IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: JULIUS DARIUS JONES,	)	
	)	Case No. 17-6008
Petitioner/Appellant	)	

RESPONSE IN OPPOSITION TO MOTION FOR AUTHORIZATION TO FILE A SECOND OR SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2244(b)(2)(A)

(document has attachments in scanned PDF format)

Respondent, by and through undersigned Counsel, files this response in opposition to Petitioner's motion to file a second habeas petition. Petitioner was convicted of, *inter alia*, first degree murder and sentenced to death in Oklahoma. This Court affirmed the district court's denial of Petitioner's petition for a writ of habeas corpus on November 10, 2015. *Jones v. Warrior*, 805 F.3d 1213 (10th Cir. 2015), *cert. denied Jones v. Duckworth*, 137 S. Ct. 109 (2016). Petitioner now asks this Court for authorization to file a second habeas petition in district court to claim that his sentence is unconstitutional because the jury was not instructed that it must find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. Petitioner has failed to satisfy the requirements of 28 U.S.C. § 2244(b).

A. Petitioner Cannot Satisfy 28 U.S.C. § 2244(b)(1)

Petitioner claims the Sixth Amendment was violated because the jury in his case was not instructed that it must find the aggravating circumstances outweighed the mitigating circumstances *beyond a reasonable doubt*.[1] Petitioner seeks to raise this issue in a second habeas petition in light of the Supreme Court's decision, one year ago, in *Hurst v. Florida*, ___ U.S. ___, 136 S. Ct. 616 (2016). However, Petitioner presented the same Sixth Amendment claim in his first petition.[2]

This Court may approve the filing of a second or successive habeas petition only if "the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C). "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1). "A 'claim' as used in § 2244(b) is an asserted federal basis for relief from a state court's judgment of conviction." *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005).

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[1]The jury was instructed that it must determine that the aggravating circumstances outweighed the mitigating circumstances before it could consider the punishment of death (O.R. VIII 1426). Respondent has attached a copy of this instruction as Exhibit A.

[2]Respondent will also show that *Hurst* does not require that the weighing determination be made beyond a reasonable doubt.

In his habeas petition, Petitioner claimed his attorney on direct appeal was ineffective because he did not include a claim that Oklahoma's death penalty scheme is unconstitutional because it fails to require the jury to determine beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. *Memorandum Opinion* dated 5/22/2013, docket number 37 (W.D. Okla. No. CIV-07-1290-D) at 39, attached to Petitioner's motion as Exhibit F. The district court denied the claim, holding that the Sixth, Eighth and Fourteenth Amendments are not violated by Oklahoma's sentencing procedure, therefore appellate counsel was not ineffective. *Id*. at 39-41.

Although Petitioner is currently presenting Sixth, Eighth and Fourteenth Amendment claims without a related ineffective assistance of counsel claim, he is raising the same claim because the district court was required to address the merits of the *Ring*[3] claim in order to decide the ineffective assistance of appellate counsel claim. *See Miller v. Mullin*, 354 F.3d 1288, 1298 (10th Cir. 2004) (in order to determine whether appellate counsel's decision not to raise a particular issue constituted deficient performance, it is necessary to evaluate the merits of the omitted claim); *see also Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 745-746 (10th Cir.

[3]In *Ring v. Arizona*, 536 U.S. 584, 609 (2002), the Court held that a capital murder defendant is entitled to have a jury determine whether any aggravating circumstances exist. As will be shown, *Hurst* is a simple application of *Ring* to Florida's sentencing scheme.

2016) (applying AEDPA[4] deference to the Oklahoma Court of Criminal Appeals' merits rejection of an otherwise procedurally barred claim because the state court determined that appellate counsel was not ineffective for failing to raise the claim).

In this case, the district court indisputably denied the same "asserted federal basis for relief" in the first petition that Petitioner is now attempting to present in a second petition. Although he relies upon a new case, he is still raising the same federal basis for relief. *See Allen v. Massie*, 236 F.3d 1243, 1244-1245 (10th Cir. 2001) (denying authorization to file second or successive application so that the petitioner could relitigate her ineffective assistance of counsel claim in light of a new Supreme Court case). Accordingly, Petitioner's motion must be denied.

B. Petitioner Cannot Satisfy 28 U.S.C. § 2244(b)(2)

Even assuming Petitioner did not present the same claim in his first habeas petition, he is not entitled to raise it in a second petition. As set forth above, this Court may approve the filing of a second or successive habeas petition only if "the application makes a prima facie showing that the application satisfies the requirements of this subsection." 28 U.S.C. § 2244(b)(3)(C). That is, the application must "show[] that the claim relies on a new rule of constitutional law, made

[4]AEDPA refers to the Antiterrorism and Effective Death Penalty Act of 1996.

retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[5] 28 U.S.C. § 2244(b)(2)(A).

Section 2244(b)(3)(C) contains three requirements: 1) the claim relies on a new rule of constitutional law; 2) the Supreme Court has made the new rule of law retroactive to cases on collateral review; and 3) the new rule of law was previously unavailable. *Tyler v. Cain*, 533 U.S. 656, 662 (2001).

The second requirement is met only if the Supreme Court has held that the new rule of law applies retroactively to cases on collateral review. *Tyler*, 533 U.S. at 662-664. The lower courts may not make a new rule retroactive. *Id*. at 663. Further, a showing by a habeas petitioner that the rule satisfies the retroactivity rule set forth in *Teague v. Lane*, 489 U.S. 288 (1989) is insufficient. *Id*. at 665-666. The Supreme Court must be the one to declare a rule of law retroactive. *Id*.; *see also Cannon v. Mullin*, 297 F.3d 989, 993-994 (10th Cir. 2002) ("It is clear that the mere fact a new rule *might* fall within the general parameters of overarching retroactivity principles established by the Supreme Court (i.e., *Teague*) is not sufficient.").

The Supreme Court has not declared *Hurst* to be retroactive. In fact, the Supreme Court has held that *Ring*, upon which *Hurst* relies, is not retroactive.

[5]The other ground for filing a second or successive petition which includes a claim that was not presented in a prior petition involves a previously unavailable factual basis and is not implicated here. *See* 28 U.S.C. § 2244(b)(2)(B).

Schriro v. Summerlin, 542 U.S. 348, 349-358 (2004). The Supreme Court's failure to declare *Hurst* to be retroactive is fatal to Petitioner's request. *See Browning v. United States*, 241 F.3d 1262, 1266 (10th Cir. 2001) (denying a motion to file a second or successive section 2255 motion because the Supreme Court has not made *Apprendi*[6] retroactive); *Boggs v. Ryan*, No. CV-14-02165-PHX-GMS, 2017 WL 67522, at *4 (D. Ariz. Jan. 6, 2017) (*Hurst* is not retroactive) (unpublished, attached as Exhibit B).

Petitioner attempts to satisfy the retroactivity requirement by arguing that *Hurst*'s allegedly new rule is a substantive one and thus must be applied retroactively. Motion at 3-5.[7] As set forth above, only the Supreme Court may make a decision retroactive, and mere general rules of retroactivity do not suffice. The Supreme Court has recognized that "with the right combination of holdings" that Court could "make a rule retroactive over the course of two cases." *Tyler*, 533 U.S. at 666. However, "[m]ultiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule." *Id*.

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[6]*Apprendi v. New Jersey*, 530 U.S. 466 (2000) (pre-cursor to *Ring*, holding that any fact which exposes a defendant to punishment beyond the statutory maximum must be found by a jury beyond a reasonable doubt)

[7]The motion does not have page numbers, but Respondent is referring to the third through fifth pages.

Part of the Court's rationale in *Tyler* was that section 2244(b)(3)(D) gives circuit courts only thirty days to act on a motion for authorization to file a second or successive habeas petition. *Id*. at 664. "The stringent time limit thus suggests that the courts of appeals do not have to engage in the difficult legal analysis that can be required to determine questions of retroactivity in the first instance." *Id*. By arguing that the rule Petitioner believes *Hurst* announced[8] is substantive, and therefore must be retroactive, Petitioner is asking this Court to do just what the Supreme Court has said it should not do.

The Supreme Court has not held that *Hurst* announces a substantive rule. In fact, the Supreme Court found that *Ring* is procedural. *Id*. at 353. Thus, there are not two or more Supreme Court decisions which necessarily dictate retroactivity.[9]

The petitioner in *Cannon* made a similar argument about *Ring*. This Court concluded that *Ring* was merely an extension of *Apprendi* to death penalty cases and

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[8]Respondent will demonstrate that *Hurst* did not announce the rule Petitioner claims it did.

[9]Petitioner relies upon *Price v. United States*, 795 F.3d 731 (7th Cir. 2015), in which the Seventh Circuit held that a Supreme Court case which invalidated a federal sentencing statute as vague announced a substantive rule. The Seventh Circuit relied upon Justice O'Connor's concurring opinion in *Tyler*, in which she stated: "'[i]f we hold in Case One that a particular type of rule applies retroactively to ... and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively.'" *Price*, 795 F.3d at 733 (quoting *Tyler*, 533 U.S. at 668-669 (O'Connor, J., concurring)). As stated above, the Supreme Court has not declared *Hurst* to be substantive. Therefore, Justice O'Connor's concurrence does not apply.

was, therefore, procedural. *Cannon*, 297 F.3d at 994. Similarly, *Hurst* is merely an application of *Ring* to Florida's death penalty scheme and is, therefore procedural. *See Summerlin*, 542 U.S. at 354-358 (holding that *Ring* is procedural and is not a watershed rule of criminal procedure).

Petitioner also fails to satisfy the other requirements of section 2244(b)(3)(C). "A case announces a new rule ... when it breaks new ground or imposes a new obligation on the government. To put it differently ... a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *In re Gieswein*, 802 F.3d 1143, 1146 (10th Cir. 2015) (quoting *Chaidez v. United States,* ___U.S.___, 133 S.Ct. 1103, 1107 (2013)). This Court has recognized that *Ring* was "simply an extension of *Apprendi* to the death penalty context." *Cannon*, 297 F.3d at 994. Similarly, *Hurst* was merely an application of *Ring* to Florida's unique sentencing scheme. *See Hurst*, 136 S. Ct. at 621-622, 623-624. In light of *Ring*, the Court's holding in *Hurst* was neither a new rule of constitutional law, nor previously unavailable. *See In re Graham*, 714 F.3d 1181, 1182-1183 (10th Cir. 2013) (holding that two cases which applied well-established principles from the Supreme Court's prior cases did not establish a new rule of constitutional law).

It is true that *Hurst*, 136 S. Ct. at 623-624, overruled prior cases, decided before *Apprendi* and *Ring*, upholding the constitutionality of Florida's death penalty statutes. *See Gieswein*, 802 F.3d at 1146 (finding a Supreme Court decision announced a new rule of law because it overruled prior Supreme Court cases). However, the Supreme Court recognized that those prior cases were "irreconcilable with *Apprendi*." *Hurst*, 136 S. Ct. at 623. Thus, the result in *Hurst* was dictated by *Apprendi*, in spite of the fact that two cases decided before *Apprendi* had upheld Florida's sentencing scheme.

Petitioner relies upon *Graham v. Collins*, 506 U.S. 461, 467 (1993), in which the Supreme Court stated that "there can be no dispute that a decision announces a new rule if it expressly overrules a prior decision." However, *Graham* also stated that a rule is not new "unless reasonable jurists hearing petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor." *Graham*, 506 U.S. at 467 (internal quotation marks omitted). As explained above, reasonable jurists would have felt compelled to apply *Apprendi* and *Ring* to Florida's sentencing statutes, notwithstanding pre-*Apprendi* cases which upheld Florida's death penalty scheme. Accordingly, *Hurst* did not announce a new rule, nor one which was previously unavailable.

Petitioner cannot satisfy section 2244(b). Accordingly, Petitioner's motion must be denied.

C. Petitioner's Proposed Second Habeas Petition is without Merit

This Court should also deny authorization because Petitioner's proposed amended petition is meritless. *See In re Payne*, 733 F.3d 1027, 1030 n.1 (10th Cir. 2013) (noting that it would deny authorization, even if the requirements of section 2255 were met, because the claim failed on its merits). First, Petitioner's claim is unexhausted[10] and subject to an anticipatory procedural bar. Petitioner cannot obtain relief on an unexhausted claim. *See* 28 U.S.C. § 2254(b) (an application for writ of habeas corpus shall not be granted if the petitioner has not exhausted the claims in state court). Moreover, the claim would doubtless be procedurally barred in state court, precluding federal habeas relief. *See DeRosa v. Workman*, 679 F.3d 1196, 1235 (10th Cir. 2012) (denying relief because the state court would, no doubt, apply a procedural bar to a claim raised for the first time in a successive post-conviction application); *see also* Okla. Stat. tit. 22, § 1089(D)(8) (a successive post-conviction

[10]Petitioner sought relief in his post-conviction application based on appellate counsel's failure to raise a *Ring* claim. *See Memorandum Opinion* dated 5/22/2013, docket number 37 (W.D. Okla. No. CIV-07-1290-D) at 39-40, attached to Petitioner's motion as Exhibit F. It is Respondent's position that *Hurst* is merely an application of *Ring* to Florida's death penalty scheme. However, if this Court disagrees and holds that *Hurst* creates a new rule of law, Petitioner has not exhausted a claim based on *Hurst*.

application will not be granted unless the legal basis for the claim could not have been reasonably formulated from a final decision of the Supreme Court or it relies on a new rule of constitutional law "that was given retroactive effect by the United States Supreme Court"); Rule 9.7(G)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2008) ("No subsequent application for post-conviction relief shall be considered by this Court unless it is filed within sixty (60) days from the date the previously unavailable legal or factual basis serving as the basis for a new issue is announced or discovered.").[11]

Further, the claim is without merit. In *Hurst*, the Supreme Court invalidated Florida's sentencing scheme in which the jury's verdict was merely advisory and the trial court was alone responsible for determining whether aggravating circumstances were proven.[12] *Hurst*, 136 S. Ct. at 622. Although the Court noted that the trial court was responsible for determining whether the aggravating circumstances outweigh the mitigating circumstances, *id*. at 622, its holding was that the Sixth Amendment was

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[11]*Hurst* was decided on January 12, 2016, placing any potential post-conviction application far outside of the OCCA's sixty day rule.

[12]It is important to note that Florida's sentencing scheme addressed in *Hurst* did not require the advisory jury to unanimously agree that any particular aggravating circumstance existed. *State v. Steele*, 921 So.2d 538, 545 (Fla. 2006). Further, the trial judge held a separate hearing after receiving the jury's advisory verdict at which both sides were permitted to introduce additional evidence. *Spencer v. State*, 615 So.2d 688, 690-691 (Fla. 1993).

violated because it was the judge who determined the existence of an aggravating circumstance. *Id*. at 624.

In Oklahoma, a jury is required to determine whether the State has proven an aggravating circumstance beyond a reasonable doubt, and whether the aggravating circumstances outweigh the mitigating evidence. *Matthews v. Workman*, 577 F.3d 1175, 1195 (10th Cir. 2009). Neither *Ring* nor *Hurst* require the jury to find beyond a reasonable doubt that aggravating circumstances outweigh the mitigating evidence. *See id*. (denying identical claim based on *Ring*); *Davila v. Davis*, 650 F. App'x 860, 872 (5th Cir. 2016) (unpublished), *petition for cert. filed* Sept. 22, 2016 (No. 16-6219) (denying certificate of appealability on claim that *Hurst* requires the jury to find a lack of mitigating evidence beyond a reasonable doubt); *Boggs*, 2017 WL 67522, at *3-4 (holding that *Hurst* does not require the jury to make the weighing determination beyond a reasonable doubt); *United States v. Sampson*, No. CR 01-10384-LTS, 2016 WL 3102003, at *4 (D. Mass. June 2, 2016) (unpublished, attached as Exhibit C) (denying motion for reconsideration of *Ring* claim based on *Hurst*); *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *5-6 (Ala. Sept. 30, 2016) (attached as Exhibit D), *petition for cert. filed* Nov. 2, 2016 (No. 16-6746) ("*Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy

the Sixth Amendment."); *People v. Rangel*, 367 P.3d 649, 681 (Cal. 2016) (*Hurst* does not require a finding beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors); *but see Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (concluding, without analysis, that Delaware's capital punishment scheme is unconstitutional because, *inter alia*, it does not require a jury to determine beyond a reasonable doubt whether the aggravating circumstances outweigh the mitigating circumstances). Accordingly, Petitioner's claim is without merit.

D. Conclusion

> The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as [the Supreme Court] interpret[s] them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as [the Supreme Court] understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that [the Supreme Court] will one day have a change of heart.

Summerlin, 542 U.S. at 358. Petitioner's attempt to relitigate a claim raised in his first habeas petition must be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS AND TYPEFACE REQUIREMENTS

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 3,134 words.

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s/ JENNIFER L. CRABB

CERTIFICATE OF SERVICE

I hereby certify that a copy of this response in opposition to motion to file second or successive petition for writ of habeas corpus was filed with the Clerk of this Court January 20, 2017, and for ECF transmission to:

Dale A. Baich, dale_baich@fd.org

s/ Jennifer L. Crabb

CERTIFICATE OF DIGITAL SUBMISSION

This is to certify that:

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s/ JENNIFER L. CRABB

IN DISTRICT COURT OF OKLAHOMA COUNTY, THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,
PLAINTIFF,

VS

JULIUS JONES,
DEFENDANT,

DISTRICT COURT
CASE NO. CF-99-4373
CCA NO. D-2002-534

CRIMINAL APPEAL ORIGINAL RECORD
VOLUME VIII OF IX

THIS FILE CONTAINS CERTIFIED COPIES OF THE ORIGINAL DESIGNATED PORTIONS, OF THE TRIAL COURT RECORD FILED IN THE ABOVE STYLED AND NUMBERED CAUSE, AND THE COURT CLERK'S CERTIFICATE FOR APPEAL TO THE COURT OF CRIMINAL APPEALS IN SIMPLIFIED FORM.

2499/0667

INSTRUCTION NUMBER 12

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

CR 4-80

WESTLAW

2017 WL 67522
Only the Westlaw citation is currently available.
United States District Court,
D. Arizona.

Boggs v. Ryan
United States District Court, D. Arizona. January 6, 2017 Slip Copy 2017 WL 67522 *(Approx. 8 pages)*

Steve Alan Boggs, Petitioner,

v.

Charles L Ryan, et al., Respondents.

No. CV-14-02165-PHX-GMS
Signed 01/06/2017

Attorneys and Law Firms

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Jeffrey Lee Sparks, Office of the Attorney General, Phoenix, AZ, for Respondents.

ORDER

Honorable G. Murray Snow, United States District Judge

*1 Before the Court is Petitioner Steve Alan Boggs's Motion for Temporary Stay and Abeyance and for Authorization to Appear in Ancillary State-Court Proceedings. (Doc. 41.) Boggs asks the Court to stay and hold his case in abeyance while he pursues state court relief. He also seeks permission for his federal habeas counsel to appear on his behalf in state court. Respondents filed a response opposing a stay and Boggs filed a reply. (Docs. 42, 43.) For the reasons set forth below, the motion is denied.

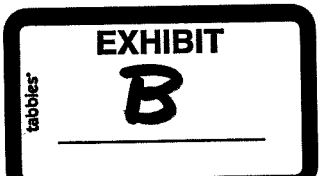
I. BACKGROUND

In 2002, Boggs and Christopher Hargrave, members of a white supremacist militia group, shot three fast-food workers to death. In 2005, a jury found Boggs guilty of three counts of first-degree murder and determined that he should be sentenced to death. The Arizona Supreme Court affirmed the convictions and sentences. *State v. Boggs*, 218 Ariz. 325, 185 P.3d 111 (2008). After unsuccessfully pursuing post-conviction relief, Boggs filed a petition for writ of habeas corpus in this Court. (Doc. 15.) Respondents filed an answer and Boggs filed a reply. (Docs. 21, 26.) Boggs's brief on evidentiary development was due on November 14, 2016. (Doc. 40.) He filed the pending motion on October 31, 2016. (Doc. 41.)

