ORIGINAL

No. F-2020-659

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

AARON LAMAR FORT,

Appellant,

-vs-

THE STATE OF OKLAHOMA,

Appellee.

BRIEF OF APPELLEE
FROM OKLAHOMA COUNTY DISTRICT COURT
CASE NO. CF-2019-1278

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SEPTEMBER 24, 2021

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

PROPOSITION I

THE RECORD IS BARREN OF EVIDENCE THAT DEFENDANT WAS DENIED HIS DUE PROCESS RIGHT TO AN IMPARTIAL JUDGE AND DEFENDANT'S REQUEST TO SUPPLEMENT THE RECORD WITH EXTRA-RECORD MATERIAL MUST BE DENIED..... 5

PROPOSITION II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE BLACK TAR HEROIN EVIDENCE OVER THE DEFENSE'S OBJECTION..... 12

PROPOSITION III

THERE WAS NO ABUSE OF DISCRETION BECAUSE DEFENDANT WAS NOT ENTITLED TO AN INSTRUCTION ON SIMPLE POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE AS A LESSER OFFENSE.. 19

PROPOSITION IV

DEFENDANT IS NOT ENTITLED TO RELIEF FOR ALLEGED CUMULATIVE ERROR.. 22

CONCLUSION 23

CERTIFICATE OF SERVICE..... 24

TABLE OF AUTHORITIES

CASES

Alexander v. State,
2002 OK CR 23, 48 P.3d 110 6

Bench v. State,
2018 OK CR 31, 431 P.3d 929 10

Bivens v. State,
2018 OK CR 33, 431 P.3d 985 ..... 21, 22

Bracy v. Gramley,
520 U.S. 899 (1997) 7

Brumfield v. State,
2007 OK CR 10, 155 P.3d 826 9

Caperton v. A.T. Massey Coal Co.,
556 U.S. 868 (2009) 8

Cipriano v. State,
2001 OK CR 25, 32 P.3d 869 20

Driskell v. State,
1983 OK CR 22, 659 P.2d 343 17

Fero v. Kerby,
39 F.3d 1462 (10th Cir. 1994) 9

Fitzgerald v. Trammell,
03-CV-531-GKF-TLW, 2013 WL 5537387 (N.D. Okla. Oct. 7, 2013) 9

Frederick v. State,
2001 OK CR 34, 37 P.3d 908 ..... 6, 9

Glossip v. State,
2001 OK CR 21, 29 P.3d 597 20

Graves v. State,
1994 OK CR 23, 878 P.2d 1075 ..... 8, 11, 12

In re Murchison,
349 U.S. 133 (1955) 7

Johnson v. State,
1982 OK CR 37, 665 P.2d 815 8

Kelley v. State,
2019 OK CR 25, 451 P.3d 566 20

Martinez v. State,
2016 OK CR 3, 371 P.3d 1100 12

McElmurry v. State,
2002 OK CR 40, 60 P.3d 4 11

McIntosh v. State,
2010 OK CR 17, 237 P.3d 800 ..... 21, 22

Miranda v. Arizona,
384 U.S. 436 (1966) 4

Mitchell v. State,
2016 OK CR 21, 387 P.3d 934 6

Moore v. State,
1988 OK CR 176, 761 P.2d 866 ..... 15, 19

Shrum v. State,
1999 OK CR 41, 991 P.2d 1032 20

State v. Tubby,
2016 OK CR 17, 387 P.3d 918 8

Stouffer v. State,
2006 OK CR 46, 147 P.3d 245 7

Tryon v. State,
2018 OK CR 20, 423 P.3d 617 20

Tumey v. Ohio,
273 U.S. 510 (1927) 7

United States v. Mendoza,
468 F.3d 1256 (10th Cir. 2006) 8

Whaley v. State,
1976 OK CR 302, 556 P.2d 1063 9

Williams v. Pennsylvania,
__ U.S.__, 136 S. Ct. 1899 (2016) 7

Wilson v. State,
1987 OK CR 86, 737 P.2d 1197 18

STATUTES

21 O.S.Supp.2018, § 51.1 1

63 O.S.Supp.2016, § 2-402 22

63 O.S.Supp.2018, § 2-415 ..... 1, 21

RULES

Rule 3.5, *Rules of the Oklahoma Court of Criminal Appeals*
Title 22, Ch. 18, App. (2019) 9

Rule 3.11, *Rules of the Oklahoma Court of Criminal Appeals*,
Title 22, Ch. 18, App. (2021) 10, 11

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AARON LAMAR FORT,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. F-2020-659
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Aaron Lamar Fort, hereinafter referred to as defendant, was charged by Information (O.R. 1-18) in Oklahoma County District Court Case No. CF-2019-1278, with Trafficking in Illegal Drugs in violation of 63 O.S.Supp.2018, § 2-415.[1] The State alleged that defendant had three prior convictions (O.R. 146-47; Tr. II 95-97, 114).[2] Defendant was tried by jury in the District Court of Oklahoma County on September 14-15, 2020, before the Honorable Timothy Henderson, District Judge. Defendant was represented by counsel. After a two-stage trial, the jury found defendant guilty after two or more violations of the Uniformed Controlled Dangerous Substance Act and fixed punishment at

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[1] Citations to the two-volume consecutively paginated original record will be referred to as (O.R. ___). Citations to the two-volume trial transcript will be referred to as (Tr. [I-II] ___). Citations to the sentencing transcript will be referred to as (Sent. Tr. __). Citations to the preliminary hearing transcript will be referred to as (Prelim. Tr. __).

[2] The State alleged more than three prior convictions in the Page Two to the Information. However, because the State sought to enhance defendant's punishment under Title 63 instead of the enhancement provision in 21 O.S.Supp.2018, § 51.1, the court required the State to elect which convictions it wanted to use for enhancement purposes and redact the rest (Tr. II 85-98).

twenty-three (23) years in prison (O.R. 187; Tr. II 116-17). On September 18, 2020, Judge Henderson sentenced defendant in accordance with the jury's verdict and imposed court costs, assessments, fees, and a period of post-imprisonment supervision (Sent. Tr. 10-11; O.R. 201-03). Defendant's sentence will run consecutively to his sentences in Oklahoma County District Court Case Nos. CF-2008-7280, CF-2009-5188, and CF-2015-3360, with no credit for time served (Sent. Tr. 10; O.R. 201). From this Judgment and Sentence, defendant has perfected his appeal to this Court.

STATEMENT OF THE FACTS

This case involves defendant's actions on March 15, 2019, at an apartment complex in Oklahoma City, in Oklahoma County (Tr. I 16, 19). On March 15, 2019, Oklahoma City Police Detective Darrin Guthrie received a tip about a possible drug house from two patrol officers that had conducted a traffic stop that morning; the officers found black tar heroin during the stop that was purchased from the apartment at issue in this case, number 205 (Tr. II 7-8, 10). On the same day, Detective Guthrie and his partner went to a parking lot with a clear view of the apartment and while sitting in an unmarked vehicle, they observed what appeared to be a drug buy: a vehicle pulled up, the passenger exited and went into the apartment for a few seconds before getting back into the car and leaving (Tr. II 8-9). Detective Guthrie and his partner followed the car and directed a marked police unit with uniformed officers to conduct a traffic stop (Tr. II 10). During the traffic stop, officers interviewed the subject that had

entered the apartment and found black tar heroin on his person; the subject indicated that he purchased the heroin from apartment number 205 (Tr. II 10). Apartment 205 was kept under surveillance while Detective Guthrie obtained a search warrant (Tr. II 11).

The search warrant required officers to knock and announce themselves (Tr. II 11). Uniformed officers knocked on the door of Apartment 205 and announced themselves, with no response from inside (Tr. I 22). The door was forced open and multiple subjects were observed inside (Tr. I 22). The interior was hazy, with the apartment's surfaces and its occupants cloaked in what looked and smelled like Mexican brown heroin—a powdery substance similar to sawdust (Tr. I 23). The odor was described as "overwhelming;" one officer stated that it was hard to breathe due to the particulates in the air (Tr. I 50). Defendant was one of four people found inside the apartment, and as officers made entry, he exited the bathroom with his person covered in the powdery heroin (Tr. I 23-24, 31; State's Exhibit 1; State's Exhibit 11). The heroin was "billowing" out of the bathroom (Tr. I 63). On a coffee table, officers observed a register till with money in it and an electric money counter; these were items associated with the distribution of narcotics (Tr. I 26, 32; State's Exhibit 1). In the apartment's single bedroom, officers found a State Identification Card bearing defendant's name and birthdate (Tr. I 78-80; Tr. II 15; State's Exhibit 12). Officers saw evidence that the powdery heroin was being flushed down the toilet (Tr. I 55). One of the

officers became concerned that the airborne heroin might be laced with fentanyl and ordered everyone out of the apartment (Tr. I 27, 70; State's Exhibit 11).

A hazmat team was summoned and the air was checked for fentanyl (Tr. II 12). A "special projects" team then entered the apartment with protective equipment and searched the apartment (Tr. II 12). Detective Guthrie observed the special projects team recover heroin from the apartment in gallon size Ziploc bags; he testified that the heroin weighed a total of 159 grams and it was taken to the Oklahoma City Police Department drug lab (Tr. II 13). Detective Guthrie filed a report after this incident and the incident number was 19-021182; Detective Guthrie also requested the lab analysis of the bags of drugs recovered in the apartment (Tr. II 13-14, 23).

Defendant was placed in the back of a police scout car during this incident and while still at the scene, he asked to speak with Detective Guthrie (Tr. II 16). Detective Guthrie read the *Miranda*[3] warning to defendant, and defendant agreed to talk to him without an attorney (Tr. II 19-20). Defendant told Detective Guthrie that he did not work, that he sold heroin, that there was heroin in the apartment and it was Mexican heroin, that he got the heroin from Mexico, and that he drove a Mercedes that was parked in the parking lot (Tr. II 21). Defendant refused to tell Detective Guthrie how much heroin was in the apartment (Tr. II

[3] *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

21). Detective Guthrie estimated that he spoke with defendant for five or six minutes (Tr. II 24).

Oklahoma City Police Forensic Chemist Matthew Scott analyzed the evidence for incident number 2019-21182 (Tr. II 29). Mr. Scott testified that the drugs were submitted to the property room by Officers Reimche and Carli (Tr. II 44). Mr. Scott testified that while officers in the field weigh the entire package of drugs, his analysis includes obtaining a net weight, which is the weight of the substance without any packaging (Tr. II 30). Mr. Scott received three items containing black tar heroin to analyze in this case (Tr. II 30, 32). The first weighed 44.5 grams, the second was 37 grams, and the third was 14 grams, which made a total of 95.5 net weight grams, slightly more than three ounces (Tr. II 32). The trafficking weight for heroin is ten grams, so this was almost ten times the trafficking amount (Tr. II 32). Other facts will be discussed as they become relevant.

PROPOSITION I

THE RECORD IS BARREN OF EVIDENCE THAT DEFENDANT WAS DENIED HIS DUE PROCESS RIGHT TO AN IMPARTIAL JUDGE AND DEFENDANT'S REQUEST TO SUPPLEMENT THE RECORD WITH EXTRA-RECORD MATERIAL MUST BE DENIED.

Defendant argues that he is entitled to relief due to judicial bias, in violation of the Due Process Clause of the United States Constitution. To support his claim, he has contemporaneously filed a Notice of Extra-Record Evidence Supporting Proposition I of the Brief of Appellant and, Alternatively, Rule 3.11

Motion to Supplement Direct Appeal Record or for an Evidentiary Hearing (hereinafter "3.11 Motion"). As explained below, defendant has failed to establish judicial bias and his request to supplement the record must be denied. This proposition of error is without merit.

Standard of Review

Defendant did not request recusal, nor did he allege any bias on the part of the trial judge until he presented his direct appeal to this Court. Therefore, his claim of judicial bias will be reviewed for plain error. *Alexander v. State*, 2002 OK CR 23, ¶ 18, 48 P.3d 110, 114; *Frederick v. State*, 2001 OK CR 34, ¶ 186, 37 P.3d 908, 954. "Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial." *Mitchell v. State*, 2016 OK CR 21, ¶ 24, 387 P.3d 934, 943.

Argument and Authority

Defendant's claim of error relies entirely on extra-record materials and is based on a single conclusory allegation, to wit: "Judge Henderson has had affairs with or has been sexually assaulting female prosecutors," including one of the two prosecutors involved in his jury trial (Appellant's Brief, pp. 5, 8). According to defendant, this alleged relationship violated his "due process right to an impartial judge," because Judge Henderson "could have been ruling in [the prosecutor's] favor as an incentive to not report the sexual assaults." (Appellant's Brief, pp. 8-9). Defendant's naked allegation that the trial court was

biased towards the prosecution during his trial fails to establish a Constitutional violation or the need for an evidentiary hearing.

"Due process guarantees 'an absence of actual bias' on the part of a judge." *Williams v. Pennsylvania*, __ U.S.__, 136 S. Ct. 1899, 1905 (2016) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). The Supreme Court has found, "[M]ost questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). "[T]he floor established by the Due Process Clause clearly requires a fair trial in a fair tribunal, before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Id.*, 520 U.S. at 904–05 (internal citation omitted). *See also Stouffer v. State*, 2006 OK CR 46, ¶ 10, 147 P.3d 245, 256 ("[E]very defendant is entitled to an impartial judge." (citing *Tumey v. Ohio*, 273 U.S. 510, 533 (1927))). The Supreme Court has explained:

> Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"

Williams, 136 S. Ct. at 1905 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009)). Defendant has failed to show that he was denied a fair trial before an impartial judge.

Defendant's claim of judicial bias is unsupported by the record and inadequately briefed. Defendant has failed to show an actual error that is plain or obvious in the record before this Court. Defendant's allegation of judicial bias is based entirely on extra-record material; he has offered no citation to the record in support of his claim, other than a footnote that sets out the sentence imposed in this case (Appellant's Brief, p. 10, n.3).[4] "It is the duty of counsel to give the page of the record at which the matter in controversy can be found and clearly present the argument and cite authority in support thereof." *Johnson v. State*, 1982 OK CR 37, ¶ 11, 665 P.2d 815, 819. It is well established that the appellant bears the burden of ensuring a sufficient record to determine the issues raised on appeal. *State v. Tubby*, 2016 OK CR 17, ¶ 10, 387 P.3d 918, 921 (collecting cases). He has failed to do so here.

Defendant's reliance on the extra-record materials in his 3.11 Motion in support of this proposition of error is misplaced. These materials are not part of the appellate record. *Graves v. State*, 1994 OK CR 23, ¶ 5, 878 P.2d 1075, 1077. Likewise, defendant's request that this Court take judicial notice of two affidavits

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[4] Defendant appears to be suggesting, without actually raising an excessive sentence claim, that the trial court's use of discretion to run the sentence in this case consecutively to defendant's earlier cases was "proof" of alleged judicial bias. "Unfavorable judicial rulings do not in themselves call into question the impartiality of a judge." *United States v. Mendoza*, 468 F.3d 1256, 1262 (10th Cir. 2006).

for search warrant (3.11 Motion, Exhibit A), does not avail him. The Tenth Circuit has explained, "Disqualification of a judge for actual bias or prejudice is a serious matter and should only be required when the evidence is compelling." *Fero v. Kerby*, 39 F.3d 1462, 1478 (10th Cir. 1994). The extra-record documents contain hearsay within hearsay about alleged crimes that are separate from defendant's case and are hardly compelling evidence of judicial bias capable of overcoming the "general presumption of impartiality on the part of judges as to matters before them." *Frederick v. State*, 2001 OK CR 34, ¶ 175, 37 P.3d 908, 951 (quotation omitted).

Unsubstantiated allegations of a relationship between one of the prosecutors and the trial judge is insufficient to support a judicial bias claim. *See Brumfield v. State*, 2007 OK CR 10, ¶ 30, 155 P.3d 826, 838 (finding no tenable claim of judicial bias where appellant "barely allude[d] to unfavorable actions by the trial judge during his trial and completely fail[ed] to establish that these actions were improper or unfair to him"). *See also Whaley v. State*, 1976 OK CR 302, ¶ 7, 556 P.2d 1063, 1065 (finding no merit to a judicial bias claim based on the trial judge's "subsequent removal from the bench and the 'popular suspicions' surrounding the [j]udge"); *Fitzgerald v. Trammell*, No. 03-CV-531-GKF-TLW, 2013 WL 5537387, at *8 (N.D. Okla. Oct. 7, 2013) (unpublished)[5] (noting that "[c]ourts have found no actual bias even where the trial court has a

[5] Because this unpublished decision is more closely on point than any published opinion by this Court, it is cited and attached as Exhibit A as persuasive authority in accordance with this Court's Rule 3.5(C)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019), and with Fed. R. App. P. 32.1 and 10th Cir. 32.1(A).

close personal relationship with the prosecutor or a key witness" (collecting cases)). Defendant has failed to establish that he was denied a fair trial due to judicial bias, and his claim must be denied.

Defendant is not entitled to supplement the record or receive an evidentiary hearing to develop his claim. Defendant's request to supplement the record or receive an evidentiary hearing under this Court's Rule 3.11(A) is equally futile. Rule 3.11(A) provides:

> After the Petition in Error has been timely filed in this Court, and upon notice from either party or upon this Court's own motion, the majority of the Court may, within its discretion, direct a supplementation of the record, when necessary, for a determination of any issue; or, when necessary, may direct the trial court to conduct an evidentiary hearing on the issue.

Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

This Court has explained, "Rule 3.11(A) solely allows this Court to supplement the record on appeal with items admitted during proceedings in the trial court but which were not designated or actually included in the record on appeal." *Bench v. State*, 2018 OK CR 31, ¶ 186, 431 P.3d 929, 974. However, it has cautioned, "Rule 3.11(A) is not intended to allow parties to bolster a trial record with extra-record documents or evidence." *Id.*, 2018 OK CR 31, ¶ 186, 431 P.3d at 974. Supplementation of the record "with matters not presented to and included as a part of the trial court record" is limited to two instances, neither of which apply here: 1) "[m]atters timely and properly admitted as a part

of a motion for a new trial," and 2) in support of an allegation of ineffective assistance of trial counsel. Rule 3.11(B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2021).

Defendant has not filed a motion for a new trial, nor has he presented a proposition of error alleging ineffective assistance of trial counsel. Therefore, he is not entitled to supplementation under this Court's Rule 3.11. *Graves*, 1994 OK CR 23, ¶ 5, 878 P.2d at 1077 ("Rule 3.11 must be strictly followed by any party seeking to supplement the record on appeal to this Court."). This Court has previously held that supplementation is "prohibited" when Rule 3.11(B) is not satisfied:

> Since Appellant did not file a motion for a new trial, there was no evidence admitted as a part of a motion for a new trial, and since Appellant makes no claim in this pleading that this extra-record evidence would support a claim of ineffective assistance of counsel "predicated upon an allegation of failure of trial counsel to properly utilize available evidence or adequately investigate to identify evidence which could have been made available during the course of trial," he is prohibited from supplementing the record with matters that were not presented to the trial court.

McElmurry v. State, 2002 OK CR 40, ¶ 167, 60 P.3d 4, 36–37 (quoting Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22 O.S., Ch.18, App. (2001)). The same result is warranted here.

Defendant's request for an evidentiary hearing must be denied. Defendant has made no effort to comply with this Court's rules for supplementation, nor has he explained why he should not be required to comply. The dates on the

materials attached to defendant's 3.11 Motion show that these items were available to defendant well before he filed his brief-in-chief on June 1, 2021. Defendant has failed to "strictly follow[]" the requirements of Rule 3.11, *Graves*, 1994 OK CR 23, ¶ 5, 878 P.2d at 1077, and his non-compliance is fatal to his Rule 3.11 Motion.

For the foregoing reasons, this proposition of error is without merit and must fail.

PROPOSITION II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED THE BLACK TAR HEROIN EVIDENCE OVER THE DEFENSE'S OBJECTION.

Defendant argues the trial court erred when it allowed the State to present State's Exhibit 13, which was 95.5 grams of black tar heroin (Tr. II 32-33). Defendant argues that the heroin should have been excluded because the State provided an inadequate chain of custody for the drugs. For the reasons set forth below, the evidence was properly admitted. This proposition of error is without merit and must be denied.

Standard of Review

The issues in this proposition of error were preserved for appellate review by contemporaneous objection at trial (Tr. II p. 33-37). A trial court's decision to admit or exclude evidence over a timely objection "is ordinarily discretionary and will not be reversed on appeal unless clearly erroneous or manifestly unreasonable." *Martinez v. State*, 2016 OK CR 3, ¶ 39, 371 P.3d 1100, 1112.

This Court defines abuse of discretion as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Id.* No abuse of discretion occurred here.

Argument and Authority

On March 15, 2019, Detective Guthrie received a tip about a possible drug house from two patrol officers that had conducted a traffic stop that morning; the officers found black tar heroin during the stop that was purchased from the apartment at issue in this case, number 205 (Tr. II 7-8, 10). On the same day, Detective Guthrie and his partner went to a parking lot with a clear view of the apartment and while sitting in an unmarked vehicle, they observed what appeared to be a drug buy: a vehicle pulled up, the passenger exited and went into the apartment for a few seconds before getting back into the car and leaving (Tr. II 8-9). Detective Guthrie and his partner followed the car and directed a marked police unit with uniformed officers to conduct a traffic stop (Tr. II 10). During the traffic stop, officers interviewed the subject that had entered the apartment and found black tar heroin on his person; the subject indicated that he purchased the heroin from apartment number 205 (Tr. II 10). Apartment 205 was kept under surveillance while Detective Guthrie obtained a search warrant (Tr. II 11).

The search warrant required officers to knock and announce themselves (Tr. II 11). Uniformed officers knocked on the door of Apartment 205 and announced themselves, with no response from inside (Tr. I 22). The door was

forced open and multiple subjects were observed inside (Tr. I 22). The interior was hazy, with the apartment's surfaces and its occupants cloaked in what looked and smelled like Mexican brown heroin—a powdery substance similar to sawdust (Tr. I 23). The odor was described as "overwhelming;" one officer stated that it was hard to breathe due to the particulates in the air (Tr. I 50). Defendant was one of four people found inside the apartment, and as officers made entry, he exited the bathroom with his person covered in the powdery heroin (Tr. I 23-24, 31; State's Exhibit 1; State's Exhibit 11). The heroin was "billowing" out of the bathroom (Tr. I 63). On a coffee table, officers observed a register till with money in it and an electric money counter; these were items associated with the distribution of narcotics (Tr. I 26, 32; State's Exhibit 1). In the apartment's single bedroom, officers found a State Identification Card bearing defendant's name and birthdate (Tr. I 78-80; Tr. II 15; State's Exhibit 12). Officers saw evidence that the powdery heroin was being flushed down the toilet (Tr. I 55). One of the officers became concerned that the airborne heroin might be laced with fentanyl and ordered everyone out of the apartment (Tr. I 27, 70; State's Exhibit 11).

A hazmat team was summoned and the air was checked for fentanyl (Tr. II 12). A "special projects" team then entered the apartment with protective equipment and searched the apartment (Tr. II 12). The evidence collected by the special projects team was brought outside to the apartment parking lot where Detective Guthrie waited (Tr. II 12-13). Detective Guthrie observed the special projects team recover heroin from the apartment in gallon size Ziploc bags; he

testified that the heroin weighed a total of 159 grams and it was taken to the Oklahoma City Police Department drug lab (Tr. II 13).[6] Detective Guthrie filed a report after this incident and the incident number was 19-021182; Detective Guthrie also requested the lab analysis of the bags of drugs recovered in the apartment (Tr. II 13-14, 23).

Defendant was placed in the back of a police scout car during this incident and while still at the scene, he asked to speak with Detective Guthrie (Tr. II 16). Detective Guthrie read the *Miranda* warning to defendant, and defendant agreed to talk to him without an attorney (Tr. II 19-20). Defendant told Detective Guthrie that he did not work, that he sold heroin, that there was heroin in the apartment and it was Mexican heroin, that he got the heroin from Mexico, and

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[6] At the preliminary hearing, Detective Guthrie provided a more thorough explanation of what happened when the drugs were recovered from the apartment:

> Normally, what would happen is—even if [the gang unit] made entry and it's my warrant there's going to be an affiant and a searcher, and a logger. But because when they made entry into the apartment they thought that there could be a Fentanyl exposure. We had to contact Special Projects and they came out with their hazmat suits, and they actually went in and searched and took everything out of it, so I wasn't part of the search or –of that. But once it was brought out I inventoried it. I did not book it in the property room, but I inventoried it and created a return for the judge.

(Prelim. Tr. 38). Detective Guthrie also testified, "I think [Officer] Reimche booked everything. That's what I was told. Reimche booked everything into the property room. It was all brought out and weighed by Projects, Special Projects officers. But I believe Reimche is the one that booked it into the property room." (Prelim. Tr. 38-39). *See Moore v. State*, 1988 OK CR 176, ¶ 60, 761 P.2d 866, 876 (considering the preliminary hearing transcript along with the trial transcript, in evaluating a chain of custody challenge).

that he drove a Mercedes that was parked in the parking lot (Tr. II 21). Defendant refused to tell Detective Guthrie how much heroin was in the apartment (Tr. II 21). Detective Guthrie estimated that he spoke with defendant for five or six minutes (Tr. II 24).

Mr. Scott testified about his analysis of the evidence for incident number 2019-21182 (Tr. II 29). Mr. Scott explained that his analysis includes obtaining a net weight, which is the weight of the substance without any packaging (Tr. II 30). Mr. Scott received three items containing black tar heroin to analyze; the first weighed 44.5 grams, the second was 37 grams, and the third was 14 grams, which made a total of 95.5 net weight grams, slightly more than three ounces (Tr. II 30, 32). The trafficking weight for heroin is ten grams, so this was almost ten times the trafficking amount (Tr. II 32). Mr. Scott identified the evidence envelope for State's Exhibit 13 as the envelope that contained the drugs he analyzed for this case (Tr. II 33).

When the State offered State's Exhibit 13, the defense objected (Tr. II 33). Outside the hearing of the jury, defense counsel objected to the admissibility of State's Exhibit 13, arguing that there was no chain of custody established for the contents of the evidence envelope (Tr. II 34). Defense counsel argued that no officer was asked to identify the contents of the envelope, that there was no testimony about where in the apartment the baggies of drugs were recovered, and while there was testimony about powdered heroin inside the apartment, there was none about where the black tar heroin was recovered (Tr. II 34-35).

The State responded that several witnesses testified that black tar heroin was recovered from individuals who purchased it from that apartment, and that it was taking the position that there were two types of heroin in the apartment (Tr. II 35). The State also argued that Detective Guthrie testified that he observed the special projects team exit the apartment with bags of heroin, and that those bags of heroin were booked into property under the incident number that was referenced by Mr. Scott (Tr. II 36). The trial court found:

> Well, Detective Guthrie stated that the special projects people brought him the heroin that he had as case number 19-21182. This exhibit shows case number 19-21182. Because of that chain I'm going to overrule your objection. The—it will go to its weight as opposed to the admissibility. The statement—because of the fentanyl scare was everyone got out, special projects went in, Hazmat went in; that the heroin was brought to Detective Guthrie from the special projects people that were inside. Granted there wasn't specifically where it was found, in the bathtub, under the drawer, in the kitchen. But the chain was case number 19-21182 according to Detective Guthrie and that is the chain of custody on the envelope—sealed envelope that Mr. Scott examined.

(Tr. II 37 (syntax in original)). The trial court's ruling was not an abuse of discretion.

"The purpose of the chain of custody rule is to insure that the evidence introduced at trial is in substantially the same condition as when it was obtained." *Driskell v. State*, 1983 OK CR 22, ¶ 59, 659 P.2d 343, 354. "In determining whether the State has laid an adequate foundation, [the judge] should consider: (1) the nature of the article; (2) the circumstances surrounding

its preservation; and, (3) the likelihood of contamination, alteration or tampering." *Id.* This Court has held, "The party offering demonstrative evidence must show that there has been no alteration or tampering with the exhibit." *Wilson v. State*, 1987 OK CR 86, ¶ 7, 737 P.2d 1197, 1201–02. However, it is not necessary to show "that there is no possibility of alteration . . . . **Where there is speculation that tampering could have occurred, any doubt goes to the weight of the evidence, and not its admissibility**." *Id.* (emphasis added). In *Wilson*, appellant argued that the chain of custody was insufficient for blood and hair samples because the State did not call the doctor that drew the blood sample, and the hair samples were sent through the mail. *Id.* This Court found no merit to appellant's challenge to the admissibility of the evidence, holding that "there [was] no serious question of tampering revealed in the record." *Id.* The same result is warranted here.

Defendant raises nothing more than speculation that tampering could have occurred. Defendant also ignores his own post-*Miranda* statements to Detective Guthrie at the scene, specifically that the apartment contained heroin and that he sold heroin (Tr. II 21). Detective Guthrie testified that he observed the drugs being carried out of the heroin-contaminated apartment by the special projects team, and the report he filed after this incident carried incident number 19-021182, the same incident number on the evidence envelope that Mr. Scott analyzed at the drug lab (Tr. II 13-14, 23, 29). The record is barren of any

unexplained delay in delivery of the contraband to the laboratory, as in the cases cited by defendant (Appellant's Brief, pp. 12-13).

Moreover, even though all of the officers that handled the evidence were not called as witnesses, the evidence established that the drugs were transported from the scene to the drug lab for analysis (Tr. II 13, 41; State's Exhibit 13). "Failure to establish the complete chain of custody only goes to the weight of the evidence. It does not affect admissibility." *Moore v. State*, 1988 OK CR 176, ¶ 62, 761 P.2d 866, 876. Under the circumstances of defendant's case, the trial court's evidentiary ruling was not an abuse of discretion.

For the foregoing reasons, there was no error when the trial court overruled defense counsel's objection and allowed the admission of State's Exhibit 13. This proposition of error is without merit and must be denied.

PROPOSITION III

THERE WAS NO ABUSE OF DISCRETION BECAUSE DEFENDANT WAS NOT ENTITLED TO AN INSTRUCTION ON SIMPLE POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE AS A LESSER OFFENSE.

Defendant argues that the trial court erred when it rejected his request for an instruction on simple possession of heroin as a lesser included offense. This claim is untenable under the law and the facts. This proposition of error is without merit and must be denied.

Standard of Review

Defense counsel preserved this issue for appeal by requesting an instruction on a lesser-included offense (Tr. II 61-63). *Tryon v. State*, 2018 OK CR 20, ¶ 66, 423 P.3d 617, 637. Therefore, the standard of review is abuse of discretion. *Kelley v. State*, 2019 OK CR 25, ¶ 10, 451 P.3d 566, 570. "An abuse of discretion is any unreasonable or arbitrary ruling made without proper consideration of the facts and law pertaining to the issue." *Id.*

Argument and Authority

During the first stage jury instruction conference, defense counsel requested an instruction on simple possession of heroin as a lesser included offense (Tr. II 61-62). The State objected (Tr. II 63-64). The trial court rejected defense counsel's request, finding that the evidence showed "enough direct and circumstantial evidence of the trafficking," and no evidence that was "sufficient to negate" the elements of the greater charge (Tr. II 66). The trial court's ruling was not an abuse of discretion, because defendant was not entitled to his requested instruction on simple possession of heroin.

"The determination of which instructions shall be given to the jury is a matter within the discretion of the trial court." *Cipriano v. State*, 2001 OK CR 25, ¶ 14, 32 P.3d 869, 873. The trial court has a duty to issue instructions on all lesser included and lesser related offenses supported by the evidence. *Glossip v. State*, 2001 OK CR 21, ¶ 28, 29 P.3d 597, 603; *see also Shrum v. State*, 1999 OK CR 41, ¶ 10, 991 P.2d 1032, 1036 (same). "Sufficient evidence to warrant a

lesser included offense is evidence which would allow a jury rationally to find the accused guilty of the lesser offense and acquit him of the greater." *Bivens v. State*, 2018 OK CR 33, ¶ 24, 431 P.3d 985, 994.

This Court considered an identical claim of error in *McIntosh v. State*, 2010 OK CR 17, ¶ 2, 237 P.3d 800, 801. In *McIntosh*, appellant was convicted of Trafficking in Controlled Dangerous Substance in violation of 63 O.S.Supp.2007, § 2-415, after former conviction of two or more felonies. *Id.* Appellant argued that the trial court erred when it refused to instruct the jury on the lesser included offense of possession of a controlled dangerous substance. *Id.* This Court held, "To be entitled to a lesser-included offense instruction on simple possession, there must have been evidence produced at trial negating the evidence that [appellant] possessed the trafficking quantity . . . ." *Id.* This Court found "no evidentiary support for a jury instruction on simple possession as a lesser-included offense of trafficking" where there was no evidence negating the quantity of controlled dangerous substance at issue. *Id.* Defendant's case is indistinguishable from *McIntosh*, and the same result is required.

The elements of Trafficking in Illegal Drugs are: "First, knowingly; Second, possessed; Third, ten (10) or more grams of heroin." (O.R. 156 (emphasis in original)). Instruction No. 6-13, OUJI-CR(2d). *See also* 63 O.S.Supp.2018, § 2-415. The elements of Possession of a Controlled Dangerous Substance are: "First, knowing and intentional; Second, possession; Third, of the controlled dangerous substance of heroin." Instruction No. 6-6, OUJI-CR(2d) (emphasis in

original). *See also* 63 O.S.Supp.2016, § 2-402. The State presented evidence that 95.5 grams of heroin were recovered from the apartment where defendant was located, while defendant was in the act of destroying evidence (Tr. I 23-24, 31, 35, 55; Tr. II 32; State's Exhibit 1; State's Exhibit 11). Notably, defendant admits that he "was in the apartment where heroin was found and therefore constructively possessed the heroin." (Appellant's Brief, p. 17). There was no evidence presented that negated the quantity of the heroin recovered. Accordingly, the trial court's instructions accurately stated the applicable law because there was no evidentiary support for an instruction on simple possession as a lesser included offense. *McIntosh*, 2010 OK CR 17, ¶ 2, 237 P.3d at 801.

For the foregoing reasons, this proposition of error is without merit and should be denied by this Court.

PROPOSITION IV

DEFENDANT IS NOT ENTITLED TO RELIEF FOR ALLEGED CUMULATIVE ERROR.

Defendant argues the cumulative effect of the alleged errors deprived him of a fair trial. "This Court has held that a cumulative error argument has no merit when this Court fails to sustain any of the other errors raised by Appellant." *Bivens*, 2018 OK CR 33, ¶ 35, 431 P.3d at 996. The State has set forth specific responses herein to rebut each claim and to demonstrate that no error occurred. Moreover, because any one of the errors alleged in the preceding Propositions would result in reversal if they had merit, there is nothing to

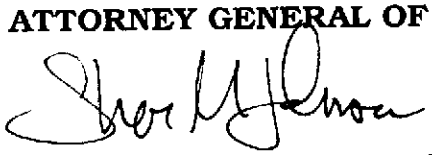
accumulate. For the foregoing reasons, defendant's final proposition of error must fail.

CONCLUSION

The defendant's contentions have been answered by both argument and citations of authority. The State contends that no error occurred which would require reversal or modification and, therefore, respectfully requests that the Judgment and Sentence be affirmed.

Respectfully submitted,

JOHN M. O'CONNOR
ATTORNEY GENERAL OF OKLAHOMA



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CERTIFICATE OF MAILING

On this 24th day of September, 2021, a true and correct copy of the foregoing was mailed to:

Hallie Bovos
Oklahoma County Public Defender's Office
320 Robert S. Kerr Avenue, Suite 400
Oklahoma City, Oklahoma 73102

Sheri M. Johnson

2013 WL 5537387
Only the Westlaw citation is currently available.
United States District Court,
N.D. Oklahoma.

James J. FITZGERALD, Petitioner,
v.
Anita TRAMMELL, Warden, Oklahoma State Penitentiary, Respondent.

No. 03–CV–531–GKF–TLW.
|
Oct. 7, 2013.

Attorneys and Law Firms

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Jack Dwayne Fisher, Fisher Law Office, Edmond, OK, for Petitioner.

Jennifer L. Crabb, Jennifer J. Dickson, Oklahoma City, OK, for Respondent.

OPINION AND ORDER

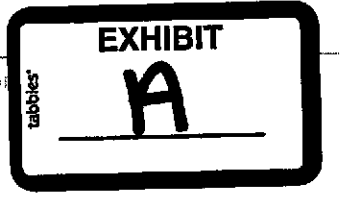
GREGORY K. FRIZZELL, Chief Judge.

*1 This matter comes before the court on a Petition for Writ of Habeas Corpus (Dkt.# 24) filed by Oklahoma death row inmate James Fitzgerald ("Petitioner"), pursuant to 28 U.S.C. § 2254, and the Report and Recommendation (Report) (Dkt.# 159), filed July 22, 2013, by Magistrate Judge T. Lane Wilson, recommending that the Court conditionally grant a writ of habeas corpus based on Petitioner's Ground 7 claim of ineffective assistance of counsel. As more fully discussed below, this court conditionally grants the petition on Ground 7 because Petitioner received ineffective assistance of counsel at his resentencing trial and denies the petition on the remaining grounds.

Petitioner, who appears through counsel, challenges his conviction and sentencing in Tulsa County District Court, Case No. CF–94–3451. In support of his petition and request for an evidentiary hearing, Petitioner submitted a Habeas Appendix One to Petition for Writ of Habeas Corpus (Dkt.# 25). Respondent filed a response to the Petition (Dkt.# 41). Petitioner filed a Reply (Dkt.# 52). Petitioner also filed a Supplemental Authority Regarding Ground One of his Petition for Habeas Corpus Relief (Dkt.# 55) and an additional Supplemental Authority in support of his Petition (Dkt.# 63). By Order filed August 9, 2010 (Dkt.# 72), the court granted Petitioner's request for an evidentiary hearing as to Ground 7 as raised in the Petition for Writ of Habeas Corpus. By Opinion and Order filed August 25, 2011 (Dkt.# 104), the court denied Respondent's request to reconsider the Order granting an evidentiary hearing and denied Respondent's motion for summary judgment. In the Opinion and Order, the court determined that because the Oklahoma Court of Criminal Appeals (OCCA) applied the wrong constitutional standard to deny Petitioner's claim of ineffective assistance of counsel, the claim would be reviewed de novo. (*Id.*).

The Magistrate Judge held the evidentiary hearing on August 21 through 23, 2012, and on November 9, 2012. After hearing the parties' evidence and reviewing the parties' proposed findings of fact and conclusions of law, the Magistrate Judge entered his Report on July 22, 2013 (Dkt.# 159), recommending that the court find Petitioner's lead attorney performed deficiently by deciding to forego presentation of expert testimony regarding Petitioner's diabetes and brain injury and evidence of his alcohol consumption at the resentencing trial. Further, the Magistrate Judge found that Petitioner was prejudiced by counsel's deficient performance. On August 19, 2013, Respondent filed an objection (Dkt.# 163) and Petitioner filed a partial objection (Dkt. # 164) to the Report. In addition to the evidence presented at the evidentiary hearing, the state court record [1] has been produced and reviewed by the court. The court considered all of these materials in reaching its decision. For the reasons discussed below, the court concludes the Report shall be accepted and the Petition shall be conditionally granted as to Ground 7. Within 180 days of the entry of this Opinion and Order, the writ shall issue unless the State of Oklahoma commences resentencing proceedings for Petitioner. In addition, the Court concludes Petitioner is not entitled to habeas corpus relief on his remaining claims (Grounds 1–6, 8–14).

[1] References to documents and pleadings from these proceedings shall be referred to by docket number, where feasible (Dkt. # —); references to the trial transcript from the original trial shall be referred to as "Tr. I Vol. —— at ——"; references to the trial transcripts from the resentencing trial shall be referred to as "Tr. II Vol. —— at—"; references to transcripts from other hearings shall be referred to



as "Tr. [hearing date] at ——." The original state court record shall be identified as "O.R. Vol. at —." Exhibits presented at the original trial shall be referred to as "State/Def. Tr. Ex. ——." Exhibits presented at the evidentiary hearing held in this case shall be identified as "Evid. Hr'g Resp./Pet. Ex. ——." Transcripts from the evidentiary hearing before Magistrate Judge Wilson will be referred to as "Dkt. # —— at ——.

BACKGROUND

I. Factual Background

***2** Pursuant to 28 U.S.C. § 2254(e)(1), the historical facts found by the state court are presumed correct. In considering the issues presented in the Petition, the court relied upon the following synopsis from the OCCA in that court's first direct appeal opinion. Following review of the record, trial transcripts, trial exhibits, and other materials submitted by the parties, the court finds this summary by the OCCA is adequate and accurate. Therefore, the court adopts the following summary as its own: [2]

[2] Additional facts, apparent from the record, may be presented throughout this opinion as they become pertinent to the court's analysis. In particular, facts summarized by the OCCA in its opinion addressing Petitioner's resentencing trial are also presumed correct unless rebutted by Petitioner by clear and convincing evidence, pursuant to 28 U.S.C. § 2254(e)(1).

