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United States Court of Appeals
Tenth Circuit

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Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NICHOLAS ALEXANDER DAVIS,

Petitioner - Appellant,

v.

TOMMY SHARP, Interim Warden, Oklahoma State Penitentiary,[*]

Respondent - Appellee.

No. 17-6225

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. 5:12-CV-01111-HE)

Michael Lieberman (Thomas Hird, with him on the briefs), Assistant Federal Public Defenders, Oklahoma City, Oklahoma, for Petitioner-Appellant.

Caroline Hunt, Assistant Attorney General (Mike Hunter, Attorney General, with her on the brief), Oklahoma City, Oklahoma, for Respondent-Appellee.

Before **HARTZ**, **MORITZ**, and **EID**, Circuit Judges.

MORITZ, Circuit Judge.

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[*] Pursuant to Fed. R. App. P. 43(c)(2), Mike Carpenter is replaced by Tommy Sharp as the Warden in this case.

After an Oklahoma jury convicted Nicholas Davis of first-degree murder and sentenced him to death, he sought federal habeas relief. In relevant part, he asserted that both trial counsel and appellate counsel were constitutionally ineffective in failing to adequately investigate his mental health and discover that he suffers from depression and post-traumatic stress disorder (PTSD). The district court denied relief. For the reasons explained below, we affirm.

Background

One evening in January 2004, Davis went to an apartment where his former girlfriend, Tia Green, was visiting her sister, Chinetta Hooks.[1] Seventeen-year-old Marcus Smith was also present in the apartment. Davis, wearing all black, knocked on the door and covered the peephole. Unable to see who was at the door, Smith asked who was there, but Davis did not respond. When Smith opened the door slightly, Davis forced his way inside. He was carrying a handgun loaded with 23 rounds, including one in the chamber, along with a box of extra ammunition. He pointed the gun at Smith, and Smith put his hands up and backed away.

As Green, Hooks, and Smith tried to reason with Davis, Davis twice lowered the gun. But he then raised it a third time and fired at Smith's head. Davis continued firing, and Green and Hooks ran into other rooms of the apartment. Davis ultimately

[1] We take the facts of the underlying crime from the decision of the Oklahoma Court of Criminal Appeals (OCCA) affirming Davis's conviction and sentence. *See Davis v. State*, 268 P.3d 86, 97–99 (Okla. Crim. App. 2011).

shot Smith three times, and Smith died at the scene. Davis also shot Green and Hooks multiple times, though they both survived.

Davis eventually confessed to the shooting. According to Davis, he went to the apartment because Green said she wanted to talk to him, and he brought a gun because Green tried to hurt him in the past. Davis also said that he shot Smith in self-defense because Smith lunged at him.

Based on these events, a jury convicted Davis of one count each of first-degree murder and being a felon in possession of a gun and two counts of shooting with the intent to kill. At sentencing, Davis's trial counsel presented a mitigation case based on Davis's life story. Nine family-member witnesses asked the jury to spare Davis's life. They painted a picture of Davis's early childhood as a happy one, during which he lived with extended family on his grandparents' farm. And they explained that he only later turned to a life of crime after his neglectful mother took him away from this idyllic setting. Unswayed by Davis's mitigation case, the jury ultimately found that the state proved three aggravating circumstances—that Davis "knowingly created a great risk of death to more than one person"; that Davis committed the murder while he was "serving a sentence of imprisonment on conviction of a felony"; and that there existed "a probability that petitioner would commit criminal acts of violence that would constitute a continuing threat to society"—and sentenced Davis to death for first-degree murder.[2] R. 513–14.

[2] For Davis's noncapital crimes—two counts of shooting with intent to kill and one count of being a felon in possession of a gun—the jury recommended sentencing

On direct appeal to the OCCA, Davis raised 21 claims of error. *Davis*, 268 P.3d at 138. In one of those claims, Davis alleged that he received ineffective assistance of counsel (IAC) at trial. Specifically, he challenged the life story that trial counsel presented in mitigation and alleged that trial counsel should have called one of his brothers to testify that his entire childhood was one of deprivation and neglect and should have called an expert witness to more fully explain to the jury how Davis's negative life experiences affected his behavior (collectively, the life-experience IAC claim). *Id.* at 129–30.