Boggs now seeks a stay so that he can return to state court and present several claims. He argues that *Lynch v. Arizona*, 136 S. Ct. 1818 (2016) (per curiam), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), are significant changes in the law under Arizona Rule of Criminal Procedure 32.1(g). He also contends that additional mitigation evidence constitutes newly discovered material facts that probably would have changed the verdict or sentence under Arizona Rule of Criminal Procedure 32.1(e). Finally, Boggs argues that the new mitigation evidence demonstrates by clear and convincing evidence that the court would not have imposed the death penalty under Arizona Rule of Criminal Procedure 32.1(h).

II. ANALYSIS

Boggs's habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(b)(1)(A). Although AEDPA does not deprive courts of the authority to stay habeas corpus petitions, it "does circumscribe their discretion." *Rhines v. Weber*, 544 U.S. 269, 276 (2005). The Supreme Court has emphasized that the stay and abeyance of federal habeas petitions is available only in limited circumstances. *Id.* at 277. "Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also undermines



AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition." *Id.*

A writ of habeas corpus may not be granted unless it appears that a petitioner has exhausted all available state court remedies. 28 U.S.C. § 2254(b)(1); *see also Coleman v. Thompson*, 501 U.S. 722, 731 (1991). In Arizona, there are two avenues for petitioners to exhaust federal constitutional claims: direct appeal and post-conviction relief proceedings ("PCR"). Rule 32 of the Arizona Rules of Criminal Procedure governs PCR proceedings and provides that a petitioner is precluded from relief on any claim that could have been raised on appeal or in a prior PCR petition. Ariz. R. Crim. P. 32.2(a)(3). The preclusive effect of Rule 32.2(a) may be avoided only if a claim falls within certain exceptions and the petitioner can justify why the claim was omitted from a prior petition or not presented in a timely manner. *See* Ariz. R. Crim. P. 32.1(d)–(h), 32.2(b), 32.4(a).

*2 When a petitioner has an available remedy in state court that he has not procedurally defaulted, it is appropriate for the federal court to stay the habeas proceedings if (1) there was good cause for the petitioner's failure to exhaust his claims first in state court, (2) his unexhausted claims are potentially meritorious, and (3) there is no indication that he engaged in intentionally dilatory litigation tactics. *See Rhines*, 544 U.S. at 277. As discussed below, courts also have the inherent power to stay cases as a means of controlling their dockets. *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)

Citing *Hurst*, Boggs seeks a stay under *Rhines* to exhaust his Claim 38 of his habeas petition. [1] (Doc. 43 at 7.) With respect to the other claims, he seeks a stay to "present in state court newly available claims without simultaneous and potentially unnecessary federal proceedings." (Doc. 43 at 3.)

A. Rule 32.1(g)

Boggs contends that under Rule 32.1(g), the United States Supreme Court's recent decisions in *Lynch* and *Hurst* provide an available remedy in state court. Rule 32.1(g) provides that a defendant may file a petition for post-conviction relief on the ground that "[t]here has been a significant change in the law that if determined to apply to defendant's case would probably overturn the defendant's conviction or sentence." Ariz. R. Crim. P. 32.1(g).

Arizona courts have characterized a significant change in the law as a "transformative event," *State v. Shrum*, 220 Ariz. 115, 118, 203 P.3d 1175, 1178 (2009), and a "clear break" or "sharp break" with the past. *State v. Slemmer*, 170 Ariz. 174, 182, 823 P.2d 41, 49 (1991). "The archetype of such a change occurs when an appellate court overrules previously binding case law." *Shrum*, 220 Ariz. at 118, 203 P.3d at 1178. A statutory or constitutional amendment representing a definite break from prior law can also constitute a significant change in the law. *Id.* at 119, 203 P.3d at 1179; *see State v. Werderman*, 237 Ariz. 342, 343, 350 P.3d 846, 847 (App. 2015).

In *Lynch*, 136 S. Ct. 1818, the Supreme Court applied *Simmons v. South Carolina*, 512 U.S. 154 (1994), to a capital sentencing in Arizona. *Simmons* held that when future dangerousness is an issue in a capital sentencing determination, the defendant has a due process right to require that his sentencing jury be informed of his ineligibility for parole. 512 U.S. at 171.

In *Lynch*, the defendant was convicted of murder and other crimes. 136 S. Ct. at 1818. Before the penalty phase of his trial began, the state successfully moved to prevent his counsel from informing the jury that, if the defendant did not receive a death sentence, he would be sentenced to life in prison without possibility of parole. *Id.* at 1819. The jury sentenced him to death. *Id.* On appeal, Lynch argued that, because the state had made his future dangerousness an issue in arguing for the death penalty, the jury should have been given a *Simmons* instruction stating that the only non-capital sentence he could receive under Arizona law was life imprisonment without parole. *Id.* The Arizona Supreme Court affirmed, holding that the failure to give the *Simmons* instruction was not error because Lynch could have received a life sentence that would have made him eligible for release after 25 years—even though any such release would have required executive clemency. *Id.* at 1820.

*3 The United States Supreme Court reversed. *Id.* The Court reiterated that under *Simmons* and its progeny, "where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole," the Due Process Clause "entitles the defendant to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel." *Id.* at 1818 (internal

quotations omitted). The Court explained that neither the possibility of executive clemency nor the possibility that state parole statutes will be amended can justify refusing a parole-ineligibility instruction. *Id.* at 1820.

Lynch does not represent a change in the law. It simply applies existing law to an Arizona case. It is not a transformative event of the kind described by Arizona courts in interpreting Rule 32.1(g). In *Shrum*, for example, the Arizona Supreme Court cited *Ring v. Arizona*, 536 U.S. 584 (2002), as a "significant change in the law." 220 Ariz. at 119, 203 P.3d at 1179. *Ring* "expressly overruled" *Walton v. Arizona*, 497 U.S. 639 (1990). As the Arizona Supreme Court explained, "before *Ring*, a criminal defendant was foreclosed by *Walton* from arguing that he had a right to trial by jury on capital aggravating factors; *Ring* transformed existing Sixth Amendment law to provide for just such a right." *Shrum*, 220 Ariz. at 119, 203 P.3d at 1179.

In contrast to the holding in *Ring*, which expressly overruled precedent and invalidated Arizona's capital sentencing scheme, *Lynch* did not transform Arizona law. The holding does not constitute a significant change in law for purposes of Rule 32.1(g).

Respondents also argue, correctly, that *Lynch* would not apply retroactively. *Lynch* applies *Simmons* to an Arizona capital sentencing. In *O'Dell v. Netherland*, 521 U.S. 151, 167 (1997), the Supreme Court rejected the argument that *Simmons* represented a "watershed" rule of criminal procedure that would apply retroactively. Like *Simmons*, *Lynch* is procedural and nonretroactive. Therefore, Boggs is not entitled to retroactive application of *Lynch*, and his claim fails to meet the exception to preclusion set out in Rule 32.1(g).

Like *Lynch*, *Hurst* did nothing to transform Arizona law. In *Hurst*, 136 S. Ct. 616, the Supreme Court held that Florida's capital sentencing scheme violated *Ring*. Under the Florida scheme, a jury makes an advisory verdict while the judge makes the ultimate factual determinations necessary to sentence a defendant to death. *Id.* at 621–22. The Court held that this procedure was invalid because it "does not require the jury to make the critical findings necessary to impose the death penalty." *Id.* at 622. The Supreme Court simply applied *Ring* to Florida's capital sentencing statutes.

Hurst does not hold, as Boggs suggests, that a jury is required to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances. (Doc. 41 at 7; Doc. 45 at 4–5.) *Hurst* held only that Florida's scheme, in which the jury rendered an advisory sentence but the judge made the findings regarding aggravating and mitigating factors, violated the Sixth Amendment. *Hurst*, 136 S. Ct. at 620. *Hurst* did not address the process of weighing the aggravating and mitigating circumstances. Indeed, the Supreme Court has held that the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *Zant v. Stephens*, 426 U.S. 862, 875 (1983); *see Tuilaepa v. California*, 512 U.S. 967, 979–80 (1994). In *Zant*, the Court explained that "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Id.* at 875 n.13; *see Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988) ("[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.").

**4* In Arizona, in accordance with *Ring* and *Hurst*, the jury makes factual findings regarding the aggravating and mitigating factors to determine the appropriate sentence. *Hurst* did not effect a change in Arizona law for purposes of Rule 32.1(g).

Moreover, even if *Hurst* were a significant change in the law, it does not apply retroactively. The Supreme Court has held that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Hurst*, which applies *Ring* in Florida, is also nonretroactive. This claim does meet the Rule 32.1(g) exception to preclusion.

B. Rule 32.1(e) and (h)

Under Rule 32.1(e), a claim is not precluded where "[n]ewly discovered material facts probably exist and such facts probably would have changed the verdict or sentence." Ariz. R. Crim. P. 32.1(e). Rule 32.1(h) provides an exception to preclusion where "[t]he defendant demonstrates by clear and convincing evidence that the facts underlying the claim would be sufficient to establish that no reasonable fact-finder would have found defendant guilty of the underlying offense beyond a reasonable doubt, or that the court would not have imposed the death penalty." Ariz. R. Crim. P. 32.1(h).

Boggs asserts that in state court he would offer newly discovered mitigation information, including evidence of "the extensive abuse, neglect, isolation, and other causes of trauma endured by Mr. Boggs as a child and adolescent"; "evidence on the links between trauma and the subsequent adoption of extremist ideology," "the frequency with which individuals exaggerate their involvement in extremist militias," and "statements from lay witnesses regarding their knowledge of the 'militia groups' to which Mr. Boggs belonged"; and a diagnosis of a Fetal Alcohol Spectrum Disorder. (Doc. 41 at 10–11.)

Respondents contend that a stay is inappropriate because Boggs is asserting a freestanding claim of actual innocence which is not cognizable on federal habeas review. (Doc. 42 at 14–15.) Respondents are correct. The Supreme Court has not recognized actual innocence as a stand-alone habeas claim. *See Herrera v. Collins*, 506 U.S. 390, 400 (1993) ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."); *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 71 (2009) ("Whether such a federal right exists is an open question.") (citing *House v. Bell*, 547 U.S. 518, 554–555 (2006)).

Regardless of whether the claim is cognizable, however, this Court may stay the proceedings as part of its inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. To evaluate whether to stay an action, the court must the weigh competing interests that will be affected by the grant or denial of a stay, including the possible damage that may result from the granting of a stay; the hardship or inequity a party may suffer in being required to go forward; and whether a stay will simplify or complicate issues, proof, and questions of law. *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962) (citing *Landis*, 299 U.S. at 254–55). "The decision to grant a stay ... is 'generally left to the sound discretion of district courts.' " *Ryan v. Gonzales*, 133 S. Ct. 696, 708 (2013) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007)).

**5* If the requested stay may cause "even a fair possibility" of harm, Boggs bears the burden of establishing "a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255. The Court finds that the relevant factors do not weigh in favor of granting Boggs's motion for a stay.

Boggs asserts that "[a] stay would thus promote judicial economy and efficiency, and it would avoid simultaneous litigation in multiple fora." (Doc. 43 at 11.) This does not constitute a "clear case of hardship or inequity" given the Supreme Court's admonition that staying a federal habeas petition frustrates AEDPA's objectives of encouraging finality and streamlining federal habeas proceedings. *Rhines*, 544 U.S. at 277. In addition, because actual-innocence is not a cognizable claim on federal habeas review, denying the stay would not result in simultaneous litigation in state and federal court. Boggs will suffer no prejudice from denial of the stay and judicial economy will be preserved because the claim will not be litigated twice.

III. APPOINTMENT OF COUNSEL

Boggs asks the Court to authorize the Federal Public Defender's ("FPD") office to represent him in state court. The Criminal Justice Act provides for appointed counsel to represent their client in "other appropriate motions and procedures." 18 U.S.C. § 3599(e).

The Supreme Court interpreted § 3599 in *Harbison v. Bell*, 556 U.S. 180 (2009), holding that the statute "authorizes federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation." *Id.* at 194. The Court explained that "subsection (a)(2) triggers the appointment of counsel for habeas petitioners, and subsection (e) governs the scope of appointed counsel's duties." *Id.* at 185. The Court noted, however, that appointed counsel is not expected to provide each of the services enumerated in section (e) for every client. Rather, "counsel's representation includes only those judicial proceedings transpiring 'subsequent' to her appointment." *Id.* at 188.

Harbison addressed the concern that under the Court's interpretation of § 3599, federally appointed counsel would be required to represent their clients in state retrial or state habeas proceedings that occur after counsel's appointment because such proceedings are also "available post-conviction process." *Id.* The Court explained that § 3599(e) does not apply to those proceedings because they are not "properly understood as a 'subsequent stage' of judicial proceedings but rather as the commencement of new judicial proceedings." *Id.* at 189. As to state post-conviction proceedings, the Court noted, "State habeas is not a stage

'subsequent' to federal habeas.... That state postconviction litigation sometimes follows the initiation of federal habeas because a petitioner has failed to exhaust does not change the order of proceedings contemplated by the statute." *Id.* at 189–90; *see Irick v. Bell*, 636 F.3d 289, 292 (6th Cir. 2011); *Lugo v. Sec'y, Florida Dep't of Corr.*, 750 F.3d 1198, 1213 (11th Cir. 2014), *cert. denied sub nom. Lugo v. Jones*, 135 S. Ct. 1171 (2015) (explaining "a state prisoner is not entitled, as a matter of statutory right, to have federally paid counsel assist him in the pursuit and exhaustion of his state postconviction remedies, including the filings of motions for state collateral relief ..."); *Gary v. Warden, Ga. Diagnostic Prison*, 686 F.3d 1261, 1274 (11th Cir. 2012) (explaining "§ 3599 does not provide for federally-funded counsel to assist someone standing in Gary's shoes in pursuing a DNA motion, the results of which might serve as the basis for an extraordinary motion for a new trial").

*6 Nevertheless, this Court has the discretion to appoint federal counsel to represent Boggs in state court. In *Harbison* the Supreme Court noted that "a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation." 556 U.S. at 190 n.7.

The Court has determined that Boggs is not entitled to a stay, either to exhaust claims based on *Lynch* and *Hurst* or to raise a claim premised on new evidence. Based on that determination, together with the *Harbison* Court's discussion of the parameters of § 3599(e), the Court finds it is not appropriate to authorize the FPD to represent Boggs in state court in this instance.

IV. CONCLUSION

Boggs is not entitled to a stay. *Lynch* and *Hurst* are not significant changes in the law for purposes of Rule 32.1(g). The Court will exercise its discretion to deny a stay with respect to Boggs's new evidence allegations and to deny the appointment of the FPD.

Accordingly,

IT IS ORDERED denying Boggs's Motion for Temporary Stay and Abeyance and for Authorization to Appear in Ancillary State-Court Proceedings. (Doc. 41.)

IT IS FURTHER ORDERED amending the briefing schedule as follows: Boggs shall file his Motion for Evidentiary Development no later than **January 20, 2017**. Respondents shall file their response no later than **February 17, 2017**. Boggs may file a reply no later than **March 3, 2017**.[2]

All Citations

Slip Copy, 2017 WL 67522

Footnotes

1 Boggs alleges that Arizona's death penalty statute violates the Sixth Amendment because it does not require the jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances. (Doc. 15 at 420–21.)

2 As already noted, Boggs's brief on evidentiary development was due November 14, 2016. The fact that he did not comply with that deadline but chose instead to file the pending order did not stay the briefing on evidentiary development.

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D. Massachusetts.

United States v. Sampson
United States District Court, D. Massachusetts. June 2, 2016 Slip Copy 2016 WL 3102003 *(Approx. 7 pages)*

United States of America

v.

Gary Lee Sampson.

Criminal Action No. 01-10384-LTS
Signed 06/02/2016

ORDER ON UNRESOLVED PORTIONS OF GOVERNMENT'S MOTION IN LIMINE (DOC. NO. 1889) AND DEFENDANT'S MOTION FOR RECONSIDERATION BASED ON *HURST v. FLORIDA* (DOC. NO. 2171)

SOROKIN, J.

*1 Gary Lee Sampson pled guilty to two counts of carjacking resulting in death and was sentenced to death in 2004. In 2011, the Court (Wolf, J.) vacated the death sentence in light of juror misconduct, and the First Circuit affirmed, ruling that Sampson is entitled to a new penalty phase trial pursuant to 28 U.S.C. § 2255. Sampson v. United States, 724 F.3d 150, 170 (1st Cir. 2013).

The case was reassigned to this session of the Court on January 6, 2016. At that time, one of several pending motions was the government's Omnibus Motion in Limine. Doc. No. 1889. The Omnibus Motion contained requests to preclude seven separate categories of evidence or argument. Previous rulings have resolved the government's requests as to five of those categories. See Doc. No. 2259 at 15-16 (regarding the scope of mitigation evidence and execution impact evidence); Doc. No. 1992 at ¶¶ 6-8 (regarding comparative proportionality evidence, the unavailability of the death penalty under Massachusetts law, and evidence regarding other executions).

Two issues raised in the Omnibus Motion remain outstanding and are resolved in this Order: 1) whether to preclude defense counsel from arguing that the government "must prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors or ... that a sentence of death is justified"; and 2) whether to preclude Sampson from making an unsworn statement of allocution to the jury during his penalty phase retrial. Doc. No. 1889 at 10-13, 28-29. Sampson opposed both of these requests. Doc. No. 1918 at 17-26, 50-63. He supplemented his opposition to the first request after the Supreme Court decided Hurst v. Florida, 136 S. Ct. 616 (2016), and also sought reconsideration of two prior rulings he suggests were inconsistent with Hurst. Doc. No. 2171. The government opposed Sampson's supplemental filing. Doc. No. 2212.

For the reasons that follow, the two unresolved requests presented in the government's Omnibus Motion are DENIED, as is Sampson's motion for reconsideration based on Hurst.

I. Motion to Preclude Arguments That "Beyond a Reasonable Doubt" Standard Applies to Weighing Process, and Motion for Reconsideration Based on *Hurst v. Florida*

A. *Background*

Citing the First Circuit's opinion disposing of Sampson's direct appeal, the government urges the Court to preclude Sampson from suggesting during jury selection, or arguing during trial, that the "beyond a reasonable doubt" standard governs the jurors' weighing of aggravating and mitigating factors during the "selection phase" of the capital sentencing process pursuant to the Federal Death Penalty Act ("FDPA"). Doc. No. 1889 at 28-29 (citing United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007)).

Relying on Apprendi v. New Jersey, 530 U.S. 466 (2000), and its progeny, including two Supreme Court decisions that post-date the First Circuit's resolution of Sampson's direct appeal, Sampson argues that application of the reasonable doubt standard to the jury's determination of whether death is justified is not only prudent, but constitutionally mandated. Doc. No. 1918 at 50-63; Doc. No. 2171-1 at 15. This is so, Sampson asserts, because the jury's determination that any aggravating factors "sufficiently outweigh" any mitigating factors and "justify a sentence of death," 18 U.S.C. § 3593(e), is a "determination increasing the maximum ... statutorily-permissible sentence." Doc. No. 1918 at 56.

*2 Following this view to its logical conclusion, Sampson seeks reconsideration of prior decisions denying two other motions presenting Apprendi-based challenges to the FDPA and the indictment in this case. Doc. No. 2171; see Doc. No. 1450 ("Motion to Dismiss the Indictment for Failure to Include Non-Statutory Aggravating Factors"); Doc. No. 1452 ("Motion to Prohibit the Government from Seeking Death Through the Application of an Unconstitutional Statute, Which Fails to Require the Government to Prove Beyond a Reasonable Doubt that Death is the Appropriate Punishment"); see also United States v. Sampson, No. 01-cr-10384, 2015 WL 7962394, at *28-*30 (D. Mass. Dec. 2, 2015) (Wolf, J.) (denying both previous Apprendi challenges).