> Fitzgerald spent the evening of July 15, 1994, with Regina Stockfleth and other friends. In the early morning hours of July 16, Fitzgerald, armed with an SKS assault rifle, robbed the Git–N–Go store at 7494 East Admiral Street in Tulsa. After the robbery he returned to Stockfleth's house, wearing a bandanna around his neck and carrying $55 cash in a Git–N–Go bag. He was asked to leave.
>
> Fitzgerald arrived at the Git–N–Go store at 6938 East Pine about 2:45 a.m. The clerk, William Russell, took the SKS rifle away from Fitzgerald. Russell pointed the rifle at Fitzgerald but apparently could not release the safety on the weapon. Fitzgerald came over the counter, and the two scuffled. Russell escorted Fitzgerald (who had the rifle) out of the store and locked the doors. As Russell retreated behind the store counter, Fitzgerald turned and fired, shattering the glass doors. His bandanna mask had fallen, and his face was visible. Fitzgerald pointed the gun in Russell's direction and fired several shots, then ran. Police recovered eight spent casings and six bullets from various locations in the store, and one bullet was found in Russell's body. That bullet had passed through six cigarette packages, two counter partitions, and a roll of calculator tape before entering Russell near his left armpit. The bullet pierced his lung and spine and broke two ribs. Russell had massive internal bleeding and died of a gunshot wound to the chest.
>
> After leaving the Pine Street store, Fitzgerald robbed the Git–N–Go store at 903 North Yale at approximately 3:00 a.m. He wore a bandanna mask and threatened the clerk with the SKS assault rifle. After this robbery Fitzgerald briefly returned to his parents' home, then left the state. In Illinois he traded the SKS rifle for $100 and a .357 magnum handgun. He was arrested in Missouri. Fitzgerald confessed to robbing the two stores and attempting to rob the store on Pine Street, but insisted he did not intend to injure or kill Russell.

Fitzgerald v. State, 972 P.2d 1157, 1161 (Okla.Crim.App.1998).

II. Procedural History

In Tulsa County District Court, Case No. CF–94–3451, Petitioner was tried by jury and convicted of two counts of robbery with a firearm, one count of attempted robbery with a firearm, and one count of first degree murder. The jury found three aggravating circumstances and recommended a death sentence on the first degree murder count. In accordance with the jury's recommendation, the Honorable E.R. (Ned) Turnbull sentenced Petitioner to death on the first degree murder count and life imprisonment and a $10,000.00 fine on the other counts.

***3** On direct appeal, Petitioner raised sixteen propositions of error, with numerous sub-propositions. The OCCA affirmed his convictions and the sentences for the counts of robbery with a firearm and attempted robbery with a firearm. *Fitzgerald v. State*, 972 P.2d 1157, 1161 (Okla.Crim.App.1998) ("*Fitzgerald I* "). The OCCA affirmed Petitioner's conviction for the first degree murder count, but vacated his death sentence because of "pervasive error in the second stage of trial." (*Id.*). The OCCA identified five errors in the sentencing stage which, in combination, "denied Fitzgerald a fair and reliable sentencing proceeding," as follows:

> [A] pro se defendant was unable to life-qualify his jury, was denied experts to assist in presentation of mitigating evidence, chose not to present such evidence without guidance or inquiry from the trial court, was denied the opportunity to rebut evidence of an aggravating circumstance, and was denied the chance to list a circumstance of the crime in mitigation.

Id. at 1175. The OCCA denied Petitioner's request for an evidentiary hearing. *Id.* at 1175 n. 73.

During the pendency of the direct appeal, Petitioner sought post-conviction relief from the OCCA, in Case No. PCD–98–643. The OCCA denied relief as moot upon reversing and remanding the death sentence on direct appeal.

Upon remand from the OCCA, a new jury was impaneled and a new sentencing trial was conducted before the Honorable J. Michael Gassett on October 17–26, 2000. The jury found two of the three alleged aggravating factors: (1) that Petitioner had been previously convicted of a felony involving the threat or use of violence to the person, and (2) the existence of a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. The jury did not find that Petitioner committed the murder to avoid lawful arrest or prosecution. The jury recommended a sentence of death and the trial court so ordered. Petitioner appealed that sentence and the OCCA affirmed in a published opinion, *Fitzgerald v. State*, 61 P.3d 901 (Okla.Crim.App.2002) ("*Fitzgerald II*").

Thereafter, Petitioner sought post-conviction relief from the OCCA, in Case No. PCD–2002–626. Petitioner's application for post-conviction relief alleged that (1) his trial and appellate counsel were ineffective for failing to adequately develop and present available mitigating evidence of Petitioner's brain damage, diabetes, and consumption of alcohol on the night of the offense, and (2) his constitutional right to a jury trial was violated by the trial court's failure to instruct the jury that it must find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt and counsel was ineffective for failing to previously raise this issue. Petitioner requested an evidentiary hearing on the ineffective assistance of counsel issues. The OCCA denied all requested relief, including the request for an evidentiary hearing, in an unpublished opinion on March 13, 2003. (Dkt. # 25, Ex. 18 (Order Denying Application for Post–Conviction Relief and Motion for Evidentiary Hearing, OCCA No. PCD–2002–626)). On March 31, 2003, the United States Supreme Court rejected Fitzgerald's petition for writ of certiorari. *Fitzgerald v. Oklahoma*, 538 U.S. 951 (2003).

***4** Petitioner initiated these proceedings on August 8, 2003, by filing a Motion to Proceed In Forma Pauperis (Dkt.# 1) and a Motion for Appointment of Counsel (Dkt.# 2). The Petition for Writ of Habeas Corpus (Dkt.# 24), identifies the following fourteen (14) grounds for relief:

> Ground I: Petitioner was denied due process of law because his right to a fair and impartial tribunal were [sic] violated when the judge who presided over his first trial was biased and openly predisposed against Petitioner and issues critical to his defense.
>
> Ground II: Petitioner was denied the basic tools to present a defense to malice aforethought murder by the denial of expert assistance guaranteed by *Ake v. Oklahoma* and his conviction violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
>
> Ground III: The first stage instruction on involuntary [sic] intoxication relieved the state of the burden of proof on "malice aforethought murder" and improperly instructed the jury in violation of the Fifth and Fourteenth Amendments to the United States Constitution.
>
> Ground IV: Petitioner was denied assistance of counsel where the purported waiver of counsel was not knowingly and intelligently made and where there was no determination of competency rendering Petitioner's conviction unconstitutional under the Sixth, Eighth, and Fourteenth Amendments.
>
> Ground V: Petitioner was denied due process of law in the guilt stage of his trial because the trial court failed to fulfill his obligation to life qualify the jury which resulted in a jury that was not fair and impartial and was prone to find guilt in violation of Sixth, Eighth, and Fourteenth Amendments.

Ground VI: The accumulation of constitutional error in the first stage of Petitioner's trial denied Petitioner a fundamentally fair trial under the Fourteenth Amendment.

Ground VI: Trial and appellate counsel's failure to adequately develop and present available mitigating evidence of brain damage, diabetes, and consumption of alcohol on the night of the offense in Petitioner's second penalty trial deprived Petitioner effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments.

Ground VII: Petitioner was denied a fundamentally fair resentencing penalty when the court admitted an overwhelming amount of prejudicial and inflammatory evidence which was irrelevant to the alleged aggravating circumstances in violation of the Eighth and Fourteenth Amendments.

Ground IX: Petitioner was denied the right to present relevant and admissible mitigation evidence and evidence that would have rebutted the aggravating circumstance "continuing threat" in violation of the Eighth and Fourteenth Amendments.

Ground X: The introduction of victim impact evidence rendered Petitioner's death sentence unconstitutional in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Ground XI: The Oklahoma "continuing threat" aggravator is unconstitutional both on its face and as applied rendering Petitioner's death sentence invalid in contravention of the Eighth and Fourteenth Amendments to the United States Constitution.

*5 Ground XII: The aggravating circumstances "prior violent felony" and "continuing threat" are duplicitous and skewed the weighing process resulting in an arbitrary sentence of death in violation of the Eighth and Fourteenth Amendments.

Ground XIII: Petitioner's rights to jury trial were violated by the failure to instruct the jury that it must find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt in violation of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution.

Ground XIV: The cumulative prejudice from errors in both the first and second stages denied Petitioner a fundamentally fair trial, due process of law and a reliable sentencing proceeding in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

(Dkt.# 24).

This case was transferred to the undersigned on February 7, 2007. (Dkt.# 60). After granting Petitioner's motion for an evidentiary hearing, the court referred the motion to Magistrate Judge T. Lane Wilson on August 9, 2010 for the evidentiary hearing and proposed findings as to Ground 7.

The Court's rulings on each of Fitzgerald's claims are discussed below.

GENERAL CONSIDERATIONS

I. Exhaustion

Generally, federal habeas corpus relief is 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)(1)(A); *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. "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) (explaining that the exhaustion requirement is "grounded in principles of comity"). In most cases, a habeas petition containing both exhausted and unexhausted claims is deemed a mixed petition requiring dismissal. Where it is clear, however, that a procedural bar would be applied by the state courts if the claim were now presented, the reviewing habeas court can conduct a procedural bar analysis instead of requiring exhaustion. *Coleman*, 501 U.S. at 735 n. 1 (citations omitted). Petitioner has fairly presented each of his habeas claims to the OCCA. Therefore, the exhaustion requirement is satisfied in this case.

II. Procedural Bar

The Supreme Court has 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; *Medlock v. Ward*, 200 F.3d 1314, 1323 (10th Cir.2000). 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 "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; *Wainwright*, 433 U.S. at 91. When a claim can be more easily and succinctly analyzed on the merits, the court need not address the applicability of a procedural bar. *Romero v. Furlong*, 215 F.3d 1107, 1111 (10th Cir.2000).

III. Standard of Review—AEDPA

***6** This court's review is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Snow v. Simmons*, 474 F.3d 693, 696 (10th Cir.2007). Under the AEDPA, the standard of review applicable to each claim depends upon how that claim was resolved by the state courts. *Alverson v. Workman*, 595 F.3d 1142, 1146 (10th Cir.2010) (citing *Snow*, 474 F.3d at 696). When a state court has adjudicated the merits of a claim, a petitioner may obtain federal habeas relief only if the state decision (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"[3] or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(1)-(2); *Neill v. Gibson*, 278 F.3d 1044, 1050–51 (10th Cir.2001); *Williams v. Taylor*, 529 U.S. 362, 402 (2000) (O'Connor, J., concurring).

[3] A legal principle is "clearly established" within the meaning of this provision only when it is embodied in a holding of the Supreme Court. *Carey v. Musladin*, 549 U.S. 70, 74 (2006).

The first step in applying § 2254(d)(1) is to assess whether there was clearly established federal law at the time the conviction became final, as set forth in the holdings of the Supreme Court. *House v. Hatch*, 527 F.3d 1010, 1016–17 (10th Cir.2008). If clearly established federal law exists, the court must then consider whether the state court decision was contrary to or involved an unreasonable application of Supreme Court law. *Id.* at 1018. When a state court applies the correct federal law to deny relief, a federal habeas court may consider only whether the state court applied the federal law in an objectively reasonable manner. *See Bell v. Cone*, 535 U.S. 685, 699 (2002); *Hooper v. Mullin*, 314 F.3d 1162, 1169 (10th Cir.2002). It is not necessary, however, that the state court cite to controlling Supreme Court precedent, so long as neither the reasoning nor the result of the state court decision contradicts Supreme Court law. *Early v. Packer*, 537 U.S. 3, 8 (2002). Further, the Supreme Court has recently held that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011). Thus, "evidence introduced in federal court has no bearing on § 2254(d)(1) review. If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id.* at 1400 (footnote omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)).

Application of § 2254(d)(2) requires the court to review any factual findings of the state court to ascertain whether they were unreasonable in light of the evidence presented at trial. "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (citing *Williams*, 529 U.S. at 411 (O'Connor, J., concurring)). The "determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

GROUNDS FOR RELIEF

I. Denial of right to fair and impartial tribunal (Ground 1)

***7** In Ground 1, Petitioner alleges that he is entitled to habeas relief because he was denied a fair and impartial

tribunal. Petitioner alleges the following factors to support his claim that the trial judge in his first trial, the Honorable E.R. "Ned" Turnbull, was not fair and impartial: (1) prior to becoming a district judge and while Petitioner's case was pending, Judge Turnbull served as an assistant district attorney in the Tulsa County District Attorney's office, though he was not assigned to Petitioner's case; (2) Judge Turnbull had a business relationship with Doug Horn, one of the prosecutors assigned to Petitioner's case; (3) Judge Turnbull allegedly informed Petitioner's trial counsel during an off the record conversation that "he was having trouble getting the D.A. out of himself;" (4) Judge Turnbull erroneously denied Petitioner funds to hire experts to assist with his defense; (5) Judge Turnbull failed to give instructions on voluntary intoxication as a defense and instead instructed that no act can be deemed less criminal by reason of voluntary intoxication; (6) Judge Turnbull allegedly failed to properly determine that Petitioner knowingly and intelligently waived his right to counsel; (7) Judge Turnbull refused to instruct in mitigation that Petitioner was under the influence of alcohol at the time of the crimes, yet Judge Turnbull's post-trial report acknowledged that Petitioner was under the influence of alcohol at the time of the offenses; and (8) Judge Turnbull was defended by the district attorney's office in a federal civil rights case at the time of trial. (Dkt. # 24 at 53–4); *Mikus v. Turnbull,* Case No. 95–CV–293 (N.D.Okla. Jan. 9, 1996). Respondent contends that the OCCA's determination that there was no judicial bias is not contrary to or an unreasonable application of federal law. Petitioner attaches to his Habeas Appendix One to Petition for Writ of Habeas Corpus, as new evidence, the Affidavits of Sid Conway and Gordon Bulla as well as Oklahoma Secretary of State records—all pertaining to Judge Turnbull's business relationship with Doug Horn. (Dkt.# 25, Ex. 6, 7, 16). Petitioner requested and was denied an evidentiary hearing on this ground. (Dkt.# 72).

Petitioner raised this issue in his first direct appeal. The OCCA denied Petitioner's bias claim finding that none of the alleged circumstances showed bias against Petitioner or infringed on his right to fair trial. *Fitzgerald I,* 972 P.2d at 1164 (footnotes omitted).

The Fourteenth Amendment's Due Process Clause requires a fair trial in a fair tribunal. *Withrow v. Larkin,* 421 U.S. 35, 46 (1975). Further, a trial must proceed before a judge with no actual bias against the defendant or interest in the outcome of his particular case. *Bracy v. Gramley,* 520 U.S. 899, 905, 908–09 (1997) (allowing discovery in habeas case where petitioner's trial judge had later been convicted of taking bribes in criminal cases); *In re Murchison,* 349 U.S. 133, 138–39 (1955) (finding denial of due process where trial judge had previously served as a one-man "judge-grand jury" in the contempt case); *Tumey v. Ohio,* 273 U.S. 510, 523 (1927) (it is a violation of due process for a criminal defendant to be tried by a judge who "has a direct, personal, substantial pecuniary interest in reaching a conclusion against [the defendant] in his case."). "In general, the standard for evaluating whether a habeas petition alleges judicial bias amounting to a denial of due process is whether the judge was 'actually biased or prejudiced against the petitioner.' " *Nichols v. Sullivan,* 867 F.2d 1250, 1254 (10th Cir.1989) (citation omitted). To show actual bias, Petitioner must present "compelling" evidence. *See Hero v. Kerby,* 39 F.3d 1462, 1478 (10th Cir.1994) (in upholding dismissal of a habeas claim involving judicial bias, the court stated that "[d]isqualification of a judge for actual bias or prejudice is a serious matter and should only be required when the evidence is compelling" (citation omitted)).

***8** Petitioner, citing *Johnson v. Gibson,* 254 F.3d 1155, 1165–66 (10th Cir.2001), contends that the state appellate court applied the incorrect federal law when it determined that, in order for Petitioner to prevail, he had to "show the trial court's prejudice against him materially affected his rights at trial, and the defendant must be prejudiced by the trial court's actions." *See Fitzgerald I,* 972 P.2d at 1163 (citing *Bryan v. State,* 935 P.2d 338, 354 (Okla.Crim.App.1997); *Stouffer v. State,* 738 P.2d 1349, 1353 (Okla.Crim.App.1987); *Carter v. State,* 560 P.2d 994, 996–97 (Okla.Crim.App.1977)). Petitioner argues that he was only required to show "bias" or "impartiality" and was not required to show that his rights were materially affected or that he was prejudiced by the trial court's bias. Indeed, as cited above, established federal law does not require that Petitioner show he was prejudiced or that his rights were materially affected to succeed on his judicial bias claim. As the state court did not apply controlling federal law, this Court must review Petitioner's claim de novo. *See Malicoat v. Mullin,* 426 F.3d 1241, 1248 (10th Cir.2005); *Cargle v. Mullin,* 317 F.3d 1196, 1202 (10th Cir.2003) (deferential standard of review does not apply if state court employed the wrong legal standard in deciding the merits of the federal issue).

Even reviewing Petitioner's claim de novo, he has failed to demonstrate that his due process rights were violated as the result of an impartial or biased tribunal. Judge Turnbull served as an assistant district attorney in the Tulsa County District Attorney's office prior to becoming a district judge and while

Petitioner's case was pending, but he was not involved in the prosecution of Petitioner's case in any way. *See* Tr. Feb. 2, 1995 at 5. Nothing in the record indicates that Judge Turnbull was actually biased as a result of his previous employment.

Petitioner also argues that the fact that Judge Turnbull had a business relationship with Doug Horn, one of the prosecutors assigned to Petitioner's case, [4] and the fact that Judge Turnbull was represented by the district attorney's office in other litigation at the time of trial shows that the trial court was somehow biased. Courts have found no actual bias even where the trial court has a close personal relationship with the prosecutor or a key witness. See, *e.g.*, *Welch v. Simons*, 451 F.3d 675, 698–701 (10th Cir.2006) ("[T]he mere fact that the lead investigator, and consequently a key witness, in the case was the trial judge's son did not mean that the trial judge had a personal interest in the outcome of the case."); *Dyas v. Lockhart*, 771 F.2d 1144, 1146 (8th Cir.1985) (cited with approval by *Welch*, 451 F.3d at 700) (concluding that the judge who presided over criminal trial in which the prosecuting attorney was the judge's nephew, the two deputy prosecuting attorneys were the judge's brother and son, and the court reporter was the judge's wife, did not have a personal interest in the outcome of the trial). Nothing in the record indicates that the trial court was actually biased as a result of his business or legal relationships with individuals in the district attorney's office.

[4] The record undisputedly shows that a business relationship existed between Judge Turnbull and Mr. Horn. *See* Tr. Feb. 8, 1995 at 8. Petitioner attempts to bolster this fact with additional documentary evidence that he did not submit in state court. "While § 2254(e)(2) refers only to evidentiary hearings, it governs as well '[w]hen expansion of the record is used to achieve the same end as an evidentiary hearing.' " *Cargle v. Mullin*, 317 F.3d 1196, 1209 (10th Cir.2003) (quoting *Boyko v. Parke*, 259 F.3d 781, 790 (7th Cir.2001)). This court recognized in its Order denying Petitioner's request for an evidentiary hearing on Ground 1 (Dkt. # 72 at 4–8) that Petitioner failed "to develop the factual basis" of this claim in state court, a threshold determination that must be made pursuant to § 2254(e)(2). As a result, this court does not consider the additional evidence submitted to support this ground. *See Cargle*, 317 F.3d at 1209; *see also Cullen v. Pinholster*, 131 S.Ct. 1388, (2011) (holding that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits"). Petitioner argues that the state suppressed this evidence and mischaracterized the business relationship, and thus, Petitioner could not have developed the factual basis of this claim in state court. The court disagrees. As acknowledged by Petitioner's counsel at a hearing on Petitioner's motion to recuse, Judge Turnbull admitted, "yes, we are still business partners and we've turned our t-shirts over to a police officer hoping that he will be able to distribute them better than we have." Tr. Feb. 8, 1995 at 8. At the same hearing, Petitioner's counsel stated she had knowledge that the relationship was still ongoing. *See id.* Nothing in the record or in Petitioner's newly developed evidence indicates that Judge Turnbull's statement was anything less than true and entirely forthcoming. *See* Gordon W. Bulla Aff., Dkt # 25, Ex. 16, ¶¶ 3, 5 (Rick Phillips and his employee state that they did receive t-shirts from Turnbull which they took to the snack bar at the Tulsa County Courthouse for distribution).

***9** Petitioner also argues that an off the record statement made by Judge Turnbull to Fitzgerald's trial counsel that "he was having trouble getting the D.A. out of himself" shows that the trial court was not impartial. Petitioner's trial counsel at his first trial provided an affidavit stating that on July 12, 1995, when she presented an ex parte application for funds for expert witnesses to Judge Turnbull, he stated that he was not ready to rule yet, but if he had to rule on that date he would deny the request for funds for a neuropsychologist and a juvenile-onset diabetes expert. According to Petitioner's trial counsel, Judge Turnbull stated that he didn't think there was any excuse for what Petitioner had done. Judge Turnbull purportedly stated that he was "having trouble getting the D.A. out of himself" and that he's "hoping someday to become fair and impartial but he's not there yet." (Dkt. # 25, Exs.8–10). On August 31, 1995, when confronted with this statement at a hearing on Petitioner's second ex parte motion for funds to hire a juvenile-onset diabetes expert, Judge Turnbull stated, "[m]aybe you misunderstood me by saying that I said that I didn't believe in this type of defense. I don't believe that I ever said any such thing, nor that that is my feeling. I may have said that I'm fresh out of the prosecutors office which is true, because I am, and that I am trying my very best to be fair and impartial, which I am also trying to do." *See* Tr. Aug. 31, 1995 at 6–7. "It is true that a trial judge should never evince the attitude of an advocate." *Brinlee v.*

Crisp, 608 F.2d 839, 852 (10th Cir.1979) (citing *Gardner v. United States*, 283 F.2d 580, 581 (10th Cir.1960)). "However to sustain an allegation of bias by the trial judge as a ground for habeas relief a petitioner must factually demonstrate that during the trial the judge assumed an attitude which went further than an expression of his personal opinion and impressed the jury as more than an impartial observer." *Id.* at 852–53 (citing *Glucksman v. Biggs*, 398 F.Supp. 1343, 1350 (S.D.N.Y.1975)). While the trial court may have shared his personal opinion on this issue with counsel in an off the record conversation, he never went so far as to assume the role of an advocate in this situation or to in any way impress the jury as more than an impartial observer. This exchange does not demonstrate any bias on the part of the trial court which would warrant habeas relief. [5]

[5] Moreover, the OCCA found that "[t]he record suggests this exchange was in fact based on a misunderstanding. Nothing in subsequent proceedings indicates Judge Turnbull did not believe in Fitzgerald's defense...." *Fitzgerald I*, 972 P.2d at 1164. These findings of fact are entitled to a presumption of correctness. *See* 28 U.S.C. § 2254(e)(1). Petitioner has failed to rebut the findings of the state court by clear and convincing evidence. *Sumner v. Mata*, 449 U.S. 539, 550 (1981).

Petitioner also complains of a comment Judge Turnbull made, outside the hearing of the jury, during a discussion of evidence to be offered in the second stage of trial. The State had filed notice it would introduce an Indiana armed robbery conviction to support the aggravating circumstance that Petitioner had committed a prior violent felony. Tr. I Vol. 6 at 1058. However, the State failed to give notice that it also intended the Indiana armed robbery conviction to support the aggravating circumstance of continuing threat. *Id.* at 1059. Based on the resulting lack of notice, Petitioner argued that the State was precluded from offering the Indiana armed robbery conviction to support the aggravating circumstance of continuing threat. *Id.* at 1060. Judge Turnbull found in favor of Petitioner. *Id.* at 1061. While discussing the issue and his ruling, Judge Turnbull remarked that he believed the jury should have this information since it was the same crime Petitioner had committed in this case "with the same excuses" that he had used before. *Id.* Petitioner has not factually demonstrated that Judge Turnbull "assumed an attitude which went further than an expression of his personal opinion and impressed the jury as more than an impartial observer." *Brinlee*, 608 F.2d at 852–53.

***10** Petitioner also claims that several of Judge Turnbull's rulings demonstrated actual bias. Specifically, he points to the trial judge's alleged erroneous denial of Petitioner's request for funds to hire experts to assist with his defense, [6] failure to instruct on voluntary intoxication as a defense or as mitigation and instead instructed that no act can be deemed less criminal by reason of voluntary intoxication, and alleged failure to properly determine that Petitioner knowingly and intelligently waived his right to counsel. "Unfavorable judicial rulings do not in themselves call into question the impartiality of a judge." *United States v. Mendoza*, 468 F.3d 1256, 1262 (10th Cir.2006); *see also Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162, 1168 (10th Cir.1999) (stating in a civil action that "merely adverse rulings can almost never constitute grounds for disqualification") (citation omitted). Even where the trial court makes incorrect legal rulings, that, standing alone, is not enough to establish actual bias. *See Welch*, 451 F.3d at 698–701, *abrogated on other grounds by Huckerby v. Workman*, 580 F.3d 1171 (10th Cir.2009) (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994) (holding that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.")). Generally, unfavorable or incorrect legal rulings constitute the basis for appeal, not for a bias challenge. *Liteky*, 510 U.S. at 555. Even though Petitioner disagreed with a number of the judge's rulings and the OCCA agreed that some rulings were incorrect, those rulings did not display actual bias warranting habeas relief.

[6] Petitioner also argues that Judge Turnbull's concern with the burden on the State to rebut expert testimony presented by a petitioner connotes bias. In his denial of Petitioner's request for expert funds, Judge Turnbull stated, "[i]f I am mistaken then I'm perplexed, because the required presentation of these types of witnesses that might be helpful or useful to the defense in turn puts the State of Oklahoma in a position of having to rebut such testimony, this would be the beginning of a never ending road in my opinion." *See* Tr. Aug. 8, 1995 at 6–7. As will be discussed in depth in the court's discussion of Ground 2, it is appropriate for the trial court to consider the burden on the State when considering whether to grant funds to hire an expert under Ake. *See Rogers v. Gibson*, 173 F.3d

1278, 1286 (10th Cir.1999) (citing *United States v. Kennedy*, 64 F.3d 1465, 1473 (10th Cir.1995)).

Petitioner contends that the cumulation of the above outlined circumstances shows that Judge Turnbull, based on his experience and knowledge as a prosecutor, demonstrated a preconceived opinion that the judge did not believe in the valid defense and mitigation of voluntary intoxication combined with brain damage and poorly controlled diabetes. (Dkt. # 24 at 51–52). Even when considering Judge Turnbull's past experience as a prosecutor, his relationships with individuals in the district attorney's office, his comments to counsel, and his adverse legal rulings, Petitioner simply has not demonstrated that the trial court was in any way biased against him or his legal defenses.

Petitioner here claims that even if he has not demonstrated actual bias, he was denied due process because the trial judge should have recused based upon the mere appearance of bias or impropriety. Petitioner argues that Judge Turnbull's prior employment with the district attorney's office, his purported misrepresentations regarding his business venture with Mr. Horn, his representation by an assistant district attorney in another lawsuit at the time of Petitioner's trial,[7] and his consideration of the burden on the State if Petitioner was granted funds for an expert, all support a finding of an appearance of impropriety. (Dkt. # 24 at 49–50). The court has found that Judge Turnbull did not misrepresent his business relationship with Mr. Horn and that the trial court's consideration of the burden on the State does not support a finding of bias.

[7] Petitioner's trial began May 20, 1996. The federal civil rights suit was dismissed January 9, 1996. *See Mikus v. Turnbull*, Case No. 95–CV–293 (N.D.Okla. Jan. 9, 1996).

***11** The Tenth Circuit in *Welch* discussed the Supreme Court's position on the appearance of bias on the part of the trial judge in a criminal case:

> Unlike its firm stance on the constitutional impermissibility of a biased judge presiding over a criminal trial, the Supreme Court has not directly addressed a criminal case involving the appearance of bias on the part of the trial judge. To be sure, the Supreme Court has, on occasion and in dicta, suggested that something less than actual bias can result in a violation of due process. *E.g.*, *Taylor v. Hayes*, 418 U.S. 488, 501, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974) ("the inquiry must be not only whether there was actual bias on [the judge's] part, but also whether there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused") (internal quotation marks and citation omitted); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955) (noting that "our system of law has always endeavored to prevent even the probability of unfairness" and that this "stringent rule may sometimes bar trial by judges who have no actual bias"). Those references, however, appear to pertain to situations in which the circumstances are sufficient to give rise to a presumption or reasonable probability of bias. Thus, as the Third Circuit recently concluded, these cases cannot reasonably be read as "stand[ing] for the conclusion ... that a judge with an appearance of bias, without more, is required to recuse himself sua sponte under the Due Process Clause." *Johnson v. Carroll*, 369 F.3d 253, 260 (3d Cir.2004) (rejecting, in context of federal habeas proceedings, state prisoner's claim of bias on the part of trial judge); *see also Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1371 (7th Cir.1994) (en banc) (rejecting the notion that an appearance of bias on the part of a trial judge amounted to a due process violation); *see generally Bracy*, 520 U.S. at 904, 117 S.Ct. 1793 (noting that "most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard."). "Because the Supreme Court's case law has not held, not even in dicta, let alone 'clearly established,' that the mere appearance of bias on the part of a state trial judge, without more, violates the Due Process Clause," *Johnson*, 369 F.3d at 263. Welch cannot establish his entitlement to federal habeas relief under the standards outlined in § 2244(d)(1).

Welch, 451 F.3d at 700–01. In this case, "any biasing influence from the circumstances here was too remote and insubstantial to create a presumption [or even a reasonable likelihood] of bias." *See Id.* at 700 (quoting *Fero v. Kerby*, 39 F.3d 1462, 1480 (10th Cir.1994)). Even if there was the appearance of bias in this case, there is no clearly established Supreme Court case holding that the mere appearance of bias by the trial court violates the Due Process Clause.

***12** Petitioner has not established that he was deprived of an impartial tribunal in violation of his constitutional rights. Petitioner's request for habeas corpus relief on Ground 1 is denied.

II. Denial of expert assistance guaranteed by *Ake v. Oklahoma* (Ground 2)

In Ground 2, Petitioner claims he was denied the basic tools to present a defense to malice aforethought murder by the denial of expert assistance guaranteed by *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Dkt. # 24 at 52). Petitioner raised this claim in his first direct appeal. The OCCA determined that the trial court erred in denying Petitioner's request for expert funds, that the error was harmless as to the guilt or innocence stage of trial, but that the error was not harmless as to the sentencing stage. *See Fitzgerald I*, 972 P.2d at 1164-68. In its lengthy analysis, the OCCA ruled as follows:

> Fitzgerald claims in Proposition II that the trial court erred by denying Fitzgerald expert funds after a proper Ake showing, thus depriving him of the right to present a first-stage defense and the right to present a defense to the death penalty by way of mitigation. He claims in two subpropositions that the trial court's denial of funds to hire an expert on juvenile-onset diabetes and a neuropsychiatrist deprived him of the ability to defend against the capital charges. We determine the trial court abused its discretion in denying Fitzgerald funds for experts. While denial of the funds was error in both stages, the first stage error was harmless. The error was not harmless in second stage.
>
> Fitzgerald tirelessly and constantly requested that the State provide funds under *Ake v. Oklahoma* for a neuropsychologist and an expert on juvenile-onset diabetes. Fitzgerald had to apply to the trial court because he was defended by the Tulsa County Public Defender's Office rather than the Oklahoma Indigent Defense System, which handles such funding requests internally. Ake held that when an indigent defendant makes a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, he is entitled to experts, at the State's expense, who will assist in evaluation, preparation and presentation of the defense. This Court has extended the principles of Ake to any expert necessary for an adequate defense. In doing so, we have emphasized the necessity of providing each defendant with the "basic tools" for his defense. This comports with the Legislature's intent that indigent defendants be provided experts, and non-expert assistance, at State expense. In creating the Indigent Defense System, the Legislature has consistently provided that the Executive Director of that System shall approve expert witnesses, and non-expert assistance, when those services are necessary in a particular case. The Legislature has also provided that in counties where the population is over 200,000 expert witness compensation for indigent defendants shall be paid by the court fund. We are concerned here, not with the technicalities of who pays and what procedures for payment are followed, but with the clear intention that all defendants are entitled to necessary expert assistance when that constitutes a basic defense tool. By extending Ake, we have ensured that the Legislature's intent is preserved, and indigent defendants in all counties of Oklahoma have access to the basic tools necessary for an adequate defense.

***13** Applying the three-part test set forth in Ake, we balance: (1) Fitzgerald's private interest in the accuracy of the proceedings; (2) the State's interest affected by providing the assistance; and (3) the probable value of the procedural safeguards sought and the risk of inaccuracy in the proceedings without the requested assistance. We conclude that Fitzgerald's interest and the interest of accuracy in the proceedings outweigh the State's interest in not expending funds. The trial court apparently also came to this conclusion, as its repeated denials of Fitzgerald's request turn instead on whether Fitzgerald had made the required preliminary showing.

Fitzgerald claimed that the combination of his juvenile-onset diabetes, probable brain damage from his head injury, and drinking habits (including drinking before committing the crimes) affected his mental processes and deprived him of the ability to form the intent to kill necessary for malice murder. To qualify for expert assistance, a defendant must make "an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense...." We have held the threshold showing is met where a defendant shows need and that he will be prejudiced by the lack of expert assistance. Fitzgerald presented evidence to support his claims at four ex parte pretrial motions hearings; ex parte hearings were also held after the first stage and before second stage instructions were given. Each time, the trial court determined Fitzgerald had failed to make the preliminary showing necessary under Ake.

Over the course of these hearings, Fitzgerald presented: (1) evidence admitted in the preliminary hearing that he had been drinking and was under the influence of alcohol at the time of the crime; (2) medical evidence that he suffered from juvenile-onset diabetes and had received a gunshot wound to the head requiring surgery in

1985; (3) medical articles on the physical, psychological, and psychosocial effects of juvenile-onset diabetes; (4) information that the combination of alcohol and juvenile-onset diabetes could result in poor judgment, poor impulse control, and exaggerated emotional responses; (5) an affidavit detailing Fitzgerald's physical and psychological symptoms corresponding with symptoms discussed in the medical literature; (6) an affidavit including a neuropsychologist's general explanation of the symptoms which, occurring after a head wound, may signal brain injury, and a description of the neuropsychological tests necessary to determine the existence and extent of such an injury; (7) an affidavit from the then Deputy Chief of the Capital Trial Division, Oklahoma Indigent Defense System (OIDS), who believed that Fitzgerald would qualify for expert funds were he being defended by OIDS; (8) information about Fitzgerald's childhood and family life resulting from his diabetes; and (9) Dr. Taylor's current psychological evaluation noting Fitzgerald's head injury and diabetes, diagnosing him as depressed, alcoholic, with poorly regulated diabetes and probable neurological impairment, and strongly recommending neurological testing plus consultation with a juvenile-onset diabetes expert. This is far more than, as the State argues, an "underdeveloped claim;" Dr. Taylor's report, combined with the other evidence, certainly contained enough information to meet the threshold requirement for a preliminary showing.

***14** Fitzgerald argued to the trial court and claims on appeal that this information is sufficient to meet the Ake threshold. We agree. In applying for funds to hire experts, Fitzgerald is merely required to show his physical and psychological condition at the time of the crime will be a significant factor in his defense. Ake stated a defendant has a right to expert assistance "to help determine whether the insanity defense is viable," as well as to conduct an appropriate examination and assist a defendant in evaluating, preparing, and presenting his defense. The trial court consistently held that, to make a proper showing, Fitzgerald would have to demonstrate that he actually suffered from these conditions and problems at the time of the offense. To require such specificity in a preliminary showing renders the Ake categories of assistance pointless. If a defendant must be able to show initially that he actually suffered from a condition at the time of the offense, there is no need for expert assistance in determining whether the defense based on that condition is viable, nor will an expert be needed to evaluate the defendant and the defense.

Fitzgerald made a showing of need when he presented detailed evidence, including a psychologist's report, that he (1) suffered from a chronic, long-term physical condition with psychological components that, combined with alcohol, may have affected his judgment and behavior the night of the crimes, and assistance of a juvenile-onset diabetes expert was necessary to confirm and explain that connection and (2) had suffered a wound with probable organic brain damage which could have affected his judgment and behavior the night of the crimes, and which could only be determined through specific neuropsychological testing available in the community. We discuss his showing of prejudice with regard to each stage of the trial below.

We first address Fitzgerald's claim that he was deprived of the right to present a first-stage defense. Since his arrest, Fitzgerald has stated he did not intend to kill Russell. Fitzgerald claimed he needed the experts during the first stage of trial to effectively present his defense that voluntary intoxication, under his special circumstances, rendered him incapable of forming the intent necessary for malice murder. Voluntary intoxication is not a complete defense to malice murder but may be considered in determining whether a defendant had the intent to kill during the commission of the crime. Sufficient evidence must be introduced to show a defendant was so intoxicated his mental powers were overcome and he was unable to form criminal intent. Fitzgerald showed he was prejudiced by the trial court's ruling since the experts would have tied the evidence that he was intoxicated at the time of the crimes to evidence that he suffered from diabetes (and, possibly, organic brain damage). The experts would have explained to the jury how the combination of those two factors created a physical/mental condition in which Fitzgerald was unable to form the intent necessary for malice murder. This testimony would have strengthened Fitzgerald's claim that he did not intend to kill Russell and enabled him to rebut the State's very effective argument for malice murder, which was based in large part on the State's version of Fitzgerald's state of mind at the time. Fitzgerald showed both need and prejudice, and the trial court's denial of his request for expert funds was error.

***15** Having found error in the first stage proceedings, we must determine whether harmless error analysis applies. Fitzgerald relies on *Frederick v. State* for his claim that harmless error analysis cannot apply. In *Frederick* the defendant's only defense was insanity; the erroneous denial

> of an Ake expert completely denied him any ability to defend against the charges. This Court determined the error permeated the entire trial, since we could not look at any evidence presented on Frederick's behalf but would be forced to speculate on what it might have been. Under those narrow circumstances, we held the denial of an Ake expert was not subject to harmless error analysis. However, we agree with the Tenth and Eighth Circuits that, generally, "a right to which a defendant is not entitled absent some threshold showing [cannot] fairly be defined as basic to the structure of a constitutional trial." We hold that, absent the narrow circumstances presented by *Frederick*, harmless error analysis applies to Ake error.

Fitzgerald I, 972 P.2d at 1164–68 (footnotes omitted) (citations omitted).

In *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), the Supreme Court held that when a defendant demonstrates to the trial judge that his mental capacity "is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Nonetheless, a criminal defendant must offer "more than undeveloped assertions that the requested assistance would be beneficial...." *Caldwell v. Mississippi*, 472 U.S. 320, 323 n. 1 (1985). "General allegations supporting a request for court appointment of a psychiatric expert, without substantive supporting facts, and undeveloped assertions that psychiatric assistance would be beneficial to the defendant will not suffice to require the appointment of a psychiatrist to aid in the preparation of a criminal defense." *Liles v. Saffle*, 945 F.2d 333, 336 (10th Cir.1991).

The Supreme Court concluded that due process entitled Ake to the assistance of a psychiatrist because Ake's insanity defense was based upon fact rather than unsupported allegations, and the State's case relied heavily upon expert testimony concerning Ake's continuing criminal threat to society. Ake, 470 U.S. at 83. The Court noted that, "[W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense." *Id.* at 76. The Court further explained that indigent defendants must have "access to the raw materials integral to the building of an effective defense." *Id.* at 77. The question becomes whether, under the particular circumstances of the case, the expert's testimony "could legitimately be characterized as 'integral to the building of an effective defense,' i.e., one of the 'basic tools of an adequate defense.' " *Toles v. Gibson*, 269 F.3d 1167, 1176 (10th Cir.2001) (quoting Ake, 470 U.S. at 77).

***16** If this court determines that the missing expert's testimony was one of the "basic tools of an adequate defense," then Petitioner's due process rights were violated. The analysis does not end there, however. In *Toles*, the Tenth Circuit held that:

> The denial of expert assistance in violation of Ake is trial error subject to harmless error analysis under the standard set forth in *Kotteakos v. United States*, 328 U.S. 750, 776, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946) (asking whether the error "had substantial and injurious effect or influence in determining the jury's verdict"). *See Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir.1995). Under this standard, we can grant relief only if we believe the error substantially influenced the jury's decision, or if we are in grave doubt as to the harmlessness of the error. *See O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

Toles, 269 F.3d at 1176–77 (footnote omitted). Accordingly, this court will first determine whether Petitioner's due process rights were violated by the trial court's denial of funding for experts to assist in providing an adequate defense. If so, the harmless error question must then be decided.

In this case, Petitioner's trial counsel made multiple requests for funds to employ a neuropsychologist and/or a juvenile-onset diabetes expert. The trial court held at least two ex parte hearings on Petitioner's motion. Counsel for Petitioner argued that after talking with Dr. Bratcher, an endocrinologist, she realized that,

> [T]he combination of diabetes and alcohol is one that is almost, and can be deadly, but certainly will result in very poor judgment, very erratic behavior, inability for the brain to function properly. And after talking with her, and being educated somewhat on what diabetes and alcohol does, I realized that we will be presenting evidence, as will the State be presenting evidence in this case, that my client was extremely intoxicated during the commission of this homicide.

Tr. Aug. 31, 1995 at 2–3. The trial court repeatedly denied counsel's requests, on the basis that Petitioner had failed to demonstrate that Petitioner's identified conditions, diabetes, brain damage, and intoxication, affected Petitioner at the time of the offense.

The court finds that the evidence was sufficient to trigger the application of Ake. Petitioner provided substantive supportive facts, in the form of an affidavit from James T. Rowan, medical records, and a May 2, 1996 psychological evaluation prepared by G.J. Ann Taylor, Ph.D, to make his threshold showing of need. *See Liles*, 945 F.2d at 336. Petitioner presented sufficient evidence to suggest that his mental condition was likely to be a significant factor during both stages of trial. *See Castro v. Oklahoma*, 71 F.3d 1502, 1513–14 (10th Cir.1995). The court concludes that the State should have provided Fitzgerald with funds for expert witnesses, and the trial court's denial of funds for such witnesses constituted a violation of his due process rights. *Ake*, 470 U.S. at 87.

