidence supports that conclusion. Further, our review of the evidence shows nothing to support the other elements of first degree manslaughter. Therefore, an instruction on first degree manslaughter was not warranted, as it was not supported by the evidence.

Williams, 22 P.3d at 713.

Despite claiming that the trial court's refusal to give a first-degree manslaughter instruction constitutes constitutional error, Petitioner devotes no argument or briefing to this point of error. Respondent points out that the record is devoid of any evidence supporting the adequate provocation element and that Petitioner admitted such in his brief on direct appeal. Upon review of the record, there is no

evidence that Petitioner was adequately provoked. The victim did nothing improper to provoke Petitioner. The evidence simply did not support the first-degree manslaughter instruction he requested. Accordingly, the Court concludes that the OCCA's decision was not an unreasonable application of *Beck*. *See* 28 U.S.C. § 2254(d). The trial court's refusal to give the first-degree manslaughter instruction does not warrant habeas relief.

II. Jury Selection

In the second claim, Petitioner argues his Sixth and Fourteenth Amendment rights were violated when prospective juror Beth Downey was improperly excused for cause because she held conscientious objections to the death penalty and Petitioner's trial counsel was not allowed to rehabilitate her. This claim was presented to the OCCA and rejected on its merits. *Williams*, 22 P.3d at 709-11. In considering Petitioner's objections to the exclusion of Ms. Downey, the OCCA stated:

> While the better approach in examining potential jurors regarding the punishments in a capital murder case is to use the voir dire questions in the order set forth in the uniform instructions, we find the manner in which the trial court conducted voir dire in this case was not error. The trial court's questions to Ms. Downey sufficiently established that she could neither consider nor impose the death penalty in a case where

> the evidence and law warranted its imposition. Her unequivocal statements that she did not believe in and would not impose the death penalty under any circumstances allowed the trial court to determine whether her views would prevent or substantially impair the performance of her duties. While the trial court did not specifically ask Ms. Downey whether she could follow the law despite her beliefs or set those beliefs aside, it is clear from her responses to other questions that she was irrevocably committed to vote against the death penalty, regardless of what the evidence and law warranted. Accordingly, the trial court did not err in excusing Downey for cause.

Id. at 710 (citations omitted). With respect to Petitioner's assertion that the trial court erred in refusing to allow him to further question and rehabilitate Ms. Downey, the OCCA noted that "[w]hen the proper questions have been asked by the trial court to determine whether prospective jurors can sit in the case, it is not error to deny defense counsel an opportunity to rehabilitate the excused jurors." *Id. (citing Scott v. State*, 891 P.2d 1283, 1289-90 (Okla. Crim. App. 1995)). The OCCA denied the claim of error and held: "The trial court's questions were adequate to determine whether Ms. Downey could sit as a fair and impartial juror in this case. Accordingly, it was not error to deny defense counsel the opportunity to make further inquiry." *Id.* at 710-11. Respondent asserts that the OCCA's decision was not an unreasonable application of clearly established federal law.

In *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 (1968), the United States Supreme Court held a sentence of death cannot be upheld if the jury that imposed or recommended it was chosen by excluding for cause all veniremen who voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. In *Adams v. Texas*, 448 U.S. 38, 45 (1980), the Court held that "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." In *Wainwright v. Witt*, 469 U.S. 412, 420 (1985), the Court held the *Adams* standard was the appropriate standard for dealing with issues regarding allegations of improper exclusion of jurors in violation of *Witherspoon.* However, "[r]elevant *voir dire* questions addressed to this issue need not be framed exclusively in the language of the controlling appellate opinion. . . ." *Id.* at 433-34. Additionally, a trial judge's decision regarding a potential juror's bias is a factual finding entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1), and Petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Davis v. Executive Dir. of Depot of Corr.*, 100 F.3d 750, 777 (10th Cir. 1996). *See also Cannon v. Gibson*, 259 F.3d 1253, 1279 (10th Cir. 2001); *Castro v. Ward*, 138 F.3d 810, 824 (10th Cir. 1998). Since issues of credibility and demeanor are critical to a judge's decision, review of such decisions is "quite deferential." *Davis*, 100 F.3d

at 777. "Deference is necessary because a reviewing court, which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court to make credibility determinations." *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003). Upon review, the question is not whether this Court might disagree with the trial court's findings, but whether those findings are fairly supported by the record. *Wainwright*, 469 U.S. at 434.

Petitioner argues that Ms. Downey was not properly questioned and his trial counsel was denied the opportunity to *voir dire* Ms. Downey about her beliefs with regard to the death penalty. The relevant part of the trial court's inquiry of Ms. Downey follows:

THE COURT: Ms. Downey, Mr. Ellard, can you think of any reason why you could not be fair and impartial jurors in this case? Ms. Downey?

MS. DOWNEY: I don't think I can – I don't believe in the death penalty.

THE COURT: All right. You tell me, then, that your views about the death penalty would prevent or substantially impair you from considering that as a punishment in this case, should the law and the evidence warrant?

MS. DOWNEY: Yes.

THE COURT: You've had some time to think about that, I assume –

MS. DOWNEY: Yes.

THE COURT: – during the last –

MS. DOWNEY: I think it would bother me. I think it would really bother me.

THE COURT: Well, I need to make sure that you and I are communicating. I doubt very seriously that regardless of any of these people's answers, if they were to be asked, would it bother you, the answer would probably be yes.

MS. DOWNEY: I think I would think about it the rest of my life. I really –

THE COURT: Well, the question is not – I doubt very seriously that if that happened, that these people wouldn't think about it the rest of their life. But that's not the question. The question is, are your views such that it would prevent you or substantially impair you from imposing that punishment, should the law and the evidence warrant?

MS. DOWNEY: Yes.

THE COURT: All right. I'll excuse you, ma'am, for cause.

(Tr. III 309-10). Without further questioning, Ms. Downey was excused for cause after defense counsel's request to *voir dire* the witness was overruled. (*Id.* at 310-11).

This Court finds that prospective juror Beth Downey was not improperly questioned and excused. Rather, the Court finds ample support for the trial court's decision that the views of prospective juror Downey were so strong that she would not be able to perform her duties as a juror in accordance with the instructions and her oath. *See Wainwright*, 469 U.S. at 433. Thus, prospective juror Downey was properly excused for cause. The trial judge was face to face with Ms. Downey and a trial judge's "power of observation often proves the most accurate method of ascertaining the truth." *Wainwright*, 469 U.S. at 434. Since Petitioner offers no evidence to rebut the factual determination of the trial court regarding Ms. Downey's bias against the imposition of the death penalty, the Court cannot grant habeas relief for the dismissal of Ms. Downey. Moreover, Petitioner cites no Supreme Court precedent supporting his claim that the trial court's refusal to allow his counsel to further question Ms. Downey violates his constitutional rights. The OCCA's finding that it was not error to deny defense counsel the opportunity to make further inquiry because the trial court's questions were sufficient to establish that Ms. Downey could not be an impartial juror was not an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). Because Petitioner has not established

that the OCCA's determination of this issue was not an unreasonable application of the above-cited Supreme Court precedent, habeas relief on this issue is denied.

III. Second Stage Instructions – Mitigating Evidence

Petitioner in his third claim for habeas corpus relief asserts that the second stage jury instructions prohibited the jury from considering all relevant mitigating evidence in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Petitioner argues that Supplemental Instruction No. 10 prohibited the jury from considering Kevin Williams's prior conviction as relevant mitigating evidence and that Supplemental Instruction No. 18 improperly limited the jury's consideration of mitigating evidence to only that related to moral culpability or blame.

This claim was presented to the OCCA and rejected on its merits. *Williams*, 22 P.3d at 727-28. Respondent contends that the OCCA's determination that the second stage jury instructions did not prohibit the jury from considering all relevant mitigating evidence was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent.

The Supreme Court has determined that a jury may not be precluded from considering any "constitutionally relevant mitigating evidence." *Buchanan v.*

Angelone, 522 U.S. 269, 276 (1998) (*citing Penry v. Lynaugh*, 492 U.S. 302, 317-18 (1989) and other cases). The Supreme Court has described such evidence as "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." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (*quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). "However, the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan*, 522 U.S. at 276 (*citing Johnson v. Texas*, 509 U.S. 350, 362 (1993); *Penry*, 492 U.S. at 326; *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988)). Concerned that restrictions on a jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence, the Supreme Court held in *Boyde v. California*, 494 U.S. 370, 380 (1990), that the standard for determining whether jury instructions satisfy these principles 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."

A. Instruction No. 10

Petitioner contends that Supplemental Instruction No. 10 improperly prohibited the jury from considering the prior conviction of Kevin Williams, Petitioner's brother, as relevant mitigating evidence. During the sentencing stage, the defense presented

the testimony of Kevin Williams and Dr. Stephen Peterson. Kevin testified regarding the abuse he and Petitioner received as children at the hands of their father as children. (*See generally* Tr. VII 1168-1228). It was brought out during his testimony that he is a convicted felon. (*See id.* at 1211-1213). Dr. Stephen Peterson later testified that at the time Kevin Williams committed the offense for which he was convicted he suffered from mental illness. (*See* Tr. VIII 1250, 1340-41).

Supplemental Instruction No. 10, the challenged instruction, provided:

> Evidence has been presented that Kevin Williams has heretofore been convicted of a criminal offense. This evidence is called impeachment evidence, and it is offered to show that the witness's testimony is not believable or truthful. If you find that this conviction occurred, you may consider this impeachment evidence in determining what weight and credit to give the credibility of that witness. You may not consider this impeachment evidence as proof of innocence or guilt of the defendant. You may consider this impeachment evidence only to the extent that you determine it affects the believability of the witness, if at all.

(O.R. 268).

In support of his claim of error, Petitioner argues that the evidence that Petitioner's brother had previously been convicted of a crime[2] is somehow probative of the fact that Petitioner suffered from a mental disorder, and thus, should be considered relevant mitigating evidence. Respondent contends that Kevin Williams's conviction was not relevant mitigating evidence to the imposition of the death penalty and that there is not a reasonable likelihood that the jury applied Instruction No. 10 in a way that prevented consideration of relevant mitigating evidence.

In considering Petitioner's contention that this instruction unconstitutionally prohibited the jury from considering all relevant mitigating evidence, the OCCA stated:

> Evidence of Kevin Williams' prior conviction in and of itself is not relevant evidence mitigating against the death penalty for [Williams] because it could not, if believed by the jury, lessen [Williams]'s culpability and the severity of his sentence. *See Bryson v. State*, 876 P.2d 240, 256-257 (Okl.Cr.1994), . . . , relying on *Eddings* and *Skipper v. South Carolina*, 476 U.S. 1, 4 . . . (1986). What is mitigating is that [Williams]'s family had a

[2] Petitioner misleadingly uses the terms "conviction" and "incarceration" interchangeably in his briefing on this issue. Instruction No. 10 was clearly only applicable to the evidence that Kevin Williams was previously "convicted of a criminal offense." The disputed jury instruction does not refer to the "incarceration" of Kevin Williams.

> history of mental disorders and that due to that family heredity there was a strong possibility [Williams] also suffered from similar mental disorders. Evidence of Kevin Williams' prior conviction merely demonstrated the family history of mental problems.
>
> Instruction No. 10 did not prevent the jury from considering Kevin Williams' testimony, if they found it credible, as mitigating evidence. Neither Instruction No. 10 nor any other instructions given to the jury prevented their consideration of the family history of mental disorders as mitigating evidence. Further, Instruction No. 19 specifically informed the jury that mitigating evidence had been introduced of [Williams]'s history of suffering abuse at the hands of his parents. (O.R.277). Accordingly, we find Instruction No. 10 did not prevent the jury from considering any relevant mitigating evidence. This assignment of error is denied.

Williams, 22 P.3d at 727.

It was not unreasonable for the OCCA to determine that evidence of the prior conviction of Kevin Williams is not relevant evidence mitigating against the death penalty in this case. The prior conviction of Petitioner's brother is neither evidence of "an aspect of a [Petitioner's] character or record" nor evidence of "the circumstances of the offense." *See Lockett*, 438 U.S. at 604. Rather, it involves the character and record of *Petitioner's brother*. Thus, there is no constitutional requirement that the jury consider the

evidence of Kevin Williams's prior conviction as mitigating evidence.

Moreover, applying the standards established in *Boyde* there is no reasonable likelihood that the jury applied Instruction No. 10 in a way that prevents the consideration of constitutionally relevant evidence. *See Boyde*, 494 U.S. at 380. Instruction No. 10 merely limited the jury's consideration of the evidence "that Kevin Williams has heretofore been convicted of a criminal offense" to impeachment purposes. Instruction No. 10 did not in any way limit the jury's consideration for mitigation purposes of the evidence of Petitioner's family history of mental disorders and abuse presented by Petitioner through Kevin Williams and Dr. Peterson. Also, as noted by the OCCA, Instruction No. 19 specifically informed the jury that mitigating evidence had been introduced of Petitioner's history of suffering abuse at the hands of his parents as well as evidence that at the time of the crime Petitioner was under the influence of mental/emotional disturbance. (O.R. 277). Furthermore, it was Dr. Peterson, and not Kevin Williams, that testified regarding Kevin's history of mental illness. The fact that the jury was instructed that Kevin's conviction should only be used to impeach Kevin's testimony does not in any way restrict consideration of Dr. Peterson's testimony regarding Kevin's history of mental illness.

The OCCA clearly complied with the mandates of the above-cited Supreme Court precedent in its analysis of Petitioner's claim that Supplemental

Instruction No. 10 improperly prohibited the jury from considering the prior conviction of Kevin Williams as relevant mitigating evidence. Having failed to demonstrate that the OCCA's finding was an unreasonable application of Supreme Court law, Petitioner is not entitled to relief on this issue.

B. Instruction No. 18

Petitioner also argues that Supplemental Instruction No. 18 improperly limited the jury's consideration of mitigation evidence to only that related to moral culpability or blame in violation of the Eighth and Fourteenth Amendments. Petitioner contends that the trial court improperly rejected his proposed instruction, which adds to the first sentence of the instruction the phrase "or suggest a reason that the defendant should be punished with a sentence less than death." (O.R. 321-22). Petitioner argues that without that language, the jury was prevented from considering all relevant mitigating evidence. Supplemental Instruction No. 18, OUJI-CR (2d) 4-78, provided:

> Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.

> While all twelve jurors must unanimously agree that the State has established beyond a reasonable doubt the existence of at least one aggravating circumstance prior to consideration of the death penalty, unanimous agreement of jurors concerning mitigating circumstances is not required. In addition, mitigating circumstances do not have to be proved beyond a reasonable doubt in order for you to consider them.

(O.R. 276).

In considering Petitioner's contention that this instruction unconstitutionally prohibited the jury from considering all relevant mitigating evidence, the OCCA stated:

> The language of this instruction has been upheld as in accordance with state law and federal constitutional requirements. *See Stafford v. State*, 731 P.2d 1372, 1375 (Okl.Cr.1987). [Williams]'s argument that his excluded language prevented the jury from considering all relevant mitigating evidence is not persuasive given the other instructions provided to the jury. Initially, Instruction No. 18 also tells the jury that what is to be considered mitigating is for them to decide. This statement broadens any limitations placed on the mitigating evidence through the first sentence. Further, the jury was given an instruction containing approximately ten (10) specifically listed mitigating circumstances. This instruction was approved by [Williams]. Here, [Williams] has

> failed to specifically set forth any relevant mitigating evidence which the jury was precluded from considering. Having reviewed Instruction No. 18 in its entirety and in context of the other in instructions provided to the jury, we find there is not a reasonable likelihood that the jury would have applied Instruction No. 18 in a way that prevented them from considering any relevant mitigating evidence. *See Boyde v. California*, 494 U.S. at 380. . . . Accordingly this assignment of error is denied.

Williams, 22 P.3d at 727-28.

After a careful review of the record, this Court finds that the OCCA's determination that there is not a reasonable likelihood that the jury would have applied Instruction No. 18 in a way that prevented them from considering any relevant mitigating evidence is not an unreasonable application of *Boyde*. The OCCA thoroughly analyzed this issue. Having failed to demonstrate that the OCCA's finding was an unreasonable application of Supreme Court law, Petitioner is not entitled to relief on this issue.

IV. Ineffective Assistance of Trial Counsel

In ground four, Petitioner presents three claims of ineffective assistance of trial counsel. First, he complains that trial counsel failed to subject the State's case to meaningful adversarial testing in the first stage of trial. Second, he claims that trial counsel failed to request proper second-degree felony

murder instructions. Lastly, he contends that trial counsel was ineffective for failure to present additional mitigating evidence. The OCCA rejected these claims on direct appeal.

Petitioner is not entitled to habeas corpus relief on his claims of ineffective assistance of counsel unless he establishes that the OCCA's adjudication of the claims was an unreasonable application of Supreme Court precedent. Petitioner must demonstrate that his counsel's performance was deficient and that the deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Osborn v. Shillinger*, 997 F.2d 1324, 1328 (10th Cir. 1993). Petitioner must establish the first prong by showing that his counsel performed below the level expected from a reasonably competent attorney in criminal cases. *Strickland*, 466 U.S. at 687-88. In making this determination, a court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id.* To establish the second prong, Petitioner must show that this deficient performance prejudiced the defense to the extent that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also Houchin v. Zavaras*, 107 F.3d 1465, 1472 (10th Cir. 1997) (*quoting Strickland*, 466 U.S. at 694). Failure to establish either prong of the *Strickland* standard will result in denial of relief. *Strickland*, 466 U.S. at 697.

A. Failure to Subject State's Case to Meaningful Adversarial Testing at First Stage of Trial

Petitioner contends he was denied the effective assistance of counsel by his counsel's concession of guilt during the first stage of trial. In support of his argument, Petitioner asserts that the first stage opening statement was nothing more than a general "hello" to the jury and request to pay close attention because at the close of trial the jury would have to make their "first important decision" of the proceedings. Petitioner further claims that counsel failed to subject the State's witnesses to meaningful cross-examination and points to four occasions during the cross-examination of Consuela Drew wherein counsel referred to the "murder" in this case. Finally, as to counsel's closing argument, Petitioner asserts counsel essentially admitted Petitioner's guilt because he told the jurors they were about to make an "easy" decision and asked them not to decide sentencing until they heard more evidence in the second stage. Petitioner argues these instances of ineffectiveness resulted in a

complete failure by counsel to subject the prosecution's case to meaningful adversarial testing. Therefore, he claims, a presumption of ineffectiveness applies without a showing of prejudice or inquiry into actual trial performance. *See United States v. Cronic*, 466 U.S. 648, 659 (1984). Respondent asserts that the OCCA's decision was not an unreasonable application of Supreme Court law because Petitioner cannot demonstrate prejudice under the *Strickland* standard.

The Supreme Court has held that prejudice may be presumed when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *Id.* In order to presume prejudice under *Cronic*, the attorney's failure to test the prosecutor's case must be complete. *Bell v. Cone*, 535 U.S. 685, 697 (2002). The Tenth Circuit Court of Appeals "has repeatedly found the *Cronic* presumption inapplicable where counsel actively participated in all phases of the trial proceedings." *Turrentine v. Mullin*, 390 F.3d 1181, 1208 (10th Cir. 2004) (internal quotation omitted); *see also Hooper v. Mullin*, 314 F.3d 1162, 1175 (10th Cir. 2002) (*Cronic* inapplicable where counsel cross-examined witnesses, made evidentiary objections, presented some evidence and gave opening and closing arguments); *Cooks v. Ward*, 165 F.3d 1283, 1296 (10th Cir. 1998) (*Cronic* inapplicable where counsel was present in the courtroom, conducted limited cross-examination, made evidentiary objections and gave closing argument). A complete absence of meaningful adversarial testing is found only where

the evidence "overwhelmingly established that [the] attorney abandoned the required duty of loyalty to his client," and where counsel "acted with reckless disregard for his client's best interests and, at times, apparently with the intention to weaken his client's case." *Turrentine*, 390 F.3d at 1208 (*quoting Osborn v. Shillinger*, 861 F.2d 612, 629 (10th Cir. 1988)).

Upon review of the record, the OCCA's determination that the presumption of prejudice does not apply here was not unreasonable.[3] *Williams*, 22 P.3d at 728 (*citing Cronic*, 466 U.S. at 658-59). The record does not support the conclusion that defense counsel entirely failed to subject the prosecution's case to meaningful adversarial testing such that prejudice should be presumed. Defense counsel cross-examined the State's first stage witnesses, made objections to the State's evidence, and made opening and closing arguments. *Cf. Hooper*, 314 F.3d at 1175; *Cooks*, 165 F.3d at 1296.

Likewise, it is clear that counsel's statements regarding the fact that the jury was making their "first important decision" and that the guilt determination was the "easy part" and asking the jury not to make its sentencing determination now, (*see* Tr. V 1022-23), do not amount to the types of statements that have been held to constitute a concession of guilt

[3] Petitioner argues that the OCCA's determination that the presumption of prejudice does not apply was not a ruling on the merits. This Court disagrees.

in other cases. *See*, *e.g.*, *United States v. Swanson*, 943 F.2d 1070, 1071, 1074 (9th Cir. 1991) (defense counsel's statements during closing argument conceding there was "no reasonable doubt" that his client was the perpetrator and that there was "no reasonable doubt" as to an essential element of the offense charged constituted a concession of guilt); *Francis v. Spraggins*, 720 F.2d 1190, 1193-94 & n.7 (11th Cir. 1983) (statement by defense counsel during closing argument in guilt phase of a capital trial that "I think he committed the crime of murder" constituted a concession of guilt); *Jones v. State*, 877 P.2d 1052, 1055 (Nev. 1994) (statement during closing argument that "the evidence shows beyond a reasonable doubt that the defendant" was the perpetrator was a concession of guilt); *State v. Harbison*, 337 S.E.2d 504, 505 (N.C. 1985) (statement by defense counsel that "I don't feel that [the defendant] should be found innocent" was a concession of guilt).

Petitioner also argues that his trial counsel's closing argument was equivalent to a complete denial of representation during a critical stage of the proceeding, and thus, prejudice should be presumed pursuant to *Cronic*, 466 U.S. at 659, n.25. Petitioner misstates the rule from *Cronic* in which the Supreme Court stated, "The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* Petitioner's trial counsel was neither absent, nor prevented from assisting Petitioner,

during closing argument, thus, no presumption of prejudice applies.

Since *Cronic* does not apply, Petitioner must affirmatively prove actual prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693-94.

The OCCA rejected Petitioner's claim of ineffective assistance during the first stage and stated as follows:

> A review of the record shows counsel did not concede guilt during the first stage. . . .
>
> . . . .
>
> During his cross-examination of Consuela Drew, counsel did refer to the killing in this case as murder. However, counsel never conceded that [Williams] had committed the killing. Therefore, we find this was not a concession of guilt. Due to the substantial evidence of guilt in this case, we find [Williams] was not prejudiced [by] the remarks as there is no reasonable probability that but for counsel's use of the term murder, the proceedings would have been different.
>
> . . . .
>
> In light of the uncontradicted evidence of [Williams]'s participation in the killing, the only real issue in the first stage of trial was [Williams]'s intent. Counsel vigorously

challenged the State's theory of premeditation. Counsel's decision to limit his first stage opening statement and closing argument was a reasonable strategy decision to maintain credibility with jurors for sentencing. *See Pickens v. Gibson*, 206 F.3d 988, 1001 (10th Cir.2000). This Court will not second guess trial strategy on appeal. *Short*, 980 P.2d at 1107. In *Wood v. State*, 959 P.2d 1, 16 (Okl.Cr.1998) this Court rejected a similar claim that trial counsel conceded guilt during closing argument. The Court stated:

> In light of the overwhelming evidence against Appellant, trial counsel may have decided not to overstate his case lest he lose credibility for the second stage where he would need it the most. A fine trial lawyer may well decide that guilt could not be doubted and save the best for saving his life. We do not find counsel's performance deficient under the circumstances.

We find that counsel in this case exercised the skill, judgment and diligence of a competent defense attorney under the circumstances when he employed the strategy to limit his first stage arguments and focus on punishment and culpability.

Williams, 22 P.3d at 728-30.

It is not necessary for this Court to evaluate trial counsel's deficiency under the first prong of *Strickland* if it easier to resolve the ineffectiveness issue by

addressing the prejudice prong. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland*, 466 U.S. at 697. Thus, the Court will examine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Upon review of the trial record, exhibits, and the briefs filed herein, this Court finds that Petitioner has failed to demonstrate that he was prejudiced by trial counsel's first-stage performance sufficiently to satisfy the second prong of the *Strickland* test. The trial transcript and original record reveal overwhelming evidence of Petitioner's participation in the crimes and guilt on both first-degree murder and assault and battery with intent to kill. The challenged statements and first stage performance by Petitioner's trial counsel did not alter the likely outcome of the first stage of the trial. Even if trial counsel's performance had been below the objective standard of reasonableness, "no reasonable probability exists that the outcome" of the first stage of the trial would have been different. Under *Strickland*, Petitioner was not prejudiced by the trial counsel's performance in the first stage of trial.

Having found that Petitioner failed to demonstrate that his trial counsel rendered constitutionally

ineffective assistance in the first stage of trial, this Court finds that the OCCA's decision was not an unreasonable application of Supreme Court law. Nor was it based on an unreasonable determination of facts in light of the evidence presented. Petitioner failed to meet his burden under 28 U.S.C. § 2254(d). Accordingly, habeas relief on this issue is denied.

B. Failure to Request Proper Second-Degree Felony Murder Instruction

Petitioner also alleges that trial counsel was ineffective for failing to request instructions on second-degree felony murder based on assault with intent to commit a felony. Petitioner contends that the appropriate underlying felony would be assault with intent to commit rape. The OCCA rejected this claim on the merits finding that counsel was not ineffective for failing to offer second-degree felony murder instructions because such instructions were not warranted by the evidence. *Williams*, 22 P.3d at 730.