During Sampson's first trial, Judge Wolf instructed the jury, in relevant part, as follows:

> If ... you decide that the prosecution has proven that the aggravating factor or factors outweigh the mitigating factors, you must decide if the prosecution has also ***proven beyond a reasonable doubt that those aggravating factors sufficiently outweigh the mitigating factors to make death the appropriate penalty*** for Mr. Sampson's crime rather than life in prison without possibility of release.... However you personally define sufficiency, the prosecution must ***convince you beyond a reasonable doubt that the aggravating factor or factors sufficiently outweigh the mitigating factors to make death the appropriate penalty*** in this case. As I told you earlier, this is a heavy burden. More than a strong probability is required. You must be ***certain beyond any reasonable doubt that a death sentence should be imposed*** before voting for it. Death is, of course, the ultimate irreversible punishment. You must not sentence Gary Sampson to die unless you are ***convinced beyond a reasonable doubt that death is the appropriate punishment***.... If you decide that the prosecution has not ***proven beyond a reasonable doubt that the death penalty is justified***, you do not have to give a reason for that decision.

Doc. No. 1870 at 57-59 (emphasis added); accord Sampson, 486 F.3d at 29.

In a post-trial opinion, Judge Wolf explained his view that neither the FDPA nor the Constitution "impose a reasonable doubt requirement on the weighing process." United States v. Sampson, 335 F. Supp. 2d 166, 234-38 (D. Mass. 2004). He reasoned that "the sentencing decision in a capital case is, in its most important respects, fundamentally different than any other task that a jury is called upon to perform in our criminal justice system," as capital sentencing juries "exercis[e] discretion in sentencing that is ordinarily exercised by judges." Id. at 238. Judge Wolf concluded that "[w]hether a jury's sentencing decision is right or wrong is not something that is capable of proof in the traditional sense," and he "initially" intended "to not only leave the determination of what is sufficient to justify a death sentence to the jurors, but also to permit the jurors to decide how certain they must be to impose a death sentence." Id.

Ultimately, though, "the government [in 2003] ***withdrew its objection*** to jurors being instructed that the weighing process carries a reasonable doubt burden provided that the court did not permit the defendant to argue that the jurors should impose a stricter burden on the government." Id. (emphasis added). "Relying on the government's revised position and viewing it as prudent," Judge Wolf "incorporated a reasonable doubt standard in the instructions relating to the weighing process" as set forth above. Id.

On appeal, the First Circuit agreed with Judge Wolf's initial view, holding that "Congress did not intend the reasonable doubt standard to apply to the weighing process" under the FDPA, and that the "weighing constitutes a process, not a fact to be found," making Apprendi and its requirements inapplicable to that final stage of a capital jury's determination. 486 F.3d at 31-32. The First Circuit found no error in Judge Wolf's instructions, though, concluding the instructions "clearly communicated to jurors the relatively straightforward proposition that they, as individuals, had to be certain that death was the appropriate punishment before

imposing it," and that any confusion which arguably could have arisen based on the inclusion of "both a personal notion of sufficiency and a reasonable doubt standard" was harmless error.[1] Id. at 33.

B. *Relevant Legal Principles*

*3 Resolution of the parties' motions related to the reasonable doubt standard turns on the application of Apprendi and its progeny in the capital sentencing context. In Apprendi, the Supreme Court held, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The Court explained that it was not "impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute" for a particular crime, as "judges in this country have long exercised discretion of this nature in imposing sentence *within statutory limits* in the individual case." Id. at 481 (emphasis in original). However, "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system" occurred where the trial judge's determination that Apprendi's crime (possessing a firearm for an unlawful purpose) was motivated by racial bias doubled the range of permissible sentences. Id. at 497.

Two years later, the Supreme Court considered Apprendi's impact in a capital case and held the Sixth Amendment requires that "an aggravating circumstance necessary for imposition of the death penalty" be found by a jury, and not a sentencing judge. Ring v. Arizona, 536 U.S. 584, 609 (2002). The Ring Court reasoned that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." Id.

The First Circuit considered both Ring and Apprendi in rejecting Sampson's claim regarding the reasonable doubt standard on direct appeal. See 466 F.3d at 31-32. Since then, though, the Supreme Court has issued two more decisions interpreting the scope of Apprendi, and Sampson suggests both support his position. In Alleyne v. United States, the Court concluded "that any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." 133 S. Ct. 2151, 2155 (2013). This is so because "a finding of fact [which] alters the legally prescribed punishment so as to aggravate it ... necessarily forms a constituent part of a new offense and must be submitted to the jury." Id. at 2162. The Alleyne Court, however, admonished that its "ruling ... does not mean that any fact that influences judicial discretion must be found by a jury." Id. at 2163.

This year, the Supreme Court invalidated Florida's capital sentencing scheme, finding it violated the Sixth Amendment because it "allow[ed] a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, 136 S. Ct. at 624. The Florida statute at issue, quoted by the Hurst majority, required the sentencing judge to find the "facts" that "sufficient aggravating circumstances exist," ***and*** that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances" in order to impose a death sentence. Fla. Stat. § 921.141(3); accord 136 S. Ct. at 622. The Supreme Court, however, focused its analysis and its ultimate statements of the holding in Hurst on the first of those "facts" – the finding of aggravating factors – and, besides quoting the statutory language, included no discussion of the second – the weighing of mitigating and aggravating factors. See generally 136 S. Ct. at 620-24. Looking only to Hurst, then, it is at best unclear whether the Supreme Court would extend its reasoning and apply Apprendi in such a manner that would require application of a reasonable doubt standard to the weighing portion of a capital sentencing determination.

However, another decision issued just a week after Hurst undermines Sampson's position. See generally Kansas v. Carr, 136 S. Ct. 633 (2016).[2] Although Carr presented a different set of issues and is not an Apprendi-based decision, the majority opinion authored by Justice Scalia contains the following passage which, though plainly dictum, is just as plainly pertinent to the issue presented here:

> *4 [T]he ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy – the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. It *would* be possible, of course, to instruct the jury that *the facts establishing* mitigating circumstances need only be proved by a preponderance, leaving the judgment whether those facts are indeed mitigating, and whether they outweigh the aggravators, to the jury's

> discretion without a standard of proof.... In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

136 S. Ct. at 642 (emphasis in original).

C. *Discussion*

Having carefully considered the prior decisions of Judge Wolf and the First Circuit in this case, as well as the line of Supreme Court cases summarized above, the Court is not persuaded that the Constitution mandates application of the reasonable doubt standard of proof to the jury's weighing of aggravating and mitigating factors under the FDPA. For the reasons explained by Judge Wolf for his initial inclination not to require the jury to make its final determination of whether death is justified "beyond a reasonable doubt," 335 F. Supp. 2d at 234-38, by the First Circuit in finding that a reasonable doubt instruction was not required as to the weighing "process," 486 F.3d at 31-33, and by Justice Scalia in positing that the jury's decision whether to afford mercy is not susceptible to any standard of proof, Carr, 136 S. Ct. at 642, the Court rejects Sampson's assertion that the Sixth Amendment requires a capital sentencing jury to find that the aggravating factors "sufficiently outweigh" the mitigating factors and justify a death sentence "beyond a reasonable doubt." Once a jury reaches the point where it must weigh aggravating and mitigating factors and determine whether a death sentence is justified, "it is exercising discretion in sentencing that is ordinarily exercised by judges." Sampson, 335 F. Supp. 2d at 238. At that point, the jury is "imposing a judgment *within the* range prescribed by statute" for the relevant capital offense (viewing that "range" as life imprisonment without possibility of release, or death), a process which Apprendi itself excepts from its reach. 530 U.S. at 481; accord Alleyne, 133 S. Ct. at 2163. Accordingly, Sampson's motion for reconsideration of his prior Apprendi-related motions is DENIED.

However, resolution of the government's motion does not end with the Court's conclusion that the Sixth Amendment does not mandate application of the reasonable doubt standard to the weighing process. As the Court has emphasized previously, e.g., Doc. No. 2259 at 5, Sampson's penalty phase retrial will be conducted pursuant to 28 U.S.C. § 2255. As such, the Court has broad equitable discretion "to restore [Sampson] to the circumstances that existed before the violation" of his rights that necessitated the new trial. United States v. Sampson, 82 F. Supp. 3d 502, 505-06 (D. Mass. 2014). Not only did Judge Wolf instruct the jury to apply a reasonable doubt standard to its ultimate determination of whether a death sentence was justified for Sampson, he did so ***with the government's consent***. Sampson, 335 F. Supp. 2d at 238. Although the First Circuit ruled the reasonable doubt instruction was not constitutionally mandated, it found no error in Judge Wolf's inclusion of the standard in his instructions regarding the weighing process. 486 F.3d at 33.

*5 With the purpose of § 2255 in mind, then, the Court DENIES the motion to preclude Sampson from arguing that the government must prove beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, or that a sentence of death is justified. In short, the Court here, as it has elsewhere, will follow the path laid out by Judge Wolf at the first trial.

II. Motion to Preclude Unsworn Allocution by Sampson

The government also seeks to preclude Sampson from offering unsworn allocution during his penalty phase retrial. Doc. No. 1889 at 10-13. According to the government, Sampson has no constitutional or statutory right to allocute, the Federal Rules of Criminal procedure do not permit allocution in a capital case before a sentencing jury, any allocution would fail the balancing test in 18 U.S.C. § 3593(c) governing admission of evidence under the FDPA, and if Sampson wishes to address the jury he may testify on his own behalf, under oath and subject to cross-examination. Id.

Sampson urges the Court to find that capital defendants – like all other criminal defendants – have a constitutional, common-law, and/or statutory right to allocute; that even if no such right exists, the FDPA grants the Court the discretion to permit allocution; and that some other federal courts have permitted capital defendants to offer allocution before sentencing juries. Doc. No. 1918 at 17-26.

Allocution is "[a]n unsworn statement from a convicted defendant to the sentencing judge ***or jury*** in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else ***in an effort to lessen the impending sentence***. This statement is not subject to cross-examination." Black's Law Dictionary 91 (10th ed. 2014) (emphasis added). Permitting criminal defendants to allocute before they are sentenced is a tradition

"[a]ncient in law" and "deeply embedded" in our criminal justice system. United States v. De Alba Pagan, 33 F.3d 125, 129 (1st Cir. 1994). It "is both a rite and a right." Id. The practice is incorporated in the Federal Rules of Criminal Procedure, which provide that, "[b]efore imposing sentence, the court must ... address the defendant personally in order to permit the defendant to speak or present any information ***to mitigate the sentence***." Fed. R. Crim. P. 32(i)(4)(A)(ii) (emphasis added).

Whether allocution is a constitutionally protected right is a complicated question that the Court need not resolve here. Compare United States v. Hall, 152 F.3d 381, 395-96 (5th Cir. 1998) (finding no constitutional due process right to allocution),[3] with United States v. Chong, 104 F. Supp. 2d 1232, 1234-36 (1999) (finding that Ninth Circuit law supports finding a constitutional basis for the right to allocution). It is enough for present purposes to note that the weight of authority suggests whether to permit allocution by a capital defendant before the jury presiding over his penalty phase trial is within the discretion of the judge presiding over the trial. See United States v. Lawrence, 735 F.3d 385, 406-08 (6th Cir. 2013) (suggesting the FDPA permits allocution but finding denial thereof was not an abuse of discretion "[c]onsidering the record as a whole"); United States v. Caro, 597 F.3d 608, 635 n.24 (4th Cir. 2010) (noting "the decision of whether to allow [a capital defendant] allocution fell within the district court's discretion," but finding no abuse of discretion where request to allocute was denied based on FDPA balancing test); United States v. Wilson, 493 F. Supp. 2d 509, 511 (E.D.N.Y. 2009) ("What is clear, however, is that this court has the discretion to permit [the capital defendant] to allocute."); United States v. Henderson, 485 F. Supp. 2d 831, 845-47 (S.D. Ohio 2007) (recognizing the court "has discretion to permit [allocution] pursuant to Rule 32" and granting capital defendant's motion to allow allocution during penalty phase); cf. Hall, 152 F.3d at 397 n.8 (deeming it "at least arguable that the district court may have discretion to admit an unsworn statement of remorse" by a capital defendant); Chong, 104 F. Supp. 2d at 1233 (finding a right to allocute under Rule 32 and the Constitution); but cf. United States v. Honken, 541 F.3d 1146, 1172 (8th Cir. 2008) (finding denial of motion to allocute before sentencing jury did not violate constitutional or statutory right, without addressing whether trial courts are otherwise vested with discretion to allow allocution).

*6 The Court is satisfied that allowing Sampson to allocute before the penalty phase jury would be consistent with the language and purpose of Rule 32,[4] would be permissible under the FDPA,[5] and would avoid the "anomalous effect" of prohibiting defendants facing execution from doing what every other criminal defendant is permitted to do (i.e., offering allocution before the entity determining their fate), Chong, 104 F. Supp. 2d at 1234 n.6.[6] Accordingly, the government's motion to preclude unsworn allocution is DENIED.

Other courts to confront the issue and permit allocution, though, have done so pursuant to various reasonable conditions deemed necessary to avoid running afoul of the balancing test governing admission of information under the FDPA. See § 3593(c) (requiring that probative value be weighed against "the danger of creating unfair prejudice, confusing the issues, or misleading the jury"). Such conditions have included instructions to the jury regarding the nature of allocution, limitations on the timing of allocution and the defendant's positioning in the courtroom, and advance notice to the court and the government about whether the defendant will allocute and what he intends to say. See, e.g., Wilson, 493 F. Supp. 2d at 511 (imposing five conditions, including advance notice, a restriction on the content of the allocution, and a requirement that the defendant remain at the defense table); Chong, 104 F. Supp. 2d at 1234 (requiring "an appropriate limiting instruction").

*7 In the first instance, the parties shall propose appropriate conditions to govern Sampson's allocution in this case in light of this Order and considering the procedures employed in the cases cited herein. The parties shall confer in this regard and file a joint report describing the conditions they agree should apply to Sampson's allocution (or, to the extent they are unable to agree, describing their differing views and the reasons therefor).

III. CONCLUSION

Accordingly, the government's Omnibus Motion in Limine (Doc. No. 1889) is DENIED insofar as it seeks to preclude Sampson from arguing that the reasonable doubt standard should apply to the jurors' weighing of aggravating and mitigating circumstances and their related determination of whether the death penalty is justified. The specific manner in which the Court will instruct the jury as to burden of proof, the weighing process, and the determination of whether a death sentence is justified for Sampson will be resolved at a later date.

The government's Omnibus Motion (Doc. No. 1889) is further DENIED insofar as it seeks to prevent Sampson from making unsworn allocution. On or before June 17, 2016, the parties

shall file the joint report described above regarding the conditions they propose to govern Sampson's allocution.

Finally, Sampson's Motion to Reconsider Certain Rulings in Light of Hurst (Doc. No. 2171) is DENIED.

SO ORDERED.

All Citations

Slip Copy, 2016 WL 3102003

Footnotes

1 According to the First Circuit, there was "no reasonable likelihood that jurors may have interpreted [Judge Wolf's] instruction in a way that could have harmed Sampson." 486 F.3d at 33. The Court of Appeals discerned "only two possibilities: either the jurors eschewed the reasonable doubt standard vis-à-vis the weighing process (which ... would have comported fully with the law) or they applied the reasonable doubt standard (which would have *benefitted* Sampson by imposing a more onerous burden on the government)." Id. (emphasis in original).

2 Hurst was argued six days after Carr, and the decision in Carr was issued eight days after the decision in Hurst. Six of the same justices were in both majorities; five of them remain on the Court today.

3 Hall was abrogated on grounds not relevant to the allocution question by United States v. Martinez-Salazar, 528 U.S. 304 (2000).

4 Although the relevant subsection of Rule 32 requires "the court" to "address the defendant personally," it does not prohibit the court from allowing a defendant "to speak or present any information" to a jury in a case where the jury, rather than the judge, will select the appropriate sentence. As other courts have reasoned, the purpose of this provision, which permits a defendant the opportunity "to mitigate the sentence" before it is imposed, would be defeated if allocution were not permitted at a time when it might have some effect on the sentencing determination. See Henderson, 485 F. Supp. 2d at 846 ("A right to allocute only before the judge reads the jury's sentence would be an empty formality."); cf. United States v. Buckley, 847 F.2d 991, 1002 (1st Cir. 1988) (finding "generous allocution opportunity" at time of provisional sentencing did not eliminate the need to permit allocution at time of final sentencing). Nothing in the FDPA conflicts with or suggests abrogation of this provision of Rule 32 in the context of a capital case. Cf. 18 U.S.C. § 3593(c) (dispensing only with Rule 32's requirement that a presentence report be prepared).

5 The FDPA permits admission of "information ... as to any matter relevant to the sentence," and specifies that "[t]he defendant may present any information relevant to a mitigating factor." 18 U.S.C. § 3593(c). It further allows for admission of such information "regardless of its admissibility under the rules governing admission of evidence at criminal trials," so long as the information satisfies the FDPA's balancing test. Id. Allocution by a capital defendant appears to fall squarely within the sort of "information" permitted by the FDPA. See Lawrence, 735 F.3d at 408 (noting "the probative value of the sound of the defendant's own voice, explaining his conduct and subsequent remorse in his own words, as information relevant to mitigation, can hardly be gainsaid").

6 It also would be anomalous to require a capital defendant to select between exercising his constitutional right to have a jury determine his sentence, and waiving that right (and hoping the government consents to a bench trial for sentencing as well) in order to gain the opportunity to offer allocution pursuant to Rule 32. See Henderson, 485 F. Supp. 2d at 846 (noting the same problem and refusing to "apply a rule in such a way that would have a chilling effect on [a capital defendant's] exercise of his fundamental right to a jury trial").

End of Document

WESTLAW

Petition for Certiorari Docketed by JERRY BOHANNON v. ALABAMA, U.S., November 4, 2016

2016 WL 5817692

In re Bohannon v. State Only the Westlaw citation is currently available.

Supreme Court of Alabama. September 30, 2016 --- So.3d ---- 2016 WL 5817692 *(Approx. 14 pages)*

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

Ex parte Jerry Bohannon

(In re Jerry Bohannon

v.

State of Alabama)

1150640

Sept. 30, 2016

Synopsis

Background: Defendant was convicted in the Mobile Circuit Court, Nos. CC-11-2989 and CC-11-2990, of two counts of capital murder, and was sentenced to death. Defendant appealed. The Court of Criminal Appeals affirmed one conviction, but remanded case. On remand, the Circuit Court vacated one conviction and sentence. On return to remand, the Court of Criminal Appeals, 2015 WL 6443170, affirmed. Petition for certiorari review was granted.

Holdings: The Supreme Court, Stuart, J., held that:

1 defendant was not entitled to jury determination whether aggravating circumstances outweighed mitigating circumstances;

2 trial court could use jury's sentencing recommendation finding aggravating circumstance;

3 allowing cross-examination of defendant's character witnesses about whether beating by defendant was consistent with purported reputation for being law-abiding, peaceful person was not plain error; and

4 trial court's failure to sua sponte instruct jury on victims' intoxication was not plain error.

Affirmed.

Murdock, J., concurred in result.

West Headnotes (11)

Change View

1 Criminal Law Review De Novo

When an appeal involves issues of law and the application of the law to the undisputed facts, appellate review is de novo.

2 Jury Death penalty

Capital defendant's Sixth Amendment right under *Ring* to have jury determine aggravating circumstances that would make defendant eligible for death penalty did not also entitle defendant to jury determination of whether aggravating circumstances outweighed mitigating circumstances, and, thus, death sentence did not become unconstitutional by judge's independent determination that aggravating circumstance or circumstances outweighed mitigating circumstance or circumstances. U.S. Const. Amend. 6; Ala. Code § 13A-5-46(e)(3).

5 Cases that cite this headnote

SELECTED TOPICS

Sentencing and Punishment

The Death Penalty
Sentencing Phase of The Capital Murder Trial

Secondary Sources

s D10 Death Penalty

Crim. Offenses and Defenses in Alabama § D10 (3d ed.)

...Code of Ala. 1975, §§ 13A-5-39 through 13A-5-59. In 1980, the United States Supreme Court, in Beck v. Alabama, struck down Alabama's death penalty statute. The current capital punishment act enumerates...

s 152. Capital murder

2 Wharton's Criminal Law § 152 (15th ed.)

...In 1972, in Furman v Georgia, the United States Supreme Court ruled that "the imposition and carrying out of the death penalty" constitutes "cruel and unusual punishment in violation of the Eighth and ...

s 41:23. Instructions on aggravating factors in capital cases

2 Trial Handbook for Ala. Law § 41:23 (3d ed.)

...The trial court in capital murder cases has a duty to instruct the jury on both aggravating and mitigating factors that the jury may consider during the sentencing phase of the case. In sentence determ...