*17 Having found constitutional error, the court must now determine whether the error was harmless as to the guilt or innocence stage of trial. On direct review of Petitioner's convictions, the OCCA found that, as to the first stage proceeding, the Ake error was harmless. The state appellate court wrote that:

> Having concluded harmless error analysis applies, we must determine whether this error is harmless beyond a reasonable doubt. Although expert testimony would have helped Fitzgerald explain his state of mind and ability to form intent, it was not necessary to raise the issue of voluntary intoxication. A defendant may claim voluntary intoxication as a defense to malice murder where evidence of overwhelming intoxication is presented. No experts are needed to raise the defense. Although the evidence of intoxication was conflicting, Fitzgerald could have made his voluntary intoxication claim based on that evidence without relying on expert testimony. Thus, Fitzgerald was not denied his ability to defend against the malice murder charge. The trial court's erroneous denial of Ake experts in the first stage of trial was harmless beyond a reasonable doubt.

Fitzgerald I, 972 P.2d at 1168 (footnotes omitted).

In a direct review of a state court criminal judgment, a constitutional error is harmless only if a court finds that it was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). But in a collateral review of a state court's criminal judgment, this Court applies the "more forgiving standard" first articulated in *Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Fry v. Pliler*, 551 U.S. 112, 116 (2007). Under the *Brecht* standard, an error is deemed "harmless unless it 'had [a] substantial and injurious effect or influence in determining the jury's verdict.' " *Fry*, 551 U.S. at 116 (quoting *Brecht*, 507 U.S. at 631). A substantial and injurious effect exists if a "court finds itself in 'grave doubt' about the effect of the error on the jury's [sentencing decision]." *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir.2006) (internal citations omitted). In *Brecht*, the Supreme Court explained that "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Brecht*, 507 U.S. at 634 (quotations omitted). "However, when a court is 'in virtual equipoise as to the harmlessness of the error' ... the court should treat the error ... as if it affected the verdict...." *Locken v. Trammel*, 711 F.3d 1218, 1232 (10th Cir.2013) (quoting *Selsor v. Workman*, 644 F.3d 984, 1027 (10th Cir.2011) (quotations omitted)).

In this case, the court finds that the failure to provide funding for experts during the first stage proceeding did not have a substantial and injurious effect or influence in determining the jury's verdict. Petitioner argues that experts were needed during the first stage guilt or innocence proceeding to present his defense that his voluntary intoxication rendered him incapable of forming the intent necessary for malice murder. In deciding the harmless error question, the court first looks to Oklahoma law on the defense of voluntary intoxication. *See Toles*, 269 F.3d at 1177. Under Oklahoma law, "voluntary intoxication has long been recognized as a defense to the crime of First Degree Malice Murder." *Taylor v. State*, 998 P.2d 1225, 1230 (Okla.Crim.App.2000), ***abrogated on other grounds by*** *Malone v. State*, 168 P.3d 185, 197 (Okla.Crim.App.2007). "Voluntary intoxication instructions should be given when evidence has been introduced at trial

that is adequate to raise that defense, i.e., to establish a prima facie case of voluntary intoxication," as defined under Oklahoma law. *Malone*, 168 P.3d at 196. Under Oklahoma law, "[a] defense of voluntary intoxication requires that a defendant, first, be intoxicated and, second, be so utterly intoxicated, that his mental powers are overcome, rendering it impossible for a defendant to form the specific criminal intent or special mental element of the crime." *Jackson v. State*, 964 P.2d 875, 892 (Okla.Crim.App.1998). Notably, the OCCA has held that a defendant's "detailed account of the circumstances surrounding [a] murder defeats [a] claim to a voluntary intoxication defense." *Bland v. State*, 4 P.3d 702, 718 (Okla.Crim.App.2000); *Taylor*, 998 P.2d at 1230; *Turrentine v. State*, 965 P.2d 955, 969 (Okla.Crim.App.1998).

***18** The record in this case demonstrates that, although Petitioner presented evidence that he had consumed alcohol prior to committing the crimes for which he was convicted, Petitioner presented no evidence of overwhelming intoxication. Edward Chambers, the store clerk at the Git–N–Go located at 7494 East Admiral, testified that he did not smell alcohol of Petitioner's person, *see* Tr. I Vol. 4 at 655, and that Petitioner "was in substantial control of what he was doing." *Id.* at 657. John Sartain, the store clerk at the Git–N–Go located at 903 North Yale, testified that nothing about the robber made him think the man had been drinking. *Id.* at 754. He did not notice any unusual odor or slurred speech. *Id.* at 753–54. In addition, the surveillance videos from the three convenience stores show that Petitioner did not exhibit signs of overwhelming intoxication. *See* State Tr. Exs. 1, 52, 76. He walked with a steady gait and otherwise moved without displaying signs of impairment. His behavior, including the fact that he wore a bandana to conceal his face and did not waste time while committing the robberies, reflected that his thought processes were not impaired. The evidence recited above demonstrates that Petitioner's mental powers were not so overcome by intoxication that he was unable to form the specific intent to kill Mr. Russell. *Jackson*, 964 P.2d at 892.

Furthermore, on July 19, 1994, or only three days after the shooting and shortly after being taken into custody in Bates County, Missouri, Petitioner gave a detailed confession to law enforcement officers. The interview was tape recorded. The transcription of the recording was presented by the State at trial. *See* State Tr. Ex. 92. The transcript reads, in pertinent part, as follows:

> ... if I remember right, when I walked in, I had the weapon up. He wasn't close to the register, he was back towards the back, like the coolers, and I raised the weapon up over my head so he could see it, and I told him that I wanted just the bills, paper money only, something like that. I don't remember exactly what I said, but ... evidently I was standing too close to the counter, 'cause he reached across. He was by the register. He reached across and got a hold of the barrel of the gun and actually snagged it all the way out of my hand. And this hit ... this had a fold-up stock, plastic fiberglass type stock with a pistol grip on it. So he got a hold of it pretty good when he snagged it. Um, he backed up, I don't know, six, eight feet, pointed the weapon at me and pulled the trigger several times, but I had the safety on, and he didn't ... obviously didn't understand the weapon, 'cause he was trying to ... when I come over the counter, he was looking at it, trying to figure out how to shut the safety off. And I crowded him real, real quick, got on him real fast and got the gun back away from him. And there was like a pushing match. He stayed in close. He didn't get ... he didn't give me no distance. And it's like the next thing I know, I'm out the door. Whether I was going out on my own or whether he pushed me, I really don't know.
>
> ***19** Um, I had it in my mind that I wasn't gonna leave without the money. So I, I turned the safety off, and this all happened like mega-seconds. I don't think it ... I don't think there was four seconds involved in this whole scene, five at the most. I, I fired a round through the door kinda towards the ceiling, and ... to, to break the glass. And I remember reaching back in, and he kinda rushed at, at me, I'm thinking. I don't remember to be honest. And I thought fuck the money, it's ... give him a good scare. And I, I figured out later that altogether, I, I fired thirteen rounds, because there was a thirty-round clip in it, and it had like one in the chamber and twenty-nine in the clip, and I had seventeen rounds left. So that means there was thirteen fired.
>
> Um, I kinda remember hitting something on the counter, and I seen him dive behind the counter. I mighta hit him at that point, I don't know, but he went down. And it was about the point that he went down that I cut out. I don't even know how ... I didn't even know that I hit him to be honest with you. I was, I was only trying to just scare him.

See State Tr. Ex. 92 at 1–2. The transcript reflects that Petitioner was able to recall details of the shooting, thereby demonstrating that he was not so intoxicated he could not later recount the events surrounding the murder.

In sum, the evidence presented during the first stage of trial did not support a defense of voluntary intoxication. In fact,

as discussed in more detail below, Petitioner withdrew his request for a voluntary intoxication instruction and stated during his closing argument that alcohol was not the cause of the murder. *See* Tr. I Vol. 6 at 998, 1032. Therefore, upon review of the record, the court is convinced that the lack of expert witnesses during the guilt or innocence stage did not have a substantial and injurious impact on the jury's decision to find Petitioner guilty of First Degree Murder. As a result, the trial court's error in failing to provide funding for experts was harmless. Petitioner's request for habeas corpus relief on Ground 2 shall be denied.

III. Trial court's failure to properly instruct jury on voluntary intoxication (Ground 3)

In Ground 3, Petitioner argues that the trial court by instruction relieved the State of the burden of proof on the element of intent in violation of his constitutional rights. Petitioner contends that in the first stage of his trial, the trial court should have instructed the jury on voluntary intoxication, and that the trial court erred by instructing the jury that voluntary intoxication did not render a person's actions less criminal. Petitioner argues that the evidence presented at trial raised a reasonable doubt about his ability to form the specific intent to commit first degree murder as a result of his drinking that night, combined with his diabetes and possible residual brain damage from the gunshot wound to his head. At trial, Petitioner withdrew his request for the voluntary intoxication instruction due to fact that he had been deprived of expert assistance to assist with linking his alcohol consumption combined with his diabetes and brain damage with his ability to form the requisite intent. The State requested an instruction that intoxication was not a defense to the crime (Instruction No. 13),[8] and the trial court agreed, stating it felt this instruction was proper given the evidence of intoxication presented. *See* Tr. I Vol. 6 at 999–1008.

[8] Instruction No. 13 stated:

> You are instructed that the laws of the State of Oklahoma provide in pertinent part: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such a condition."

(O.R. Vol. III at 472)

*20 As to these allegations, the OCCA held, "[i]n light of the conflicting evidence presented regarding Fitzgerald's level of intoxication and the amount of detail he recalled in each statement to police, this decision was not clearly an abuse of discretion." *Fitzgerald I*, 972 P.2d at 1173. In so deciding, the OCCA described the following evidence:

> At trial, the two surviving robbery victims testified Fitzgerald did not appear to be drunk; one said Fitzgerald might have been intoxicated but appeared to know what he was doing. Family and friends with Fitzgerald that night, testifying for the State, variously said he had one beer and was not intoxicated, was slightly drunk, obviously drunk, and pretty drunk. In Fitzgerald's statements to police, admitted at trial, he said he had been drinking tequila and beer all night, was very intoxicated, did not remember a lot of details about the crimes, and had not intended to hurt Russell.

Fitzgerald I, 972 P.2d at 1173–74.

"There is no Supreme Court precedent establishing a constitutional right to instructions regarding the defendant's intoxication at the time of the crime." *Spears v. Mullin*, 343 F.3d 1215, 1244–45 (10th Cir.2003) (citing *Montana v. Egelhoff*, 518 U.S. 37, 39–40, 43, 51, 56, 116 (1996) (holding that a Montana statute precluding consideration of voluntary intoxication in determining existence of a mental state that is an element of the criminal offense does not violate the Due Process Clause)). Under Oklahoma law, however, juries may consider voluntary intoxication to determine if a defendant had the intent to commit first degree murder. *See, e.g.*, *Bland v. State*, 4 P.3d 702, 715 (Okla.Crim.App.2000); *Lamb v. State*, 767 P.2d 887, 889–90 (Okla.Crim.App.1988). "[A] defense of voluntary intoxication requires that a defendant, first, be intoxicated and, second, be so utterly intoxicated, that his mental powers are overcome, rendering it impossible for a defendant to form the specific criminal intent or special mental element of the crime." *Toles*, 269 F.3d at 1177 (quoting *Jackson v. State*, 964 P.2d 875, 892 (Okla.Crim.App.1998)). Further, under Oklahoma law, once the trial court makes the legal determination that the evidence is insufficient to support an instruction on the defense of intoxication, it is "within the discretion of the trial court to merely reject an instruction on the alleged defense or to reject the instruction and advise the jury that pertinent state law provides that intoxication is not

a defense to guilt." *Crawford v. State*, 840 P.2d 627, 638-39 (Okla.Crim.App.1992), *abrogated on other grounds by Malone v. State*, 168 P.3d 185 (Okla.Crim.App.2007).

On federal habeas review, the court reviews the alleged error in failing to instruct on voluntary intoxication in the context of the entire trial, only for the denial of fundamental fairness and due process. *Spears*, 343 F.3d at 1244 (citing *Henderson v. Kibbe*, 431 U.S. 145, 156-57 (1977); *Foster v. Ward*, 182 F.3d 1177, 1193-94 (10th Cir.1999)).

***21** Upon review of the record, neither the trial court's failure to give a voluntary intoxication instruction nor the trial court's instruction that intoxication did not constitute a defense to guilt rendered Petitioner's trial fundamentally unfair. As the OCCA noted, the evidence of Petitioner's intoxication was conflicting. Petitioner's statements to the police recounting the details of the murder further belie his claim of voluntary intoxication. *See Spears*, 343 F.3d at 1244 (citing *Ivles*, 269 F.3d at 1171). No evidence established that his judgment was so impaired at the time of the murder that it was impossible for him to form malice aforethought. Accordingly, the OCCA's determination was not unreasonable. *See* 28 U.S.C. § 2254(d)(1).

Petitioner also argues that the giving of Instruction No. 13, that intoxication did not constitute a defense to guilt, relieved the State of the burden of proof beyond a reasonable doubt on the critical question of Petitioner's state of mind. Petitioner argues that Instruction No. 13 shifted the burden of proof as to his mental state onto him and created a conclusive presumption of intent in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979) (invalidating the instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," because jury instruction unconstitutionally shifted the burden of proving intent from the prosecution to defendants), and *In re Winship*, 397 U.S. 358, 364 (1970) (state must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the accused] is charged."). Under *Sandstrom*, the test for unconstitutionality is whether any "reasonable juror could have given the presumption conclusive or persuasion-shifting effect." *Sandstrom*, 442 U.S. at 519. Petitioner does not explain how Instruction No. 13 could be understood by reasonable jurors to require them to find Petitioner intended to kill, because they were prevented from considering his intoxication at the time of the offense. There is no mention of any "presumption" of intent in Instruction No. 13; in fact, there is no mention of intent. *See United States v. Treeken*, 803 F.2d 1085, 1092 (10th Cir.1986) (declining to invalidate instruction under *Sandstrom* where instruction suggested that the jury "may infer" or "may consider" certain evidence rather than speaking of "presumptions"). To the contrary, at no point during Petitioner's trial did he argue that he could not form the intent to commit murder due to his intoxication. In fact, in one of Petitioner's taped statements to the police, which was played and transcribed for the jury, he said, "I'm not blaming the alcohol...." *See* State Tr. Ex. 93 at 8. Petitioner also claimed in his statements to the police that he only intended to scare the victim and did not intend to hurt the victim. *See* State Tr. Exs. 92 and 93. Likewise, Petitioner argued in closing arguments, "Guilt of first degree murder in the commission of a felony, definitely I am. With malice aforethought? No." *See* Tr. I Vol. 6 at 1033. Instruction No. 13 in no way created a presumption of intent nor did it prohibit the jury from considering Petitioner's evidence (other than evidence of intoxication) and arguments that he did not intend to kill. The trial court's instructions did not violate *Sandstrom* or *Winship*. Petitioner has not established that the OCCA's decision regarding the intoxication instructions was contrary to, or an unreasonable application of, established federal law. Habeas relief on Ground 3 is denied.

IV. Trial court's failure to ensure knowing and intelligent waiver of right to counsel (Ground 4)

***22** In Ground 4, Petitioner claims that he was denied assistance of counsel because the trial court erred by accepting his waiver of the constitutional right to counsel when there was no determination of competency and the waiver was not knowingly and intelligently made. Respondent argues that the OCCA's determination that Petitioner's waiver of his right to counsel was knowing and intelligent is not contrary to, or an unreasonable application of, established Supreme Court law.

Petitioner was represented by appointed counsel throughout the preliminary proceedings. Petitioner filed a motion to proceed pro se, O.R. Vol. II at 224–26, and the trial court conducted a hearing on Petitioner's motion on April 18, 1996. Petitioner's trial began May 20, 1996.

Petitioner raised this issue in his first direct appeal. The OCCA rejected Petitioner's claim on the merits finding that the circumstances and evidence did not raise a doubt about Petitioner's competency sufficient to require a separate competency proceeding and that Petitioner's waiver of his right to counsel was knowingly and intelligently made. *Fitzgerald I*, 972 P.2d at 1162–63.

A defendant has a Sixth Amendment right to self-representation. See *Faretta v. California*, 422 U.S. 806, 819, 821 (1975). Because the right to counsel is also guaranteed by the Sixth Amendment, however, a defendant may waive the right to counsel and proceed at trial pro se "only if the waiver is knowing, intelligent, and voluntary." *Maynard v. Boone*, 468 F.3d 665, 676 (10th Cir.2006) (citing *Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *Faretta*, 422 U.S. at 835). The validity of such a waiver thus contains two distinct inquiries. *Id.* (citing *Godinez v. Moran*, 509 U.S. 389, 402 n. 13 (1993)). The court must first ensure that the defendant is competent to waive counsel. *Id.* It must then determine that the waiver is knowing and voluntary. *Id.*

At the April 18, 1996, hearing on Petitioner's motion to proceed pro se, the trial court explained Petitioner's Sixth Amendment rights to counsel and to represent himself. Tr. Apr. 18, 1996 at 3. The trial court explained the duties of an attorney at trial. *Id.* at 3–4. The trial court inquired whether Petitioner had been forced or coerced into making this decision and Petitioner replied that he made this decision "[o]ut of my own free will, yes, sir." *Id.* at 4. The trial court questioned Petitioner extensively to determine whether he was dissatisfied with his attorney's representation and whether he understood the consequences of his decision. *Id.* at 4, 9. Petitioner said he and his attorney did not agree on his defense, but stated he was satisfied with her qualifications and experience. *Id.* at 6, 9. He said self-representation was his right as an American citizen and indicated he preferred to take control of his case since he would have to live with the outcome. *Id.* at 4–5. The trial court advised Petitioner of the nature of the charges, the offenses charged, and the range of punishment possible for each offense. *Id.* at 7–8. Trial counsel confirmed she had explained Petitioner's Sixth Amendment rights to him and advised him against proceeding pro se. *Id.* at 9–10. The trial court found Petitioner was "in control of your faculties, that you understand what's going on, that you understand the conversations, the meaning and the consequences of conversations that we're having." *Id.* at 10. At no point in the proceedings did Petitioner's counsel raise any concerns about Petitioner's competency to waive his right to counsel. *See id.* at 9–10, 25. The trial court repeatedly advised Petitioner against self-representation, pointing out Petitioner did not know what he was doing, that this was a bad decision, and that Petitioner could get the death penalty because he decided to proceed pro se. *Id.* at 10, 14, 16. In subsequent motion proceedings, the trial court explained court procedures and gave Petitioner a comprehensive written outline of the trial structure, which included the court's voir dire questions on the death penalty and indicated when Petitioner would have the opportunity to argue, present evidence, and make motions and objections to the court. Tr. May 13, 1996 at 2 (motion hearing). Throughout the April 18 hearing and later proceedings, the trial court stated that, if Petitioner changed his mind, standby counsel would be re-appointed to represent him, even if trial had begun, and urged Petitioner to reconsider. Tr. Apr. 18, 1996 at 19; Tr. May 10, 1996 at 12–13; Tr. May 13, 1996 at 8–9 (motion hearing); Tr. I Vol. 1 at 2. Despite the trial judge's admonishments, Petitioner insisted he wanted to represent himself. Tr. May 10, 1996 at 12–13; Tr. May 13, 1996 at 8–9 (motion hearing); Tr. I Vol. 1 at 2.

***23** Petitioner argues that his waiver of counsel was invalid because (1) the trial court failed to conduct a hearing to determine his competency to waive counsel, and (2) his waiver was not knowing and intelligent. The court shall address each of these arguments.

A. Competency

Petitioner raises a procedural competency claim. He claims the trial court should have conducted a separate hearing to determine competency because he had presented information raising a doubt about his competency to waive counsel.

The Supreme Court has stated "that a court is [not] required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his right to counsel. As in any criminal case, a competency determination is necessary only when a court has reason to doubt the defendant's competence." *Godinez*, 509 U.S. at 401 n. 13 (citing *Drope v. Missouri*, 420 U.S. 162, 180–81 (1975); *Pate v. Robinson*, 383 U.S. 375, 385 (1966)). To obtain habeas relief on his procedural competency claim, Petitioner must show that the trial court failed to give proper weight to the information suggesting incompetence which came to light during the proceedings. *McGregor v. Gibson*, 248 F.3d 946, 954–55 (10th Cir.2001) (citing *Drope*, 420 U.S. at 179).

The standard of competency to waive the right to counsel is the same as the standard of competency to stand trial. *Godinez*, 509 U.S. at 399; see also *United States v. DeShazer*, 554 F.3d 1281, 1287–88 (10th Cir.2009). This standard considers whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him." *Godinez*, 509

U.S. at 396 (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

The Supreme Court in *Drope* discussed the factors that should be considered in determining whether there was sufficient doubt so that the trial court was required to make a competency determination:

> [E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated. That they are difficult to evaluate is suggested by the varying opinions trained psychiatrists can entertain on the same facts.

Drope, 420 U.S. at 180; *see also McGregor v. Gibson*, 248 F.3d 946, 954–55 (10th Cir.2001) (discussing factors). Likewise, the Court noted, "Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with the closest contact with the defendant, is unquestionably a factor which should be considered." *Drope*, 420 U.S. at 178 (citations and quotation omitted); *see also Maynard v. Boone*, 468 F.3d 665, 676 (10th Cir.2006) (considering the fact that counsel at waiver hearing "did not raise the question of competency to the trial court, or object to the hearing because of Maynard's mental state"); *Barnett v. Hargett*, 174 F.3d 1128, 1135–36 (10th Cir.1999) (finding petitioner established bona fide doubt based in part on expressed belief of counsel at sentencing that petitioner was not competent).

***24** In *Walker v. Attorney General for State of Oklahoma*, 167 F.3d 1339 (10th Cir.1999), the Tenth Circuit rejected the petitioner's request for habeas corpus relief on his procedural competency claim because it determined that there was no bona fide doubt that the petitioner was competent to stand trial. In that case, although a competency hearing was held, the petitioner's competency was determined under a constitutionally impermissible standard of proof—the court considered this analogous to a situation where no hearing was held. *Id.* at 1345. The appellate court considered the evidence produced at Walker's competency hearing which included the testimony and the report of a psychiatrist, the testimony of Walker's attorney, as well as testimony from an attorney who represented Walker in another murder prosecution during approximately the same time period, and the prosecutor. *Id.* at 1346. The court found as follows:

> Mr. Walker's trial counsel also testified at the competency hearing. He stated that he had represented thousands of criminal defendants and had in other cases objected to going forward with a trial based on his belief that the defendant might not be competent. Although he further testified that Mr. Walker's moods varied and that at times he felt Mr. Walker did not understand clearly what was going on, he admitted he had not raised Mr. Walker's competency at trial. Indeed, he put Mr. Walker on the stand. The attorney who represented Mr. Walker in the other, contemporaneous criminal proceeding testified that he too experienced times during his representation of Mr. Walker when Mr. Walker did not appear to comprehend what was going on. Nonetheless, that attorney did not ask for a jury trial on Mr. Walker's competence or file an objection to going to trial based on that basis. The attorney also testified that it would have been his obligation to bring to the attention of the court any information indicating Mr. Walker was not competent to stand trial, and that he believed the issue in his trial to be insanity rather than competence. Finally, the judge observed that he had tried the case and that he had noticed nothing at the time to raise a concern about Mr. Walker's competency.
>
> We have carefully reviewed the evidence pertaining to Mr. Walker's competency at the time of his trial, including the transcript of his trial testimony. This record sets out a lamentable and grievous life history. It is undisputed that Mr. Walker was brutalized physically, emotionally, and sexually by his parents. His medical records reveal a history of serious mental disease that was apparently difficult to diagnose and to treat effectively. Nonetheless, the experts who examined the evidence determined that Mr. Walker was competent to stand trial and we have found nothing in the record to the contrary. The evidence, deplorable as it is, simply does not raise a bona fide doubt as to Mr. Walker's

competency at the time of his trial. Accordingly, he cannot prevail on his procedural competency claim.

*25 *Id.* at 1346–47.

Likewise, the Tenth Circuit, in Valdez v. Ward, 219 F.3d 1222 (10th Cir.2000), rejected the petitioner's request for habeas corpus relief on his procedural competency claim because it determined that there was no bona fide doubt that the petitioner was competent to stand trial. *Id.* at 1241. In that case, the petitioner argued that the trial court erred in failing to suspend trial proceedings and re-evaluate his competency in violation of his procedural due process rights. *Id.* at 1239. In rejecting the procedural competency claim, the court noted that despite evidence that the petitioner suffered from paranoid delusions, none of the experts at trial testified that the petitioner was incompetent to stand trial. *Id.* at 1241. In addition, the Tenth Circuit considered the fact that there was no evidence in the record that the petitioner acted irrationally or was disruptive during any of the proceedings against him. *Id.* The court found that "our review of Mr. Valdez's own testimony convinces us he was competent at the time of trial. His 'behavior on the stand was neither irrational nor unusual. His testimony was responsive to the questions asked, logical, and coherent.' " *Id.* (quoting Foster v. Ward, 182 F.3d 1177, 1191 (10th Cir.1999)).

Petitioner claims the trial court should have conducted a separate hearing to determine competency because he had presented information to the trial court raising a doubt about his competency to waive counsel. Petitioner refers to the information submitted in support of his requests for expert funds which included: evidence that he suffered from juvenile-onset diabetes, O.R. Vol. III at 379–81; a medical article discussing some physical symptoms associated with juvenile-onset diabetes and the effects the disease may have on physical and psychosocial development, as well as evidence describing the effect of alcohol on a person with this disease, O.R. Vol. III at 385–391; evidence that Petitioner suffered from some of the physical effects and psychosocial problems commonly associated with juvenile-onset diabetes, O.R. Vol. III at 382–84; evidence he had received a gunshot wound to the head requiring surgery, O.R. Vol. III at 392–393; and evidence that he had been drinking the night of the murder, O.R. Vol. III at 384. This information was not presented to support a suggestion that Petitioner was incompetent to stand trial or waive his right to counsel, rather it was presented to show that Petitioner required expert assistance to present a first-stage defense to malice murder and to present mitigating evidence.

As stated above, the trial court found Petitioner to be in control of his faculties and to understand the nature and consequences of the proceeding. Tr. Apr. 18, 1996 at 10. As in *Walker,* Petitioner's counsel never raised any concerns about Petitioner's competency to waive his right to counsel, despite indicating that she had discussed his waiver with him and being given the opportunity to voice any concerns. *See* Tr. Apr. 18, 1996 at 9–10, 25; see also *Walker,* 167 F.3d at 1346–47 (despite obligation to bring to the attention of the court any information that petitioner was not competent, counsel did not do so believing issue at trial was insanity not incompetence). Nothing in the record suggests Petitioner appeared incompetent or acted in an irrational, disruptive, or unusual manner during the hearing on his motion to proceed pro se. His "behavior on the stand was neither irrational nor unusual. His testimony was responsive to the questions asked, logical, and coherent." *Valdez,* 219 F.3d at 1241 (citation omitted). While there was evidence that Petitioner suffered from some physical and psychosocial problems, no medical opinions or any other evidence were introduced at any time in the proceedings that called into question Petitioner's competency. Cf. *Walker,* 167 F.3d at 1346–47 (while there was evidence of severe mental illness and insanity defense, court found that evidence did not raise bona fide doubt as to competency); *Valdez,* 219 F.3d at 1241 (despite evidence that the petitioner suffered from paranoid delusions, no expert testified that petitioner was incompetent).

*26 The OCCA held, "[t]his Court cannot find that the information about Fitzgerald's diabetes and head injury alone raised a doubt about his competency sufficient to require a separate competency proceeding." *Fitzgerald I,* 972 P.2d at 1163. This court agrees. The information before the trial court at the time of Petitioner's waiver of his right to counsel did not give the trial court sufficient reason to doubt Petitioner's competence. *See Godinez,* 509 U.S. at 401 n. 13. Petitioner has not shown that the trial court failed to give proper weight to any information suggesting incompetence which may have come to light during the proceedings. *See McGregor,* 248 F.3d at 955. The OCCA's determination was not an unreasonable application of established federal law. *See* 28 U.S.C. § 2254(d)(1). Petitioner cannot succeed on his procedural competency claim.

B. Knowing, intelligent, and voluntary waiver

The second prong of this analysis—whether the waiver is knowing and voluntary—hinges on the Petitioner's understanding of the significance and consequences of his

decision, as well as whether the decision was coerced. *Maynard*, 468 F.3d at 677. Thus, the Tenth Circuit has said that "[i]t is 'ideal' when the trial judge conducts a 'thorough and comprehensive formal inquiry' including topics such as the nature of the charges, the range of punishment, possible defenses, and a disclosure of risks involved in representing oneself pro se." *United States v. Turner*, 287 F.3d 980, 983 (10th Cir.2002) (quoting *United States v. Willie*, 941 F.2d 1384, 1388 (10th Cir.1991)). However, "[n]o precise litany is prescribed." *United States v. Padilla*, 819 F.2d 952, 959 (10th Cir.1987). Additionally, a defendant's technical legal knowledge is not relevant to an assessment of his knowing exercise of the right to waive counsel. *Faretta*, 422 U.S. at 836. Nevertheless, failure to conduct this inquiry does not necessarily indicate a constitutional violation if the surrounding facts and circumstances indicate that the defendant "understood his right to counsel and the difficulties of pro se representation." *Willie*, 941 F.2d at 1389. Even if a defendant "conduct [s] his own defense ultimately to his own detriment, his choice must be honored...." *Faretta*, 422 U.S. at 834.

"In this context, knowing and intelligent means only that he was reasonably informed by the court of the hazards of self-representation and had sufficient understanding of those hazards. The trial court's obligation is to impart enough information to the defendant so that the defendant can make a fully informed choice." *Turner*, 287 F.3d at 984 (determining that the district court provided defendant enough information for knowing and intelligent waiver where "[t]he court informed Mr. Turner that he had a right to competent counsel to represent him, advised Mr. Turner of the charges against him, and explained to Mr. Turner that he would be required to follow court rules without any assistance from the judge."). In determining whether a defendant knowingly and intelligently waived his right to counsel, "we must consider the total circumstances of the individual case including background, experience and the conduct of the accused person." *Padilla*, 819 F.2d at 958 (internal quotation omitted).

***27** Here, the trial court explained Petitioner's Sixth Amendment rights to counsel and to represent himself. Tr. Apr. 18, 1996 at 3. The trial court also explained the duties of an attorney at trial. *Id.* at 3–4. The trial court inquired whether Petitioner had been forced or coerced into making this decision, and Petitioner replied that he made the decision to waive counsel out of his own free will. *Id.* at 4. The trial court advised Petitioner of the nature of the charges, the offenses charged, and the range of punishment possible for each offense. *Id.* at 7–8. The trial court repeatedly advised Petitioner against self-representation, pointing out that Petitioner did not know what he was doing, that this was a bad decision, and the potential consequences of proceeding pro se. *Id.* at 10, 14, 16. The trial court gave Petitioner the opportunity to reconsider his decision on repeated occasions. *Id.* at 19; Tr. May 10, 1996 at 12–13; Tr. May 13, 1996 at 8–9 (motion hearing); Tr. I Vol. 1 at 2. [9]

9 The facts of this case are easily distinguished from those relied upon by Petitioner. In *Taylor* and *Padilla*, the trial court never advised the defendant of "the dangers and disadvantages of self-representation." *United States v. Taylor*, 113 F.3d 1136, 1141 (10th Cir.1997) (comparing Taylor's case with *Padilla*). In *Taylor*, the trial court never asked the defendant his reasons for proceeding pro se or whether he actually understood the consequences of his decision. *Id.* In *Taylor* and *Padilla*, the trial court did not inform the defendant of the nature of the charges against him, the statutory offenses included, or the possible range of punishment or what would be expected of him in the courtroom. *Id.*; *Padilla*, 819 F.2d at 958.

The OCCA found as follows:

> Fitzgerald also gave a knowing, intelligent, and voluntary waiver. He denied his decision was coerced during the April 18, 1996, hearing and does not suggest coercion on appeal. Fitzgerald had several prior convictions and was familiar with the criminal justice system. He was informed of the nature of the charges, offenses, and range of punishment and repeatedly advised that this was a bad decision. Over the course of several hearings, the trial court explained courtroom procedure and the role of each party, including Fitzgerald and standby counsel. Offered several opportunities to reconsider his decision, Fitzgerald clearly and unequivocally stated his intention to proceed pro se. The record

> shows Fitzgerald's waiver of his right to counsel was knowing and voluntary.

Fitzgerald I, 972 P.2d at 1163.

This court finds that the OCCA's determination that Petitioner's waiver was knowing and intelligent was not an unreasonable application of established federal law. 28 U.S.C. § 2254(d)(1). While the trial court did not specifically discuss any defenses Petitioner might have or mitigation, the record indicates that Petitioner was reasonably informed by the trial court of the hazards of self-representation and had sufficient understanding of those hazards. The trial court imparted enough information to Petitioner so that he could make a fully informed choice. *See Turner*, 287 F.3d at 983-84. Accordingly, Petitioner is denied habeas corpus relief on Ground 4.

V. Trial court's failure to "life qualify" the jury (Ground 5)

In Ground 5, Petitioner contends that, pursuant to the Supreme Court's holding in *Morgan v. Illinois*, 504 U.S. 719 (1992), he was unconstitutionally denied a right to "life qualify" his guilt-stage jury. Petitioner raised this issue in his first direct appeal. The OCCA determined that there was error under *Morgan*, and under a cumulative error review, in combination with the Ake error and instructional error vacated Petitioner's death sentence and remanded for a new sentencing trial. *Fitzgerald I*, 972 P.2d at 1170-71. Petitioner argues that the OCCA's decision was an unreasonable application of *Morgan* because the error infected his jury in the guilt-stage as well as the sentencing stage, and that he should have been granted an entirely new trial, not merely a new sentencing proceeding.

***28** In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court determined that it was proper to ask prospective jurors about their views concerning the death penalty during voir dire in capital cases. Such "death qualifying" questions would ensure the impartiality of jurors by allowing the state to properly exercise challenges for cause against potential jurors unwilling to return a capital sentence. *See id.* at 520-23. In *Morgan*, defense counsel was given the parallel ability to identify those jurors who would always impose the death penalty. *Morgan* held that "on voir dire the court must, on defendant's request, inquire into the prospective jurors' views on capital punishment," because a prospective juror who would always impose the death penalty must not be empaneled. *Morgan*, 504 U.S. at 726. "A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror." *Id.* at 729. Voir dire must adequately identify such unqualified jurors, and to this end, certain inquiries must be made in capital cases. *Id.* at 729-31. "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.* at 729.

"The trial court retains great latitude in deciding what questions should be asked on voir dire." *Mu'Min v. Virginia*, 500 U.S. 415, 424 (1991). Of course, when reviewing a state court's conduct of voir dire, a federal habeas court's "authority is limited to enforcing the commands of the United States Constitution." *Id.* at 422. A state court's refusal to pose "constitutionally compelled" questions merits habeas relief. *Id.* at 424-26. To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair. *See Murphy v. Florida*, 421 U.S. 794, 799 (1975). The trial court's duty to "life qualify" a jury is "constitutionally compelled." *See Morgan*, 504 U.S. at 733-34, 739 ("Because the 'inadequacy of voir dire' leads us to doubt that petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand.").

The issue here is whether the OCCA's determination that failure to "life qualify" the jury contributed to an accumulation of error which necessitated reversal of the second stage of the proceedings, but not the first stage of the proceedings, was an unreasonable application of established federal law. This Court determines it was not. The Supreme Court in the *Morgan* decision explained that "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do" and mandated that a death sentence imposed in a case where such a juror was impaneled cannot stand. *Morgan*, 504 U.S. at 729. As such, the failure to "life qualify" the jury, after a capital defendant's request to do so, renders the sentencing stage fundamentally unfair, because of the risk that a juror was impaneled who would automatically impose the death penalty, and thus fail to properly consider the evidence

of aggravating and mitigating circumstances. *See id.* at 735. *Morgan* does not in any way indicate that the failure to "life qualify" the jury renders the guilt stage fundamentally unfair. *Id.* at 739 n. 11. Thus, the OCCA's determination was not an unreasonable application of *Morgan*. *See* 28 U.S.C. § 2254(d)(1). Petitioner is denied habeas relief on this ground.

VI. Accumulation of error in the first stage (Ground 6)

***29** In Ground 6, Petitioner claims that "the accumulation of constitutional error in the first stage of Petitioner's trial denied Petitioner a fundamentally fair trial under the Fourteenth Amendment ." (Dkt. # 24 at 118).

The Tenth Circuit has repeatedly held that cumulative error analysis is applicable only where there are two or more actual errors. *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir.2003). Cumulative impact of non-errors is not part of the analysis. *Le v. Mullin*, 311 F.3d 1002, 1023 (10th Cir.2002) (citing *United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir.1990) (en banc)). "[T]he task 'merely' consists of 'aggregat[ing] all the errors that have been found to be harmless' and 'analyz [ing] whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.' " *Grant v. Trammell*, ---F.3d ---, 2013 WL 4105939, at *15 (10th Cir.2013) (quoting *Rivera*, 900 F.2d at 1470). "Only if the errors 'so fatally infected the trial that they violated the trial's fundamental fairness' is reversal appropriate." *Id.* (quoting *Matthews v. Workman*, 577 F.3d 1175, 1195 n. 10 (10th Cir.2009)). "[A]ll a defendant needs to show is a strong likelihood that the several errors in his case, when considered additively, prejudiced him." *Id.* at * 16.

In this case, the court did not find two or more actual errors as to the guilt or innocence stage of Petitioner's trial. As a result, there is no basis for a cumulative error analysis. For that reason, Petitioner is denied habeas corpus relief on Ground 6.

VII. Ineffective assistance of trial and appellate counsel for failure to develop and present mitigating evidence (Ground 7)

In Ground 7, Fitzgerald claims that trial counsel provided ineffective assistance in failing to develop and present mitigating evidence at his resentencing trial. He also claims that appellate counsel provided ineffective assistance in presenting this argument on appeal from the resentencing trial. After conducting an evidentiary hearing on the issue of ineffective assistance of trial counsel, the Magistrate Judge determined that Petitioner's claim is meritorious and recommended that habeas corpus relief be granted as to this ground of error. (Dkt.# 159). Respondent filed an objection (Dkt.# 163) and Petitioner filed a partial objection (Dkt.# 164) to the Report. In accordance with Rule 8(b) of the Rules Governing Section 2254 Cases and 28 U.S.C. § 636(b)(1)(C), the court reviewed de novo those portions of the Report to which the parties have objected, and concludes that, for the reasons discussed below, the Report shall be accepted. The Petition for Writ of Habeas Corpus shall be conditionally granted as to the Ground 7 claim of ineffective assistance of appellate counsel for failing to raise on direct appeal from Petitioner's resentencing trial a meritorious claim of ineffective assistance of trial counsel.

***30** By way of background, and as noted in the Report (Dkt.# 159), Petitioner's resentencing trial took place in October 2000. He was represented by three attorneys from the Oklahoma Indigent Defense System (OIDS): Silas Lyman, Dr. Kathy LaFortune, and Lynn Burch.[10] Mr. Lyman, previously a state prosecutor, served as first chair. In July 1999, or well in advance of the resentencing trial, Petitioner's attorneys retained Dr. Herman Jones, a neuropsychologist, to evaluate Petitioner. They also retained Dr. Christina Bratcher, an endocrinologist, to review Petitioner's history of diabetes, to opine on his prognosis, and to share her results with Dr. Jones. At the resentencing trial, the State presented evidence in support of three aggravating circumstances: (1) that Petitioner "was previously convicted of a felony involving the use or threat of violence to the person," (2) that Petitioner committed the murder in an attempt to avoid arrest and prosecution, and (3) that Petitioner posed a "continuing threat to society." *See* Tr. II Vol. V at 750. Mr. Lyman cross-examined the witnesses presented by the State in support of the aggravating circumstances. Dr. LaFortune presented the opening statement on behalf of Petitioner, see Tr. II Vol. VII at 1056, and presented three witnesses in support of mitigation. Those witnesses were Petitioner's mother, Virginia Fitzgerald, *id.* at 1068; Petitioner's foster mother, Sandra Davis, *id.* at 1103; and Petitioner's son, Kyle Fitzgerald, Tr. II Vol. VIII at 1147. Mr. Lyman presented closing argument on behalf of Petitioner, *id.* at 1181. Other mitigation evidence presented by Petitioner's defense team included a copy of Petitioner's waiver of extradition from Missouri, where he was arrested, to Oklahoma; and medical records documenting Petitioner's treatment for diabetes and a gunshot wound to the head. Despite having retained two expert witnesses, the defense team unreasonably chose not to present either expert witness. During his closing argument, Mr. Lyman argued, inter alia,

that Petitioner's life was "not a life full of excuses," *see* Tr. II Vol. VIII at 1183–84; that Petitioner had abused alcohol the night of the crimes, but was not using alcohol as an "excuse," *id.* at 1188–89; that his diabetes "affected him," but conceded to the jury that many "people suffer from diabetes [that] don't go out and commit crimes," *id.* at 1191; that Petitioner "was shot ... in the frontal lobe of the head," but conceded to the jury that "we will never know what this injury to [Petitioner] did to him .... none of us are doctors," *id.* at 1193–94; and that, because of a broken leg suffered while in prison, Petitioner was no longer a threat to society since he was no longer mobile, *id.* at 1194–95. At the conclusion of the resentencing trial, the jury found two aggravating circumstances: (1) that Petitioner had previously been convicted of a violent felony, and (2) that Petitioner posed a continuing threat to society. *Id.* at 1240. The jury recommended that Petitioner be sentenced to death. *Id.* at 1241. In reaching this sentence, the jury necessarily found, per jury instruction Nos. 16 and 17, that these aggravating factors necessarily outweighed all of the combined mitigating factors found, if any. *See* O.R. Vol. VI at 1135–1137.