Oklahoma's second-degree murder statute provides: "Homicide is murder in the second degree . . . [w]hen perpetrated by a person engaged in the commission of any felony other than the unlawful acts set out in Section 1, subsection B, of this act." Okla. Stat. tit 21, § 701.8(2). A homicide committed while in the commission of the felony of assault with the intent to commit rape is second-degree felony murder. *Id.*; Okla. Stat. tit. 21, § 701.7(B). Here, the elements of

intent to commit rape would be necessary to establish assault with intent to commit a felony. *See* OUJI-CR (2d) 4-14 (Assault with Intent to Commit a Felony – Elements); *see also* OUJI-CR (2d) 4-120 (Rape in the First Degree – Elements).

In Oklahoma, "all lesser forms of homicide are necessarily included and instructions on lesser forms of homicide should be administered if they are supported by the evidence." *Shrum v. State*, 991 P.2d 1032, 1036 (Okla. Crim. App. 1999). The failure of Petitioner's trial counsel to request an appropriate second-degree felony murder instruction was neither objectively unreasonable nor prejudicial to Petitioner under the first and second prongs, respectively, of the ineffective assistance of counsel test because the evidence did not support a second-degree felony murder instruction. *Cf. United States v. Cook*, 45 F.3d 388, 393 (10th Cir. 1995) (appellate counsel's failure to raise meritless issue on appeal does not constitute ineffective assistance). As recognized by the OCCA, no evidence was introduced during the first stage of trial supporting an assault with intent to rape.[4] *See Williams*, 22 P.3d at 713. No evidence was introduced by the State or brought out by the defense on

[4] Petitioner did not contend in this proceeding that an instruction on second-degree felony murder based on assault with intent to kidnap would be appropriate; however, Petitioner did make this argument in its appeal to the OCCA. The Court notes that no evidence was introduced supporting assault with intent to kidnap.

cross-examination that Petitioner intended to rape the victim. *See id.* It was not until the second stage of trial, through Dr. Peterson's expert testimony, that any evidence concerning Petitioner's intent to rape the victim was introduced. *See id.*

Having found that Petitioner failed to demonstrate that his trial counsel rendered ineffective assistance for failing to request proper second-degree felony murder instructions, this Court finds that the OCCA's decision was not an unreasonable application of Supreme Court law. Nor was it based on an unreasonable determination of facts in light of the evidence presented. Accordingly, habeas relief on this issue is denied.

C. Mitigating Evidence

Petitioner contends that his trial counsel was ineffective for failing to call Petitioner's father, Earl Williams, Jr., as a witness and failing to offer any reports documenting the mental illnesses of Petitioner's siblings or instances of child abuse.

During the sentencing stage, the defense presented the testimony of Kevin Williams, Petitioner's brother, and psychiatrist Dr. Stephen Peterson. Kevin Williams testified regarding the abuse he and Petitioner received as children at the hands of their father. (*See generally* Tr. VII 1168-1228). As discussed above, it was brought out at trial that Kevin Williams is a convicted felon. (*See id.* at 1211-13).

Dr. Peterson's testimony concerning the physical abuse suffered by Petitioner in his childhood corroborated Kevin's testimony. (*See*, *e.g.*, Tr. VIII 1258). He testified that Earl Williams stated he raised his children by the creed "work 'em, beat 'em and feed 'em." (*Id.* at 1266). Dr. Peterson testified regarding sexual abuse suffered by Petitioner's siblings and the history of diagnosed and suspected mental illnesses in Petitioner's family. (*See*, *e.g.*, *id.* at 1250, 1257-58, 1261-63, 1266, 1274, 1284, 1340-41, 1343-44). Dr. Peterson testified that Petitioner's father admitted to the family history of abuse and that he had beaten both Petitioner and his mother. (*Id.* at 1257-58). Dr. Peterson also testified that he has diagnosed Petitioner with bipolar disorder and a sexual disorder. (*Id.* at 1320, 1325-26). Dr. Peterson based his testimony upon interviews with Petitioner, Petitioner's family members, Petitioner's criminal and court records, and the medical records of Petitioner and his family members. (*Id.* at 1243).

On cross-examination, the prosecution challenged that Dr. Peterson's findings were based chiefly on accounts from biased family members and stressed the absence of reports documenting the mental illness of Petitioner's family members or the childhood abuse. (*Id.* at 1330-1345). The prosecution also attacked Dr. Peterson as uncredible and biased because he was hired for a purpose and was pro-defense in capital cases. (*Id.* at 1454-56).

Petitioner complains that on redirect, his trial counsel never sought to admit any of the reports or

medical records relied upon by Dr. Peterson nor did trial counsel call Earl Williams, Jr. as a witness. Petitioner argues that without such evidence, he was unable to rebut the prosecution's closing arguments that the mitigation evidence was exaggerated, that the jury should discard all of the mitigation, and that "the only documentation, the only actual thing on paper anywhere is the fact that [Petitioner's family] had a good family life; that [Earl Williams, Jr.] was a minister; that [Earl Williams, Jr.] was a caring father." (Tr. VIII 1454). While Petitioner cites Tenth Circuit caselaw regarding counsel's duty to investigate mitigating evidence, he does not actually assert failure to investigate mitigating evidence as a basis for relief.

The OCCA rejected this claim of error and stated:

> Here, counsel presented two witnesses who testified to [Williams]'s traumatic childhood and his family history of mental disorders. The testimony of Dr. Peterson and Kevin Williams sufficiently rebutted any arguments that Mr. Williams was a caring father with a good family life. The presentation of additional witnesses documenting [Williams]'s childhood and corroborating Dr. Peterson's testimony probably would not have changed the tone of the prosecutor's closing argument. The closing argument in this case followed a familiar pattern and would more than likely have remained the same no matter how many witnesses the defense offered. Further, corroborating Dr.

> Peterson's testimony with written documentation of the illnesses of [Williams]'s siblings would have been merely cumulative to his testimony. Appellant was not denied the presentation of any relevant mitigation evidence. The presentation of the additional evidence now sought by [Williams] would not have minimized the risk of the death penalty in light of the substantial evidence in aggravation. Trial counsel's decision to not present additional mitigating evidence was reasonable trial strategy under the circumstances. Trial counsel presented a vigorous second stage defense. Giving deference to the decisions made by trial counsel, we conclude his performance was not constitutionally deficient.

Williams, 22 P.3d at 731.

As recognized above, this Court is not required to evaluate trial counsel's deficiency under the first prong of *Strickland* if it easier [sic] to resolve the ineffectiveness issue by addressing the prejudice prong. *See Strickland*, 466 U.S. at 697. As applied to the sentencing stage of his trial, Petitioner must demonstrate "a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. Petitioner has not met this standard.

"In evaluating prejudice, we must keep in mind the strength of the government's case and the aggravating [circumstances] the jury found as well as the

mitigating factors that might have been presented." *Castro v. Ward*, 138 F.3d 810, 832 (10th Cir. 1998) (internal quotation marks omitted). Here three aggravating circumstances[5] were found to support Petitioner's death sentence: (1) his previous conviction of a felony involving the use or threat of violence; (2) he knowingly created a great risk of death to more than one person; and (3) the continuing threat Petitioner presented to society. The State presented abundant evidence to support each of these circumstances.

The mitigating evidence Petitioner contends should have been presented consists of the testimony of Petitioner's father and the medical and military records which Dr. Peterson relied upon in formulating his expert opinion. From this evidence, the jury admittedly would not have learned of significant, if any, new mitigating circumstances. The testimony of Earl Williams, Jr. would likely be largely duplicative of Kevin Williams and Dr. Peterson. Kevin testified regarding Petitioner's upbringing and the abuse he suffered, and Dr. Peterson testified regarding Earl's statements during Dr. Peterson's interview with him. Petitioner's father also would be subject to impeachment as a biased family member and might have lacked credibility in the jury's eyes based upon his

[5] The jury actually returned a verdict finding four aggravating circumstances but on appeal, the OCCA found the "avoid lawful arrest or prosecution" aggravator invalid as it was not supported by the evidence. *Williams*, 22 P.3d at 723.

past conduct and character. Moreover, putting Petitioner's father on the stand might have opened the door to nonmitagatory testimony regarding other violent conduct by Petitioner of which his father was aware. Likewise, the records relied upon by Dr. Peterson would be duplicative of Dr. Peterson's testimony as Dr. Peterson testified regarding the key mitagatory content of those records. Equally, the admission of those records could have been detrimental to Petitioner's case as those records contained some information which would conflict with Petitioner's theme of a family history of mental illness and abuse. (*See*, *e.g.*, Tr. VIII 1395-96).

No reasonable probability exists that, had trial counsel presented the additional mitigating evidence, the jury would have imposed a sentence less than death.[6] Petitioner's background, together with the nature and circumstances of the victim's death, presented a strong case in support of the three determinative aggravating circumstances. Mr. Williams was a convicted felon who undisputedly stabbed Ms. Hand to death and then assaulted her roommate. The available mitigating evidence simply did not outweigh these aggravating circumstances. The Court

[6] Moreover, the record indicates that trial counsel's decision not to call Petitioner's father, Earl Williams, Jr., to testify was a tactical decision. (*See* App. of Ex. in Support of Application for Post-Conviction Relief, Case No. PCD-2000-1650, Ex. 6, O'Connell Aff., ¶ 13). For the reasons discussed above, this Court cannot say that trial counsel's strategy was an unreasonable one.

therefore concludes that no prejudice under *Strickland* resulted from trial counsel's failure to present this mitigating evidence. Having found that Petitioner failed to demonstrate that his trial counsel rendered ineffective assistance for failing to present additional mitigating evidence, this Court finds that the OCCA's decision was not an unreasonable application of *Strickland.* Accordingly, habeas relief on this issue is denied.

V. Evidentiary, Instructional and Procedural Errors

Petitioner contends that the trial court committed several evidentiary, instructional and procedural errors which individually, and as a whole, rendered his trial fundamentally unfair in violation of his due process rights. Petitioner argues that the trial court improperly instructed the jury as to the statutory definition of malice, improperly denied his Motion to Hold Trifurcated Proceedings, improperly allowed the jury to hear the prejudicial testimony of Yolanda Cunningham, improperly admitted evidence of prejudicial phone calls, and improperly admitted a Judgment and Commitment Order.

Habeas review is not available to correct state law evidentiary errors. *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999) (*citing Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (habeas review is limited to violations of constitutional rights)). This Court is concerned only with the possible infringement

of federal constitutional rights. Accordingly, the Court will review the trial court's evidentiary rulings only insofar as Petitioner's federal constitutional rights may have been impacted. In a habeas proceeding claiming a denial of due process, a court will not question the evidentiary, instructional or procedural rulings of the state court unless the petitioner can show that, because of the trial court's actions, his trial, as a whole, was rendered fundamentally unfair. *Nguyen v. Reynolds*, 131 F.3d 1340, 1357 (10th Cir. 1997) (discussing instructional rulings); *Maes v. Thomas*, 46 F.3d 979, 987 (10th Cir. 1995) (*quoting Tapia v. Tansy*, 926 F.2d 1554, 1557 (10th Cir. 1991) (discussing evidentiary and procedural rulings)).

A. Failure to Instruct on Statutory Definition of Malice

Petitioner asserts that the trial court's failure to instruct the jury on the statutory definition of malice rendered his trial fundamentally unfair. Specifically, Petitioner argues the trial court failed to properly set forth the statutory definition of malice found in Okla. Stat. tit. 21, § 701.7(A) which states: "A person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." In support of his argument, Petitioner refers to the Committee Comments for OUJI-CR (2d) 4-63 wherein it is stated that the

language of § 701.7 was largely adapted from the Georgia Criminal Code and that the Georgia Code addressed express malice and implied malice. However, the Oklahoma Legislature adopted only that portion of the Georgia statute referencing express malice. Petitioner contends that Instruction No. 18 (OUJI-CR (2d) 4-63) improperly permitted the jury to find "malice aforethought" based upon implied malice. Instruction No. 18 stated that "the external circumstances surrounding the commission of a homicidal act **may** be considered in finding whether or not deliberate intent existed in the mind of the defendant to take a human life." (O.R. 307) (emphasis added). Petitioner argues that Instruction No. 18 turned the mandatory requirement that malice be proven by external circumstances into an option.

Petitioner did not object to the instructions given on malice or propose an alternative instruction, thus the OCCA reviewed for plain error. *Williams*, 22 P.3d at 714. The OCCA, denying this assignment of error, ruled that the jury was properly instructed on the definition of "malice aforethought" and first-degree malice aforethought murder under Oklahoma law. *Id.* The OCCA specifically noted that Instruction No. 17 set forth the definition of "malice aforethought" consistently with § 701.7 and that Instruction No. 18 instructed the jury on the consideration to be given to external circumstances. *Id.* Respondent argues that the Court must accept the OCCA's interpretation of Oklahoma law, and thus, the jury was adequately instructed.

A § 2254 petitioner has a heavy burden in attempting to set aside a state conviction based on an erroneous jury instruction. *Maes*, 46 F.3d at 984. "As a general rule, errors in jury instructions in a state criminal trial are not reviewable in federal habeas corpus proceedings, 'unless they are so fundamentally unfair as to deprive petitioner of a fair trial and to due process of law.'" *Nguyen*, 131 F.3d at 1357 (*quoting Long v. Smith*, 663 F.2d 18, 23 (6th Cir. 1981)). In *Henderson v. Kibbe*, the Supreme Court stressed "[t]he 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.'" 431 U.S. 145, 154 (1977) (*quoting Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). *See also Cummings v. Sirmons*, 506 F.3d 1211, 1240 (10th Cir. 2007).

"State law determines the parameters of the offense and its elements and a federal court may not reinterpret state law." *Tillman v. Cook*, 215 F.3d 1116, 1131-32 (10th Cir. 2000) (citations omitted). As a result, this Court is bound by the OCCA's determination that the jury was properly instructed on the definition of "malice aforethought" under Oklahoma law.

The Court finds no infringement of federal constitutional rights in the instruction given to the jury. The instruction given to the jury on "malice aforethought" did not render trial fundamentally unfair. Because the OCCA's ruling on this issue was not an

unreasonable application of Supreme Court law, Petitioner is denied habeas relief on this ground.

B. Denial of Motion to Trifurcate

Petitioner contends that the trial court's denial of his Motion to Hold Trifurcated Trial was prejudicial to the proceedings. The record reflects that prior to the second stage of trial, Petitioner filed his Motion to Hold Trifurcated Trial, specifically requesting the sentencing on Count II, the non-capital offense, be resolved first, and capital sentencing on Count I follow thereafter. The trial court overruled the motion, but offered to trifurcate the trial by conducting a capital sentencing stage first and a non-capital sentencing second. Petitioner stood on his motion and declined the trial court's offer.

The OCCA found that the trial court's sentencing procedure was not unduly prejudicial and ruled, "Accordingly, due to the specific limiting instructions used by the court, we find no error in the trial court's combining the sentencing for the capital offense with the non-capital enhanced offense into one proceeding." *Williams*, 22 P.3d at 715-17. Respondent contends that Petitioner's sentencing was fundamentally fair.

As discussed above, this Court will not question the evidentiary or procedural rulings of the state court unless Petitioner can show that, because of the trial court's actions, his trial, as a whole, was rendered fundamentally unfair. *See Maes*, 46 F.3d at 987.

Petitioner first argues that pursuant to the Oklahoma statutes and Oklahoma precedent established in *Perryman v. State*, 990 P.2d 900, 905 (Okla. Crim. App. 1999), when both aggravating circumstances and enhancement with former convictions are at issue, as they were in this case, there cannot be a shared sentencing stage. Again, this Court may not reinterpret state law and is thus bound by the OCCA's resolution of this issue absent a determination that his trial was rendered fundamentally unfair. *See Tillman*, 215 F.3d at 1131-32. In *Perryman*, the court found the combining into one sentencing proceeding of a capital murder count with non-capital non-enhanced offenses was error. *See Williams*, 22 P.3d at 715 (*citing Perryman*, 990 P.2d at 905). The OCCA in Petitioner's direct appeal distinguished *Perryman* as follows:

> While *Perryman* addressed the division of sentencing issues, the fact that it involved non-capital non-enhanced offenses distinguishes it from the present case. In *Perryman*, none of the evidence admitted during the second stage was relevant to the determination of the proper punishment for the non-capital offenses. In the present case, evidence of [William]'s prior convictions was relevant to the jury's decision whether the punishment in Count II should be enhanced and in proving the aggravating circumstance of "prior violent felony."

Id. (*citing Perryman*, 990 P.2d at 905). The OCCA went on to find that neither Okla. Stat. tit. 22, § 860

(now Okla. Stat. tit. 22, § 860.1) (requiring a bifurcated trial for second and subsequent offenses in which evidence of former convictions is to be admitted) nor Okla. Stat. tit. 22, § 701.10 (providing for a separate sentencing proceeding upon conviction of first-degree murder when the death penalty is an option) prohibit the procedure used here. Thus, this Court is bound by the OCCA's determination that the procedure used in this case was not prohibited by Oklahoma law.

Petitioner next argues that the trial court's instruction to the jury limiting consideration of aggravation and victim impact evidence was insufficient because combining two different punishment schemes in the same proceeding is too unwieldy for a group of laypersons. Petitioner argues that the jurors were given limiting instructions they could not humanly follow, which resulted in a fundamentally unfair sentencing proceeding.

In *Gregg v. Georgia*, the Supreme Court recognized that the problem of the jury's lack of skill and experience with sentencing procedures will be alleviated if the jury is "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." 428 U.S. 153, 192-93 (1976). The Supreme Court likewise acknowledged the requirement of careful instructions on the law and how to apply it. *Id.* at 193.

Here, the jury was specifically instructed that in reaching its decision on punishment for Count II, it

was to consider only the evidence incorporated from the first stage and evidence pertaining to the prior convictions. (O.R. 282). Likewise, the jury was specifically instructed not to consider the victim impact evidence or evidence supporting the aggravating circumstances for Count II. (*Id.*). Further, the jury was specifically instructed as to the prior convictions alleged by the State and the State's burden of proof beyond a reasonable doubt.[7] The OCCA reasonably

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[7] In footnote 20 of his petition, Petitioner raises the transactional nature of three of his prior convictions arguing that only one of them was admissible as to non-capital sentencing under Oklahoma law. Petitioner was found guilty of first degree rape, first degree kidnapping, first degree battery, and first degree burglary in the State of Arkansas, Case No. CR-92-452-1. These offenses occurred in one incident. The issue of the transactional nature of the offenses was raised in Petitioner's motion to trifurcate (O.R. 223-24) and again at the beginning of the second stage of trial (Tr. VI 1052). Petitioner's objections were overruled and the evidence of the offenses was admitted, under the caveat it would be decided later whether they should be redacted or whether the jury could be adequately instructed to consider the offenses in Case No. CR-92-452-1 as one conviction. (*Id.* at 1052-53, 1138). The prior convictions were not redacted in any way and the trial court ultimately instructed the jury to consider the Arkansas convictions in Case No. CR-92-452-1 as one conviction. (O.R. 257-58). The OCCA ruled: "Under 21 O.S.1991, § 51.B (now 21 O.S.Supp.1999, § 51.1) it was error for the trial court to admit all of the convictions listed in Case No. CR-92-452-1. However, the limiting instruction properly advised the jury as to the consideration to be given the prior convictions. This cured any error." *Williams*, 22 P.3d at 716, n.7. This Court finds that the admission of the prior convictions did not result in a federal constitutional violation and did not render Petitioner's trial fundamentally unfair.

found that the instructions were specific enough to clearly channel the jury's decision-making process between the non-capital and the capital offenses. *Williams*, 22 P.3d at 716.

A jury is presumed to follow the Court's instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (*citing Richardson v. Marsh*, 481 U.S. 200, 211 (1987)); *see also United States. v. Carter*, 973 F.2d 1509, 1513 (10th. Cir. 1992) ("We presume jurors will remain true to their oath and conscientiously follow the trial court's instructions."). The instructions here were clear, explicit and unambiguous. There is nothing in the record to indicate the jury could not follow these instructions.

Petitioner also argues that by combining the sentencing proceedings for the capital and non-capital offenses, he was not able to argue that he should not be sentenced to death because he had already been given a severe sentence in Count II. Neither the procedure used in this case nor the court's instructions limited Petitioner's ability to argue for the lightest possible sentence in either count. Petitioner further contends that combining the sentencing proceedings somehow denied Petitioner of a right to present information relevant to a showing of future dangerousness. Contrary to Petitioner's claim, it is not evident what additional information would have been before the jury in deciding the appropriateness of the death penalty had the jury sentenced Petitioner first for the non-capital offense. Any evidence of his future dangerousness or lack thereof because of

incarceration, together with the prior violent felonies, was properly before the jury in making their sentencing determination as to Count I as this determination was made at the same time as the sentencing determination for Count II.

The Court finds no infringement of federal constitutional rights in the procedure utilized by the trial court here. Upon review of the record, Petitioner has not shown that the trial court's denial of Petitioner's Motion to Hold Trifurcated Trial rendered the sentencing proceedings fundamentally unfair. Because OCCA's resolution of this issue was not an unreasonable application of Supreme Court law, Petitioner is not entitled to relief on this claim.

C. Testimony of Yolanda Cunningham

Petitioner next contends that his trial was rendered fundamentally unfair by the testimony of witness Yolanda Cunningham due to lack of notice regarding the substance of her testimony and her emotional outburst during trial. Respondent contends that Ms. Cunningham's testimony and outburst did not cause Petitioner's trial to be fundamentally unfair.

During the second stage of trial, the prosecution introduced the testimony of Yolanda Cunningham. Ms. Cunningham testified that between July 5 and July 8, 1992, Petitioner raped her four times while she was held in his apartment and not allowed to leave. She also testified to a separate incident which

occurred when she was five months pregnant. She said that Petitioner "put [her] down on the ground" and also stated, "You don't tell me about hurt. It took me seven years to get over that." (Tr. VI 1069). It is undisputed that Ms. Cunningham was an emotional witness who at the time she gave the above-referenced testimony raised her voice to shout over the voice of the trial judge. At that point, the trial court recessed. (Tr. VI 1069-71). Petitioner's counsel moved for a mistrial, in part, on the basis that no pre-trial notice had been received of any rape committed when Cunningham was five months pregnant. The motion was overruled. (Id. at 1069-71). The State's Notice of Evidence in Aggravation stated in part:

> Yolanda Cunningham will testify that between July 5, 1992, and July 8, 1992, the Defendant raped her four (4) times. During this time she was held in Defendant's apartment and not allowed to leave. . . . She will testify that he raped her before but she never reported it. She will testify that he had hit her at least once during their relationship.

(O.R. 197-98). The trial judge noted for the record the witness was emotional and that she was being treated for a mental illness. (Tr. VI 1071). The prosecution indicated it was not going to ask any further questions and risk another emotional outburst. Both Ms. Cunningham and the jury were returned to the courtroom, both parties indicated no further questions would be asked, and the witness was excused.

(*Id.* at 1073). Petitioner did not request an admonishment to the jury and no admonishment was given.

On direct appeal, the OCCA denied the assignment of error on this issue. The appellate court ruled that Petitioner was given adequate notice of the substance of Ms. Cunningham's testimony, and found that the trial court took appropriate measures to prevent undue prejudice to Petitioner as a result of Ms. Cunningham's outburst. The OCCA found that the omission of an admonishment to the jury following Ms. Cunningham's outburst was not plain error.[8] *Williams*, 22 P.3d at 717-18.

Petitioner will be entitled to relief on this claim only if he can establish that the admission of this testimony rendered the trial fundamentally unfair. *Smith v. Gibson*, 197 F.3d 454, 460 (10th Cir. 1999) (*citing Scrivner v. Tansy*, 68 F.3d 1234, 1239-40 (10th Cir. 1995)).

Upon review of the record, Petitioner has not shown that the admission of Yolanda Cunningham's testimony rendered the sentencing proceedings fundamentally unfair. The incident was of short duration and the trial court's measures appropriately reduced the risk of undue prejudice to Petitioner. Ms. Cunningham's testimony regarding Petitioner's violent attacks on her were clearly relevant to establishing

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[8] Because Petitioner did not request an admonishment, the OCCA reviewed the failure to admonish for plain error. *Williams*, 22 P.3d at 717-18.

the aggravating circumstances. The OCCA's resolution was not an unreasonable application of Supreme Court law, and thus, Petitioner is not entitled to relief on this claim.

D. Testimony Regarding Prejudicial Phone Calls

Petitioner argues that the introduction of testimony regarding harassing phone calls in the second stage of trial in support of the continuing threat aggravating circumstance rendered the proceedings fundamentally unfair in violation of due process and the Eighth Amendment. Petitioner argues that the evidence was irrelevant and more prejudicial than probative. Petitioner's motion in limine to exclude evidence of the harassing phone calls and his objections during Ms. Sauser's testimony were overruled. The OCCA denied this claim on the merits. Respondent contends that Petitioner's sentencing proceeding was not rendered fundamentally unfair by the admission of the evidence of harassing phone calls.

During the second stage of trial, the prosecution presented the testimony of Michelle Sauser concerning harassing phone calls she had received. (*See* Tr. VI 1102-11). She stated that she and her husband purchased meat from Petitioner in February 1997 and shortly thereafter she received harassing phone calls from two to ten times a day over an eight week period of time. (*Id.* at 1102-1105). She stated that at first the caller would call and be silent. Over time,

the caller began to groan and moan. Eventually, the caller began to talk and whisper. (*Id.* at 1104-05). The caller stated that he wanted to have sex with her and be with her "at any cost," that he wanted to tie her up and perform certain sexual acts, and that he wanted to taste her blood. (*Id.* at 1106). Eventually, a tap was placed on Ms. Sauser's phone by the police and she recognized the voice as that of Petitioner. (*Id.* at 1106-07, 1109). When she identified him over the phone, he hung up. The call was traced to a pay phone. Sauser did not receive any further calls. (*Id.* at 1109-11). A week later LeAnna Hand was killed. (*Id.* at 1111).