See More Secondary Sources

Briefs

BRIEF FOR PETITIONER

1998 WL 839959
Louis Jones, Jr. v. U.S.
Supreme Court of the United States
Dec. 01, 1998

...FN*Counsel of Record The opinion of the Court of Appeals (J.A. 82-123) is reported at 132 F.3d 232. The judgment and opinion of the Court of Appeals were issued on January 5, 1998. (J.A. 82-123, 124). ...

Brief for Respondent Reginald Dexter Carr, Jr.

2015 WL 4624622
STATE OF KANSAS, Petitioner, v. Reginald Dexter CARR, Jr., Respondent.
Supreme Court of the United States
Aug. 03, 2015

...FN* Admitted only in New York; supervised by members of the firm The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inf...

Brief for Respondent Jonathan D. Carr

2015 WL 4624621
STATE OF KANSAS, Petitioner, v. Jonathan D. CARR, Respondent.
Supreme Court of the United States
Aug. 03, 2015

...FN* Counsel of Record The Kansas

EXHIBIT D

3 Jury Sentencing Matters
Under *Apprendi*, any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. U.S. Const. Amend. 6.

4 Jury Death penalty
In a capital case, the Sixth Amendment right to a jury trial requires that a jury find an aggravating circumstance necessary for imposition of the death penalty. U.S. Const. Amend. 6.

2 Cases that cite this headnote

5 Jury Death penalty
Under *Ring*, the jury, not a judge, must find the existence of an aggravating factor to make a capital defendant death-eligible. U.S. Const. Amend. 6.

4 Cases that cite this headnote

6 Jury Statutory provisions
Because in Alabama, a jury, and not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a capital defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment. U.S. Const. Amend. 6; Ala. Code § 13A-5-40.

4 Cases that cite this headnote

7 Sentencing and Punishment Effect of recommendation
Once jury found existence of aggravating circumstance that made defendant death-eligible, namely, that two or more persons were killed by one act or pursuant to one scheme or course of conduct, trial court was permitted to use jury's recommendation and evaluate and determine appropriate sentence within statutory range, which included death sentence. Ala. Code § 13A-5-40(a)(1).

1 Case that cites this headnote

8 Criminal Law Necessity of Objections in General
"Plain error" is error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.

9 Criminal Law Necessity of Objections in General
The "plain error" standard for reviewing unpreserved error applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant.

10 Criminal Law Other offenses and character of accused
State's cross-examination of defendant's character witnesses as to whether surveillance videotape showing defendant beating victim after shooting him was consistent with defendant's purported reputation for being law-abiding, peaceful person did not rise to level of plain error, in trial for capital murder, despite defendant's assertions that his state of mind was central issue in case and that his defense depended on persuading jury that it should view surveillance tape and other evidence through the lens of his law-abiding character; State's questions were about surveillance tape that had already been admitted into evidence and had been viewed by jury, and therefore, jury was free to draw its own conclusions about defendant's state of mind from its viewing of tape.

11 Criminal Law Necessity of requests
Failure to sua sponte instruct jury victims' intoxication could have made them more aggressive was not plain error in capital murder prosecution in which defendant claimed reasonable inference of self-defense; defendant's opening statement claimed that one victim pushed defendant a couple times during

altercation and victims were high on methamphetamine which made people aggressive, evidence of intoxication was admitted, jury viewed surveillance tape of nightclub parking lot where altercation occurred and was able to observe confrontation, and jury was instructed to consider all evidence and therefore was free to consider all evidence, including evidence of victims' intoxication and defendant's argument that victims' intoxication made them act aggressively.

Petition for Writ of Certiorari to the Court of Criminal Appeals (Mobile Circuit Court, CC-11-2989 and CC-11-2990; Court of Criminal Appeals, CR-13-0498)

Opinion

STUART, Justice.

*1 This Court granted certiorari review of the judgment of the Court of Criminal Appeals affirming Jerry Bohannon's conviction for capital murder and his sentence of death. We affirm.

Facts and Procedural History

The evidence presented at trial established the following. Around 7:30 a.m. on December 11, 2010, Jerry Bohannon, Anthony Harvey, and Jerry DuBoise were in the parking lot of the Paradise Lounge, a nightclub in Mobile. The security cameras in the parking lot recorded DuBoise and Harvey talking with Bohannon. After DuBoise and Harvey had turned and walked several feet away from him, Bohannon reached for a pistol. Apparently, when they heard Bohannon cock the hammer of the pistol, DuBoise and Harvey turned to look at Bohannon. DuBoise and Harvey then ran; Bohannon pursued them, shooting several times. DuBoise and Harvey ran around the corner of the building and when the reappeared they had guns. A gunfight ensued. Harvey was shot in the upper left chest; DuBoise was shot three times in the abdomen. The testimony indicated that, in addition to shooting DuBoise and Harvey, Bohannon pistol-whipped them. Both DuBoise and Harvey died of injuries inflicted by Bohannon.

In June 2011, Bohannon was charged with two counts of capital murder in connection with the deaths. The murders were made capital because two or more persons were killed "by one act or pursuant to one scheme or course of conduct." § 13A–5–40(a)(1), Ala. Code 1975. Following a jury trial, Bohannon was convicted of two counts of capital murder. During the penalty phase, the jury recommended by a vote of 11-1 that Bohannon be sentenced to death; the circuit court sentenced Bohannon to death for each capital-murder conviction. Bohannon appealed. The Court of Criminal Appeals affirmed one of Bohannon's capital-murder convictions but remanded the case, in light of a double-jeopardy violation, for the circuit court to set aside one of Bohannon's capital-murder convictions and its sentence. Bohannon v. State, [Ms. CR–13–0498, October 23, 2015] —— So.3d —— (Ala.2015). The circuit court vacated one conviction and sentence, and, on return to remand, the Court of Criminal Appeals affirmed Bohannon's death sentence. Bohannon v. State, [Ms. CR–13–0498, December 18, 2015] —— So.3d —— (Ala.2015). Bohannon petitioned this Court for certiorari review of the judgment of the Court of Criminal Appeals. This Court granted Bohannon's petition to consider four grounds:

—Whether Bohannon's death sentence must be vacated in light of Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016);

—Whether the circuit court's characterization of the jury's penalty-phase determination as a recommendation and as advisory conflicts with Hurst;

—Whether the circuit court committed plain error by allowing the State to question defense character witnesses about Bohannon's alleged acts on the night of the shooting; and

—Whether the circuit court committed plain error by failing to sua sponte instruct the jury on the victims' intoxication?

Standard of Review

1 *2 Bohannon's case involves only issues of law and the application of the law to the undisputed facts; therefore, our review is de novo. Ex parte Key, 890 So.2d 1056, 1059 (Ala.2003)("This Court reviews pure questions of law in criminal cases de novo."), and State v. Hill, 690 So.2d 1201, 1203–04 (Ala.1996).

Discussion

2 First, Bohannon contends that his death sentence must be vacated in light of the United States Supreme Court's decision in Hurst.

In 2000, in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that the United States Constitution requires that any fact that increases the penalty for a crime above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. I n Ring v. Arizona, 536 U S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court, applying its decision in Apprendi to a capital-murder case, stated that a defendant has a Sixth Amendment right to a "jury determination of any fact on which the legislature conditions an increase in their maximum punishment." 536 U.S. at 589, 122 S.Ct. 2428. Specifically, the Court held that the right to a jury trial guaranteed by the Sixth Amendment required that a jury "find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 585, 122 S.Ct. 2428. Thus, Ring held that, in a capital case, the Sixth Amendment right to a jury trial requires that the jury unanimously find beyond a reasonable doubt the existence of at least one aggravating circumstance that would make the defendant eligible for a death sentence.

In Ex parte Waldrop, 859 So.2d 1181 (Ala.2002), this Court considered the constitutionality of Alabama's capital-sentencing scheme in light of Apprendi and Ring, stating:

> "Waldrop argues that under Alabama law a defendant cannot be sentenced to death unless, after an initial finding that the defendant is guilty of a capital offense, there is a second finding: (1) that at least one statutory aggravating circumstance exists, see Ala. Code 1975, § 13A–5–45(f), and (2) that the aggravating circumstances outweigh the mitigating circumstances, see Ala. Code 1975, § 13A–5–46(e)(3). Those determinations, Waldrop argues, are factual findings that under Ring must be made by the jury and not the trial court. Because, Waldrop argues, the trial judge in his case, and not the jury, found that two aggravating circumstances existed and that those aggravating circumstances outweighed the mitigating circumstances, Waldrop claims that his Sixth Amendment right to a jury trial was violated. We disagree.
>
> "It is true that under Alabama law at least one statutory aggravating circumstance under Ala. Code 1975, § 13A–4–49, must exist in order for a defendant convicted of a capital offense to be sentenced to death. See Ala. Code 1975, § 13A–5–45(f)('Unless at least one aggravating circumstance as defined in Section 13A–5–49 exists, the sentence shall be life imprisonment without parole.'); Johnson v. State, 823 So.2d 1, 52 (Ala.Crim.App.2001)(holding that in order to sentence a capital defendant to death, the sentencer ' "must determine the existence of at least one of the aggravating circumstances listed in [Ala. Code 1975,] § 13A–5–49" ' (quoting Ex parte Woodard, 631 So.2d 1065, 1070 (Ala.Crim.App.1993))). Many capital offenses listed in Ala. Code 1975, § 13A–5–40, include conduct that clearly corresponds to certain aggravating circumstances found in § 13A–5–49:
>
> *3 " 'For example, the capital offenses of intentional murder during a rape, § 13A–5–40(a)(3), intentional murder during a robbery, § 13A–5–40(a)(2), intentional murder during a burglary, § 13A–5–40(a)(4), and intentional murder during a kidnapping, § 13A–5–40(a)(1), parallel the aggravating circumstance that "[t]he capital offense was committed while the defendant was engaged ... [in a] rape, robbery, burglary or kidnapping," § 13A–5–49(4).'
>
> "Ex parte Woodard, 631 So.2d at 1070–71 (alterations and omission in original).
>
> "Furthermore, when a defendant is found guilty of a capital offense, 'any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing.' Ala. Code 1975, § 13A–5–45(e); see also Ala. Code 1975, § 13A–5–50 ('The fact that a particular capital offense as defined in Section 13A–5–40(a) necessarily includes one or more aggravating circumstances as specified in Section 13A–5–49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.'). This is known as 'double-counting' or 'overlap,' and Alabama courts 'have repeatedly upheld death sentences where the only aggravating circumstance supporting the death sentence overlaps with an element of the capital offense.' Ex parte Trawick, 698 So.2d 162, 178 (Ala.1997); see also Coral v. State, 628 So.2d 954, 965 (Ala.Crim.App.1992).

"Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala. Code 1975, § 13A–5–40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A–5–49(4), was 'proven beyond a reasonable doubt.' Ala Code 1975, § 13A–5–45(e); Ala. Code 1975, § 13A–5–50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala. Code 1975, § 13A–5–45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 609, 122 S.Ct. at 2443. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all Ring and Apprendi require.

"....

"Waldrop also claims that Ring and Apprendi require that the jury, and not the trial court, determine whether the aggravating circumstances outweigh the mitigating circumstances. See Ala. Code 1975, §§ 13A–5–46(e), 13A–5–47(e), and 13A–5–48. Specifically, Waldrop claims that the weighing process is a 'finding of fact' that raises the authorized maximum punishment to the death penalty. Waldrop and several of the amici curiae claim that, after Ring, this determination must be found by the jury to exist beyond a reasonable doubt. Because in the instant case the trial judge, and not the jury, made this determination, Waldrop claims his Sixth Amendment rights were violated.

"Contrary to Waldrop's argument, the weighing process is not a factual determination. In fact, the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof. As the United States Court of Appeals for the Eleventh Circuit noted, 'While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard ... the relative weight is not.' Ford v. Strickland, 696 F.2d 804, 818 (11th Cir.1983). This is because weighing the aggravating circumstances and the mitigating circumstances is a process in which 'the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence.' Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Moreover, the Supreme Court has held that the sentencer in a capital case need not even be instructed as to how to weigh particular facts when making a sentencing decision. See Harris v. Alabama, 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995)(rejecting 'the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required" ' (quoting Franklin v. Lynaugh, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) and holding that 'the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer').

*4 "Thus, the weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum. See California v. Ramos, 463 U.S. 992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983)('Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, ... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment.'); Zant v. Stephens, 462 U.S. 862, 902, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)(Rehnquist, J., concurring in the judgment) ('sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does').

"In Ford v. Strickland, supra, the defendant claimed that 'the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment.' Ford, 696 F.2d at 817. The United States Court of Appeals for the Eleventh Circuit rejected this argument, holding that 'aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed.' 696 F.2d at 818. Furthermore, in addressing the defendant's claim that the State must prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, the court stated that the defendant's argument

> " 'seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof

> under a reasonable doubt or preponderance standard, see State v. Dixon, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. [1950], 40 L.Ed.2d 295 (1974), and State v. Johnson, 298 N.C. 47, 257 S.E.2d 597, 617–18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party.'
>
> "696 F.2d at 818. Alabama courts have adopted the Eleventh Circuit's rationale. See Lawhorn v. State, 581 So.2d 1159, 1171 (Ala.Crim.App.1990)('while the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party'); see also Melson v. State, 775 So.2d 857, 900–901 (Ala.Crim.App.1999); Morrison v. State, 500 So.2d 36, 45 (Ala.Crim.App.1985).
>
> "Thus, the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, Ring and Apprendi do not require that a jury weigh the aggravating circumstances and the mitigating circumstances."

Ex parte Waldrop, 859 So.2d at 1187–90 (footnotes omitted). This Court concluded that "all [that] Ring and Apprendi require" is that "the jury ... determine[ ] the existence of the 'aggravating circumstance necessary for imposition of the death penalty.' " 859 So.2d at 1188 (quoting Ring, 536 U.S. at 609, 122 S.Ct. 2428), and upheld Alabama's capital-sentencing scheme as constitutional when a defendant's capital-murder conviction included a finding by the jury of an aggravating circumstance making the defendant eligible for the death sentence.

In Ex parte McNabb, 887 So.2d 998 (Ala.2004), this Court further held that the Sixth Amendment right to a trial by jury is satisfied and a death sentence may be imposed if a jury unanimously finds an aggravating circumstance during the penalty phase or by special-verdict form. McNabb emphasized that a jury, not the judge, must find the existence of at least one aggravating factor for a resulting death sentence to comport with the Sixth Amendment.

*5 The United States Supreme Court in its recent decision in Hurst applied its holding in Ring to Florida's capital-sentencing scheme and held that Florida's capital-sentencing scheme was unconstitutional because, under that scheme, the trial judge, not the jury, made the "findings necessary to impose the death penalty." —— U.S. ——, 136 S.Ct. at 622. Specifically, the Court held that Florida's capital-sentencing scheme violated the Sixth Amendment right to a trial by jury because the judge, not the jury, found the existence of the aggravating circumstance that made Hurst death eligible. The Court emphasized that the Sixth Amendment requires that the specific findings authorizing a sentence of death must be made by a jury, stating:

> "Florida concedes that Ring required a jury to find every fact necessary to render Hurst eligible for the death penalty. But Florida argues that when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance.' ... The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying Ring. '[T]he additional requirement that a judge also find an aggravator,' Florida concludes, 'only provides the defendant additional protection.' ...
>
> "The State fails to appreciate the central and singular role the judge plays under Florida law. ... [T]he Florida sentencing statute does not make a defendant eligible for death until 'findings by the court that such person shall be punished by death.' Fla. Stat. § 775.082(1) (emphasis added). The trial court alone must find 'the facts ... [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' § 921.141(3) .... '[T]he jury's function under the Florida death penalty statute is advisory only.' Spaziano v. State, 433 So.2d 508, 512 (Fla.1983). The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that Ring requires.
>
> "....
>
> "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."

Hurst, —— U.S. ——, 136 S.Ct. at 622–24 (final emphasis added).

Bohannon contends that, in light of Hurst, Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a jury does not make "the critical findings necessary to impose the death penalty." —— U.S. ——, 136 S.Ct. at 622. He maintains that Hurst requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death sentence is unconstitutional. We disagree.

3 4 5 6 Our reading of Apprendi, Ring, and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury "find an aggravating circumstance necessary for imposition of the death penalty." Ring, 536 U.S. at 585, 122 S.Ct. 2428. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

*6 Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, holding that the Sixth Amendment "do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances" because, rather than being "a factual determination," the weighing process is "a moral or legal judgment that takes into account a theoretically limitless set of facts." 859 So.2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may "exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." 530 U.S. at 481, 120 S.Ct. 2348. Hurst does not disturb this holding.

Bohannon's argument that the United States Supreme Court's overruling in Hurst of Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which upheld Florida's capital-sentencing scheme against constitutional challenges, impacts the constitutionality of Alabama's capital-sentencing scheme is not persuasive. In Hurst, the United States Supreme Court specifically stated: "The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." Hurst, —— U.S. ——, 136 S.Ct. at 624 (emphasis added). Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis.

Bohannon's death sentence is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment. The jury, by its verdict finding Bohannon guilty of murder made capital because "two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct," see § 13A-5-40(a)(10), Ala. Code 1975, also found the existence of the aggravating circumstance, provided in § 13A-5-49(9), Ala. Code 1975, that "[t]he defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme of course of conduct," which made Bohannon eligible for

a sentence of death. See also § 13A–5–45(e), Ala. Code 1975 ("[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing."). Because the jury, not the judge, unanimously found the existence of an aggravating factor—the intentional causing of the death of two or more persons by one act or pursuant to one scheme or course of conduct—making Bohannon death-eligible, Bohannon's Sixth Amendment rights were not violated.

Bohannon's argument that the jury's finding of the existence of the aggravating circumstance during the guilt phase of his trial was not an "appropriate finding" for use during the penalty phase is not persuasive. Bohannon reasons that because, he says, the jury was not informed during the guilt phase that a finding of the existence of the aggravating circumstance during the guilt phase would make him eligible for the death penalty, the jury did not know the consequences of its decision and appreciate its seriousness and gravity.

A review of the record establishes that the members of the venire were "death-qualified" during voir dire. Specifically, the trial court instructed:

> "THE COURT: The defendant was indicted by the Grand Jury of Mobile County during its term in June of 2011....
>
> *7 "....
>
> "THE COURT: The case—and by that I mean the Grand Jury indictment—is indicted for what is known as capital murder.
>
> "Capital murder is an offense which, if the defendant is convicted, is punishable either by death or by life imprisonment without the possibility of parole.
>
> "The first part of this case that will be presented to the jury is what is known as the guilt phase. The jury will be called upon to determine whether the State has proved that the defendant is guilty beyond a reasonable doubt of the offense, or whether the State has proved the guilt of the defendant beyond a reasonable doubt of anything at all.
>
> "If the jury finds the defendant not guilty, that, of course, ends the matter.
>
> "If the jury finds the defendant guilty of some offense less than capital murder, then it will be incumbent upon the Court—or me—to impose the appropriate punishment.
>
> "If, however, the jury finds the defendant guilty of the offense of capital murder, the jury would be brought back for a second phase, or what we know as the penalty phase of this case. And, at that time, the jury may hear more evidence, will hear legal instructions and argument of counsel. The jury would then make a recommendation as to whether the appropriate punishment is death or life imprisonment without the possibility of parole."

Bohannon's jury was informed during voir dire that, if it returned a verdict of guilty of capital murder, Bohannon was eligible for a sentence of death. Therefore, Bohannon's argument that his jury was not impressed with the seriousness and gravity of its finding of the aggravating circumstance during the guilt phase of his trial is not supported by the record.