10 Mr. Burch also represented Petitioner on direct appeal from the resentencing trial.

***31** In an application for post-conviction relief, filed in OCCA Case No. PCD–2002–626, Petitioner argued that trial and appellate counsel were ineffective for failing to present available mitigating evidence. Applying the three-tiered test enunciated in *Walker v. State*, 933 P.2d 327, 333–334 (Okla.Crim.App.1997), [11] the OCCA rejected the ineffective assistance of counsel claims and affirmed Petitioner's death sentence. (Dkt. # 25, Ex. 18 at 3).

11 In 2004, *Walker* was superseded by statute, see *Davis v. State*, 123 P.3d 243 (Okla.Crim.App.2005).

In his Petition for Writ of Habeas Corpus, Petitioner asserts that his trial attorneys provided ineffective assistance at the resentencing trial when they failed to develop and present experts to explain the interaction of his brain damage, diabetes and intoxication. By Order filed August 9, 2010 (Dkt.# 72), this court granted Petitioner's request for an evidentiary hearing as to Ground 7. By Opinion and Order filed August 25, 2011 (Dkt.# 104), this court denied Respondent's request to reconsider the Order granting an evidentiary hearing and denied Respondent's motion for summary judgment. In the Opinion and Order, this court also determined that because the OCCA applied the wrong constitutional standard to deny Petitioner's claim of ineffective assistance of appellate counsel, the claim would be reviewed de novo. (*Id.*).

The evidentiary hearing was held on August 21 through 23, 2012, and on November 9, 2012. After hearing the parties' evidence and reviewing the parties' proposed findings of fact and conclusions of law (Dkt.156, 157), the Magistrate Judge entered the Report on July 22, 2013 (Dkt.# 159). The Magistrate Judge recommends that the court find Petitioner's attorneys' performance at the resentencing trial deficient and prejudicial to Petitioner because the attorneys chose not to present expert testimony regarding his diabetes, brain injury, and evidence of his alcohol consumption. On August 19, 2013, Respondent filed an objection (Dkt.# 163) and Petitioner filed a partial objection (Dkt.# 164) to the Report.

Upon de novo review of the objections, the court finds the Report shall be accepted over the parties' objections. Under the familiar constitutional standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), Petitioner must demonstrate that his counsel's performance was deficient and that the deficient performance was prejudicial. *Id.* at 687; *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. There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id.* at 689. In making this determination, a court must "judge ... [a] 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. While there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, closer scrutiny applies to reviewing attorney performance during the penalty phase of a capital case. *Littlejohn v. Trammell*, 704 F.3d 817, 859 (10th Cir.2013). Assessing attorney performance requires every effort to avoid hindsight bias and evaluate conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. "Representation is constitutionally ineffective only if it 'so undermined the proper functioning of the adversarial process' that the defendant was denied a fair trial." *Harrington v. Richter*, 131 S.Ct. 770, 791 (2011) (quoting *Strickland*, 466 U.S. at 686). "The *Strickland* standard must be applied with 'scrupulous

care.' " *Cullen v. Pinholster*, 131 S.Ct. 1388, 1408 (2011) (quoting *Richter*, 131 S.Ct. at 788). As noted in *Richter*, "[e]ven under *de novo* review, the standard for judging counsel's representation is a most deferential one." *Richter*, 131 S.Ct. at 788.

***32** 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." *Strickland*, 466 U.S. at 694; *see also Hoxsie 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.

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). The Tenth Circuit has explained that,

> If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.

Cargle v. Mullin, 317 F.3d 1196, 1202 (10th Cir.2003) (footnote omitted) (citation omitted); *see also Parker v. Champion*, 148 F.3d 1219, 1221 (10th Cir.1998).

In his Report, the Magistrate Judge determined that, under the deficient performance prong of *Strickland*, Mr. Lyman's decision not to call expert witnesses or to present evidence of Petitioner's alcohol use qualifies as a "strategic decision." *See* Dkt. # 159 at 60. That determination was based on the Magistrate Judge's conclusions that Mr. Lyman's investigation prior to the resentencing trial was adequate, and that although Mr. Lyman harbored a misunderstanding of critical facts surrounding Petitioner's health conditions, this was an error of fact as opposed to a legal error. In addition, the Magistrate Judge determined that, based on the status of the law at the time of the trial, Mr. Lyman had reason to be concerned that the expert testimony could serve as a "double-edged sword," i.e., that the expert testimony could be used by the State against Petitioner as evidence in support of the aggravating circumstances. The Magistrate Judge also determined that Mr. Lyman lacked sufficient experience under American Bar Association (ABA) Guideline 5.1 for providing representation in a capital case, but that Mr. Lyman's failure to meet the ABA's guidelines, standing alone, is insufficient to disqualify the decision as strategic. The Magistrate Judge concluded that Mr. Lyman's "strategic decision" not to present any explanation for Petitioner's behavior, although compelling evidence readily existed, was unreasonable. (*Id.* at 69–70). This decision was so unreasonable it led the Magistrate Judge to find that "there is a reasonable probability that at least one juror would have voted for life imprisonment rather than the death penalty" had this important mitigation evidence been presented. (*Id.* at 70).

A. Petitioner's partial objection to the Report

***33** The court first considers Petitioner's partial objection to the Report (Dkt.# 164). Petitioner objects to the Magistrate Judge's finding that Mr. Lyman's decision not to introduce the expert testimony of Dr. Bratcher and Dr. Jones qualifies as a "strategic decision" under *Strickland*. Petitioner identifies three primary arguments in support of his partial objection: (1) that the "double-edged sword" analysis is incorrect, (2) that Mr. Lyman misunderstood his duty to protect Petitioner's "substantive constitutional right under the Eighth Amendment" to have the jury consider mitigating evidence that might well have influenced the jury's appraisal of his moral culpability, and (3) that counsel's investigation and decision to limit the investigation were unreasonable. Each of Petitioner's arguments is discussed below.

1. The "double-edged sword" analysis

Mr. Lyman testified at the evidentiary hearing that his main reason for not calling either Dr. Jones or Dr. Bratcher was that the mental health evidence could be a "double-edged sword" because the State could use the evidence to support

the aggravating circumstances. (Dkt. # 141 at 88). In his partial objection to the Report, Petitioner complains that the Magistrate Judge erred in finding that Mr. Lyman's concern qualifies as a "strategic decision ." (Dkt. # 164 at 6–15). Specifically, Petitioner complains that the Magistrate Judge erred in limiting his analysis to case law available to Mr. Lyman at the time of Petitioner's resentencing trial, and argues that other cases decided after Petitioner's trial are also controlling. Petitioner is correct that case law available before and after Petitioner's resentencing trial emphasized that expert testimony or evidence must be introduced if it explains the defendant's actions and could influence the jury's assessment of his moral culpability. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 397–98 (2000); *Smith v. Mullin*, 379 F.3d 919 (10th Cir.2004). In addition, Mr. Lyman could have expanded his analysis to distinguish the Tenth Circuit cases available at the time of Petitioner's resentencing trial, see, *e.g., Duvall v. Reynolds*, 139 F.3d 768 (10th Cir.1998); *Davis v. Executive Dir. Dep't Corr.*, 100 F.3d 750 (10th Cir.1996). Those cases establish that, at the time, the clear trend was to proceed with caution when presenting mental health evidence as mitigation evidence because it could easily be used to support aggravating circumstances such as continuing threat. Assessing attorney performance requires every effort to avoid hindsight bias and to evaluate conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Therefore, the Court agrees with the Magistrate Judge's conclusion that Mr. Lyman's decision not to call experts based on his concerns regarding the double-edged nature of the evidence does not disqualify the decision from being "strategic."

2. Consideration of potential conflict with first stage finding of guilt

***34** Petitioner complains the Magistrate Judge failed to consider Mr. Lyman's misplaced concern that presentation of the experts during the second stage would be inconsistent or conflicting with the jury's first stage guilty verdict for First Degree Murder. Furthermore, Petitioner contends Mr. Lyman was required, under Eighth Amendment principles established in *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (citing *Boyd v. California*, 494 U.S. 370, 387); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); and *Locket v. Ohio*, 438 U.S. 586, 604 (1978), to present relevant mitigating evidence that may serve as a basis for a sentence less than death. Petitioner contends that Mr. Lyman's decision was an error of law disqualifying the decision from being categorized as strategic. This court has reviewed the transcripts from the evidentiary hearing and is convinced that Mr. Lyman's decision not to call the expert witnesses was based on a misunderstanding of the expert testimony and not on an erroneous understanding of legal principles that would prevent presentation of the testimony. *See Williams*, 529 U.S. at 395–96 (finding that preparation of mitigation case was inadequate because counsel incorrectly thought that state law barred access to foster home records); *Kimmelman v. Morrison*, 477 U.S. 365, 386–87 (1986) (concluding that counsel's failure to engage in the discovery process resulted from counsel's misunderstanding of law regarding discovery procedures). Therefore, Mr. Lyman's decision resulted from a factual error and qualified as a strategic decision. For that reason, Petitioner's objection lacks merit.

3. Mr. Lyman's investigation

Lastly, Petitioner argues that the Magistrate Judge erred in finding that Mr. Lyman's investigation was constitutionally adequate. Petitioner lists Mr. Lyman's failure to learn the correct definition of "disinhibition," to provide critical evidence of intoxication to Dr. Jones and to call Dr. Jones as a witness, to obtain a report from Dr. Bratcher and provide it to Dr. Jones, to call Dr. Bratcher as a witness, to organize and present a coherent plan to avoid the death penalty, and to present a complete and accurate picture of Petitioner's gunshot wound and resulting frontal lobe impairment. (Dkt. # 164 at 18–36). Although Petitioner argues that the cited factors support a finding that Mr. Lyman failed to investigate, none of the cited factors is based on information that Mr. Lyman failed to uncover. *See DeRosa v. Workman*, 679 F.3d 1196, 1208–1209 (10th Cir.2012) (stating that counsel's failure to investigate a mitigation case can be considered ineffective assistance, but "only if the investigation fails to ... uncover significant mitigating evidence"). Thus, the Magistrate Judge did not err in finding that Mr. Lyman's investigation was adequate. Furthermore, all of the factors cited by Petitioner contribute to the objective unreasonableness of the strategy followed by Mr. Lyman. This argument lacks merit.

***35** For the reasons discussed above and after de novo review, the court concludes Petitioner's partial objection to the Report lacks merit.

B. Respondent's objections to the Report

Respondent objects to the Magistrate Judge's findings on five grounds: (1) the reasons for finding counsel ineffective are refuted by the record, (2) the Report is contrary to

Tenth Circuit precedent, (3) the Report fails to afford the required deference to trial counsel's strategic decisions, (4) the Magistrate Judge's findings of fact are erroneous, and (5) Petitioner was not prejudiced by Mr. Lyman's deficient performance. (Dkt.# 163). Each category of objection is discussed below.

1. Reasons for finding counsel ineffective

First, Respondent claims the Magistrate Judge incorrectly characterizes the OCCA direct appeal opinion as a "mandate" to present expert testimony at the resentencing trial. This is not the case. The Magistrate Judge noted that the case procedurally came to Mr. Lyman after the OCCA issued a mandate to provide funding for expert witnesses. (Dkt. # 159 at 62, 65, 69). The Magistrate Judge specifically noted in his Report that the OCCA order "was not determinative" on the issue of whether Mr. Lyman should have presented the expert witnesses. (*Id.* at 69). Moreover, the Magistrate Judge did not at any time conclude that Mr. Lyman had *per se* erred by not presenting expert witnesses at trial. Indeed, contrary to Respondent's argument, the Magistrate Judge correctly found after engaging in extensive inquiry and analysis that "in the absence of compelling reasons not to present the expert testimony," Mr. Lyman was obligated to do so. (Dkt. # 159 at 69). The Magistrate Judge found Mr. Lyman could articulate no compelling reasons to support his decision not to present this important mitigating evidence. This is the core of the Magistrate Judge's decision this court now accepts and affirms. (Dkt. # 159 at 69). Upon careful review of the Report and the OCCA's opinion, the court finds this objection to be without merit.

Next, Respondent argues that Mr. Lyman "had sufficient experience to make the strategic decisions he made," (Dkt. # 163 at 7), and that the Magistrate Judge "improperly downplayed Mr. Lyman's experience with mental health mitigating evidence," (*id.* at 8). Respondent also states that Mr. Lyman's "inability to recall ever personally presenting the testimony of a mental health expert has no bearing on the reasonableness of his decisions in Petitioner's case." (*Id.* at 9). However, in the Report the Magistrate Judge determined that although Mr. Lyman failed to satisfy the American Bar Association's guidelines for capital trial representation, that failure, standing alone, is insufficient "to warrant a finding that the decision not to utilize expert testimony was not a strategic decision." (Dkt. # 159 at 55). Nothing presented by Respondent convinces the court that the Magistrate Judge improperly weighed Mr. Lyman's level of experience in finding that Mr. Lyman's "strategic decision" was objectively unreasonable. The court finds Respondent's objection to the Magistrate Judge's analysis of Mr. Lyman's experience with mental health evidence to be without merit.

***36** Respondent also takes issue with the Report's characterization of the defense as being "organized in a haphazard manner." (Dkt. # 163 at 9). However, the record demonstrates that unquestionably was the case. According to Dr. LaFortune's testimony, which was significantly more consistent and linear than that of Mr. Lyman, Mr. Lyman made the decision not to call Dr. Jones in approximately March 2000 (Dkt. # 142 at 345) and not to call Dr. Bratcher after the trial had begun in October 2000 (*Id.* at 328). Though "shocked" by the decision not to call any expert witnesses regarding Petitioner's mental and physical condition, Dr. LaFortune chose not to confront Mr. Lyman, who was the lead attorney in a death penalty case--which Dr. LaFortune equated to being a "commander" in a "war zone." (*Id.* at 329). Even had Dr. LaFortune chosen to confront Mr. Lyman about his questionable decision regarding Dr. Bratcher, she would have had little opportunity to have a meaningful conversation on the topic when the trial had already commenced. In making these unilateral decisions, Mr. Lyman failed to disclose to his trial partner, Dr. LaFortune, who had more experience with expert testimony, that Mr. Lyman had no experience with presenting mitigation evidence in capital cases. (Dkt. # 142 at 328, 331–332, 338, 347, 351; Dkt. # 143 at 494–95). Dr. LaFortune testified that, had she known Mr. Lyman had no experience with mitigation in capital cases, she would have questioned Mr. Lyman's decision and even asked Mr. Lyman to discuss that decision with their supervisor. (*Id.* at 331–32, 347). Dr. LaFortune felt that Mr. Lyman's approach of just giving the jury the medical records was not enough, because jurors could not make sense of the medical records without "someone to guide them." (*Id.* at 332).

Mr. Lyman's own testimony regarding his decisions not to use the expert witnesses further demonstrates the trial team's disorganization. The Magistrate Judge highlighted that Mr. Lyman's testimony demonstrated significant confusion about why each witness had been eliminated from the trial. Initially, Mr. Lyman testified that he was interviewing Dr. Bratcher, who Mr. Lyman felt "did not come off as strong in [her] presence when you're talking to her" (Dkt. # 141 at 63), for the purpose of potentially providing Dr. Bratcher's report to Dr. Jones. (Dkt. # 141 at 64). Mr. Lyman then stated he was thinking that Dr. Jones could rely upon Dr. Bratcher's testimony at trial, if Mr. Lyman presented Dr. Jones at trial. (*Id.*). However, Mr. Lyman simultaneously testified that he

was already inclined not to use Dr. Jones either. (Dkt. # 141 at 64). This time line makes little sense when reviewing Mr. Lyman's March 2000 witness list, which included Dr. Bratcher (though Mr. Lyman states he had decided not to call her as a witness) and excluded Dr. Jones (though Mr. Lyman states he was still considering calling Dr. Jones as a witness). (Dkt. # 159 at 63). Upon a de novo review of the record, the court finds that the evidence presented at the evidentiary hearing supports the Magistrate Judge's depiction of a disorganized defense team that was unable to cohere and formulate a plan for mitigation. Respondent's objection is without merit.

***37** Respondent also objects to the Magistrate Judge's finding that Mr. Lyman misunderstood the expert reports. (Dkt. # 163 at 15). Respondent argues "Mr. Lyman considered all of the evidence and formed a reasonable concern about how a jury might react" to the expert testimony. (*Id.* at 17). The Report specifically discusses Mr. Lyman's testimony concerning his understanding of the term "disinhibition" as used by Dr. Jones in his report. According to Dr. Jones, the term "disinhibition" refers to a lack of impulse control. (Dkt. # 142 at 180–83). Mr. Lyman explained his concern that the State could have used Dr. Jones' testimony regarding "disinhibition" to portray Petitioner as a "person who just doesn't care, just would do what he wanted to do, wasn't inhibited." (Dkt. # 141 at 89). In fact, Mr. Lyman admitted it was his belief, which has borne out to be a misunderstanding on Mr. Lyman's part, that when he made the decision not to call Dr. Jones that the term "disinhibited" meant Mr. Fitzgerald "didn't give a damn." (*Id.* at 91:11–19). Mr. Lyman acknowledged that he may have misunderstood the word "disinhibition," but believed the jury would think Fitzgerald "didn't care." (*Id.* at 89:22–90:3). Mr. Lyman's testimony supports the Magistrate Judge's finding that Mr. Lyman did not understand the technical term "disinhibition" as used by Dr. Jones. Respondent's objection is without merit.

2. Alleged failure to afford deference to Mr. Lyman's strategic decisions

Next Respondent argues that the Report fails to afford deference to Mr. Lyman's strategic decisions, citing *Bullock v. Carver*, 297 F.3d 1036, 1044 (10th Cir.2002). Respondent states that when counsel's strategic decisions are being evaluated for reasonableness, reviewing courts must give "considerable deference" to counsel's decisions.

In the Report, the Magistrate Judge acknowledged that the *Strickland* standard is "highly deferential" and that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. Applying that standard, the Magistrate Judge accurately determined that, in consideration of all the facts, Mr. Lyman's strategic decisions were objectively unreasonable.

To the extent Respondent is arguing that once the Magistrate Judge found Mr. Lyman's decisions were "strategic," those decisions could not be challenged, the court disagrees. The "mere incantation of 'strategy' does not insulate attorney behavior from review." *Fisher v. Gibson*, 282 F.3d 1283, 1296 (10th Cir.2002). The court must consider whether that strategy was objectively reasonable. *See id.* at 1305; *Roe v. Flores–Ortega*, 528 U.S. 470, 481 (2000); *Hooper v. Mullin*, 314 F.3d 1162, 1169–70 (10th Cir.2002).

Respondent's challenge to the Magistrate Judge's finding is without merit. The Magistrate Judge considered Mr. Lyman's stated reasons for excluding the expert witnesses and not introducing evidence of Petitioner's intoxication. After engaging in substantial analysis, the Magistrate Judge concluded that Mr. Lyman's strategic decision to exclude the expert witnesses' testimony was objectively unreasonable.

***38** First, Mr. Lyman's strategic decision not to call Dr. Jones was objectively unreasonable. Dr. Jones was prepared to testify that Petitioner's medical records demonstrated he had suffered a gunshot wound to the head that pierced the covering of the Petitioner's brain and caused bone fragments to lodge in his frontal lobe. (Dkt. # 142 at 176). Dr. Jones explained that the frontal lobe is the portion of the brain responsible for one's ability to empathize, anticipate one's actions, reflect upon one's actions, and perform other behaviors that a lay person might commonly refer to as a conscience. (*Id.* at 177). Dr. Jones further explained that Petitioner's neurological damage, taken alone, would not have a significant impact, but that when Petitioner's neurological damage was coupled with fatigue, excessive anxiety, sedating drugs or medications (of which alcohol [12] was an exemplar), concurrent physical illness, depression, or lack of motivation, all which were at issue in the trial, it could result in more impulsive behavior or keep Petitioner from slowing down and anticipating the consequences of his actions. (*Id.* at 179–182, 191, 214). Dr. Jones adeptly described that these factors would have a multiplicative effect on Petitioner's ability to control his actions. (*Id.* at 203). The doctor used the image of a cart rolling down a hill as a teaching metaphor. He explained that Petitioner, given "static factors in his personality," would

already be at an increased slope, and each time another factor was added, including the neurological frontal lobe injury, the alcohol usage, and the potential metabolic imbalance from not eating that day and from uncontrolled diabetes, the slope of the incline would become steeper, thereby resulting in the cart, Petitioner's decision making processes, being harder and more difficult to control. (*Id.* at 201–204). Dr. Jones testified that the net result of this multiplicative effect would be that Petitioner had "less control" and "less inhibition." (*Id.* at 203). Finally, Dr. Jones testified that, without the assistance of expert testimony, the medical records Mr. Lyman presented to the jury could not explain to lay jurors this multiplicative effect on Petitioner's decision-making processes. (*Id.* at 204–205). The mitigating impact of the omitted expert testimony is undeniable.

12 The record in this case includes the affidavit of Regina Stockfleth. *See* Evid. Hr'g Pet. Ex. 2; Dkt. # 25, Ex. 21. Ms. Stockfleth avers that on the night of the robberies and murder, she and Petitioner "drank heavily." (*Id.* at ¶ 3). During the early evening hours, they consumed a "fairly large size bottle of tequila and some Margarita mix.... We were also drinking beer.... After we drank the bottle of tequila ... [w]e went to two different bars in Tulsa.... Around 12 to 1 o'clock, we headed home ... Jim and I were both loaded. His driving scared me." (*Id.* at ¶¶ 3, 4, 5). The record also contains a stipulation regarding the testimony of Candy Ashley, aka Candy Goodnight. See Evid. Hr'g Pet. Ex. 23. Ms. Ashley observed a man fitting Petitioner's description outside the convenience store on East Admiral. *Id.* He was carrying what appeared to be a rifle. *Id.* It was her opinion that, based on the way the man was walking and behaving, the man was intoxicated. *Id.*

Second, a review of Dr. Bratcher's affidavit likewise reveals strong mitigation evidence. Dr. Bratcher described the long history of Petitioner's uncontrolled diabetes, noting that he was hospitalized several times in his youth as a result of his diabetes, including one loss of consciousness and two diabetic seizures. (Dkt. # 25 at 99). Dr. Bratcher also stated that, due to petitioner's diabetes, the potential large amounts of alcohol consumed by Petitioner on the night of the murder, and Petitioner's frontal lobe injury, Petitioner's cognitive functioning could have been affected, which might have impacted Petitioner's judgment that night. (Dkt. # 25 at 99). [13]

13 While Mr. Lyman believed Dr. Bratcher would not be a good witness because she lacked a strong presence, (Dkt. # 141 at 63–64), he could have resolved this problem by allowing Dr. Jones to present Dr. Bratcher's findings at trial.

***39** In contrast, when reviewing the transcript of Mr. Lyman's testimony, Mr. Lyman provides no persuasive reason for not presenting these expert witnesses. With respect to Petitioner's childhood diabetes, Mr. Lyman initially explained that he listed Petitioner's diabetes as a mitigating factor so as to tell the full story about Petitioner's life, (Dkt. # 141 at 54), demonstrating that "he's been dealing with diabetes" from an early age. Mr. Lyman then conceded that one option for highlighting the mitigating effect of Petitioner's childhood diabetes was to hire an expert to present such testimony. (*Id.* at 56). Upon reviewing Dr. Bratcher's affidavit regarding Petitioner's diabetes, Mr. Lyman conceded such testimony would have been helpful to the Petitioner at trial. (*Id* . at 60). However, Mr. Lyman confusingly explained that he chose not to present any expert witnesses to discuss the impact of Petitioner's diabetes because he wanted to present a "no excuse" mitigation theme, whereby Petitioner took responsibility for his actions. (Dkt. # 141 at 71–72). By mentioning Petitioner's childhood diabetes, but providing no evidentiary support as to how Petitioner's diabetes contributed to or was relevant to Petitioner's poor decision making, Mr. Lyman caused a contrary result, whereby a reasonable juror would have perceived Petitioner's diabetes as merely an excuse and not an explanation. Mr. Lyman's closing arguments all but confirm this misguided approach:

> And you learn—and this isn't an excuse, its just part of his life—that he was diagnosed with diabetes at a young age. And these are what these medical records are for, to document that, to support that he suffers from diabetes. Many people do. ***And there's no question that people suffer from diabetes don't go out and commit crimes. There's no correlation with that, that I'm aware of.*** But it's part of his life. O.R. Vol. VIII at 1191 (emphasis added).

Even before Mr. Lyman made these regrettable remarks at closing, the district attorney had already closed in on the unreasonableness of Mr. Lyman's choice not to present expert testimony as to the import of this medical evidence:

> It's for you to resolve under the facts and the circumstances of the case. And what have you been told? ***You've been told that he's a diabetic, you've been told that he has children. Common sense tell you, and life experience tells you, that does not make him much different than a lot of people in those arenas.*** And you can use common sense and you can use your life experiences when you go back there. O.R. Vol. VIII at 1177 (emphasis added).

The reasons provided by Mr. Lyman for not presenting an expert witness with respect to the Petitioner's diabetes were unreasonable. The decision had the opposite of Mr. Lyman's intended effect, an outcome that a practitioner exercising reasonable judgment should have identified prior to trial. At the evidentiary hearing, Mr. Lyman attempted to explain his decision, noting that some of the lay witnesses presented testimony regarding the effects of Petitioner's diabetes. (Dkt. # 141 at 76–77). However, Mr. Lyman subsequently admitted the OCCA had previously held, in this case, that laymen were not adequate witnesses to testify on these medical issues. (*Id.*) It was unreasonable for Mr. Lyman not to heed OCCA's guidance against that approach.

***40** Mr. Lyman's approach with respect to presenting expert witness testimony on the impact of Petitioner's alcohol intake repeats much of his faulty reasoning discussed above. Mr. Lyman was concerned that the jury would view Petitioner's use of alcohol the night of the murder as an excuse, and he wanted to present a "no excuse" defense. (Dkt. # 141 at 73). Instead, as with the evidence of Petitioner's diabetes, Mr. Lyman allowed evidence of Petitioner's alcohol usage on the night of the murder into the record and then provided no explanation as to why that evidence was important. (*Id.* at 73–75). This strategy, as discussed above, was unreasonable as it merely provided the jurors with facts without telling them why such facts were medically significant.

With respect to both Petitioner's alcohol usage on the night in question and Petitioner's frontal lobe injury, Mr. Lyman testified that he did not want to put on the expert witnesses because he worried such testimony would introduce "bad facts and circumstances surrounding" the Petitioner. (Dkt. # 141 at 74, 88). However, he conceded that the bad facts the experts might mention were not facts he was capable of otherwise excluding and in fact had already been admitted into evidence by the prosecution. (Dkt. # 141 at 74). Indeed, Mr. Lyman testified he did not want to "highlight" factors already raised by the state. (*Id.* at 98). Making a bad decision worse, Mr. Lyman actually admitted evidence that compounded the negative effect of the excluded expert witness testimony by introducing medical records documenting that Petitioner had recovered fully from his frontal lobe injury by stating that Petitioner's neurological examination was "normal." (Dkt. # 142 at 170). Dr. Jones explained that without expert testimony, such records did not present an accurate picture, as the term "normal" merely encompassed Petitioner's physical functioning [14] and bore no relation to possible long-term psychological effects, such as those investigated by Dr. Jones. (*Id.* at 169–175). For all these reasons, Mr. Lyman unreasonably calculated the risk of the jury potentially hearing bad evidence for a second time versus the benefit of the jury receiving expert testimony explaining Petitioner's significantly diminished decision-making capacity the night of the murder. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 535–36 (2003) ("Counsel told the sentencing jury '[y]ou're going to hear that Kevin Wiggins has had a difficult life,' but never followed up on this suggestion.") (citation omitted); *McNair v. Campbell*, 307 F.Supp.2d 1277, 1315 (M.D.Ala.2004), aff'd in part, rev'd in part, 416 F.3d 1291 (11th Cir.2005) ("While it may have been reasonable for counsel to decide not to introduce evidence of drug abuse at sentencing, this court cannot find it reasonable for counsel to introduce 'bad' facts of McNair's drug use, without the explanation upon which mitigation would be premised.").

14 Dr. Jones interpreted the examination as an indication that Petitioner was "grossly intact and would be able to return to work within two months" under Social Security disability definitions. (Dkt. # 142 at 171).

***41** Compounding Mr. Lyman's unreasonable risk-versus-benefit analysis was a fundamental misunderstanding of Dr. Jones's testimony that precluded Mr. Lyman from making

a reasonable choice. As highlighted above, Dr. Jones's testimony would have been very helpful in establishing that Petitioner had a diminished capacity for making decisions the night of the murder. However, Mr. Lyman fundamentally misunderstood Dr. Jones's opinion; tragically Mr. Lyman misinterpreted Dr. Jones's explanation of the word "disinhibition." (*Id.* at 89). Dr. Jones used the word "disinhibition" to describe Petitioner's decision-making abilities on the night in question. Mr. Lyman mistakenly believed the word "disinhibition" as used by Dr. Jones meant that Petitioner "just didn't give a damn." (*Id.*). In reality, Dr. Jones intended to convey that Petitioner lacked inhibition, or the ability to slow down and consider the consequences of his actions prior to acting. (Dkt. # 142 at 176, 177, 201–205). This was a fundamental and damaging misunderstanding of critically relevant evidence. Also inexplicable is counsel's fear that, by presenting evidence showing Petitioner had been shot in the head while passively sitting on his front porch, the jury might conclude that the Petitioner was a violent person, as opposed to a victim. (Dkt. # 141 at 99). This concern was unreasonable, as Mr. Lyman admitted he could have presented evidence that Petitioner had been a victim in the incident. (*Id.*). Simply put, Mr. Lyman's unreasonable strategic decision gained Petitioner nothing and cost the Petitioner gravely. As a result the jury heard no expert testimony shedding light on Petitioner's diminished capacity. And in the absence of that mitigation evidence, the State successfully cast Petitioner as someone not "much different than a lot of people in those arenas." O.R. Vol. VIII at 1177.

Lastly, Respondent argues that the Magistrate Judge did not give sufficient deference to Mr. Lyman's decision to exclude the expert witnesses due to concerns about introducing evidence regarding Petitioner's Anti–Social Personality Disorder ("ASPD"). (Dkt. # 163 at 17–27). However, Respondent's brief contains no reference to the record establishing that Mr. Lyman's decision was specifically based on concerns about introducing evidence of Petitioner's ASPD. (*Id.*). Moreover, in its review of Mr. Lyman's examination, this court found no testimony that Mr. Lyman chose to exclude the expert witnesses because of concerns about potential ASPD evidence. (Dkt. # 141 at 1–158). Thus, Respondent appears to be imputing to Mr. Lyman a concern about potential ASPD evidence in light of counsel's stated decision to present a "no excuse" defense. Nonetheless, the Magistrate Judge considered any potential impact of the ASPD testimony in assessing the reasonableness of Mr. Lyman's decision and concluded that it was unreasonable for Mr. Lyman to have excluded the expert testimony. Respondent contends the ASPD evidence would have precluded a reasonable attorney from presenting the expert testimony because such evidence would have provided support for Respondent's arguments that (1) Petitioner was a dangerous criminal, (2) that Petitioner would pose a continuing threat to society, and (3) that Petitioner possessed poor decision making skills, including a lack of empathy for others and a diminished conscience. (Dkt. # 163 at 17–27). As discussed below, Respondent's arguments reflect a misunderstanding of the burdens of persuasion at issue here.

***42** At the resentencing trial, three aggravating factors were at issue: (1) that Petitioner had previously been convicted of a violent felony, (2) that the murder was committed to avoid further prosecution, and (3) that defendant would continue to be a threat to society. O.R. Vol. VI at 1128. Once one of these aggravating factors had been found, the death penalty could not be imposed unless the jury also unanimously found that the aggravating factors outweighed the mitigating circumstances. O.R. Vol. VI at 1137. As Petitioner had previously been convicted of an armed robbery where he threatened the victim with death, counsel could have had no reasonable doubt that the jury would find the first aggravating factor. Once that aggravating factor was established, Petitioner became eligible for the death penalty. Thus, the heart of the Petitioner's defense was his mitigation case. A reasonable practitioner should have recognized that robust mitigation evidence was Petitioner's only meaningful defense.

Respondent's argues expert testimony would have resulted in the jury perceiving Petitioner as having a lack of empathy for others and a diminished conscience. But, as the Magistrate Judge noted, any concern about exposing the jury to testimony regarding Petitioner's ASPD "simply cannot outweigh the benefits of utilizing" the expert testimony. (Dkt. # 159 at 68). Dr. Jones could have put Petitioner's ASPD in context by explaining that the combination of Petitioner's alcohol consumption, uncontrolled diabetes, and frontal lobe injury exacerbated Petitioner's already diminished capacity and that each added factor had a negative multiplicative impact on Petitioner's ability to control his behavior and anticipate consequences. (Dkt. # 142 at 179–182, 191, 203, 214). Indeed, co-counsel Dr. LaFortune, who had significantly more experience than Mr. Lyman in presenting mental health expert testimony, opined that the potentially damaging effects of Petitioner's ASPD could be dealt with by having an expert deconstruct the diagnosis for the jury. (Dkt. # 142 at 327). Dr. LaFortune observed that Mr. Lyman, like many

lawyers, did not appreciate "the importance of mental health testimony." (*Id.* at 346). This undoubtably was the case. Mr. Lyman failed to appreciate that putting Petitioner's behavior into context was imperative to an adequate defense to the death penalty. Mr. Lyman's judgment to the contrary was unreasonable.

Based on all of the factors discussed above, the court concurs with the Magistrate Judge's conclusion that Mr. Lyman's decisions to omit all expert testimony and further evidence of Petitioner's alcohol consumption were objectively unreasonable and were not "sound trial strategy." *See* Mayfield v. Woodford, 270 F.3d 915, 927 (9th Cir.2001) (citing *Strickland*, 466 U.S. at 689). Despite the deference properly afforded to strategic decisions, this is the rare case in which the record shows trial counsel's strategic decisions to have been objectively unreasonable. Respondent's objection is without merit.

3. Tenth Circuit precedent

***43** In the next category of objections, Respondent argues that the Report fails to follow Tenth Circuit precedent. Respondent attempts to distinguish a case cited by the Magistrate Judge, *Smith v. Mullin*, 379 F.3d 919 (10th Cir.2004) (finding ineffective assistance of counsel in failing to present mitigating evidence), and argues that the facts of this case are more aligned with *DeLozier v. State*, 531 F.3d 1306 (10th Cir.2008) (finding no deficient performance by counsel when evidence of ASPD and risk of future violence was omitted). Respondent also cites *Duvall v. Reynolds*, 139 F.3d 768, 782 (10th Cir.1998) (finding counsel's decision regarding mitigating evidence reasonable because "[t]he jury could have perceived such evidence as aggravating rather than mitigating"); *Davis v. Executive Dir. Dep't Corr.*, 100 F.3d 750, 763 (10th Cir.1996) (rejecting ineffective assistance of counsel claim because "the jury might have reacted negatively" to evidence of the petitioner's alcoholism); *Sallahdin v. Mullin*, 380 F.3d 1242, 1250–51 (10th Cir.2004) (recognizing that jury could have viewed petitioner's steroid use as aggravating, rather than mitigating); *Wackerly v. Workman*, 580 F.3d 1171, 1178–79 (10th Cir.2009) (rejecting ineffective assistance claim based on possibility that mitigating evidence could be considered "double-edged").

The Report reflects careful consideration of trial counsel's concern that the potential testimony of Dr. Jones and Dr. Bratcher could be used by the State to support the aggravating circumstance of continuing threat. In fact, as discussed above, the Magistrate Judge concluded that those concerns did not disqualify Mr. Lyman's decision from being categorized as strategic. Certainly, the Tenth Circuit case law cited by Respondent reflects that an attorney should consider whether expert testimony could be used to support aggravating circumstances and that a decision to omit potentially damaging evidence may be considered effective assistance. However, in *Williams v. Taylor*, 529 U.S. 362 (2000), a decision issued approximately six months before Petitioner's resentencing trial, the Supreme Court emphasized that expert testimony or evidence serving to explain the defendant's actions should be introduced if it "might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398. The evidence at issue in *Williams* demonstrated that the petitioner's violent behavior "was a compulsive reaction rather than the product of cold-blooded premeditation." *Id.* In this case, without the expert testimony, Petitioner's jury was left with an incomplete explanation for Petitioner's actions. The expert testimony and evidence of alcohol consumption may not have overcome, undermined, or rebutted the State's evidence supporting the aggravating circumstances. However, because the omitted evidence would have explained the interplay between Petitioner's alcohol consumption and his physical and mental conditions attributable to his diabetes and frontal lobe injury, it might well have influenced the jury's appraisal of Petitioner's moral culpability. In other words, the testimony might well have demonstrated to the jury that Petitioner's firing of the gun was a compulsive reaction attributable to a lack of impulse control rather than the product of cold-blooded premeditation. The expert testimony and other evidence serving to explain Petitioner's actions should have been introduced.

***44** Although this Court is mindful that mental health evidence can serve as a "double-edged sword" during the sentencing stage of a capital case, the particular facts of this case warrant a disposition consistent with *Williams*, 529 U.S. at 395–97 (holding that trial counsel provided ineffective assistance in failing to introduce evidence that might have influenced jury's appraisal of defendant's moral culpability). Respondent's objection to the Report as contrary to Tenth Circuit precedent is overruled.

4. The Magistrate Judge's findings of fact

Next, Respondent alleges that the Magistrate Judge made erroneous factual findings. The court identifies nine challenges within this objection, as follows: (1) the Report incorrectly states that Mr. Lyman was unfamiliar with the mitigation case, (2) the Report incorrectly characterizes Mr.

Lyman's testimony regarding the strength of the intoxication evidence, (3) the Report "appears to suggest" that Mr. Lyman did not provide sufficient information to Dr. Jones regarding Petitioner's level of intoxication, (4) the Report mischaracterizes Dr. Jones' testimony regarding Petitioner's lack of impulse control, (5) the Report incorrectly concludes that Petitioner's ASPD could be a result of his alcohol dependence and brain damage, (6) the Report incorrectly states that Dr. Jones "did not question Dr. Bratcher's ability" to render an opinion regarding the potential effects of Petitioner's diabetes on his behavior on the night of the murder, (7) the statement that "it is likely that some evidence of the impact of Mr. Fitzgerald's diabetes on his brain function that evening could be presented were Dr. Jones and Dr. Bratcher able to consult with one another and review all of the evidence," has absolutely no support in the record, (8) the Report improperly credits or relies on Dr. LaFortune's testimony, and (9) the Report incorrectly summarizes Dr. Jones' testimony regarding ASPD. (Dkt. # 163 at 30–36). Respondent argues that the Magistrate Judge's conclusions concerning the adequacy of Mr. Lyman's decisions were influenced by these "unreasonable factual findings." (*Id.* at 30). To evaluate Respondent's claim, the court conducted a de novo review of the record, including reading the transcript of the evidentiary hearing. *See Gee v. Estes*, 829 F.2d 1005, 1008–1009 (10th Cir.1987). For the reasons discussed below, the court finds that Respondent's objections to the findings of fact contained in the Report are without merit. In addition, Respondent's objections fail to raise any new issues of law or fact that alter the validity of the Report's conclusions.

In challenges one, two, and three, Respondent focuses on several of the Magistrate Judge's characterizations of Mr. Lyman's testimony and Mr. Lyman's consultation with Dr. Jones. In challenge one, Respondent claims that the Report inconsistently states that "Petitioner has failed to demonstrate that Mr. Lyman was unaware of the witnesses and information available for use in developing a mitigation defense," (Dkt. # 159 at 53), and then later states that "Mr. Lyman may not have been as familiar with the mitigation case being built for petitioner's second trial as he could, or should, have been," *id.* at 57. The first statement contributed to the Magistrate's Judge's finding that Mr. Lyman's investigation was adequate. The second statement referred directly to Mr. Lyman's demonstrated misunderstanding of the medical facts and opinions contained in Dr. Jones' report. The fact that Mr. Lyman was aware of the witnesses and available information is not inconsistent with the fact that Mr. Lyman did not fully understand the medical facts and opinions contained in Dr. Jones' report. Upon careful reading of the Report, the court finds no inconsistency in the two statements.

***45** As to challenge two, Respondent alleges that the Magistrate Judge incorrectly characterized Mr. Lyman's testimony regarding the strength of the intoxication evidence. (Dkt. # 163 at 31). In support of this claim, Respondent cites to the Report as stating that "Mr. Lyman testified that he believed the evidence was sufficient to establish that petitioner was intoxicated." (*Id.*). At the evidentiary hearing, Mr. Lyman testified that the evidence was sufficient "if [the jury] believed that it was Mr. Fitzgerald that [Ms. Ashley]" saw at the convenience store on East Admiral at the time of the shooting. (Dkt. # 141 at 67:16–23). The Magistrate Judge's characterization of the testimony was accurate.