The OCCA ordered the state trial court to conduct an evidentiary hearing on this claim. *Id.* at 132. During that hearing, appellate counsel clarified that (1) the life-experience IAC claim alleged trial counsel was ineffective in the manner in which she chose to present Davis's life story to the jury (first by characterizing his early childhood as positive and second by failing to call an expert to tie together the story of Davis's life) and (2) the life-experience claim did *not* allege that trial counsel was ineffective in failing to investigate or present evidence about Davis's mental health. Nevertheless, the hearing on the life-experience IAC claim yielded critical details about trial counsel's investigation into Davis's mental health. For instance, appellate counsel pointed out that trial counsel sought a mental-health evaluation from Terese

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Davis to 45 years, 67 years, and 25 years, respectively. The trial court adopted the jury's recommendations and ordered all sentences to run concurrently.

Hall, a clinical psychologist.[3] And appellate counsel also provided the court with a memo in which trial counsel memorialized the results of Hall's mental-health evaluation, including Hall's conclusions that Davis suffered from antisocial personality disorder and was "a psychopath." R. 530. Additionally, appellate counsel noted that Hall did not recommend any further psychological testing and told trial counsel that she could not assist with Davis's defense.

The OCCA reviewed the results of the evidentiary hearing and rejected the life-experience IAC claim. *Davis*, 268 P.3d at 132–38. It also rejected Davis's remaining claims and thus affirmed his convictions and sentence. *Id.* at 139.

Davis then sought postconviction relief in state court. There, he raised what we refer to respectively as the Trial PTSD Claim and the Appellate PTSD Claim (collectively, the PTSD Claims). *See Davis v. State*, No. PCD-2007-1201, slip op. at 3 (Okla. Crim. App. Jan. 25, 2012) (unpublished). Specifically, in the Trial PTSD Claim, he alleged that trial counsel was ineffective in failing to investigate, develop, and present evidence, at both the guilt and sentencing stages, that he suffered from PTSD. *Id.* In the Appellate PTSD Claim, he alleged that appellate counsel was ineffective in failing to investigate, develop, and raise this aspect of trial counsel's alleged ineffectiveness on appeal. *Id.* at 7. In support, Davis submitted a report from Lara Duke, a licensed psychologist who spent five hours with Davis, administered

[3] Trial counsel also obtained an initial evaluation of Davis's mental health from psychologist Max Edgar and a competency evaluation from forensic psychologist Peter Rausch.

various tests, and diagnosed Davis with PTSD. *Id.* at 3–4. The OCCA found the Trial PTSD Claim waived because Davis failed to raise it on direct appeal. *Id.* at 6; *see also Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013) ("[I]ssues that were not raised previously on direct appeal, but which could have been raised, are waived for further review."). It rejected the Appellate PTSD Claim on the merits. *Davis*, slip op. at 7–8. Thus, the OCCA denied Davis's motion for postconviction relief. *Id.* at 11.

Next, Davis filed a habeas petition in federal district court. *See* 28 U.S.C. § 2254. As relevant here, he raised the PTSD Claims along with what we refer to respectively as the Trial Depression Claim and the Appellate Depression Claim (collectively, the Depression Claims). In particular, he argued trial counsel was ineffective in failing to investigate, develop, and present evidence at both the guilt and sentencing stages of trial that he suffered from depression and appellate counsel was ineffective in failing to investigate and raise this particular aspect of trial counsel's alleged ineffectiveness on appeal. The district court denied Davis's petition and refused to grant him a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1)(A).

Davis then sought to appeal to this court. We granted him a COA to appeal the district court's resolution of the Depression Claims and the PTSD Claims.

Analysis

On appeal, Davis argues the district court erred in denying relief on both the Depression Claims and the PTSD Claims. In evaluating his arguments, we review the

district court's legal analysis de novo. *See Smith v. Duckworth*, 824 F.3d 1233, 1241–42 (10th Cir. 2016).