7 Next, Bohannon contends that an instruction to the jury that its sentence is merely advisory conflicts with Hurst because, he says, Hurst establishes that an "advisory recommendation" by the jury is insufficient as the "necessary factual finding that Ring requires." Hurst, ––– U.S. ––––, 136 S.Ct. at 622 (holding that the "advisory" recommendation by the jury in Florida's capital-sentencing scheme was inadequate as the "necessary factual finding that Ring requires"). Bohannon ignores the fact that the finding required by Hurst to be made by the jury, i.e., the existence of the aggravating factor that makes a defendant death-eligible, is indeed made by the jury, not the judge, in Alabama. Nothing in Apprendi, Ring, or Hurst suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range. Therefore, the making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with Hurst.

8 9 10 Bohannon further contends that the circuit court erred when it failed to limit the State's questioning of defense character witnesses about his alleged acts on the

night of the shooting. Because Bohannon made no objection on this basis at trial, we review the issue for plain error.

*8 "Plain error is

" 'error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings. Ex parte Taylor, 666 So.2d 73 (Ala.1995). The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant. Taylor.'

"Ex parte Trawick, 698 So.2d [162,] 167 [(Ala.1997)].

Ex parte Walker, 972 So.2d 737, 742 (Ala.2007). See also Ex parte Womack, 435 So.2d 766, 769 (Ala.1983).

According to Bohannon, the State's questioning was highly prejudicial in light of the facts that his state of mind was a central issue for the jury's determination and that his defense depended on persuading the jury that it should view the surveillance tape and other evidence through the lens of his law-abiding character. He further argues that the prejudice was compounded by the State's argument that each of his character witnesses admitted that a person who beats and shoots somebody is not a law-abiding, peaceful person. Accordingly, he maintains that his conviction should be reversed as a result of the circuit court's failure to limit the State's cross-examination of his character witnesses.

Our review of the record establishes that the State's questioning of Bohannon's character witnesses about his conduct immediately before and during the offense as reflected in the surveillance tape " 'did not seriously affect the fairness or integrity of the judicial proceedings.' " Ex parte Walker, 972 So.2d at 742 (quoting Ex parte Trawick, 698 So.2d 162, 167 (Ala.1997)). The record establishes that the State asked three of Bohannon's witnesses whether the content of the tape was consistent with Bohannon's reputation for good behavior. For example, the State asked a witness: "[Y]ou saw what happened out there at the Paradise Lounge ... [T]hat's not consistent with having a good reputation." The State's questions were about a surveillance tape that had already been admitted into evidence and had been viewed by the jury. Because the jury was free to draw its own conclusions about Bohannon's state of mind from its viewing of the tape, no probability exists that the alleged improper questioning substantially prejudiced Bohannon or affected the integrity of his trial. Plain error does not exist in this regard.

11 Lastly, Bohannon contends that the circuit court also committed plain error by failing sua sponte to instruct the jury on the victims' intoxication. Specifically, he argues that because the evidence supported a reasonable inference of self-defense, the circuit court should have instructed the jury that the victims' intoxication at the time of the offense may have made them aggressive. See Stevenson v. State, 794 So.2d 453, 455 (Ala.Crim.App.2001)(recognizing that " '[a] defendant is permitted to demonstrate, under a theory of self-defense, that the victim was under the influence of alcohol at the time of the fatal altercation' " and that "a defendant should be allowed a jury instruction [when requested] regarding the intoxication of the deceased, to show tendencies towards aggression, when the evidence would support a reasonable inference of self-defense" (quoting Quinlivan v. State, 555 So.2d 802, 805 (Ala.Crim.App.1989))).

*9 In Ex parte Martin, 931 So.2d 759 (Ala.2004), this Court, when addressing whether the trial court's failure to give, sua sponte, instructions to the jury explaining the scope of the victim's statements constituted plain error, recognized:

" ' "To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations.' " Ex parte Bryant, 951 So.2d 724, 727 (Ala.2002)(quoting Hyde v. State, 778 So.2d 199, 209 (Ala.Crim.App.1998)). In United States v. Young, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the United States Supreme Court, construing the federal plain-error rule, stated:

" 'The Rule authorizes the Courts of Appeals to correct only "particularly egregious errors," United States v. Frady, 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), those errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings," United States v. Atkinson, 297 U.S. [157] , at 160, 56 S.Ct. 391, 80 L.Ed. 555 [(1936)]. In other words, the plain-error exception to the contemporaneous-objection rule is to be "used sparingly, solely in those circumstances

> in which a miscarriage of justice would otherwise result." United States v. Frady, 456 U.S. at 163, n. 14, 102 S.Ct. 1584.'
>
> "See also Ex parte Hodges, 856 So.2d 936, 947–48 (Ala.2003)(recognizing that plain error exists only if failure to recognize the error would 'seriously affect the fairness or integrity of the judicial proceedings,' and that the plain-error doctrine is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result' (internal quotation marks omitted))."

931 So.2d at 767–68.

This Court has required a trial court to instruct the jury sua sponte "only [in] those instances where evidence of prior convictions [were] offered for impeachment purposes." Johnson v. State, 120 So.3d 1119, 1128 (Ala.2006)(citing Ex parte Martin, 931 So.2d at 769). In such cases, the trial court has been required to issue a sua sponte instruction because, in light of the facts in those particular cases, an instruction was considered necessary to protect the defendant from the misuse of "presumptively prejudicial" information that could be considered by the jury for a limited purpose. Ex parte Minor, 780 So.2d 796, 804 (Ala.2000).

The record in this case simply does not support a conclusion that the circuit court's failure to issue a sua sponte instruction on the victims' intoxication constituted plain error. The evidence at issue is not "presumptively prejudicial" to Bohannon, and, because the jury was instructed to consider all the evidence, Bohannon was not substantially prejudiced by the circuit court's failure to issue such an instruction. The record establishes that Bohannon's counsel argued in his opening statement that one of the victims pushed Bohannon a couple of times during the altercation and that the victims were high on methamphetamine and that that drug makes individuals aggressive. The record also establishes that evidence was admitted indicating that the victims were intoxicated and that the jury, when it viewed the surveillance tape, was able to observe the confrontation between Bohannon and the victims. Therefore, the jury was free to consider all the evidence Bohannon presented, which included evidence of the victims' intoxication and Bohannon's argument that the victims' intoxication made them act aggressively. Because the jury was instructed to consider all the evidence, the failure to sua sponte give an instruction on the victims' intoxication did not seriously affect the fairness or integrity of Bohannon's trial or substantially prejudice Bohannon. Ex parte Martin, supra; and Ex parte Henderson, 583 So.2d 305, 306 (Ala.1991). After considering the evidence and the totality of the circuit court's jury instruction, we conclude that the circuit court's failure to give sua sponte an instruction about the proper use of the victims' intoxication did not constitute plain error.

Conclusion

*10 Based on the foregoing, the judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

Bolin, Parker, Shaw, Main, Wise, and Bryan, JJ., concur.

Murdock, J., concurs in the result.

All Citations

--- So.3d ----, 2016 WL 5817692

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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

JULIUS JONES, Petitioner, vs. ANITA TRAMMELL, Warden,[1] Oklahoma State Penitentiary, Respondent.	)	Case No. CIV-07-1290-D

MEMORANDUM OPINION

Petitioner, a state prisoner currently facing execution of a sentence of death, appears with counsel and petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his convictions in the District Court of Oklahoma County, Case No. CF-1999-4373, of one count of first-degree felony murder, one count of felonious possession of a firearm, and one count of conspiracy to commit a felony. Respondent has responded to Petitioner's *Petition for a Writ of Habeas Corpus* (hereinafter "Petition"),[2] and Petitioner has replied. The State court record has been supplied.[3]

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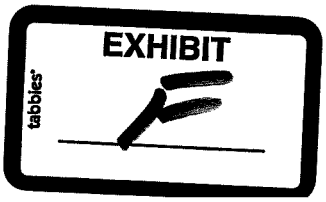
[1] Pursuant to Fed. R. Civ. P. 25(d), Anita Trammell is hereby substituted for Marty Sirmons as Respondent in this case.

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

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



PROCEDURAL HISTORY

Petitioner was convicted by a jury in the District Court of Oklahoma County, State of Oklahoma, Case No. CF-1999-4373, of one count of first-degree felony murder for the death of Paul Howell, one count of felonious possession of a firearm, and one count of conspiracy to commit a felony. For the crime of first-degree felony murder, the jury recommended the imposition of a sentence of death, finding the existence of two aggravating circumstances: (1) that the defendant knowingly created a great risk of death to more than one person; and (2) that there exists the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. Petitioner was also sentenced to fifteen years imprisonment on the felonious possession of a firearm count and twenty-five years imprisonment on the conspiracy count.

Petitioner appealed his convictions and his sentences to the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"). The OCCA affirmed Petitioner's convictions and sentence of death in a published opinion dated January 27, 2006. Jones v. State, 128 P.3d 521 (Okla. Crim. App. 2006). The OCCA granted Petitioner's petition for rehearing, but denied recall of the mandate. Jones v. State, 132 P.3d 1 (Okla. Crim. App. 2006). Certiorari was denied on October 10, 2006. Jones v. Oklahoma, 127 S.Ct. 404 (2006). Petitioner filed an Application for Post-Conviction Relief which was denied by the OCCA in an unpublished opinion. Jones v. State, No. PCD-2002-630 (Okla. Crim. App. Nov. 5, 2007).

FACTUAL BACKGROUND

Under 28 U.S.C. § 2254(e), when a federal district court addresses "an application for

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

> On Wednesday, July 28, 1999, Paul Howell was fatally shot in the driveway of his parents' Edmond home. Howell, his sister, Megan Tobey, and Howell's two young daughters had just returned from a shopping trip in Howell's Chevrolet Suburban. Howell pulled into the driveway and turned the engine off. As Tobey exited from the front passenger side, she heard a gunshot. Tobey turned to see her brother slumped over the driver's seat, and a young black male, wearing a white T-shirt, a stocking cap on his head, and bandana over his face, demanding the keys to the vehicle. Tobey rushed to get herself and Howell's daughters out of the Suburban. As Tobey escorted the girls through the carport, she heard someone yelling at her to stop, and then another gunshot. Tobey got the girls inside and summoned for help. Howell's parents ran outside to find their son lying on the driveway. His vehicle was gone. Howell died a few hours later from a single gunshot wound to the head.
>
> Two days after the shooting, Oklahoma City police found Howell's Suburban parked near a convenience store on the south side of town. Detectives canvassed the neighborhood and spoke with Kermit Lottie, who owned a local garage. Lottie told detectives that Ladell King, and another man he did not know, had tried to sell the vehicle to him the day before. Lottie realized at the time that the vehicle matched the description given in news reports about the Howell carjacking. Ladell King, in turn, told police that he had agreed to help Christopher Jordan and Jones find a buyer for a stolen vehicle. On the night of the shooting, Jordan came to King's apartment driving a Cutlass; Jones arrived a short time later, wearing a white T-shirt, a black stocking cap, and a red bandana, and driving the Suburban. King told police that Jones could be found at his parents' Oklahoma City home.

> Police then drove to Jones's parents' home, called a telephone number supplied by King, and spoke to someone who identified himself as Julius Jones. Jones initially agreed to come out and speak to police, but changed his mind. Police made several attempts to re-establish telephone contact; eventually a female answered and claimed Jones was not there. While some officers maintained surveillance at the home, others sought and obtained warrants to arrest Jones and search his parents' home for evidence. Police found a .25–caliber handgun, wrapped in a red bandana, secreted in the attic through a hole in a bedroom ceiling and found papers addressed to Jones in the bedroom. Police also found a loaded, .25–caliber magazine, hidden inside a wall-mounted door-chime housing. Further investigation revealed that the bullet removed from Howell's head, and a bullet shot into the dashboard of the Suburban, were fired from the handgun found in the attic of the Jones home.
>
> Christopher Jordan was arrested on the evening of July 30. Jones, who managed to escape his parents' home before police had secured it, was arrested at a friend's apartment on the morning of July 31. The two men were charged conjointly with conspiracy to commit a felony, and with the murder of Howell. Jordan agreed to testify against Jones as part of a plea agreement. At trial, Jordan testified that the two men had planned to steal a Chevrolet Suburban and sell it; that they followed Howell's vehicle for some time with the intent to rob Howell of it; that once Howell pulled into the driveway, Jordan stayed in their vehicle while Jones, armed with a handgun, approached the Suburban on foot; that after the robbery-shooting, Jones drove the Suburban away and told Jordan to follow him; and that Jones subsequently claimed his gun had discharged accidentally during the robbery.

Jones, 128 P.3d at 532-33.

Additional facts and testimony were submitted to the jury at trial but are not contained in the OCCA's summary. Additional facts necessary for a determination of Petitioner's claims will be set forth in detail throughout this Opinion where applicable.

PETITIONER'S CLAIMS FOR RELIEF

STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter

"AEDPA"), in order to obtain federal habeas relief once a State court has adjudicated a particular claim on the merits, Petitioner must demonstrate that the adjudication:

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

28 U.S.C. § 2254(d)(1-2).

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

at 412.

The "AEDPA's purpose [is] to further the principles of comity, finality, and federalism. There is no doubt Congress intended AEDPA to advance these doctrines." Williams v. Taylor, 529 U.S. 420, 436 (2000). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007). The deference embodied in Section 2254(d) "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 786 (2011)(citation omitted).

GROUNDS FOR RELIEF

Ground 1: Ineffective Assistance of Trial Counsel Regarding Failure to Present Evidence and Failure to Effectively Cross-Examine Witnesses.

In his first ground for relief, Petitioner complains about the effectiveness of his trial counsel. Petitioner faults his trial counsel for failing to (1) show the jury that Petitioner's hair was too short for him to be the one identified by Megan Tobey as the person who shot Mr. Howell; (2) argue that Mr. King, and not Petitioner, was most likely the one seen earlier in the day with Mr. Jordan; (3) present evidence of Mr. Jordan's confessions to the crime; and (4) demonstrate to the jury Mr. Jordan's pattern of falsehoods. Petitioner asserts that all of these complaints were presented to the OCCA either on direct appeal or in his post-conviction relief application. (Pet. at 23-24.) Respondent argues that only the third complaint

is exhausted and that the OCCA's disposition of the third complaint is neither contrary to nor an unreasonable application of Supreme Court law. As to the remaining complaints, Respondent argues for the application of the doctrine of anticipatory procedural bar. In his Reply, Petitioner, with reference to the Rule 3.11 Motion presented by his appellate counsel on direct appeal, has taken issue with Respondent's characterization of his complaints as unexhausted.

On direct appeal, appellate counsel presented numerous claims regarding trial counsel's ineffectiveness. Brief of Appellant, Case No. D-2002-534, pp. 39-57. In support of the claim set forth in direct appeal Proposition VIII, appellate counsel also filed 39 supplementary materials in an extensive Rule 3.11 Motion. Completely absent from his direct appeal brief is any reference to trial counsel's actions (or inactions) relating to the length of Petitioner's hair and who, besides Petitioner, may have been with Mr. Jordan on the day Mr. Howell was murdered (Petitioner's first and second complaints raised here). Relative to Petitioner's third complaint, appellate counsel argued on direct appeal that trial counsel was ineffective for failing to present the testimony of Emmanuel Littlejohn concerning statements Mr. Jordan allegedly made to him about the murder of Mr. Howell. Id. at 41. In Petitioner's application for post-conviction relief, post-conviction counsel expanded the claim, arguing that trial counsel was ineffective for not presenting the testimony of Christopher Berry, who, like Mr. Littlejohn, allegedly heard Mr. Jordan make statements about the murder of Mr. Howell. Original Application for Post-Conviction Relief,

Case No. PCD-2002-630, pp. 27-31.[4] Relative to his fourth complaint, appellate counsel argued on direct appeal that trial counsel was ineffective for failing to "effectively and fully" impeach Mr. Jordan with prior inconsistent statements. Appellate counsel cited inconsistent preliminary hearing testimony, and also noted that trial counsel did not interview Mr. Jordan before trial. Appellate counsel additionally argued that

> trial counsel failed to methodically and exhaustively go through Mr. Jordan's plea agreement, his prior inconsistent statements to Mr. Littlejohn and in his plea negotiation proffer dated September 12, 2000, his motivation for testifying falsely to avoid the death penalty, his motivation to obtain and retain the lenient treatment set forth in his plea agreement, his relation with Mr. King, and his subjective belief, whether true or untrue, that he would serve not more than 15 years on a life sentence with all but 30 years suspended.

Brief of Appellant, pp. 45-46 (citations omitted).

Having thoroughly reviewed the state court record, the Court agrees with Respondent that Petitioner's first and second complaints are unexhausted. Petitioner's citations to the direct appeal record do not show that these complaints were raised therein.[5] If Petitioner

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[4] Relative to this claim, Petitioner also claimed in his post-conviction application that his appellate counsel was ineffective for failing to raise this claim of trial counsel ineffectiveness. Petitioner has presented the appellate counsel portion of this claim in his Ground Six.

[5] The only citations made by Petitioner (Reply at 5-6) which have any relation to his first and second complaints are very broad, general statements about trial counsel's alleged failures. See Rule 3.11 Motion, p. 2 (As an introduction to the list of supplementary materials, reference to "a failure by trial counsel to effectively use all available evidence and/or to adequately investigate to identify evidence which was available and should have been presented or otherwise utilized at trial. . . .") and p. 4 ("Trial counsel was ineffective in failing to fully and fairly subject the prosecution's evidence at trial to the crucible of meaningful adversarial testing through cross-examination."). These generalized statements, which are completely devoid of the factual bases of Petitioner's first and second complaints, in no way alert the OCCA to Petitioner's claims regarding trial counsel's actions relating to the length of Petitioner's hair and who, besides Petitioner, may have been with Mr. Jordan on the day Mr. Howell was murdered. See Bland v. Sirmons, 459 F.3d 999, 1011 (10th Cir. 2006) (citing Picard v Connor, 404 U.S. 270, 275 (1971) (claim is unexhausted when it has not

were to return to State court with these claims now, it is clear, as Respondent alleges, that they would be procedurally barred due to Petitioner's failure to present them in his initial post-conviction application. See Anderson v. Sirmons, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) ("'Anticipatory procedural bar' occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it.").

The only way for Petitioner to circumvent this anticipatory procedural bar is by making one of two showings: he may either demonstrate "cause and prejudice" for his failure to raise the claims in his initial application for post-conviction relief, or he may show that failure to review his claims will result in a "fundamental miscarriage of justice." Id. at 1240. Petitioner has not alleged cause and prejudice, but has attempted to satisfy the fundamental miscarriage of justice exception by asserting his innocence. (Reply at 6-7.) The fundamental miscarriage of justice exception addresses those rare instances "where the State has convicted the wrong person of the crime." Sawyer v. Whitley, 505 U.S. 333, 340 (1992). Thus, to meet the exception, a petitioner must make "a colorable showing of factual innocence." Beavers v. Saffle, 216 F.3d 918, 923 (10th Cir. 2000). This requires Petitioner to "show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Schlup v. Delo, 513 U.S. 298, 327 (1995). Petitioner has failed to demonstrate facts to satisfy this demanding burden. The length of Petitioner's hair compared to Mr. Jordan's is not a persuasive showing of actual innocence. Further, the identity of someone

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been "fairly presented" to the state courts)).

possibly seen earlier in the day with Mr. Jordan also lacks persuasiveness as to the identity of the shooter and his accomplice in a different location hours after the crime. These facts, even if accepted, do not persuasively show Petitioner is actually innocent of the crimes in light of the amount of evidence pointing to his guilt and, thus, do not justify a circumvention of an anticipatory procedural bar to his first and second complaints.

Regarding Petitioner's fourth complaint, the Court disagrees with Respondent that this complaint is unexhausted. While Petitioner's fourth complaint does not mirror the claim raised by appellate counsel on direct appeal regarding the impeachment of Mr. Jordan, it is in essence the same claim. On direct appeal, appellate counsel argued that trial counsel was ineffective in his cross-examination of Mr. Jordan in that he did not fully and effectively discredit him as he could have from available evidence. Here, although Petitioner cites to some additional available evidence which might have been used to discredit Mr. Jordan, the underlying claim is the same.