Respondent alleges in challenge three that the Magistrate Judge improperly suggested that Mr. Lyman did not provide "sufficient information" to Dr. Jones regarding Petitioner's potential intoxication. (Dkt. # 163 at 32). In the Report, the Magistrate Judge states that Dr. Jones "was only marginally aware of petitioner's alcohol use on the night of the murder." (Dkt. # 159 at 62). The Magistrate Judge's statement simply reflects acknowledgment of the alcohol consumption evidence available to all parties. Neither the exact number of drinks nor their alcohol content was known. As a result, Dr. Jones testified that "if I could have had a more clear estimate of how intoxicated he was, that would certainly allow me to be more clear and precise in my conclusion." (Dkt. # 142 at 185:20–22). Thus, Dr. Jones based his opinion on all of the evidence available to him and no new evidence regarding Petitioner's alcohol consumption was presented at the evidentiary hearing that was not available at the time of Petitioner's resentencing trial. Nothing in the record supports Respondent's statement that the Magistrate Judge intended to suggest that Mr. Lyman did not provide Dr. Jones with sufficient information. This court concludes that the purported "erroneous" factual findings regarding Mr. Lyman raised in the first three challenges are taken out of context or simply not inconsistent or erroneous.

In challenges four, five, and nine, Respondent focuses on several of the Magistrate Judge's characterizations of Dr. Jones' testimony. In challenge four, Respondent alleges that the Magistrate Judge mischaracterizes Dr. Jones' testimony regarding Petitioner's lack of impulse control. (Dkt. # 163 at 32). Respondent cites to the section of the Report summarizing Dr. Jones' testimony where the Magistrate Judge wrote that "Dr. Jones testified that ... Petitioner [would]

have more difficulty with impulse control in making an initial decision...." (Dkt. # 159 at 27). In support of this challenge, Respondent accurately quotes Dr. Jones' testimony at the evidentiary hearing. (Dkt. # 163 at 32). In response to questions from the Magistrate Judge, Dr. Jones testified that "it is not so much the initial decision to eat the candy bar, but once the compromise is in place, that's when it gets worse. It's the second candy bar." (Dkt. # 142 at 201:6–9). In other words, Dr. Jones testified that, in Petitioner's case, the results of an initial poor decision can be multiplied by the compromised frontal lobe injury. While the Magistrate Judge may have misstated that Petitioner would have more difficulty with impulse control in making an initial decision, the misstatement does not impact the conclusion that trial counsel provided ineffective assistance in failing to present the expert testimony.

***46** In challenge five, Respondent alleges that the Magistrate Judge "incorrectly concluded" that ASPD could be the result of Petitioner's alcohol dependence and brain injury. (Dkt. # 163 at 33). Respondent's challenge is misplaced. The Magistrate Judge wrote that "Dr. Jones testified that antisocial personality disorder could be a result of petitioner's Axis I problems-alcohol dependence and cognitive disorder." (Dkt. # 159 at 28). That statement accurately reflects the following testimony of Dr. Jones: "Q: Can the personality disorders come from-can the personality disorder in Axis II be as a result of the problems identified in Axis I? A: Yes." (Dkt. # 142 at 209:11–14). In objecting to the statement as erroneous, Respondent cites to and quotes much of the same testimony relied on by the Magistrate Judge in his Report. Respondent's characterization of the statement as an incorrect conclusion fails to acknowledge the Magistrate Judge's complete summary of the testimony of Dr. Jones. (Dkt. # 159 at 28–32). After reviewing all of Dr. Jones' testimony, the court agrees with the Magistrate Judge's findings of fact contained in the Report.

In challenge nine, Respondent claims that the Magistrate Judge incorrectly found that "Dr. Jones would have attributed [P]etitioner's actions to his personality disorder only if no other factors were at issue." (Dkt. # 163 at 36 (quoting Dkt. # 159 at 68)). Respondent has taken the challenged statement out of context. In the Report, the Magistrate Judge concluded that,

> Mr. Lyman's concerns about the testimony regarding petitioner's diagnosis of anti-social personality disorder simply cannot outweigh the benefits of utilizing Dr. Jones's testimony. This fact is particularly true because Dr. Jones specifically stated that if petitioner was intoxicated or otherwise compromised at the time of the murder, he would have opined that petitioner was impaired by the gunshot wound. Dr. Jones would have attributed petitioner's actions to his personality disorder only if no other factors were at issue.

(Dkt. # 159 at 68). The Magistrate Judge's statements are supported by the following testimony of Dr. Jones at the evidentiary hearing:

> The Court: ... Dr. Jones, in terms of the discussion we had about events that create a multiplying effect, given your evaluation of Mr. Fitzgerald and assuming there was no intoxication and no acute diabetic event, would the decision to pick up a gun and go rob a convenience store be one of those multiplying events, or would that just be something that would still fit within sort of his normal behavior?
>
> Witness: Were he not intoxicated, were there not to be any disruption from the diabetes, then I would conceptualize this as a product of his antisocial personality disorder and the brain injury would be a nonfactor.

(Dkt. # 142 at 293:13!294:1). Respondent claims that Dr. Jones' testimony was that "he would attribute Petitioner's behavior *solely* to ASPD if Petitioner's frontal lobe damage was not exacerbated by alcohol or diabetes." (Dkt. # 163 at 36 (emphasis in original)). The distinction urged by Respondent is without substantive effect. While the Magistrate Judge did not specifically mention the brain injury in the sentence challenged by Respondent, it is clear that throughout the Report the Magistrate Judge fully appreciated the potential effect of the compromising factors of alcohol and diabetes on Petitioner's frontal lobe damage. This court concludes that the purported factual mischaracterizations regarding Dr. Jones' testimony, as discussed above, are without merit.

***47** In challenges six and seven, Respondent focuses on several of the Magistrate Judge's characterizations of testimony regarding Petitioner's diabetes. Respondent claims

that, in the "Findings of Fact" section of the Report, the Magistrate Judge incorrectly stated that "although Dr. Jones did not have enough information to render an opinion regarding the potential effects of Petitioner's diabetes on his behavior on the night of the murder, 'he did not question Dr. Bratcher's ability to do so.' " (Dkt. # 163 at 33 (quoting Dkt. # 159 at 30)). According to Respondent, the Magistrate Judge "unreasonably implied that Dr. Bratcher would have been able to render a credible opinion." (Dkt. # 163 at 34). This Court disagrees with Respondent's interpretation of the Report. Later, in the "Conclusions of Law" section of the Report, the Magistrate Judge specifically stated that Dr. Jones "advised either Mr. Lyman or Dr. LaFortune that an endocrinologist, such as Dr. Bratcher, would be better able to opine on the impact of alcohol and diabetes on Petitioner's metabolism, and that he could rely on her report to supplement his conclusions." (Dkt. # 159 at 62). The Magistrate Judge did not ignore the extent of Dr. Bratcher's information or the lack of evidence regarding Petitioner's blood sugar level in reaching any of his conclusions. This objection is without merit.

Respondent also challenges the Magistrate Judge's statement that "it is likely that some evidence of the impact of Mr. Fitzgerald's diabetes on his brain function that evening could be presented were Dr. Jones and Dr. Bratcher able to consult with one another and review all of the evidence." (Dkt. # 163 at 34 (quoting Dkt. # 159 at 68 n. 27)). Respondent misinterprets the meaning of the footnote. Based on review of the testimony at the evidentiary hearing, the court finds that had either Dr. Bratcher or Dr. Jones, in reliance on Dr. Bratcher's report, testified at the resentencing trial, evidence of Petitioner's diabetes and its potential impact on Petitioner's behavior on the night of the robberies and murder would have been presented to the jury. That finding is reflected in the footnote cited by Respondent. This objection is without merit.

In challenge eight, Respondent argues that the Magistrate Judge improperly credited Dr. LaFortune's testimony regarding the experts. (Dkt. # 163 at 35). Respondent questions Dr. LaFortune's belief that Dr. Bratcher and Dr. Jones could have put Petitioner's antisocial behaviors "in context." (*Id.*). Respondent argues that Dr. Bratcher was nonessential, insofar as her testimony would merely have indicated "Petitioner had unspecified behaviors which indicated a rebellion against diabetes." (*Id.*) After reviewing the transcripts from the evidentiary hearing, the court finds this objection falls short. As the record indicates, Dr. Bratcher was prepared to provide an analysis of Petitioner's medical history, how his diabetes affected his development as a person, and how his diabetes and gunshot wound affected his judgment the night of the murder. (Dkt. # 25 at 98–100; Dkt. # 141 at 65:5–66:16). This objection is without merit.

***48** In summary, the court conducted a de novo review of the nine challenges raised in Respondent's objection to the Magistrate Judge's findings of fact. Based on the foregoing, the court finds that Respondent's objections fail to raise any new issue of law or fact that alter the validity of the Report's conclusions.

5. Prejudice resulting from Mr. Lyman's deficient performance

As the last objection to the Report, Respondent contends that Petitioner has failed to show a reasonable probability that the outcome of his resentencing trial would have been different if Mr. Lyman had presented the testimony of Ms. Stockfleth, Ms. Ashley, Dr. Bratcher, and Dr. Jones. (Dkt. # 163 at 36–37). Respondent argues that the "mitigating" evidence omitted by Mr. Lyman would have strengthened the State's case in aggravation and weakened Petitioner's case in mitigation and that, as a result, Petitioner cannot satisfy the prejudice prong of the *Strickland* standard.

The evidence supporting the aggravating circumstances found by the resentencing jury (i.e., that Petitioner was previously convicted of a felony involving the use or threat of violence to the person, and that there was a probability Petitioner would commit criminal acts of violence that would constitute a continuing threat to society) was strong. However, because Mr. Lyman decided not to present expert testimony to explain why Petitioner committed the acts resulting in the murder, the jury was left to conclude that Petitioner was simply a calculating, violent man.

Because a death sentence requires a unanimous vote from the jury, if "there is a reasonable probability that one juror" would have chosen a life sentence, Petitioner has established prejudice. *Higgins*, 539 U.S. at 537; *Wilson v. Simmons*, 536 F.3d 1064, 1095 (10th Cir.2008). As the Magistrate Judge observed, Petitioner's resentencing jury "had no understanding of the interplay of petitioner's diabetes diagnosis, his lack of family support from a young age, his frontal lobe damage, and the impact his intoxication had on his brain function." (Dkt. # 159 at 69). Had the jury heard evidence demonstrating that Petitioner's conduct was the result of mental and physical injuries and was beyond his control, there is a reasonable probability that one juror

would have voted for life imprisonment rather than the death penalty. Respondent's objection based on the prejudice prong of *Strickland* is without merit.

Having determined that the parties' objections to the Report lack merit, the Court shall accept the Report. Petitioner received ineffective assistance of counsel at his resentencing trial. Furthermore, because the omitted issue of ineffective assistance of trial counsel is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission directly establishes deficient performance by appellate counsel. Furthermore, the court is convinced that the result of Petitioner's appeal would have been different had the claim of ineffective assistance of trial counsel been developed and presented on appeal. Therefore, Petitioner is entitled to a new sentencing trial. Habeas corpus relief shall be conditionally granted on Ground 7.

VIII. Trial court's admission of prejudicial and inflammatory evidence during resentencing trial (Ground 8)

*49 Petitioner claims he was denied a fundamentally fair resentencing trial because the trial court admitted the first stage evidence from his May 1996 trial in violation of his Eighth and Fourteenth Amendment rights. Specifically, Petitioner argues that the following evidence was improperly admitted: (1) the surveillance and crime scene videotapes and photographs; (2) ballistics and firearms testimony and evidence; (3) autopsy and crime scene photographs, diagrams, and protocol; and (4) the medical examiner's testimony.[15] Petitioner contends the disputed evidence was irrelevant to resentencing issues and that it was more prejudicial than probative under Okla. Stat. tit. 12, § 2403 (1991). Respondent contends the admission of the challenged evidence did not render Petitioner's trial so fundamentally unfair as to deprive him of due process of law.

15 In his petition, Petitioner mentions that he objected to the introduction of the following evidence at trial: a letter written by Petitioner regarding the assault rifle; a receipt from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF); transcripts of Petitioner's statements to law enforcement; judgments and sentences for the robbery convictions; testimony about how Petitioner got the assault rifle; testimony about the night of the murder and Petitioner's arrest. (Dkt. # 24 at 176). However, the petition contains no argument as to how introduction of this evidence rendered his trial fundamentally unfair. Consequently, to the extent Petitioner seeks relief with respect to the introduction of this evidence, it is denied.

In Petitioner's second direct appeal, the OCCA denied this claim of error. *Fitzgerald II*, 61 P.3d at 905. The state appellate court ruled that the evidence of which Petitioner complains was properly admitted under Okla. Stat. tit. 21, § 701.10a, governing the admissibility of evidence when a capital case is remanded for a new sentencing trial. *Id.* at 905 and n. 18. Section 701.10a(4) provides in pertinent part: "All exhibits and a transcript of all testimony and other evidence properly admitted in the prior trial and sentencing shall be admissible in the new sentencing proceeding [.]" As explained by the OCCA, "[t]his statute requires that all properly admitted evidence from the original trial be admitted at the resentencing trial, but preserves a defendant's ability to challenge that underlying (and therefore ongoing) admissibility." *Fitzgerald II*, 61 P.3d at 905 (citing *Humphreys v. State*, 947 P.2d 565, 573 (Okla.Crim.App.1997)). The OCCA rejected Petitioner's argument that the admission of evidence at resentencing is limited to evidence bearing directly on punishment and denied Petitioner's claim of error because he did not argue how the challenged evidence was improperly admitted in his original trial.[16] *Id.*

16 Petitioner relied on *Howell v. State*, 967 P.2d 1221 (Okla.Crim.App.1998) to support this proposition on direct appeal and relies upon it again in these proceedings. The OCCA rejected this holding from *Howell* and noted that "*Howell* is not binding precedent as the opinion only received a majority of votes for the result from this Court. Moreover, we find *Howell's* language—limiting the admission of evidence in a capital resentencing trial to issues relating to punishment—to be inconsistent with 21 O.S.2001, § 701.10a and its interpretation in *Humphreys v. State*." *Fitzgerald II*, 61 P.3d at 905.

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. 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) (quoting *Mayes v. Gibson*, 210 F.3d 1284, 1293 (10th Cir.2000)). The fundamental fairness analysis is approached "with 'considerable self-restraint.' " *Smallwood*, 191 F.3d at 1275 (quoting *Jackson v. Shanks*, 143 F.3d 1313, 1322 (10th Cir.1998)). The fundamental fairness inquiry requires the court to look at the effect of the disputed evidence within the context of the entire second stage and consider its relevance, the strength of the aggravating evidence as compared to the mitigating evidence, and decide where the disputed evidence's admission could have given the prosecution an unfair advantage. *Spears v. Mullin*, 343 F.3d 1215, 1226 (10th Cir.2003).

***50** As explained above, the OCCA held that the challenged evidence was properly admitted under Oklahoma law. Moreover, the challenged evidence was probative of the aggravating circumstances alleged. At Petitioner's resentencing trial, the State alleged the following aggravators: (1) Fitzgerald had been previously convicted of a felony involving the threat or use of violence to the person; (2) the existence of a probability he would commit criminal acts of violence that would constitute a continuing threat to society; and (3) the defendant committed the murder to avoid lawful arrest or prosecution. *See Fitzgerald II*, 61 P.3d at 903 n. 3.

In order to establish the continuing threat aggravator, the State was required to establish the following:

> *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.

OUJI CR 2d 4–74. This aggravator focuses on the defendant's propensity towards violence. *See James v. Gibson*, 211 F.3d 543, 559 (10th Cir.2000). Under Oklahoma law, proof of the continuing threat aggravating factor is based on "the circumstances surrounding the murder for which the defendant has just been convicted and his prior criminal conduct." *Moore v. Reynolds*, 153 F.3d 1086, 1111 (10th Cir.1998) (quoting *Douglas v. State*, 951 P.2d 651, 675 (Okla.Crim.App.1997)); *see also James*, 211 F.3d at 559 ("The most compelling evidence supporting continuing threat can come from the facts surrounding the murder itself."). In *Jurek v. Texas*, 428 U.S. 262, 271 (1976), the Supreme Court upheld an aggravating circumstance nearly identical to Oklahoma's continuing threat aggravating circumstance. The Court quoted with approval the Texas Court of Criminal Appeals, as follows:

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another.

Jurek, 428 U.S. at 272–73.

In this case, the probative value of the surveillance tapes and crime scene videotape outweighed any prejudicial effect. Obviously, the surveillance tape of the attempted robbery and murder of William Russell (State Tr. Ex. 52) is probative of the continuing threat aggravating circumstance in that it shows the exact circumstances and nature of the murder at issue. Moreover, this tape was relevant to the alleged aggravating circumstance of "murder to avoid arrest." The video tapes of the two armed robberies committed by Petitioner on the same night as the murder (State Tr. Exs. 1 and 76) show other criminal conduct of Petitioner. Likewise the crime scene videotape prepared and narrated by Tulsa Police Detective Roy Heim (State Tr. Ex. 53) was probative of the continuing threat aggravating circumstance. The videotape was prepared shortly after the police arrived on the scene and before any evidence was collected. With the narration by Detective Heim, the videotape demonstrated how the murder occurred and showed the direct path of the fatal bullet. At several points, the videotape shows the victim laying in a pool of blood on the floor of the store. This tape, though prejudicial, was probative insofar as it served to educate the jury as to the circumstances of the murder.

***51** Petitioner claims that the music playing in the background during this tape was prejudicial. He characterizes the music as "loud punk music" and argues that the two

songs playing in the background contain lyrics concerning the commission of acts of violence. The background music is barely audible and as noted by the trial court, the lyrics are nearly indiscernible. *See* Tr. II Vol. IV at 725. The music obviously came from the store's radio. There is little likelihood that the background music would prejudice the jury.

Similarly, the testimony of the medical examiner, the autopsy and crime scene photographs, the autopsy diagrams, and protocol were probative of the continuing threat aggravator as they explain and show the circumstances of Mr. Russell's murder. The photographs, diagrams, and protocol corroborate the medical examiners' testimony.

The ballistics and firearm evidence, of which Petitioner complains, was relevant to establish Petitioner's propensity for violence in support of the continuing threat aggravator. This evidence came in the form of firearms, ammunition, and spent shell casings utilized during testimony. Petitioner did not kill Mr. Russell with a hunting rifle. Rather, Petitioner purchased and used an SKS assault rifle. *See* State Tr. Ex. EE at 674–76, 678; Ex. GG at 850–51.

Petitioner argues that *Spears v. Mullin*, 343 F.3d 1215 (10th Cir.2003), supports his position that the admission of the challenged evidence rendered his resentencing proceedings fundamentally unfair. However, the challenged evidence admitted in the present case is easily distinguished from the challenged evidence admitted in *Spears*. In *Spears*, the Tenth Circuit held that the admission of graphic crime scene photographs depicting the victim's post-mortem stab wounds and otherwise mutilated body rendered Spear's second stage trial fundamentally unfair. *Id.* at 1226–28. Specifically, the court determined that the photographs at issue were not relevant to the alleged aggravating circumstances and potentially misled the jury. *Id.* at 1227–28. In addition, the *Spears* court stated,

> Even if the photographs were minimally relevant to the heinous, atrocious, or cruel aggravator, the photographs' prejudicial effect outweighed their probative value. Important to this conclusion is the fact that the State waited until the second stage to introduce the photographs. By contrast, the State introduced comparatively innocuous photographs at the first stage, seeming to deliberately await the second stage to present the more gruesome photographs solely for their shock value.

Id. at 1228. The court found that the evidence supporting the aggravating circumstances was not particularly strong when compared to the mitigating evidence and ultimately held, "[t]his highly inflammatory evidence fatally infected the trial and deprived Spears and Powell of their constitutional rights to a fundamentally fair sentencing proceeding." *Id.* at 1229. In contrast, here, the disputed evidence is relevant to alleged aggravators, as explained above. The disputed evidence is not of a particularly inflammatory or gruesome nature. Moreover, the evidence supporting the alleged aggravators in this instance is particularly strong.

***52** This Court does not find the OCCA ruling contrary to or an unreasonable application of Supreme Court precedent.[17] Given the probative nature of the challenged evidence and the wealth of additional evidence supporting the aggravating circumstances found by the jury, the admission of the challenged evidence was not so unduly prejudicial as to render the proceedings against Petitioner fundamentally unfair. *See Duckett*, 306 F.3d at 999. Consequently, Petitioner is not entitled to relief on this ground.

17 Petitioner argues that because the OCCA did not make a specific finding regarding whether any of the challenged evidence denied Petitioner a fair trial, this Court's review should be de novo. To the contrary, a state appellate court does not have to cite or even be aware of the applicable federal law, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002).

IX. Denial of right to present mitigating evidence rebutting the "continuing threat" aggravating circumstance (Ground 9)

Petitioner claims he was denied the right to present mitigating evidence and evidence that would have rebutted the "continuing threat" aggravating circumstance. Petitioner specifically claims that the trial court erred by not permitting (1) the jury to see him in his wheelchair, and (2) Dr. Mark

Cunningham to testify regarding his risk assessment of prison society. Respondent argues that the OCCA's rejection of this claim was not an unreasonable application of Supreme Court precedent.

Petitioner raised this issue in his second direct appeal. The OCCA rejected Petitioner's claim of error and found that the trial court properly excluded the above evidence. *Fitzgerald II*, 61 P.3d at 903–05.

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, inter alia, *Penry v. Lynaugh*, 492 U.S. 302, 317–18 (1989)). 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)). "Consideration of mitigating factors allows a jury to make an individualized sentencing determination based upon the defendant's specific life experiences and characteristics." *Hawkins v. Mullin*, 291 F.3d 658, 680 (10th Cir.2002). "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)).

With respect to Petitioner's claim that he was denied the opportunity to present evidence rebutting the "continuing threat" aggravator, "a defendant must have a meaningful opportunity to deny or explain the State's evidence used to procure a death sentence." *Duvall v. Reynolds*, 139 F.3d 768, 797 (10th Cir.1998) (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977)). However, as discussed above, 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)). Accordingly, the court will review the trial court's evidentiary rulings only insofar as Petitioner's federal constitutional rights may have been impacted, 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.

A. The wheelchair

***53** The OCCA rejected Fitzgerald's claim that the jury should have been permitted to see him in his wheelchair and found as follows:

> After his original trial but before resentencing, Fitzgerald's leg was severely broken in an incident with Tulsa County Deputies. Fitzgerald was left with limited mobility and must now use a wheelchair or other device to ambulate. He is, however, able to sit in a chair and walk short distances without aid. Based upon this evidence, the trial court ordered that Fitzgerald be seated in a normal chair during trial, and prohibited him from sitting in his wheelchair, because it was "not medically necessary." Fitzgerald argues that this was error because it prohibited him from introducing evidence regarding his limited mobility, which was relevant in mitigation and to rebut the "continuing threat" aggravating circumstance. However, the trial court's ruling did not prohibit the jury from hearing evidence offered by Fitzgerald regarding his medical condition and diminished ability to move about.
>
> The jury viewed the videotape of the leg fracture, received evidence that Fitzgerald could not bear weight on it and needed an assistive device for ambulation, was instructed that Fitzgerald had limited mobility as a result of his broken leg, and was well informed of those limitations. The trial court did not prohibit any evidence regarding any of his medical conditions from being presented to the jury. Thus, we cannot say that the trial court's order prohibiting Fitzgerald from sitting in the wheelchair in the courtroom was error. This argument is denied.

Fitzgerald II, 61 P.3d at 903–04.

It was not unreasonable for the OCCA to determine that the trial court's order prohibiting Petitioner from sitting in the wheelchair in the courtroom was not error. The trial court's order did not prohibit Petitioner from introducing evidence that he was required to utilize a wheelchair, nor as indicated by the OCCA, did the trial court prohibit Petitioner from introducing evidence of his leg break or his resulting mobility problems. The trial court's order simply did not prohibit Petitioner from introducing any constitutionally relevant mitigating evidence or any evidence which might rebut the "continuing threat" aggravator, and as a result, did not render Petitioner's resentencing trial fundamentally unfair.

B. Dr. Mark Cunningham

Likewise, the OCCA rejected Fitzgerald's claim of error with regard to Dr. Cunningham's proposed testimony and found as follows:

> At the State's request, the trial court prohibited Fitzgerald from calling Dr. Cunningham to testify. Fitzgerald had filed an Offer of Proof of the Proposed Testimony of Dr. Mark Cunningham, stating that Cunningham would testify regarding "violence risk assessment." The Offer of Proof laboriously detailed why Cunningham was an expert, what violence risk assessment was, how it is performed, and why it is the best way to determine an inmate's level of risk. As the Offer of Proof did not discuss Fitzgerald or his level of risk, the trial court ordered Fitzgerald to produce that additional information. Fitzgerald then filed a Response to the State's Motion in Limine Regarding Testimony of Dr. Mark Cunningham which reiterated the highlights of the Offer of Proof and argued that Dr. Cunningham's testimony was admissible, but failed to offer any additional information over his particularized risk assessment. The trial court then granted the State's motion to prohibit Dr. Cunningham from testifying.
>
> *54 This Court had originally reversed and remanded Fitzgerald's sentence for resentencing-in part, because he was prohibited from presenting expert testimony to rebut the "continuing threat" aggravating circumstance and discuss his future dangerousness. In that opinion, this Court discussed the necessity and importance of hiring such an expert. In response, Fitzgerald "contacted," possibly hired Dr. Cunningham to conduct a risk assessment for him, and perhaps even retained Dr. Cunningham to serve as a witness for the defense. However, nothing in either the Offer of Proof or Response indicates that Cunningham performed risk assessment on Fitzgerald or how he would testify regarding such an assessment. Thus, the trial court correctly prohibited Dr. Cunningham from testifying and this Proposition is denied.

Fitzgerald II, 61 P.3d at 904–05 (footnotes omitted) (citing *Hooker v. State*, 887 P.2d 1351, 1367 (Okla.Crim.App.1994)).

Petitioner argues that the OCCA's reliance on *Hooker* was in error. Petitioner claims that *Hooker* stands for the proposition that a defendant is not entitled to an instruction that "society" was limited to prison society. (Dkt. # 24 at 189). This Court cannot second-guess the state court's ruling on state law issues. *See Smallwood*, 191 F.3d at 1275. However, it should be noted that, contrary to Petitioner's argument, the state appellate court in *Hooker* upheld a trial court's decision to prevent a defense expert from testifying where the expert's opinions were not based on individual assessment of the subjects of her opinion. See *Hooker*, 887 P.2d at 1367 ("The witness' theoretical conclusions are not relevant to Hooker's character or the circumstances of this particular crime."). Similarly, here, the OCCA found that while Petitioner sought to use an expert to present risk assessment evidence, "nothing in either the Offer of Proof or Response indicates that Cunningham performed risk assessment on Fitzgerald or how he would testify regarding such an assessment. Thus, the trial court correctly prohibited Dr. Cunningham from testifying." *Fitzgerald II*, 61 P.3d at 905.

Petitioner's reliance upon *Skipper v. South Carolina*, 476 U.S. 1 (1986) is misplaced. In *Skipper*, the trial court excluded testimony of jailers and a regular visitor regarding the defendant's good behavior during the time he spent in jail awaiting trial. Upon review, the Court held that the exclusion of the evidence deprived the petitioner of his right to present all relevant mitigating evidence. *Id.* at 4–5. The Court found that "the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison" and that "such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.' " (*Id.* (quoting *Lockett*, 438 U.S. at 604)). Unlike the excluded testimony in *Skipper*, which was relevant individualized evidence of the known prior behavior and history of the defendant, the proffered testimony of Dr. Cunningham in the present case consisted of theoretical, generalized conclusions on "how he employed group statistical data in conducting an assessment of an inmate's adjustment to prison, such as Petitioner." (Dkt. # 24 at 189).

*55 Petitioner does not challenge the fact that Dr. Cunningham's risk assessment testimony was not individualized to Petitioner. (Dkt. # 24 at 189–90). Tellingly, Petitioner has not pointed to a single decision where any court has permitted such generalized testimony in mitigation or to rebut evidence of future dangerousness. In fact, courts have rejected theoretical, generalized testimony offered in mitigation or to rebut evidence of future dangerousness. See, *e.g.*, *United States v. Edelin*, 180 F.Supp.2d 73, 74–76 (D.D.C.2001) ("The proffered testimony ... has no relation to the specific charges against [the defendant], his character, or any other proper mitigation factor, would provide no basis for the jury to impose a sentence less than death, and is therefore inadmissible as mitigation evidence."); *United States v. Johnson*, 223 F.3d 665, 675 (7th Cir.2000) (finding

that evidence that maximum security federal prisons with control units would be sufficient to control defendant's dangerous propensities was not an appropriate mitigating factor; mitigating factors are limited to factors specific to the defendant, not those against the death penalty in general); *United States v. Thomas*, 2006 WL 140558, at *24 (D.Md.2006) (unpublished)[18] (holding that to be reliable, a risk assessment methodology must incorporate an individualized and complete assessment of the defendant). In *Edelin*, the defendant intended to call (the same) Dr. Mark Cunningham to provide testimony about generalized risk assessment by the Bureau of Prisons, statistical incidence of violent acts within the Bureau of Prisons' system, and confinement classifications and security levels in the Bureau of Prisons. *Edelin*, 180 F.Supp.2d at 74. The trial court granted the government's motion to preclude the defendant from introducing any expert testimony about the Bureau of Prisons' ability to prevent defendant Edelin from committing any future criminal acts. *Id.* at 75. The trial court reasoned that in contrast to *Skipper*, the proffered testimony "has no relation to the specific charges against [the defendant], his character, or any other proper mitigation factor, would provide no basis for the jury to impose a sentence less than death, and is therefore inadmissible as mitigation evidence." *Edelin*, 180 F.Supp.2d at 76.

18 This and other unpublished opinions are cited herein for persuasive value. *See* 10th Cir. R. 32.1(A).

It was not unreasonable for the OCCA to determine that the trial court did not err in prohibiting Dr. Cunningham from testifying. The generalized theoretical opinion of Dr. Cunningham regarding the defendant's probable favorable adjustment to prison if his life was spared is not relevant to "any aspect of [Fitzgerald's] character or record" nor evidence of "the circumstances of the offense." *See Lockett*, 438 U.S. at 604. Nor was it relevant to rebut evidence that Petitioner individually posed a continuing threat to society. The trial court's order did not render Petitioner's resentencing trial fundamentally unfair. Habeas corpus relief on Ground 9 is denied.

X. Victim impact evidence (Ground 10)

***56** Petitioner argues that the introduction of victim impact evidence at his resentencing trial rendered his death sentence unconstitutional in violation of the Sixth, Eighth, and Fourteenth Amendments. Petitioner argues that victim impact evidence serves as an unconstitutional "superaggravator" and that the victim's father, mother, and sister were permitted to inject improper and prejudicially irrelevant victim impact testimony into the proceedings. Respondent contends that the OCCA's determination that the victim impact testimony was proper is not contrary to or an unreasonable application of Supreme Court precedent.

Petitioner argues that the victim's father, mother, and sister were permitted to inject improper and prejudicially irrelevant victim impact testimony into the proceedings. Glen Russell, the victim's father, testified that in order to escape the reality of his son's death, he accrued large credit card bills which eventually led to bankruptcy. Tr. II Vol. VII at 978. He also testified that he lost his job due to his deep depression, was place on Prozac, and suffered sleeplessness and ulcers. *Id.* at 979. Janet Russell, the victim's sister, stated that her brother's murder caused her to become very withdrawn which in turn affected her work performance. *Id.* at 984–85. The victim's mother, Grace Russell, testified that her son was a pleasant, loving young man who was engaged to be married, and planned to move to Brazil. *Id.* at 987–88. As a result of his murder, Mrs. Russell withdrew from her family and developed physical illnesses, such as heart and stomach pains, whenever she would see a Git–NGo Store. *Id.* at 989. Petitioner also complains that the prosecution asked Mrs. Russell an open-ended question as to whether there was anything else she would like to tell the jury as to how her son's murder has affected her, to which she responded, "Well, probably a lot of things but I don't think I'm able to say them here in court." *Id.* at 990.

The OCCA denied relief on this claim noting that the "superaggravator" argument has been rejected and that "the victim impact evidence in this case was properly limited to the financial, emotional, psychological and physical effects of the victim's murder on his mother, father and sister." *Fitzgerald II*, 61 P.3d at 905.

In 1992, Oklahoma enacted legislation permitting victim impact evidence. *See* Okla. Stat. tit. 21, § 701.10(c) (1992),[19] and Okla. Stat. tit. 22, §§ 984, 984.1 (1992).[20] If a state chooses to allow the admission of victim impact evidence, the Eighth Amendment erects no per se bar. 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.' 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.* at 1238–39 (quoting *Booth v. Maryland*, 482 U.S. 496, 502 (1987), *overruled in part by Payne*, 501 U.S. at 825); see also *Dodd v. Trammell*, ---F.3d ---, 2013 WL 5124331, *20 (10th Cir.2013). The Supreme Court in *Payne* specifically outlined why victim impact evidence was relevant to a capital jury's sentencing decision:

> [19] Section 701.10(c) of Title 21 provides, "[i]n the sentencing proceeding, ... the state may introduce evidence about the victim and about the impact of the murder on the family of the victim."
>
> [20] Section 984 of Title 22, in effect at the time of Fitzgerald's crime and trial, defines "victim impact statements" as "information about the financial, emotional, psychological, and physical effects of a violent crime on each victim and members of their immediate family, and includes information about the victim, circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion of a recommended sentence." Per section 984. 1, copies of the victim impact statements are to be made available to the parties.
>
> ***57** 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.
>
> *Hain*, 287 F.3d at 1238 n. 10 (quoting *Payne*, 501 U.S. at 825) (citations omitted) (internal quotation marks omitted).

The victim impact evidence introduced at Fitzgerald's trial was not " 'so unduly prejudicial that it render[ed] the trial fundamentally unfair.' " *See Hain*, 287 F.3d at 1238 (quoting *Payne*, 501 U.S. at 825). The victim's family described the victim as an individual and each family member told of the specific harm and unique loss they suffered emotionally, physically, or financially as a result of the murder. *See id.* at n. 10. The victim's family's statements were not lengthy or overly emotional—the testimony was limited to descriptions of the victim and the impact of the murder on the victim's family. *See Payne*, 501 U.S. at 827. The OCCA's determination was not an unreasonable application of *Payne*. Habeas relief on Ground 10 is denied.

XI. Constitutionality of "continuing threat" aggravator (Ground 11)

Petitioner asserts that the continuing threat aggravator is unconstitutionally vague and overbroad. The OCCA denied relief on this claim in Petitioner's second direct appeal. The OCCA noted that it has previously upheld the constitutionality of the "continuing threat" aggravator and declined to revisit the issue. *Fitzgerald II*, 61 P.3d at 905–06 (citing *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 1340, 1353–54 (10th Cir.1997) (citing *Tuilaepa v. California*, 512 U.S. 967, 972 (1994)) ("Because the continuing threat factor is neither unconstitutionally vague nor applicable to every defendant convicted of murder in the first degree, it is properly used during both the eligibility decision and the selection decision."). 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 his Ground 11 claim that the "continuing threat" aggravating circumstance was unconstitutional as applied at his resentencing trial. He provides no argument in his brief to allow the Court to analyze the claim. The Court therefore denies his "as applied" claim on the merits.

XII. "Prior violent felony" and "continuing threat" aggravators (Ground 12)

***58** Petitioner contends his constitutional rights were violated because the same past criminal conduct (his prior convictions for armed robbery and burglary) was used by

the State to support both the "continuing threat" aggravator and the "prior conviction of violent felonies" aggravator. Petitioner claims that the "continuing threat" aggravator and the "prior conviction of violent felonies" aggravator are duplicative and skewed the weighing process, resulting in an arbitrary sentence of death in violation of the Eighth and Fourteenth Amendments. In disposing of Petitioner's second direct appeal, the OCCA rejected this argument:

> In Proposition VI, Fitzgerald claims that his constitutional rights were violated because the State was allowed to use his former violent felony convictions to support both the "prior violent felony" and "continuing threat" aggravating circumstances. This claim has previously been addressed and rejected by this Court because the evidence of prior convictions to support these two aggravating circumstances does not "show the same aspect of appellant or his crime." The same is true here and this Proposition is denied.

Fitzgerald II, 61 P.3d at 906 (footnote omitted).

Notably, Petitioner acknowledges that the Supreme Court has not addressed this issue. 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, the weighing process is unconstitutionally skewed.

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 denies habeas relief on this basis. However, even assuming arguendo that the AEDPA standards allow Petitioner to rely on *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 neither aggravating factor at issue here "necessarily subsume[d]" the other. See *Cooks*, 165 F.3d at 1289. The 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. *See id.* 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. *See id.* 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 based on other facts as well, including the circumstances of the murder, evidence of Petitioner's planned escape from prison, State Tr. Ex. II, JJ, and evidence that Petitioner planned at some point to rob an armored car in Pennsylvania, Tr. II. Vol. VI at 838.

***59** 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 claim.

XIII. Failure to instruct jury that aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt (Ground 13)

Petitioner alleges that Oklahoma's sentencing scheme for death penalty cases violates the Sixth, Eighth, and Fourteenth Amendments. Petitioner's particular complaint is that the jury in his case was not required to find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. In support of his claim, Petitioner cites *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002).

Respondent contends that Ground 13 is procedurally barred, claiming that the OCCA in Petitioner's second post-conviction proceeding declined to address the substance of this claim due to Petitioner's failure to present the claim on direct appeal. However, rather than consider the procedural posture of this claim, the court finds the claim can be more easily and succinctly denied on the merits. *Romero v. Furlong*, 215 F.3d 1107, 1111 (10th Cir.2000). In

Matthews v. Workman, 577 F.3d 1175 (10th Cir.2009), an Oklahoma capital habeas petitioner, relying on both *Apprendi* and *Ring*, argued that his jury should have been instructed to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Without this determination, Matthews argued his death sentence was invalid. Relying on its decision in *United States v. Barrett*, 496 F.3d 1079, 1107 (10th Cir.2007), the Tenth Circuit found no merit to the claim. In particular, the court found that the jury's weighing of the factors in aggravation and mitigation "is not a finding of fact subject to *Apprendi* but a 'highly subjective, largely moral judgment regarding the punishment that a particular person deserves.' " *Matthews*, 577 F.3d at 1195 (quoting *Barrett*, 496 F.3d at 1107). In accordance with *Matthews*, Fitzgerald's Ground 13 claim is denied.

XIV. Cumulative errors in both stages (Ground 14)

In Ground 14, Petitioner claims that he is entitled to relief based on cumulative error. The court has determined in Ground 6 above, that Petitioner is not entitled to relief on the ground of cumulative error as to the guilt or innocence stage of trial. Because the court has determined that Petitioner is entitled to a new sentencing trial based on his Ground 7 claim of ineffective assistance of trial and appellate counsel, the court need not analyze Petitioner's claim of cumulative error during his resentencing trial.

CERTIFICATE OF APPEALABILITY

Rule 11, Rules Governing Section 2254 Cases in the United States District Courts, instructs that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." The Court recognizes that "[r]eview of a death sentence is among the most serious examinations any court of law ever undertakes." *Breechen v. Reynolds*, 41 F.3d 1343, 1370 (10th Cir.1994). To be granted a certificate of appealability, however, Petitioner must demonstrate a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner can satisfy that standard by demonstrating that the issues raised are debatable among jurists of reason or that the questions deserve further proceedings. *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003). "Obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor." *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983) (citations omitted).

*60 The court has determined that Petitioner received ineffective assistance of counsel at his resentencing trial. For that reason, the Petition for Writ of Habeas Corpus is conditionally granted as to Ground 7. However, the court has denied relief as to the grounds of error affecting the guilt or innocence stage of Petitioner's trial (Grounds 1–6). The court recognizes that some of Petitioner's stated issues relate to the alleged deprivation of one of his constitutional rights, which, if substantiated, could entitle him to habeas relief. In order to ensure that these issues receive the type of review on appeal which should be accorded such serious matters, the court has carefully considered each issue and finds that the following issue could be debated among jurists or could be resolved differently by another court:

> Ground 2: Petitioner was denied the basic tools to present a defense to malice aforethought murder by the denial of expert assistance guaranteed by *Ake v. Oklahoma* and his conviction violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Additionally, this court finds that this issue is adequate to deserve encouragement to proceed further. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot*, 463 U.S. at 893).

ACCORDINGLY IT IS HEREBY ORDERED that:

1. The Report and Recommendation (Dkt.# 159) is **accepted** and the court overrules the objections (Dkt.163, 164) thereto.

2. The petition for writ of habeas corpus (Dkt.# 24) is **conditionally granted** in part and **denied** in part, as follows:

   a. The petition is **conditionally granted** as to Ground 7. The writ of habeas corpus shall issue unless the State of Oklahoma commences resentencing proceedings in Tulsa County District Court, Case No CF–1994–3451, within 180 days of the entry of this Opinion and Order.

   b. The remaining grounds for relief raised in the petition for writ of habeas corpus are **denied.**

3. A certificate of appealability is granted as to the claim enumerated herein.

4. A separate judgment shall be entered in this matter.

REPORT AND RECOMMENDATION

T. LANE WILSON, United States Magistrate Judge.

Before the undersigned United States Magistrate Judge for a report and recommendation is a part of petitioner's Petition for Writ of Habeas Corpus. (Dkt.# 24). After filing this lawsuit, petitioner filed his Amended Motion for Evidentiary Hearing. (Dkt.# 62). Petitioner alleged fourteen grounds for relief in support of his motion. *Id.* The District Court granted petitioner's motion as to the seventh ground for relief only and referred this case to the undersigned for the purpose of conducting an evidentiary hearing and issuing a report and recommendation. *Id.* Petitioner's seventh ground for relief alleges that "trial and appellate counsel's failure to adequately develop and present available mitigating evidence of brain damage, diabetes, and consumption of alcohol on the night of the offense in petitioner's second penalty trial deprived petitioner effective assistance of counsel." (Dkt.24, 72).

*61 The undersigned held an evidentiary hearing on August 21–23, 2012, and November 9, 2012. (Dkt.132, 133, 135, 136, 141, 142, 143, 152, 153). The undersigned also ordered the parties to submit proposed findings of fact and conclusions of law. (Dkt.# 152). Those submissions were filed on February 5, 2013. (Dkt.156, 157).

For the reasons that follow, the undersigned recommends that the District Court **GRANT** petitioner's Petition for Writ of Habeas Corpus on the grounds that petitioner was denied effective assistance of counsel. The undersigned finds that petitioner's counsel, during the second penalty trial, fell below the constitutional standards guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

PROCEDURAL HISTORY AND BACKGROUND INFORMATION

Initial Trial and Sentencing

In 1996, petitioner was convicted in state court of two counts of robbery with a firearm, one count of attempted robbery, and one count of first-degree murder in connection with a series of robberies at Git–n–Go stores in Tulsa over the course of one night. *See Fitzgerald v. State*, 972 P.2d 1157, 1161 (Okla.Crim.App.1998). Petitioner received three life sentences for the robbery counts and the death penalty for the murder. *See id.* Prior to the trial, petitioner "tirelessly and constantly requested that the State provide funds under *Ake v. Oklahoma*[1] for a neuropsychologist and an expert on juvenile-onset diabetes." *Id.* at 1165. Petitioner argued that these experts were necessary to explain the connection between his diabetes diagnosis and his consumption of alcohol the night of the crimes, as well as the impact of a gunshot wound that caused probable brain damage affecting petitioner's behavior and judgment. *See id.* at 1167. The trial court denied those requests, holding that petitioner was required to show that he actually suffered from the conditions for which he sought expert testimony at the time the crimes were committed. *See id.* at 1164, 1166.

1 *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), provides that an indigent defendant who makes a preliminary showing that experts are necessary to an adequate defense is entitled to retain experts at the State's expense. Petitioner was required to request funds through motions to the trial court because he was represented by the Tulsa County Public Defender's Office. *See Fitzgerald*, 972 P.2d at 1165.

Initial Appeal

In 1998, the Oklahoma Court of Criminal Appeals ("OCCA") affirmed the convictions but reversed the death sentence based on a number of errors that occurred during the sentencing stage. *See id.* at 1175. OCCA gave special consideration to petitioner's claim that the trial court erred in refusing to allow petitioner to retain experts to assist in preparing a case for mitigation during the second stage trial. *See id.* at 1161, 1168–70, 1175. OCCA agreed with petitioner's argument that "the mere facts of the gunshot wound and his diabetic condition are not particularly mitigating" and required expert testimony. *See id.* at 1166. OCCA also held that the trial court erred in requiring a heightened burden of proof from petitioner to establish his need for those experts. *See id.* at 1166–67. OCCA remanded the case for a new penalty phase trial, in which petitioner would be permitted to retain experts for use at trial. *See id.* at 1175.

Second Trial

*62 Petitioner's second penalty phase trial took place in October 2000. (Dkt.# 54).[2] Three attorneys from the Oklahoma Indigent Defense System ("OIDS") were appointed to represent petitioner at the second trial: Silas Lyman, Dr. Kathy LaFortune, and Lynn Burch. (Dkt. # 141 at 115). Mr. Lyman served as first chair. (Dkt. # 141 at 15). The OIDS attorneys retained Dr. Herman Jones, a neuropsychologist, in July 1999 to evaluate petitioner. (Pet.Exh.12).[3] They retained Dr. Christina Bratcher, an endocrinologist, to review petitioner's history of diabetes, to opine on his prognosis, and to share her results with Dr. Jones and another neuropsychologist. (Resp.Exh.1).

2 The parties designated the trial transcript as part of the record for consideration of petitioner's Petition for Writ of Habeas Corpus. (Dkt.# 54). References to the second penalty phase trial will be cited as (Tr. T.—).

3 All exhibits introduced during the evidentiary hearing will be cited as (Pet.Exh.——) or (Resp.Exh. ——).

At the second trial, the State sought to prove three aggravating circumstances in support of the death penalty: (1) that petitioner "was previously convicted of a felony involving the use or threat of violence to the person;" (2) that petitioner committed the murder in an attempt to avoid arrest and prosecution; and (3) that petitioner posed a "continuing threat to society." (Tr. T. 750) (citing 21 Okla. Stat. §§ 701.12(1), (5), and (7)). The State presented evidence to assist the jury in reconstructing the crime scene of the murder, including video and still photographs from the surveillance video at the convenience store. (Tr. T. 762–78). The testimony of two witnesses from the first trial, Michael Hansen and Neil David Myers, was introduced and read into the record. (Tr. T. Exh. AA and DD). These witnesses gave testimony regarding the petitioner's activities on the night of the murder, which included looking for pallets to sell. (Tr. T. Exh. AA and DD). Michael Hansen testified that he observed petitioner drink one beer while they were out looking for pallets and that petitioner tried to persuade him to commit a robbery that evening. (Tr. T. Exh. AA at 775–76, 778). Michael Hansen did not think petitioner was intoxicated at that time. (Tr. T. Exh. AA at 778). Neil David Myers testified that petitioner came to his house around ten o'clock that evening to ask him to go to a bar. (Tr. T. Exh. DD at 809). Petitioner was "slightly drunk" at the time. (Tr. T. Exh. DD at 813).

The two troopers who captured petitioner in Missouri also testified in person at the second trial. (Tr. T. 787–814, 816–26). Deputy Justin Moreland testified that petitioner confessed to the shooting in a recorded statement. (Tr. T. 796). The statement was played for the jury, who was given transcripts to read along with the recording. (Tr. T. 798). In that statement, petitioner talked freely about his level of intoxication on the night of the murder. (Resp.Exh.6). The State also introduced a second recorded statement, in which petitioner told now-former Tulsa Police Detective Charles Folks about the robbery that led to the murder, including the fact that he was heavily intoxicated. (Tr. T. 861–70; Resp. Exh. 7).

The State presented evidence that petitioner had previously committed a violent felony by introducing testimony from the victim of an armed robbery that petitioner committed in Indiana in 1988. (Tr. T. 955-62). Petitioner's pen pal, Susan Kay Duncan, testified that petitioner wrote her letters discussing an escape plan and stating that he "knew" he would have to hurt or kill an inmate to protect himself while in prison. (Tr. T. 896–902). The State introduced those letters and a recorded telephone conversation involving petitioner and Ms. Duncan as well. (Resp.Exh.5–8). The officers who arrested petitioner also testified that he had access to a gun at the time of his arrest and that he made statements indicating that he would have shot the officers to escape arrest. (Tr. T. 787–814, 816–29).

*63 After the State rested its case, Dr. LaFortune made her opening statement. (Tr. T. 1056–62). Dr. LaFortune described petitioner's diabetes diagnosis, his time in foster care, his difficult family life, the gunshot wound he suffered at age twenty-six, his current medical condition, and his relationship with his son. (Tr. T. 1056–62). Mr. Lyman then introduced into evidence a copy of petitioner's waiver of extradition from Missouri, where he was arrested, to Oklahoma. (Tr. T. 1063–64; Exh. 29). Mr. Lyman also introduced into evidence medical records documenting petitioner's treatment for diabetes and the gunshot wound. (Tr. T. 1064–66; Exh. 8–15, 17). The medical records indicated that petitioner's diabetes had always been poorly controlled. (Tr. T. Exh. 8–14). Medical records from his gunshot wound indicated that petitioner had to undergo multiple surgeries and received treatment from a neurologist, who noted that petitioner's neurological examinations post-surgery were "normal." (Resp. Exh. 14, identified as Tr. T. Exh. 15).

Petitioner's mother, foster mother, and son testified on petitioner's behalf. (Tr. T. 1068–1102; 1103–32; 1147–59). Petitioner's mother testified about the impact that petitioner's Type I diabetes diagnosis had on his life and his behavior as a young teenager. (Tr. T. 1071–72). Ultimately, his behavior led to a stint in foster care. (Tr. T. 1072–73). She also testified that petitioner was the victim of a gunshot wound to the head when he was twenty-six years old. (Tr. T. 1074–76). She stated that petitioner's behavior changed after he was shot, describing him as "fearful" and quick to anger. (Tr. T. 1075). She also stated that petitioner "was never that way before he was shot." (Tr. T. 1076).

Petitioner's foster mother testified that petitioner came to live with her in 1974. (Tr. T. 1107). She stated that he was very thin and poorly dressed when she first met him but that he was a pleasant child. (Tr. T. 1107). When she accepted petitioner as a foster child, she knew only that he had been in trouble with the law, as the system provided little information for foster parents at that time. (Tr. T. 1109, 1114). She did have an opportunity to meet petitioner's parents at a later date. (Tr. T. 1109). She described petitioner's father as self-absorbed and uninterested in his children. (Tr. T. 1109–11). She described petitioner's mother as looking "worn out" and "overwhelmed." (Tr. T. 1109). After petitioner left her care and returned to his parents, she was aware that he continued to have trouble with stealing and truancy. (Tr. T. 1114). Although petitioner was not a model student in her care, the foster mother stated that petitioner did well in her home and responded positively to the structure and discipline she imposed. (Tr. T. 1114–17). He was angry about his diabetes diagnosis and had a tendency to overeat sweets, but he was never aggressive and was, in fact, "one of the more enjoyable of our foster kids." (Tr. T. 1116–17).

***64** Petitioner's thirteen-year-old son, Kyle, was the last mitigation witness. (Tr. T. 1147–59). Kyle lived with his grandmother in 1994, when the murder occurred. (Tr. T. 1150). Petitioner also lived in the home. (Tr. T. 1150). Kyle testified that he and petitioner had a strong relationship during that time and spent a great deal of time together. (Tr. T. 1150). Kyle was "[r]cally upset" when petitioner went to jail. (Tr. T. 1150). He testified that his father writes him often from jail and that they still have a good relationship. (Tr. T. 1150–51). Kyle wanted to maintain a relationship with his father and did not want to lose him to the death penalty. (Tr. T. 1155–56).

Mr. Lyman gave the closing argument. (Tr. T. 1181–1208). He argued that the jury should consider petitioner's entire life and stated that the mitigating evidence was presented to help the jury understand petitioner's life was "not a life full of excuses." (Tr. T. 1183–84). Mr. Lyman stated that the evidence regarding the circumstances of the robberies and the murder was "not contested." (Tr. T. 1184). He acknowledged that the evidence showed "[t]here is a bad person and there is a good person" inside petitioner. (Tr. T. 1185). He argued, however, that petitioner took sole responsibility for the crimes and was remorseful. (Tr. T. 1185–88). Mr. Lyman briefly noted that petitioner talked about abusing alcohol the night of the crimes, but he quickly stated that petitioner was not using alcohol as an excuse. (Tr. T. 1188–89). Mr. Lyman characterized petitioner's letters, in which he planned an escape, as proof that petitioner also showed remorse for the murder and concern for his family. (Tr. T. 1190–91).

With respect to petitioner's diabetes, Mr. Lyman stated that the medical records were submitted as proof of petitioner's diagnosis. (Tr. T. 1191). He argued that petitioner's diagnosis "affected him" and contributed to his problems. (Tr. T. 1191). He also argued that the problems young diabetic patients experience were compounded by a dysfunctional family. (Tr. T. 1191–92). Mr. Lyman cited petitioner's mother's lack of understanding about her family's issues and petitioner's time in foster care as proof of the family's dysfunction. (Tr. 1191–92). Mr. Lyman explained that those problems led to petitioner spending time in prison because "[h]e was trouble and he was a problem." (Tr. 1192–93). Mr. Lyman contended, however, that petitioner served his time and had started creating a family before he was shot in the head. (Tr. T. 1193).

Mr. Lyman characterized this gunshot wound as "a very important event" that changed petitioner's personality. (Tr. T. 1193–94). He argued that petitioner was not violent until after his injury. (Tr. T. 1194, 1195). However, Mr. Lyman also stated that

> Now, we really will never know what this injury to James did to him. And none of us are doctors. And there's information in these records, and the State will bring it up, and I'll tell you right now, that he's had neurological assessments after the gunshot wound that appear to be normal. But did his life take a normal twist after this, this point in time? It did not.

*65 (Tr. T. 1194). Mr. Lyman made no further argument regarding the gunshot wound, but he noted that the medical records documenting the gunshot wound and petitioner's recovery were submitted to the jury for consideration. (Tr. T. 1193–94).

Finally, Mr. Lyman argued that petitioner was no longer a threat to society due to a broken leg that he sustained while in prison. (Tr. T. 1194–95). Mr. Lyman stated that due to complications from that injury, petitioner was no longer a threat to society because he was not mobile. (Tr. T. 1194–95).

Following closing arguments, the jury found that the State had proven two aggravating circumstances: (1) that petitioner had previously been "convicted of a felony involving the use or threat of violence to the person;" and (2) that petitioner posed a "continuing threat to society" because he was likely to commit further "criminal acts of violence." (Tr. T. 1240). The jury did not find that petitioner committed the murder "for the purpose of avoiding or preventing a lawful arrest or prosecution." (Tr. T. 1240). The jury sentenced petitioner to death. (Tr. T. 1241).

Appeals After the Second Trial

Petitioner again appealed the death sentence, and OCCA affirmed. See *Fitzgerald v. State*, 61 P.3d 901 (Okla.Crim.App.2002). In his state post-conviction proceeding, petitioner argued that his "trial and appellate counsel were ineffective for failing to present available mitigating evidence." (Dkt. # 25, Exh. 18 at 3).[4] OCCA disagreed. OCCA applied

> The three-tiered test enunciated in *Walker v. State* [933 P.2d 327, 333–34 (Okla.Crim.App.1997)]. Did appellate counsel commit the alleged predicate act? [*Id.* at 333.] If so, was counsel's performance deficient under *Strickland v. Washington's* two-pronged test? [*Id.*] We consider mishandled claims on their merits only if the post-conviction petitioner sustains the initial heavy burden of proving deficient performance. [*Id.*]

(Dkt. # 25, Exh. 18 at 3). OCCA concluded that petitioner had failed to establish "that the omission amounts to deficient performance: that counsel breached any duties owed him or that counsel's judgment was unreasonable and fell beyond an acceptable range of professional assistance." (Dkt. # 25, Exh. 18 at 3–4). In a footnote to that holding, OCCA stated that "[i]t appears from the application that trial and appellate counsel's decision not to present this evidence was strategic as the evidence was available at trial. This Court will not second-guess strategic decisions." (Dkt. # 25, Exh. 18 at n. 14). Following this denial, petitioner filed his Petition for Writ of Habeas Corpus (Dkt. # 24).

Petition for Writ of Habeas Corpus

In the Petition for Writ of Habeas Corpus, petitioner raises fourteen points of error. (Dkt.# 24). Petitioner's seventh point of error argues that counsel was ineffective for failing to "adequately develop and present available mitigating evidence of brain damage, diabetes, and consumption of alcohol on the night of the offense in petitioner's second penalty trial." (Dkt. # 24 at 140; Dkt. # 72). Petitioner argues that counsel either failed to recognize the "viable mitigating strategy" available or ignored it. (Dkt. # 24 at 152). Petitioner also argues that the record contained no explanation for counsel's decision not to present the mitigating evidence, thereby preventing the court from determining whether the decision was strategic. (Dkt. # 24 at 153). Petitioner contends, however, that even if the decision was strategic, it was unreasonable under any standard. (Dkt. # 24 at 163). In support, petitioner cites counsel's decision to use the fact that petitioner suffered from diabetes and a gunshot wound without presenting expert testimony "to explain the significance of the evidence to the jury." (Dkt. # 24 at 155). Petitioner also contends that it was patently unreasonable for counsel to ignore the evidence of petitioner's intoxication at the time of the murder. (Dkt. # 24 at 155). Petitioner argues that this trial strategy, if it was strategy, resulted in prejudice to petitioner because counsel was limited, in closing argument, to generic arguments that petitioner was a "bad man" whose life still had "value" because he took responsibility for his crimes and maintained "strong relationships with his family." (Dkt. # 24 at 166). Finally, petitioner argues that there was no conflict or risk that the mitigating evidence would act as a "double-edged sword" to support the aggravating circumstances. (Dkt. # 24 at 168–172).

*66 In response, the State argues that counsel conducted an adequate investigation and "presented sufficient mitigating evidence." (Dkt. # 41 at 54). The State contends that counsel's

[4] Petitioner submitted OCCA's opinion in his post-conviction petition as an exhibit to his petition. The unpublished opinion can be found at the following citation: *Fitzgerald v. State*, PCD–2002–626 (Okla.Crim.App. March 13, 2003).

decision was a strategic decision and a sound one. (Dkt. # 41 at 54). The State cites to the jury instructions, which contained a list of eleven mitigating factors presented to the jury during the second penalty trial, as proof that petitioner's counsel presented sufficient mitigating evidence to avoid a finding of ineffective assistance of counsel. (Dkt. # 24 at 55–56). The State also argues that petitioner suffered no prejudice. (Dkt. # 24 at 57–58). The State contends that the outcome of the trial would not have changed, even if the "proposed evidence" had been presented, due, in part, to the strength of the evidence supporting the aggravating circumstances. (Dkt. # 24 at 58).

District Court's Order Granting Evidentiary Hearing

Of the fourteen points of error raised in petitioner's Petition for Writ of Habeas Corpus, the District Court found that only petitioner's claim that counsel was ineffective for failing to "adequately develop and present available mitigating evidence of brain damage, diabetes, and consumption of alcohol on the night of the offense in petitioner's second penalty trial" required additional consideration. (Dkt. # 24 at 140; Dkt. # 72). The District Court reviewed the evidence presented at the second penalty trial as well as the available expert information and opinions of which counsel knew but did not present. (Dkt.# 72).

Citing *Strickland,* the District Court concluded that "there is a reasonable probability that the presentation of the proposed testimony, as outlined in the affidavits presented by Petitioner, could have altered the outcome of the sentencing phase." (Dkt. # 72 at 13). The District Court further held that "the record is silent regarding trial counsel's reasons, or lack thereof, for not presenting the available testimony relating to Petitioner's brain damage, diabetes, and consumption of alcohol on the night of the offense, although the record shows that trial counsel prepared to present such testimony." (Dkt. # 72 at 15). Because the affidavits from Dr. LaFortune and Mr. Burch were vague, and because lead counsel, Mr. Lyman, had not submitted an affidavit, the District Court determined that "the available record is inadequate to allow the Court to analyze whether Petitioner's trial counsel was constitutionally deficient." (Dkt. # 72 at 15).

The District Court ordered an evidentiary hearing and referred the matter to the undersigned. (Dkt. # 72 at 15–16, 17). The District Court stated that "the purpose of the evidentiary hearing will be to determine trial counsel's strategy and reasons, or lack thereof, for foregoing the use of the proffered testimony regarding Petitioner's brain damage, diabetes, and consumption of alcohol on the night of the offense during the sentencing phase." (Dkt. # 72 at 16). The District Court further instructed that "[i]f trial counsel made a strategic decision not to use the proposed testimony, the Court must evaluate 'whether that was a constitutionally reasonable decision under the circumstances.' " (Dkt. # 72 at 16, quoting *Bryan v. Mullin,* 335 F.3d 1207, 1214–15 (10th Cir.2003)). Finally, the District Court stated that if the facts asserted were true, petitioner may be entitled to habeas relief. (Dkt. # 72 at 16).

FINDINGS OF FACT

*67 Prior to the evidentiary hearing, the parties conducted discovery, including the deposition of Mr. Lyman and other witnesses. (Dkt.76, 80, 85, 86, 88, 102, 103, 105, 107, 108, 110, 111). During that time, the undersigned denied petitioner's request to present expert witness testimony (dkt.# 112) "regarding standards for effective representation and the ABA standards" because it was unnecessary in light of the undersigned's ability "to apply the relevant legal standards" and the lack of relevance that expert testimony would have in resolving factual issues. (Dkt. # 122 at 2). The District Court also denied the State's motion seeking reconsideration of the order granting an evidentiary hearing, or, in the alternative, summary judgment. (Dkt.89, 90, 104).

The undersigned conducted the evidentiary hearing on August 21–23, 2012, and November 9, 2012. (Dkt.132, 133, 135, 136, 141, 142, 143, 152, 153). During the course of the hearing, the undersigned heard testimony from Mr. Lyman, Dr. LaFortune, Mr. Burch, Dr. Jones, and Debbie Maddox and admitted numerous exhibits. The parties also stipulated that the first robbery occurred at 2:30 AM. (Dkt. # 141 at 12–14). A summary of the evidence follows.

Silas Lyman

Mr. Lyman was the lead attorney on petitioner's second penalty phase trial, which occurred in October 2000. (Dkt. # 141 at 14–15). Mr. Lyman obtained his law degree in 1989 and worked as a prosecutor in various offices until the fall of 1997. (Dkt. # 141 at 15–29; Pet. Exh. 5). During that time, Mr. Lyman's trial experience included serving as second chair in a burglary case and a manslaughter case and serving as lead counsel in a misdemeanor vehicular homicide, one to three child abuse cases, one shooting with intent to kill case, one or two narcotics cases, a mental health trial and a case of assault and battery of a police officer. (Dkt. # 141 at 19–

29). Additionally, Mr. Lyman stated that he prepared many cases that settled before trial. (Dkt. # 141 at 34). Mr. Lyman testified that none of the cases he tried involved the use of a psychologist or psychiatrist as an expert witness. (Dkt. # 141 at 29–30).

In the fall of 1997, Mr. Lyman made the decision to move from the district attorney's office, where he worked as a prosecutor, to the Oklahoma Indigent Defense System ("OIDS"), to serve as a capital trial attorney in the Tulsa–Sapulpa Office. (Dkt. # 141 at 29). Mr. Lyman stated that he made this choice for several reasons: (1) he knew several of the attorneys in the OIDS Tulsa–Sapulpa office and wanted to work with a good friend of his who had moved to OIDS approximately a year and a half earlier; (2) he wanted to "have the opportunity to be a trial lawyer in a very important and serious area of the law representing people in their worst situation"; and (3) he wanted to move from a rural area to a larger city so that his wife would have better employment opportunities. (Dkt. # 141 at 30–32).

***68** Prior to his work on the instant case, Mr. Lyman worked on other cases as a capital trial defense attorney at OIDS.[5] In his first case that went to trial, *Sampson*,[6] he served as second chair. (Dkt. # 141 at 37). A neuropsychologist testified as an expert witness during that trial, but Mr. Lyman was not responsible for that witness, nor did he have a clear memory of the reason for that testimony. (Dkt. # 141 at 37–38). His second case, the *Slone* case, ended in a guilty plea. (Dkt. # 141 at 38; Pet. Exh. 6). Mr. Lyman's first case as lead counsel was the *Matthews* case, a retrial following reversal. (Dkt. # 141 at 39–43). Mr. Lyman testified that he handled the guilt phase of the trial, in which the defendant asserted his innocence, and his co-counsel handled the penalty phase, including the presentation of a psychologist as an expert witness. (Dkt. # 141 at 40). According to petitioner's list of cases, Mr. Lyman worked on two additional cases that ended in guilty pleas before he was assigned petitioner's case.[7] (Pet.Exh.6). Mr. Lyman testified that he worked on two additional cases, performing preliminary work on one and negotiating a guilty plea as lead counsel on the other. (Dkt. # 141 at 44–45). Counsel for petitioner then asked Mr. Lyman if his capital defense experience was "basically two death-penalty trials, neither one that you had put on psychology evidence; is that correct?" (Dkt. # 141 at 46). Mr. Lyman agreed. (Dkt. # 141 at 46).

5 Pet. Exh. 6 is a list of the cases in which Mr. Lyman served as first or second chair at OIDS before he tried the instant case. Case names, citations, and a brief description of the case are included in the list.

6 Sampson is not included in the list (Pet.Exh.6), but Mr. Lyman cited it in his deposition testimony. (Dkt. # 141 at 37).

7 Mr. Lyman was also assigned to the *Millhollin* case prior to his work on petitioner's case, but that case ended in a mistrial and was not re-tried until after Mr. Lyman tried petitioner's case.

Petitioner's counsel then reviewed the attorney eligibility requirements set forth in the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. ((Dkt. # 141 at 46–53; Pet. Exh. 8). Counsel for petitioner and Mr. Lyman agreed that, at the time of petitioner's second trial, Mr. Lyman met the first guideline for admission to practice in Oklahoma. (Dkt. # 141 at 50). Mr. Lyman did not have five years of criminal defense litigation experience, as stated in the second guideline. (Dkt. # 141 at 50–51). Mr. Lyman believed that he met the qualifications of the third guideline. (Dkt. # 141 at at 51). The third ABA guideline requires

> prior experience as lead counsel in no fewer than nine jury trial of serious and complex cases which were tried to completion, as well as prior experience as lead counsel or co-counsel in at least one case in which the death penalty was sought. In addition, of the nine jury trials which were tried to completion, the attorney should have been lead counsel in at least three cases in which the charge was murder or aggravated murder; or alternatively, of the nine jury trials, at least one was a murder or aggravated murder trial and additional five were felony jury trials.

(Pet.Exh.8). Mr. Lyman explained that his trial experience as a prosecutor, coupled with his previous work at OIDS, arguably met the numerical requirements, but he also stated that "not all the cases I did as a prosecutor were serious and complex." (Dkt. # 141 at 51–52). Counsel for petitioner

stipulated that Mr. Lyman met the requirements for guidelines four and six, which relate to procedural knowledge and continuing education. (Dkt. # 141 at 52–53). Mr. Lyman indicated that he arguably met the fifth guideline, requiring experience with expert witnesses, although he acknowledged a difference between preparing expert witnesses for trial and actually presenting them to a jury. (Dkt. # 141 at 52–53). Finally, counsel for petitioner stated that he would allow "the record to speak for itself" with respect to the seventh guideline—demonstration of "the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases." (Dkt. # 141 at 53; Pet. Exh. 8).

***69** Counsel for petitioner then questioned Mr. Lyman about his decisions regarding petitioner's second trial, beginning with the list of eleven mitigating factors presented to the jury during the second trial. (Dkt. # 141 at 53–54; Pet. Exh. 18). The first three mitigating factors addressed petitioner's childhood diagnosis of diabetes and the 1985 gunshot wound to plaintiff's head. (Pet.Exh.18). Mr. Lyman testified at the evidentiary hearing that he compiled that list because "I thought that this would best detail the mitigating circumstances that we were trying to establish under our theme." (Dkt. # 141 at 54).

Mr. Lyman explained that he believed petitioner's diabetes diagnosis was mitigating because it "tells [the jury] from an early age that he's been dealing with diabetes" and that it helped present a picture of petitioner's "whole life." (Dkt. # 141 at 54–55). Mr. Lyman admitted that he could have presented expert testimony "to more fully define the diagnosis of diabetes and the impact, potentially the family and social impact that it has on a young person...." (Dkt. # 141 at 56). In fact, Mr. Lyman had hired an adult endocrinologist, Dr. Christina Bratcher, to testify as an expert witness at petitioner's second trial. (Dkt. # 141 at 56–57; Pet. Exh. 15). In requesting funds for her services, Mr. Lyman stated that Dr. Bratcher would "focus[ ] on significant episodes of the mismanagement of his diabetes. The goal is to present to the jury in a meaningful manner the history of his illness, the current state of his medical condition and the probable prognosis for the future." (Dkt. # 141 at 57).

Mr. Lyman met with Dr. Bratcher at some point before the trial in 2000. (Dkt. # 141 at 61–62). He could not remember if Dr. LaFortune attended that meeting with him, but he believed that she did. (Dkt. # 141 at 61–62). He also had no "specific recall on exactly what [Dr. Bratcher] said what her findings were," but he recalled discussing petitioner's history of diabetes and how it had impacted his life over the years. (Dkt. # 141 at 62). Mr. Lyman reviewed an affidavit from Dr. Bratcher and stated that he had no reason to believe that her affidavit was inconsistent with the information she disclosed at their meeting. (Dkt. # 141 at 59–62, 65; Pet. Exh. 1). He also stated, however, that Dr. Bratcher was not as specific in her interview with him as she was in her affidavit. ((Dkt. # 141 at 66).

Dr. Bratcher's affidavit[8] provided basic background information regarding the symptoms associated with juvenile onset diabetes, Type 1. (Pet.Exh.1). Dr. Bratcher also reviewed petitioner's personal medical history with diabetes, noting that he had been hospitalized on numerous occasions for reasons "explicitly related to uncontrolled diabetes." (Pet.Exh.1). Dr. Bratcher opined on the long-term impact of petitioner's diabetes, stating that chronic illnesses like juvenile onset diabetes were known to cause stress, impact emotional development, and create conflict. (Pet.Exh.1). These emotional complications were exacerbated in patients who did not have adequate family support. (Pet.Exh.1). Dr. Bratcher also opined on the interaction between Type 1 diabetes and alcohol, based on information that petitioner had consumed "large quantities of alcohol" without eating regular meals on the night of the murder. (Pet.Exh.1). The interaction could cause dramatic changes in blood sugar that "could have affected Mr. Fitzgerald's cognitive functioning." (Pet.Exh.1).

8 Dr. Bratcher's affidavit will be addressed as a stand-alone piece of evidence later in the Report and Recommendation. The summary provided here is intended to give context to Mr. Lyman's testimony.

***70** Mr. Lyman later made the decision not to call Dr. Bratcher as a witness because he "did not believe that she would be a good witness.[9] She did not come off as strong in presence when you're talking to her as she appears to come off in writing." (Dkt. # 141 at 63). He recalled that, after meeting with Dr. Bratcher, he felt that her findings would more appropriately be used as background information for another expert, "someone like Dr. Herman Jones [a neuropsychologist] if we chose to use him, although I think at that point in time we were inclined not to use him." (Dkt. # 141 at 64). Mr. Lyman testified that Dr. Bratcher's affidavit was "a helpful affidavit by itself," but he expressed concerns that Dr. Bratcher would become "a summation witness for the state" and "would have negated what we were trying to do, and that was to show value to his life that's not an

excuse." (Dkt. # 141 at 60, 73–75, 78–79). He believed that a mitigation theory involving petitioner's diabetes, alcohol, and mental impairment "could have been perceived as an excuse" and would undercut the "no-excuse mitigation theme" he had chosen to present. (Dkt. # 141 at 72–73).

9 Mr. Lyman could not recall specifically when he made the decision not to call Dr. Bratcher as a witness, nor could he recall whether he talked to Dr. LaFortune or Mr. Burch about that decision. (Dkt. # 141 at 63, 66–67, 86–87). Mr. Lyman testified that "I just know generally we talked about this case and worked on this case for some time prior to it being tried." (Dkt. # 141 at 66–67). He also stated that Dr. LaFortune did not "voic[e] an objection" to the decision not to call Dr. Bratcher as a witness. (Dkt. # 141 at 86–87).

Specifically, Mr. Lyman stated that he did not use Dr. Bratcher to address the interaction between petitioner's alcohol usage and his diabetes because he had "concerns that it would be an excuse. There was other ways that the use of alcohol or his consumption of alcohol had been introduced in the trial." [10] (Dkt. # 141 at 73). He was comfortable with presenting the evidence regarding petitioner's diabetes through the medical records because "my feeling at the time was that it's better to make the arguments based on what has been presented in the medical records and the no excuse for alcohol in all the arguments I made without exposing and making a negative with a particular witness." (Dkt. # 141 at 73–74). Mr. Lyman acknowledged that the jury would not be able to ascertain the effects of diabetes on children without Dr. Bratcher's testimony, but he believed that "they did receive some of that type of information from his mother" and foster mother. (Dkt. # 141 at 76–77).

10 At that time, petitioner's counsel also questioned Mr. Lyman regarding the affidavits of Candy Ashley and Regina Stockfleth, which will be covered in more detail later in the Report and Recommendation. (Dkt. # 141 at 66–68; Pet. Exh. 2, 23). Both affidavits indicated that petitioner was intoxicated at the time of the murder. (Pet.Exh.2, 23). Mr. Lyman admitted that he could have established petitioner's intoxication at the time of the murder by calling Ms. Ashley and Ms. Stockfleth as witnesses, if the jury believed their testimony. (Dkt. # 141 at 67–68, 70). Mr. Lyman also acknowledged that petitioner's own statements about his intoxication had been presented to the jury through the introduction of a transcript of petitioner's statements to law enforcement. (Dkt. # 141 at 68–69; Pet. Exh. 25). In fact, Mr. Lyman used those statements to support his mitigation theme of "no excuses" by pointing out that petitioner stated that he did not blame alcohol for his decision to commit the robberies and the murder. (Dkt. # 141 at 69).

Mr. Lyman testified that he had similar concerns about presenting testimony from Dr. Herman Jones. (Dkt. # 141 at 87–88). Mr. Lyman stated that his "number one concern was that he would in effect become the state's best summation witness for their case." (Dkt. # 141 at 88). He believed that Dr. Jones would make a good witness and that "the state would be able to utilize his findings and opinions to benefit the state's case to the extent that it would diminish any benefit we would have received from him if we had used him." (Dkt. # 141 at 88). On cross-examination, he agreed that the expert reports were favorable to petitioner when presented in a straightforward manner, but he stated that a jury does not receive information "in a vacuum." (Dkt. # 141 at 131).

Mr. Lyman had specific concerns about the portions of Dr. Jones's report that described petitioner as goal-oriented but impulsive and disinhibited. (Dkt. # 141 at 88–91; Pet. Exh. 12). Mr. Lyman believed that the term "disinhibited" meant that petitioner was "a person that just didn't care, just would do what he wanted to do, wasn't inhibited." (Dkt. # 141 at 89). He also believed that petitioner's lack of caring was caused by the gunshot wound and "with the combination of alcohol it could get worse." (Dkt. # 141 at 90). Mr. Lyman acknowledged that he may have misunderstood the term "disinhibition," but he stated that he believed the jury would have reached the same conclusion. (Dkt. # 141 at 89–90, 91). Mr. Lyman also stated that he "thought that [he] would have talked" to Mr. Burch and Dr. LaFortune about whether to call Dr. Jones as a witness, but he could not recall a specific date or time for that conversation. (Dkt. # 141 at 91–92, 93).

*71 Mr. Lyman denied that he chose not to call Dr. Bratcher and Dr. Jones due to his own inexperience in presenting expert witness testimony. (Dkt. # 141 at 93). On cross-examination, Mr. Lyman testified that he remembered feeling anxious about the trial, but he was confident that his previous experiences preparing expert witnesses for trial was sufficient. (Dkt. # 141 at 110–14). Mr. Lyman explained that his concern regarding Dr. Jones's testimony was two-fold. (Dkt. # 141 at 94–95). First, he believed that the State would use Dr. Jones's

testimony to highlight the aggravating factors surrounding the murder. (Dkt. # 141 at 94). He reiterated this position on cross-examination, stating that Dr. Jones would have been "forced to answer questions of [petitioner] being goal-oriented when he was planning an escape and not under the influences of alcohol, or the number of escapes, the recruitment of juveniles, his criminal history, all the other things, and it was going to avalanche everything else." (Dkt. # 141 at 131). Second, he believed that the State's cross-examination of Dr. Jones would "diminish and negate our other mitigating factors, and in effect one of the last witnesses this jury would see would be the defense witness that I believe would have been a better state's witness." (Dkt. # 141 at 94). Mr. Lyman denied that those concerns existed in all death penalty cases involving psychological testimony, stating that, in this case, he worried that the jury would "get off track of what I was trying to show in the other mitigation factors." (Dkt. # 141 at 95). He also wanted to focus on "presenting a no-excuse life story, remorse, responsibility" mitigation case, and he was concerned that testimony from Dr. Bratcher and Dr. Jones would serve as reiteration of the facts surrounding the murder and "come[ ] off as an excuse." (Dkt. # 141 at 129). Mr. Lyman cited "the potential conflict there in a juror's mind of, well, I thought he was guilty but yet now you're telling me or going off this path that he's not culpable or his degree of culpability is reduced because of his state of mind at the time." (Dkt. # 141 at 130). Mr. Lyman believed that a mitigation defense that showed "the good and the bad" in petitioner was a better way to meet the goal to "humanize" petitioner and show that he had "good qualities too, that his family loved him, that his life had value." (Dkt. # 141 at 127–28).

Mr. Lyman stated that he "tried" to cover all of the mitigating factors in his closing argument. (Dkt. # 141 at 98–99). He agreed that petitioner's diabetes diagnosis was a good mitigating factor because petitioner was not at fault for the condition that impacted him. (Dkt. # 141 at 99). He was less positive about the gunshot wound and resulting neurological deficits. (Dkt. # 141 at 99). Although he agreed petitioner was the victim, he was concerned that the jury would view petitioner in a negative light because he was "part of another violent act" and because he was not certain that the jury would know about the circumstances that led to petitioner's injury. (Dkt. # 141 at 99–100). Mr. Lyman acknowledged that he could have provided that information to the jury. (Dkt. # 141 at 100).

*72 Mr. Lyman also testified that although he made the decision not to call Dr. Bratcher or Dr. Jones as expert witnesses at some point prior to the trial, he did present evidence to support the mitigating factors of diabetes and the gunshot wound to the head through a stipulation admitting petitioner's medical records. (Dkt. # 141 at 122). He stated that the records allowed him to reference petitioner's history "and make them part of the whole mitigation theme." (Dkt. # 141 at 122). Mr. Lyman discounted the State's position at trial regarding petitioner's diabetes diagnosis. (Dkt. # 141 at 123). Although the State ridiculed the notion that a juvenile diabetes diagnosis mitigated the crime of first degree murder, he insisted that the State's treatment of petitioner's diabetes would have been worse if Dr. Bratcher had testified. (Dkt. # 141 at 123–24).

Mr. Lyman testified that he was familiar with the OCCA opinion, including the OCCA's determination that a lay witness is not an effective substitute for an expert witness. (Dkt. # 141 at 134). Mr. Lyman stated that he did not interpret the OCCA decision as a directive or mandate to present expert testimony. (Dkt. # 141 at 134). To the contrary, his decision not to present expert testimony was a "difficult" decision based on the specific facts of the case and the advice of co-counsel. (Dkt. # 141 at 135). Mr. Lyman stated that "[t]he easiest thing to do would have been to call Dr. Jones or Dr. Bratcher or both." (Dkt. # 141 at 135). Instead, he "took the way I thought would be best for [petitioner] at the time." (Dkt. # 141 at 135).

Dr. Herman Jones

Dr. Herman Jones testified that he worked as a neurologist and psychologist and currently served as a professor at the University of Oklahoma Health Sciences Center in the College of Medicine. (Dkt. # 142 at 165). In 1999, he was retained to examine petitioner; evaluate the evidence, medical records, and other reports; and "render opinions concerning any frontal lobe impairment as a result of his gunshot injury." (Dkt. # 142 at 166). At the time he was retained in 1999, he was not yet board-certified in neuropsychology, but he did perform consultations on individuals with brain injuries and nerve behavioral deficits. (Dkt. # 142 at 167–69). In 1999, he served as the director "of the brain injury program at the Rehabilitation Center" and consulted on cases at Jim Thorpe Rehabilitation Center and the Oklahoma Department of Vocational Rehabilitation. (Dkt. # 142 at 168–69).

Having established Dr. Jones's credentials at the time he was retained to evaluate petitioner, counsel for petitioner asked Dr. Jones to review the medical records related to petitioner's gunshot wound in 1985. (Dkt. # 142 at 169–

70; Pet. Exh. 14). Dr. Jones identified medical records from the neurosurgeon who operated on petitioner after he was shot. (Dkt. # 142 at 169–70). Among those records was an August 13, 1985, record that contained the statement, "His neurological examination today was normal." (Dkt. # 142 at 170; Pet. Exh. 14). Dr. Jones explained that a "standard neurological evaluation" like the one referenced in the records "has six components. It has reflexes, a motor sensory examination, mental status examination, gait and station and cranial nerves." (Dkt. # 142 at 170). Dr. Jones testified that the record did not describe "a detailed examination of deficits that could have determined whether there was sequelae." [11] Dr. Jones interpreted the August 13, 1985, neurological examination as the neurosurgeon's opinion that petitioner was "grossly intact and would be able to return to work within two months," insofar as the ability to return to work was defined under Social Security disability rules. (Dkt. # 142 at 171).

11 Merriam–Webster defines sequelae as the "afteraffect of disease, condition, or injury." http://www.merriam-webster.com/dictionary/sequela (last visited on April 17, 2013). By sequelae, Dr. Jones was referring to "residual impairment or permanent impairment to the frontal lobe," from counsel's previous question. (Dkt. # 142 at 170).

*73 Dr. Jones explained the distinction between a neurologist/neurosurgeon's concerns with respect to neurological functioning and a neuropsychologist's concerns. (Dkt. # 142 at 171–73). Neurologists/neurosurgeons address the physical injury that impacts neurological functioning, and neuropsychologists evaluate the residual impairments and behavioral deficits that remain after an injury. (Dkt. # 142 at 172–73). Dr. Jones opined that laymen, like those on a jury, would not be able to determine that petitioner had residual impairment simply by reading the August 13, 1985, report. (Dkt. # 142 at 173–75).

Dr. Jones explained the nature of petitioner's injury: "the bullet dislodged a bone fragment which penetrated the covering of the brain called the dura, the dura mater, and that [ ] bone fragment then lodged itself in the inferior aspects of his frontal lobe." (Dkt. # 142 at 176). The details of the injury were important to the examination and its results, Dr. Jones opined, "because the front or anterior portions of the frontal lobe are responsible for many behavioral constructs, the ability to empathize with other individuals, the ability to anticipate and reflect upon the consequences of one's actions." (Dkt. # 142 at 177). Dr. Jones stated that many indviduals believe that the conscience is found in the orbital frontal cortex of the frontal lobe. (Dkt. # 142 at 177).

Dr. Jones then reviewed his own report, saying that he relied on previous testing and then performed a number of other tests. (Dkt. # 142 at 175–78). Dr. Jones found that petitioner had "subtle but significant" behavioral deficits as a result of the gunshot wound. (Dkt. # 142 at 178). The damage to petitioner's brain "would not be manifested in his activities of daily living typically, but that they would be intensified were further compromising factors to be present, such as exotoxins, alcohol specifically." (Dkt. # 142 at 178). In that sense, the neurosurgeon's report was correct—petitioner would be able to work and would not be considered disabled. (Dkt. # 142 at 178). With the injury, petitioner's moral judgment would not ordinarily be impacted, but secondary factors "can intensify structural neurologic damage." (Dkt. # 142 at 178–79). Dr. Jones listed six circumstances that would exacerbate petitioner's behavioral deficits: (1) fatigue; (2) excessive anxiety; (3) sedating drugs or medications, including alcohol; (4) concurrent physical illness, both acute and chronic; (5) depression; and (6) lack of motivation. (Dkt. # 142 at 179).

Dr. Jones testified that impulsivity was one symptom of petitioner's injury. (Dkt. # 142 at 180). He explained that the orbital frontal cortex "causes individuals to inhibit themselves, to slow down, to anticipate the consequences of their actions so that damage in this area and behavioral deficits from this area are often referred to as disinhibition." (Dkt. # 142 at 180). Dr. Jones's report also stated that petitioner's impulsivity would be "intensified and exacerbated" by alcohol. (Dkt. # 142 at 182; Pet. Exh. 12). Dr. Jones opined in his report that, under the influence of alcohol, petitioner "typically retains the capacity to engage in goal directed behavior and sequenced activities but likely displays more impulsive disinhibited character." (Dkt. # 142 at 182; Pet. Exh. 12). In his testimony at the evidentiary hearing, he expounded on that opinion, stating that alcohol "intensifies the effects of the brain injury. It further compromises the function of those parts of the brain that are responsible for control and inhibition." (Dkt. # 142 at 183). Although Dr. Jones could not quantify the effect through numbers, he explained that "the effects are not linear, they don't stack up and add to each other." (Dkt. # 142 at 184). Instead, if petitioner was subjected to more than one of the exacerbating factors, his symptoms would "intensify, not just in an additive fashion, but in a multiplicative fashion." (Dkt. # 142 at 184). For example, at the time he issued his report, Dr. Jones had

been told that petitioner was intoxicated on the night of the murder. (Dkt. # 142 at 184–85). Dr. Jones explained that intoxication would have impacted petitioner's impulsivity, but he could not clearly estimate the extent of the impact without a better understanding of petitioner's level of intoxication. (Dkt. # 142 at 185).

*74 Petitioner's counsel then reviewed the evidence that could have been submitted at the second trial to establish petitioner's intoxication. (Dkt. # 142 at 186–92). Dr. Jones read the affidavit of Regina Stockfleth, which gave a somewhat detailed description of petitioner's alcohol consumption on the night of the murder. (Dkt. # 142 at 186–87; Pet. Exh. 2). In the affidavit, Ms. Stockfleth stated that she and petitioner drank a bottle of tequila mixed into margarita mix and some beer before driving to two different bars. (Pet.Exh.2). While at the bars, petitioner continued to drink, although Ms. Stockfleth could not remember what petitioner was drinking. (Pet.Exh.2). Petitioner then drove them home. (Pet.Exh.2). Ms. Stockfleth noted that petitioner was "drunk" and that his driving was impaired. (Pet.Exh.2).

Dr. Jones also read the affidavit of Candy Ashley. (Dkt. # 142 at 188–89). Ms. Ashley was parked approximately one hundred feet from the convenience store that was the site of the first robbery. (Dkt. # 142 at 188; Pet. Exh. 23). While her companion was in the convenience store, she observed a man, later identified as petitioner, walking around the store. (Pet.Exh.23). "[T]he way the man was walking and behaving" led Ms. Ashley to believe that he was intoxicated. (Pet.Exh.23). Ms. Ashley's companion then returned to the car, and they left. (Pet.Exh.23). Her companion later called the police to report what she had seen. (Pet.Exh.23). The parties stipulated that the first robbery occurred at 2:30 A.M., and petitioner's counsel stated that, according to the record, the murder occurred at 3:07 A.M. (Dkt. # 141 at 12–14; Dkt. # 142 at 190).

Dr. Jones agreed that the two affidavits indicated petitioner was intoxicated and that the affidavits were consistent with his understanding of petitioner's level of intoxication as it was reflected in Dr. Jones's report. (Dkt. # 142 at 184–85, 190–92). Dr. Jones opined that petitioner's intoxication would have been a "significant factor" that exacerbated petitioner's behavioral deficits on the night of the murder. (Dkt. # 142 at 190–91). Dr. Jones further opined that petitioner's behavior "would be more likely to reflect disinhibition and would further reduce his ability to anticipate the consequences of his actions." (Dkt. # 142 at 191).

Petitioner's counsel also questioned Dr. Jones about petitioner's diabetes, through the affidavit of Dr. Bratcher. (Dkt. # 142 at 192–99). Dr. Jones testified that he would have been able to rely on Dr. Bratcher's opinion as an "additional external consultation[ ]." (Dkt. # 142 at 192). Dr. Jones reviewed Dr. Bratcher's affidavit, which showed that petitioner had been hospitalized multiple times for conditions related to poor diabetes management. (Dkt. # 142 at 192–94; Pet. Exh. 1). Dr. Jones testified that petitioner's diabetes was a medical condition that would qualify as one of the secondary factors affecting petitioner's behavioral deficits. (Dkt. # 142 at 194). He also noted that Dr. Bratcher's affidavit described both chronic and acute issues with petitioner's diabetes management. (Dkt. # 142 at 194). Dr. Jones opined that the frontal lobe responds to metabolic imbalances, including high and low blood sugar. (Dkt. # 142 at 195–96). He explained that "the brain requires a disproportionate amount of energy demands from sugar and oxygen" as well as "a balance of those nutrients and an absence of relative toxins." (Dkt. # 142 at 196). Dr. Jones further explained that "normal brains will react to either variations of too low or too high [blood sugar], just as an individual with prior structural damage will respond in a more exaggerated fashion to those same variations." (Dkt. # 142 at 196). Dr. Jones "expect[ed]" that, for petitioner, the combination of alcohol and diabetes would cause hypoglycemia, a "sugar low" that causes symptoms of "sedation and fatigue." (Dkt. # 142 at 199).

*75 Additionally, petitioner's impairment would make it "more difficult" to manage alcoholism and diabetes because "[t]he reduced ability to anticipate the consequences of one's actions [also applies] in a larger context, whether that be alcoholism or whether that be a chronic disease like diabetes." (Dkt. # 142 at 199–200). Dr. Jones agreed that petitioner's history of multiple hospitalizations due to diabetes complications reflected that difficulty. (Dkt. # 142 at 200). Dr. Jones testified that not only would petitioner have more difficulty with impulse control in making an initial decision, such as the choice not to eat a candy bar because he is diabetic, "once the compromise is in place, that's when it gets worse." (Dkt. # 142 at 200–01). Once petitioner made an initial bad decision, "[t]he slope that he slides down is steeper." (Dkt. # 142 at 201). With all three conditions—brain impairment, alcohol, and diabetes—present, "[t]here would be less control but more disinhibition. There would be less inhibition but more disinhibition." (Dkt. # 142 at 203–04).

After examining petitioner, Dr. Jones met with Mr. Lyman and Dr. LaFortune.[12] (Dkt. # 142 at 181–83, 205–06). Dr. Jones recalled discussing the concept of "disinhibition" with Mr. Lyman, but did not remember whether Mr. Lyman had questions about its definition. (Dkt. # 142 at 181–83). At the attorneys' request, Dr. Jones reviewed his multi-axial assessment[13] of petitioner during his meeting(s) with Mr. Lyman. (Dkt. # 142 at 205–06). Dr. Jones explained which diagnoses applied to each Axis: (1) Axis I applies to all psychological and psychiatric problems; (2) Axis II addresses "baseline personality functioning;" and (3) Axis III "describes medical conditions that relate back to the first two issues." (Dkt. # 142 at 207–08). Dr. Jones had assessed petitioner with alcohol dependence and cognitive disorder, NOS on Axis I, antisocial personality disorder on Axis II, and "penetrating missile wound to the brain" on Axis III. (Dkt. # 142 at 206). Dr. Jones did not address psychosocial stressors on Axis IV or provide a global assessment functioning score on Axis V. (Dkt. # 142 at 206).

12 Dr. Jones met with Mr. Lyman on two separate occasions. (Dkt. # 142 at 181–83). Dr. LaFortune attended the first meeting, but Dr. Jones could not recall if anyone other than Mr. Lyman attended the second meeting. (Dkt. # 142 at 181–83).

13 A multi-axial assessment is a diagnostic tool used in conjunction with the DSM–IV to create a complete assessment of a patient by addressing "the interrelated complexities of the various biological, psychological, and social aspects of a person's condition." http://medicald ictionary.thefreedictionary.com/multiaxial+system (last visited on April 19, 2013).

With respect to petitioner's personality disorder, Dr. Jones testified that anti-social personality disorder could be a result of petitioner's Axis I problems—alcohol dependence and cognitive disorder. (Dkt. # 142 at 209). Petitioner's counsel read an excerpt from a book titled *Behavioral Neurology*, written by neurologist, Dr. Jonathan Pincus. (Dkt. # 142 at 209–10). In that excerpt, Dr. Pincus makes the case that a diagnosis of anti-social personality disorder may be a reflection of disease in the frontal lobe. (Dkt. # 142 at 209–10). Dr. Jones agreed that the symptoms of anti-social personality disorder could be caused by neurologic damage. (Dkt. # 142 at 210). In petitioner's case, Dr. Jones could not identify petitioner's anti-social personality disorder as an effect of the frontal lobe damage, and he opined that petitioner's anti-social personality disorder "existed before he had brain damage and you could have both simultaneously." (Dkt. # 142 at 211). He cited petitioner's juvenile history as evidence that petitioner's frontal lobe damage did not cause him to exhibit signs of anti-social personality disorder. (Dkt. # 142 at 211–12). Notwithstanding that opinion, Dr. Jones still believed that the combination of brain damage and excessive alcohol would have made it more difficult for petitioner to control his impulses and behavior at the time of the murder. (Dkt. # 142 at 213). Plaintiff's diabetes could also have been a factor, but because Dr. Jones did not have sufficient information to form an opinion on its impact (i.e. no access to Dr. Bratcher's opinion), he did not discuss it with Mr. Lyman. (Dkt. # 142 at 213–14).

*76 On cross-examination, counsel for the State presented Dr. Jones with conflicting testimony regarding petitioner's level of intoxication. (Dkt. # 142 at 215–22). Dr. Jones agreed that his opinion would require an assumption that Regina Stockfleth was telling the truth in her affidavit. (Dkt. # 142 at 217). Counsel for the State asked Dr. Jones about the testimony of Mr. Hansen, who testified at trial that petitioner drank only one can of beer that night and left Ms. Stockfleth's house at eleven o'clock that evening, not at one o'clock in the morning.[14] (Dkt. # 142 at 217; Tr. T. State's Exh. AA). Counsel for the State also asked Dr. Jones about the testimony of the store clerk from the first robbery, who testified that petitioner seemed "in control" and, at most, in "an early stage of intoxication," and from the clerk at the third robbery, who noticed no signs that petitioner was intoxicated.[15] (Dkt. # 142 at 218–19; Tr. T. State's Exh. CC, FF). Dr. Jones acknowledged that those statements contradicted the affidavits of Ms. Stockfleth and Ms. Ashley. (Dkt. # 142 at 219). Dr. Jones also acknowledged that his opinion would change if petitioner was not intoxicated on the night of the murder. (Dkt. # 142 at 219). Additionally, Dr. Jones stated that the amount of alcohol necessary to achieve intoxication varies among individuals, particularly those who habitually consume alcohol. (Dkt. # 142 at 220–21).

14 Mr. Hansen testified in person at the first trial. At the second trial, the State read his testimony into the record.

15 The clerk from the first robbery, Edward Thomas Chambers, and the clerk from the third robbery, John William Sartain, also testified in person at the

first trial. Their testimony was read into the record at the second trial.

Counsel for the State asked similar questions about petitioner's blood sugar levels, stress levels, fatigue, lack of motivation, depression, and illness on the night of the murder. (Dkt. # 142 at 219, 221–22). Dr. Jones stated that he had no personal knowledge about any of those circumstances on the night of the murder. (Dkt. # 142 at 219, 221–22). He testified, however, that if none of those circumstances were present on the night of the murder, petitioner's level of functioning would be "pretty close to typical for him." (Dkt. # 142 at 223).

Dr. Jones also stated that he had specifically omitted the issue of petitioner's diabetes from his opinion. (Dkt. # 142 at 222). Although Dr. Jones testified that he did not have enough information about the status of petitioner's diabetes on the night of the murder to feel comfortable rendering an opinion regarding its impact on petitioner's behavior, he did not question Dr. Bratcher's ability to do so. (Dkt. # 142 at 222–23). He stated that petitioner's reactions would vary depending on whether his blood sugar was high or low. (Dkt. # 142 at 223–24). He also re-affirmed his opinion in his report, which noted that "moods and emotions associated with blood sugar fluctuations are highly variable and idiosyncratic even within the same individual." (Dkt. # 142 at 224; Pet. Exh. 12). Dr. Jones later testified that the medical records indicated that petitioner's diabetes could be managed, as he had been "fairly stable" for the last few years leading up to the murder. (Dkt. # 142 at 247–49).

*77 Turning to the issue of petitioner's diagnosis of anti-social personality disorder, Dr. Jones acknowledged that he also had no knowledge of petitioner's circumstances when he committed past crimes, acquired the gun used in the murders, or planned an escape from jail while awaiting trial on the murder and robbery charges. (Dkt. # 142 at 225–26). He testified that it was possible for petitioner to commit crimes without being compromised and that such behavior would be "consistent with my diagnosis of an antisocial personality disorder." (Dkt. # 142 at 226). He confirmed that petitioner exhibited all of the signs of antisocial personality disorder and that petitioner exhibited those signs prior to receiving the damage to his frontal lobe. (Dkt. # 142 at 228–30). He also confirmed that his opinion on this issue was consistent with two other expert reports, written by Dr. Ann Taylor and Dr. Mickey Ozolins, who both examined petitioner before Dr. Jones was retained. [16] (Dkt. # 142 at 230–32; Resp. Exh. 15). Dr. Jones essentially agreed with Dr. Taylor's findings, in which she concluded that petitioner was oppositional and defiant, had trouble with the law from an early age, experienced behavioral problems from an early age, suffered from a substance abuse problem in his teens, and had a long history of diabetes mismanagement. (Dkt. # 142 at 231–34).

16 Dr. Taylor's report is included in the record, but Dr. Ozolin's report is not. However, Dr. Jones's report indicates that he reviewed both reports in rendering his own opinion. (Pet.Exh.12).

Counsel for the State reviewed three letters that petitioner wrote to his friend, Susan Duncan, attempting to persuade her to help him escape, as well as the transcript of a telephone call that petitioner made to his family. (Dkt. # 142 at 237; Resp. Exh. 5, 8). Dr. Jones agreed that this evidence tended to show that petitioner was attempting to manipulate Ms. Duncan. (Dkt. # 142 at 241). Dr. Jones testified that manipulative behavior was consistent with anti-social personality disorder, as was a lack of "consistent empathy," "inflated self-appraisal," and "superficial charm." (Dkt. # 142 at 241–42). All of those qualities, which reflected the diagnosis of anti-social personality disorder, contributed to Dr. Jones's opinion that petitioner posed a danger to society at large and could pose a danger to the prison population and staff. (Dkt. # 142 at 241–43). Counsel for the State also reviewed additional evidence with Dr. Jones that would establish petitioner's goal-oriented behavior and "potential for danger." (Dkt. # 142 at 243–47).

On re-direct examination, Dr. Jones again stated that he does not perform any investigation in his role as an expert. (Dkt. # 142 at 276). Instead, he relies on the information that is made available to him. (Dkt. # 142 at 276). Dr. Jones stated that the evidence of the timeline of the robberies, together with the affidavits of Ms. Stockfleth and Ms. Ashley "certainly would have buttressed my opinion that a level of—a significant level of intoxication was present." (Dkt. # 142 at 276–77). Additionally, Dr. Bratcher's report would have been significant to Dr. Jones because Dr. Bratcher's affidavit "talks more about the developmental aspects and how it distorts personality acquisition and development." (Dkt. # 142 at 277–78). Dr. Jones emphasized the importance of "understand[ing] how that person got there so as to get them away from there to make that diagnostic label no longer applicable," particularly in the context of educating a jury. (Dkt. # 142 at 278–79).

Dr. Kathy LaFortune

*78 Dr. LaFortune has worked as both a lawyer and as a psychologist. (Dkt. # 142 at at 300–304). She joined

OIDS in February 2000, working under the title of "capital counsel." (Dkt. # 142 at 302–03). She testified that "[m]y main job at that time was to gather evidence for mitigation," assist attorneys in determining "what type of experts, if any, would need to be utilized," and reviewing issues relevant to defendants' competency, both at the time of the crime and for purposes of standing trial. (Dkt. # 142 at 303). Her position was a new one, and Dr. LaFortune testified that the trial lawyer always had the final say in deciding how mental health evidence would or would not be utilized. (Dkt. # 142 at 304). Prior to joining OIDS, Dr. LaFortune had no direct experience as a death-penalty attorney, but she did advise her husband, a district attorney, on how to handle mental health expert testimony in several death penalty cases. (Dkt. # 142 at 305–06).

Dr. LaFortune testified that in the several months that she worked at OIDS prior to petitioner's second trial, she felt that she had established a rapport with Mr. Lyman, "[b]ut eight months is not a long time to develop a solid collegiality. I was new." (Dkt. # 142 at 309–10). She described her role in petitioner's second trial as "uncovering childhood history; talking to his relatives about his history, including his mother, his father; [and] talking to his two children" to prepare them to testify in court about their father. (Dkt. # 142 at 310). She spoke extensively with petitioner's foster mother to gain insight to petitioner's childhood. (Dkt. # 142 at 310–11).

Dr. LaFortune also investigated the impact of a Type I diabetes diagnosis on a child, which she considered "probably the most important aspect of this case." (Dkt. # 142 at 311). She explained that a child diagnosed with Type I diabetes would "tend to act out, tend to take risks that another child in school would not because of their fear about the diagnosis" unless the child had support and proper monitoring at home. (Dkt. # 142 at 311). After Mr. Lyman requested the services of Dr. Bratcher in March 2000, Mr. Lyman and Dr. LaFortune met with Dr. Bratcher in her office to discuss whether she would be willing and able to testify. (Dkt. # 142 at 313). Dr. LaFortune could not recall whether she identified Dr. Bratcher as a potential witness or whether Mr. Lyman retained her on his own. (Dkt. # 142 at 313). Dr. LaFortune could only recall that "Dr. Jelly was not able or unwilling to testify for whatever reason, and Mr. Lyman and I went to see Dr. Bratcher to ask her about testifying in this case." (Dkt. # 142 at 313–14). She also could not recall whether she had any contact with Dr. Bratcher before that meeting. (Dkt. # 142 at 314). After that meeting, Mr. Lyman did not tell Dr. LaFortune that he did not want to utilize Dr. Bratcher as an expert witness, so Dr. LaFortune continued to work with Dr. Bratcher to develop her testimony. (Dkt. # 142 at 315).

*79 Dr. LaFortune testified that Dr. Bratcher's affidavit, written in 2002, was consistent with the information she provided to Dr. LaFortune and Mr. Lyman in 2000, prior to petitioner's second trial. (Dkt. # 142 at 314–15). Dr. LaFortune believed that Dr. Bratcher would be able to explain the ways that petitioner's lack of family support impacted his response to the Type I diabetes diagnosis, including petitioner's inability or unwillingness to control the disease. (Dkt. # 142 at 315–19, 342–43). She explained that her goal in utilizing Dr. Bratcher "would have been to have her give a description of type I diabetes, first of all, and then relate it to his specific childhood environment and how those two things would have interacted...." (Dkt. # 142 at 323). She further explained that she would have asked Dr. Bratcher "to give a description of the emotional and psychological—I guess for her it would be psychiatric issues surrounding his self-esteem, self-concept, the fear that children with type I diabetes may have and how this fear impacts their behavior." (Dkt. # 142 at 324). Dr. LaFortune would also have focused Dr. Bratcher's testimony on petitioner's physical changes and limitations, in light of the fact that his diabetes was not well-controlled later in life, and the impact that the stress of having diabetes caused in petitioner's relationships and social activities. (Dkt. # 142 at 324). She understood that uncontrolled blood sugar could cause a patient to be "agitated and irritable and angry and not making good decisions, not making rational decisions." (Dkt. # 142 at 340–41).

She testified that Mr. Lyman made the decision not to call Dr. Bratcher at some point during the trial. (Dkt. # 142 at 328–29). She was "shocked" by his decision but did not confront him. (Dkt. # 142 at 329). Dr. LaFortune also disagreed with Mr. Lyman's decision to submit petitioner's medical records to the jury without the context of expert testimony. (Dkt. # 142 at 332). She believed that the jurors could not "look at those records on their own and make sense of them without someone to guide them...." (Dkt. # 142 at 332).

Dr. LaFortune explained that a death penalty trial was "like being in a war zone" and required her to "follow what the lead attorney, the commander, tells you." (Dkt. # 142 at 329). At that time, she trusted Mr. Lyman's opinion because she believed he was a seasoned attorney who had performed well in court. (Dkt. # 142 at 330). Had she known that he had no experience with mitigation death penalty cases, she would have spoken with him about his decision not to call

Dr. Bratcher as a witness and suggested that they discuss the decision with their supervisor or other attorneys in the office. (Dkt. # 142 at 331–32, 348). Instead, Dr. LaFortune testified that she called Debbie Maddox, an OIDS attorney in the Norman, Oklahoma, office, to "vent [her] frustrations." (Dkt. # 142 at 333–34).

Dr. LaFortune testified that she also supported calling Dr. Jones, the neuropsychologist, as a witness because Dr. Bratcher's testimony could not address all of the factors that mitigated petitioner's behavior on the night of the murder. (Dkt. # 142 at 335–38). She believed that Dr. Jones would have been able to explain the impact of petitioner's gunshot wound on his behavior, which became more physically aggressive after he was shot. (Dkt. # 142 at 335–36). She also believed that "Dr. Jones would have explained the impact neuropsychologically on his behavior in becoming disinhibited and explaining to the jury the significance of that gunshot wound and the paranoia that resulted...." (Dkt. # 142 at 337). She did not recall whether Mr. Lyman misunderstood the term "disinhibited." (Dkt. # 142 at 337–38). However, she did remember that Mr. Lyman made the decision not to use Dr. Jones as a witness well before the trial because Dr. Jones was never included on the witness list. (Dkt. # 142 at 338). Because she had only been with OIDS for six or seven weeks at the time that decision was made, she "would never" have questioned Mr. Lyman's decision. (Dkt. # 142 at 345).

*80 Mr. Lyman did share his concerns that calling Dr. Bratcher or Dr. Jones as a witness would permit the state to review, in front of the jury, all of petitioner's violent acts, including his previous crimes and his threats of escape and injury to others. (Dkt. # 142 at 338–39). Dr. LaFortune stated, however, that she believed that the experts should have been called because they could "look at the antisocial behaviors that he had and put them in another context." (Dkt. # 142 at 339).

On cross-examination, Dr. LaFortune confirmed that she examined the defense witnesses during petitioner's second trial. (Dkt. # 142 at 358). She also reviewed her opening statement and confirmed that she did not mention Dr. Bratcher; therefore, Mr. Lyman must have made his decision before the State rested its case. (Dkt. # 142 at 366, 370). Dr. LaFortune did not believe those decisions were reasonable, but she re-iterated her reasons for not raising the issue with Mr. Lyman, stating that she believed that he was a seasoned capital attorney who understood the importance of the expert testimony. (Dkt. # 142 at 370–74, 386).

Lynn Burch

Mr. Burch, the third member of petitioner's trial team, testified on behalf of the State. (Dkt. # 143 at 489–90). He participated in the trial as an appellate attorney, pursuant to a new policy that placed appellate attorneys into the capital trial division to assist with trials by preserving errors and pursuing a more aggressive pre-trial motion practice. (Dkt. # 143 at 489–90, 493). Mr. Burch testified that petitioner's trial was "my first time in a trial court setting," so he was "in an observing and learning mode." (Dkt. # 143 at 493). He was not involved in making decisions regarding which witnesses to call at trial. (Dkt. # 143 at 492–93).

With respect to the trial itself, Mr. Burch recalled that he and Mr. Lyman had some concerns about Dr. LaFortune's opening statement, but he did not remember whether those concerns related to the decision not to use expert witnesses. (Dkt. # 143 at 490–92). He also did not recall whether he was present for the decision not to call Dr. Bratcher as a witness during the trial or whether someone told him about it. (Dkt. # 143 at 494–95). He believed that Mr. Lyman made the decision on his own. (Dkt. # 143 at 495, 496).

Debbie Maddox

Debbie Maddox worked as a capital defense attorney in the Norman, Oklahoma, office at the time of petitioner's second trial. (Dkt. # 143 at 396, 400). During petitioner's second trial, Ms. Maddox received a call from Dr. LaFortune. (Dkt. # 143 at 416). She remembered that petitioner's trial was a resentencing trial, and she remembered that Dr. LaFortune called "on the first evening after the first day of trial." (Dkt. # 143 at 416).

When Ms. Maddox spoke to Dr. LaFortune from home that night, Dr. LaFortune was "very upset." (Dkt. # 143 at 417). The two of them had spoken previously about petitioner's trial and the experts Dr. LaFortune had prepared, and Dr. LaFortune told Ms. Maddox that Mr. Lyman no longer wanted to "use the experts." (Dkt. # 143 at 417). Dr. LaFortune reported that when Mr. Lyman and Mr. Burch asked her about her opening statement, she told them her mitigation theory only to have them dismiss it and "deride" her. (Dkt. # 143 at 417–18). Ms. Maddox testified that their condemnation of Dr. LaFortune's strategy, as Dr. LaFortune relayed it during their telephone conversation, was so harsh that Ms. Maddox questioned whether Dr. LaFortune was still part of the trial team. (Dkt. # 143 at 418). Ms. Maddox then asked Dr.

LaFortune what mitigation evidence would be presented. (Dkt. # 143 at 418). Ms. Maddox testified that Dr. LaFortune's description of the evidence Mr. Lyman wanted to present "all sounded like they were going to be aggravating witnesses, but that they were just going to cross-examine, that that was going to be kind of what they utilized." (Dkt. # 143 at 418).

*81 Ms. Maddox advised Dr. LaFortune to speak with the trial judge about her concerns. (Dkt. # 143 at 419–20). Ms. Maddox even offered to get involved with the case, even though "[i]t would not have been pretty" for her to do so. (Dkt. # 143 at 419–20). Dr. LaFortune did not want to pursue that course of action, so Ms. Maddox focused on calming Dr. LaFortune. (Dkt. # 143 at 419–20).

Ms. Maddox also testified that she spoke with Dr. LaFortune two more times before the trial ended. (Dkt. # 143 at 420). Ms. Maddox said that Dr. LaFortune was still concerned about the outcome of the trial and unhappy about the strategy employed, but she was less upset than she had been the first night. (Dkt. # 143 at 420). Ms. Maddox gave only one other piece of advice: to make a record for appellate counsel by memorializing the events in writing. (Dkt. # 143 at 420).

During Ms. Maddox's testimony, she also recounted her experience with death penalty cases. (Dkt. # 143 at 395–96). When counsel for petitioner asked questions about Ms. Maddox's experience working with expert witnesses, counsel for the State objected, arguing that "Ms. Maddox's career and her experience with mitigation witnesses is not relevant at all to this hearing." (Dkt. # 143 at 396–97). Counsel for petitioner argued that he did not intend to ask Ms. Maddox her opinion, but he believed that her experience put the conversations with Dr. LaFortune into context. (Dkt. # 143 at 397). At that time, the undersigned announced that he was going to allow Ms. Maddox to give her opinion. (Dkt. # 143 at 398). Ms. Maddox opined on a number of issues related to the evidence available for use in mitigation and the use of expert witnesses in death penalty cases. (Dkt. # 143 at 395–484).

The State subsequently filed a motion to strike Ms. Maddox's opinion testimony. (Dkt.# 144). Counsel for both parties presented arguments and testimony on November 9, 2012. (Dkt.152, 153). Because the undersigned has determined that Ms. Maddox's opinion testimony is not necessary to the analysis and legal conclusions set forth in this report and recommendation, the undersigned does not include those opinions here. [17] *See* Dkt. # 158, Order on Motion to Strike.

[17] Were Ms. Maddox's opinions to be considered, they would undoubtedly weigh in favor of Petitioner.

The Exhibits

Both parties submitted a number of exhibits for use at the evidentiary hearing. Each party stipulated to the admissibility of the other party's exhibits prior to the hearing. The undersigned has reviewed all of the exhibits but will only address those relevant to the ineffective assistance of counsel analysis.

Affidavit of Dr. Christina Bratcher

Dr. Bratcher is an endocrinologist. (Pet.Exh.1). She reviewed petitioner's medical records with the expectation that she would serve as an expert witness at petitioner's second trial. (Pet.Exh.1). Dr. Bratcher's affidavit was drafted and signed in December 2002, more than two years after petitioner's second trial. (Pet.Exh.1).

After reviewing petitioner's records, Dr. Bratcher concluded that petitioner suffered from Type I diabetes, "a chronic, life-long disease" "affecting the production of the chemical compound insulin by cells located in the human pancreas. Petitioner was diagnosed at age twelve. (Pet.Exh.1).

*82 Dr. Bratcher opined that petitioner had significant difficulty controlling his diabetes. (Pet.Exh.1). She cited ten hospitalizations that occurred between his diagnosis in September 1971 and the time of the murder "that were explicitly related to uncontrolled diabetes." (Pet.Exh.1). In 1986, after petitioner sustained the injury to his frontal lobe from the gunshot wound, he experienced symptoms that included "decreased consciousness and confusion." (Pet.Exh.1). Petitioner was subsequently diagnosed with mild diabetic neuropathy, which "can upset the normal flow of certain types of nerve impulses through the legs, arms, and other parts of the body." (Pet.Exh.1).

Dr. Bratcher also opined that external factors could have impacted petitioner's behavior on the night of the murder. (Pet.Exh.1). She noted the neuropsychological expert report, presumably from Dr. Jones, which cited the diagnosis of injury to petitioner's left frontal lobe. (Pet.Exh.1). She also stated that, based on witness reports, petitioner's judgment could have been impacted by alcohol consumption and lack of food. (Pet.Exh.1). Dr. Bratcher explained that "[i]ngestion of alcohol can dramatically increase blood sugar levels in a

diabetic, or may induce extremely low blood sugar levels if the person has not eaten." (Pet.Exh.1).

Finally, Dr. Bratcher stated that petitioner's diabetes diagnosis "is significant because of the impact that chronic illness played in his development as a person." (Pet.Exh.1). The stress of a chronic illness can affect an adolescent's self-esteem, sense of independence, and relationships. (Pet.Exh.1). Even with her limited knowledge of petitioner's family history, Dr. Bratcher found clear evidence that petitioner had "poor family support for his illness, as well as behaviors which indicated a rebellion against his disease that is commonly seen in young diabetic patients." (Pet .Exh. 1). These stressors "can have long-lasting effects on an individual's personality, family relationships, and ability to control the symptoms of diabetes." (Pet.Exh.1).

Report by Dr. Herman Jones

Dr. Herman Jones, a neuropsychologist, examined petitioner in July 1998, four years after the murder and a little more than two years before his second trial. (Pet.Exh.12). In addition to performing a number of tests, Dr. Jones also reviewed reports from a previous psychological evaluation and a recent neuropsychological evaluation. (Pet.Exh.12). Dr. Jones also reviewed petitioner's history and found it "significant" for a gunshot wound to the head—specifically the "left inferior medial frontal lobe"—in July 1985. (Pet.Exh.12). During that same time period, petitioner had "several events of loss of consciousness" that were "attributed to diabetes." (Pet.Exh.12). Petitioner also began suffering "generalized tonic clonic seizures secondary to fluctuations in his blood sugar" after the gunshot wound. (Pet.Exh.12).

Testing revealed "subtle but significant findings of persisting neurologic damage in the anterior portions of his brain (frontal lobe) with greater impairment demonstrated on the activities mediated with the left frontal lobe compared to the right." (Pet.Exh.12). The damage manifested in "decreased spontaneous fluency and decreased verbal problem solving." (Pet.Exh.12). Behaviorally, petitioner's brain damage "makes him slightly more impulsive under normal situations and reduces his ability to disengage or inhibit his impulses." (Pet.Exh.12). Under "normal circumstances," petitioner's "behavior would be within 'normal' parameters given his psychosocial circumstances." (Pet.Exh.12).

***83** However, if petitioner "experiences a toxic encephalopathy such as that induced with alcohol consumption, the neurologic component of impulsivity is intensified and exacerbated." (Pet.Exh.12). Dr. Jones opined that petitioner "typically retains the capacity to engage in goal directed behavior and sequenced activities during these intervals, but he likely displays a more impulsive disinhibited character." (Pet.Exh.12). Petitioner reported that he frequently drank excessive amounts of alcohol, so Dr. Jones concluded that petitioner's use of alcohol that night would be "a significant factor in conceptualizing his behavior and its etiology." (Pet.Exh.12).

Dr. Jones also found petitioner's diabetes diagnosis significant. (Pet.Exh.12). He noted that "blood glucose fluctuations" associated with Type I diabetes typically cause "mood swings and emotional behaviors." (Pet.Exh.12). He also noted that petitioner "has a decreased appreciation of his mood swings and lack of concurrent awareness and correlation between his blood glucose levels and his mood." (Pet.Exh.12). Dr. Jones did not opine about the impact of petitioner's diabetes on his behavior the night of the murder because he had no information about petitioner's blood sugar levels that night to help him form an opinion. (Pet.Exh.12).

Evidence of Intoxication

Petitioner submitted two affidavits from potential witnesses Regina Stockfleth and Candy Ashley. (Pet.Exh.2, 23). The State stipulated [18] that the affidavits would accurately reflect the witnesses' testimony, if called to testify. (Pet.Exh.2, 23). Petitioner argues that these witnesses were available at the time of the second trial and that Mr. Lyman knew the substance of their proffered testimony. (Dkt. # 157 at 28–29). Petitioner contends that their testimony could have proven that he was intoxicated at the time of the murder. (Dkt. # 157 at 29–30).

18 The State lodged an objection to Regina Stockfleth's affidavit, arguing that it was not relevant to the issues to be determined at the evidentiary hearing. (Pet.Exh.2). The State stipulated to the admission of the affidavit subject to this objection. (Pet.Exh.2). Candy Ashley's affidavit contains no objection. (Pet.Exh.23). The undersigned finds that Regina Stockfleth's affidavit, which provides evidence regarding petitioner's intoxication on the night of the murder, is relevant to the issues, as it reflects testimony that Mr. Lyman could have presented to the jury.

Regina Stockfleth

Regina Stockfleth's affidavit states that she and petitioner have been friends for twenty years. (Pet.Exh.2). They began drinking margaritas, made with "a fairly large size bottle of tequila and some Margarita mix," at five or six o'clock on the evening of the murder. (Pet.Exh.2). Petitioner then left Ms. Stockfleth's house to look for marijuana. (Pet.Exh.2). When he returned, they drove to two different bars and continued to drink. (Pet.Exh.2). Petitioner drove them home around twelve or one o'clock in the morning, and he was intoxicated at that time, as demonstrated by his erratic driving. (Pet.Exh.2). Ms. Stockfleth further stated that she did not see petitioner eat anything that evening. (Pet.Exh.2).

Candy Ashley

Candy Ashley does not know petitioner personally. (Pet.Exh.23). On the night of the murder, she was sitting in a van parked approximately one hundred feet from the first convenience store that petitioner robbed, waiting for her partner, who was inside the store. (Pet.Exh.23). She observed a white male walking around the store. (Pet.Exh.23). The man walked to the back of the store's exterior and then returned "carrying what she believed to be a rifle." (Pet.Exh.23). The man looked to the front of the store and again walked to the back of the store's exterior. (Pet.Exh.23). Based on the way he walked, Ms. Ashley thought the man was intoxicated. (Pet.Exh.23). Ms. Ashley's partner, Sean, then returned to the van, and they left the store. Ms. Ashley told Sean what she had seen, and when they arrived home, Sean called the police to report what Ms. Ashley had seen. (Pet.Exh.23).

***84** The next day, Ms. Ashley saw a news story with video about a robbery at another convenience store one mile from the store she had been to the previous evening. (Pet.Exh.23). Ms. Ashley believes that the man she saw carrying the rifle is the same man depicted in the video from the other robbery. (Pet.Exh.23).

Petitioner's Statement to Police

In addition to the affidavits of Regina Stockfleth and Candy Ashley, petitioner also submitted a transcript of a statement that he made to police on July 20, 1994. (Pet.Exh.25).[19] A Tulsa homicide detective reviewed the video of the murder with petitioner and asked petitioner to describe the events. (Pet.Exh.25). On several occasions during the interview, petitioner stated that he was "drunk" and could not clearly remember what happened. (Pet. Exh. 25 at 2, 5, 8, 13, 14).

19 The State also submitted a transcript of this statement as Respondent's Exhibit 7.

The State submitted a second transcript of an interview that petitioner gave to police on July 19, 1994. (Resp.Exh.6). In that statement, petitioner described, in some detail, drinking margaritas with "a female friend" (Regina Stockfleth). (Resp.Exh.6). He also stated that he left to buy marijuana with a "minor individual from the neighborhood" (Michael Hansen) but never bought any. (Resp.Exh.6). Instead, he purchased and drank a single can of beer. (Resp.Exh.6). After buying and consuming the beer, petitioner and the "female friend" went to two bars, where they continued to drink. (Resp.Exh.6). Petitioner then described the two robberies and the attempted robbery, in which he shot and killed the store clerk. (Resp.Exh.6). Petitioner repeatedly stated that he could not remember or "kinda" remembered the events because he was intoxicated. (Resp.Exh.6). Petitioner did tell the officer conducting the interview that he was "not blaming the alcohol" but that he believed it "impaired my thinking." (Resp.Exh.6).

Petitioner's Medical Records

Petitioner's medical records were submitted to the jury in petitioner's second trial under a stipulation, without additional testimony. (Dkt. # 141 at 153–54). The records address petitioner's treatment for a gunshot wound to the left frontal lobe of his brain on July 4, 1985. (Pet.Exh.14). Petitioner underwent three surgeries within a one-week period to repair the damage and retrieve the bullet. (Pet.Exh.14). Petitioner's recovery in the hospital was somewhat slowed due to his diabetes. (Pet.Exh.14). Following his discharge from the hospital, petitioner had two follow-up appointments with Dr. Leslie C. Hellbusch, a neurosurgeon. (Pet.Exh.14).

At the first appointment on August 13, 1985, Dr. Hellbusch wrote that petitioner's "neurological examination today was normal." (Pet.Exh.14). Petitioner was ordered to return for a follow-up appointment in two months and to refrain from returning to work until that time. (Pet.Exh.14). At the second follow-up appointment on October 15, 1985, Dr. Hellbusch found that petitioners "neurological examination today looked normal. He has had no evidence of cerebrospinal fluid rhinorrhea." (Pet.Exh.14). Because petitioner was still exhibiting physical effects from the injury, such as headaches, dizziness, and fainting, Dr. Hellbusch ordered petitioner not to return to work, do any heavy lifting, or drive a vehicle. (Pet.Exh.14).

Mitigating Circumstances Jury Instruction

*85 Petitioner submitted the jury instruction from his second trial that listed the mitigating circumstances the jury was to consider in reaching its decision. (Pet.Exh.18). Petitioner's counsel reviewed most of the mitigating circumstances during his examination of Mr. Lyman. (Dkt. # 141 at79–85). The jury instruction lists eleven mitigating circumstances. (Pet.Exh.18). The first three mitigating circumstances listed were

1. That James Fitzgerald was diagnosed with diabetes at age 11 and must take daily insulin injections;

2. That in 1985 James Fitzgerald suffered a gunshot wound to the head that resulted in physical injury to his brain;

3. That prior to the 1985 gunshot wound to his head, James Fitzgerald was not convicted of any crimes involving violence;

(Pet.Exh.18). The remaining mitigating circumstances addressed petitioner's cooperation and accountability for his crimes following the arrest; family relationships; difficult childhood; and recent injury, which decreased his mobility and caused him daily pain. (Pet.Exh.18).