I. The Depression Claims

Davis's § 2254 petition alleged in part that trial counsel was ineffective in "fail[ing] to investigate, develop, and present evidence of . . . [m]ajor [d]epressive [d]isorder." R. 31. He further argued that appellate counsel was likewise ineffective in failing to investigate and present "[a] complete mental[-]health claim . . . on appeal." *Id.* at 60. The district court ruled that these claims were unexhausted and subject to an anticipatory procedural bar.

We agree. The Depression Claims are unexhausted because Davis never presented such claims in state court, either on direct appeal or in his postconviction application. *See* § 2254(b)(1)(A) (requiring habeas petitioner to exhaust claims in state court); *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006) ("A claim has been exhausted when it has been 'fairly presented' to the state court." (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971))). On direct appeal, Davis did advance the life-experience IAC claim. But he expressly limited that claim to his allegations that trial counsel was ineffective in failing to present evidence—in the form of testimony from an expert and from Davis's brother—of Davis's difficult childhood and its effects on him. Davis did *not* argue trial counsel was ineffective in failing to adequately investigate or present evidence about Davis's depression. *Davis*, 268 P.3d at 129–30. Indeed, during the direct-appeal evidentiary hearing, Davis's appellate counsel specifically stated that Davis was not asserting on appeal that trial counsel

was ineffective in failing to conduct psychological testing or in failing to present evidence from a mental-health expert. Likewise, Davis's postconviction application included only the PTSD Claims and did not mention depression.

Resisting the conclusion that he never raised the Depression Claims in state court, Davis suggests in passing that he adequately presented these claims during the postconviction proceedings because the psychological report he submitted in support of his postconviction claims mentioned symptoms of depression. But the mere appearance of the word "depression" in a report that Davis submitted to support an IAC claim about PTSD was insufficient to exhaust IAC claims about depression that did not appear in Davis's postconviction application. *See Fairchild v. Workman*, 579 F.3d 1134, 1147 (10th Cir. 2009) (finding that petitioner did not exhaust specific IAC claims arising from acute brain syndrome and counsel's failure to order additional neurological testing by advancing more general IAC claim related to unspecified cognitive deficiencies in state court); *Bland*, 459 F.3d at 1011 (explaining that for purposes of exhaustion, "'[f]air presentation' requires more than presenting 'all the facts necessary to support the federal claim' to the state court" (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam))).

Further, if Davis were to return to state court and present the Depression Claims now, the state court would find them procedurally barred. That is because Davis could have brought the Trial Depression Claim on direct appeal. *See Logan*, 293 P.3d at 973 (providing that in postconviction proceeding, "issues that were not raised previously on direct appeal, but which could have been raised, are waived").

And he could have brought the Appellate Depression Claim in his application for postconviction relief. *See* Okla. Stat. Ann. tit. 22, § 1086 (requiring petitioner to present "[a]ll grounds for relief available . . . in his [or her] original, supplemental[,] or amended application" for postconviction relief and stating that "[a]ny ground . . . not so raised . . . may not be the basis for a subsequent application"); *id.* § 1089(D)(2) (providing that in capital cases, any available "grounds for relief" that are "not included in a timely [postconviction] application shall be deemed waived"). These claims are therefore subject to an anticipatory procedural bar. *See Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) (explaining that 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" (quoting *Moore v. Schoeman*, 288 F.3d 1231, 1233 n.3 (10th Cir. 2002))).

Davis advances no argument against applying an anticipatory procedural bar. Nor does he argue that this court should overlook the procedural bar based on cause and prejudice or manifest injustice. *See English v. Cody*, 146 F.3d 1257, 1259 (10th Cir. 1998) ("On habeas review, this court does not address issues that have been defaulted in state court on an independent and adequate state procedural ground, unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice."). Accordingly, we conclude that the Depression Claims are unexhausted and subject to an anticipatory procedural bar. We therefore affirm the

district court's ruling denying habeas relief on the Depression Claims and turn next to the PTSD claims.