To prevail on a claim of ineffective assistance of counsel under the Sixth Amendment, Petitioner must first show that his counsel's representation fell below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. 668, 688 (1984). In so doing, Petitioner must overcome the "strong presumption" that his counsel's conduct fell within the "wide range of reasonable professional assistance" that "'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)). He must, in other words, overcome the presumption that his counsel's conduct was constitutionally effective. United States v. Haddock, 12 F.3d 950, 955 (10th Cir. 1993). A

claim of ineffective assistance "must be reviewed from the perspective of counsel at the time," Porter v. Singletary, 14 F.3d 554, 558 (11th Cir. 1994), and, therefore, may not be predicated on "'the distorting effects of hindsight.'" Parks v. Brown, 840 F.2d 1496, 1510 (10th Cir. 1987) (quoting Strickland, 466 U.S. at 689).

If constitutionally deficient performance is shown, Petitioner must then demonstrate that "there is a 'reasonable probability' the outcome would have been different had those errors not occurred." Haddock, 12 F.3d at 955 (citing Strickland, 466 U.S. at 688, 694, and Lockhart v. Fretwell, 506 U.S. 364, 369-70 (1993)). In the specific context of a challenge to a death sentence, the prejudice component of Strickland focuses on whether "the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695; quoted in Stevens v. Zant, 968 F.2d 1076, 1081 (11th Cir. 1992). Petitioner bears the burden of establishing both that the alleged deficiencies unreasonably fell beneath prevailing norms of professional conduct and that such deficient performance prejudiced his defense. Strickland, 466 U.S. at 687; Yarrington v. Davies, 992 F.2d 1077, 1079 (10th Cir. 1993). In essence, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. "Counsel's performance must be 'completely unreasonable' to be constitutionally ineffective, 'not merely wrong.'" Welch v. Workman, 639 F.3d 980, 1011 (10th Cir. 2011) (quoting Hoxsie v.Kerby, 108 F.3d 1239, 1246 (10th Cir. 1997)). "Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky,

559 U.S. 356, __, 130 S. Ct. 1473, 1485 (2010).

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

Harrington v. Richter, 562 U.S. __, __, 131 S. Ct. 770, 788 (2011).

In addressing the merits of Petitioner's fourth complaint, the OCCA held as follows:

> Next, Jones claims that trial counsel should have cross-examined Jordan more thoroughly, in both the guilt and punishment stages of trial, with the aim of showing the jury that Jordan was slanting his testimony in hopes of bettering his own situation. Counsel did cross-examine Jordan at length, pointing out inconsistencies in his story and otherwise attacking his credibility. Jones's arguments on appeal are nothing more than complaints about exactly how that impeachment should have been accomplished. Jordan admitted in guilt-stage cross-examination that many of the details he had previously given to police and his own attorney were false; Jones's defense counsel methodically went over many of these untruths. Jordan also admitted, on cross-examination, that he had previously lied about his involvement in this case to help himself out. In the punishment stage, trial counsel cross-examined Jordan again about his plea negotiations, and how he stood to gain from helping the State convict Jones. The fact that counsel did not ask every

> question Jones is now able to formulate on appeal is not proof of deficient performance.

Jones, 128 P.3d at 546-47.[6] Petitioner has failed to show that this determination by the OCCA is contrary to, or an unreasonable application of, clearly established Supreme Court precedent. Accordingly, relief is denied as to this claim.

Petitioner's third complaint was aptly addressed by the OCCA on both direct appeal and on consideration of his post-conviction application. On direct appeal, the OCCA held as follows:

> Jones goes on to attack trial counsel's decision not to present the testimony of Emmanuel Littlejohn. A multiple felon and convicted murderer, Littlejohn briefly shared a county jail cell with co-defendant Jordan while awaiting capital resentencing in his own first-degree murder case. Littlejohn told defense investigators that Jordan admitted he was falsely throwing blame on Jones, that Jordan said Jones was not involved in the Howell murder at all, and that Jordan had even gone so far as to hide the murder weapon and other incriminating evidence in the Joneses' home himself. The fact that defense counsel actually did investigate Littlejohn's claim before trial reduces Jones's argument to one over trial strategy which, as Strickland instructs, is much more difficult to attack. Littlejohn's criminal history presented obvious credibility problems. While he had nothing to gain from testifying on Jones's behalf, he had little to lose by perjuring himself with claims that were impossible to corroborate. Moreover, the image of Jordan planting evidence in the attic of the Jones family home, without their knowledge, might have been somewhat difficult for the jury to believe. We find nothing unreasonable about counsel's decision to forgo Littlejohn's assistance.

Jones, 128 P.3d at 546. On consideration of Petitioner's post-conviction application, the

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[6] On direct appeal, Petitioner challenged trial counsel's cross-examination of Mr. Jordan in both stages of his bifurcated trial. As shown by this citation to the OCCA's opinion, the OCCA addressed both aspects of the claim in a single disposition. In his petition for habeas relief, however, Petitioner only challenges trial counsel's performance in the guilt stage.

OCCA held as follows:

> Next, Petitioner claims trial counsel was ineffective for failing to investigate and present [a witness] at trial, and that appellate counsel was ineffective for not recognizing and advancing this claim on direct appeal. Specifically, Petitioner claims that the testimony of Christopher Berry . . . could have made a difference in the outcome of the trial. At the time of Petitioner's trial, Berry was being held in the Oklahoma County Jail on a charge of Child Abuse Murder. He was later convicted of that charge and sentenced to life in prison without the possibility of parole. Berry claims, by affidavit, that he overheard Petitioner's co-defendant, Christopher Jordan, boasting that he, not Petitioner, was the triggerman in the homicide with which they were jointly charged.
>
> Petitioner made a similar claim on direct appeal, alleging trial counsel was ineffective for not presenting the testimony of another jail inmate, Emmanuel Littlejohn, who also allegedly heard Jordan boast about being the triggerman. We rejected that claim, because the inmate's credibility was suspect and the details of the account were specious. Berry suffers from the same credibility problems that Littlejohn did. Nor do we agree with Petitioner's argument that Berry's claim necessarily "corroborates" Littlejohn's. Berry's affidavit suggests that Jordan admitted Petitioner was involved in the murder, while according to Littlejohn, Jordan denied that Petitioner had any involvement. Taken together, these inmates' claims show only one thing: that Christopher Jordan changed his story to suit his own needs. Yet this much was already clear to the jury, through trial counsel's extensive cross-examination of Jordan, who testified against Petitioner at trial.

Jones, No. PCD-2002-630, slip op. at 10-11 (citations to the direct appeal opinion omitted). Once again, Petitioner has failed to show that the OCCA rendered a decision which is contrary to, or an unreasonable application of, Supreme Court precedent. Accordingly, relief is denied as to this claim.

In sum, the Court finds that Petitioner is not entitled to relief on Ground One. For the reasons set forth above, Petitioner's first and second complaints are procedurally barred and his third and fourth complaints are denied.

Ground 2: Ineffective Assistance of Trial Counsel Regarding Suppression of Evidence.

In his second ground for relief, Petitioner makes an additional claim regarding his trial counsel's alleged ineffectiveness. He claims that because trial counsel failed to make necessary requests and objections which would have shown that a search warrant contained materially false information, counsel was ineffective and habeas relief is warranted.[7] Respondent responds that the OCCA's determination that counsel was not ineffective for failing to move to suppress the evidence pursuant to Franks v. Delaware, 438 U.S. 154 (1978), is neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court.

The facts leading up to the search of Petitioner's home and the underlying basis for his claim are best summarized by the OCCA's thorough analysis and determination of Petitioner's claim on direct appeal:

> In Proposition One, Jones claims that evidence seized from his parents' home pursuant to a search warrant was improperly admitted. On July 30, 1999, police officers, believing Jones was present, surrounded Jones's parents' home and attempted to make contact with Jones by telephone. An officer spoke with an individual who identified himself as Jones, and some time later, Jones's parents, sister and brother came out of the house. Jones's father told police that Jones was not in the house and invited the police inside to look for him. The officers informed Jones's parents they would wait on a search warrant due to safety concerns. Thereafter, officers obtained a search warrant. A police tactical team entered the house around 9:30 p.m. and declared it secure by 10:00 p.m. Jones was not inside. After that, the search team entered the house and conducted the search.

[7] The search warrant ultimately lead to the discovery of the gun used in the shooting and some of its ammunition.

The search yielded items seen by the victim's sister during the crime, clothing items that King saw Jones wearing thirty minutes after the crime, a semi-automatic, chrome-finished pistol consistent with a gun King said Jones habitually carried, a red bandana, the pistol's magazine and bullets, a dark green and a black stocking cap, and a white tee shirt with black trim.

Jones filed a motion to suppress all the evidence prior to trial, arguing the affidavit for search warrant lacked probable cause, night-time authorization was improper under 22 O.S.Supp.1999, § 1230, and the night-time search was improper. The trial court denied the motion to suppress. At trial, Jones objected to the admission of the evidence on the basis that the night-time search was not supported by sufficient facts.

Jones claims the information in the affidavit was insufficient to ensure the issuing magistrate had a substantial basis for concluding that probable cause existed. He complains that the affidavit did not contain a factual basis establishing that evidence would be found in Jones's parents' residence and did not include any information establishing the reliability of the statement from, or the veracity of, Ladell King. Jones also claims his trial counsel was ineffective for failing to object to the search warrant on the basis that the affidavit contained deliberate false and/or misleading information. An argument raised in support of a motion to suppress which is not raised at trial is waived. Young v. State, 1998 OK CR 62, ¶ 22, 992 P.2d 332, 339. Therefore, we review Jones's claim that the affidavit was insufficient to establish probable cause for plain error. Cheatham v. State, 1995 OK CR 32, ¶ 48, 900 P.2d 414, 427.

We give a magistrate's finding of probable cause great deference. Mollett v. State, 1997 OK CR 28, ¶ 14, 939 P.2d 1, 7. The residence of a person suspected of a crime is a natural place for concealing evidence of that crime. Id., 1997 OK CR 28, ¶ 15, 939 P.2d at 7. Further, facts to establish the reliability of information obtained from King was not necessary, because King was named in the affidavit as the giver of the information. Caffey v. State, 1983 OK CR 39, ¶ 11, 661 P.2d 897, 900. Upon review, we find the information set forth in the affidavit sufficient to support the magistrate's finding of probable cause and issuance of the search warrant.

We also find trial counsel was not ineffective for failing to object and request a Franks hearing to determine whether the police knowingly or with reckless disregard for the truth included false or misleading information in the affidavit or omitted critical information. Jones submits the police intentionally

> omitted critical information from the affidavit – that the police knew Jones had left the residence prior to obtaining the search warrant. The record shows the police had Jones's residence surrounded and attempted contact with Jones, whom they believed was inside, at the time other officers were preparing the affidavit. Around 4:30 p.m., Jones's father told police Jones was not inside. This information was not included in the affidavit which was presented to the magistrate around 7:00 p.m.
>
> In Franks v. Delaware, the Supreme Court held that an affidavit supporting a factually sufficient search warrant might be attacked upon allegations that the affidavit contained intentional lies or reckless disregard for the truth. If the inaccuracies are removed from consideration and there remains in the affidavit sufficient allegations to support a finding of probable cause, the inaccuracies are irrelevant. Id., 438 U.S. 154, 171, 98 S.Ct. at 2684, 57 L.Ed.2d 667. To determine whether the inaccuracies are irrelevant, we ask whether the warrant would have been issued if the judge had been given accurate information. Wackerly, 2000 OK CR 15, ¶ 13, 12 P.3d at 9. We find, even had the affidavit included Jones's parents' claim that Jones had left the home, a substantial basis for the issuance of the warrant would have existed and the warrant would have properly been issued.
>
> The magistrate had a substantial basis for concluding that probable cause existed. No plain error occurred. Further, trial counsel's failure to attack the sufficiency of the affidavit at trial and request a Franks hearing does not constitute deficient performance, as such an objection would have failed. Phillips v. State, 1999 OK CR 38, ¶ 104, 989 P.2d 1017, 1044.

Jones, 128 P.3d at 535-37 (footnotes omitted).

As stated previously, Petitioner bears the burden when claiming ineffective assistance of counsel of demonstrating that the OCCA's determination was unreasonable. He must establish both that the alleged deficiencies unreasonably fell beneath prevailing norms of professional conduct and that such deficient performance prejudiced his defense. Strickland, 466 U.S. at 686. In the case of a claim of ineffectiveness for failing to present a Fourth Amendment claim, Petitioner's burden increases even more:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice.

Kimmelman v. Morrison, 477 U.S. 365, 375 (1986).

Petitioner claims that at the time law enforcement were obtaining the search warrant, the police had "uncontradicted information" he was not at the residence. In support of this allegation, Petitioner cites to his parents' testimony at the suppression hearing.[8] His parents testified they looked throughout the house and then told law enforcement that Petitioner was not at their residence. Petitioner further claims the State later agreed in its Response to Defendant's Motion to Suppress (O.R. at 213) that the officers knew the house was unoccupied beginning at or about 4:00 p.m. on July 30. (Pet. at 25.)[9]

Petitioner has not demonstrated the OCCA's determination to be unreasonable, nor has he shown that law enforcement made false statements in the affidavit. In Franks, the

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[8] This is not an instance where trial counsel completely failed to attempt to suppress the evidence obtained pursuant to the search warrant. Prior to trial, trial counsel moved to suppress the evidence on the grounds that the search was improperly conducted on a residence during the night and that the magistrate judge did not make and articulate specific findings necessary to authorize a night-time search. Trial counsel specifically agreed with the prosecutor, however, that the hearing was not a Franks hearing. (Tr., 8/11/2000 and 8/15/2000, p. 25.)

[9] The State objects to Petitioner's characterization of its Response. One of the State's arguments against the claim that the warrant was improperly executed at night was that the statute requiring warrants on occupied dwellings to be served during the day was not violated because the house was not occupied when the warrant was served. Respondent states that the Response did not contain an admission the police knew Petitioner was not there. Instead, in hindsight, the prosecutors knew at the time of the filing of the Response that Petitioner had fled the house and that the search was actually conducted on an unoccupied dwelling.

Supreme Court held that a defendant is entitled to a hearing regarding a warrant's sufficiency to sustain probable cause if allegations of deliberate falsehood or of reckless disregard for the truth on the part of an affiant are specifically identified in the affidavit and accompanied by a statement of supporting reasons. If these requirements are met, and when the allegedly false or reckless material is set to one side there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. Alternatively, if the remaining content is insufficient, the defendant is entitled to a hearing. Franks, 438 U.S. at 171-72.[10] "Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." Id. at 171.

The testimony and arguments offered in support of his claim were considered by the State court, along with Detective Flowers' testimony at the suppression hearing and at the trial. Detective Flowers testified at trial that when he first arrived at Petitioner's parents' home he called Petitioner's phone number and spoke with someone who identified himself as Petitioner. Detective Flowers told Petitioner the house was surrounded and requested that he come outside. The front door opened and someone looked out, but then the door was shut. Despite later being told otherwise by Petitioner's parents, Detective Flowers was concerned that Petitioner was still in the house. According to his testimony, Detective Flowers did not know Petitioner was not in the house until after the tactical team entered the home and

[10] "Whether he will prevail at that hearing is, of course, another issue." Id.

completed their sweep of the premises. (Tr., Vol. VII, pp. 177-88, 206.)[11] Detective Flowers' trial testimony was consistent with the concerns he expressed in his testimony at the suppression hearing – concerns that at the time, Petitioner was armed and barricaded in the house. (Tr., 8/11/2000 and 8/15/2000, pp. 164-65.)

Petitioner has also failed to demonstrate the OCCA's determination was unreasonable that, even had the affidavit included Petitioner's parents' statements he had left the home, a substantial basis for the warrant would have existed and the warrant would have been properly issued. Further, as determined by the OCCA, since an objection based on Franks to the affidavit would have failed, trial counsel's failure to request such a hearing does not constitute deficient performance. As Petitioner has failed to demonstrate the OCCA's determination is unreasonable as to both his Fourth Amendment claim and his Sixth Amendment claim, his second ground for relief is denied in its entirety.

Ground 3: Prosecutorial Misconduct.

In his third ground for relief, Petitioner claims that during closing arguments the prosecutor improperly gave her personal opinion of his guilt, vouched for the credibility of witnesses, misstated testimony, engaged in speculation, and started a demonstration as to how the shooting occurred by pointing her finger at a juror's head.[12] He claims these and

[11] Indeed, it seems illogical that law enforcement would utilize a tactical team and a negotiator if they knew the house was unoccupied.

[12] Petitioner's claim regarding the prosecutor's demonstration with a juror is included only in the caption to his ground for relief. It was neither identified nor argued in the body of his claim.

other instances of prosecutorial misconduct deprived him of his right to due process of law under the Eighth and Fourteenth Amendments. (Pet. at 28-30)[13]

Petitioner raised these claims of prosecutorial misconduct on direct appeal. The OCCA held:

> In Proposition Eleven, Jones argues various trial errors and prosecutorial misconduct deprived him of a fair trial and a reliable sentencing proceeding and warrants a new trial or modification of his sentences. Jones's complaints include: improper display of emotion, improper personal opinion, misstating evidence, misleading comments, arguing guilt by association, speculation, going outside record, inflammatory demonstration, arguing that Jones committed unadjudicated crimes without a reliable basis, evoking emotional response, misstatement of applicable law and improper argument.
>
> Many of the errors claimed by Jones were not objected to at trial; therefore, we review those claims for plain error. Banks v. State, 2002 OK CR 9, ¶ 41, 43 P.3d 390, 401. After carefully reviewing the arguments and record, we find no plain error. Some of the errors claimed by Jones were objected to at trial and the objections were sustained by the trial court, most with instructions or admonishments, which cured any error that may have occurred. Slaughter, 1997 OK CR 78, ¶ 110, 950 P.2d at 869.
>
> Some of the instances Jones complains of were proper comments on the evidence, reasonable inferences based on the evidence, or evidentiary rulings by the trial court that were not an abuse of discretion. Bland v. State, 2000 OK CR 11 ¶ 97, 4 P.3d 702, 728. The jury was properly instructed that it was the finder of fact and that attorney argument was not evidence. Juries are presumed to follow their instructions. Turrentine v. State, 1998 OK CR 33, ¶ 26, 965 P.2d 955, 968. The comments were the typical sort of comments made during the normal course of closing argument and, as such, these instances of alleged improper comment fall within the broad parameters of effective advocacy and do not constitute error. Matthews v. State, 2002 OK CR 16, ¶ 38, 45 P.3d 907, 920.
>
> We address one complaint concerning an inflammatory demonstration

[13] Petitioner does not identify the "other instances" he refers to in his claim for relief.

> by the prosecutor. During sentencing stage final closing argument, the prosecutor, in describing how the victim was killed, stated Jones held the gun to Howell's head while simultaneously pointing her finger at a juror's head, as if demonstrating a gun pointed towards the juror's head. Trial counsel objected, but the prosecutor continued the demonstration using co-counsel as the victim.
>
> This Court has previously upheld demonstrations that are based on the evidence presented at trial and not theatrical demonstrations. Gilbert v. State, 1997 OK CR 71, ¶ 94–95, 951 P.2d 98, 121. This demonstration was an attempt to illustrate the shooting based upon the evidence presented at trial; however, the conduct involving a juror cannot be condoned. Still, we find it was not so egregious as to elicit an emotional response rather than a rational judgment from the juror or the jury and it was not so prejudicial as to deprive Jones of a fair sentencing proceeding.
>
> "Allegations of prosecutorial misconduct will not cause a reversal of judgment or modification of sentence unless their cumulative effect is such as to deprive the defendant of a fair trial and fair sentencing proceeding." Spears v. State, 1995 OK CR 36, ¶ 60, 900 P.2d 431, 445. This Court looks at the entire record to determine whether the cumulative effect of improper conduct by the prosecutor prejudiced an appellant causing plain error. Romano v. State, 1995 OK CR 74, ¶ 54, 909 P.2d 92, 115. Having reviewed the entire record, we find neither reversal nor modification is warranted on this proposition.

Jones, 128 P.3d at 544-45.

The deferential standard of review under 28 U.S.C. § 2254(d) is required since the OCCA adjudicated Petitioner's prosecutorial misconduct claim on the merits. See Walker v. Gibson, 228 F.3d 1217, 1241 (10th Cir. 2000), abrogated on other grounds by Neill v. Gibson, 278 F.3d 1044, 1057 (10th Cir. 2001). Petitioner does not allege that the prosecutor's misconduct denied him a specific constitutional right. The appropriate standard, therefore, is "'the narrow one of due process, and not the broad exercise of supervisory power.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v.