Petitioner's Letters and Phone Calls

The State submitted several letters that petitioner wrote to Susan Duncan from jail and transcripts of phone calls that petitioner made to his family from jail in the spring of 1999. (Resp.Exh.5, 8). The letters describe petitioner's desire to avoid growing old in prison, which he stated was dangerous, and his feelings about the death penalty. (Resp.Exh.5). Statements in the last two letters and in the telephone call transcripts indicate that petitioner had formulated a plan to escape. (Resp.Exh.5).

Petitioner attempted to recruit two people, one of whom was a minor, to assist him. (Resp.Exh.5, 8). Petitioner's plan was to have someone with a gun intercept him while he was in transport to or seeking treatment at an emergency room. (Resp.Exh.5, 8). Petitioner explained to Ms. Duncan that a prisoner being transported for medical care only had one officer accompanying him, making it easy for an accomplice with a gun to hold up the officer while petitioner grabbed the officer to keep him from drawing his weapon. (Resp.Exh.5). Petitioner would then make his escape in one car, drive a short distance, and then "dump" the first car for a second car. (Resp.Exh.5). Petitioner believed that he had convinced Ms. Duncan to store the two getaway cars at her home. (Resp.Exh.5).

In his phone calls to his family, petitioner spoke to Randy Whitaker about the escape plan. (Resp.Exh.8). Those conversations are thinly veiled, and it is clear that petitioner wanted Randy Whitaker to drive the car during the escape. (Resp.Exh.8). Petitioner also believed that he had convinced Ms. Duncan to store the two getaway cars at her home. (Resp.Exh.5).

At some point, authorities discovered petitioner's escape plan. During a telephone call to Ms. Duncan on April 22, 1999, she told petitioner that she did not want any further contact with him. (Resp.Exh.8). She stated that she had "been questioned all day" and was "not going to be put in jail for nothing." (Resp.Exh.8). Petitioner then called his mother to ask if anyone had been to her house asking questions. (Resp.Exh.8). He told his mother that he had been joking "with old fat Sue about running off and evidently somebody come and talk to her about that." (Resp.Exh.8). He also stated that Ms. Duncan was upset, but he "could care less, she don't mean nothing to me." In that same telephone call, however, petitioner spoke to Randy Whitaker again about helping him escape. (Resp.Exh.8).

CONCLUSIONS OF LAW

*86 In his proposed findings of fact and conclusions of law, petitioner argues that Mr. Lyman's lack of experience and failure to investigate prevented him from making an informed strategic decision not to present expert testimony at petitioner's second trial. (Dkt. # 157 at 42–54). Alternatively, petitioner argues that even if Mr. Lyman's decision can be construed as a strategic decision, it was an objectively unreasonable decision based on the evidence presented at the hearing. (Dkt. # 157 at 55–63). Petitioner also contends that Mr. Lyman's concerns about the expert testimony working as a "two edged sword" that would strengthen the State's evidence of the aggravating circumstances were objectively unreasonable, as they represent a misunderstanding of the applicable case law. (Dkt. # 157 at 64–74). Petitioner argues that a proper reading of the case law holds that the concern that mitigating evidence can be used as a "two edged sword" to bolster the State's claims that a defendant is a continuing danger applies only when that defendant has claimed innocence. (Dkt. # 157 at 64–74). Because Mr.

Lyman's strategy and decision-making process was based on an erroneous understanding of the law, petitioner argues that the decision not to use expert testimony was objectively unreasonable. (Dkt. # 157 at 64–74).

In its proposed findings of fact and conclusions of law, the State argues that Mr. Lyman's experience, or lack of experience, does not impact the analysis regarding the reasonableness of his decision. (Dkt. # 156 at 16–18). The State also argues that Mr. Lyman's investigation was thorough and reasonable under the circumstances, in light of the fact that Mr. Lyman knew of all the evidence that Petitioner presented at the hearing. (Dkt. # 156 at 18–19). Further, the State contends that Mr. Lyman's theme at the second trial, "a 'large' one intended to humanize Petitioner and convince the jury that he had a good side and there was value to his life" was appropriate and reasonable under the circumstances. (Dkt. # 156 at 19).

The State further contends that Mr. Lyman was right to be concerned about the use of experts, for the following reasons: (1) Mr. Lyman believed that the presentation of expert testimony regarding petitioner's "mental state," including the impact of alcohol, diabetes, and the brain injury on petitioner's thought processes, would appear to the jury as an attempt to improperly re-litigate intent at a resentencing trial and would harm Mr. Lyman's credibility with the jury; (2) Mr. Lyman believed that evidence of intoxication would appear to the jury as an excuse, which conflicted with part of Mr. Lyman's theme that petitioner's life had value because he took responsibility for his actions; and (3) the expert witnesses, particularly on cross-examination, would highlight the aggravating evidence, thereby harming petitioner's case. (Dkt. # 156 at 18–22). With respect to Mr. Lyman's concerns about the expert testimony being used to highlight the aggravating factors, which he called a "double-edged sword," the State cites Mr. Lyman's concerns that Dr. Bratcher would make a weak witness and that Dr. Jones would be forced to testify about petitioner's disinhibition, goal-oriented behavior, and anti-social personality disorder. (Dkt. # 156 at 21–22). In light of all these concerns, the State argues that Mr. Lyman's strategy and his decision not to call expert witnesses was reasonable. (Dkt. # 156 at 24).

Standard of Review

***87** The Sixth Amendment "right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (citations omitted). In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United States Supreme Court defined the parameters for analyzing ineffective assistance of counsel claims. To prevail on a claim for ineffective assistance of counsel, a convicted defendant bears the burden of proving two elements to establish that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. "First, the defendant must show that counsel's performance was deficient" by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

In analyzing whether counsel's performance was deficient, a reviewing court must strive "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Courts are required to give great deference to counsel's performance through "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" based on "prevailing professional norms." *Id.* at 689, 690. The prevailing professional norms are determined by applying the law as it existed at the time counsel acted or failed to act. *See Bland v. Sirmons*, 459 F.3d 999, 1030–31 (10th Cir.2006) (applying the standard to a claim based on failure to obtain a jury instruction on involuntary intoxication); *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir.2002) (citations omitted) (stating that counsel is not required to "predict future law" or to anticipate arguments that do not exist at the time of trial).

Additionally, counsel is presumed to have acted in an "objectively reasonable manner" and in a manner that "might have been part of a sound trial strategy." *Bullock*, 297 F.3d at 1046. Counsel is given "wide latitude" to make "tactical decisions" because "[t]here are countless ways to provide effective assistance in any case." *Strickland*, 466 U.S. at 689. Accordingly, where the facts establish that decisions made by counsel were, in fact, "strategic choices made after thorough investigation of law and facts relevant to plausible options," those decisions are virtually unchallengeable." *Id.* at 690. Conversely, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. Counsel must conduct a reasonable investigation or "make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. If a decision qualifies as a strategic decision made after a constitutionally adequate investigation, a convicted

defendant may only establish deficient performance if "the choice was so patently unreasonable that no competent attorney would have made it." *Bullock*, 297 F.3d at 1046 (citations and internal quotation marks omitted).

***88** "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* Prejudice is established by a "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Thus, a defendant must prove by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Supreme Court defines "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.*

Deficient Performance

In his proposed findings of fact and conclusions of law, petitioner argues that Mr. Lyman's performance was deficient in a number of ways. First, petitioner asserts that Mr. Lyman's lack of experience with the presentation of expert testimony to establish mitigating factors in a capital cases made it impossible for him to make a strategic decision. (Dkt. # 157 at 42–55). Petitioner also contends that Mr. Lyman failed to conduct an adequate investigation by failing to comprehend the expert testimony that could have been presented and by failing to understand the impact of submitting fact-based evidence without expert testimony to educate the jury. (Dkt. # 157 at 50–55). Finally, petitioner argues that, even if Mr. Lyman made a strategic decision not to present expert testimony, that decision was objectively unreasonable and would have impacted at least one juror's decision. (Dkt. # 157 at 55–74).

Adequate Investigation

Petitioner's claim that Mr. Lyman conducted an inadequate investigation is based, in large part, on what petitioner perceives as Mr. Lyman's failure to comprehend the importance of the information uncovered in the investigation. (Dkt. # 157 at 42–55). The State contends that Mr. Lyman's investigation was thorough because he was aware of all of the evidence presented during the evidentiary hearing. (Dkt. # 156 at 18–19). In support, the State cites to Mr. Lyman's retention of two experts, Dr. Bratcher and Dr. Jones; his meetings with those witnesses; and the witness and exhibit lists. (Dkt. # 156 at 18–19).

Although "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at 690, the duty to investigate is separate from the question of whether counsel made a reasonable, strategic decision. When considering a claim that counsel was ineffective because he failed to investigate, the question "is not whether trial counsel made a tactical or strategic decision not to include the omitted mitigation evidence at trial, but rather whether 'the investigation supporting counsel's decision ... *was itself reasonable.*" *Anderson v. Sirmons*, 476 F.3d 1131, 1145 (10th Cir.2007) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2427, 156 L.Ed.2d. 471 (2003) (emphasis in original)).

In the Tenth Circuit, counsel's failure to properly prepare a mitigation case can be considered ineffective assistance of counsel, but "only if the investigation fails to ... uncover significant mitigating evidence." *DeRosa v. Workman*, 679 F.3d 1196, 1208–09 (10th Cir.2012) (quoting *Wilson v. Sirmons*, 536 F.3d 1064, 1143 (10th Cir.2008)). In *DeRosa*, the district court granted defendant an evidentiary hearing on his ineffective assistance of counsel claim. *See id.* at 1200, 1206–07. At that hearing, defendant presented a number of factual witnesses and one expert witness that he argued should have been presented as part of the mitigating evidence at his trial. *See id.* at 1214–18. The Tenth Circuit, reviewing the decision of the district court, concluded that defendant's attorney "was well aware of most, if not all, of the significant mitigating events that occurred during DeRosa's life" and had presented evidence recounting most of those events to the jury; therefore, the failure to introduce at trial the additional evidence presented during the evidentiary hearing was not a constitutional error. *Id.* at 1218–19.

***89** Conversely, the Supreme Court has found ineffective assistance of counsel and prejudice where counsel's failure to investigate a previous conviction resulted in the failure to discover mitigating evidence in the case file regarding the defendant's mental health. *See Rompilla v. Beard*, 545 U.S. 374, 390, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). Instead of reviewing the court file, counsel for defendant interviewed five family members in his investigation on defendant's childhood and mental development. *See id.* at 381–82. The Court, in *Rompilla*, concluded that counsel's investigation fell below prevailing professional norms because counsel for the defendant was aware that the prosecution intended to use the transcript of the previous conviction and the accompanying court file to prove aggravation that supported the death penalty. *See id.* at 383–87 (holding that "[t]he notion that

defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense." It was also a standard set forth by the American Bar Association.). The Tenth Circuit has made similar findings in cases where counsel "did not investigate and therefore did not know such evidence was available." *Anderson*, 476 F.3d at 1145–46 (collecting cases involving failure to investigate). In *Anderson* and the cases cited therein, the courts found that a proper investigation would have yielded evidence that, to a reasonable probability, would have impacted at least one juror's decision. *See id.* at 1145–48.

The State's argument that, at the time of petitioner's second trial, Mr. Lyman was aware of the evidence petitioner presented during the evidentiary hearing, is well supported by the case law. Petitioner has failed to demonstrate that Mr. Lyman was unaware of the witnesses and information available for use in developing a mitigation defense. Petitioner has submitted no *new* information or witnesses that did not exist at the time of petitioner's second trial.[20] Accordingly, the undersigned recommends a finding that Mr. Lyman's investigation into the mitigating evidence satisfied the constitutional duty to investigate.

[20] The impact of Mr. Lyman's failure to understand the information gained during the investigation is addressed *infra*.

Strategic Decision

Petitioner contends that Mr. Lyman's lack of experience with capital trials, generally, and with the use of mitigation expert testimony, specifically, prevented Mr. Lyman from making a strategic decision not to call Dr. Bratcher and Dr. Jones as expert witnesses during petitioner's second trial. (Dkt. # 157 at 8–9). Both parties agree that Mr. Lyman did not meet all of the ABA's advisory guidelines for qualification of capital counsel, but the State argues that this fact does not mandate a finding that Mr. Lyman's decisions were not strategic or reasonable. (Dkt. # 156 at 16–17).

Lack of Experience

Although there was some debate about Mr. Lyman's criminal trial experience during the evidentiary hearing, the evidence ultimately established that Mr. Lyman did not meet all of the 1989 ABA Guidelines for the appointment of counsel in death penalty cases. The applicable guideline, ABA Guideline 5.1 recommends that appointed counsel have "at least five years litigation experience in the field of criminal defense" and "have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989); (Pet.Exh.8). Mr. Lyman acknowledged that he did not meet these requirements because he had only worked at OIDS for three years when he conducted petitioner's second trial and an insufficient number of his previous trials rose to the level of "serious and complex cases." (Dkt. # 141 at 47–53). Counsel for petitioner and Mr. Lyman also discussed Mr. Lyman's experience with "the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence." ABA Guidelines; (Dkt. # 141 at 48–53). Mr. Lyman testified that he had experience working with expert witnesses, including limited experience with psychiatric expert witnesses, but he had never presented expert testimony to a jury. (Dkt. # 141 at 48–53).

***90** While Mr. Lyman's lack of experience is relevant to a discussion of the strategic nature of the decisions he made and of their objective reasonableness, his failure to meet the qualifications set forth in the ABA Guidelines is insufficient, standing alone, to warrant a finding that the decision not to utilize expert testimony was not a strategic decision. As the Supreme Court has noted on numerous occasions, the "[p]revailing norms of practice as reflected in the American Bar Association standards and the like ... are guides to determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688. *See also Padilla v. Kentucky*, 559 U.S. 356, ___, 130 S.Ct. 1473, 1482, 176 L.Ed.2d 284 (2010) (collecting citations). The generalized standard of "reasonableness under prevailing professional norms" articulated in *Strickland* is the standard, not a "particular set of detailed rules." *Strickland*, 466 U.S. at 688–89 (citation omitted). Accordingly, while the standards set forth in the ABA Guidelines "may be valuable measures," they are not dictates and are not determinative here. *Padilla*, 130 S.Ct. at 1482. *Misunderstanding of the Expert Reports*

Petitioner also contends that Mr. Lyman's lack of experience contributed to his misunderstanding of Dr. Jones's report. Although Mr. Lyman met with Dr. Jones and spoke to him about the expert report, Mr. Lyman did not demonstrate a clear understanding of the meaning of that report. Specifically, Mr. Lyman testified that he interpreted Dr. Jones's conclusion that petitioner was "disinhibited" to mean that petitioner was uncaring and did not care about the consequences of his actions. (Dkt. # 141 at 89–93). Dr. Jones testified to the contrary, stating that "disinhibited" was a reference to a

lack of impulse control. (Dkt. # 142 at 180–83). Petitioner's disinhibition was directly caused by damage to the frontal lobe of his brain from the gunshot wound petitioner received in 1985. (Dkt. # 142 at 175–79). Petitioner argues that this testimony constitutes strong mitigating evidence that the jury should have heard. (Dkt. # 157 at 28–35).

A decision based on an error of law cannot be categorized as a strategic decision if, under the circumstances, that decision was "contrary to professional prevailing norms." *Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). In *Kimmelman*, the defendant's attorney failed to conduct any pretrial discovery because he was under the "mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense." *Id.* at 385. Because the defendant's attorney was not aware of the evidence against his client, he failed to file a motion to suppress certain evidence. *See id.* The Supreme Court concluded that the attorney's decision was not a strategic one because it stemmed from the attorney's misunderstanding of the law regarding discovery procedures, which resulted in a failure to investigate.[21] *See id.* at 386–87. The Supreme Court applied this analysis to a similar case in *Williams v. Taylor*, 529 U.S. 362, 395–96, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). In *Williams*, counsel's investigation into the defendant's childhood for the purpose of preparing a mitigation case was inadequate, in part,[22] because counsel failed to obtain state records that revealed defendant was the victim of criminal neglect and an abusive foster home. *See id.* Counsel for the defendant failed to obtain those records "not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." *Id.* at 395.

21 Consistent with *Strickland*, the Court also held that the defendant was required to establish prejudice by demonstrating (1) that a timely motion to suppress would have been granted and (2) that, to a reasonable probability, the jury would have reached a different result without the introduction of the suppressed evidence. *See Kimmelman*, 477 U.S. at 375.

22 The record also revealed that counsel did not begin its mitigation investigation until a week before trial and that counsel failed to uncover additional records of the defendant's "borderline" mental retardation, commendations the defendant received in prison, and the testimony of prison officials and a prison ministry volunteer who would have testified that the defendant was not prone to violence and thrived under the structure of the prison schedule. *Williams*, 529 U.S. at 395–96.

***91** The evidence, as it was presented during the hearing, indicates that Mr. Lyman may not have been as familiar with the mitigation case being built for petitioner's second trial as he could, or should, have been. This error, however, was a misunderstanding of fact, not a misunderstanding of the law; therefore, Mr. Lyman's decision not to call Dr. Jones as an expert witness may still be considered a strategic decision, even though Mr. Lyman's interpretation of Dr. Jones's report was incorrect.[23]

23 The undersigned notes that Mr. Lyman may have misunderstood the term "disinhibited" based on his conversations with Dr. Jones, which included a discussion of Dr. Jones's conclusion—not included in his report—that petitioner had anti-social personality disorder. (Dkt. # 142 at 206–08). In his testimony at the evidentiary hearing, Dr. Jones testified that the signs and symptoms of anti-social personality disorder include "a pervasive pattern of disregard for and violation of the rights of others," "a failure to conform to social norms with respect to lawful behaviors," "deceitfulness," "impulsivity," "irritability and aggressiveness," "consistent irresponsibility," and "lack of remorse" or "rationalization" of misdeeds. (Dkt. # 142 at 226–30). Petitioner exhibited all seven signs and symptoms. (Dkt. # 142 at 226–30). Several of those factors describe behavior that could define the petitioner as uncaring, which could explain Mr. Lyman's incorrect interpretation of Dr. Jones's findings.

"*Double–Edged Sword*"

Mr. Lyman testified that his main reason for not calling either Dr. Jones or Dr. Bratcher as an expert witness was his concern that the State would use that testimony on cross-examination to support the aggravating factors. (Dkt. # 141 at 88). Mr. Lyman's concern with Dr. Bratcher's testimony was that the focus on the interaction between petitioner's diabetes and alcohol consumption would "come across, one, as an excuse; two, that it would be in effect kind of a summation for the state." (Dkt. # 141 at 82). Mr. Lyman had similar concerns with Dr. Jones's testimony. (Dkt. # 141 at 88). He stated that his "number one concern was that [Dr. Jones] would in

effect become the state's best summation witness for their case" because he would be cross-examined on the evidence that supported the aggravating factors and "the state would be able to utilize his findings and opinions to benefit the state's case to the extent that it would diminish any benefit we would have received from him if we had used him." (Dkt. # 141 at 88). Mr. Lyman testified that Dr. Jones's findings regarding petitioner's impulsivity, particularly his findings on the interaction between petitioner's frontal lobe damage and alcohol consumption would be wrongly interpreted by the jury. (Dkt. # 141 at 90–91).

The State argues that Mr. Lyman's decision on this issue was both strategic and reasonable because the expert opinions constituted a "double-edged sword," evidence that could be used to support both aggravation and mitigation. (Dkt. # 156 at 3–4). Petitioner argues that the "double-edged sword" argument should be applied to an analysis of prejudice under the second prong of *Strickland*. (Dkt. # 157 at 64–74). Under the prevailing case law concerning evidence that may be considered a "double-edged sword," petitioner is correct in stating that the evidence should be considered in analyzing whether petitioner was prejudiced by the failure to present expert testimony. The undersigned addresses the issue here solely for the purpose of determining whether Mr. Lyman erred, as a matter of law, in viewing the expert testimony through the lens of the "double-edged sword analysis." If Mr. Lyman did err as a matter of law, then his decision would not be strategic because it would have been "contrary to professional prevailing norms." *Kimmelman*, 477 U.S. at 385.

In his analysis of the "double-edged sword" cases, petitioner correctly notes that the Tenth Circuit now draws a distinction among certain types of cases. (Dkt. # 157 at 64–74). For example, in *Smith v. Mullin*, 379 F.3d 919, 943 n. 11 (10th Cir.2004), the Tenth Circuit acknowledged that evidence of mental impairments can be seen as a "double-edged sword." The Tenth Circuit ultimately found, however, that counsel was ineffective in failing to introduce mental health evidence and that the defendant suffered prejudice as a result because, to the extent that such evidence was aggravating, that evidence was already before the jury. *See id.* The Court distinguished its previous cases involving evidence of a " 'double-edged' nature" on the grounds that in all of those cases, "such evidence had not previously been placed before the jury." *Id.* The Tenth Circuit found prejudice in *Smith* because "[t]he jury already had evidence of Mr. Smith's impulsiveness and lack of emotional control. What the jury wholly lacked was an *explanation* of how Mr. Smith's organic brain damage caused these outbursts of violence and caused this 'kind hearted' person to commit such a shocking crime." *Id.* at 943 (emphasis in original).

***92** At the time of petitioner's second trial in October 2000, however, *Smith* had not yet been decided, and the cases available to Mr. Lyman indicated that the Tenth Circuit viewed mental health evidence as a double-edged sword that required counsel to proceed with caution in presenting such evidence.[24] *See, e.g., Duvall v. Reynolds*, 139 F.3d 768, 782 (10th Cir.1998) (holding counsel's decision not to introduce evidence of the defendant's substance abuse reasonable because it "would have resulted in the introduction of details of [ ] prior convictions and violent conduct, which invariable resulted from his substance abuse. The jury could have perceived such evidence as aggravating rather than mitigating."); *Davis v. Executive Dir. Of Dept. of Corrections*, 100 F.3d 750, 760–61 (10th Cir.1996). In *Davis*, the Tenth Circuit held that counsel's decision not to introduce evidence of the defendant's alcoholism as a factor in establishing the defendant's mental state at the time of the crime was reasonable, even though the facts established that the defendant was an alcoholic who had been drinking on the day of the murder. *Davis*, 100 F.3d at 763–64. The Court based its holding on the following reasons: (1) no direct evidence supported a finding that the defendant was intoxicated at the time of the crime; (2) the defendant's multiple unsuccessful attempts to achieve sobriety could be viewed as an aggravating factor; and (3) the expert report also contained evidence that the defendant lied about the facts of the crime, either to the expert or to the jury. See *id.*

24 At the time, the Supreme Court's precedent also cautioned counsel that a criminal defendant's mental health and childhood history could be a "two-edged sword" that "may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Penry v. Lynaugh*, 492 U.S. 302, 324, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (abrogated by *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)). In *Penry*, the issue was whether the jury instructions clearly instructed the jury to consider the mitigating value of such evidence and not whether counsel was ineffective. However, the possibility that mitigating evidence could ultimately be harmful to a criminal defendant's case during the penalty phase of a

> capital trial is clearly stated in the case law that existed at the time of petitioner's second trial.

Nothing in the Court's analysis in *Davis* and similar cases would have put Mr. Lyman on notice that the evidence of petitioner's diabetes, alcohol intake, or frontal lobe damage should carry more weight as mitigating evidence simply because petitioner's guilt was not at issue or because the State had re-introduced that evidence during its case-in-chief. Accordingly, the undersigned cannot conclude that Mr. Lyman's decision not to introduce expert witnesses who could opine on those issues was an error of law that would disqualify Mr. Lyman's decision from being categorized as a strategic one.

Objective Reasonableness of the Strategic Decision

Because Mr. Lyman's decision not to call expert witnesses or present evidence of petitioner's alcohol use qualifies as a strategic decision made after adequate investigation, petitioner's claim that Mr. Lyman's performance was constitutionally deficient succeeds only if Mr. Lyman's decisions were objectively unreasonable. *See Strickland* 466 U.S. at 690–91 (holding that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). This highly deferential standard requires a finding that Mr. Lyman's decisions were "completely unreasonable, not merely wrong." *Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir.2000) (citations omitted). Although the undersigned has recommended findings that Mr. Lyman's investigation and "no excuses" strategy were constitutionally adequate, the implementation of the defense case in petitioner's second trial contains numerous errors. "[C]umulatively, each failure underscores a fundamental lack of formulation and direction in presenting a coherent defense," so that the defense case appears haphazard and disorganized. *Stouffer v. Reynolds*, 168 F.3d 1155, 1164 (10th Cir.1999). *See also Fisher v. Gibson*, 282 F.3d 1283, 1299 (10th Cir.2002). After careful review of the entire record, for the reasons that follow, the undersigned is convinced that, under the circumstances of this case, counsel's decisions were objectively unreasonable.

***93** Mr. Lyman, Dr. LaFortune, and Mr. Burch were appointed to represent petitioner after OCCA reversed the death sentence in his first trial on the grounds that the trial court erred in denying funds for expert witnesses. See *Fitzgerald*, 972 P.2d at 1165. Petitioner argued to OCCA that an adequate defense required the use of two experts —a neuropsychologist and "an expert on juvenile-onset diabetes"—because "the combination of his juvenile-onset diabetes, probable brain damage from his head injury and drinking habits (including drinking before committing the crimes) affected his mental processes and deprived him of the ability to form the intent to kill necessary for malice murder." *Id.* at 1165–66. OCCA agreed that petitioner had submitted sufficient evidence to demonstrate that "his physical and psychological condition at the time of the crime will be *a significant factor* in his defense." *Id.* at 1166. The evidence and theories petitioner presented on direct appeal were nearly identical to the evidence and theories presented during the evidentiary hearing. *See id.* OCCA held that the denial of expert testimony deprived petitioner of the opportunity to present mitigating evidence of his diabetes and brain injury. *See id.* at 1168–69. OCCA specifically

> reject[ed] the suggestion that lay witnesses provide an effective substitute for expert testimony in these circumstances. Fitzgerald's friends and family could have testified regarding symptoms and behavior they observed, and his pediatrician and surgeon could have testified regarding their diagnoses and treatment. However, these witnesses could not effectively explain the particular problems and phenomena associated with juvenile-onset diabetes, nor could they describe the physiological and psychological effects resulting when alcohol and diabetes are combined. These witnesses certainly could neither conduct neuropsychological tests nor present the result of those tests to the jury. *As other witnesses could not present this mitigating evidence*, Fitzgerald has shown he was prejudiced by the trial court's decision.

Id. (emphasis added). OCCA reversed with instructions for petitioner to receive a second trial for purposes of determining his sentence. *See id.* at 1174–75. With this mandate from OCCA, Mr. Lyman undertook representation of petitioner.

According to Dr. Jones's report, Mr. Lyman retained Dr. Jones in July 1999 to conduct neuropsychological testing.

(Pet.Exh.12). Dr. Jones was made aware of petitioner's diabetes diagnosis, but he was only marginally aware of petitioner's alcohol use on the night of the murder. (Pet. Exh. 12; Dkt. # 142 at 184). Dr. Jones testified that "[i]t was conveyed to me that a large amount of a mixed drink was consumed, but I don't know the amount, nor do I know the alcohol content, nor do I know his blood alcohol level at an approximate time."[25] (Dkt. # 142 at 184). He had also advised either Mr. Lyman or Dr. LaFortune that an endocrinologist, such as Dr. Bratcher, would be better able to opine on the impact of alcohol and diabetes on petitioner's metabolism, and that he could rely on her report to supplement his conclusions. (Dkt. # 142 at 192, 250).

25 The evidence of petitioner's intoxication and the decision not to use any evidence of alcohol use is discussed *infra*.

***94** Although the record does not clearly establish when Dr. Jones made those statements to counsel, Mr. Lyman did not request funds for Dr. Bratcher, an endocrinologist, until March 21, 2000. (Pet.Exh.15). Ten days later, Mr. Lyman submitted his witness list, which included Dr. Bratcher but did not include Dr. Jones. (Pet.Exh.19). Mr. Lyman testified that he included Dr. Bratcher on the witness list, even though she had not yet submitted a report, "with the thought that we may be using her." (Dkt. # 141 at 86). Because Dr. Jones was not on the witness list, Mr. Lyman stated that he must have decided not to call Dr. Jones as a witness "sometime before then." (Dkt. # 141 at 86).

Mr. Lyman's testimony regarding the decisions he made not to utilize either Dr. Jones or Dr. Bratcher reinforces the appearance of disorganization in the defense of petitioner's case. Mr. Lyman initially stated that he chose not to call Dr. Bratcher after he interviewed her because he did not think that she would make a good witness. (Dkt. # 141 at 60–67). He testified, however, that Dr. Jones could have used the information Dr. Bratcher provided to support his testimony. (Dkt. # 141 at 60, 64). He further testified that he "viewed it more as providing or attempting to consider using whatever her findings would be with someone like Dr. Herman Jones if we chose to use him, although I think at that point in time we were inclined not to use him." (Dkt. # 141 at 64). Yet, Mr. Lyman submitted a witness list without Dr. Jones on it (the witness he was apparently considering calling) and with Dr. Bratcher on it (the witness he did not intend to call but needed to support Dr. Jones' testimony), even before he received Dr. Bratcher's report. This contradiction in testimony indicates that Mr. Lyman did not have a clear plan for building petitioner's mitigation defense.

Dr. LaFortune's testimony also supports that conclusion. Although Mr. Lyman testified that he decided not to call Dr. Bratcher after meeting with her (dkt. # 141 at 60–67), Dr. LaFortune testified that Mr. Lyman did not communicate his decision to her until after the trial began. (Dkt. # 142 at 315, 328–29, 364). Dr. LaFortune also testified that she had continued to work with Dr. Bratcher until the time of trial. (Dkt. # 142 at 315). She did testify that she was aware that Dr. Jones was not on the witness list submitted in March 2000, and she did not consult with him after that time. (Dkt. # 142 at 360–61). She stated that she believed Mr. Lyman could have filed a supplemental witness list, but she did not discuss any further conversations about utilizing Dr. Jones. (Dkt. # 142 at 360–61). She also stated that she could have asked Dr. Bratcher to rely upon Dr. Jones's report in her testimony, but she did not state whether that was part of her trial strategy and doing so would have contradicted Mr. Lyman's stated strategy.[26] (Dkt. # 142 at 351).

26 Dr. LaFortune was responsible for preparing the mitigation witnesses and presenting them to the jury.

Not only does the testimony of Mr. Lyman and Dr. LaFortune establish a pattern of disorganization and a lack of communication among the members of petitioner's defense team, the last-minute decision not to utilize expert testimony from Dr. Bratcher (and the earlier decision not to use Dr. Jones) also jeopardized the defense theory. Prior to trial, Mr. Lyman had prepared a list of mitigating factors to be used in an instruction for the jury. (Pet.Exh.18). The first two mitigating factors related to petitioner's diabetes and his brain injury. (Pet.Exh.18). If Dr. Bratcher was to be called as an expert witness to establish the impact of petitioner's diabetes on his development, as Mr. Lyman and Dr. LaFortune testified, and if she was to discuss how her findings dovetailed with Dr. Jones's findings, as Mr. Lyman and Dr. LaFortune implied, the decision to remove Dr. Bratcher from the witness list after the mitigating factors were finalized robbed petitioner of the very evidence that OCCA had said was necessary to create an effective mitigation defense. *See Fitzgerald*, 972 P.2d at 1168–69. In fact, submitting these mitigating factors without a neuropsychology expert like Dr. Jones, of itself, shows disorganization, particularly in light of the medical records regarding Mr. Fitzgerald's brain injury (discussed *infra.*).

*95 Without the expert testimony, the jury received only partial information regarding those mitigating factors. Jurors presumably reviewed petitioner's medical records establishing that petitioner was diagnosed with Type I diabetes at age twelve and had difficulty managing his diabetes for years. (Tr. T. 1065–66; Tr. T. Def. Exh. 8–14, 17). Petitioner's mother testified briefly about his diabetes diagnosis and his tendency, as a teenager, "to keep wandering away from home," but she could not recall any information about the progress of his illness. (Tr. T. 1071–72). Petitioner's foster mother testified that petitioner had difficulty managing his diabetes because he liked to eat sugary foods. (Tr. T. 1116–17). She was able to recall and describe petitioner's emotional response to his diabetes diagnosis. (Tr. T. 1116–17). She stated that petitioner "didn't like being a diabetic," that he was "really angry" and "felt it was really unfair." (Tr. T. 1117). Even at fifteen years of age, three years after his diagnosis, petitioner's foster mother felt that "he still was hanging onto a lot of anger concerning his diabetes." (Tr. T. 1117). While this testimony helped provide the jury with background information regarding petitioner's diabetes, it fell fall short of providing the jury with an explanation of "the particular problems and phenomena associated with juvenile-onset diabetes," as OCCA mandated. *Fitzgerald*, 972 P.2d at 1168–69.

Likewise, jurors received an incomplete picture of the impact of petitioner's gunshot wound. Counsel introduced the medical records without any comment or testimony to explain them. (Tr. T. 1066; Pet. Exh. 14). As Dr. Jones testified, the medical records indicate that petitioner recovered *fully* from his gunshot wound. (Dkt. # 142 at 169–75). The medical records did not establish that petitioner had frontal lobe damage and residual impairment. (Dkt. # 142 at 169–75). In fact, the medical records, without explanation from an expert witness like Dr. Jones, actually damaged petitioner's case. The medical records contained a letter from petitioner's neurosurgeon, who reported that petitioner's neurological examination was "normal." (Pet.Exh.14). Dr. Jones testified that a jury, which has no specialized knowledge of neurology, would not understand that the neurological examination described in the letter referenced only physical components such as reflexes, orientation, gait, and cranial nerves and was intended to serve as a notice that petitioner could return to work under Social Security Disability standards. (Dkt. # 142 at 169–75). The jury never even heard evidence of petitioner's frontal lobe damage. To their knowledge, petitioner "suffered a gunshot wound to the head that resulted in physical injury to his brain," and he fully recovered from that injury. (Pet.Exh.18).

The failure to introduce any evidence of petitioner's frontal lobe damage and its implications for petitioner's behavior is a particularly egregious omission. In *Smith*, 379 F.3d at 940–43, the Tenth Circuit found that counsel was ineffective in failing to introduce evidence of the defendant's mental retardation, caused by a brain injury resulting from a near-drowning when the defendant was a child. The Tenth Circuit noted that evidence of mental illness, mental retardation, or organic brain injuries is the most compelling mitigating evidence available. *See id.* at 942. Failure to introduce this mitigating evidence was both objectively unreasonable and prejudicial because the jury had seen evidence of the defendant's "impulsiveness and lack of emotional control. What the jury wholly lacked was an *explanation* of how Mr. Smith's organic brain damage caused these outbursts of violence...." *Id.* at 943 (emphasis in original). The Court concluded that the mitigating evidence of the defendant's brain injury and resulting mental retardation would have provided that explanation. *See id.*

*96 In this case, the jury heard evidence that petitioner sustained a gunshot wound, but they heard no testimony regarding the damage caused by the gunshot wound petitioner sustained. Dr. Jones's testimony at the hearing was clear and persuasive. The damage to petitioner's frontal lobe was "subtle" but "significant." (Dkt. # 142 at 178). While the behavioral deficits caused by the frontal lobe damage "would not be manifested in his activities of daily living," the effects of the damage "would be intensified were further compromising factors to be present," such as physical illness or alcohol. (Dkt. # 142 at 178–79).

Mr. Lyman had evidence of two compromising factors at his disposal: physical illness, in the form of petitioner's diabetes, and alcohol consumption. Admittedly, the evidence presented at the evidentiary hearing regarding petitioner's blood sugar levels was not significant. Although petitioner submitted medical records showing that petitioner had a history of poor diabetes management, petitioner submitted no concrete evidence regarding his blood sugar level around the time of the murder. Dr. Jones testified that the brain requires a large amount of sugar to function properly and that too much or too little blood sugar would impact brain function. (Dkt. # 142 at 196). He stated that, if petitioner had been drinking at the time of the murder, he could have been experiencing hyperglycemia, caused by the liver breaking

down alcohol into sugars. (Dkt. # 142 at 198–200). He also stated, however, that hyperglycemia presents with symptoms of sedation, which contradicted reports that petitioner was hyperactive on the night of the murder. (Dkt. # 142 at 198–200; Tr. T. State's Exh. AA).

Although the evidence of the impact of petitioner's diabetes on his brain function was weak, the evidence that he was intoxicated was strong. Regina Stockfleth's affidavit stated that she and petitioner consumed large amounts of alcohol that night and that petitioner was heavily intoxicated shortly before he committed the robberies and the murder. (Pet.Exh.2). Candy Ashley, a neutral bystander, submitted an affidavit describing petitioner's behavior as consistent with intoxication. (Pet.Exh.23). Additionally, petitioner made statements admitting that he was intoxicated at the time of the murder during two separate interviews. (Resp.Exh.6,7). While there was some conflicting evidence that indicated petitioner was not heavily intoxicated—both Michael Hansen and the clerk at the first convenience store testified that petitioner did not appear intoxicated that night—Mr. Lyman testified that he believed the evidence was sufficient to establish petitioner's intoxication. (Dkt. # 141 at 69–73). He simply chose not to present evidence of intoxication because he thought it was inconsistent with the "no excuses" mitigation defense he wanted to present.

In light of the impact that petitioner's intoxication had on his brain function, as presented through Dr. Jones's testimony, the undersigned finds that Mr. Lyman's decision not to present evidence of petitioner's intoxication was objectively unreasonable. Dr. Jones's testimony would likely have served to demonstrate that petitioner's brain was not functioning properly at the time of the murder as a result of the interaction between petitioner's brain damage and the alcohol he had consumed. Mr. Lyman's concerns about the testimony regarding petitioner's diagnosis of anti-social personality disorder simply cannot outweigh the benefits of utilizing Dr. Jones's testimony. This fact is particularly true because Dr. Jones specifically stated that if petitioner was intoxicated or otherwise compromised at the time of the murder, he would have opined that petitioner was impaired by the gunshot wound. Dr. Jones would have attributed petitioner's actions to his personality disorder only if no other factors were at issue. Taken together, Mr. Lyman's lack of experience, his haphazard organization of the mitigation defense, his misunderstanding of the expert testimony and how it should be used, and his last-minute decisions to remove Dr. Bratcher from the witness line-up and to not present evidence of petitioner's intoxication [27] support a finding that Mr. Lyman's decisions were objectively unreasonable. The undersigned notes that the opinion from OCCA, in which that court gave very specific reasons for finding that expert testimony was necessary in this case, also moved the scales in favor of petitioner, although it was not determinative. Mr. Lyman had explicit instructions from OCCA, and in the absence of compelling reasons not to present that expert testimony, the undersigned believes that Mr. Lyman was obligated to do so. Mr. Lyman could articulate no compelling reasons to support his decision, based on his thoughts at the time of the trial; therefore, the decisions he made were objectively unreasonable.

[27] In addition, it is likely that some evidence of the impact of Mr. Fitzgerald's diabetes on his brain function that evening could be presented were Dr. Jones and Dr. Bratcher able to consult with one another and review all of the evidence.

Prejudice

***97** Although Mr. Lyman's decisions were objectively unreasonable, petitioner is not entitled to relief unless he can demonstrate prejudice. Petitioner must prove by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 668 U.S. at 694. The Supreme Court defines "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.* Because a death sentence requires a unanimous vote from the jury, if "there is a reasonable probability that one juror" would have chosen a life sentence, petitioner has established prejudice. *See Wiggins,* 539 U.S. at 537. *See also Matthews v. Workman,* 577 F.3d 1175, 1190 (10th Cir.2009).

The undersigned adopts the Tenth Circuit's reasoning in *Smith,* in which the Court found prejudice under similar, albeit more severe, circumstances. *Smith,* 379 F.3d at 942–44. As in *Smith,* the jury in petitioner's second trial had no understanding of the interplay of petitioner's diabetes diagnosis, his lack of family support from a young age, his frontal lobe damage, and the impact his intoxication had on his brain function. The Tenth Circuit has held that such evidence, particularly the evidence of petitioner's brain injury, is strong mitigating evidence that tends to generate sympathy among jurors. *See id.* at 942. Mr. Lyman's defense of petitioner wholly failed to provide any explanation for his behavior, even though the evidence available to him would have provided a "compelling explanation for his behavior."

Id. at 944 (emphasis removed). As such, there is a reasonable probability that at least one juror would have voted for life imprisonment rather than the death penalty, and petitioner has established prejudice.

RECOMMENDATION

For the reasons set forth in this report and recommendation, the undersigned RECOMMENDS that the Court find that petitioner has proven that he received ineffective assistance of counsel and that he was prejudiced thereby as a result of his counsel's failure to present expert testimony regarding his diabetes and brain injury, and evidence of his alcohol consumption as it relates to these two issues, during the second trial of the penalty phase of his case.

OBJECTIONS

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b)(2), a party may file specific written objections to this report and recommendation. Such specific written objections must be filed with the Clerk of the District Court for the Northern District of Oklahoma by August 5, 2013.

If specific written objections are timely filed, Fed.R.Civ.P. 72(b)(3) directs the district judge to:

> determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

***98** *See also* 28 U.S.C. § 636(b)(1).

The Tenth Circuit has adopted a "firm waiver rule" which "provides that the failure to make timely objections to the magistrate's findings or recommendations waives appellate review of factual and legal questions." *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1059 (10th Cir.1996) (quoting *Moore v. United States*, 950 F.2d 656, 659 (10th Cir.1991)). Only a timely specific objection will preserve an issue for *de novo* review by the district court or for appellate review.

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