II. The PTSD Claims

In these claims, Davis asserts that trial counsel deficiently and prejudicially failed to investigate and present evidence of PTSD at trial and that appellate counsel deficiently and prejudicially failed to investigate and raise trial counsel's alleged ineffectiveness on direct appeal. To the extent the OCCA adjudicated these claims on their merits, we must give its decisions "the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)). More specifically, under the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, we may only grant Davis habeas relief on a claim the OCCA adjudicated on the merits if he can meet certain "difficult" standards set forth in § 2254(d). *Harrington v. Richter*, 562 U.S. 86, 102 (2011); *see also* § 2254(d) (precluding federal habeas court from granting relief on claim if state court adjudicated merits of that claim unless state court's decision "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law" or "was based on an unreasonable determination of the facts in light of the evidence presented" to relevant state court).

Here, Davis first raised the PTSD Claims in his application for postconviction relief. The OCCA rejected the Trial PTSD Claim on procedural grounds, finding it waived because Davis could have brought it on direct appeal. *Davis*, slip op. at 6; *see also* § 1089(C)(1) (providing that "[t]he only issues that may be raised in an

application for post[]conviction relief are those that . . . [w]ere not and could not have been raised in a direct appeal"). It rejected the Appellate PTSD Claim on the merits. *See Davis*, slip op. at 7–8.

In his § 2254 petition, Davis again raised the Trial and Appellate PTSD Claims. In denying relief, the district court found the Trial PTSD Claim procedurally defaulted. *See Smith v. Allbaugh*, 921 F.3d 1261, 1267 (10th Cir. 2019) ("The procedural-default rule generally prevents a federal court from reviewing a habeas claim when the state court declined to consider the merits of that claim based 'on independent and adequate state procedural grounds.'" (quoting *Maples v. Thomas*, 565 U.S. 266, 280 (2012))); *Logan*, 293 P.3d at 973 (explaining that under Oklahoma law, "issues that were not raised previously on direct appeal, but which could have been raised, are waived" for purposes of postconviction proceedings). It further found that the OCCA's rejection of the Appellate PTSD Claim was not an unreasonable application of clearly established federal law. Thus, the district court concluded, the Appellate PTSD Claim neither provided the requisite cause for purposes of overcoming the default of the Trial PTSD Claim nor succeeded as a standalone claim. *See Maples*, 565 U.S. at 280 (noting that court can excuse procedural default if petitioner shows cause for the default and actual prejudice); *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (explaining that IAC can constitute cause to excuse procedural default).

On appeal, Davis does not challenge the district court's conclusion that because he could have raised the Trial PTSD Claim on direct appeal but failed to do

so, that claim is procedurally defaulted. Instead, he argues that he can show cause and prejudice to overcome the default.[4]

"Cause for a procedural default exists where 'something *external* to the petitioner, something that cannot fairly be attributed to him[,] . . . "impeded [his] efforts to comply with the [s]tate's procedural rule."'" *Id.* (first three alterations in original) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991), *modified*, *Martinez v. Ryan*, 566 U.S. 1 (2012)). And "[i]t has long been the rule that attorney error is an objective external factor providing cause for excusing a procedural default"—provided that the "error amounted to a deprivation of the constitutional right to counsel." *Davila*, 137 S. Ct. at 2065. That is, an attorney's error can constitute cause to excuse a procedural default if it satisfies both prongs of the test for IAC: deficient performance (i.e., "that counsel's representation fell below an objective standard of reasonableness") and prejudice (i.e., "there is a reasonable

[4] Other than cause and prejudice, Davis hints at one other argument that could overcome the procedural default: he suggests that because trial and appellate counsel were not separate (they worked in the same office), the procedural bar does not apply because it is not adequate. *See Cannon v. Mullin*, 383 F.3d 1152, 1172 (10th Cir. 2004) (noting that to be "adequate," state procedural rule must, in part, "allow[] petitioner an opportunity to consult with separate counsel on appeal in order to obtain an objective assessment of trial counsel's performance" (quoting *English*, 146 F.3d at 1263), *abrogated in part on other grounds by Simpson v. Carpenter*, 912 F.3d 542 (10th Cir. 2018), *cert. denied*, 2019 WL 5150543 (Oct. 15, 2019). But Davis never actually connects the alleged nonseparateness of his counsel to the adequacy of the procedural bar. That is, the section of Davis's brief that discusses the procedurally barred Trial PTSD Claim entirely omits any argument that the bar is inadequate because counsel were not separate. Thus, Davis waived any challenge to the adequacy of the procedural bar by failing to brief it on appeal. *See Grant v. Trammell*, 727 F.3d 1006, 1025 (10th Cir. 2013) ("Even a capital defendant can waive an argument by inadequately briefing an issue . . . .").

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). *Strickland v. Washington*, 466 U.S. 668, 687–88, 694 (1984).

We turn, then, to Davis's alleged cause: whether, as he alleges in the Appellate PTSD Claim, appellate counsel was ineffective in failing to investigate, develop, and raise on appeal the issue of trial counsel's alleged ineffectiveness in failing to investigate, develop, and present evidence, at both the guilt and sentencing stages, that Davis suffers from PTSD. Because the OCCA rejected this claim on its merits, AEDPA limits our review. *See Duckett v. Mullin*, 306 F.3d 982, 996, 998 (10th Cir. 2002) (holding that petitioner's appellate IAC claim did not establish cause because OCCA's rejection of claim was not contrary to Supreme Court precedent under §2254(d)(2)); *Neill v. Gibson*, 278 F.3d 1044, 1057–58 (10th Cir. 2001) (applying AEDPA deference to appellate IAC claim proffered to establish cause). That is, to establish cause for purposes of overcoming the procedural default of the Trial PTSD Claim, Davis must demonstrate that the OCCA's decision rejecting the Appellate PTSD Claim was an unreasonable application of *Strickland*.[5] *See* § 2254(d)(1). This unreasonable-application standard is difficult to meet, particularly for IAC Claims. *See Stouffer v. Trammell*, 738 F.3d 1205, 1221 (10th Cir. 2013) (noting that state-court decision is only unreasonable "if all 'fairminded jurists' would agree that the

[5] As will become clear, we focus our analysis on the performance prong of *Strickland*. And on that prong, Davis does not argue for either of the other pathways to relief under § 2254(d): that the OCCA relied on an unreasonable factual determination or applied law contrary to *Strickland*.

state court got it wrong" (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011))). Under AEDPA, we do not ask merely whether counsel performed reasonably under *Strickland*; instead, we ask "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105 (noting doubly deferential review of IAC claims raised in habeas proceeding).

To succeed on an IAC claim premised on the failure to raise an issue on appeal, a petitioner must show both that (1) appellate counsel performed deficiently in failing to raise the particular issue on appeal and (2) but for appellate counsel's deficient performance, there exists a reasonable probability the petitioner would have prevailed on appeal. *See Neill*, 278 F.3d at 1057. Yet "the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal." *Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995). Indeed, appellate attorneys frequently "'winnow out' weaker claims in order to focus effectively on those more likely to prevail." *Id.* (quoting *Smith v. Murray*, 477 U.S. 527, 536 (1986)). Thus, in evaluating an argument that appellate counsel performed deficiently in failing to raise an issue on appeal, this court typically "examine[s] the merits of the omitted issue."[6] *Id.* If the omitted "issue is meritless, its omission will not constitute deficient performance." *Miller v. Mullin*, 354 F.3d 1288, 1298 (10th Cir. 2004) (quoting *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003)).

[6] Our analysis of whether Davis can overcome the procedural default of the Trial PTSD Claim such that we may consider the merits of that claim turns, in large part, on the merits of that claim. We acknowledge "the apparent circularity of this review." *Banks*, 54 F.3d at 1516.

Because appellate IAC claims premised on the failure to raise an issue on appeal turn largely on the merits of the issue not raised, we also briefly outline the standards that govern the merits of the omitted issue in this case: the procedurally defaulted Trial PTSD Claim, in which Davis faults trial counsel for failing to investigate, develop, and present evidence that he suffers from PTSD. An IAC claim premised on a lack of investigation is governed by the same *Strickland* standards as all other IAC claims. *See Rompilla v. Beard*, 545 U.S. 374, 380–81 (2005). On the performance prong, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. But counsel need not "scour the globe on the off chance something will turn up." *Rompilla*, 545 U.S. at 383. And "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. On the prejudice prong, a petitioner must show that but for counsel's failure to investigate, there exists a reasonable probability of a different result. *See Rompilla*, 545 U.S. at 390.

Applying these principles, the OCCA found that appellate counsel did not perform deficiently in failing to raise the Trial PTSD Claim. The OCCA concluded that (1) Davis failed to "rebut[] the presumption that [appellate] counsel acted as competent counsel and fully investigated the issue and purposefully omitted the claim from the direct appeal"; and (2) "[a]ppellate counsel appropriately sorted through potential claims of error and raised only those with the best chances for relief."

Davis, slip op. at 7–8. In so doing, the OCCA expressly found that "trial counsel fully investigated [Davis's] background." *Id.* at 8. It therefore implicitly concluded that the omitted Trial PTSD Claim lacked merit; so omitting it on direct appeal did not constitute deficient performance.

The district court reviewed the OCCA's decision and determined that the OCCA's conclusion that appellate counsel did not perform deficiently was not unreasonable. In so doing, the district court confirmed the OCCA's implicit finding, in which it rejected the Trial PTSD Claim. That is, the district court affirmatively found that because the record indicated trial counsel did not perform deficiently, appellate counsel's decision not to argue otherwise was indeed a strategic one.

Specifically, the district court pointed to the mental-health evaluation from clinical psychologist Terese Hall, in which Hall concluded that Davis suffered from antisocial personality disorder and characterized him as "a psychopath." R. 530. Then, reasoning that trial counsel need not conduct endless investigations, only reasonable investigations, the district court concluded that when trial counsel's mental-health investigation "revealed that [Davis's] mental health would not be helpful to his defense, trial counsel reasonably and strategically pursued other lines of defense." *Id.* at 533; *see also Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1313 (11th Cir. 2016) ("[W]e have often observed that evidence of a defendant's antisocial personality disorder can negatively impact the jury."); *Stafford v. Saffle*, 34 F.3d 1557, 1565 (10th Cir. 1994) (noting that evidence of antisocial behavior plays into jury's assessment of continuing-threat aggravator). Thus, the district court

concluded, appellate counsel likewise did not perform deficiently when she relied on Hall's evaluation and chose not to bring an IAC claim based on trial counsel's failure to further investigate or present evidence of Davis's mental health.

We now turn to Davis's argument on appeal—whether the Appellate PTSD Claim establishes cause to excuse the procedural default of the Trial PTSD Claim.

Davis first argues that the OCCA unreasonably applied *Strickland*'s performance prong in adjudicating the Appellate PTSD Claim because its decision was based wholly on the absence of an affidavit from trial counsel. *See, e.g.*, *Wilson v. Sirmons*, 536 F.3d 1064, 1090 (10th Cir. 2008) ("There is no support for the proposition that the absence of an affidavit from trial counsel is fatal to a habeas petitioner's claim of [IAC]."). But Davis mischaracterizes the OCCA's ruling. Although the OCCA mentioned the absence of such an affidavit, that was not the sole basis for its ruling. *See Davis*, slip op. at 7. Instead, the OCCA stated more generally that Davis failed to "provide[] any support for his claim that appellate counsel did not fully investigate the psychological evidence." *Id.* The OCCA then simply pointed to the absence of an affidavit as an example of that failure. *See id.* Thus, we reject Davis's argument that the OCCA's decision was unreasonable because it turned solely on the absence of an affidavit from trial counsel.

Next, and more substantially, Davis argues that appellate and trial counsel failed to adequately investigate his mental health. *See Anderson*, 476 F.3d at 1145 (stating that "question" before us in that case was not "whether trial counsel made a tactical or strategic decision not to include the omitted mitigation evidence at trial,

but rather whether 'the investigation supporting counsel's decision . . . was itself reasonable'" (alteration in original) (emphasis omitted) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523 (2003))). More specifically, Davis contends that it was not reasonable for his attorneys to accept Hall's mental-health evaluation—which he characterizes as "a premature, drive-by[,] phone-call opinion"—without further investigation. Aplt. Br. 20. And in a nod to our standard of review, he insists that the OCCA unreasonably applied *Strickland* when it concluded otherwise.

In support, Davis asserts that "it is common for symptoms of PTSD to be misdiagnosed as [antisocial personality disorder]." Aplt. Br. 56. As such, he contends, Hall's diagnosis of antisocial personality disorder should have triggered further mental-health investigation. Additionally, Davis points out that Hall neither conducted any actual testing before reaching this conclusion nor prepared an actual report. And he argues that it is not reasonable for counsel to rely on an opinion from a mental-health professional that was not based on any formal testing. *Cf. Postelle v. Carpenter*, 901 F.3d 1202, 1216 (10th Cir. 2018) (noting that counsel should not "abdicate all responsibility for handling scientific or technical evidence" to experts), *cert. denied*, 139 S. Ct. 2668 (2019).

We disagree. "[C]ounsel is not required to keep hiring experts until the most favorable one possible is found." *DeLozier v. Sirmons*, 531 F.3d 1306, 1333 (10th Cir. 2008). And "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. The circumstances here include an

unequivocally unhelpful evaluation from Hall, a mental-health professional who routinely evaluates capital defendants. *See, e.g.*, *Smith v. Sharp*, 935 F.3d 1064, 1079 n.7 (10th Cir. 2019); *Grissom v. Carpenter*, 902 F.3d 1265, 1274–76 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2030 (2019). Hall spent several hours with Davis and also reviewed the reports of the defense team's interviews with Davis's family members; thus, her conclusion was not the "drive-by" opinion that Davis insists it was. Aplt. Br. 27. And Hall's conclusions were forceful: she indicated that her meeting with Davis left "[quite the] impression" on her and said she did "not need to do testing to see clearly that" Davis suffers from antisocial personality disorder. R. 530. She also indicated that Davis "scores high on any risk[-]assessment scale" and is "high on the Hare Psychopathy Checklist." *Id.*

Moreover, Hall did not recommend any further testing.[7] And this simple fact—among others—meaningfully distinguishes the primary cases Davis relies upon to support his argument that his attorneys' investigations were constitutionally deficient. For example, in *Bemore v. Chappell*, a forensic psychologist reported to trial counsel that petitioner suffered from several mental-health conditions, including organic brain impairment, bipolar disorder, and antisocial personality disorder, and specifically recommended further testing to confirm a mental-health diagnosis. 788 F.3d 1151, 1159 (9th Cir. 2015). But because counsel believed this report conflicted

[7] Additionally, the two mental-health professionals who previously evaluated Davis neither suggested further testing nor indicated that Davis might suffer from PTSD.

with her planned "'good[-]guy' defense strategy, she placed the report 'in the back of a file drawer'" and did not follow up on it. *Id.* The Ninth Circuit held that this amounted to deficient performance (and that the California court unreasonably concluded otherwise) because the "early decision to pursue a risk-fraught 'good[-]guy' mitigation strategy did not satisfy [counsel's] duty first to unearth potentially mitigating mental[-]health evidence." *Id.* at 1174. Yet here, Hall did not recommend further testing, so Davis's trial counsel did not contradict expert advice when she elected not to pursue further testing. Moreover, Davis's trial counsel did not discount Hall's evaluation because it clashed with a planned defense; instead, trial counsel used Hall's evaluation to make a strategic decision about what kind of defense to pursue.

Davis also relies on *Hooper v. Mullin*, 314 F.3d 1162 (10th Cir. 2002). There, defense counsel received a one-page report from a psychologist who indicated the petitioner suffered from possible brain damage and recommended additional mental-health testing. 314 F.3d at 1168. Rather than follow that recommendation, counsel decided to present an undeveloped defense based on the mere possibility of brain damage. *See id.* at 1170. We held that this was unreasonably deficient performance (and that the OCCA unreasonably concluded otherwise), stating, "[d]efense counsel specifically chose to present, as mitigating evidence, the possibility that [p]etitioner might have brain damage and other psychological problems. Having made that strategic decision, however, [p]etitioner's counsel then presented this evidence without any further investigation, in an unprepared and ill-informed manner" and

without speaking to his experts prior to trial. *Id.* at 1171. But here, again, Hall did not recommend any further testing. Moreover, the failures in *Hooper* went beyond a simple failure to investigate; indeed, trial counsel's lone strategy in that case was to mount a defense based on the possibility of brain damage—a possibility he intentionally declined to investigate. Davis points to no similar facts here.

The facts of the third case that Davis relies on, *Anderson*, 476 F.3d 1131, are even less analogous. There, applying de novo review, we found counsel performed deficiently by conducting "only the most rudimentary investigation of [petitioner's] background" and by presenting a "skeletal" mitigation case to the jury. *See id.* at 1142, 1144–45. Here, by contrast, trial counsel indisputably investigated Davis's background and presented a mitigation case that, unlike in *Anderson*, "offer[ed] the jury a potential explanation" for Davis's actions. *Id.* at 1144.

Thus, none of Davis's cases are persuasive. And in light of Hall's experience and the certainty of her conclusions, we conclude that trial counsel did not perform deficiently when she relied on Hall's evaluation of Davis and ceased investigating Davis's mental health. *See Strickland*, 466 U.S. at 691 ("[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."); *Duckett*, 306 F.3d at 998 (applying *Strickland* to evaluate merits of trial IAC claim omitted from appeal as part of deciding whether appellate IAC claim had merit and thus established cause to overcome procedural default of trial IAC claim). Indeed, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will

turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 545 U.S. at 383. And here, applying the requisite deference to trial counsel's decision, she reasonably drew a line after receiving the results of Hall's evaluation. *See id.* Thus, the Trial PTSD Claim lacks merit.

We therefore conclude that reasonable jurists could agree that appellate counsel did not perform deficiently when she omitted the Trial PTSD Claim from Davis's appeal. *See Duckett*, 306 F.3d at 997–98 (holding that OCCA did not unreasonably apply *Strickland* when it rejected claim that appellate counsel was ineffective in failing to allege trial counsel was ineffective in failing to pursue drug-and-sex-abuse mitigation case; noting that trial counsel's decision to instead pursue PTSD mitigation case was strategic and based on reasonable investigation, and reasoning that "[b]ecause trial counsel was not ineffective, appellate counsel correlatively [could not] be ineffective for failing to raise a dependent ineffectiveness claim"). Further, we conclude reasonable jurists could agree that appellate counsel did not perform deficiently when, like trial counsel, she relied on Hall's evaluation and ceased investigating Davis's mental health. *See Richter*, 562 U.S. at 105 ("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.").

In sum, we cannot say that "all 'fairminded jurists' would" disagree with the OCCA's adjudication of the performance prong of the Appellate PTSD

Claim. *Stouffer*, 738 F.3d at 1221 (quoting *Harrington*, 562 U.S. at 101). And that means the Appellate PTSD claim both lacks merit as a standalone claim and fails to establish cause to excuse the procedural default of the Trial PTSD Claim.[8] Accordingly, we affirm the district court's order denying habeas relief on the PTSD Claims.

Conclusion

The Depression Claims are subject to an anticipatory procedural bar. And because the Appellate PTSD Claim lacks merit, it does not excuse the procedural default of the Trial PTSD Claim or constitute an independent basis for granting the writ. We therefore affirm the district court's order denying habeas relief. As a final matter, we deny Davis's request for an expanded COA to appeal the district court's order denying relief on three additional claims he presented in his § 2254 petition because reasonable jurists could not debate the district court's resolution of those claims. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

[8] Because the Appellate PTSD Claim fails on the performance prong, we need not consider *Strickland*'s prejudice prong. Likewise, because Davis cannot show cause, we also need not address the prejudice prong of the cause-and-prejudice analysis.