DeChristoforo, 416 U.S. 637, 642 (1974)). Accordingly, "it is not enough that the prosecutor's remarks were undesirable or even universally condemned." Darden, 477 U.S. at 181 (citation omitted). A prosecutor's improper remarks require reversal of a conviction or sentence only if the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. The fundamental fairness inquiry requires an examination of the entire proceedings and the strength of the evidence against Petitioner, both as to the guilt stage and the sentencing phase. Id. at 643 (see also Littlejohn v. Trammell, 704 F.3d 817, 837 (10th Cir. 2013)).

In almost every instance identified by Petitioner of statements that are claimed to be improper, the prosecutor prefaced her argument with words such as "submit" and "contend." During the first stage of trial, the prosecutor stated: "For instance, the State of Oklahoma contends that we know Julius Jones is the shooter in this case. How do we know that?" (Tr., Vol. X, p. 48) The statement was met with an objection and the trial court ordered the prosecutor to rephrase the statement. It then admonished the jury: "Ladies and Gentlemen of the jury, I'll remind you that anything that the attorneys say is for purposes of persuasion only. You are the trier of fact. And you will determine what the facts are in this case." Id. A later statement of the prosecutor's summation of her opinion of one of defendant's contentions regarding a disputed fact was met with an objection that her statement was improper. The prosecutor offered to and did rephrase the statement, to which no subsequent objection was raised. (Tr., Vol. X, pp. 61-62)

Petitioner next complains the prosecutor inaccurately quoted the testimony of his

girlfriend, Analiese Presley. These statements identified by Petitioner were the prosecutor's summation of the testimony and were also not met with an objection. (Tr., Vol. X, pp. 81, 91) As Petitioner identifies in his Petition, "some correction of the attribution to the girlfriend was attempted (Pet. at 28): "But as the Judge told you, what we say is not evidence. So I'm going to tell you a few things that I remember that the State of Oklahoma apparently remembers different from the testimony. But what I say about it, what they say about it doesn't matter. It's what you remember being said." (Tr., Vol. X, p. 106)

Petitioner also claims the prosecutor speculated as to what the victim, Paul Howell, would have done had he been asked, and that the statement that he would have acquiesced in the taking of his vehicle was made as an encouragement to the jury to base its decision in part on sympathy. The prosecutor's statement that Paul Howell was not given a chance to give up the vehicle, that he would have done so voluntarily, and that he did not have to die for it, was made during the explanation of the elements of felony murder to argue a taking by force. This statement was also not met with any objection. (Tr., Vol. X, pp. 63-64) The same is true regarding a similar statement made by the prosecutor during the second stage closing argument. (Tr., Vol. XV, p. 47)

Petitioner last claims the prosecutor encouraged the jury to disregard mitigating evidence and offered her opinion that the aggravating circumstances outweighed mitigation when the prosecutor submitted: (1) that the defendant's age did not reduce his level of blame (Tr., Vol. XV, p. 188); (2) that whether or not the killing was premeditated did not reduce the moral culpability of the murder (Tr., Vol. XV, p. 188); (3) that the defendant's

background of high school, Sunday school, and work experience did not extenuate the manner and reason for which Paul Howell was killed (Tr., Vol. XV, p. 189); and, (4) that the aggravating circumstances far outweighed any mitigation offered by the defense. (Tr., Vol. XV, p. 188)

As determined by the OCCA, these statements were all typical of normal closing argument and were reasonable inferences based on the evidence presented at trial. Additionally, the jury was reminded that the comments of counsel were not evidence and that the jury was to rely on its own recollection as to the testimony and evidence presented at trial. Petitioner has not demonstrated that the OCCA's determination of these claims is unreasonable.

As to the prosecutor's demonstration of the shooting utilizing a juror, Petitioner has offered nothing to demonstrate the OCCA's determination on that issue is unreasonable. Taken together with all of the instances of alleged improper statements and compared to the evidence presented at trial, Petitioner has not shown the cumulative effect of these comments and of the demonstration so infected his trial with unfairness as to deprive him of a fair trial. Accordingly, Petitioner's third ground for relief is denied.

Ground 4: Removal of Prospective Juror for Cause.

In his fourth ground for relief, Petitioner argues the trial court improperly excused prospective juror McPeak for cause in violation of Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Respondent asserts the OCCA's determination is neither contrary to, nor an unreasonable application of, clearly established federal law.

The Sixth and Fourteenth Amendments prohibit the exclusion of jurors from a capital trial "simply because they voice[] general objections to the death penalty or express[] conscientious or religious scruples against its infliction." Witherspoon v. Illinois, 391 U.S. 510, 522 (1968). A dismissal of a juror contrary to Witherspoon is a constitutional error requiring vacation of a death sentence. Rivera v. Illinois, 556 U.S. 148, 161 (2009). A juror may be dismissed for cause if his "'views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 420 (1985) (citation and emphasis omitted). A trial court's determination of a juror's ability to obey instructions and fulfill his duties is subject to deference: "[W]hen there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly is by its assessment of the venireman's demeanor, is entitled to resolve it in favor of the State.'" Uttecht v. Brown, 551 U.S. 1, 7 (2007) (alterations omitted) (quoting Wainwright, 469 U.S. at 434). In addition, a trial judge's decision on juror bias is a factual determination subject to the presumption of correctness in 28 U.S.C. § 2254(e)(1). Witt, 469 U.S. at 429; see also Cannon v. Gibson, 259 F.3d 1253, 1280 (10th Cir. 2001).

The OCCA considered Petitioner's claim on direct appeal and denied relief, concluding that while the juror's initial responses were ambiguous, upon further questioning by the trial court, the juror "clearly stated he could not and would not vote for the death penalty under any circumstances." Jones, 128 P.3d at 534. A review of the record demonstrates that the OCCA's decision is not contrary to, nor an unreasonable application

of, clearly established federal law. During voir dire, the following occurred between the trial judge and prospective juror McPeak:

> THE COURT: Alright. And you have – have you heard me talk about these two groups of people, about these always and never groups? Mr. McPeak, do you believe you fall into either one of those categories?
>
> PROSPECTIVE JUROR MCPEAK: Yes, I do.
>
> THE COURT: All right. Which category is it that you believe that you fall into?
>
> PROSPECTIVE JUROR MCPEAK: I believe I would fall into the one that I would never vote for the death penalty.
>
> THE COURT: Okay. Do you understand that Oklahoma law provides that you must listen to the evidence?
>
> PROSPECTIVE JUROR MCPEAK: Yes, sir.
>
> THE COURT: And that you must be able to follow the law in this case?
>
> PROSPECTIVE JUROR MCPEAK: Yes, sir.
>
> THE COURT: Are you telling me that you would not be able to listen to the evidence and you would not be able to follow the law?
>
> PROSPECTIVE JUROR MCPEAK: I would be able to.
>
> THE COURT: Pardon me?
>
> PROSPECTIVE JUROR MCPEAK: I would be able to.
>
> THE COURT: You would be able to follow the law?
>
> PROSPECTIVE JUROR MCPEAK: Yes.
>
> THE COURT: And if the law told you that you have to consider and give consideration to all three possible punishments, including the death penalty, that you would be able to consider all three possible punishments?

PROSPECTIVE JUROR MCPEAK: Yes, sir, I would. I would consider the other two before I considered the death penalty.

THE COURT: Can you give meaningful consideration to all three punishments?

PROSPECTIVE JUROR MCPEAK: Yes, sir.

THE COURT: I thought that you told me, Mr. McPeak, that you would never – that you fell into this never category, that under any circumstances after the evidence has been presented, that you would not ever vote for the death penalty.

PROSPECTIVE JUROR MCPEAK: Well, I wouldn't vote for the death penalty, but I would vote for the other two before I voted for the death penalty, if it came to that.

THE COURT: Okay. Mr. McPeak, you are kind of confusing me here a little bit.

PROSPECTIVE JUROR MCPEAK: Well, I don't – I guess what I mean is that I would not vote for the death penalty, no.

THE COURT: After listening to the evidence?

PROSPECTIVE JUROR MCPEAK: Yes.

THE COURT: And if the law told you that you had to give meaningful consideration to all three possible punishments, give meaningful consideration to all three, what you're telling me that is that you would under no circumstances vote for the death penalty?

PROSPECTIVE JUROR MCPEAK: Yes.

THE COURT: All right. Counsel, do you want to approach? Let me ask you this question, are you unequivocal in your answer?

PROSPECTIVE JUROR MCPEAK: What do you mean by that?

THE COURT: In other words, are you firm in your answer[?]

PROSPECTIVE JUROR MCPEAK: Yes, sir.

(Tr., Vol. 2(A), pp. 156-59).

As the record makes clear, the juror unequivocally and firmly stated he could not vote to impose the death penalty. The trial court was well within its province when it excused the juror for cause, as his views on serving on a capital jury would prevent or substantially impair the performance of his duties as a juror. See Witt, 469 U.S. at 420. Given the substantial deference given to a trial court's excusal of prospective jurors and this Court's standard of review under the AEDPA of the OCCA's determination, Petitioner's claim fails. See 28 U.S.C. § 2254(d); Brown, 551 U.S. at 7.

Petitioner also argues that the trial court did not give Petitioner an opportunity to question the juror regarding his responses. However, Petitioner does not provide clearly established federal law in support of this claim. See Brown v. Sirmons, 515 F.3d 1072, 1081 (10th Cir. 2008) (rejecting argument on habeas review that trial court was required to permit petitioner an opportunity to rehabilitate potential jurors). Accordingly, Petitioner's fourth ground for relief is denied in its entirety.

Ground 5: Absence From Various Stages of Proceedings.

Petitioner claims his Constitutional rights to be present at all critical stages of his trial were violated in several instances without an express personal waiver and against his wishes. Specifically, he asserts he was not present at the following: (1) a hearing regarding which laboratory the State should use to do destructive DNA testing; (2) a hearing regarding a witness' testimony as to whether he testified truthfully on the subject of expected leniency

on a pending charge and whether another witness disclosed all of his pending charges; (3) a hearing regarding possible suspicious telephone calls received by some of the jurors; (4) a hearing regarding jury instructions; (5) an admonition by the trial court to the jurors not to discuss the case during a break in deliberations to allow the jurors to move their cars out of the parking garage; and, (6) a hearing regarding a possible comment made by one of the jurors indicating that he may have already made up his mind about sentencing before hearing all of the evidence. (Pet. at 32; Motion Hearing 3/8/01, pp. 3-8; Tr., Vol. V, pp. 127-34; Tr., Vol. VI, pp. 33, 88; Tr., Vol. VII, pp. 5-137; Tr., Vol. X, pp. 3-49, 184-85; Tr., Vol. XIII, pp. 27-91).[14] Respondent responds that the OCCA's determination was not unreasonable in light of clearly established Supreme Court precedent.

Petitioner raised this claim on direct appeal. The OCCA held:

> Jones argues, in Proposition Ten, that he is entitled to a new trial because he was deprived of the right to be present at all critical stages of his trial in violation of due process and Oklahoma statute. Jones claims he did not knowingly and voluntarily waive his right to be present at various hearings conducted during the course of his trial. Jones states his trial counsel unilaterally waived his right to be present during certain court proceedings and on numerous other occasions the record is silent as to Jones's presence or waiver by trial counsel. Jones claims his absence on these occasions prevented him from consulting with counsel which constitutes a due process violation and a structural flaw in the proceedings against him.
>
> A defendant's right to be present "at the trial" is protected by statute. 22 O.S.2001, § 583; Dodd v. State, 2004 OK CR 31, ¶ 20, 100 P.3d 1017, 1027; Ryder v. State, 2004 OK CR 2, ¶ 29, 83 P.3d 856, 864; Perry v. State,

[14] Petitioner characterizes these instances as various court proceedings "including motion hearings, discussions of various legal issues, discussions of mistrial requests, taking up issues of possible jury contamination, and conferencing regarding instructions." (Pet. at 32.)

1995 OK CR 20, ¶ 25, 893 P.2d 521, 527–28. The "right to be present" that Jones claims was violated is rooted primarily in a defendant's Sixth Amendment right to confront the witnesses against him. Dodd, id. A defendant's Fifth Amendment due process right is violated only if the defendant's absence from some portion of the proceedings is shown to have impaired his ability to defend himself. Id.; see United States v. Gagnon, 470 U.S. 522, 526, 105 S.Ct. 1482, 1484, 84 L.Ed.2d 486 (1985); Snyder v. Massachusetts, 291 U.S. 97, 105–106, 54 S.Ct. 330, 332–33, 78 L.Ed. 674 (1934). This "right to be present" has limitations, however. Dodd, id.

> An accused does not have an absolute constitutional right to be present at every in camera discussion between court and counsel, even during the trial itself. Davis v. State, 1988 OK CR 153, ¶ 12, 759 P.2d 1033, 1036. Nor does the statutory right to be present "at the trial" extend to *in camera* hearings or other matters outside the jury's presence. Reid v. State, 1970 OK CR 149, 478 P.2d 988, 999–1000, modified 507 P.2d 915.

Dodd, 2004 OK CR 31, ¶ 20, 100 P.3d at 1027–1028.

The record shows Jones was present for all critical stages. Jones was present at all times the jury was in the courtroom, except for one occasion when the jury was brought into the courtroom for the sole purpose being dismissed for the day. A knowing and voluntary waiver of his presence was not necessary for the pretrial hearings, motion hearings or the *in camera* hearings. Dodd, id. Trial counsel for Jones was always present at these hearings.

A defendant must be allowed to be present where his presence "bears, or may be fairly assumed to bear, a relation, reasonably substantial, to his opportunity to defend." Lockett v. State, 2002 OK CR 30, ¶ 9, 53 P.3d 418, 423, quoting Snyder v. Massachusetts, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). In Lockett, this Court said "it did not intend to hold in any way that 'the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow.' " Id. (quoting Snyder, 291 U.S. at 106–107, 54 S.Ct at 332). Appellant here has not specifically shown how his presence was necessary at these various hearings or how he was deprived of his opportunity to defend his case by his absence. We find no statutory violation, no due process violation and no error.

Jones, 128 P.3d at 543-44.

A defendant has a constitutional right to be present at trial proceedings whenever his presence has a reasonably substantial relation to the fullness of his opportunity to defend against the charge. Kentucky v. Stincer, 482 U.S. 730, 745 (1987) (defendant's rights under the Confrontation Clause of the Sixth Amendment were not violated by his exclusion from a hearing to determine the competency of two child witnesses); United States v. Gagnon, 470 U.S. 522, 526 (1985) (due process rights not violated by defendant's absence during in camera discussion between trial judge and juror). A defendant's presence at proceedings "is a 'condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.'" Gagnon, 470 U.S. at 526 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934)).

Petitioner's trial counsel was present at all of the hearings and conferences. A defendant's presence, however, is not required at a conference or hearing at which he could do nothing, such as a hearing on a motion that concerns only matters of law. Id. at 527. In the instant case, the discussions and arguments at the hearings involved either purely legal issues or factual determinations of matters outside the scope of those involving the charges against him that resulted in legal decisions by the trial judge. In each of these instances, Petitioner would have gained nothing by attending and could have contributed nothing related to the subject matter of the hearings or conferences.

Petitioner has not demonstrated his presence at these specific hearings had a reasonably substantial relation to the fullness of his opportunity to defend against the charge. His presence during these instances was not required for a fair hearing and he was not denied

due process. See Gagnon, 470 U.S. at 527. Nor has Petitioner demonstrated that the OCCA's determination is contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. For the foregoing reasons, Petitioner's fifth ground for relief is denied in its entirety.

Ground 6: Ineffective Assistance of Appellate Counsel.

In his sixth ground for relief, Petitioner claims his appellate counsel was ineffective because he failed to discover a juror had "an extensive record of contacts" with the legal system, failed to discover that another person from the county jail could corroborate that Christopher Jordan confessed to the murder, and failed to argue the unconstitutionality of Oklahoma's determination of whether mitigating circumstances outweigh aggravating circumstances.

As discussed above, when considering Petitioner's claims of ineffective assistance of trial counsel, Strickland, requires Petitioner to establish both that his counsel's performance was deficient and that his defense was thereby prejudiced. Strickland's requirements for demonstrating ineffective assistance of counsel govern the ineffective assistance of appellate counsel inquiry. Neill v. Gibson, 278 F.3d 1044, 1057 (10th Cir. 2001) (citing Smith v. Robbins, 528 U.S. 259, 285 (2000)). Demonstrating deficient performance of appellate counsel for failing to raise an issue can, however, be difficult.

> A claim of appellate ineffectiveness can be based on counsel's failure to raise a particular issue on appeal, although it is difficult to show deficient performance under those circumstances because counsel "need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." Id. at 288, 120 S.Ct.

> 746 (following Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). Thus, in analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, "we look to the merits of the omitted issue," Neill v. Gibson, 278 F.3d 1044, 1057 (10th Cir.2001) (quotation omitted), cert. denied, 537 U.S. 835, 123 S.Ct. 145, 154 L.Ed.2d 54 (2002), generally in relation to the other arguments counsel did pursue. If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance. See, e.g., Smith, 528 U.S. at 288, 120 S.Ct. 746; Banks v. Reynolds, 54 F.3d 1508, 1515-16 (10th Cir. 1995); Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994).

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

1. Failure to Investigate Juror's Background

Petitioner first claims both trial counsel and appellate counsel "together failed to discover that juror Whitmire, despite creating the impression that he had had only minor contact with the legal system prior to be [sic] called to jury [sic], in fact had an extensive record of contacts including multiple offenses of driving under the influence of alcohol." (Pet. at 33.)[15] This claim was raised by Petitioner in his application for post-conviction review and was denied on the merits by the OCCA:

> Petitioner also faults direct appeal counsel for failing to thoroughly investigate the juror's backgrounds. He claims that one juror, Juror W., gave false or misleading answers in *voir dire*, chiefly about his prior dealings with the judicial system. During *voir dire*, the trial court asked if any of the panel had appeared in a court of law under any circumstances as a witness, plaintiff,

[15] This is the entire extent of Petitioner's argument on this issue.

or defendant. Juror W.'s answer was "[t]raffic-related offenses." Petitioner claims this answer was "misleading at best" because, according to documents appended to Petitioner's Application, Juror W. (1) had been a defendant in a 1986 Oklahoma County civil lawsuit; (2) had sought bankruptcy protection in 1989; (3) had been the subject of two emergency protective orders in 1999; and (4) had been convicted several times of Driving Under the Influence, including two felony convictions for that crime in 1984. Petitioner also presents evidence suggesting that Juror W. embellished or misrepresented the nature of his employment, claiming that he was a physical therapist, when in fact he was a physical therapist's assistant.

Regarding his apparent felony driving convictions, Juror W.'s answer was literally true; as Petitioner concedes, Driving Under the Influence is defined and punished in the Oklahoma Highway Safety Code, 47 O.S. § 11-902. Regarding his other contacts with the judicial system, the State points to the lack of evidence that Juror W. actually had to appear in court on any of them. Whether Juror W.'s answer was deliberately intended to be misleading or untruthful is debatable.[3] Nevertheless, Petitioner has failed to show that Juror W. could not be a fair and impartial juror in this case.

> [3]The documents Petitioner submits indicate that Juror W. did not appear in the civil action and that a default judgment was entered against him. It is not clear whether Juror W. was ever required to appear in court on the bankruptcy matter. As to the protective orders, emergency orders are issued *ex parte* without the subject party being required to appear. 22 O.S. 2001, § 60.3. However, in his reply brief, Petitioner includes an appearance docket for one of the protective-order cases, which suggests Juror W. did appear in court on the day the temporary order against him was rescinded.