Petitioner argues this evidence was not relevant because it did not show a pattern of violent conduct which was likely to continue in the future. He argues the comments made over the phone were in the context of a sexual fantasy and were not threats of violence.

Okla. Stat. tit. 21, § 701.12(7) sets forth the continuing threat aggravator as follows: "[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." To support this aggravator, "the State must present evidence showing the defendant's behavior demonstrated a threat to society and a probability that threat would continue to exist in the future." *Turrentine v. State*, 965 P.2d 955, 977 (Okla. Crim. App. 1998). Under Oklahoma law, evidence of unadjudicated bad acts is admissible in a capital case to prove a defendant constitutes a

continuing threat to society. *Douglas v. State*, 951 P.2d 651, 675 (Okla. Crim. App. 1997).

On direct appeal, the OCCA determined the evidence presented through the testimony of Michelle Sauser was probative of the fact that Petitioner constitutes a continuing threat to society. *Williams*, 22 P.3d at 720. Explaining its rationale, the OCCA stated:

> [Williams]'s characterization of his conduct as non-violent is not accurate. While his phone calls might not have had any explicit references to crimes such as kidnapping or rape, the acts described by [Williams], sexual and otherwise, were not consensual and would only be accomplished by overcoming Ms. Sauser's will. Such conduct would therefore be criminal. The phone calls demonstrate a willingness and propensity on the part of [Williams] to engage in criminal behavior that puts other people at risk.
>
> Further, the evidence was properly admitted when considered with Dr. Peterson's testimony of [Williams]'s conduct while in jail. Dr. Peterson testified that while incarcerated in the Arkansas Department of Corrections from 1993 to 1996, [Williams] continued to have sexual fantasies. These fantasies included vulgar talk and phone sex to female guards while he was a trustee. Upon his release, [Williams] sent a sexually explicit note to the counselor who was treating him for his sexual problems. Dr. Peterson also testified [Williams]'s fantasies continued

> after his release and included women who purchased meat from him. This evidence, combined with the phone calls made to Ms. Sauser only weeks before Hand's murder, shows a pattern of escalating violent sexual conduct which supports the jury's finding of the probability of future dangerousness which constitutes a continuing threat to society.

Id. at 720-21.

Petitioner also argued that Ms Sauser's testimony was more prejudicial than probative under Okla. Stat. tit. 12, § 2403. Here, Petitioner specifically alleges that Ms. Sauser's testimony that Petitioner's phone calls placed her in such fear that she was afraid to leave the house, she was afraid for her children and that she would wake up in the middle of the night assuming the caller was in her home was not probative and was prejudicial and unfair. (*See* Tr. VI 1107-08). Petitioner's objection at trial came after this testimony was given. (*Id.*). The trial court ruled that had the objection been made timely it would have been sustained on grounds of relevancy, however, since the objection was not timely made, all the court could do was end such testimony. (*Id.*).

Section 2403 provides that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." The OCCA ruled that Ms. Sauser's testimony regarding her emotions and

fear was not relevant, but ruled that "in light of the other evidence presented in support of the aggravator, the error in admitting the testimony was harmless as it did not result in a miscarriage of justice, or constitute a substantial violation of a constitutional or statutory right." *Williams*, 22 P.3d at 721.

To be entitled to federal habeas relief, Petitioner must establish that the OCCA's resolution of this issue is contrary to or an unreasonable application of clearly established federal law. Considerable deference must be given to state court evidentiary rulings, and the Court may not provide habeas relief unless those rulings "rendered the trial so fundamentally unfair that a denial of constitutional rights results." *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002). Likewise, as previously stated, this Court "will not disturb a state court's admission of evidence of prior crimes, wrongs or acts unless the probative value of such evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies defendant due process of law." *Duvall*, 139 F.3d at 787 (*citing Hopkinson v. Shillinger*, 866 F.2d 1185, 1197 (10th Cir. 1989), *overruled on other grounds by Sawyer v. Smith*, 497 U.S. 227 (1990)).

In this case, Petitioner has not demonstrated that the trial court's evidentiary rulings admitting the testimony of Michelle Sauser rendered his trial, as a whole, fundamentally unfair. The OCCA explained that the testimony of Ms. Sauser was generally relevant to the continuing threat aggravator, was not unduly prejudicial and the admission of

irrelevant testimony was harmless. *Williams*, 22 P.3d at 720-21. This Court agrees. The Court finds no infringement of federal constitutional rights in the admission of the questioned testimony. The admission of Michelle Sauser's testimony did not render Petitioner's trial fundamentally unfair. Because the OCCA's rejection of this issue was not an unreasonable application of Supreme Court law, Petitioner is not entitled to habeas corpus relief on this portion of his claim.

E. Judgment and Commitment Order

Petitioner contends that the admission of State's Exhibit 67, a judgment and commitment order from the circuit court of Jefferson County, Arkansas, reflecting a prior conviction for the crime of rape, violated his due process and confrontation rights and made the death sentence unreliable in violation of the Eighth and Fourteenth Amendments. Petitioner argues that the exhibit should not have been admitted because it was both inadmissible hearsay and insufficient proof of the conviction it was offered to prove because it did not establish it was entered on a plea of guilty. The trial court overruled Petitioner's objection to Exhibit 67 on the grounds the exhibit was certified and the omission was merely a scrivener's error. (Tr. VI 1052-53, 1139). The OCCA denied this

assignment of error on the merits.[9] Respondent contends that admission of the exhibit did not render Petitioner's sentencing fundamentally unfair.

Petitioner first argues that the exhibit was inadmissible hearsay as it failed to fall within the hearsay objection for final judgments and sentences found in Okla. Stat. tit. 12, § 2803(22) which states as follows:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> 22. Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility;

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[9] Petitioner failed to object to the exhibit at the time the exhibit was introduced. However, Petitioner later objected to the admission of the exhibit on the grounds that the exhibit did not reflect whether a plea of guilty or *nolo contendere* was entered. Due to Petitioner's failure to timely object, the OCCA reviewed only for plain error. *Williams*, 22 P.3d. at 724.

Petitioner contends that State's Exhibit 67 does not fall within the hearsay exception because it does not establish that his conviction was entered upon a plea of guilty. Petitioner also argues that Exhibit 67 was insufficient to constitute a judgment and sentence under Oklahoma law. The OCCA found that the Exhibit 67 was not inadmissible hearsay and that it adequately reflects a valid judgment and sentence. The OCCA explained the rationale behind its decision:

> The Court has had few opportunities to review section 2803(22). In *Wade v. State*, 624 P.2d 86, 91 (Okl.Cr.1981) the appellant challenged the use of a court minute introduced to prove a prior conviction from Louisiana. The appellant claimed the exhibit was inadmissible hearsay as it did not state it was a final judgment, nor did it in any way state that the judgment was pronounced in accordance with the verdict. In finding the exhibit properly admitted, this Court stated:
>
> > Section 2803(22) applies by its terms to a final judgment offered to prove a fact essential to the judgment. This is not the case where the fact to be proved is the historical occurrence of the conviction for habitual offender purposes. This evidence is more properly entered under the Section 2803(8) exception for public records, where no issue as to the definition of judgment is presented. . . .

624 P.2d at 91.

In the present case, the Judgment and Commitment Order indicates [Williams] appeared personally before the court with legal counsel, was advised of his constitutional rights, and entered a knowing and voluntary plea. The order further sets forth [Williams]'s name and his attorney's name, the offense of rape, the time to serve at the Arkansas Department of Corrections as twenty years with ten suspended, and that the sentence is to run concurrent with the sentence imposed in the case reflected in State's Exhibit 66. The order is signed by the circuit judge and certified by the clerk. State's Exhibit 66 reflects [Williams] pled guilty and was convicted of four separate felonies, three of which were violent crimes.

The document for all purposes reflects a valid final judgment and sentence. It adequately reflects appellant was advised of his rights and represented by counsel. *See Staten v. State*, 738 P.2d 565, 566 (Okl.Cr.1987). The failure to check the box indicating whether the conviction was based upon a plea of guilty or a plea of nolo contendere appears to have been a scrivener's error. We find that omission does not render the conviction invalid for purposes of sentencing. Therefore, we find the trial judge did not abuse his discretion in admitting the order into evidence and the order was properly submitted to the jury in support of the aggravating circumstances of prior violent felony and continuing

> threat. Accordingly, this assignment of error is denied.

Williams, 22 P.3d at 725.

Considerable deference must be given to state court evidentiary rulings, and the Court may not provide habeas relief unless those rulings "rendered the trial so fundamentally unfair that a denial of constitutional rights results." *Duckett*, 306 F.3d at 999. Likewise, as previously stated, this Court "will not disturb a state court's admission of evidence of prior crimes, wrongs or acts unless the probative value of such evidence is so greatly outweighed by the prejudice flowing from its admission that the admission denies defendant due process of law." *Duvall*, 139 F.3d at 787 (further citation omitted).

In this case, Petitioner has not demonstrated that the trial court's evidentiary rulings admitting State's Exhibit 67 rendered his trial, as a whole, fundamentally unfair. The OCCA found that the exhibit was admissible under a hearsay exception and that it bore sufficient indicia that the due process requirements were met in the prior proceeding to constitute a valid judgment under Oklahoma law.[10]

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[10] Likewise, as to Petitioner's claim that the admission of the exhibit violated the Confrontation Clause, a habeas court considers the state of constitutional law at the time that the applicant's conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 380 (2000). Petitioner's conviction became final when the United States Supreme Court denied certiorari on his direct appeal on September 7, 2002. *See Allen v. Reed*, 427 F.3d 767,

(Continued on following page)

Williams, 22 P.3d at 724-25. This Court agrees. The Court finds no infringement of federal constitutional rights in the admission of Exhibit 67. The admission of the judgment and commitment order did not render Petitioner's trial fundamentally unfair. Because the OCCA's rejection of this issue was not an unreasonable application of Supreme Court law, Petitioner is not entitled to habeas corpus relief on this portion of his claim.

F. Cumulative Errors

Petitioner argues that the combination of alleged evidentiary, instructional and procedural errors rendered the proceedings fundamentally unfair. Respondent contends that Petitioner never presented the instant claim to the OCCA either on direct appeal or in a collateral proceeding, and thus, the claim is unexhausted. Respondent contends that the Court should nonetheless deny the unexhausted claim on its

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774 (10th Cir. 2005) (*citing Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)). At that time the admission of hearsay did not violate the Confrontation Clause if the statement fell within a "firmly rooted" hearsay exception, or if the statement was supported by "particularized guarantees of trustworthiness." *Stevens v. Ortiz*, 465 F.3d 1229, 1236 (10th Cir. 2006) (*quoting Ohio v. Roberts*, 448 U.S. 56, 66 (1980)). Here, as determined by the OCCA, the exhibit fell within a hearsay exception and further, it is supported by "particularized guarantees of trustworthiness" as it was signed by the judge, certified by the court clerk, and shows that Petitioner appeared personally before the court with legal counsel. *See Williams*, 22 P.3d at 725.

merits pursuant to 28 U.S.C. § 2254(b)(2) at the same time that the petition is denied on the merits.

The instant claim lacks merit because the combination of the above-listed alleged evidentiary, instructional and procedural errors does not render Petitioner's trial fundamentally unfair. The Court reviews alleged evidentiary, instructional and procedural errors in light of the "trial as a whole" to determine if their effect was to cause the trial to be fundamentally unfair. *Nguyen*, 131 F.3d at 1357; *Maes*, 46 F.3d at 987. Thus, in reviewing each of the above-listed sub-propositions, this Court has evaluated the alleged error in light of the entire trial – which necessarily includes the other alleged evidentiary, instructional and procedural errors. Furthermore, the combination of the alleged errors does not render the trial fundamentally [sic] as the only actual error that has been identified was the admission of Ms. Sauser's testimony regarding her reaction to Petitioner's threatening phone calls. For the reasons stated above, this evidence did not render Petitioner's trial fundamentally unfair. Petitioner's unexhausted claim is therefore denied.

VI. Former Felony Convictions – Aggravating Circumstances

Petitioner contends his constitutional rights were violated because the same criminal conduct (i.e., his record of prior felony convictions) was used by the State to support both the "continuing threat" aggravator

and the "prior conviction of violent felonies" aggravator. In disposing of Petitioner's direct appeal, the OCCA rejected this argument:

> This Court has upheld the use of the same act or course of conduct to support more than one aggravating circumstance where the evidence shows different aspects of the defendant's character or crime. *Bernay v. State*, 989 P.2d 998, 1016 (Okl.Cr.1999); *Turrentine [v. State]*, 965 P.2d [955,] 978 [(Okla. Crim. App. 1998)]; *Cannon v. State*, 961 P.2d 838, 852-53 (Okl.Cr.1998); *Medlock v. State*, 887 P.2d 1333, 1350 (Okl.Cr.1994). . . . Further, the Tenth Circuit has ruled that the two aggravating circumstances at issue here do not impermissibly overlap. *Cooks v. Ward*, 165 F.3d 1283, 1289 (10th Cir.1998).
>
> The prior violent felony aggravator looks to a defendant's criminally violent past to determine whether, when combined with the murder for which he has just been convicted, a death sentence is warranted. The continuing threat aggravator looks toward [Williams]'s future conduct and the need for protection of society from that probable future criminal conduct. As we stated in *Woodruff v. State*, 846 P.2d 1124, 1146 (Okl.Cr.) . . . :
>
> > The presentation of Appellant's past history of criminal behavior (the prior convictions for solicitation to commit murder) to prove the "prior violent felony" aggravating circumstance and the presentation of Appellant's propensity for

> committing future harm (evidence of the Thompson homicide) to prove "continuing threat" address separate and distinct aspects of Appellant's conduct and provide multiple reasons to impose the death penalty. This situation is distinguishable from cases in which multiple aggravators generally describe the same behavior and impose a more severe penalty for exactly the same reasons.
>
> Accordingly, we find the aggravators in this case address separate and distinct aspects of [Williams]'s conduct. Use of the prior convictions to support two aggravators was not error. This assignment of error is denied.

Williams, 22 P.3d at 725-26.

Notably, Petitioner cites no Supreme Court cases in support of this claim. Instead, he relies primarily on a case from the Tenth Circuit, *United States v. McCullah*, 76 F.3d 1087 (10th Cir. 1996). In *McCullah*, the court held that "double counting of aggravating factors, especially under a weighing scheme, has a tendency to skew the weighing process and creates the risk that the death sentence will be imposed arbitrarily and thus, unconstitutionally." *Id.* at 1111. Such precedent does not, however, stand for the proposition that any time evidence supports more than one aggravating circumstance, those circumstances impermissibly overlap, *per se*.

The Tenth Circuit has repeatedly held that *McCullah* does not prohibit the use of the same

evidence in support of more than one aggravator. See *Medlock v. Ward*, 200 F.3d 1314, 1319 (10th Cir. 2000); *Trice v. Ward*, 196 F.3d 1151, 1173-74 (10th Cir. 1999); *Cooks v. Ward*, 165 F.3d 1283, 1289 (10th Cir. 1998). "The test we apply is not whether certain evidence is relevant to both aggravators, but rather, whether one aggravating circumstance 'necessarily subsumes' the other." *Cooks*, 165 F.3d at 1289 (*quoting McCullah*, 76 F.3d at 1111).

As previously stated, the AEDPA requires the application of Supreme Court precedent in determining whether the state court proceeding violated clearly established federal law. *See* 28 U.S.C. § 2254(d)(1). Because there is no Supreme Court precedent regarding duplicative aggravating circumstances, this Court must deny habeas relief on this basis. However, even assuming arguendo that the AEDPA standards allow Petitioner to rely on a circuit court case such as *McCullah* as a basis for federal habeas relief, it is apparent the jury in Petitioner's case did not "double count" aggravating factors and that the two aggravating factors at issue here did not "necessarily subsume" each other. As the OCCA noted, the two aggravating factors at issue focused on different aspects of Petitioner's conduct. The "prior conviction of a violent felony" aggravator focused solely on Petitioner's past criminally violent behavior. In contrast, the "continuing threat" aggravator focused on future conduct and whether Petitioner was likely to engage in violent criminal behavior in the future and whether he would be a threat to society as

a result. Although this factor was undoubtedly based in part on Petitioner's previous crimes, it arguably focused on different aspects of those crimes than did the "prior violent felony" factor (e.g., whether any aspects of Petitioner's prior crimes suggested that he was likely to engage in future violent behavior). Moreover, the continuing threat aggravator was also based on other facts as well, including those specifically listed by the Court of Criminal Appeals.

Because the OCCA's rejection of this issue was not an unreasonable application of clearly established federal law, Petitioner is not entitled to habeas corpus relief on this portion of his claim.

VII. Insufficient Evidence – "Great Risk of Death" Aggravating Circumstance

In his seventh claim, Williams contends that the prosecution failed to present sufficient evidence at trial to support the "knowingly created a great risk of death to more than one person" aggravating circumstance. The OCCA rejected this argument and denied relief, as follows:

> After [Williams] killed Hand, he kicked in the door to Elizabeth Hill's bedroom and ripped the phone from her hand. He tackled her as she tried to run out of the duplex. Placing both hands around her neck, he choked her. Hill testified she could not breathe and that somehow she freed herself and ran out of the duplex. [Williams] argues that because Hall [sic] never lost consciousness,

did not sustain any permanent physical injury, admitted she had no idea how she got away, and as no weapon was used, the evidence was insufficient to prove there was any risk of death.

This aggravating circumstance is proved by a defendant's acts which create a risk of death to another "in close proximity, in terms of time, location, and intent" to the killing. *Le v. State*, 947 P.2d [535,] 549 [(Okla. Crim. App. 1997)]. The gravamen of the circumstance is not the number of persons killed, but the callous creation of the risk to more than one person. *McCracken v. State*, 887 P.2d 323, 332 (Okl.Cr.1994). . . .

Here, [Williams] choked Hill. That he did not choke her to death does not invalidate the aggravator. While [Williams] may not have verbally threatened Ms. Hill's life, choking her certainly amounts to a threat to take away her life. [Williams] contends it is possible he let Hill go thereby negating the intent to kill her. The evidence is not clear as to exactly how Ms. Hill got away from [Williams], and we will not speculate on possibilities. That she was not sure how she got away does not reduce the actual risk to her. The jury looked at the evidence of the attack on Ms. Hill and found it sufficient to sustain a conviction for assault and battery with intent to kill. We have reviewed the evidence for purposes of sustaining the aggravator and find it sufficient to show [Williams] threatened the life of Ms. Hill and had the apparent ability

> and means of taking her life. We reject [Williams]'s argument that Ms. Hill's life was not placed in actual great risk of death and find the evidence supported the jury's finding of the aggravator. This assignment of error is denied.

Williams, 22 P.3d at 724 (footnote omitted).

In reviewing a claim of insufficient evidence, this Court must first ask whether, viewing the evidence in a light most favorable to the State, there was sufficient evidence for any rational fact finder to find this aggravating factor beyond a reasonable doubt. *See LaFevers v. Gibson*, 182 F.3d 705, 723 (10th Cir. 1999) (*applying Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In applying the *Jackson* standard, the Court looks to Oklahoma law to determine the "substantive elements" of the "great risk of death to more than one person" aggravator. The OCCA has consistently interpreted the "great risk of death to more than one person" aggravating circumstance in two ways. The state court has held that more than one person need not be killed, only that the defendant knowingly creates a great risk of death to more than one person. *See Le*, 947 P.2d at 549; *accord Trice v. Ward*, 196 F.3d 1151, 1173 (10th Cir. 1999) (holding that evidence supported the jury's finding of the great risk of death to more than one person aggravator, where the petitioner murdered one victim and delivered life threatening blows to a second victim). In addition, the OCCA has held the fact that more than one person is

killed satisfies this aggravator. *Slaughter v. State*, 950 P.2d 839, 858 (Okla. Crim. App. 1997).

In the present matter, it is uncontroverted that Petitioner caused the death of Ms. Hand, and further, that he choked Ms. Hill. The jury found the evidence relating to the attack on Ms. Hill sufficient to convict Petitioner of assault and battery with intent to kill. Such facts are more than sufficient to support the jury's finding of the aggravating circumstance of "great risk of death." The OCCA found sufficient evidence to support the jury's decision, and its decision was not an unreasonable application of the *Jackson* standard. Habeas relief is denied on this issue.

VIII. Prosecutorial Misconduct

For his eighth claim, Petitioner alleges that he was deprived of his rights under the Eighth and Fourteenth Amendments due to prosecutorial misconduct. Respondent contends that the OCCA's decision that the prosecutor's comments neither violated the presumption of innocence nor rendered Petitioner's trial fundamentally unfair is not a decision contrary to, or an unreasonable application of, established Supreme Court precedent.

Petitioner specifically complains about the following comment made during the prosecution's first stage closing argument: "So ladies and gentlemen, all I ask you to do is consider the evidence when you go back there, but realize that this case is really about

sentencing. There is no question about guilt." (Tr. V 1024). At trial, Petitioner's counsel objected to the comment, the trial court sustained the objection, admonished the jury, and told the jury "this is about guilt." (*Id.*).

On direct appeal, the OCCA rejected Petitioner's argument and denied relief, as follows:

> [Williams] now argues on appeal that in spite of the admonishment, the error is reversible when considered in conjunction with trial counsel's failure to challenge guilt.
>
> A trial court's admonition to the jury to disregard the remarks of counsel usually cures any error unless it is of such nature, after considering the evidence, that the error appears to have determined the verdict. The comment in question was made during the second portion of the State's closing argument. It was an isolated remark which was not repeated. Except for the statement in question, the prosecutor's closing arguments were proper comments on the evidence and on the jury's duty to determine whether the State had met its burden of proof beyond a reasonable doubt.
>
> Contrary to [Williams]'s claim, the presumption of innocence was not violated. No remark was made that the presumption of innocence did not apply. Further, the jury received specific written instructions on the presumption of innocence and the State's burden of proof. The jury was specifically

> told what the attorneys said in closing argument was purely argument and not evidence to be considered in reaching their verdict. Viewing the comment and the admonishment in context of the trial, the comment was not outcome determinative and the trial court's admonition was sufficient to cure any error. Contrary to [Williams]'s claim, counsel did challenge guilt in this case, thereby reducing any negative impact this comment may have had on the trial. This assignment of error is denied

Williams, 22 P.3d at 711 (citation omitted).

Petitioner also contends that the OCCA's decision does not warrant deferential treatment under the AEDPA because "the OCCA did not consider established Federal Law in its decision." (Dkt. #25 at 72) (*citing Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002)). This is not the correct standard as to whether AEDPA deference applies. As noted by the Supreme Court in *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam), the failure to discuss or even to be aware of federal precedent does not in itself render a state court's decision contrary to federal law. The Supreme Court thus applied the AEDPA standard to a claim which the state court disposed of without citing controlling Supreme Court precedent. *Id.* at 366. Similarly, in *Cook v. McKune*, the Tenth Circuit recognized that *Early* clarified discord between conflicting Tenth Circuit cases as to when deference under the AEDPA applies and applied AEDPA deference to an OCCA ruling that cited only Oklahoma

caselaw. 323 F.3d 825, 831 (10th Cir. 2003). *Accord Hawkins v. Mullin*, 291 F.3d 658, 677 (10th Cir. 2002) (applying the AEDPA standard where state appellate court only discussed state law). The inquiry here is whether each claim "was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d); *see also Le*, 311 F.3d at 1010-11. The OCCA adjudicated this claim on the merits as demonstrated above. This Court must therefore apply the AEDPA standard to determine whether the OCCA's ruling on this issue was an unreasonable application of Supreme Court precedent.

Not every improper and unfair remark made by a prosecutor will amount to a federal constitutional deprivation. *See Caldwell v. Mississippi*, 472 U.S. 320, 338 (1985) (plurality opinion). When a prosecutor's comment or argument deprives Petitioner of a specific constitutional right, a habeas claim may be established without requiring proof that the entire trial was thereby rendered fundamentally unfair. *Mahorney v. Wallman*, 917 F.2d 469, 472 (10th Cir. 1990) (*citing Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). A prosecutor's improper comment or argument which does not deprive a defendant of a specific constitutional right will require the reversal of a state conviction only where those remarks sufficiently infect the trial so as to make it fundamentally unfair and, therefore, a denial of due process. *Donnelly*, 416 U.S. at 643, 645; *see also Trice*, 196 F.3d at 1167; *Hoxsie v. Kerby*, 108 F.3d 1239, 1243 (10th Cir. 1997). Federal law clearly

provides that in order to constitute a due process violation the prosecutorial conduct must be of sufficient significance to result in the denial of a defendant's right to a fair trial. *Donnelly*, 416 U.S. at 645.

This Court's inquiry into the fundamental fairness of a trial can only be made after examining the entire proceeding. *Donnelly*, 416 U.S. at 643. The complained of remarks or arguments must be considered in the context in which they were made. *Greer v. Miller*, 483 U.S. 756, 765-66 (1987); *see also Darden v. Wainwright*, 477 U.S. 168, 179 (1986).

> To view the prosecutor's statements in context, we look first at the strength of the evidence against the defendant and decide whether the prosecutor's statements plausibly "could have tipped the scales in favor of the prosecution." . . . We also ascertain whether curative instructions by the trial judge, if given, might have mitigated the effect on the jury of the improper statements. . . . Ultimately, we "must consider the probable effect the prosecutor's [statements] would have on the jury's ability to judge the evidence fairly."

Fero v. Kerby, 39 F.3d 1462, 1474 (10th Cir. 1994) (*quoting Hopkinson v. Shillinger*, 866 F.2d 1185, 1210 (10th Cir. 1989)). In addition, the Court must consider the prejudice, if any, attributable to the prosecutor's comments. *Brecheen v. Reynolds*, 41 F.3d 1343, 1355 (10th Cir. 1994) (*citing Mahorney*, 917 F.2d at 472-73).

Petitioner contends that the prosecutor's comment when combined with ineffective assistance of defense counsel violated his right to the presumption of innocence. "Where prosecutorial misconduct directly affects a specific constitutional right such as the presumption of innocence . . . , a habeas petitioner need not establish that the entire trial was rendered unfair, but rather that the constitutional guarantee was so prejudiced that it effectively amounted to a denial of that right." *Torres v. Mullin*, 317 F.3d 1145, 1158 (10th Cir. 2003) (*citing Paxton v. Ward*, 199 F.3d 1197, 1217-18 (10th Cir. 1999) and *Mahorney*, 917 F.2d at 473); *see also Donnelly*, 416 U.S. at 643.

The OCCA found that while the comment was improper, the presumption of innocence was not violated. The state appellate court noted that no statement was made that the presumption of innocence did not apply. Further, the jury received specific written instructions on the presumption of innocence and the burden of proof. *Williams*, 22 P.3d at 711. The OCCA also found it significant that the jury was specifically instructed that what the attorneys said in closing argument was purely argument and not evidence to be considered in reaching their verdict. *Id.* The OCCA remarked that Petitioner's counsel did challenge the burden of proof. *Id.* Upon review of the record, this Court finds that the presumption of innocence was not so prejudiced by the prosecutor's comment that it effectively amounted to a denial of the presumption. *See Torres*, 317 F.3d at 1158. The OCCA's determination that the presumption of

innocence was not violated was not an unreasonable application of Supreme Court precedent.

The OCCA also found that considering the comment and the admonishment in context of the trial, including the performance of Petitioner's counsel in the first stage, the comment was not outcome determinative and the trial court's admonition was sufficient to cure any error. *Id.* This Court agrees. Evidence supporting Petitioner's guilt was overwhelming. The prosecutor's statements could not have plausibly "tipped the scales in favor of the prosecution." *See Fero*, 39 F.3d at 1474. The curative instructions given by the trial judge likely mitigated any effect the improper statement might have had on the jury. It is highly unlikely the prosecutor's statement would have had any effect on the jury's ability to judge the evidence fairly. *See id.* After examination of the entire record, this Court concludes that the prosecutor's improper comment did not sufficiently infect the trial so as to make it fundamentally unfair, *see Donnelly*, 416 U.S. at 643, 645, and thus, the OCCA's determination that the prosecutor's improper comment did not prejudice the outcome of the trial is not an unreasonable application of Supreme Court precedent. Petitioner is denied relief on this ground.

IX. Victim Impact Statements

Petitioner contends that the victim impact statement of Brenda Monroe, Ms. Hand's mother, was admitted in violation of due process and his Eighth

Amendment rights. He maintains that Ms. Monroe's victim impact testimony impermissibly characterized the crime, characterized Petitioner, and consisted of highly prejudicial statements causing the trial to become unfair. Respondent argues that the OCCA's decision that Ms. Monroe's testimony was properly admitted was not an unreasonable application of established Supreme Court precedent.

The established Supreme Court precedent involving victim impact statements is set forth in *Payne v. Tennessee*, 501 U.S. 808 (1991). *Hain v. Gibson*, 287 F.3d 1224, 1238 (10th Cir. 2002). The Supreme Court in *Payne* held that "the only constitutional limitation on such evidence is if it 'is so unduly prejudicial that it renders the trial fundamentally unfair.'" *Id.* (*quoting Payne*, 501 U.S. at 825). In such an event, the Court indicated, "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." *Id.* (*quoting Payne*, 501 U.S. at 825). The prohibition against the victim's family giving their "characterizations and opinions about the crime, the defendant, and the appropriate sentence" remains in place. *Id.* (*quoting Booth v. Maryland*, 482 U.S. 496, 502 (1987), *overruled in part* by *Payne*, 501 U.S. at 825). The Supreme Court in *Payne* specifically outlined why victim impact evidence was relevant to a capital jury's sentencing decision:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have

> before it at the sentencing phase evidence of the specific harm caused by the defendant. The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.

Id. at 1238, n. 10 (*quoting Payne*, 501 U.S. at 825) (internal quotation marks omitted).

In Petitioner's direct appeal, the OCCA cited and applied the rule of law set out in *Payne*. The OCCA held that, with the exception of the evidence regarding the victim's activities during high school, all of Ms. Monroe's victim impact testimony was properly admitted. *Williams*, 22 P.3d at 718-20. With respect to the emotional and purportedly prejudicial nature of Ms. Monroe's statements, the OCCA found as follows:

> Many of the comments challenged by [Williams] as being too emotional also illustrated the psychological impact on Ms. Monroe of losing her daughter. As the trial court noted, it can be difficult to distinguish between what is emotional and what is psychological, and even what is physical. Ms. Monroe's statements concerning her hysterical reaction when informed of her daughter's death and the ensuing psychotherapy, physical illnesses, and depression were properly admitted as relevant to showing how the

> victim's death emotionally, psychologically, and physically affected her mother. Contrary to [Williams]'s argument, Ms. Monroe's fears of losing her daughter's pictures, of being attacked, and of losing her husband and parents were not so tenuous to the homicide as to lack probative value.
>
> . . . .
>
> While a portion of the victim impact testimony was very emotional, taken as a whole, the testimony was within the bounds of admissible evidence, and its emotional content did not have such a prejudicial effect or so skew the presentation as to divert the jury from its duty to reach a reasoned moral decision, based on reliable evidence, whether to impose the death penalty.

Williams, 22 P.3d at 718-19.

After a careful review of the record, this Court finds that the OCCA's determination on this issue was not an unreasonable application of Supreme Court precedent. As described above, the OCCA reasonably determined that the testimony of Ms. Monroe was not unduly prejudicial and that the testimony which Petitioner challenges due to its emotional nature was properly admitted to show the psychological and physical effect of the crime on Ms. Monroe. Ms. Monroe's victim impact statement did not impermissibly characterize the crime or Petitioner or state an opinion about the appropriate sentence. The victim's impact statement of Ms. Monroe was not

"so unduly prejudicial that it render[ed] the trial fundamentally unfair." *Payne*, 501 U.S. at 825.

The OCCA's decision that Ms. Monroe's testimony was properly admitted was not an unreasonable application of *Payne.* Habeas relief on this claim is denied.

X. Constitutionality of "Continuing Threat" Aggravating Circumstance

Petitioner asserts that the continuing threat aggravator is unconstitutionally vague and overbroad. The OCCA denied relief on this claim in Petitioner's direct appeal. The OCCA noted that it has previously upheld the constitutionality of the continuing threat aggravator "finding it neither vague nor overbroad" and declined to reconsider its previous decisions. *Williams*, 22 P.3d at 722-23 (*citing Short v. State*, 980 P.2d 1081, 1103 (Okla. Crim. App. 1999); *Hamilton v. State*, 937 P.2d 1001, 1012 (Okla. Crim. App. 1997); *Pennington v. State*, 913 P.2d 1356, 1373 (Okla. Crim. App. 1995); *Walker v. State*, 887 P.2d 301, 320 (Okla. Crim. App. 1994)).

Similarly, Tenth Circuit precedent forecloses Petitioner's facial challenge to Oklahoma's continuing threat aggravator as unconstitutional. *Sallahdin v. Gibson*, 275 F.3d 1211, 1232 (10th Cir. 2002); *see also Medlock v. Ward*, 200 F.3d 1314, 1319 (10th Cir. 2000) (noting that the Tenth Circuit has repeatedly upheld the facial constitutionality of the continuing threat aggravator as narrowed by the State of Oklahoma);

Nguyen v. Reynolds, 131 F.3d 1349, 1352-353 (10th Cir. 1997). Petitioner does not make any argument which compels or permits this Court to disregard the binding precedent. Accordingly, habeas relief must be denied on this issue.

Petitioner also states in the title to this ground ten claim that the continuing threat to society aggravating circumstance was unconstitutional as applied at his trial. He provides no argument to support this claim in the body of his brief. The Court will summarily deny his claim on the merits as Petitioner presents no argument to allow the Court to analyze the claim.

XI. Ineffective Assistance of Appellate Counsel

Petitioner contends that appellate counsel was ineffective for failing to challenge the uniform jury instruction concerning the sentencing options for first degree murder, OUJI-CR (2d) 4-68. Petitioner asserts trial counsel objected to the instruction given to the jury on grounds the instruction failed to provide an adequate definition of the meaning of life without the possibility of parole. Petitioner argues that his appellate counsel's failure to raise this issue on direct appeal denied him the effective assistance of counsel under prevailing professional norms. Petitioner raised this claim in his first petition for post-conviction relief and the OCCA denied the claim on its merits. Respondent contends that the OCCA's

ruling on this issue is not an unreasonable application of *Strickland*, 466 U.S. 668.

In evaluating Petitioner's claim of ineffective assistance of appellate counsel as raised in the instant action, this Court shall apply the *Strickland* two-pronged standard used for claims of ineffective assistance of trial counsel. *See United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995). As noted earlier, the *Strickland* test requires a showing of both deficient performance by counsel and prejudice to Petitioner as a result of the deficient performance. *Strickland*, 466 U.S. at 687. When a habeas petitioner alleges that his appellate counsel rendered ineffective assistance by failing to raise an issue on direct appeal, the Court first examines the merits of the omitted issue. *Hawkins v. Hannigan*, 185 F.3d 1146, 1152 (10th Cir. 1999). If the omitted issue is meritless, then counsel's failure to raise it does not amount to constitutionally ineffective assistance. *Id.*; *see also Parker v. Champion*, 148 F.3d 1219, 1221 (10th Cir. 1998) (citing *Cook*, 45 F.3d at 392-93). If the issue has merit, the Court must then determine whether appellate counsel's failure to raise the claim on direct appeal was deficient and prejudicial. *Hawkins*, 185 F.3d at 1152 (*citing Cook*, 45 F.3d at 394).

Petitioner, in his reply brief (Dkt #48, p. 15), argues that the deferential standard of review under the AEDPA does not apply to ineffective assistance of appellate counsel claims where the OCCA utilized the three-step approach from *Walker v. State*, 933 P.2d 327 (Okla. Crim. App. 1997) as it did here, rather

than the two-prong *Strickland* test. Petitioner cites *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003) in support. Petitioner misstates the inquiry espoused by the Tenth Circuit Court of Appeals in *Cargle.* The Tenth Circuit in *Cargle* explained its rationale for declining to apply AEDPA deference to Cargle's ineffective assistance of appellate counsel claim as follows:

> *Walker*'s step-two truncation of the *Strickland* test thus enables the OCCA to reject appellate ineffectiveness allegations without any assessment of the merits of underlying predicate claims, so that the OCCA has been able to declare that a "failure to raise even a meritorious claim does not, in itself, constitute deficient performance."
>
> . . . .
>
> It is clearly wrong, as a matter of federal law, to require as a necessary condition for relief under *Strickland*, something beyond the obvious merit of the omitted claim. The very focus of a *Strickland* inquiry regarding performance of appellate counsel is upon the merits of omitted issues, and no test that ignores the merits of the omitted claim in conducting its ineffective assistance of appellate counsel analysis comports with federal law. A sufficiently meritorious omitted claim certainly can, by itself (or in relation to other issues that counsel did pursue), establish constitutionally deficient performance by appellate counsel. Because the OCCA's analysis

> of petitioner's appellate ineffectiveness allegations deviated from the controlling federal standard, *see Cargle*, 947 P.2d at 588-89 (repeatedly invoking principle contrasted with *Strickland* here), it is not entitled to deference. Of course, in this and in every case raising an ineffective appellate counsel issue, whether the OCCA decision should be accorded AEDPA deference will depend upon a case-specific determination of whether the OCCA followed established *Strickland* standards, including the principle that ineffective appellate assistance can be established on the basis of the demonstrable merit of the issue omitted by counsel on the petitioner's direct appeal.

Id. at 1204-05 (footnote omitted) (citations omitted). As dictated by the Tenth Circuit in *Cargle*, the Court must engage in case-specific determination of whether the OCCA followed established *Strickland* standards. The OCCA in this case did not employ the methods of analysis which the Tenth Circuit in *Cargle* found to be in conflict with *Strickland*. The OCCA did not reject the ineffective assistance of appellate counsel claim without inquiring into the merits of the omitted claim, nor did it find that ineffective assistance could not be established in this case despite a sufficiently meritorious omitted claim. In the instant case, the OCCA followed established *Strickland* standards, despite its application of the three-step *Walker* approach. The OCCA analyzed the merits of the omitted claim as required by *Strickland* and reached the following conclusion: "[A]ppellate

counsel's failure to raise [the] claim of error . . . did not render his performance unreasonable under prevailing professional norms as such a claim would have been rejected in light of case law from this Court, the Tenth Circuit Court of Appeals and the United States Supreme Court." *Williams (PC)*, 31 P.3d at 1050. Thus, this Court reviews Petitioner's claim under the AEDPA.

OUJI-CR (2d) 4-68, the challenged instruction, provides:

> The defendant in this case has been found guilty by you, the jury, of the offense of murder in the first degree. It is now your duty to determine the penalty to be imposed for this offense.
>
> Under the law of the State of Oklahoma, every person found guilty of murder in the first degree shall be punished by death, or imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole.

Petitioner argues that this instruction fails under *Shafer v. South Carolina*, 532 U.S. 36 (2001) and *Simmons v. South Carolina*, 512 U.S. 154 (1994) because it does not provide an adequate definition of the meaning of life without the possibility of parole. The OCCA held that appellate counsel was not deficient for failing to raise the issue because it has repeatedly upheld OUJI-CR (2d) 4-68 as "the uniform instruction setting forth the punishment of life without parole is sufficiently clear to enable any rational

juror to understand it without explaining it further" and "instructions additional to the uniform instruction are not necessary." *Williams (PC)*, 31 P.3d at 1049.

Moreover, the OCCA found that "appellate counsel was not deficient for failing to raise the issue in light of recent jurisprudence from the United States Supreme Court and the Tenth Circuit Court of Appeals." See *id.* The OCCA explained that *Simmons* and *Shafer* are inapplicable to this case and that this conclusion is supported by Tenth Circuit precedent:

> Petitioner asserts that in *Shafer v. South Carolina*, 532 U.S. 36 . . . (2001) the Supreme Court reaffirmed the principle of *Simmons v. South Carolina*, 512 U.S. 154 . . . (1994), that due process entitles a defendant to inform the jury of his parole eligibility where the defendant's future dangerousness is at issue and the only sentencing alternative to death available to the jury is life without the possibility of parole.
>
> In *Simmons*, the jury was given two sentencing options-life imprisonment and death. Under South Carolina state law, the defendant's prior convictions rendered him ineligible for parole. The trial court refused the defendant's requested instructions defining a life sentence and setting forth his parole ineligibility. On appeal, the Supreme Court found in the absence of an instruction setting forth the defendant's parole ineligibility, the jury could have reasonably believed the

defendant would be released on parole if he were not executed. The Court explained to the extent that misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing the defendant to death and sentencing him to a limited period of incarceration. The Supreme Court found the failure to provide the jury with accurate information regarding the defendant's parole ineligibility, combined with the state's argument the defendant would pose a future danger if not executed denied the defendant due process.

In *Shafer*, the jury was instructed that "life imprisonment means until death of the offender", but the trial court, over defense objection, did not instruct "that a life sentence, if recommended by the jury, would be without parole." *Shafer*, 121 S.Ct. at 1269 (internal citations omitted). Thereafter, the jury sent a note inquiring "'1) Is there any remote chance for someone convicted of murder to become elig[i]ble for parole?'" and "'2) Under what conditions would someone convicted of murder be elig[i]ble?'" *Id.* at 1269. The trial court responded with "'Parole eligibility or ineligibility is not for your consideration.'" *Id.* The Supreme Court extended *Simmons* to situations where the jury's choice is between life without parole and death, even if a third alternative sentence encompassing release is available to the court should the jury not unanimously agree on a statutory aggravator. The Court held "whenever future dangerousness is at issue in a capital sentencing

proceeding under South Carolina's new scheme, due process requires that the jury be informed that the life sentence carries no possibility of parole." *Id.* The Court recognized that the jury was confused by the absence of such instruction as evidenced by its further question about parole eligibility, and firmly rejected the trial court's response that parole eligibility was not for the jury's consideration. The Court stated the "reality [of a life sentence without parole] was not conveyed to Shafer's jury by the court's instructions." *Id.* at 1274.

This Court has consistently rejected the applicability of *Simmons* to our statutory capital sentencing procedures "since Oklahoma capital juries are aware that a defendant may be sentenced to life, life without the possibility of parole, or death." *Fitzgerald v. State*, 972 P.2d 1157, 1171 (Okl.Cr.1998). *See also Gilbert v. State*, 955 P.2d 727, 731 (Okl.Cr.1998); *Hain v. State*, 919 P.2d 1130, 1145 (Okl.Cr.) . . . ; *Trice v. State*, 912 P.2d 349, 351-352 (Okl.Cr.1996); *Mayes v. State*, 887 P.2d 1288, 1317-1318 (Okl.Cr.1994). . . .

Shafer modifies this holding only to the extent that instructions by the trial court, additional to the uniform instruction, could conflict with the uniform instruction and confuse the jury as to the meaning of the available sentencing options. In *Johnson v. Gibson*, 254 F.3d 1155 (10th Cir. 2001) the trial court instructed the jury on the three statutory sentencing options, including life

imprisonment without the possibility of parole. The jury sent the following note to the trial judge during deliberations: "We need to know! Is life without parole firm – Does it mean he can never be paroled?" *Id.* at 1164. The trial court responded, over defense objection: "It is inappropriate for you to consider the question asked." *Id.*

The Tenth Circuit recognized it had previously held that instructing the jury on the three statutorily proscribed punishment options, without any further explanation, satisfies *Simmons*. *Id.* at 1165. The Court further noted that a trial court, in response to a jury's inquiry as to the meaning of a life sentence without parole, may simply refer the jury back to the instructions as given. *Id.* However, "instead of simply referring the jury back to the court's original instructions, 'the trial court told the jury it was not appropriate for it to consider whether the defendant could never be paroled'" and in so doing "plainly contradicted" the original instructions. *Id.* Applying *Shafer*, the Tenth Circuit found that as a result, "the jury had a conflict between the court's instructions as to whether it was proper to consider parole eligibility in imposing sentence" and "[a]t worst, the jury may very well have thought that parole was available, even with the life without parole option, but for some unknown reason it could not consider that fact." *Id.*

In the present case, no instructions additional to the uniform instructions on the

> statutorily prescribed punishment options were given. Therefore, the jury was not presented with a "false choice" as to its sentencing options. *See Johnson v. Gibson*, 254 F.3d at 1167, (Henry, J., concurring). The record in this case reflects no questions were asked by the jury as to the meaning of any of the punishment options. Therefore, appellate counsel's failure to raise a claim of error as to the trial court's failure to give instructions additional to the uniform instructions on the three statutorily proscribed punishment options did not render his performance unreasonable under prevailing professional norms as such a claim would have been rejected in light of case law from this Court, the Tenth Circuit Court of Appeals and the United States Supreme Court. Appellate counsel's failure to raise the claim at issue here did not render his performance unreasonable under prevailing professional norms. Accordingly, post-conviction relief on the grounds of ineffective assistance of appellate counsel is denied.

Williams (PC), 31 P.3d at 1049-50.

The OCCA's determination that appellate counsel's failure to raise the claim at issue on direct appeal did not amount to ineffective assistance of appellate counsel is not an unreasonable application of Supreme Court precedent. Petitioner's claim that it was error for the trial court not to provide the jury additional instruction on the definition of life without parole is without merit. Had appellate counsel raised

the issue on direct appeal, the OCCA would have denied the claim of relief pursuant to precedent from the OCCA, from the Supreme Court (*Simmons, Shafer*) and from the Tenth Circuit Court of Appeals (*Johnson*). *See id.* Because the omitted claim is meritless, appellate counsel's failure to raise it does not amount to constitutionally ineffective assistance. *See Hawkins*, 185 F.3d at 1152. Petitioner is not entitled to habeas relief on this issue.

XII. Jury Instruction on "Continuing Threat" Aggravating Circumstance

Petitioner asserts that the jury instruction on the "continuing threat" aggravator was so ambiguous that there was a reasonable likelihood the jury would interpret it incorrectly. Petitioner relies upon *Boyde v. California*, 494 U.S. 370 (1990). Petitioner argues the instruction is ambiguous and subject to an erroneous interpretation as to whether the State was required to prove the probability that Petitioner would commit future acts of violence that constitute a continuing threat to society.

At trial, the state relied on the aggravating circumstance that "at the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society." (O.R. 271). *See* Okla. Stat. tit. 21, § 701.12(7). The trial court instructed per OUJI-CR (2d) No. 4-74 as follows:

> The State has alleged that there exists a probability that the defendant will commit future acts of violence that constitute a continuing threat to society. This aggravating circumstance is not established unless the State proved beyond a reasonable doubt:
>
> *First*, that the defendant's behavior has demonstrated a threat to society; and
>
> *Second*, a probability that this threat will continue to exist in the future.

(Supplemental Instruction No. 15, O.R. 273). Petitioner argues that while under Oklahoma law, aggravating circumstances do not have elements, from the jury's perspective, they did, because the jury became acclimated to the structure in the first stage jury instructions where the state had to prove the enumerated elements of a crime beyond a reasonable doubt. Petitioner contends that because the "First" and "Second" components of the challenged instruction fail to mention any requirement of violence, the jury was likely to interpret the instruction in a manner that would not require it to find a "probability that the defendant will commit future acts of violence" in order to find he "constitute[d] a continuing threat to society."

In reviewing an allegedly ambiguous instruction, the Court inquires "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (*quoting Boyde*, 494 U.S. at 380) (internal quotation marks

omitted). "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (*quoting Cupp*, 414 U.S. at 147).

The OCCA in rejecting Petitioner's claim of error applied the "reasonable likelihood" standard and found that the instruction was not ambiguous or subject to erroneous interpretation. The state court found that the instruction was "a correct statement of the law which properly channels the discretion of the jury." *Williams*, 22 P.3d at 722 (*citing Welch v. State*, 2 P.3d 356, 374 (Okla. Crim. App. 2000); *Brown v. State*, 989 P.2d 913, 932 (Okla. Crim. App. 1998); *Hawkins v. State*, 891 P.2d 586, 596 (Okla. Crim. App. 1994)). The OCCA likewise recognized that in *Bland v. State*, 4 P.3d 702 (Okla. Crim. App. 2000), it had rejected a challenge that the uniform instruction was deficient for failing to properly set forth the requirement that the jury had to find the defendant would commit "future acts of violence." The state court quoted its findings in *Bland* as follows:

> The first paragraph of the instruction explicitly refers to the allegation that there exists a probability that the defendant will commit future acts of violence. That the subsequently listed two criteria which must be proven do not mention violence does not negate the burden on the State to prove a probability that the defendant will commit future acts of violence that constitute a continuing threat to society as listed in the first paragraph.

> Reading the instruction in its entirety, it is clear the State had the burden of proving the defendant had a history of criminal conduct that would likely continue in the future and that such conduct would constitute a continuing threat to society. Accordingly, we reject Appellant's challenge to Instruction No. 4-74, OUJI-CR (2d). This assignment of error is therefore denied.

Williams, 22 P.3d at 722 (*quoting Bland*, 4 P.3d at 725). The state court rejected the argument that the instruction was comparable to an instruction setting out incorrect elements of a criminal offense and noted that aggravating circumstances do not contain elements under Oklahoma law. *Id.* (*citing Phillips*, 989 P.2d at 1041). Finally, the OCCA recognized that when viewing the instructions as a whole there was no reasonable likelihood that the jurors interpreted the trial court's instructions to mean that the state did not have the burden of proving the continuing threat had to be of a violent nature beyond a reasonable doubt. *Id.* (referring to Instructions 7, 11, 12 and 13). The state court ultimately held that considering the trial as a whole, there is not a reasonable likelihood that the jurors in this case misinterpreted the instruction. *Id.*

The OCCA's decision is a reasonable application of *Boyde* and *Estelle* because the first sentence of the challenged instruction explicitly informed that jury of the requisite violent nature of the "continuing threat to society." The jury was instructed that "the

probability that the defendant will commit future acts of violence" is what constitute[s] the "continuing threat to society." (O.R. 273). Thus, in reading the disputed instruction in its entirety, there is not a reasonable likelihood that the jury interpreted the instruction to mean that Petitioner could pose a threat to society without finding a probability that he would commit future acts of violence.

The state appellate court's ruling is further supported by reviewing the second stage jury instructions and proceedings as a whole. *See Estelle*, 502 U.S. at 72 ("the instruction . . . must be considered in the context of the instructions as a whole and the trial record"). The jury was repeatedly instructed that the State had the burden of proving the aggravating circumstances beyond a reasonable doubt. (*See* O.R. 265, 269-71, 275). Furthermore, the "continuing threat" instruction must be read in light of Supplemental Instruction No. 13 which stated that the jury must "determine whether any one of or more of the following aggravating circumstances existed beyond a reasonable doubt:. . . . 5 At the present time there exists a probability that the defendant will commit criminal acts of violence that would constitute a continuing threat to society." Instruction No. 13, as well as Instruction No. 11, reiterated the requirement of "criminal acts of violence." Further, the evidence admitted in support of the aggravating circumstances and the prosecution's argument emphasized violent acts. (*See* Tr. VIII 1452).

Furthermore, the fact that the instruction might be read to permit the jury to consider Petitioner's nonviolent conduct when determining whether Petitioner poses a future risk of society does not amount to a constitutional violation. Under Oklahoma law, while a nonviolent crime standing alone cannot be the basis for finding the continuing threat aggravator, *Wilson v. Sirmons*, 536 F.3d 1064, 1110 (10th Cir. 2008) (*citing Torres v. State*, 962 P.2d 3, 23 (Okla. Crim. App. 1998)), a jury is free to consider "the defendant's nonviolent offenses in conjunction with other factors when determining whether the defendant poses a future risk to society." *Id.* (*quoting Boltz v. Mullin*, 415 F.3d 1215, 1231 (10th Cir. 2005)). In this case, the jury considered extensive evidence relating to Petitioner's past violent conduct, there is no reasonable likelihood that the jury would have determined that the defendant poses a future risk to society based solely upon Petitioner's nonviolent conduct.

The OCCA's determination that the jury instruction on the continuing threat aggravating circumstance was not unconstitutionally ambiguous is not an unreasonable application of *Boyde* and *Estelle.* Having failed to demonstrate that the OCCA's finding was an unreasonable application of Supreme Court law, Petitioner is not entitled to relief on this issue.

XIII. Systemic Risk of Error

Petitioner argues his death sentence must be vacated because the overwhelming systemic risk of error in the Oklahoma trial and appellate process renders the death penalty a cruel and unusual punishment administered without due process and equal protection of the law. Respondent incorrectly contends that Petitioner failed to raise this claim on direct appeal or in state post-conviction proceedings. Petitioner did explicitly raise the issue in his post-conviction proceedings. (*See* Original Application for Post Conviction Relief in a Death Penalty Case, Post Conviction No. PCD-2000-1650, pp. 23-30).

The OCCA in the post-conviction proceeding rejected this claim finding it had been waived because it was not, but could have been, raised on direct appeal. *Williams (PC)*, 31 P.3d at 1051. The OCCA "[a]pplying the three-part test for ineffective assistance of appellate counsel" likewise found that Petitioner's counsel's failure to raise the issue was not ineffective assistance of counsel. *Id.* Because the OCCA found the claim was waived, Respondent alternatively contends that procedural bar applies.

Habeas relief may be denied if a state disposed of an issue on an adequate and independent state procedural ground. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *see also Romero v. Tansy*, 46 F.3d 1024, 1028 (10th Cir. 1995); *Brecheen v. Reynolds*, 41 F.3d 1343, 1353 (10th Cir. 1994). A state court's finding of procedural default is deemed "independent"

if it is separate and distinct from federal law. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). If the state court finding is "strictly or regularly followed" and applied "evenhandedly to all similar claims," it will be considered "adequate." *Maes v. Thomas*, 46 F.3d 979, 986 (10th Cir. 1995) (*citing Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982)).

To overcome a procedural default, a habeas petitioner must demonstrate either: (1) good cause for failure to follow the rule of procedure and actual resulting prejudice; or (2) that a fundamental miscarriage of justice would occur if the merits of the claims were not addressed in the federal habeas proceeding. *Coleman*, 501 U.S. at 749-50. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. *Id.* As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991).

Petitioner contends that the ineffectiveness of his appellate counsel for failing to raise this claim in the direct appeal establishes the requisite "cause and

prejudice" to overcome any procedural bar. Ineffective assistance of appellate counsel may constitute cause for state procedural default where counsel's performance falls below the minimum standard established in *Strickland. See Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). When considering a claim of ineffective assistance of appellate counsel for failure to raise an issue, the Court looks to the merits of the omitted issue. *Hooks v. Ward*, 184 F.3d 1206, 1221 (10th Cir. 1999) (*citing United States v. Cook*, 45 F.3d 388, 392 (10th Cir. 1995)). "If the omitted issue is without merit, counsel's failure to raise it does not constitute constitutionally ineffective assistance of counsel." *Id.* (quotation omitted). Furthermore, the ineffective assistance of appellate counsel claim asserted as "cause" must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. *Murray*, 477 U.S. at 489. Petitioner did raise ineffective assistance of appellate counsel in his post-conviction proceedings. (*See* Original Application for Post Conviction Relief in a Death Penalty Case, Post Conviction No. PCD-2000-1650, pp. 23-30).

In this case, the OCCA's determination that Petitioner has waived, or procedurally defaulted on, this claim is both "independent" and "adequate." The OCCA's procedural bar, based on Petitioner's failure to raise the omitted claims on direct appeal, is an "independent" state ground because state law provided "the exclusive basis for the state court's holding." *Maes*, 46 F.3d at 985. The basis for the finding of

procedural default is Oklahoma statute, Okla. Stat. tit. 22, § 1089. It is "independent" as it is separate and distinct from federal law. *See Ake*, 470 U.S. at 75. The procedural bar based on § 1089 has been applied in a consistent and evenhanded fashion. *See*, *e.g.*, *Medlock v. Ward*, 200 F.3d 1314, 1322-23 (10th Cir. 2000); *Sherrill v. Hargett*, 184 F.3d 1172, 1175 (10th Cir. 1999); *Moore v. Reynolds*, 153 F.3d 1086, 1097 (10th Cir. 1998). Thus, the OCCA's finding is "adequate." *See Maes*, 46 F.3d at 986.

Furthermore, Petitioner has not established the requisite "cause" and "prejudice" to overcome procedural bar because Petitioner's appellate counsel was not ineffective for failing to raise Petitioner's claim regarding the alleged systemic risk of error. The Court finds that Petitioner's claim that the systemic risk of error in Oklahoma renders the death penalty cruel and unusual punishment is without merit. In his brief, Petitioner cites no specific processes or procedures in Oklahoma which allegedly create an unacceptable risk of error with respect to the death penalty. Nor does Petitioner point to any Oklahoma or federal caselaw recognizing a risk of error in the Oklahoma trial and appellate processes with respect to the death penalty. Rather, Petitioner cites only general caselaw pertaining to the Eighth Amendment and a May 2001 Gallup Poll regarding the death penalty. The Supreme Court has continued to recognize that "the death penalty is not invariably unconstitutional," *see*, *e.g.*, *Kennedy v. Louisiana*, 128 S.Ct. 2641, 2650 (2008) (*citing Gregg v. Georgia*, 428 U.S.

153 (1976)), and Petitioner refers to no attributes of Oklahoma's trial and appellate process that render it unconstitutional here. Petitioner has not established a reasonable probability that had he raised the issue on direct appeal, he would have prevailed. *See Smith v. Robbins*, 528 U.S. 259, 286 (2000) (*citing Strickland*, 466 U.S. at 694). Because the omitted issue is without merit, appellate counsel's failure to raise it does not constitute constitutionally ineffective assistance of counsel. *See Hooks*, 184 F.3d at 1221. Because Petitioner's appellate counsel was not ineffective for failing to raise the systemic risk of error claim, Petitioner has not shown the requisite "cause" and "prejudice" to overcome his procedural default.

Petitioner's only other means of gaining federal habeas review of his defaulted claim is a claim of actual innocence under the fundamental miscarriage of justice exception. *Herrera v. Collins*, 506 U.S. 390, 403-404 (1993); *Sawyer v. Whitley*, 505 U.S. 333, 339-341 (1992); *see also Schlup v. Delo*, 513 U.S. 298 (1995). Petitioner has not asserted the fundamental miscarriage of justice exception as a means of overcoming procedural default. As a result, Petitioner's claim is procedurally barred. Petitioner is denied relief on this ground.

XIV. Accumulated Errors

Petitioner contends that the cumulative effect of individual errors that were individually found to be

harmless is sufficiently prejudicial to violate his constitutional rights. The OCCA denied this claim of error on direct appeal as follows:

> We have found error occurring in both the first and second stages of this trial. None of these errors required reversal singly. In viewing the cumulative effect of these errors we also find they do not require reversal of this case as none were so egregious or numerous as to have denied Appellant a fair trial.

Williams, 22 P.3d at 732.

This Court has reviewed the constitutional errors found by the OCCA, but has found no additional errors. The errors reviewed were harmless or non-prejudicial. 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." *Hamilton v. Mullin*, 436 F.3d 1181, 1196 (10th Cir. 2006) (internal quotations omitted). The Court cannot find under the facts of this case that the cumulative effect of the errors had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted). The OCCA's denial of Petitioner's claim based on cumulative error was not an unreasonable application of Supreme Court law. Petitioner is not entitled to relief on this claim.

XV. Appellate Reweighing of Aggravating and Mitigating Circumstances

In his Amendment to his Petition for Writ of Habeas Corpus (Dkt.#48), Petitioner, relying upon *Ring v. Arizona*, 536 U.S. 584 (2002), asserts that the OCCA violated his Sixth and Eighth Amendment rights by reweighing the aggravating and mitigating circumstances after finding one of the aggravating circumstances invalid. Petitioner claims that the reweighing was a factual determination on which the legislature conditions an increase in maximum punishment which must be made by a jury according to the Supreme Court in *Ring*. Petitioner asserted this claim in his second application for post-conviction relief which was rejected by the OCCA on January 10, 2003 in Case No. PCD-2002-1067.

As noted above, Petitioner characterizes his claim as based upon *Ring v. Arizona*. However, in *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004), the Supreme Court held that "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Ring* was issued on June 24, 2002, after Petitioner's conviction and sentence had become final on direct review. *See Beard v. Banks*, 542 U.S. 406, 411 (2004) (a conviction is final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied") (*quoting Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)). Thus, Petitioner may not

now challenge his sentence based upon a retroactive application of *Ring*. Petitioner is denied habeas corpus relief on this ground.

ACCORDINGLY IT IS HEREBY ORDERED that:

1. The petition for writ of habeas corpus, as amended (Dkt. ##25, 48) is **denied**.

DATED this 7th day of March, 2011.

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22 P.3d 702

Court of Criminal Appeals of Oklahoma.

Sterling Bernard WILLIAMS, Appellant,
v.
STATE of Oklahoma, Appellee.

No. D-99-654. | April 9, 2001. | Rehearing Denied May 17, 2001. | As Corrected June 21, 2001.

An Appeal from the District Court of Tulsa County, the Honorable Thomas C. Gillert, District Judge.

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OPINION

LUMPKIN, Presiding Judge:

¶ 1 Appellant Sterling Bernard Williams was tried by jury and convicted of First Degree Murder (Count I) (21 O.S.1991, § 701.7) and Assault and Battery with Intent to Kill, After Former Conviction of Two Felonies (Count II) (21 O.S.Supp.1992, § 652), Case No. CF-97-2385, in the District Court of Tulsa County. In Count I, the jury found the existence of four (4) aggravating circumstances and recommended the punishment of death. In Count II, the jury recommended as punishment ninety-nine (99) years imprisonment. The trial court sentenced accordingly. From this judgment and sentence Appellant has perfected this appeal.[1]

¶ 2 Appellant was convicted of the pre-meditated murder of LeAnna Hand and of the assault and battery with intent to kill on her roommate Elizabeth Hill. In May of 1997, Appellant worked as an independent contractor for Willard Enterprises Colorado Choice Meat Company. He had sold Hand meat on prior occasions. On May 14, 1997, Appellant phoned Hand and said he had some free meat he was going to give away and that he would bring it by her home. At

[1] Appellant's Petition in Error was filed in this Court on November 8, 1999. Appellant's brief was filed July 5, 2000. The State's brief was filed September 18, 2000. The case was submitted to the Court September 25, 2000. Appellant's reply brief was filed November 7, 2000. Oral argument was held January 5, 2001.

approximately 11:00 a.m., Hill was in her room dressing when she heard a knock at the front door. A moment later, she heard the answering machine on the telephone click on. Hill picked up the phone in her bedroom and discovered Hand's mother on the line. Hill spoke for just a moment, then she heard Hand call her name from the other room. She opened her bedroom door and saw Hand struggling with Appellant. Hill heard Hand fall to the floor and saw Appellant standing over her body. Hill immediately shut her bedroom door and locked it. She tried to call 9-1-1 but could not get an open phone line. Appellant then kicked down her bedroom door and knocked the phone out of her hand. He told Hill to be quiet. Instead, she screamed and tried to run out of the room. She escaped from her room, but Appellant tackled her in the hallway. He threw her to the ground, climbed on top of her, and put both hands around her neck. Despite Appellant's attempts to choke Hill, she fought back and was able to free herself and run out of the front door of the duplex.

¶ 3 Hill was running to a neighbor's home when the manager of a nearby apartment complex, Carol Gorman, saw her and waved her over. Gorman observed bloody hand prints on Hill's neck. Meanwhile, as soon as Hill ran out of the duplex, Appellant also left. He walked to his car parked in the driveway of the duplex and drove away.

¶ 4 The police arrived at the scene to find Hand dead in her living room. She had suffered a seven inch stab wound to her chest. The knife cut through

her ribs, through a portion of her left lung, completely through her heart and into her right lung. The knife was still in her body, tangled in her clothes. Near the victim the police found a box from the Colorado Choice Meat Company, a roll of duct tape, a baseball cap with the company logo, and a pair of gloves. Nothing was missing from the duplex, including cash Hill had left on her bed.

¶ 5 On the same day, Appellant phoned his employer and said he had just killed a girl and had to go to Chicago to hide out. Appellant withdrew money from his back [sic] account. Appellant also phoned his girlfriend, Consuela Drew, and told her he was going to jail. An all points bulletin was issued containing a description of Appellant's car. The next day, May 15, 1997, Ms. Drew again spoke with Appellant and told him to turn himself in to the police. That same day Appellant was stopped by authorities in Alexandria, Louisiana. He had a serious cut to the index finger on his left hand, and scratches on his neck, face and chest. Appellant cooperated with the officers and asked that the $121 dollars taken from him be given to his children.

¶ 6 A t-shirt retrieved from Appellant later tested positive for Hand's DNA. The knife found at the murder scene was found to match a butcher block set of knives in Appellant's home.

¶ 7 At trial, the defense offered no evidence during the guilt stage. During the second stage of trial, the State presented evidence to support four aggravating

circumstances. This evidence consisted of two Judgment and Commitment Orders from the State of Arkansas indicating Appellant's prior convictions for rape, kidnapping, burglary, and first degree battery. The State's evidence also showed that on separate occasions, Appellant had attacked girlfriend, Yolanda Cunningham; broken into the home of Mike Applebury and attacked him with a baseball bat; and made obscene threatening phone calls to Michelle Sauser.

¶ 8 During the second stage, the defense argued Appellant suffered from several mental health difficulties, including bipolar disorder and a sexual disorder. Expert witness testimony was offered to show that Appellant's family had a history of severe substance abuse and poor anger control. Evidence also showed Appellant suffered from childhood physical abuse at the hands of his father. Expert witness testimony showed Appellant went to Hand's home intending only to rape her, not kill her, and that his mental disorders caused him to panic when Hand resisted and he stabbed her only intending to silence her.

¶ 9 Appellant raises twenty (20) propositions of error in his appeal. These propositions will be addressed in the order in which they arose at trial.

JURY SELECTION

¶ 10 In his first assignment of error, Appellant contends the trial court erred in excusing prospective

juror Downey for cause. "The proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Patton v. State,* 973 P.2d 270, 281-282 (Okl.Cr.1998), *cert. denied,* 528 U.S. 939, 120 S.Ct. 347, 145 L.Ed.2d 271 (1999) *quoting Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). A juror's bias need not be proved with "unmistakable clarity;" neither must the juror express an intention to vote against the death penalty "automatically." *Id.* at 282. Determination of a juror's bias often cannot be reduced to a question and answer session. *Id.* Despite the lack of clarity in the written record, there are situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. *Id.* This Court will look to the entirety of the juror's *voir dire* examination to determine if the trial court properly excused the juror for cause. *Id.* As the trial court personally observes the jurors and their responses, this Court will not disturb its decision absent an abuse of discretion. *Id.*

¶ 11 When asked by the trial court whether she could be an impartial juror, Ms. Downey replied she didn't think she could because she did not believe in the death penalty. She stated it would bother her the rest of her life to impose the death penalty. The trial court then attempted to clarify the issue by stating

that the issue was not whether it would bother her, but whether her views were such that it would prevent her or substantially impair her from imposing the death penalty, should the law and the evidence warrant. Ms. Downey answered in the affirmative. She was then excused for cause. (Tr. Vol.III, pg.309-310).

¶ 12 Specifically, Appellant contends it was never ascertained whether or not Ms. Downey could follow the law despite her views or set them aside. Appellant argues it was error for the trial court to ask whether the prospective juror's views would substantially impair her from imposing the death penalty. He contends this is not the equivalent of asking whether her views would substantially impair her from following the law.

¶ 13 The Oklahoma Uniform Jury Instructions-Criminal set forth the questions and answers a trial judge should ask when death qualifying a jury. *See* OUJI-CR (2d) 1-5. The uniform instructions do not include the "substantially impair" language. While the better approach in examining potential jurors regarding the punishments in a capital murder case is to use the *voir dire* questions in the order set forth in the uniform instructions, we find the manner in which the trial court conducted *voir dire* in this case was not error. *See Brown v. State,* 989 P.2d 913, 923 (Okl.Cr.1998). The trial court's questions to Ms. Downey sufficiently established that she could neither consider nor impose the death penalty in a case where the evidence and law warranted its imposition.

Her unequivocal statements that she did not believe in and would not impose the death penalty under any circumstances allowed the trial court to determine whether her views would prevent or substantially impair the performance of her duties. *See Patton,* 973 P.2d at 282-283; *Le v. State,* 947 P.2d 535, 545 (Okl.Cr.1997), *cert. denied,* 524 U.S. 930, 118 S.Ct. 2329, 141 L.Ed.2d 702 (1998). While the trial court did not specifically ask Ms. Downey whether she could follow the law despite her beliefs or set those beliefs aside, it is clear from her responses to other questions that she was irrevocably committed to vote against the death penalty, regardless of what the evidence and law warranted. Accordingly, the trial court did not err in excusing Downey for cause.

¶ 14 Appellant further argues the trial court erred in refusing him the opportunity to further question and rehabilitate Ms. Downey. At trial, defense counsel asked to rehabilitate the prospective juror on the grounds it was incumbent on the court to ask her if she could set her beliefs aside. The objection was overruled.

¶ 15 The manner and extent of *voir dire* rests within the discretion of the trial court. *Banks v. State,* 701 P.2d 418, 423 (Okl.Cr.1985), *cert. denied,* 502 U.S. 1036, 112 S.Ct. 883, 116 L.Ed.2d 787 (1992). When the proper questions have been asked by the trial court to determine whether prospective jurors can sit in the case, it is not error to deny defense counsel an opportunity to rehabilitate the excused jurors. *Scott v. State,* 891 P.2d 1283, 1289-1290 (Okl.Cr.1995), *cert.*

denied, 516 U.S. 1077, 116 S.Ct. 784, 133 L.Ed.2d 735 (1996).

¶ 16 Reviewing the record before us in this regard we do not find any abuse of judicial discretion. The trial court's questions were adequate to determine whether Ms. Downey could sit as a fair and impartial juror in this case. Accordingly, it was not error to deny defense counsel the opportunity to make further inquiry. *See Trice v. State,* 853 P.2d 203, 209 (Okl.Cr.1993), *cert. denied,* 510 U.S. 1025, 114 S.Ct. 638, 126 L.Ed.2d 597 (1993). This assignment of error is denied.

FIRST STAGE ISSUES CLAIMS OF PROSECUTORIAL MISCONDUCT

¶ 17 In his second assignment of error, Appellant contends he was denied a fair trial by prosecutorial misconduct. Specifically, he complains about the following comment made during the prosecution's first stage closing argument.

> So ladies and gentlemen, all I ask you to do is consider the evidence when you go back there, but realize that this case is really about sentencing. There is no question about guilt.

¶ 18 Defense counsel's objection to the comment was sustained. The trial judge admonished the jury to disregard the comment, and told the jury that "this is about guilt." Appellant now argues on appeal that in spite of the admonishment, the error is reversible

when considered in conjunction with trial counsel's failure to challenge guilt.

¶ 19 A trial court's admonition to the jury to disregard the remarks of counsel usually cures any error unless it is of such nature, after considering the evidence, that the error appears to have determined the verdict. *Al-Mosawi v. State,* 929 P.2d 270, 284 (Okl.Cr.1996), *cert. denied,* 522 U.S. 852, 118 S.Ct. 145, 139 L.Ed.2d 92 (1997). The comment in question was made during the second portion of the State's closing argument. It was an isolated remark which was not repeated. Except for the statement in question, the prosecutor's closing arguments were proper comments on the evidence and on the jury's duty to determine whether the State had met its burden of proof beyond a reasonable doubt.

¶ 20 Contrary to Appellant's claim, the presumption of innocence was not violated. No remark was made that the presumption of innocence did not apply. Further, the jury received specific written instructions on the presumption of innocence and the State's burden of proof. The jury was specifically told what the attorneys said in closing argument was purely argument and not evidence to be considered in reaching their verdict. Viewing the comment and the admonishment in context of the trial, the comment was not outcome determinative and the trial court's admonition was sufficient to cure any error. Contrary to Appellant's claim, counsel did challenge guilt in this case, thereby reducing any negative impact this

comment may have had on the trial. This assignment of error is denied.

FIRST STAGE JURY INSTRUCTIONS

A.

¶ 21 In his third assignment of error, Appellant challenges the jury instructions given during the guilt stage of trial. Initially, he contends the trial court erred in failing to give his requested instructions on second degree depraved mind murder, second degree felony murder and first degree manslaughter.

¶ 22 The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court. *Patton,* 973 P.2d at 288. Absent an abuse of that discretion, this Court will not interfere with the trial court's judgment if the instructions as a whole, accurately state the applicable law. *Id.* "[A]ll lesser forms of homicide are necessarily included and instructions on lesser forms of homicide should be administered if they are supported by the evidence." *Shrum v. State,* 991 P.2d 1032, 1036 (Okl.Cr.1999).[2] In determining the sufficiency of the evidence to support a lesser offense we look at whether the evidence might allow a jury to acquit the defendant of the greater offense and convict him of the lesser. *See*

[2] While I disagree with this Court's failure to adhere to precedent in *Shrum,* I accede to its application in this case based upon the doctrine of *stare decisis. Shrum,* 991 P.2d at 1037-39 (Lumpkin, V.P.J. concurring in result).

Hogan v. Gibson, 197 F.3d 1297, 1305 (10th Cir.1999). With these rules of law in mind, we review Appellant's allegations.

¶ 23 Murder in the second degree occurs "[w]hen perpetrated by an act imminently dangerous to another person and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual." 21 O.S.1991, § 701.8(1). Appellant initially argues that "lack of intent to kill" is not an element of the offense of second degree murder. This Court has consistently held that second degree depraved mind murder is applicable where there is no premeditated intent to kill any particular person. *See Phillips v. State,* 989 P.2d 1017, 1034 (Okl.Cr.1999), *cert. denied,* 531 U.S. 837, 121 S.Ct. 97, 148 L.Ed.2d 56 (2000); *Boyd v. State,* 839 P.2d 1363, 1367 (Okl.Cr.1992), *cert. denied,* 509 U.S. 908, 113 S.Ct. 3005, 125 L.Ed.2d 697 (1993); *Foster v. State,* 714 P.2d 1031, 1039-40 (Okl.Cr.1986), *cert. denied,* 479 U.S. 873, 107 S.Ct. 249, 93 L.Ed.2d 173 (1986). We find Appellant's arguments to revisit the issue are not persuasive.

¶ 24 The evidence in the present case does not support the conclusion that Appellant acted without any premeditated design to effect death. Appellant took a butcher knife from his home, placed it in a box with a pair of gloves and a roll of duct tape and went to the deceased's home to meet her at the appointed time. Appellant and the deceased had met previously and would recognize each other on sight. The

deceased was stabbed within five minutes of Appellant's arrival at her home. The butcher knife was driven approximately seven inches into the deceased's body. The ensuing wound was the result of a rapid, hard thrust of the knife into the body with only the handle of the knife visible. This evidence is sufficient for any rational trier of fact to find Appellant acted with the premeditated intent to kill the deceased.

¶ 25 Appellant disputes the conclusion of premeditation and argues the evidence showed no reason for the victims to feel threatened when he entered their home, therefore there was no evidence to suggest that he formed the intent to kill in advance. Premeditation sufficient to constitute murder may be formed in an instant, or it may be formed instantaneously as the killing is being committed. *Phillips,* 989 P.2d at 1029. It may be inferred from the fact of the killing, unless circumstances raise a reasonable doubt whether such design existed. *Freeman v. State,* 876 P.2d 283, 287 (Okl.Cr.), *cert. denied,* 513 U.S. 1022, 115 S.Ct. 590, 130 L.Ed.2d 503 (1994). The evidence clearly supports a finding that when Appellant stabbed the deceased, he did so with the intent to kill her, regardless of whether that intent was formed prior to or after arriving at her home. Accordingly, instructions on second degree depraved mind murder were not warranted, as that crime was not supported by the evidence.

¶ 26 The defense also requested jury instructions on second degree felony murder based upon the underlying felonies of attempted kidnapping and attempted

rape. These instructions were rejected by the trial court. Now on appeal, Appellant admits these proposed instructions "missed the mark" as they relied on felonies which fell under the first degree felony murder statute, 21 O.S.Supp.1996, § 701.7(B). Appellant argues the appropriate felony upon which to base a second degree felony murder instruction is assault with intent to commit a felony. *See* 21 O.S.1991, § 681. Appellant contends his request for second degree felony murder instructions based upon attempted kidnapping and attempted rape was adequate to prompt the trial court to instruct on second degree felony murder based upon assault with intent to rape or kidnap. He further argues that as the defense repeatedly pressed for some kind of lesser offense instruction that would give the jury a non-capital option, had the trial court offered to instruct on second degree felony murder based on assault with intent to rape or kidnap, the defense would have readily adopted that alternative.

¶ 27 Initially, we find Appellant has waived all but plain error review by his failure to request instructions on second degree felony murder based upon assault with intent to rape or kidnap. *Cheney v. State,* 909 P.2d 74, 90 (Okl.Cr.1995). In a criminal prosecution, the trial court has the duty to correctly instruct the jury on the salient features of the law raised by the evidence without a request by the defendant. *Wing v. State,* 280 P.2d 740, 747 (Okl.Cr.1955). *See also Atterberry v. State* 731 P.2d 420, 422 (Okl.Cr.1986). However, the trial court's duty extends

only to those instructions which are supported by the evidence introduced during the trial. *Rawlings v. State,* 740 P.2d 153, 160 (Okl.Cr.1987). Here, there was no evidence to support the requested instruction.[3]

¶ 28 At the close of the first stage of trial, no evidence had been introduced as to an assault with intent to rape or kidnap. During the first stage of trial, the State's evidence showed Appellant went to Hand's home with a box containing a knife, gloves and duct tape. No evidence was introduced by the State or brought out by the defense on cross-examination that Appellant had any intent other than the intent to kill the deceased. It was not until the second stage of trial, through Dr. Peterson's expert testimony, that any evidence concerning Appellant's intent to rape or kidnap the deceased was introduced. Therefore, first stage instructions as to second degree felony murder based upon assault with intent to rape or kidnap were not warranted and were properly omitted from the jury's consideration.

¶ 29 Homicide is manslaughter in the first degree when "perpetrated without a design to effect death,

[3] The defense filed a motion *in limine* requesting the State be prohibited from arguing in first stage closing argument that Appellant had intended to commit a rape against either Hand or Hill or kidnap either victim. The trial court overruled the motion, finding it fair comment on the evidence to "suggest to the jury or to ask the jury rhetorically what he was doing." However, during closing argument, no argument was made that the evidence inferred Appellant went to the victims' home with the intent to rape or kidnap.

and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon . . . " 21 O.S.1991, § 711(2). Appellant argues the inclusion of heat of passion as an element of first degree manslaughter by means of a dangerous weapon is questionable. This argument has been previously rejected in *Ledbetter v. State,* 933 P.2d 880, 888 (Okl.Cr.1997) wherein we stated "the applicable case is *Brown v. State,* 777 P.2d 1355, 1357 (Okl.Cr.1989), where we held heat of passion is an element of the jury instruction for first degree manslaughter by means of a dangerous weapon."

¶ 30 "The elements of heat of passion are: 1) adequate provocation; 2) a passion or emotion such as fear, terror, anger, rage or resentment; 3) homicide occurred while the passion still existed and before a reasonable opportunity for the passion to cool; and 4) a causal connection between the provocation, passion and homicide." *Charm v. State,* 924 P.2d 754, 760 (Okl.Cr.1996); *cert. denied,* 520 U.S. 1200, 117 S.Ct. 1560, 137 L.Ed.2d 707 (1997). Appellant concedes "there [was] no evidence to indicate the victim conducted herself in a manner described by the provocation doctrine." Our review of the evidence supports that conclusion. Further, our review of the evidence shows nothing to support the other elements of first degree manslaughter. Therefore, an instruction on first degree manslaughter was not warranted, as it was not supported by the evidence.

¶ 31 In his final argument in this assignment of error, Appellant asserts that by failing to instruct the

jury on any lesser forms of homicide, the trial court failed to provide the jury with the option of convicting him of a non-capital offense as required by *Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). This same argument was raised and rejected in *Valdez v. State,* 900 P.2d 363, 378-379 (Okl.Cr.1995), *cert. denied,* 516 U.S. 967, 116 S.Ct. 425, 133 L.Ed.2d 341 (1995) wherein we stated:

> Neither *Beck v. Alabama* nor *Schad v. Arizona* [501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991)] require that a jury in a capital case be given a third, non-capital option where the evidence absolutely does not support that option. The evidence in this case did not support a second degree murder instruction and the jury was thus properly precluded from considering that particular non-capital option.

See also Phillips, 989 P.2d at 1035. Similarly, the evidence in the present case did not support instructions on any lesser forms of homicide.

¶ 32 Further, in *Le,* 947 P.2d at 547, this Court stated that *Beck* is not applicable in Oklahoma as the Oklahoma death penalty scheme allows the jury to choose between acquittal, life, life without parole, or death. As Oklahoma law provides viable options between acquittal and death, the jury had the opportunity to express doubts about Appellant's culpability during the sentencing phase. *Id.*

¶ 33 Therefore, for the reasons discussed above, we find the trial court did not err in omitting instructions

on any lesser forms of homicide. This assignment of error is denied.

B.

¶ 34 In his fourth assignment of error, Appellant contends the trial court failed to adequately instruct the jury on the definition of "malice." Specifically, Appellant argues the trial court failed to set forth the statutory definition of malice. In support of his argument he refers to the Committee Comments for OUJI-CR (2d) 4-63. Therein it is stated that the language of § 701.7 from title 21 was largely adapted from the Georgia Criminal Code and that the Georgia Code addressed express malice and implied malice. However, the Oklahoma Legislature adopted only that portion of the Georgia statute referencing express malice. Appellant argues the failure to provide the jury with a definition of implied malice improperly lowered the State's burden and allowed a conviction on a basis broader than the [sic] allowed by statute.

¶ 35 The defense neither objected to the lack of an instruction on implied malice nor proposed such an instruction. Therefore, we review only for plain error. *Cheney,* 909 P.2d at 90.

¶ 36 The jury was given the uniform jury instructions in this case. Instruction No. 16 set forth the statutory elements of the crime of first degree murder pursuant to OUJI-CR (2d) 4-61. Instruction No. 17 set forth the definition of "malice aforethought" as follows:

> "Malice aforethought" means a deliberate intention to take away the life of a human being. As used in these instructions, "malice aforethought" does not mean hatred, spite or ill-will. The deliberate intent to take a human life must be formed before the act and must exist at the time a homicidal act is committed. No particular length of time is required for formation of this deliberate intent. The intent may have been formed instantly before commission of the act.

OUJI-CR (2d) 4-62. This definition of malice aforethought is consistent with that set forth in 21 O.S.1991, § 701.7(A). That section provides:

> A. A person commits murder in the first degree when that person unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

¶ 37 Further, in Instruction No. 18, the jury was instructed on the consideration to be given external circumstances surrounding the commission of a homicidal act. *See* OUJI-CR (2d) 4-63.

¶ 38 These instructions adequately instructed the jury on the law of first degree malice aforethought murder. *See Johnson v. State,* 928 P.2d 309, 316 (Okl.Cr.1996) (the giving of the uniform jury instructions-1st edition-regarding first degree murder adequately instructed the jury on the elements of the

offense and the State's burden.) In enacting § 701.7(A), the Legislature specifically rejected the theory of implied malice. Consequently this Court has never required a finding by the jury of or an instruction to the jury regarding implied malice. We decline to make such a ruling today. As the jury was properly instructed in this case, this assignment of error is denied.

SECOND STAGE ISSUES

A.

¶ 39 In his fifth assignment of error, Appellant contends the trial court erred in denying his motion to trifurcate the trial proceedings. The record reflects that prior to the second stage of trial, Appellant filed a Motion to Hold Trifurcated Trial, specifically requesting the sentencing on Count II, the non-capital offense, be resolved first, and capital sentencing on Count I follow thereafter. The trial court overruled the motion, but offered to trifurcate the trial by conducting a capital sentencing stage first and a non-capital sentencing second. The court explained that it felt the jury could be appropriately instructed and could be trusted to follow its instructions concerning sentencing, out-of-state witnesses were present and ready to testify, and no "real danger of potential harm" was evident. The defense stood on its motion and declined the court's offer. *supra*.

¶ 40 We have reviewed our case law and have found no cases specifically on point. In a footnote in *Jones v. State,* 899 P.2d 635, 640 n. 1 (Okl.Cr.1995) the Court noted "the trial was conducted in three stages, guilt/innocence, punishment for all non-capital crimes and punishment for murder in the first degree." *Id.*[4] However, the propriety of the three stage trial was not raised on appeal.

¶ 41 In *Perryman v. State,* 990 P.2d 900, 905 (Okl.Cr.1999) the Court found the combining into one sentencing proceeding of a capital murder count with non-capital non-enhanced offenses was error.[5] This Court explained "[b]ecause we have held that sentencing juries in unenhanced, non-capital crimes should not be exposed to evidence of statutory

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[4] Jones was convicted of capital murder and three non-capital offenses. No prior convictions were alleged. He was sentenced to the death penalty for the murder conviction and a term of years imprisonment for the non-capital offenses.

[5] Perryman was convicted of first degree murder and two non-capital offenses. No prior convictions were alleged with the non-capital offenses. He was sentenced to life imprisonment without the possibility of parole for the murder conviction and a term of years imprisonment for the non-capital offenses. On appeal, the appellant argued he was denied a fair sentencing hearing on his non-capital offenses because the jury rendered the maximum sentences on the non-capital offenses following the second stage of trial after it heard evidence in support of the aggravating circumstances alleged in the Bill of Particulars and victim impact evidence. The record showed the trial court submitted only the issue of guilt/innocence during first stage and the issue of punishment for all offenses during second stage.

aggravating circumstances or victim impact evidence, we find error occurred in the instant case. . . ." *Id.*

¶ 42 While *Perryman* addressed the division of sentencing issues, the fact that it involved non-capital non-enhanced offenses distinguishes it from the present case. In *Perryman,* none of the evidence admitted during the second stage was relevant to the determination of the proper punishment for the non-capital offenses. In the present case, evidence of Appellant's prior convictions was relevant to the jury's decision whether the punishment in Count II should be enhanced and in proving the aggravating circumstance of "prior violent felony."

¶ 43 The procedure used in this case was not prohibited by statute. *See* 22 O.S.1991, § 860 (now 22 O.S.Supp.1999, § 860.1) (requires a bifurcated trial for second and subsequent offenses in which evidence of former convictions is to be admitted) and 21 O.S.Supp.1992, § 701.10 (provides for a separate sentencing proceeding upon conviction of first degree murder when the death penalty is an option). Nor was it unduly prejudicial due to the trial court's limiting instructions. The jury was specifically instructed that in reaching its decision on punishment for Count II they were to consider only the evidence incorporated from the first stage and evidence pertaining to the prior convictions. They were specifically instructed not to consider the victim impact evidence or evidence supporting the aggravating

circumstances.[6] Further, the jury was specifically instructed as to the prior convictions alleged by the State and the State's burden of proof beyond a reasonable doubt. These instructions were specific enough to clearly channel the jury's decision-making process between the non-capital and the capital offenses.

¶ 44 Appellant argues the limiting instruction was one the jury "couldn't humanly follow." It is well established that juries are presumed to follow their instructions. *United States. v. Carter,* 973 F.2d 1509, 1513 (10th.Cir.1992), *cert. denied,* 507 U.S. 922, 113 S.Ct. 1289, 122 L.Ed.2d 681 (1993); *Turrentine v. State,* 965 P.2d 955, 968 (Okl.Cr.), *cert. denied,* 525 U.S. 1057, 119 S.Ct. 624, 142 L.Ed.2d 562 (1998) *citing Zafiro v. United States,* 506 U.S. 534, 540, 113 S.Ct. 933, 939, 122 L.Ed.2d 317 (1993). The instructions here were clear, explicit and unambiguous. There is nothing in the record to indicate the jury could not follow these instructions.

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[6] Instruction No. 22A provided:

> In determining the appropriate sentence in Count 2, Assault and Battery with Intent to Kill, you may only consider evidence incorporated from the first stage of trial and evidence pertaining to the State's allegations of previous convictions. You cannot consider evidence of prior bad acts by the defendant which have not resulted in conviction, evidence of the underlying facts of the alleged former convictions, aggravating evidence or circumstances, or victim impact evidence, while determining the suitable punishment for Count 2.

¶ 45 As discussed later in this opinion, the death penalty was adequately supported by aggravating circumstances which outweighed the mitigating evidence. The ninety-nine year sentence for Count II was also supported by the evidence of the prior convictions and the facts of the assault with intent to kill committed on Elizabeth Hill.[7]

¶ 46 Appellant further argues that by combining the sentencing proceedings for the capital and non-capital offense, he was deprived of the ability to argue to the

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[7] In footnote 4 of his appellate brief, Appellant raises the transactional nature of three of his prior convictions. In Case No. CR-92-452-1, Appellant was found guilty of first degree rape, first degree kidnapping, first degree battery, and first degree burglary in the State of Arkansas. These offenses occurred in one incident. The issue of the transactional nature of the offenses was raised in Appellant's motion to trifurcate and again at the beginning of the second stage of trial. Appellant's objection to the admission of three of the prior convictions on the basis they arose from the same transaction was overruled. The trial court admitted the prior convictions under the caveat it would be decided later whether they should be redacted or whether the jury could be adequately instructed to consider the offenses in Case No. CR-92-452-1 as one conviction. The prior convictions were not redacted in any way and the trial court ultimately instructed the jury to consider the convictions in Case No. CR-92-452-1 as one conviction. The other prior conviction, also out of Arkansas, Case No. CR-92-481-1 was for first degree rape.

> Under 21 O.S.1991, § 51.B (now 21 O.S.Supp.1999, § 51.1) it was error for the trial court to admit all of the convictions listed in Case No. CR-92-452-1. However, the limiting instruction properly advised the jury as to the consideration to be given the prior convictions. This cured any error.

jury that he should not be sentenced to death because he had already been given a severe sentence in Count II. Neither the procedure used in this case nor the court's instructions limited counsel's ability to argue for the lightest possible sentence in either count. Appellant's argument, that the jury did not have enough information in making its sentencing determination in Count I, is the converse of his above argument that the jury had too much information in making the sentencing determination in Count II. However, neither argument prevails.

¶ 47 The jury had before it all of the necessary information in order to render a decision as to the death penalty. Contrary to Appellant's claim, it is not evident what additional information would have been before the jury in deciding the appropriateness of the death penalty had the jury sentenced Appellant first for the non-capital offense. Any evidence of his future dangerousness or lack thereof because of incarceration, together with the prior violent felonies, was properly before the jury in making their sentencing determination as to Count I.

¶ 48 The jury's consideration of any information additional to that needed for sentencing in Count II was specifically limited. Here, the jury merely had, at one time, all of the information it needed for sentencing in both counts, and that consideration was specifically channeled by limiting instructions. The only difference between Appellant's requested trifurcated procedure and the procedure used by the trial court was that the jury was required to retire

and deliberate only twice instead of three times. The practicalities of requiring a jury to retire and deliberate more than twice and the presence of out-of-state witnesses were relevant considerations for the trial court. The trial court appropriately balanced those considerations with Appellant's right to a fair sentencing proceeding.

¶ 49 Accordingly, due to the specific limiting instructions used by the court, we find no error in the trial court's combining the sentencing for the capital offense with the non-capital enhanced offense into one proceeding. Neither the death penalty nor the ninety-nine year sentence warrant modification on this ground. This assignment of error is denied.

B.

¶ 50 In his seventh assignment of error, Appellant contends the testimony of witness Yolanda Cunningham was unduly prejudicial due to lack of notice and emotional outbursts. Cunningham testified that between July 5 and July 8, 1992, Appellant raped her four times while she was held in his apartment and not allowed to leave. She also testified to a separate incident which occurred when she five months pregnant when Appellant "put me down on the ground." "You don't tell me about hurt. It took me seven years to get over that." Defense counsel objected, in part, on the basis no pre-trial notice had been received of any rape committed when Cunningham was five months pregnant. The objection was overruled.

¶ 51 The State's Notice of Evidence in Aggravation stated in part:

> Yolanda Cunningham will testify that between July 5, 1992, and July 8, 1992, the Defendant raped her four (4) times. During this time she was held in Defendant's apartment and not allowed to leave. . . . She will testify that he raped her before but she never reported it. She will testify that he had hit her at least once during their relationship. . . .

¶ 52 It is not clear from Cunningham's testimony whether the incident which occurred when she was pregnant was a rape or an assault. In either case, the State's notice was sufficient to put Appellant on notice that Cunningham would testify to more than just the four rapes in July 1992. *See Mayes v. State,* 887 P.2d 1288, 1299 (Okl.Cr.1994), *cert. denied,* 513 U.S. 1194, 115 S.Ct. 1260, 131 L.Ed.2d 140 (1995).

¶ 53 Cunningham was a somewhat emotional witness who on at least one occasion shouted over the voice of the trial judge in an attempt to be heard. The record reflects all parties were aware of the possible volatility of her testimony. The prosecutor indicated her intent to limit her questioning of the witness and the trial judge indicated he would cut off any non-responsive answers. In its first questions to the witness, the State established she was on medication. She testified to the July 13, 1992, attack on Mike Applebury and the series of rapes occurring between July 5 and July 8, 1992. She then testified that on another occasion Appellant vandalized her

apartment. This incident was not covered in the State's notice of aggravating evidence. Appellant's objection was sustained and the jury admonished to disregard the statement. This admonishment cured any error. *See Al-Mosawi,* 929 P.2d at 284.

¶ 54 After Cunningham testified to the incident which occurred when she was pregnant, the trial court recessed and admonished the witness to answer only the question asked of her and not to talk over the court. Defense counsel's request for a mistrial was overruled. The trial judge noted for the record the witness was emotional and that she was being treated for a mental illness. The prosecution indicated it was not going to ask any further questions and risk another emotional outburst. Both Cunningham and the jury were returned to the courtroom, both parties indicated no further questions and the witness was excused.

¶ 55 Appellant finds error in the trial court's failure to admonish the jury, but also argues such admonishment would have been ineffectual as the evidence was so prejudicial that the jury could not disregard it in reaching its verdict. No admonishment was requested by Appellant, therefore our review is limited to plain error. *Smith v. State,* 932 P.2d 521, 532 (Okl.Cr.1996).

¶ 56 In *Ellis v. State,* 867 P.2d 1289, 1297 (Okl.Cr.1992), *cert. denied,* 513 U.S. 863, 115 S.Ct. 178, 130 L.Ed.2d 113 (1994) the appellant objected to an emotional outburst from one of the victim's

relatives in the courtroom. This Court noted the record showed that the trial court sent the jury out of the courtroom immediately, and the disruptive spectators were escorted out of the room by members of their family. In rejecting the claim of error, this Court stated "the incident was of short duration and the trial court took appropriate measures to prevent any unfair prejudice." *Id.,* 867 P.2d at 1297.

¶ 57 In the present case, the trial court interrupted Cunningham's emotional outburst and recessed the proceeding. After an *in-camera* hearing, both the witness and the jury were brought back into the courtroom, and in front of the jury the witness was excused from further questioning. We find this incident was of short duration and the trial court's measures appropriately reduced the risk of undue prejudice to Appellant. The omission of an admonishment to the jury was not plain error, and in fact appropriate as it could have drawn undue attention to the witness's outburst. Accordingly, this assignment of error is denied.

VICTIM IMPACT EVIDENCE

¶ 58 In his sixth assignment of error, Appellant asserts the victim impact evidence violated his constitutional rights as it was emotionally weighted testimony, hearsay, and testimony from more than one witness. Victim impact evidence is constitutionally acceptable unless "it is so unduly prejudicial that it renders the trial fundamentally unfair. . . ." *Payne v.*

Tennessee, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720, 735 (1991). In *Cargle v. State,* 909 P.2d 806, 827-28 (Okl.Cr.1995), *cert. denied,* 519 U.S. 831, 117 S.Ct. 100, 136 L.Ed.2d 54 (1996) this Court set out the basis the United States Supreme Court utilized to find the Eighth Amendment is not violated by victim impact evidence and that the Fourteenth Amendment has the potential to be implicated if appropriate restrictions are not placed on victim impact evidence. In *Cargle,* 909 P.2d. at 828, we stated:

> The statutory language [22 O.S.Supp.1993, § 984] is clear the evidence should be restricted to the "financial, emotional, psychological, and physical effects," or impact, of the crime itself on the victim's survivors; as well as some personal characteristics of the victim. So long as these personal characteristics show how the loss of the victim will financially, emotionally, psychologically, or physically impact on those affected, it is relevant, as it gives the jury "a glimpse of the life" which a defendant "chose to extinguish," . . . However, these personal characteristics should constitute a "quick" glimpse, and its use should be limited to showing how the victim's death is affecting or might affect the victim's survivors, and why the victim should not have been killed. (internal citations omitted).

¶ 59 On the first day of the punishment phase of trial, the defense filed a Motion to Preclude Victim

Impact Evidence, which in part, requested a hearing pursuant to *Cargle*. A hearing was held wherein the court indicated it had reviewed the statements prepared by Hand's parents, Stephen Hand and Brenda Monroe, and excised out certain portions of each statement which were not relevant victim impact evidence. The court also overruled Appellant's request to limit the number of victim impact witnesses to one. Hand's parents then testified by reading their prepared statements and answering a few questions.

¶ 60 At trial, and now on appeal, Appellant objects to comments in Ms. Monroe's statement concerning: (1) the grief she felt because she would never have the grandchildren she longed for, (2) that part of her died when her child died and "a piece of her heart [had] been cut out and was buried with her when she was stabbed to death.", (3) the murder of her "precious child", (4) reminiscences of the victim's activities in high school, and (5) her fear of losing her daughter's pictures, of being attacked, and of losing her husband and parents.

¶ 61 Many of the comments challenged by Appellant as being too emotional also illustrated the psychological impact on Ms. Monroe of losing her daughter. As the trial court noted, it can be difficult to distinguish between what is emotional and what is psychological, and even what is physical. Ms. Monroe's statements concerning her hysterical reaction when informed of her daughter's death and the ensuing psychotherapy, physical illnesses, and depression were properly admitted as relevant to showing how the victim's

death emotionally, psychologically, and physically affected her mother. Contrary to Appellant's argument, Ms. Monroe's fears of losing her daughter's pictures, of being attacked, and of losing her husband and parents were not so tenuous to the homicide as to lack probative value.

¶ 62 Ms. Monroe's descriptions of her daughter as her "baby" and "precious child" were emotional but did not "tap[ ] into the rage jurors feel when children are victimized" as Appellant argues. The jury knew the twenty-two year old victim was the witness's offspring yet they also knew she was not a child in the legal sense of the term. Comments about the victim's activities in high school were not relevant as they did not show the impact of the victim's death on her survivors. However, the reference was brief and did not prevent the jury from fulfilling its function in the second stage of trial of returning a verdict based upon a reasoned moral response.

¶ 63 Appellant also contends the victim impact evidence contained inadmissible hearsay. In her prepared statement, Ms. Monroe stated that in January 1997, her daughter took a taxi to a grocery store, purchased several bags of food and then delivered, by cab, the food to a homeless shelter. Ms. Monroe stated she did not know about her daughter's act at the time and only found out about it after her death when she found the receipts in her things. The defense objected to this statement as hearsay and a hearing was held to determine the basis of Ms. Monroe's knowledge. Monroe stated her daughter had told

her about taking the food to the homeless shelter but she had forgotten until she went through her daughter's possessions. The trial court found the statement was not hearsay as it relied on Ms. Monroe's own perception in finding the receipts. The comment was edited to strike any reference to the taxicab.

¶ 64 Ms. Monroe's statement was not hearsay as it was not offered to prove the truth of the matter asserted-that the victim actually delivered food to the homeless. *Chambers v. State,* 649 P.2d 795, 798 (Okl.Cr.1982) (if the purpose for which the statement is offered is not to establish any assertion made by the challenged evidence, it is not hearsay). *See* 12 O.S.1991, § 2801(3). The statement was based upon her own personal knowledge, having found the receipts, and provided a brief glimpse of the unique characteristics of the individual known as LeAnna Beth Hand.

¶ 65 While a portion of the victim impact testimony was very emotional, taken as a whole, the testimony was within the bounds of admissible evidence, and its emotional content did not have such a prejudicial effect or so skew the presentation as to divert the jury from its duty to reach a reasoned moral decision, based on reliable evidence, whether to impose the death penalty.

¶ 66 Finally, Appellant contends this Court should adopt a rule similar to that set forth by the state of New Jersey that absent exceptional circumstances, victim impact testimony should be limited to one

witness. Appellant argues that a "parade of witnesses must not be empowered to force itself into capital sentencing proceedings. . . ." In 22 O.S.Supp.1992, § 984.1 the Legislature stated that any family member who wishes to appear personally "shall have the absolute right to do so." This Court has attempted to channel the jury's discretion in considering victim impact evidence by enacting specific instructions to be given to the jury in the event victim impact evidence is presented. These instructions state, in part, that consideration of the evidence must be limited to a moral inquiry into the culpability of the defendant, not an emotional response to the evidence. *Cargle,* 909 P.2d at 829. In light of our state statute, it is not for this Court to set a limit on the number of victim impact witnesses. However, the statutory language defining victim impact evidence and the jury instructions enacted by this Court effectively limit the presentation of victim impact evidence so that it will not end up a mere parade of emotions.

¶ 67 In the present case, the victim impact evidence consisted of two witnesses, and comprised approximately twelve pages of transcript. This was not a situation in which the victim impact evidence could be called excessive. There is nothing in the record to indicate permitting both of the victim's parents to testify disrupted the jury's reasoned process of determining the appropriate punishment in this case. Accordingly, we find the victim impact evidence as a whole was properly admitted in this case. As discussed further in the Mandatory Sentence Review,

the admission of any improper statements was harmless beyond a reasonable doubt as it had no impact on the outcome of the sentencing proceeding. Therefore, this assignment of error is denied.

AGGRAVATING CIRCUMSTANCES

A.

¶ 68 Appellant raises several challenges to the continuing threat aggravator in his eighth, twelfth, and seventeenth assignments of error. Appellant contends in his eighth assignment of error that evidence of harassing phone calls was improperly admitted in support of the continuing threat aggravating circumstance. During the second stage, the State presented the testimony of Michelle Sauser concerning harassing phone calls she had received. She stated that she and her husband purchased meat from Appellant in February 1997 and shortly thereafter she began to get nuisance phone calls. She received the calls from two to ten times a day over an eight week period. For the first week, the calls came four or five times a day and the caller would immediately hang up. Over time, the caller began to groan and moan. Eventually, the caller began to talk and whisper and stated that he wanted to have sex with her and be with her at any cost. The caller also said he wanted to tie her up and perform certain sexual acts Ms. Sauser found offensive. The caller said he wanted to taste her blood. Eventually, a tap was placed on Ms. Sauser's phone by the police and she

recognized the voice as that of Appellant. When she confronted Appellant with her identification, he hung up. The call was traced to a pay phone and eventually to Appellant. Sauser did not receive any further calls. A week later LeAnna Hand was killed.

¶ 69 Appellant argues this evidence did not show a pattern of violent conduct which was likely to continue in the future. He argues the comments made over the phone were in the context of a sexual fantasy with no threats to kidnap, rape or otherwise do violence to Sauser. Appellant's motion in *limine* to exclude evidence of the harassing phone calls and his objections during Ms. Sauser's testimony were overruled.

¶ 70 Title 21 O.S.1991 § 701.12 sets forth the continuing threat aggravator as follows: "[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." To support this aggravator, the State must present evidence showing the defendant's behavior demonstrated a threat to society and a probability that threat would continue to exist in the future. *Turrentine,* 965 P.2d at 977. Evidence of unadjudicated bad acts is admissible in a capital case to prove a defendant constitutes a continuing threat to society. *Douglas v. State,* 951 P.2d 651, 675 (Okl.Cr.1997), *cert. denied,* 525 U.S. 884, 119 S.Ct. 195, 142 L.Ed.2d 159 (1998).

¶ 71 Appellant's characterization of his conduct as non-violent is not accurate. While his phone calls

might not have had any explicit references to crimes such as kidnapping or rape, the acts described by Appellant, sexual and otherwise, were not consensual and would only be accomplished by overcoming Ms. Sauser's will. Such conduct would therefore be criminal. The phone calls demonstrate a willingness and propensity on the part of Appellant to engage in criminal behavior that puts other people at risk.

¶ 72 Further, the evidence was properly admitted when considered with Dr. Peterson's testimony of Appellant's conduct while in jail. Dr. Peterson testified that while incarcerated in the Arkansas Department of Corrections from 1993 to 1996, Appellant continued to have sexual fantasies. These fantasies included vulgar talk and phone sex to female guards while he was a trustee. Upon his release, Appellant sent a sexually explicit note to the counselor who was treating him for his sexual problems. Dr. Peterson also testified Appellant's fantasies continued after his release and included women who purchased meat from him. This evidence, combined with the phone calls made to Ms. Sauser only weeks before Hand's murder, shows a pattern of escalating violent sexual conduct which supports the jury's finding of the probability of future dangerousness which constitutes a continuing threat to society.

¶ 73 Appellant further complains that Ms. Sauser's testimony was more prejudicial than probative under 12 O.S.1991, § 2403. Section 2403 provides that "[r]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of

unfair prejudice, confusion of the issues, misleading the jury, undue delay, needless presentation of cumulative evidence, or unfair and harmful surprise." Here, Ms. Sauser testified Appellant's phone calls placed her in such fear that she was afraid to leave the house, she was afraid for her children and that she would wake up in the middle of the night assuming the caller was in her home. Appellant's objection came after this testimony was given. The trial court ruled that had the objection been made timely it would have been sustained on grounds of relevancy, however, coming late as it did, all the court could say was that was the end of such testimony.

¶ 74 Under 12 O.S.1991, § 2401 relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ms. Sauser's testimony concerning her reactions to the phone calls did not make it more probable that Appellant was the caller. The testimony did run the risk of confusing the jury as to who exactly was the victim in the case on trial. However, in light of the other evidence presented in support of the aggravator, the error in admitting the testimony was harmless as it did not result in a miscarriage of justice, or constitute a substantial violation of a constitutional or statutory right. 20 O.S.1991, § 3001.1 Based upon the foregoing, we find Appellant was not denied a reliable sentencing proceeding by the admission of improper

evidence. Accordingly, this assignment of error is denied.

¶ 75 In his twelfth assignment of error, Appellant asserts the jury was improperly instructed on the aggravator. The record reflects the jury was given the uniform instruction, Oklahoma Uniform Jury Instruction-Criminal No. 4-74.[8] Relying on *Boyde v. California,* 494 U.S. 370, 379-80, 110 S.Ct. 1190, 1197-98, 108 L.Ed.2d 316 (1990) Appellant argues the instruction is ambiguous and subject to an erroneous interpretation as to whether the State was required to prove the probability that he would commit future acts of violence that constitute a continuing threat to society. Appellant admits a challenge to this instruction was raised in *Bland v. State,* 4 P.3d 702, 725 (Okl.Cr.2000). However, he argues the issue in that case was whether the instruction was deficient on its face, while the issue in this case is whether the instruction is so ambiguous there was a reasonable likelihood the jury could have made an invalid interpretation.

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[8] Instruction No. 15 stated:

> The State has alleged that there exists a probability that the defendant will commit future acts of violence that constitute a continuing threat to society. This aggravating circumstance is not established unless the State proved beyond a reasonable doubt:
>
> *First,* that the defendant's behavior has demonstrated a threat to society; and
>
> *Second,* a probability that this threat will continue to exist in the future.

¶ 76 In *Boyde,* the issue was whether the appellant's capital sentencing proceedings violated the Eighth Amendment because the trial court's instructions were so ambiguous they failed to allow the jury to consider all relevant mitigating evidence. The Supreme Court stated:

> We think the proper inquiry in such a case 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. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition.

Boyde at 110 S.Ct. at 1198.

¶ 77 In applying the above standard, the Supreme Court reviewed the challenged instruction standing alone and within the context of the proceeding in light of the other instructions given to the jury. The Court concluded there was not a reasonable likelihood that the jurors understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner. *Id.,* at 1201.

¶ 78 Applying the "reasonable likelihood" standard in the present case, we find OUJI-CR (2d) 4-74 is not ambiguous or subject to erroneous interpretation. Reviewing the instruction itself, we have repeatedly

held it is a correct statement of the law which properly channels the discretion of the jury. *Welch v. State,* 2 P.3d 356, 374 (Okl.Cr.2000); *Brown,* 989 P.2d at 932; *Hawkins v. State,* 891 P.2d 586 596 (Okl.Cr.1994), *cert. denied,* 516 U.S. 977, 116 S.Ct. 480, 133 L.Ed.2d 408 (1995). In *Bland,* we rejected challenges that the instruction was deficient for failing to properly set forth the requirement that the jury had to find the defendant would commit "future acts of violence," and that it was overbroad for using the term "probability." This Court stated:

> The first paragraph of the instruction explicitly refers to the allegation that there exists a probability that the defendant will commit future acts of violence. That the subsequently listed two criteria which must be proven do not mention violence does not negate the burden on the State to prove a probability that the defendant will commit future acts of violence that constitute a continuing threat to society as listed in the first paragraph. Reading the instruction in its entirety, it is clear the State had the burden of proving the defendant had a history of criminal conduct that would likely continue in the future and that such conduct would constitute a continuing threat to society. Accordingly, we reject Appellant's challenge to Instruction No. 4-74, OUJI-CR (2d). This assignment of error is therefore denied.

Bland, 4 P.3d at 725.

¶ 79 Further, contrary to Appellant's argument, the instruction did not set forth elements of the aggravator. We have previously held that aggravating circumstances do not contain elements to be proven as do criminal offenses. *Phillips,* 989 P.2d at 1041. The uniform instruction on continuing threat, OUJI-CR (2d) 4-74, merely sets out the evidence necessary to support a finding of the aggravator. Therefore, we reject Appellant's argument that the instruction is comparable to an instruction setting out incorrect elements of a criminal offense.

¶ 80 Based upon the foregoing and reading the instruction in its entirety, we fail to find a reasonable likelihood that the jurors interpreted the trial court's instructions to mean that the State did not have the burden of proving the continuing threat had to be of a violent nature. This conclusion is reinforced by looking at the instruction in context of the other instructions given to the jury. Instruction No. 17 informed the jury that the State had the burden of proving beyond a reasonable doubt the aggravating circumstances. (O.R.275) This burden of proof was reiterated throughout the instructions, specifically Instructions No. 7, 11, 12 and 13. Further, evidence presented by the State in support of the aggravator illustrated the violent nature of Appellant's prior attacks. In closing argument, the prosecutor argued the continuing threat aggravator was limited to acts of violence.

¶ 81 When the instruction is read in its entirety and considered in the context of the trial, it seems unlikely the jury would arrive at any interpretation other

than the State had to prove beyond a reasonable doubt the probability Appellant would commit future acts of violence. Therefore, we find there is not a reasonable likelihood that the jurors in Appellant's case misinterpreted the instruction. This assignment of error is denied.

¶ 82 In his seventeenth assignment of error, Appellant argues the continuing threat aggravator is unconstitutional as it is vague and overbroad. We have previously upheld the constitutionality of this aggravator finding it neither vague nor overbroad. *See Short v. State,* 980 P.2d 1081, 1103, *cert. denied,* 528 U.S. 1085, 120 S.Ct. 811, 145 L.Ed.2d 683 (1999); *Hamilton v. State,* 937 P.2d 1001, 1012 (Okl.Cr.1997), *cert. denied,* 522 U.S. 1059, 118 S.Ct. 716, 139 L.Ed.2d 657 (1998); *Pennington v. State,* 913 P.2d 1356, 1373 (Okl.Cr.1995), *cert. denied,* 519 U.S. 841, 117 S.Ct. 121, 136 L.Ed.2d 72 (1996); *Walker v. State,* 887 P.2d 301, 320 (Okl.Cr.1994), *cert. denied,* 516 U.S. 859, 116 S.Ct. 166, 133 L.Ed.2d 108 (1995). Further, the Tenth Circuit has also consistently rejected the contention. *See LaFevers v. Gibson,* 182 F.3d 705, 720 (10th Cir.1999); *Nguyen v. Reynolds,* 131 F.3d 1340, 1354 (10th Cir.1997). We decline reconsideration of our previous decisions in this regard. This assignment of error is denied.

B.

¶ 83 In his tenth, thirteenth and fourteenth assignments of error, Appellant raises challenges to the

aggravating circumstance "[t]he murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution." 21 O.S.1991, § 701.12(5). In his tenth assignment of error, Appellant challenges the sufficiency of the evidence supporting the aggravator. To support a finding that the murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution the State must prove the defendant killed in order to avoid arrest or prosecution. *Patton,* 973 P.2d at 297. There must also be a predicate crime, separate from the murder, for which the defendant seeks to avoid arrest or prosecution. *Id.*

¶ 84 Appellant relies on *Barnett v. State,* 853 P.2d 226, 233-234 (Okl.Cr.1993) to argue that the State failed to prove an underlying predicate crime. In *Barnett,* the defendant was alleged to have committed the crime of murder for the purpose of avoiding lawful arrest or prosecution for the predicate crime of assault and battery. Under the circumstances of the case, this Court found the evidence showed the protracted assault and battery was the ultimate cause of the victim's death. Therefore, the assault and battery was not separate and distinct from the murder itself, but rather was part of a continuing transaction which culminated in the death of the victim. *Id.*

¶ 85 The facts in the present case fit the pattern of *Barnett.* The only evidence presented of the attempted rape was Appellant's statement to his psychiatrist that he intended to rape Hand, but when he pulled out the knife she tried to get away and screamed for her roommate. He further said he stabbed her one

time intending only to silence her. Under this evidence, the attempted rape was not separate and distinct from the murder itself, but rather was part of a continuing transaction which culminated in the death of the victim. Because the attempted rape, at a minimum, was a significant contributing cause of the victim's death, Appellant can not be found to have murdered the victim in order to avoid prosecution for the assault and battery. *See Id.* at 234. Accordingly, we find attempted rape, which in this particular case was part of the continuing transaction which resulted in the death of Hand, was not a separate and distinct crime from the murder itself. Accordingly, we must hold that this aggravating circumstance, that "the murder was committed for purposes of avoiding or preventing a lawful arrest or prosecution," fails. The impact of invalidating this aggravating circumstances [sic] is discussed in the Mandatory Sentence Review.

¶ 86 In propositions of error thirteen and fourteen Appellant raises further challenges to the "avoid lawful arrest" aggravator. As we have found that aggravator invalid in this case, those propositions of error are now moot.

C.

¶ 87 In his eleventh assignment of error, Appellant contends the evidence is insufficient to support the aggravator that he knowingly created a great risk of death to more than one person. Appellant's objections

at trial have adequately preserved the issue for appellate review.

¶ 88 "When the sufficiency of the evidence of an aggravating circumstance is challenged on appeal, the proper test is whether there was any competent evidence to support the State's charge that the aggravating circumstance existed." *Romano v. State,* 847 P.2d 368, 387 (Okl.Cr.1993); *aff'd, Romano v. Oklahoma,* 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994). "In making this determination, this Court should view the evidence in the light most favorable to the State." *Id.*

¶ 89 After Appellant killed Hand, he kicked in the door to Elizabeth Hill's bedroom and ripped the phone from her hand. He tackled her as she tried to run out of the duplex. Placing both hands around her neck, he choked her. Hill testified she could not breathe and that somehow she freed herself and ran out of the duplex. Appellant argues that because Hall [sic] never lost consciousness, did not sustain any permanent physical injury, admitted she had no idea how she got away, and as no weapon was used, the evidence was insufficient to prove there was any risk of death.

¶ 90 This aggravating circumstance is proved by a defendant's acts which create a risk of death to another "in close proximity, in terms of time, location, and intent" to the killing. *Le,* 947 P.2d at 549. The gravamen of the circumstance is not the number of persons killed, but the callous creation of the risk to more than one person. *McCracken v. State,* 887 P.2d

323, 332 (Okl.Cr.1994), *cert. denied,* 516 U.S. 859, 116 S.Ct. 166, 133 L.Ed.2d 108 (1995).

¶ 91 Here, Appellant choked Hill. That he did not choke her to death does not invalidate the aggravator. While Appellant may not have verbally threatened Ms. Hill's life, choking her certainly amounts to a threat to take away her life. Appellant contends it is possible he let Hill go thereby negating the intent to kill her. The evidence is not clear as to exactly how Ms. Hill got away from Appellant, and we will not speculate on possibilities. That she was not sure how she got away does not reduce the actual risk to her. The jury looked at the evidence of the attack on Ms. Hill and found it sufficient to sustain a conviction for assault and battery with intent to kill.[9] We have reviewed the evidence for purposes of sustaining the aggravator and find it sufficient to show Appellant threatened the life of Ms. Hill and had the apparent ability and means of taking her life. We reject Appellant's argument that Ms. Hill's life was not placed in actual great risk of death and find the evidence supported the jury's finding of the aggravator. This assignment of error is denied.

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[9] This finding by the jury sufficiently rebuts Appellant [sic] claim the evidence did not show he knew of [sic] should have known his choking of Hill were [sic] at a "'great risk' of being lethal."

D.

¶ 92 Turning to other allegations of error concerning second stage issues, Appellant contends in his ninth assignment of error that State's Exhibit 67, a judgment and commitment order from the circuit court of Jefferson County, Arkansas, reflecting a conviction for the crime of rape, was improperly admitted. Appellant did not raise an objection at the time the exhibit was introduced. However, later in the second stage an objection was made on the grounds the exhibit did not reflect whether a plea of guilty or nolo contendere was entered. The trial court overruled the objection on the grounds the exhibit was certified and the omission was merely a scrivener's error.

¶ 93 In light of Appellant's failure to raise a timely objection, we review only for plain error. *Miller v. State,* 977 P.2d 1099, 1110 (Okl.Cr.1998); *Simpson v. State,* 876 P.2d 690, 693 (Okl.Cr.1994). Appellant now argues on appeal that the exhibit was inadmissible hearsay as it failed to fall within the provision for final judgments and sentences pursuant to 12 O.S.1991, § 2803(22).

¶ 94 Admission of evidence is left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Miller,* 977 P.2d at 1110. Section 2803(22) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> 22. Evidence of a final judgment, entered after a trial or upon a plea of guilty, but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one (1) year, to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility;

¶ 95 The Court has had few opportunities to review section 2803(22). In *Wade v. State,* 624 P.2d 86, 91 (Okl.Cr.1981) the appellant challenged the use of a court minute introduced to prove a prior conviction from Louisiana. The appellant claimed the exhibit was inadmissible hearsay as it did not state it was a final judgment, nor did it in any way state that the judgment was pronounced in accordance with the verdict. In finding the exhibit properly admitted, this Court stated:

> Section 2803(22) applies by its terms to a final judgment offered to prove a fact essential to the judgment. This is not the case where the fact to be proved is the historical occurrence of the conviction for habitual offender purposes. This evidence is more properly entered under the Section 2803(8) exception for public records, where no issue as to the definition of judgment is presented.

> See State v. Stone, 122 Ariz. 304, 594 P.2d 558 (Ariz.App.1979).

624 P.2d at 91.

¶ 96 In the present case, the Judgment and Commitment Order indicates Appellant appeared personally before the court with legal counsel, was advised of his constitutional rights, and entered a knowing and voluntary plea. The order further sets forth Appellant's name and his attorney's name, the offense of rape, the time to serve at the Arkansas Department of Corrections as twenty years with ten suspended, and that the sentence is to run concurrent with the sentence imposed in the case reflected in State's Exhibit 66. The order is signed by the circuit judge and certified by the clerk. State's Exhibit 66 reflects Appellant pled guilty and was convicted of four separate felonies, three of which were violent crimes.

¶ 97 The document for all purposes reflects a valid final judgment and sentence. It adequately reflects appellant was advised of his rights and represented by counsel. *See Staten v. State,* 738 P.2d 565, 566 (Okl.Cr.1987). The failure to check the box indicating whether the conviction was based upon a plea of guilty or a plea of nolo contendere appears to have been a scrivener's error. We find that omission does not render the conviction invalid for purposes of sentencing. Therefore, we find the trial judge did not abuse his discretion in admitting the order into evidence and the order was properly submitted to the

jury in support of the aggravating circumstances of prior violent felony and continuing threat. Accordingly, this assignment of error is denied.

E.

¶ 98 In his eighteenth assignment of error, Appellant contends the use of his prior convictions to support more than one aggravating circumstance skewed the weighing process in the second stage in violation of his constitutional rights. Appellant's prior convictions were used to support both the "prior violent felony" aggravator and the "continuing threat" aggravator.

¶ 99 This Court has upheld the use of the same act or course of conduct to support more than one aggravating circumstance where the evidence shows different aspects of the defendant's character or crime. *Bernay v. State,* 989 P.2d 998, 1016 (Okl.Cr.1999); *Turrentine,* 965 P.2d at 978; *Cannon v. State,* 961 P.2d 838, 852-53 (Okl.Cr.1998); *Medlock v. State,* 887 P.2d 1333, 1350 (Okl.Cr.1994), *cert. denied,* 516 U.S. 918, 116 S.Ct. 310, 133 L.Ed.2d 213 (1995). Further, the Tenth Circuit has ruled that the two aggravating circumstances at issue here do not impermissibly overlap. *Cooks v. Ward,* 165 F.3d 1283, 1289 (10th Cir.1998).

¶ 100 The prior violent felony aggravator looks to a defendant's criminally violent past to determine whether, when combined with the murder for which he has just been convicted, a death sentence is

warranted. The continuing threat aggravator looks toward Appellant's future conduct and the need for protection of society from that probable future criminal conduct. As we stated in *Woodruff v. State,* 846 P.2d 1124, 1146 (Okl.Cr.), *cert. denied,* 510 U.S. 934, 114 S.Ct. 349, 126 L.Ed.2d 313 (1993):

> The presentation of Appellant's past history of criminal behavior (the prior convictions for solicitation to commit murder) to prove the "prior violent felony" aggravating circumstance and the presentation of Appellant's propensity for committing future harm (evidence of the Thompson homicide) to prove "continuing threat" address separate and distinct aspects of Appellant's conduct and provide multiple reasons to impose the death penalty. This situation is distinguishable from cases in which multiple aggravators generally describe the same behavior and impose a more severe penalty for exactly the same reasons.

¶ 101 Accordingly, we find the aggravators in this case address separate and distinct aspects of Appellant's conduct. Use of the prior convictions to support two aggravators was not error. This assignment of error is denied.

SECOND STAGE JURY INSTRUCTIONS

A.

¶ 102 In his fifteenth assignment of error, Appellant argues the trial court erred in giving an impeachment

instruction concerning the testimony of Appellant's brother, Kevin Williams. Evidence of Mr. Williams' prior conviction for attempted second degree murder was admitted during his direct examination. Jury Instruction No. 10,[10] OUJI-CR (2d) 9-22, prohibited the jury from using the evidence as proof of innocence or guilt and restricted its use to that of impeachment. Appellant's objection and proposed instruction have properly preserved the issue for appellate review.

¶ 103 At trial, Appellant objected to the instruction on two grounds. The first objection went to language in the instruction that the evidence was offered for the specific purpose of showing that the witness was not reliable. Appellant argued the evidence of the witness's prior conviction was offered by the defense and was not offered to discredit the witness but to bolster the credibility of the defense by being forthright about the conviction in order to lessen the

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[10] Instruction No. 10 provided:

> Evidence has been presented that Kevin Williams has heretofore been convicted of a criminal offense. This evidence is called impeachment evidence, and it is offered to show that the witness's testimony is not believable or truthful. If you find that this conviction occurred, you may consider this impeachment evidence in determining what weight and credit to give the credibility of that witness. You may not consider this impeachment evidence as proof of innocence or guilt of the defendant. You may consider this impeachment evidence only to the extent that you determine it affects the believability of the witness, if at all.

"sting" and to corroborate Dr. Peterson's testimony in mitigation. The second objection concerned the prohibition of the jury's consideration of the evidence for any purpose other than impeachment. These same two objections and arguments are now raised on appeal.

¶ 104 Evidence of a witness's prior conviction is properly admissible in order to challenge the credibility of the witness. 12 O.S.1991, § 2609. The applicability of this provision is not limited according to when the evidence is introduced, be it direct or cross-examination. That the evidence was introduced by the defense is a risk taken by the defense. Introduction of the prior conviction can enhance the credibility of the defense in the eyes of the jury by admitting up front to the conviction. However, it also opens up the possibility the prosecution could argue the witness is not credible because of the prior conviction. While the language in the instruction providing that the purpose for which the evidence is offered is to show that the witness's testimony is not believable or truthful is not completely accurate when the evidence is offered on direct examination, the purpose of the instruction is clear that such evidence can be used only to determine the credibility of the witness and not as substantive evidence against the defendant. Any error in the language of the instruction did not have a substantial impact on the outcome of second stage. Therefore, any error was harmless. *Simpson,* 876 P.2d at 702.

¶ 105 In Appellant's second objection to the instruction, he argues it precluded the jury from considering the prior conviction as mitigating evidence. In determining the appropriateness of the death sentence in a particular case, the Supreme Court has held that the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime. *See Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 2951-2952, 106 L.Ed.2d 256 (1989); *California v. Brown,* 479 U.S. 538, 107 S.Ct. 837, 839, 93 L.Ed.2d 934 (1987); *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). This line of cases reflects the belief that punishment should be directly related to the personal culpability of the criminal defendant. "Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." *California v. Brown,* 479 U.S. at 545, 107 S.Ct. at 841 (O'Connor, J., concurring).

¶ 106 Evidence of Kevin Williams' prior conviction in and of itself is not relevant evidence mitigating against the death penalty for Appellant because it could not, if believed by the jury, lessen Appellant's culpability and the severity of his sentence. *See Bryson v. State,* 876 P.2d 240, 256-257 (Okl.Cr.1994), *cert. denied,* 513 U.S. 1090, 115 S.Ct. 752, 130 L.Ed.2d 651 (1995), relying on *Eddings* and *Skipper v. South Carolina,* 476 U.S. 1, 4, 106 S.Ct. 1669, 1671,

90 L.Ed.2d 1, 7 (1986). What is mitigating is that Appellant's family had a history of mental disorders and that due to that family heredity there was a strong possibility Appellant also suffered from similar mental disorders. Evidence of Kevin Williams' prior conviction merely demonstrated the family history of mental problems.

¶ 107 Instruction No. 10 did not prevent the jury from considering Kevin Williams' testimony, if they found it credible, as mitigating evidence. Neither Instruction No. 10 nor any other instructions given to the jury prevented their consideration of the family history of mental disorders as mitigating evidence. Further, Instruction No. 19 specifically informed the jury that mitigating evidence had been introduced of Appellant's history of suffering abuse at the hands of his parents. (O.R.277). Accordingly, we find Instruction No. 10 did not prevent the jury from considering any relevant mitigating evidence. This assignment of error is denied.

B.

¶ 108 In his sixteenth assignment of error, Appellant complains about Jury Instruction No. 18.[11] He

[11] Instruction No. 18, (OUJI-CR (2d) 4-78) provided:

Mitigating circumstances are those which, in fairness, sympathy, and mercy, may extenuate or reduce the degree of moral culpability or blame. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.

(Continued on following page)

contends his proffered instruction, which adds to the first sentence the phrase "or suggest a reason that the defendant should be punished with a sentence less than death," was improperly rejected by the trial court. Appellant argues that without that language, the jury was prevented from considering all relevant mitigating evidence.

¶ 109 The language of this instruction has been upheld as in accordance with state law and federal constitutional requirements. *See Stafford v. State,* 731 P.2d 1372, 1375 (Okl.Cr.1987). Appellant's argument that his excluded language prevented the jury from considering all relevant mitigating evidence is not persuasive given the other instructions provided to the jury. Initially, Instruction No. 18 also tells the jury that what is to be considered mitigating is for them to decide. This statement broadens any limitations placed on the mitigating evidence through the first sentence. Further, the jury was given an instruction containing approximately ten (10) specifically listed mitigating circumstances. This instruction was approved by Appellant. Here, Appellant has failed to specifically set forth any relevant mitigating evidence

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While all twelve jurors must unanimously agree that the State has established beyond a reasonable doubt the existence of at least one aggravating circumstance prior to consideration of the death penalty, unanimous agreement of jurors concerning mitigating circumstances is not required. In addition, mitigating circumstances do not have to be proved beyond a reasonable doubt in order for you to consider them.

which the jury was precluded from considering. Having reviewed Instruction No. 18 in its entirety and in context of the other in instructions provided to the jury, we find there is not a reasonable likelihood that the jury would have applied Instruction No. 18 in a way that prevented them from considering any relevant mitigating evidence. *See Boyde v. California,* 494 U.S. at 380, 110 S.Ct. at 1201. Accordingly this assignment of error is denied.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

¶ 110 In his nineteenth assignment of error, Appellant contends he was denied the effective assistance of counsel by counsel's concession of guilt during the first stage of trial. In support of his argument, Appellant asserts that during the first stage opening statement, counsel told the jury they would be making a "first decision," implied that he believed there would be a second decision-meaning a second stage decision, and that there would more evidence put before the jury after the guilt stage. Appellant further directs us to four occasions during the cross-examination of Consuela Drew wherein counsel referred to the "murder" in this case. Finally, as to counsel's closing argument, Appellant asserts counsel raised no defense, and aside from referencing the State's burden of proof, conveyed an expectation that the jury would convict. Appellant argues these instances of ineffectiveness, together with counsel's failure to request suitable first stage jury instructions

on second degree felony-murder, resulted in a complete failure by counsel to subject the prosecution's case to meaningful adversarial testing. Therefore, he claims, a presumption of ineffectiveness applies without a showing of prejudice or inquiry into actual trial performance. *See United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 2046-48, 80 L.Ed.2d 657 (1984).

¶ 111 Our review of the record shows this is not a situation where the presumption of prejudice is appropriate. *See Id.* Therefore, our standard of review is that set forth in *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), applying the presumption that trial counsel was competent to provide the guiding hand that the accused needed, and therefore the burden is on the accused to demonstrate both a deficient performance and resulting prejudice. *Id.; see also Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). *Strickland* sets forth the two-part test which must be applied to determine whether a defendant has been denied effective assistance of counsel. First, the defendant must show that counsel's performance was deficient, and second, he must show the deficient performance prejudiced the defense. Unless the defendant makes both showings, "it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Appellant must demonstrate that counsel's representation was unreasonable under prevailing

professional norms and that the challenged action could not be considered sound trial strategy. 466 U.S. at 688-89, 104 S.Ct. at 2065. The burden rests with Appellant to show that there is a reasonable probability that, but for any unprofessional errors by counsel, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.,* 466 U.S. at 698, 104 S.Ct. at 2070, 80 L.Ed.2d at 700. This Court has stated the issue is whether counsel exercised the skill, judgment and diligence of a reasonably competent defense attorney in light of his overall performance. *Bryson v. State,* 876 P.2d 240, 264 (Okl.Cr.1994), *cert. denied,* 513 U.S. 1090, 115 S.Ct. 752, 130 L.Ed.2d 651 (1995).

¶ 112 A review of the record shows counsel did not concede guilt during the first stage. Counsel's opening statement is reprinted below:

> We'll make one now. Thank you, Judge. Good morning, ladies and gentlemen. You've heard Mr. Collier tell you about the evidence he intends to show you to prove or to try to prove that on the morning of May 14, 1997, my client, Sterling Williams, killed LeAnna Hand and attacked Elizabeth Hill. I'm going to ask you to pay very close attention to that evidence, and I'm sure you will. That evidence is going to be very important to you, all of the evidence you hear.
>
> You're going to have to make some serious decisions about some serious issues in this

> trial. And by the time you have heard this evidence, you'll be ready to make perhaps the first decision, as to whether or not Sterling Williams killed LeAnna Hand on May 14, 1997. That will be the first important decision you'll have to make. But once you've made that decision after you've heard all this evidence, by the time this trial is over, you will realize that there is a lot more going on with the facts of this case and with Sterling Williams than what the district attorney has just told you. Thank you.

¶ 113 Counsel did not concede guilt in this statement. Counsel's reference to the "first decision" the jury must make does not necessarily imply a second stage of trial and a decision on punishment. As noted by counsel, the jury had before it two decisions in the first stage-Appellant's guilt or innocence concerning Hand's murder and his guilt or innocence in the attack on Elizabeth Hill. Further, counsel's statement that once the trial was over, the jury would realize there was a lot more going on with the case does not imply counsel anticipated evidence to be put before the jury after the guilt stage. It merely informed the jury that once the trial was over, they would know a lot more about the case than what the prosecutor had stated in his opening statement. In his opening statement, counsel did not state that Appellant was guilty. He merely said the State was going to try prove his client guilty and the jury must listen to all of the evidence.

¶ 114 During his cross-examination of Consuela Drew, counsel did refer to the killing in this case as murder. However, counsel never conceded that Appellant had committed the killing. Therefore, we find this was not a concession of guilt. Due to the substantial evidence of guilt in this case, we find Appellant was not prejudiced the remarks as there is no reasonable probability that but for counsel's use of the term murder, the proceedings would have been different.

¶ 115 Further in closing argument, we find no concession of guilt. The entire first stage closing argument is printed below:

> Thank you Your Honor. Good afternoon, ladies and gentlemen. I want to thank you for your week's worth of patience and the attention you've paid to this evidence. All through voir dire and all through this evidence, we have never once said to you, Sterling Williams didn't do this. But we don't have to. It's up to the State to prove to you beyond a reasonable doubt that he did, and that's your job now. He's charged with murder in the first degree. He's charged with assault and battery with intent to kill. And you've got instructions on those charges, and you've also got an instruction on assault and battery. And now it is your job to retire back there and decide, based on the evidence you've heard, which, if any, of those crimes Sterling Williams committed. That's your job. That's what we're asking you to do now.

> That may be the easy part. But when we were doing voir dire, we spent a lot of time talking about sentencing and appropriate sentences. And that is not your job now. Withhold any thought at this point about sentences, because it would be easy for you to do, is to think, I'm convinced Sterling Williams did these things, and here's what I think ought to happen to him because of it. But that's not your job now. Resist that temptation. Don't do it. Determine guilt, if any, but not sentencing, because as I told you in opening statement, there is a lot more to this story. If you determine Sterling is guilty of these crimes, there is a lot more to this story than what the district attorney has told you. And don't determine sentence until you have heard this whole story. Thank you very much.

¶ 116 This argument does not convey the belief that Appellant is guilty. Trial counsel held the State to its burden of proof. Counsel referred the jury to the instructions and the evidence and argued the State had not met its burden of proof. These were correct statements of the law. Counsel's reference to second stage was in the form of a hypothetical statement-that if the jury determined Appellant was guilty, the decision as to his punishment was not to be made at that time. The comment did not imply that Appellant was guilty.

¶ 117 In light of the uncontradicted evidence of Appellant's participation in the killing, the only real

issue in the first stage of trial was Appellant's intent. Counsel vigorously challenged the State's theory of premeditation. Counsel's decision to limit his first stage opening statement and closing argument was a reasonable strategy decision to maintain credibility with jurors for sentencing. *See Pickens v. Gibson,* 206 F.3d 988, 1001 (10th Cir.2000). This Court will not second guess trial strategy on appeal. *Short,* 980 P.2d at 1107. In *Wood v. State,* 959 P.2d 1, 16 (Okl.Cr.1998) this Court rejected a similar claim that trial counsel conceded guilt during closing argument. The Court stated:

> In light of the overwhelming evidence against Appellant, trial counsel may have decided not to overstate his case lest he lose credibility for the second stage where he would need it the most. A fine trial lawyer may well decide that guilt could not be doubted and save the best for saving his life. We do not find counsel's performance deficient under the circumstances.

We find that counsel in this case exercised the skill, judgment and diligence of a competent defense attorney under the circumstances when he employed the strategy to limit his first stage arguments and focus on punishment and culpability.

¶ 118 As for the failure to request appropriate instructions on second degree felony murder, the propriety of such instructions was discussed in Propositions three and fourteen. We found that such instructions were not warranted by the evidence.

Therefore, counsel was not ineffective for failing to offer second degree felony-murder instructions.

¶ 119 Appellant next turns to second stage and argues that counsel was ineffective for failing to present additional mitigating evidence. During second stage, the defense presented the testimony of Kevin Williams, Appellant's brother, and psychiatrist Dr. Stephen Peterson. Kevin Williams testified that he and Appellant grew up in Chicago where they lived with their parents and brothers and sisters. He stated that both he and Appellant were beaten during their childhood by their father. Kevin testified to numerous instances of beatings suffered by Appellant. He also testified that he and Appellant watched their father's pornographic movies beginning at the age of eight or nine.

¶ 120 In order to make a psychiatric assessment of Appellant, Dr. Peterson interviewed him for approximately seven and one half hours. He also interviewed other family members, and reviewed the medical records of Appellant and other family members. Dr. Peterson's testimony concerning the physical abuse suffered by Appellant in his childhood corroborated Kevin's testimony. Dr. Peterson also testified that he had reviewed the psychiatric records of Appellant's brother Truman who had become institutionalized. Dr. Peterson testified the records indicated Truman had been sexually abused during his childhood and that his parents may have had a role in such abuse. Dr. Peterson also testified to reviewing reports which showed that Appellant's mother had beaten him, that

Kevin was diagnosed with bipolar disorder, and that another brother Elliott was diagnosed with bipolar disorder and alcohol abuse.

¶ 121 Now on appeal, Appellant argues counsel was ineffective for failing to call Appellant's father, Earl Williams, Jr., as a witness and failing to offer any reports in documenting the illnesses of Appellant's siblings or instances of child abuse. Appellant argues that without such evidence, he was unable to rebut the prosecution's closing arguments that the mitigation evidence was exaggerated, that the jury should discard all of the mitigation, and that "the only documentation, the only actual thing on paper anywhere is the fact that he [Earl Williams, Jr.] had a good family life; that he was a minister; that he was a caring father."

¶ 122 The record indicates that as of the beginning of the first stage of trial, counsel planned to call Earl Williams, Jr., as a second stage witness. (Tr. Vol.IV., pg.612). However, Mr. Williams ultimately was not called and the record is void of any explanation. The record shows that much of the testimony from Kevin concerning his father, and certain portions of Dr. Peterson's testimony were not at all favorable or flattering to Mr. Williams. In addition to Kevin's testimony concerning numerous beatings inflicted upon Appellant and himself by his father, Dr. Peterson testified that Mr. Williams stated he raised his children by the creed "work 'em, beat 'em and feed 'em." Dr. Peterson testified Mr. Williams was an elder in his church, yet he physically abused his children

and his wife, and that he had a long term relationship with another woman and fathered three children by her. As stated above, no explanation is given for the decision not to call Mr. Williams as a witness. Therefore, we do not know whether Mr. Williams himself decided against testifying or whether counsel made a strategic decision not to call him as a witness.

¶ 123 As for written documentation in support of Dr. Peterson's testimony, the record indicates the records reviewed by Dr. Peterson were voluminous. He testified he reviewed a four-inch thick sheaf of medical records on Appellant's brother Truman, military and medical records on his brother Elliott, and medical records on Kevin. The prosecution's challenges to Dr. Peterson's testimony came in the not unexpected form of arguments that he was influenced by the fact he was being paid by the defense, not that his testimony was not supported by written documentation. The focus of the prosecution's argument that the mitigation evidence was exaggerated was the lack of any written documentation supporting the defense's claims of childhood abuse. On that issue, Dr. Peterson testified that to the best of his knowledge there was no documentation with the Illinois Department of Human Services or any law enforcement agencies regarding any abuse of Appellant and his siblings.

¶ 124 When counsel has mitigating evidence and elects not to present it at trial, the Tenth Circuit has stated:

> If counsel has mitigating evidence available but elects not to present that evidence, then the inquiry must focus on the reason or reasons for the decision not to introduce that evidence. If counsel had a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty, then that decision must be given a strong presumption of correctness and the inquiry is generally at an end. If, however, the decision is not tactical, and counsel's performance is therefore deficient, then the first prong of *Strickland* is satisfied. *Id.* at 1368.

Duvall v. Reynolds, 139 F.3d 768, 777 (10th Cir.1998) quoting *Brecheen v. Reynolds,* 41 F.3d 1343, 1368 (10th Cir.1994).

¶ 125 Here, counsel presented two witnesses who testified to Appellant's traumatic childhood and his family history of mental disorders. The testimony of Dr. Peterson and Kevin Williams sufficiently rebutted any arguments that Mr. Williams was a caring father with a good family life. The presentation of additional witnesses documenting Appellant's childhood and corroborating Dr. Peterson's testimony probably would not have changed the tone of the prosecutor's closing argument. The closing argument in this case followed a familiar pattern and would more than likely have remained the same no matter how many witnesses the defense offered. Further, corroborating Dr. Peterson's testimony with written documentation of the illnesses of Appellant's siblings would have

been merely cumulative to his testimony. Appellant was not denied the presentation of any relevant mitigation evidence. The presentation of the additional evidence now sought by Appellant would not have minimized the risk of the death penalty in light of the substantial evidence in aggravation. Trial counsel's decision to not present additional mitigating evidence was reasonable trial strategy under the circumstances. Trial counsel presented a vigorous second stage defense. Giving deference to the decisions made by trial counsel, we conclude his performance was not constitutionally deficient.

¶ 126 Having thoroughly reviewed the record, and all of Appellant's allegations of ineffectiveness, we have considered counsel's challenged conduct on the facts of the case as viewed at the time and have asked if the conduct was professionally unreasonable and, if so, whether the error affected the jury's judgment. *Short,* 980 P.2d at 1107. In that light, we find that certain omissions and errors were made by trial counsel. In determining whether these errors or omissions were outside the wide range of professionally competent assistance, we consider whether counsel fulfilled the function of making the adversarial testing process work. *Id.* As our ultimate focus must be on the fundamental fairness of the trial, we find that Appellant has failed to rebut the strong presumption that counsel's conduct was professionally reasonable and that he has failed to show that he was denied a fundamentally fair trial. Accordingly, this assignment of error is denied.

ACCUMULATION OF ERROR CLAIM

¶ 127 In his twentieth assignment of error, Appellant contends the aggregate impact of the errors in this case warrants reversal of his convictions and at the very least modification of his death sentence. This Court has repeatedly held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant. *Ashinsky v. State,* 780 P.2d 201, 209 (Okl.Cr.1989); *Weeks v. State,* 745 P.2d 1194, 1196 (Okl.Cr.1987). However, when there have been numerous irregularities during the course of a trial that tend to prejudice the rights of the defendant, reversal will be required if the cumulative effect of all the errors is to deny the defendant a fair trial. *Bechtel v. State,* 738 P.2d 559, 561 (Okl.Cr.1987). We have found error occurring in both the first and second stages of this trial. None of these errors required reversal singly. In viewing the cumulative effect of these errors we also find they do not require reversal of this case as none were so egregious or numerous as to have denied Appellant a fair trial. *Gilbert v. State,* 951 P.2d 98, 122, (Okl.Cr.1997), *cert. denied,* 525 U.S. 890, 119 S.Ct. 207, 142 L.Ed.2d 170 (1998). Therefore, no new trial or modification of sentence is warranted and this assignment of error is denied.

MANDATORY SENTENCE REVIEW

¶ 128 Pursuant to 21 O.S.1991, § 701.13(C), we must determine (1) whether the sentence of death

was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) whether the evidence supports the jury's finding of the aggravating circumstances as enumerated in 21 O.S.1991, § 701.12. Turning to the second portion of this mandate, the jury found the existence of four (4) aggravating circumstances: 1) the defendant was previously convicted of a felony involving the use of threat of violence to the person; 2) the defendant knowingly created a great risk of death to more than one person; 3) the murder was committed for the purpose of avoiding lawful arrest or prosecution; and 4) there was an existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1991, § 701.12(1)(2)(5) and (7).

¶ 129 In Proposition Ten, we found the aggravator of "avoid lawful arrest or prosecution" invalid as it was not supported by the evidence. When an aggravating circumstance is found to be invalid, this Court has the authority to review any remaining aggravating circumstances and the mitigating evidence to determine the validity of the death sentence. *Barnett,* 853 P.2d at 234. A specific reweighing of the aggravating circumstances versus the mitigating factors is implicit to this review. *Id. See also Robedeaux v. State,* 866 P.2d 417, 436 (Okl.Cr.1993), *cert. denied,* 513 U.S. 833, 115 S.Ct. 110, 130 L.Ed.2d 57 (1994); *Hayes v. State,* 845 P.2d 890, 893 (Okl.Cr.1992).

¶ 130 Turning to the remaining aggravating circumstances, evidence of Appellant's previous felony

convictions from Arkansas was sufficient to prove the aggravator of "prior violent felony". *See Patton,* 973 P.2d at 296. In Proposition Eleven, we found the "great risk of death" aggravator was supported by sufficient evidence.

¶ 131 To prove the aggravating circumstance of "continuing threat", this Court has held "the State may present any relevant evidence, in conformance with the rules of evidence, . . . including evidence from the crime itself, evidence of other crimes, admissions by the defendant of unadjudicated offenses or any other relevant evidence." *Battenfield v. State,* 816 P.2d 555, 566 (Okl.Cr.1991), *cert. denied,* 503 U.S. 943, 112 S.Ct. 1491, 117 L.Ed.2d 632 (1992). In the present case, evidence of Appellant's criminal history, which included his prior convictions for violent offenses, his prior unadjudicated offenses, and the evidence in which the murder of LeAnnna [sic] Beth Hand was committed was sufficient to support this aggravator. *See Hain v. State,* 919 P.2d 1130, 1147-48 (Okl.Cr.1996); *cert. denied,* 519 U.S. 1031, 117 S.Ct. 588, 136 L.Ed.2d 517 (1996) (in determining the callousness of the crime, the defendant's attitude is critical to the determination of whether he poses a continuing threat to society.) This evidence showed Appellant has a propensity toward violence which makes him a continuing threat to society.

¶ 132 Turning to the mitigating evidence. Appellant presented two (2) witnesses: his brother Kevin and psychiatrist Dr. Peterson. These witnesses testified that Appellant suffered severe emotional trauma as a

child due to frequent emotional neglect and physical, mental, and emotional abuse inflicted on him by his parents; such trauma had a long term impact on Appellant's life which contributed to the murder of the deceased; Appellant was under the influence of extreme mental/emotional disturbance at the time of the crime; Appellant was deprived off [sic] his normal judgment and reasoning ability at the time of the crime; Appellant is amenable to treatment; he does not pose a threat in a prison environment; cooperation by Appellant with the authorities; Appellant's character and work ethic; that he has a family who loves him and would be severely impacted should he be put to death; and Appellant is a human being whose life has value. This evidence was summarized into ten (10) factors and submitted to the jury for their consideration as mitigating evidence, as well as any other circumstances the jury might find existing or mitigating.

¶ 133 Upon a review of the record, and careful reweighing of the three remaining valid aggravating circumstances and the mitigating evidence, we find the sentence of death to be factually substantiated and appropriate. The mitigating evidence does not outweigh the remaining valid aggravators. We find the jury would have still assessed the death penalty even without the "avoid lawful arrest or prosecution" aggravator. Under the record before this Court, we cannot say the jury was influenced by passion, prejudice, or any other arbitrary factor contrary to 21 O.S.1991, § 701.13(C), in finding that the aggravating

circumstances outweighed the mitigating evidence. Accordingly, finding no error warranting reversal or modification, the **JUDGMENTS** and **SENTENCES** for First Degree Murder and Assault and Battery with Intent to Kill are **AFFIRMED**

JOHNSON, V.P.J., concur.

CHAPEL, J., dissent.

LILE, J., concur.

WINCHESTER, S.J., concur.

CHAPEL, Judge, Dissenting:

¶ 1 Williams requested Second Degree Murder instructions at trial.[1] As the trial court's denial of Williams's request and refusal to so instruct the jury constituted reversible error, his Judgment and Sentence should be reversed and the case remanded for a new trial.

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[1] Second Degree Murder is divided into two sub-parts: murder committed (1) by one with a "depraved mind" or (2) during the commission of a felony other than those enumerated in the First Degree Murder statute. 21 O.S.1991, § 701.8 Although Williams's request for Second Degree Murder instructions rested on both theories, only the "depraved mind" claim has merit. Similarly, the denial of Williams's request for First Degree Manslaughter instructions was appropriate as those instructions were not supported by the evidence.

¶ 2 In *Hogan v. Gibson,* the Tenth Circuit Court of Appeals was critical of applying a "sufficiency of the evidence for the greater offense" standard to assess the necessity of lesser-included instructions.[2] Mindful of *Hogan,* the majority opinion correctly states that lesser-included instructions such as those sought by Williams should be given if supported by the evidence.[3] As well, the majority accurately cites the applicable test as "whether the evidence might allow a jury to acquit the defendant of the greater offense and convict him of the lesser."[4]

¶ 3 Notwithstanding the lip service paid to the Tenth Circuit, this case is *Hogan redux.* Its conclusions were correctly noted but erroneously applied.[5] The majority opinion states but ignores the proper test, replacing it with a rule that essentially excuses a refusal to give warranted instructions whenever the

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[2] *Hogan v. Gibson,* 197 F.3d 1297 (10th Cir.1999). The Tenth Circuit elaborated: "[the Oklahoma Court of Criminal Appeals should consider] whether there is sufficient evidence to warrant instructing the jury on a lesser included offense, not whether there is sufficient evidence to warrant conviction of the greater offense." *Id.* at 1305.

[3] Majority Opinion at 711 citing *Shrum v. State,* 991 P.2d 1032, 1037-39 (Okl.Cr.1999)

[4] Majority Opinion at 711 citing *Hogan v. Gibson,* 197 F.3d 1297 (10th Cir.1999).

[5] This is not the first time this Court has erroneously analyzed a lesser included instruction question. See *Gilson v. State,* 8 P.3d 883, 932 (Okl.Cr.2000) (Chapel, J., dissenting).

evidence supports the jury's ultimate determination.[6] While I agree that the evidence presented at Williams's trial may have sufficiently supported a finding that he intended to kill the victim and was guilty of First Degree Murder, that determination is irrelevant to whether he was entitled to a lesser-included offense instruction.

¶ 4 The majority's analysis turns on its claim that the evidence does not support the conclusion that Williams acted without premeditated intent.[7] It reiterates indications of Williams's intent to kill the victim,[8] dismisses one of Williams's arguments by noting that premeditation can be formed in an instant,[9] and concludes that since the evidence was sufficient for any rational trier of fact to find that Williams acted with the intent to kill, Second Degree Murder instructions were not warranted.[10] This analysis is a back-handed way of stating that the evidence was sufficient to support the jury's finding of

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[6] "The evidence clearly supports a finding that when Appellant stabbed the deceased, he did so with the intent to kill her, regardless of whether that intent was formed prior to or after arriving at her home. Accordingly, instructions on second degree depraved mind murder were not warranted." Majority Opinion at 712.

[7] Majority Opinion at 712.

[8] Majority Opinion at 712.

[9] Majority Opinion at 712.

[10] Majority Opinion at 712.

intent to kill, and remains a "gross deviation" from the *Beck* rule as noted by the *Hogan* Court.[11]

¶ 5 I find that Williams was entitled to a Second Degree Murder instruction. Specifically, Second Degree "Depraved Mind" Murder occurs when death results from an act imminently dangerous to another, done with a depraved mind but without a premeditated design to effect death.[12] Williams's act of stabbing the victim's chest was imminently dangerous and evidenced reckless indifference to her life and safety. The central question here is whether he committed this act with or without the intent to kill. The evidence supports either conclusion.

¶ 6 Williams entered the victim's house with her consent, purportedly to deliver meat. Indeed, his possession of a steak box containing a knife, gloves, and duct tape suggests an entry was prompted by criminal intent-Rape, Kidnapping or Murder.[13] The prosecution's theory was that he planned to rape the victim. The evidence indicates that during Williams's struggle to subdue the victim, he fatally stabbed her once in the chest. Did he intend to kill her? Perhaps. By contrast, his single stab could have been a defensive reaction to her struggle, intended to subdue her further, prevent his own injury, or facilitate his flight

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[11] *Hogan,* 197 F.3d at 1305.

[12] 21 O.S.1991, § 701.8.

[13] No money or property was taken so it is fair to assume that Williams did not intend to rob the victim.

from the scene. The record indicates that the evidence supports either characterization, which is exactly why a lesser-included instruction should have been given.[14] The question (and the answer) was one for the jury. Just as a reasonable juror could have found the elements for First Degree Murder, so could a juror have determined that Williams did *not* intend to kill the victim, convicting him of Second Degree Murder instead.[15]

¶ 7 Williams should have received his requested instruction; failure to give it was reversible error. I dissent.

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[14] Additionally, this Court has upheld Second Degree Murder convictions challenged on the sufficiency of the evidence based upon analogous facts. *Dickson v. State,* 761 P.2d 860 (Okl.Cr.1988) (defendant shot victim once in the head at close range but asserted that he did not intend to hurt victim); *Dorsey v. State,* 739 P.2d 528 (Okl.Cr.1987) (defendant armed himself with knife, started a fight with the victim, and intentionally stabbed him); *Foster v. State,* 657 P.2d 166 (Okl.Cr.1983) (defendant stabbed her newborn baby multiple times upon birth and placed it in a trash can). Although this is not the standard for review, it is clearly persuasive in evaluating whether there was sufficient evidence to support the instruction. Moreover, based upon the foregoing cases, it is obvious that this Court would have upheld Williams's conviction for Second Degree Murder.

[15] In the future, I would advise trial courts to liberally construe the evidence in favor of instructing juries on lesser included offenses. Central to our system of justice is allowing a jury to decide a defendant's guilt or innocence on an informed basis. Allowing a jury to choose between acquittal and two or more possible convictions only further insures that a verdict is fair and just.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STERLING B. WILLIAMS, Petitioner-Appellant, v. ANITA TRAMMELL, Warden, Oklahoma State Penitentiary, Respondent-Appellee.	No. 11-5048

ORDER

(Filed Oct. 4, 2013)

Before **HARTZ**, **MURPHY**, **HOLMES**, Circuit Judges.

Appellee'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
ELISABETH A. SHUMAKER, Clerk