Certain classes of persons - including, among others, practicing attorneys, law enforcement officers, and felons who have not had their civil rights fully restored - may be excused from jury service "for cause." 38 O.S. 2001, § 28; 22 O.S. 2001, § 658. Like most jurisdictions, including the United States Supreme Court, Oklahoma has long held that statutory qualifications for jury service are not fundamental or constitutional in nature. Rather, the overarching concern is whether the juror in question could be fair and impartial. See Kohl v. Lehlback, 160 U.S. 293, 301-03, 16 S.Ct. 304, 307, 40 L.Ed. 432 (1895); Queenan v. Territory, 11 Okl. 261, 71 P. 218, 219-220 (1901), aff'd, 190 U.S. 548, 23 S.Ct. 762, 47 L.Ed. 1175 (1903). "[T]he

general rule is to the effect that statutes providing for the selection of electors for jury service have never been regarded as an essential element of the right of trial by jury, and the method of selection is entirely within the control of the Legislature, provided only that the fundamental requisite of impartiality is not violated." Brown v. State, 14 Okl. Cr. 609, 618, 174 P. 1102 (1918).

As we stated in Petitioner's direct appeal (regarding a different challenge to the jury-selection process), it is ultimately trial counsel's responsibility to use *voir dire* to determine whether those selected for the jury are acceptable to him. Jones, 2006 OK CCR 5 at ¶ 9, 128 P.3d at 533. Challenges to a juror's qualifications must be raised at the first available opportunity, or they are waived. Johnson v. State, 1988 OK CR 242, ¶ 17, 764 P.2d 197, 201; Cooper v. State, 27 Okl.Cr. 278, 282, 226 P. 1066, 1067-68 (1924). Absent evidence that the juror was biased, a trial court's decision to grant a new trial is generally reviewed for an abuse of discretion. Johnson, 1988 OK CR 242 at ¶ 19, 764 P.2d at 202. This rule applies even when the juror's answers to *voir dire* questions appear to have been deliberately misleading. Raub v. Carpenter, 187 U.S. 159, 23 S.Ct. 72, 73, 47 L.Ed. 119 (1902); McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984)("The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial"); United States v. Currie, 609 F.2d 1193, 1194 (6th Cir. 1979).

Petitioner presents no affidavits as to whether, and if so, when, either trial or appellate counsel ever became aware of Juror W.'s contacts with the judicial system. In essence, he asks this Court to presume deficient performance from a silent record. Strickland requires us to presume that counsel acted competently, exploring all reasonable avenues of inquiry. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Jones, 2006 OK CR 5 at ¶ 78, 128 P.3d at 545. The fact that a juror may be excusable "for cause" does not necessarily mean that either party wishes to have him removed. Indeed, defense counsel may have sound strategic reasons for keeping a panelist with a criminal record. See Jackson v. State, 1998 OK CR 39, ¶¶ 14-18, 964 P.2d 875, 884 (on appeal, defendant claimed the trial court erred in excusing a prospective juror for cause, even though he was a convicted felon). However, we do not reach the issue of reasonable strategy, because we simply cannot tell, from the record before us, whether or not Petitioner's prior counsel were aware of Juror W.'s past legal affairs. We will not find counsel to have performed deficiently on such unsupported allegations. Rule 9.7(B)(2), (D), Rules of the Oklahoma Court of Criminal Appeals, 22 O.S., Ch. 18, App.

> (2007); Jones, 2006 OK CR 5 at ¶ 85, 128 P.3d at 547; see also Conover v. State, 1997 OK CR 39, ¶ 14, 942 P.2d 229, 233 (failure to raise juror's felony record on direct appeal did not, standing alone, establish ineffective assistance of appellate counsel). Moreover, Petitioner has failed to show that Juror W. was unable to be fair and impartial – the prejudice prong of the Strickland analysis. Harris, 2007 OK CR 32 at ¶ 15.

Jones, PCD-2002-630, slip op. at 5-9 (other footnotes omitted).

In McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984), the Supreme Court held that in order to obtain a new trial based on a juror's mistaken response to a question in voir dire, the juror's impartiality is paramount to the consideration of a fair trial:

> We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556.

Here, Petitioner not only has failed to demonstrate that juror Whitmire's answers were not honest or that the questions presented to him were material, he has also failed to show that the juror was impartial. Petitioner does not explain how previous appearances in a court of law would affect this juror's ability to be unbiased and to follow the law as given by the trial court. Most importantly for this Court's review, Petitioner has not demonstrated that the OCCA's determination is contrary to, or an unreasonable application of, clearly established Federal law.

2. Failure to Discover Corroborating Witness

Petitioner next summarily claims that trial counsel and appellate counsel "failed to discover that Emmanuel Littlejohn's report of a Christopher Jordan confession could be corroborated by at least one other person - Christopher Berry." (Pet. at 33.) This claim was also raised in Petitioner's application for post-conviction relief and denied by the OCCA:

> Next, Petitioner claims trial counsel was ineffective for failing to investigate and present two witnesses at trial, and that appellate counsel was ineffective for not recognizing and advancing this claim on direct appeal. Specifically, Petitioner claims the testimony of Christopher Berry and James Lawson could have made a difference in the outcome of the trial. At the time of Petitioner's trial, Berry was being held in the Oklahoma County Jail on a charge of Child Abuse Murder. He was later convicted of that charge and sentenced to life in prison without possibility of parole. Berry claims, by affidavit, that he overheard Petitioner's co-defendant, Christopher Jordan, boasting that he, not Petitioner, was the triggerman in the homicide with which they were jointly charged.
>
> Petitioner made a similar claim on direct appeal, alleging trial counsel was ineffective for not presenting the testimony of another jail inmate, Emmanuel Littlejohn, who also allegedly heard Jordan boast about being the triggerman. We rejected that claim, because the inmate's credibility was suspect and the details of the account were specious. Jones, 2006 OK CR 5 at ¶ 82, 129 P.3d at 546. Berry suffers from the same credibility problems that Littlejohn did. Nor do we agree with Petitioner's argument that Berry's claim necessarily "corroborates" Littlejohn's. Berry's affidavit suggests that Jordan admitted Petitioner was involved in the murder, while according to Littlejohn, Jordan denied that Petitioner had any involvement. See id. Taken together, these inmates' claims show only one thing: that Christopher Jordan changed his story to suit his own needs. Yet this much was already clear to the jury, through trial counsel's extensive cross-examination of Jordan, who testified against Petitioner at trial. See id. at ¶ 83, 128 P.2d [sic]at 546-47.
>
> The posture of this case requires Petitioner to demonstrate not only that trial counsel failed to conduct a reasonably thorough investigation into witnesses potentially favorable to the defense, but that appellate counsel did as well. Petitioner claims appellate counsel "failed to investigate whether

> others heard Mr. Jordan's confessions in the jail," but he does not present specifics to show how a reasonable investigation would have uncovered Berry's current claim. Berry does not aver that he ever attempted to contact Petitioner's appellate counsel, and Petitioner does not explain how appellate counsel was supposed to find out about Berry's claims in any other way. If Berry had information he believed to be relevant to Petitioner's case, then he had a responsibility to reveal it timely. We will not find appellate counsel deficient for failing to be clairvoyant. Petitioner has failed to show either (1) that appellate counsel's investigation was not reasonable, or (2) that such investigation would have uncovered information that undermines confidence in the outcome of the trial. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

Jones, PCD-2002-630, slip op. at 10-11.

As identified by the OCCA, trial counsel extensively cross-examined Christopher Jordan at trial and identified for the jury's consideration numerous changes in his account of the events related to the shooting. Petitioner has not demonstrated either deficient performance of trial counsel or resulting prejudice, nor that appellate counsel was ineffective for failing to raise the issue on appeal. He adds nothing more on habeas review to demonstrate the OCCA's determination was unreasonable.

3. Failure to Argue Unconstitutionality of Aggravating/Mitigating Weighing Scheme

Lastly, Petitioner claims appellate counsel "also failed to argue the unconstitutionality of Oklahoma's determination of whether mitigating circumstances outweigh aggravators," and that this failure constitutes ineffectiveness because the current scheme violates Apprendi v. New Jersey, 530 U.S. 466 (2000), "in that only the first fact in the chain of aggravator-mitigator factfinding is required to be found beyond a reasonable doubt under Oklahoma's current scheme." (Pet. at 33-34.) The OCCA summarily denied Petitioner's claim based on

its repeated rejections of previously raised claims of the same nature:

> Petitioner argues that several aspects of Oklahoma's capital trial procedure constitute structural defects in the judicial process: . . . (4) not requiring the jury to find that aggravating circumstances outweigh mitigating circumstances "beyond a reasonable doubt." Constitutional challenges to all of theses claims have been repeatedly considered and rejected by this Court. Harris, 2007 OK CR 32 at ¶ 19; Hogan v. State, 2006 OK CR 19, ¶ 84, 139 P.3d 907, 935; Rojem v. State, 2006 OKCR 7, ¶¶ 59-60, 66-67, 130 P.3d 287, 299, 300; Matthews v. State, 2002 OK CR 16, ¶ 56, 45 P.3d 907, 924. Attempting to label them as "structural error" adds nothing new to the analysis.

Jones, PCD-2002-630, slip op. at 13-14.

Petitioner's jury was instructed that it must find the existence of any aggravating circumstance beyond a reasonable doubt. The jury made the determination that Petitioner had knowingly created a great risk of death to more than one person and that there existed the probability that he would commit criminal acts of violence that would constitute a continuing threat to society. The jury's determination of the existence of those aggravating circumstances – the functional equivalent of an element of a greater offense – placed Petitioner in that class of persons eligible to receive the death penalty. All Apprendi requires is that a jury, and not a judge, determine the existence of aggravating circumstances beyond a reasonable doubt.

In Matthews v. Workman, 577 F.3d 1175 (10th Cir. 2009), the Tenth Circuit considered a claim identical to the one presented here and found it barred by its decision in United States v. Barrett, 496 F.3d 1079, 1107 (10th Cir. 2007):

> There, we explained that the jury's determination that aggravating factors outweigh mitigating factors is not a finding of fact subject to Apprendi but a "highly subjective, largely moral judgment regarding the punishment that a

> particular person deserves." Id. at 1107 (citing Caldwell v. Mississippi, 472 U.S. 320, 340 n. 7, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)). We are of course bound by this decision as the law of the circuit.

Matthews, 577 F.3d at 1195.

Petitioner has failed to demonstrate that his Sixth, Eighth, and Fourteenth Amendment rights were violated by either Oklahoma's sentencing procedure and requirements or the jury's determination of the prerequisites necessary for the imposition of a sentence of death. The underlying claim supporting Petitioner's assertion of ineffectiveness is without merit. As such, neither trial nor appellate counsel can be found to have performed deficiently for failing to raise and argue this claim, nor has Petitioner demonstrated the OCCA's determination to be unreasonable. Accordingly, Petitioner's sixth ground for relief is denied.

Ground 7: Life Without Possibility of Parole Jury Instructions.

Petitioner claims the trial court erred when it failed to give an instruction regarding the meaning or effect of the sentence of life without the possibility of parole, in violation of his Eighth and Fourteenth Amendment rights. He contends that because of the trial court's omission of this instruction on an "issue that regularly confuses jurors," he is entitled to habeas relief. (Pet. at 35.)

On appeal, Petitioner raised a number of issues he conceded the OCCA had previously rejected. The instant claim is one of those issues. The OCCA declined to revisit the issues and found that prior adjudications did not have an effect on the fairness of Petitioner's trial or on his sentencing. Jones, 128 P.3d at 551 & n.11.

The Supreme Court has previously addressed this issue, albeit with fewer sentencing

options than the three provided by Oklahoma law:

> In Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), this Court held that where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without the possibility of parole, due process entitles the defendant "to inform the jury of [his] parole ineligibility, either by jury instruction or in arguments by counsel."

Shafer v. South Carolina, 532 U.S. 36, 39 (2001) (quoting Ramdass v. Angelone, 530 U.S. 156, 165 (2000)). In both Simmons and Shafer, the jury was only given two sentencing options, creating a false choice of either sentencing the petitioners to death or sentencing them to a limited period of incarceration. Simmons, 512 U.S. at 161; Shafer, 532 U.S. at 41.

In Mayes v. Gibson, 210 F.3d 1284 (10th Cir. 2000), the Tenth Circuit was presented with an issue identical to Petitioner's instant claim. In Mayes, the trial court had instructed the jury to choose between life imprisonment, life imprisonment without the possibility of parole, and death. The Tenth Circuit concluded the "three-way choice fulfills the Simmons requirement that a jury be notified if the defendant is parole ineligible," and denied relief. Id. at 1294; see also McCracken v. Gibson, 268 F.3d 970, 980-81 (10th Cir. 2001).

Subsequent to Mayes, the Tenth Circuit was presented with the argument that the Supreme Court's decision in Shafer undermined the Circuit's prior determination in Mayes. Smith v. Mullin, 379 F.3d 919 (10th Cir. 2004). The Tenth Circuit held:

> Given the two-way choice in Shafer, and the clear evidence of jury confusion, that case is distinguishable from our decision in Mayes. Because Mr. Smith's case is identical to Mayes and suffers none of Shafer's identified short-comings, Mr. Smith is not entitled to relief from his sentence on these grounds.

Smith, 379 F.3d at 938.

In Welch v. Workman, 639 F.3d 980, (10th Cir. 2011), the Tenth Circuit considered an issue on habeas review regarding two notes from the jury requesting clarification of the meaning of the life without possibility of parole sentencing option. The trial court responded both times that it was not allowed to answer the jury's question. In denying relief, the Tenth Circuit stated:

> Even assuming the trial court's statement (that it was not allowed to answer the jury's questions) ran afoul of Oklahoma procedural law, its response simply could not have created a prohibited false choice under the United States Constitution. Failing to clarify the life without parole instruction cannot be "taken to mean that parole was available but that the jury, for some unstated reason, should be blind to this fact." Shafer, 532 U.S. at 53, 121 S.Ct. 1263 (quotation marks omitted). Rather, as in McCracken and McGregor, the state trial court's non-responsive answer simply required the jury to return to the instructions as its sole guidance. And those instructions properly referred to Oklahoma's three-option sentencing scheme, offering the jury three choices—death, life imprisonment without parole and life imprisonment—which we have previously held to be constitutionally adequate. Hamilton v. Mullin, 436 F.3d 1181, 1191 (10th Cir. 2006).

Id. at 1005; see also Littlejohn v. Trammell, 704 F.3d 817, 826-31 (10th Cir. 2013).

Petitioner's claim here fails in that there is no evidence of jury confusion on the issue of the sentencing options. The Tenth Circuit has held that due process concerns arise under Simmons only when four factors are met:

> "(1) the prosecution seeks the death penalty; (2) the prosecution places the defendant's future dangerousness at issue; (3) the jury asks for clarification of the meaning of 'life imprisonment,' or a synonymous statutory term; and (4) the judge's response threatens to cause a jury's misunderstanding so the jury will perceive a false choice of incarceration when future dangerousness is at issue."

Hamilton v. Mullin, 436 F.3d 1181, 1191 (10th Cir. 2006)(quoting Mollett v. Mullin, 348 F.3d 902, 914 (10th Cir. 2003)). Unlike Hamilton, Petitioner's jury did not send a note to the trial court during deliberations requesting clarification of the sentencing options. Without a note or question from the jury, and without a judge's response to such jury inquiry, there is no evidence to suggest jury confusion or that the jury was misled. Id.

The Tenth Circuit's precedent precludes the instant claim. Petitioner does not make any argument which compels or permits this court to disregard this binding precedent. See United States v. Foster, 104 F.3d 1228 (10th Cir. 1997). Additionally, Petitioner has failed to demonstrate that the OCCA's resolution of this claim is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C.A. §2254(d)(1). Accordingly, this ground for relief is denied.

Ground 8: Challenge to Continuing Threat Aggravating Circumstance.

In his eighth ground for relief, Petitioner contends that under the current Oklahoma interpretation, there is no homicide that could not be made death-eligible through the use of the continuing threat aggravating circumstance. The Court interprets Petitioner's argument as a claim that the aggravating circumstance is unconstitutionally vague and overbroad. Respondent responds that the aggravating circumstance is constitutional, that the OCCA's determination regarding vagueness is neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court, and that Petitioner's

"overbroad" challenge is unexhausted and procedurally barred from review.[16] Alternatively, Respondent argues Petitioner's claim is foreclosed by binding Tenth Circuit precedent and must be denied.

Petitioner's constitutional challenge to the continuing threat aggravating circumstance was denied by the OCCA. The State Court held: "This Court has repeatedly upheld the constitutional validity of the continuing threat aggravator and we will not revisit the issue." Jones, 128 P.3d at 549.

In Nguyen v. Reynolds, 131 F.3d 1340 (10th Cir. 1997), the Tenth Circuit found Oklahoma's continuing threat aggravating circumstance was "nearly identical" to the aggravating factor used by Texas and approved by the Supreme Court in Jurek v. Texas, 428 U.S. 262, 274-75 (1976). In construing the constitutionality of Oklahoma's continuing threat aggravating circumstance, the Tenth Circuit held:

> [t]he fact that Oklahoma chooses to grant a sentencing jury wide discretion to make a predictive judgment about a defendant's probable future conduct does not render the sentencing scheme in general, or the continuing threat factor in particular, unconstitutional. Although this predictive judgment is not susceptible of "mathematical precision," we do not believe it is so vague as to create an unacceptable risk of randomness. To the contrary, we believe the question of whether a defendant is likely to commit future acts of violence has a "common-sense core of meaning" that criminal juries are fully capable of understanding.

Nguyen, 131 F.3d at 1354.

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[16] The Court need not consider Respondent's exhaustion and procedural bar assertion, as Petitioner's claim may be rejected easily on the merits. 28 U.S.C. § 2254(b)(2); Neill, 278 F.3d at 1063.

Both the Tenth Circuit and the United States Supreme Court have found this aggravating circumstance to pass constitutional muster. See Johnson v. Texas, 509 U.S. 350 (1993) (Texas' capital sentencing scheme based on continuing threat to society does not violate Eighth Amendment); Revilla v. Gibson, 283 F.3d 1203, 1218 (10th Cir. 2002); Sallahdin v. Gibson, 275 F.3d 1211, 1232 (10th Cir. 2002); Medlock v. Ward, 200 F.3d 1314, 1319 (10th Cir. 2000); Hooks v. Ward, 184 F.3d 1206, 1238-39 (10th Cir. 1999); Moore v. Gibson, 195 F.3d 1152, 1177-78 (10th Cir. 1999); Ross v. Ward, 165 F.3d 793, 800 (10th Cir. 1999); Trice v. Ward, 196 F.3d 1151, 1172-73 (10th Cir. 1999); Castro v. Ward, 138 F.3d 810, 816 (10th Cir. 1998).

> Mr. Wilson first challenges the constitutionality of the continuing threat aggravator. Under Oklahoma law, this aggravator requires "[t]he existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Okla. Stat. Ann. tit. 21, § 701.12(7). He claims that this is vague and overbroad because it does not perform the appropriate narrowing function. This claim is foreclosed by our Circuit's precedent. We have repeatedly upheld the constitutionality of this aggravator. See, e.g., Sallahdin v. Gibson, 275 F.3d 1211, 1232 (10th Cir. 2002); Medlock, 200 F.3d at 1319–20; Nguyen v. Reynolds, 131 F.3d 1340, 1353–54 (10th Cir. 1997). Mr. Wilson offers no reasons for us to deviate from our prior precedent, and we decline to do so today.

Wilson v. Sirmons, 536 F.3d 1064, 1109 (10th Cir. 2008).

As in Wilson, the Tenth Circuit's precedent precludes this claim. And like his previous ground for relief, Petitioner does not make any argument which compels or permits this Court to disregard Tenth Circuit binding precedent. Petitioner has failed to demonstrate that the OCCA's resolution of this claim is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the

United States." 28 U.S.C.A. §2254(d)(1). Therefore, habeas relief on Petitioner's eighth ground for relief is denied.

CONCLUSION.

After a complete review of the transcripts, trial record, appellate record, record on post-conviction proceedings, briefs filed by Petitioner and Respondent, and the applicable law, the Court finds Petitioner's request for relief in his *Petition For Writ of Habeas Corpus* (Dkt. No. 22) should be denied. ACCORDINGLY, habeas relief is DENIED on all grounds. An appropriate judgment will be entered.

IT IS SO ORDERED this 22nd day of May, 2013.

TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE