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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

MARLON DEON HARMON,

Petitioner - Appellant,

v.

TOMMY SHARP, Warden, Oklahoma State Penitentiary,*

Respondent - Appellee.

No. 16-6360

Appeal from the United States District Court for the Western District of Oklahoma (D.C. No. 5:13-CV-00080-M)

Patti Palmer Ghezzi (Emma Victoria Rolls with her on the briefs), Office of the Federal Public Defender, Western District of Oklahoma, Oklahoma City, OK, for the Respondent-Appellee.

Jennifer Crabb, Oklahoma Attorney General's Office, Oklahoma City, OK, for the Respondent-Appellee.

Before **HARTZ**, **HOLMES**, and **CARSON**, Circuit Judges.

CARSON, Circuit Judge.

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* Pursuant to Fed. R. App. P. 43(c)(2), we substitute the current Warden, Tommy Sharp (in the stead of former Interim Warden, Mike Carpenter) as party respondent.

Marlon Harmon ("Petitioner" or "Harmon") is a state prisoner in Oklahoma. After a bifurcated proceeding, the jury convicted him of first-degree felony murder and sentenced him to death. The Oklahoma Court of Criminal Appeals affirmed his conviction and sentence on direct appeal and later denied two applications for post-conviction relief. Harmon then filed a petition for relief in the United States District Court for the Western District of Oklahoma under 28 U.S.C. § 2254, which the district court denied. He now appeals the district court's denial of his petition. Our jurisdiction arises under 28 U.S.C. §§ 1291 and 2253. We affirm.

I. Factual and Procedural History

A. Factual History

Under the Anti-Terrorism and Effective Death Penalty Act of 2006 (AEDPA), we presume the factual findings of the Oklahoma Court of Criminal Appeals (OCCA) are correct absent clear and convincing evidence to the contrary. See 28 U.S.C. § 2254(e)(1); Schriro v. Landrigan, 550 U.S. 465, 473–74 (2007). The OCCA found the following facts:

> On August 17, 2004, Appellant Harmon picked up his friend, Jasmine Battle, and asked her to go with him to rob a nearby convenience store.[1] Harmon was driving a green Honda Accord, and had brought a gun. As they neared the Q & S convenience store at 26th Street and Independence in Oklahoma City, Harmon got out of the car and walked to that store while Battle drove around the block. Shortly, she heard three gunshots and saw that Harmon had blood on his hands when he came running back to her. A frightened Battle abandoned the car and left.
>
> FN1: Battle entered into a plea agreement, cooperated with the State and testified against Harmon.

A young girl riding her bicycle across from the store saw Harmon run out of the store. He was clutching money in one hand and a gun in the other. She watched him run away and saw Kamal Choudhury, the owner of the store, run out and fall to the ground. She tried to call 911 from a pay phone outside the store. Unsuccessful, she then ran home to tell her mother what she had witnessed. Lance Nicholas arrived just as Choudhury emerged from the store. He heard Choudhury calling for help and saw a red substance on his clothes. He called 911 and tried to help Choudhury. When Nicholas asked Choudhury to describe the man who shot him, Choudhury pointed to Nicholas' baseball cap, worn backwards.[2] Choudhury was alert and responsive when he was transported to the hospital, but died early the next morning as a result of the gunshot wounds he sustained during the robbery.

> FN2: Neighbors in the area saw a man fitting Harmon's description walking toward the store, a green Honda driven by a young African American woman circling the block, and a man running back to the car. Witnesses described Harmon as wearing shorts, a shirt, tennis shoes and a "scarf", "do-rag" or "beanie."

Inside the store responding police officers found a large amount of blood and what appeared to have been the contents of a wallet: money, an I.D. card, and notes. Choudhury's wallet and credit cards were missing. Harmon's palm print was identified on a blood stained piece of paper found among the contents of the wallet. By the following day, Choudhury's credit cards had been used sixteen times. A card was first used fifteen minutes after the shooting at a gas station located a block away from the apartment Harmon shared with his girlfriend. Cards were also used at gas stations in El Reno and Chandler; witnesses placed Harmon in both towns after the shooting. Battle identified Harmon and one of his friends on the security videotape obtained from the Chandler gas station.

Tyrone Boston provided information to the police about Harmon's involvement in the robbery-murder. Learning of Boston's statement, Harmon responded by saying Boston was a "snitch" and voicing his regret that he had not killed him. Boston claimed to suffer from memory problems at trial, but acknowledged that Harmon had told him that he (Harmon) had been required to "plug" a man.

Harmon v. Oklahoma, 248 P.3d 918, 926–27 (Okla. Crim. App. 2011).

B. Procedural History

Petitioner ultimately confessed to the robbery and murder. After he confessed, he spoke with Battle at the Oklahoma City Police Department homicide office. During that conversation, which police recorded, he indicated to Battle that the police had them on camera and knew everything.

The State of Oklahoma subsequently charged Petitioner with first-degree felony murder and sought the death penalty. At Petitioner's preliminary hearing, the court expressed concern that police violated Petitioner's right to remain silent and refused to consider his confession to the police.

At trial, the prosecutor entered Petitioner's recorded conversation with Battle into evidence and elicited testimony from Battle regarding the conversation. During the guilt phase, the following conversation occurred between the prosecutor and Battle:

> State: Do you recall hearing or seeing on that video [of the conversation] it's over, I'm through?
>
> Battle: Yes.
>
> State: What did you understand [Harmon] to mean by that?
>
> Battle: That he had confessed to it.

The judge admonished the jury that Battle's statement was "total and pure speculation and fiction," that it was to be ignored, and that it was "not to be considered during deliberations."

The prosecutors also replayed the video for the jury twice during closing arguments in the guilt phase—first during the initial closing argument and then again during the prosecution's rebuttal argument. After playing the video during its initial closing argument, the prosecution stated:

> Now, that's a piece of evidence. You can, of course, play it during your deliberations. I know you have to play it a few times to hear what it says, but he's not saying, oh my God, what are they talking about, why are they saying we did this? What is he saying? It's over. Candid camera got us. They know about El Reno.[1]

After playing the tape for the second time, the prosecution argued:

> Hardly the words of an innocent man, I think. Listen to what he says there. They know every mother fucking thing. They got everybody. It's over for me. I'm through. Not, my goodness, I can't figure out what's going on here, they're framing us, things are falling apart, none of that. That, Ladies and Gentlemen, is the tone; that, Ladies and Gentlemen, is the choice of words of resignation. He is straight there. It's over. They describe everything, he says. And she says everything what? What have they got? Everything. Candid camera in El Reno. They saw you getting out of the car.
>
> You're witnessing two things right there on that video. The obvious one that we have talked so much about. There is something more suttle [sic] here and it came from that witness stand the other day when Jasmine Battle was testifying to you. She told you that she did not cooperate with the police and didn't tell them anything until that happened, right?

The jury subsequently convicted Harmon of first-degree felony murder.

The State moved the evidence from the guilt phase into evidence during the sentencing phase of the trial. The State also introduced evidence that the victim had

[1] The video Petitioner referred to was not a video of the crime; it was a video of Petitioner at a gas station where the victim's credit cards were used.

consciously suffered before he died; that Petitioner had previously robbed individuals and threatened them with firearms both before and after the murder; that Petitioner had, with several other prisoners, attempted to sexually assault another prisoner (although the evidence did not show that Petitioner had sexually assaulted anyone); that Petitioner had stabbed another prisoner; and that Petitioner had committed the charged crime while on parole.

The district court described the mitigation evidence presented by Petitioner:

> Four of the nine witnesses who testified on behalf of Petitioner were family members. Petitioner's cousin, Jason Murphy, testified that he and Petitioner grew up together and that Petitioner had a tough home life. Mr. Murphy told the jury that Petitioner's mother used drugs and was not really there for him. Because of her, Petitioner saw things "a small kid shouldn't see[,]" including domestic abuse. Petitioner spent many nights away from home in an attempt to avoid his unstable home environment. Mr. Murphy testified that Petitioner attended school about half of the time. When Petitioner was released from prison, Mr. Murphy tried to help him. Petitioner moved in with him, and Mr. Murphy continually encouraged Petitioner to get a job and quit hanging around with the wrong crowd. Mr. Murphy testified that he contacted the police when he learned of Petitioner's involvement in Mr. Choudhury's death. Mr. Murphy kept in contact with Petitioner while he was in jail. Petitioner regretted not taking Mr. Murphy's advice. Mr. Murphy asked the jury to spare Petitioner's life. On cross-examination, Mr. Murphy admitted that although he and Petitioner had similar backgrounds, he, unlike Petitioner, went to school, got a job, and was successful.
>
> John Bromsey, Petitioner's uncle, testified that he looked after Petitioner. Mr. Bromsey testified that Petitioner often got kicked out of the house for defending his mother from his stepfather's abuse. When Petitioner stayed with him, which was often, Mr. Bromsey made sure Petitioner did his school work. Mr. Bromsey acknowledged his sister's drug habit, which was present even before Petitioner was born. Mr. Bromsey testified that because Petitioner's siblings were dealing with the same issues Petitioner did as growing up, he now took care of them. Mr. Bromsey, who had his own issues

with drugs, was at one time incarcerated at the same facility as Petitioner. While in prison, Mr. Bromsey told Petitioner that when he was released, he should stay at his house and look after his siblings. Mr. Bromsey told him to "turn the lights on and stay out of trouble." Petitioner did not follow his advice. Mr. Bromsey asked the jury to spare Petitioner's life. He said that he would write and visit Petitioner.

Petitioner's aunt, Janice Williams, testified that she and her family raised Petitioner from a baby. From about age one to four or five, Petitioner was often in their care. Ms. Williams told the jury that her father, Petitioner's grandfather, had wanted to adopt Petitioner, but Petitioner's mother would not let him. When Petitioner was a teenager, a question arose as to whether her brother[—that is, Janice Williams's brother—]was actually Petitioner's father, but that did not change the way they felt about him. Ms. Williams testified that Petitioner had a great relationship with her father and that when Petitioner was with them, he was never in any trouble. Ms. Williams testified that she maintained contact with Petitioner and she asked the jury to spare his life. On cross-examination, Ms. Williams told the jury that when Petitioner first got into trouble at the age of fourteen, she tried to help him get back on track. She admitted that his struggles had been heartbreaking to her family .

Petitioner's little sister, JaQuinda Sims, who was only thirteen at the time of trial, also testified. She testified that she did not live with her parents, but with relatives, as did her brothers. She identified family pictures, which were introduced into evidence. She told the jury that she had written letters to Petitioner for a long time. Five of those letters were admitted into evidence. She and Petitioner had a special relationship. She said she would write him forever.

Petitioner fathered a child when he was only fourteen years old. His daughter, Trynecka, was twelve years old at the time of trial (Tr. VI, 90; Tr. VII, 155). His daughter's mother, Danielle Sheffey, and grandmother, Loretta Sheffey, both testified. Loretta Sheffey testified that when she met Petitioner "he was pretty much on his own." Petitioner stayed at her house two to three times a week. Ms. Sheffey grew to love Petitioner as one of her own. Petitioner wanted her to adopt him, but she was not in a position to do so. Ms. Sheffey testified that she still loved Petitioner and she asked the jury to spare his life. Danielle Sheffey gave more details about her relationship with Petitioner and Petitioner's relationship with their daughter. She

testified that their daughter is deaf, and even though Petitioner's contact with her has been sporadic, she knows who her father is and she loves him. She asked the jury to spare Petitioner's life for their daughter's sake.

Devonna Bolden, Petitioner's girlfriend at the time of the crime, testified about her relationship with Petitioner. Ms. Bolden, who has lupus, told the jury that Petitioner took good care of her when they were dating. She also testified that when she got pregnant with his child and had a miscarriage, Petitioner was helpful in every way. Ms. Bolden had spent time with Petitioner and his daughter. She said Petitioner and his daughter were very close and that Petitioner had learned sign language in order communicate with her. Although their relationship ended when Petitioner went to jail, she testified that she still had feelings for him.

Nathaniel Thurman, an ordained minister, testified that he had been visiting with Petitioner in the county jail two to three times a month for the last three to four years. He testified that he and Petitioner had had some fairly in-depth conversations and that Petitioner had a strong faith. He described Petitioner as intelligent and articulate and said Petitioner was good at writing poems and drawing. Pastor Thurman told the jury that he would visit him in prison if the jury spared Petitioner's life.

Licensed clinical social worker Selonda Moseley compiled a social history of Petitioner's life and discussed her findings with the jury. She testified that she interviewed Petitioner's family members and reviewed all of his records. She told the jury that the purpose of a social history is "not to . . . explain away a person's behavior," but "to understand why someone thought or behaved certain ways or why they interacted with their environment the way they did." Ms. Moseley testified extensively about Petitioner's upbringing, using a governmental study which evaluates risk and protective factors in five categories–individual, family, school, peers, and community. Ms. Moseley concluded that Petitioner had multiple risk factors and less protective factors across all categories. In the individual category, he had eight out of ten risk factors and none of the seven protective factors; in the family category, he had all of the risk factors and one of four protective factors; in the school category, he had all of the risk factors and no protective factors; in the peer category, he had two of three risk factors and one of three protective

> factors; and in the community category, he had six of nine risk factors and all of the protective factors.
>
> Ms. Moseley gave additional testimony about Petitioner's mother, who was only fifteen when she gave birth to him. Petitioner was a crack baby, whose mother would express her breast milk rather than feed him. Ms. Moseley testified that "because of his mother's depression, her substance abuse and her [violent] relationship with her husband, all of those factors interfered with her being a positive role model for [Petitioner] and being able to attend to his needs". His mother's issues often caused a reversal in their roles, i.e., Petitioner would come home and find his mother so high that he would have to take care of her. Ms. Moseley also testified about the issue of Petitioner's paternity and the affect that had on him.
>
> Finally, Ms. Moseley testified about Petitioner's future. She testified that although she was aware of those instances when Petitioner got into trouble while incarcerated, she also recognized his ability to excel while confined and felt that he could be productive in prison.

Harmon v. Royal, No. CIV-13-80-M, 2016 WL 6693561, at *26–28 (W.D. Okla. Nov. 14, 2016) (first, third, and fourth alteration in original, second alteration added).

At the conclusion of the sentencing phase, the jury found three aggravating circumstances—the murder was especially heinous, atrocious, or cruel; the murder was committed by a person while serving a sentence of imprisonment for conviction of a felony; and at that time there existed a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. The jury sentenced Petitioner to death.

Petitioner appealed to the OCCA. Among other issues, he argued that: (1) he was prejudiced when the judge admitted his videotaped conversation with Battle into evidence; and (2) the prosecutor committed misconduct by improperly describing the jury

instructions to the jury and denigrating Petitioner's mitigation evidence. The OCCA affirmed his conviction and sentence. The United States Supreme Court denied certiorari.

Petitioner later sought state collateral relief. In his first application for post-conviction relief (the "First APCR"), he argued that: (1) his trial counsel were ineffective because they failed to obtain a psychological evaluation and present evidence regarding his mental illness and other disorders, present his family history through the testimony of his relatives, and present evidence that he was sexually molested as a child; (2) his appellate counsel was ineffective because she failed to assert those claims on appeal; and (3) his appellate counsel was ineffective because she also failed to assert a claim that the prosecutor committed misconduct when the prosecutor asked questions of Battle that were intended to inform the jury of Harmon's confession.[2] Original Application for Post Conviction Relief at 7–16, 37–40, 46–48, Harmon v. Oklahoma, No. PCD-2008-919919 (Okla. Crim. App. Jan. 4, 2013). He also argued that even if these errors alone did not entitle him to habeas relief, the cumulative effect of the errors entitled him to such relief. See id. at 48–49. The OCCA denied Petitioner's application for post-conviction relief and also denied his motion seeking an evidentiary hearing.[3] Harmon v. Oklahoma, No. PCD-2008-919 (Okla. Crim. App. Jan. 4, 2013) (the "First APCR Opinion").

[2] Petitioner also raised other arguments which are not before this Court.

[3] Harmon subsequently filed a second application for post-conviction relief (the "Second APCR"). The OCCA also denied the Second APCR.

Thereafter, Petitioner filed a petition for a writ of habeas corpus under 22 U.S.C. § 2254 in the United States District Court for the Western District of Oklahoma. He named the warden of the Oklahoma State Penitentiary as the Respondent. The district court denied habeas relief and did not issue a certificate of appealability ("COA").

Petitioner then appealed to this Court. We issued a COA with respect to several issues. First, "whether Mr. Harmon received constitutionally ineffective assistance of counsel"—with the exception of certain ineffective assistance claims for which we did not grant Petitioner a COA—and whether "Mr. Harmon is entitled to an evidentiary hearing concerning this ground for relief." Second, "whether the introduction of Mr. Harmon's incriminating statements to his co-defendant, Jasmine Battle, had a substantial and injurious effect on the jury's verdicts." Third, "whether prosecutorial misconduct during his sentencing proceedings denied Mr. Harmon due process." Fourth, "whether the cumulative effect of" those "errors denied Mr. Harmon a fundamentally fair trial and/or sentencing."[4]

II. Standard of Review

AEDPA requires that we apply a "difficult to meet" and "highly deferential standard" in federal habeas proceedings under 28 U.S.C. § 2254; it "demands that state-

[4] Petitioner subsequently filed a motion to expand the certificate of appealability to include other issues. These issues include: (1) "Constitutional Violations Resulting from Suppression of Victim's Family's Preference for a Sentence Less than Death"; (2) "Failure to Disclose Battle's Complete Agreement with Prosecutors"; and (3) "Ineffective Assistance of Trial and Appellate Counsel in Failing to Investigate, Develop, and Present Evidence of an Alternative Suspect." We have considered his arguments and deny that motion.

court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citations omitted). When a petitioner includes in his habeas application a "claim that was adjudicated on the merits in State court proceedings," a federal court shall not grant relief on that claim unless the state-court decision:

> (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).

Section 2254(d)(1)'s reference to "clearly established Federal law, as determined by the Supreme Court of the United States," "refers to the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). "Federal courts may not extract clearly established law from the general legal principles developed in factually distinct contexts, and Supreme Court holdings must be construed narrowly and consist only of something akin to on-point holdings." Fairchild v. Trammell ("Fairchild I"), 784 F.3d 702, 710 (10th Cir. 2015) (internal quotation marks and citation omitted).

Under § 2254(d)(1), a state-court decision is "contrary to" the Supreme Court's clearly established precedent if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [that] precedent." Williams, 529 U.S. at 405–06. A state court need not

cite, or even be aware of, applicable Supreme Court decisions, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

A state-court decision is an "unreasonable application" of Supreme Court law if the decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." Williams, 529 U.S. at 407–08. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Conversely, "[i]f a legal rule is specific, the range may be narrow," and "[a]pplications of the rule may be plainly correct or incorrect." Id. And "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." Williams, 529 U.S. at 410 (emphases in original).

If we determine that a state-court decision is either contrary to clearly established Supreme Court law or an unreasonable application of that law, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding, we then apply de novo review and may only grant habeas relief if the petitioner is entitled to relief under that standard. See Milton v. Miller, 744 F.3d 660, 670–71 (10th Cir. 2014) ("Miller's satisfaction of the § 2254(d)(1) standard has two related effects . . . Second, it requires us to review de novo his ineffective assistance of appellate counsel claim, rather than deferring to the OCCA's resolution of that claim."); Hancock v. Trammell, 798 F.3d 1002, 1012 (10th Cir. 2015) ("If the OCCA had misunderstood the basis for the district court's ruling, as Mr. Hancock argues, the mistake

would likely have constituted an unreasonable determination of fact and allowed us to consider the merits of the underlying constitutional claim.").

Similarly, claims not "adjudicated on the merits" in state court are entitled to no deference. Fairchild I, 784 F.3d at 711. But "even in the setting where we lack a state court merits determination, '[a]ny state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by "clear and convincing evidence."'" Grant v. Royal, 886 F.3d 874, 889 (10th Cir. 2018) (quoting 28 U.S.C. §2254(e)(1)) (alteration in original); see also Victor Hooks v. Ward ("Victor Hooks I"), 184 F.3d 1206, 1223 (10th Cir. 1999) (presuming the correctness of state-court findings on a claim not adjudicated on the merits). Although a petitioner bears a heavy burden under AEDPA, we "undertake this review cognizant that our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." Fairchild v. Workman (Fairchild II), 579 F.3d 1134, 1140 (10th Cir. 2009) (internal quotation marks omitted).

With these standards in mind, we turn to Petitioner's claims.

III. Discussion

A. Ineffective Assistance of Counsel

Petitioner contends that his trial counsel was ineffective because counsel failed to: (1) fully investigate and present Petitioner's documented history of mental health disorders; (2) hire a qualified medical expert to evaluate Petitioner and, during the sentencing proceedings, explain Petitioner's mental impairments and how those impairments, coupled with his difficult childhood, impaired his ability to regulate

emotions and control impulses;[5] and (3) discover and present evidence of his childhood sexual abuse. We analyze the first two arguments together because they are substantially related.

Petitioner also contends appellate counsel was ineffective because counsel failed to present Petitioner's ineffective assistance of trial counsel claims on direct appeal.

1. Legal Framework Generally

We review claims of ineffective assistance of counsel under the framework laid out in Strickland v. Washington, 466 U.S. 668 (1984).[6] Byrd v. Workman, 645 F.3d 1159, 1167 (10th Cir. 2011). Under Strickland, a petitioner "must show both that his counsel's performance 'fell below an objective standard of reasonableness' and that 'the deficient performance prejudiced the defense.'" Id. (emphasis omitted) (quoting Strickland, 466 U.S. at 687–88). "These two prongs may be addressed in any order, and failure to satisfy either is dispositive." Victor Hooks v. Workman ("Victor Hooks II"), 689 F.3d 1148, 1186 (10th Cir. 2012).

[5] In the introduction to his argument, Petitioner summarily asserts that counsel was ineffective when counsel "failed to investigate and present available mitigation witnesses who could have humanized Harmon and provided the mental health expert with critical background information." Pet'r's Br. 23. His detailed argument, however, only addresses counsel's failure to consult with and present a qualified mental health expert. Thus, he has waived his more expansive claim regarding mitigation witnesses. See United States v. Patterson, 713 F.3d 1237, 1250 (10th Cir. 2013) ("By failing to develop any argument on this claim at *this court,* Patterson has waived the claim.").

[6] The Strickland standard applies to both ineffective assistance of appellate counsel claims and ineffective assistance of trial counsel claims. Smith v. Robbins, 528 U.S. 259, 285 (2000).

"[O]ur review of counsel's performance under the first prong of Strickland is a 'highly deferential' one." Byrd, 645 F.3d at 1168 (quoting Danny Hooks v. Workman, 606 F.3d 715, 723 (10th Cir. 2010)). "Every effort must be made to evaluate the conduct from counsel's perspective at the time." Littlejohn v. Trammell ("Littlejohn I"), 704 F.3d 817, 859 (10th Cir. 2013). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Victor Hooks II, 689 F.3d at 1187 (quoting Byrd, 645 F.3d at 1168). And the "petitioner 'bears a heavy burden' when it comes to overcoming that presumption." Byrd, 645 F.3d at 1168 (quoting Fox v. Ward, 200 F.3d 1286, 1295 (10th Cir. 2000)). "To be deficient, the performance must be outside the wide range of professionally competent assistance. In other words, it must have been completely unreasonable, not merely wrong." Danny Hooks, 606 F.3d at 723 (internal quotation marks and citation omitted).

"A state prisoner in the § 2254 context faces an even greater challenge." Victor Hooks II, 689 F.3d at 1187 (citing Byrd, 645 F.3d at 1168). "[W]hen assessing a state prisoner's ineffective-assistance-of-counsel claims on habeas review, '[w]e defer to the state court's determination that counsel's performance was not deficient and, further, defer to the attorney's decision in how to best represent a client.'" Id. (alterations in original) (quoting Byrd, 645 F.3d at 1168). "Thus our review of ineffective-assistance claims in habeas applications under § 2254 is 'doubly deferential.'" Id. (quoting Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)).

"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 *any* reasonable argument exists that counsel satisfied Strickland's deferential standard." Harrington, 562 U.S. at 105 (emphasis added). And "because the Strickland standard is a general standard, a state court has . . . more latitude to reasonably determine that a defendant has *not* satisfied that standard." Byrd, 645 F.3d at 1168 (emphasis added).

Despite our strong presumption that counsel rendered constitutionally reasonable assistance, "we have recognized a need to apply . . . closer scrutiny when reviewing attorney performance during the sentencing phase of a capital case." Cooks v. Ward, 165 F.3d 1283, 1294 (10th Cir. 1998); see also Osborn v. Shillinger, 861 F.2d 612, 626 n.12 (10th Cir. 1988) ("[T]he minimized state interest in finality when resentencing alone is the remedy, combined with the acute interest of a defendant facing death, justify a court's closer scrutiny of attorney performance at the sentencing phase."). "We judge counsel's performance by reference to 'prevailing professional norms,' which in capital cases include the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ('ABA Guidelines')." Victor Hooks II, 689 F.3d at 1201 (quoting Young v. Sirmons, 551 F.3d 942, 957 (10th Cir. 2008)). "Among the topics defense counsel should investigate and consider presenting include medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experiences, and religious and cultural influences." Young, 551 F.3d at 957.

"Counsel has a duty to conduct a 'thorough investigation—in particular, of mental health evidence—in preparation for the sentencing phase of a capital trial.'" Victor Hooks II, 689 F.3d at 1201 (quoting Michael Wilson v. Sirmons ("Michael Wilson I"), 536 F.3d 1064, 1083 (10th Cir. 2008)). "[D]rawing on a trilogy of Supreme Court cases—[Terry] Williams v. Taylor, 529 U.S. 362 (2000), Wiggins v. Smith, 539 U.S. 510 (2003), and Rompilla v. Beard, 545 U.S. 374 (2005)—involving ineffective assistance at capital-sentencing proceedings[,]" we divined the following three principles:

> First, the question is not whether counsel did *something*; counsel must conduct a full investigation and pursue reasonable leads when they become evident. Second, to determine what is reasonable investigation, courts must look first to the ABA guidelines, which serve as reference points for what is acceptable preparation for the mitigation phase of a capital case. Finally, because of the crucial mitigating role that evidence of a poor upbringing or mental health problems can have in the sentencing phase, defense counsel must pursue this avenue of investigation with due diligence. Our own Circuit has emphasized this guiding principle. In Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004), we held that it was "patently unreasonable" for trial counsel to fail to present evidence of Smith's borderline mental retardation, brain damage, and troubled childhood, and stated that this type of mitigating evidence "is exactly the sort of evidence that garners the most sympathy from jurors."

Michael Wilson I, 536 F.3d at 1084–85 (citations omitted).

"Under the prejudice prong [of Strickland], a petitioner must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Littlejohn v. Royal ("Littlejohn II"), 875 F.3d 548, 552 (10th Cir. 2017) (quoting Strickland, 466 U.S. at 694). "When a petitioner alleges ineffective assistance of counsel stemming from a failure to investigate mitigating evidence at a capital-sentencing proceeding, 'we evaluate the totality of the evidence'"

that AEDPA permits us to consider. Jeremy Williams v. Trammell, 782 F.3d 1184, 1215 (10th Cir. 2015) (quoting Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004)).

More specifically:

> we reweigh the evidence in aggravation against the totality of available mitigating evidence, considering the strength of the State's case and the number of aggravating factors the jury found to exist, as well as the mitigating evidence the defense did offer and any additional mitigating evidence it could have offered.

Littlejohn II, 875 F.3d at 553 (10th Cir. 2017) (quotations and citations and omitted). "[W]e must consider not just the mitigation evidence that Defendant claims was wrongfully omitted, but also what the prosecution's response to that evidence would have been." Michael Wilson v. Trammell ("Michael Wilson II"), 706 F.3d 1286, 1306 (10th Cir. 2013).

"If there is a reasonable probability that at least one juror would have struck a different balance, . . . prejudice is shown." Littlejohn I, 704 F.3d at 861 (quoting Victor Hooks II, 689 F.3d at 1202). Put another way, in the capital-sentencing context, if the petitioner demonstrates a reasonable probability that "at least one juror would have refused to impose the death penalty," the petitioner has successfully shown prejudice under Strickland. Victor Hooks II, 689 F.3d at 1202.

2. State Procedural Bar

Before we turn to the merits, we must address a procedural argument raised by the Respondent. The Respondent contends that we cannot consider Petitioner's ineffective assistance of trial counsel claims because Petitioner waived those claims when he failed to assert them on direct appeal.

In Oklahoma, a defendant must assert any available ineffective assistance of counsel claims on direct appeal, or the defendant waives those claims. See Sporn v. Oklahoma, 139 P.3d 953, 953–54 (Okla. Crim. App. 2006) ("As with all other claims that could have been raised upon direct appeal, a claim of ineffective assistance of trial counsel, available at the time of a defendant's direct appeal, must be presented in that direct appeal or it is waived."). Because Petitioner did not assert these claims until the First APCR, the OCCA held that he waived these claims. Harmon, No. PCD-2008-919, slip op. at 3.

"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." See English v. Cody, 146 F.3d 1257, 1259 (10th Cir. 1998). Thus, unless Petitioner can show cause and prejudice or a fundamental miscarriage of justice, the Court cannot reach his ineffective assistance of trial counsel claims.

Petitioner argues that his claims are not procedurally barred because, despite noting that the claims were barred, the OCCA nevertheless reached their merits. He also argues that we should set aside the procedural bar because: (1) the same public defender's office represented him at trial and on direct appeal; and (2) his appellate counsel was

ineffective when appellate counsel failed to investigate and assert his ineffective assistance of trial counsel claims.[7] We will address these arguments in turn.

i. Existence of the Procedural Bar

Petitioner contends that no procedural bar exists because, although the OCCA characterized his ineffective assistance of trial counsel claims as waived, it reached the merits of those claims.

Significantly, the OCCA reached the merits of his claims while discussing whether to set aside its procedural bar—that is, the OCCA considered whether appellate ineffective assistance of counsel warranted setting aside that bar but determined that it did not because appellate counsel was not ineffective for failing to assert meritless ineffective assistance of trial counsel claims.

Charitably construed in Petitioner's favor, the OCCA's opinion, at best, states alternative holdings. When a state court determines that a procedural bar exists and then reaches the merits of a federal claim as an alternative holding, federal courts must "honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." Harris v. Reed, 489 U.S. 255, 264 n.10 (1989). Thus, a federal habeas court should not "reach the merits of a federal claim where the state court addressed the merits" when "the state court clearly alternatively held that the petitioner

[7] Respondent contends that Petitioner waived these arguments for setting aside the procedural bar because they were not adequately briefed in Petitioner's opening brief. We will assume for the purposes of this appeal that Petitioner adequately raised these arguments because doing so will not change the outcome of the appeal.

had procedurally defaulted." Shafer v. Stratton, 906 F.2d 506, 508–10 (10th Cir. 1990). Accordingly, we may only grant relief on Petitioner's ineffective assistance of trial counsel claims if grounds exist for us to set aside the procedural bar.[8]

ii. Cause and Prejudice for Ineffective of Assistance of Counsel Claims Not Asserted on Direct Appeal Generally

In states that require defendants to assert ineffective assistance of trial counsel claims on direct appeal, cause and prejudice justifies bypassing the procedural bar for any meritorious claims that were asserted in the first application for post-conviction relief, *unless* the state's procedures:

> (1) allow[] petitioner an opportunity to consult with separate counsel on appeal in order to obtain an objective assessment of trial counsel's performance and (2) provid[e] a procedural mechanism whereby a petitioner can adequately develop the factual basis of his claims of ineffectiveness.

English, 146 F.3d at 1262–63.

"[T]he state bears the burden of proving the adequacy of a state procedural bar in order to preclude federal habeas review," and thus must prove both that: (1) trial counsel and appellate counsel are separate; and (2) the state provides an adequate procedural mechanism for the petitioner to supplement the record. Cuesta-Rodriguez v. Carpenter, 916 F.3d 885, 901 (10th Cir. 2019) (separate counsel); Victor Hooks I, 184 F.3d 1206,

[8] The district court determined that Petitioner's ineffective assistance of counsel claims failed on the merits and did not address this procedural bar. Nevertheless, we "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court . . . ." Richison v. Ernest Grp., Inc., 634 F.3d 1123, 1130 (10th Cir. 2011).

1217 (10th Cir. 1999) (state procedure for supplementing the record). At the same time, once the state invokes a procedural bar, the petitioner has the "responsibility to put the adequacy of the state procedural bar at issue" by, "at a minimum," making "specific allegations . . . as to the inadequacy of the state procedure." Id. at 1216–17. "The scope of the state's burden of proof" is then "measured by the specific claims of inadequacy put forth by the petitioner." Id.

a. Separate Counsel

In this case, Petitioner contends that appellate counsel and trial counsel were not separate because the Oklahoma County Public Defender's Office represented Petitioner at trial and on direct appeal.[9] Regardless, different attorneys from the same public defender's office may, under certain circumstances, constitute separate counsel. See Cannon v. Mullin, 383 F.3d 1152, 1173–74 (10th Cir. 2004), abrogated on other grounds by Simpson v. Carpenter, 912 F.3d 542, 576 n.18 (10th Cir. 2018). We have identified several factors that a court may consider when determining whether such representation

[9] In the district court, Petitioner's filings only argued that trial and appellate counsel were not separate because all counsel worked for the same public defender's office. Petitioner also filed a motion seeking an evidentiary hearing to address the inadequacies of the procedural bar, but that motion did not provide any additional allegations regarding the separateness of counsel.

Respondent argues that Petitioner waived any argument regarding separateness of counsel by inadequately presenting it to the district court. We need not address that issue, however, because even assuming Petitioner adequately presented the issue to the district court, we are satisfied that Respondent has shown that trial and appellate counsel were separate when Respondent's evidence of separateness is measured against Petitioner's limited allegations.

constitutes representation by separate counsel: (1) the structure of the public defender's office—"[a] statewide public defender's office with independent local offices, and perhaps even a distinct appellate office, would not raise the same concerns as when trial and appellate counsel work in adjacent rooms"; (2) whether the public defender's office has a "history of raising ineffective-assistance claims"; (3) whether the public defender's office has "a policy of not claiming ineffective assistance by public defenders at trial"; and (4) whether appellate counsel argued for plain error review of arguments that trial counsel did not raise, but failed to argue that trial counsel was ineffective for failing to raise those arguments before the trial court. See id. For example, in Cannon, we determined that counsel were not separate because appellate counsel argued six issues for the first time on appeal under the plain error standard, but did not argue that trial counsel was ineffective when trial counsel failed to raise those errors. See id.

On direct appeal, appellate public defenders from the Oklahoma County Public Defender's Office have repeatedly raised ineffective assistance of trial counsel arguments based on the conduct of attorneys from that office. See, e.g., Coddington v. Oklahoma, 254 P.3d 684 (Okla. Crim. App. 2011) (ineffective assistance of trial counsel claim filed by appellate counsel in this case with regard to the conduct of trial counsel in this case); Jiminez v. Oklahoma, 144 P.3d 903 (Okla. Crim. App. 2006) (ineffective assistance of trial counsel claim filed by appellate counsel in this case); Davis v. Oklahoma, 268 P.3d 86 (Okla. Crim. App. 2011) (ineffective assistance of trial counsel claim filed with regard to the conduct of trial counsel in this case); Dodd v. Oklahoma, 100 P.3d 1017 (Okla. Crim. App. 2004) (same); Patton v. Oklahoma, 973 P.2d 270 (Okla. Crim. App. 1998)

(same); Frederick v. Oklahoma, 400 P.3d 786 (Okla. Crim. App. 2017), overruled by Williamson v. Oklahoma, 422 P.3d 752, 762 & n.1 (Okla. Crim. App. 2018); Warner v. Oklahoma, 144 P.3d 838 (Okla. Crim. App. 2006), overruled by Taylor v. Oklahoma, 419 P.3d 265, 269 (Okla. Crim. App. 2018); Jones v. Oklahoma, 128 P.3d 521 (Okla. Crim. App. 2006). Those previously asserted claims are strong evidence that we should treat appellate attorneys and trial attorneys from the Oklahoma County Public Defender's Office as separate counsel. See Cuesta-Rodriguez, 916 F.3d at 901–02 (concluding that appellate counsel and trial counsel from the Oklahoma County Public Defender's Office were separate counsel after considering the office's record of asserting ineffective assistance of counsel claims against trial counsel from that office).

At the same time, the appellate public defender in this case argued one instance of plain error and did not argue that trial counsel was ineffective for failing to raise the argument. Nevertheless, we are not satisfied that one such omission—in contrast to the six omissions in Cannon—establishes that the Oklahoma County Public Defender's Office does not assert ineffective assistance of trial counsel claims on direct appeal in light of the other evidence that the office files such claims. Thus, although we address this matter in the first instance, we are satisfied that Petitioner's appellate counsel and trial counsel were separate.

b. Adequate Procedural Mechanism

We turn now to the adequacy of the state's procedural mechanism for supplementing the record. An Oklahoma defendant may supplement the record on direct appeal pursuant to Rule 3.11 of the Rules of the Oklahoma Court of Criminal Appeals.

See Rule 3.11(B)(3)(b), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App., available at http://okcca.net/online/rules/rulesrvr.jsp?r=34; see also Fairchild v. Trammell, 784 F.3d 702, 721 (10th Cir. 2015) ("Oklahoma provides a reasonable time to investigate a claim of ineffective assistance before raising it on direct appeal. A claim of ineffective assistance can be raised with the opening brief on appeal. And the brief can be accompanied by a request to supplement the record.").

In English, we held that the Oklahoma bar applies when "trial and appellate counsel differ; and the ineffectiveness claim can be resolved upon the trial record alone." English, 146 F.3d at 1264. We also held that if trial and appellate counsel differed, the Oklahoma bar would apply to ineffective assistance of counsel claims that could not be resolved upon the trial record alone "only if [Rule 3.11] is adequately and evenhandedly applied." Id. We then remanded for the district court to determine "whether these claims embrace matters in the trial record or whether they require enlargement of that record or additional fact-finding." Id. We instructed that:

> [i]f, on remand, the district courts conclude that Petitioners' claims concern matters wholly manifest in the direct appeal record, the claims are procedurally barred. If, on the other hand, the district courts conclude that Petitioners' claims could only be adequately developed thorough [sic] supplementation of the record on appeal or additional fact-finding, the district courts should then consider whether the applicable Oklahoma remand procedure was adequate to serve that purpose. In so doing, the courts should consider the four bases of inadequacy alleged by Petitioners, see supra pages 1263–64, and any other additional factor deemed pertinent.

Id. at 1264–65.

Before this court, Petitioner argues that his claims are not procedurally barred because his ineffective assistance of trial counsel claims require consideration of matters outside the trial record. Significantly, in his district court filings, Petitioner did not assert either that: (1) the procedural bar was inadequate because his claims involved matters outside the trial record; or (2) Rule 3.11 was not an adequate procedural mechanism for supplementing the record on direct appeal. Although Petitioner also filed a motion seeking an evidentiary hearing to address the inadequacies of the procedural bar, that motion similarly did not allege any deficiencies in Oklahoma's procedures. Thus, Petitioner waived those arguments. Accordingly, for purposes of this appeal, we conclude that Oklahoma's procedural mechanism is adequate.

iii. Cause and Prejudice from Ineffective Assistance of Appellate Counsel

"A claim of ineffective assistance of appellate counsel can [also] serve as cause and prejudice to overcome a procedural bar" that bars an ineffective assistance of trial counsel claim, if the ineffective assistance of appellate counsel claim "has merit." Ryder ex rel. Ryder v. Warrior, 810 F.3d 724, 746–47 (10th Cir. 2016). At the same time, an ineffective assistance of appellate counsel claim lacks merit if the petitioner argues that appellate counsel should have asserted *meritless* ineffective assistance of trial counsel claims. See id. at 747. So, if an ineffective assistance of trial counsel claim lacks merit, the ineffective assistance of appellate counsel claim is meritless and the ineffective assistance of trial counsel claim is procedurally barred. See id. When considering the merits of a petitioner's claim in this context, we afford AEDPA deference to any state

court determination as to whether appellate counsel was constitutionally ineffective. See id. at 746.

For that reason, we consider the merits of Petitioner's ineffective assistance of trial counsel claims only to determine whether those claims are procedurally barred and whether Petitioner has stated potentially meritorious ineffective assistance of appellate counsel claims. Although our analysis is somewhat circular, we proceed in this manner because Petitioner has asserted a cumulative error claim. We do not cumulate prejudice from a procedurally barred ineffective assistance of trial counsel claim when we address a petitioner's cumulative error claim. Cuesta-Rodriguez, 916 F.3d at 916 ("So Cuesta-Rodriguez's ineffective-assistance claims, having been ruled procedurally barred, have no place in our cumulative-error analysis."); see also Simpson, 912 F.3d at 572–73, 603–04 (not aggregating prejudice from a procedurally barred Brady claim during a cumulative error analysis after declining to set aside the procedural bar because the petitioner had not made an adequate showing of prejudice, even assuming that petitioner made an adequate showing of cause). In contrast, we do cumulate prejudice from an ineffective assistance of trial counsel claim that fails for lack of adequate prejudice. See Cargle v. Mullin, 317 F.3d 1196, 1207 (10th Cir. 2003).

Turning to Petitioner's merits argument, he contends his trial counsel acted ineffectively by failing to: (1) fully investigate and present Petitioner's documented history of mental health disorders, and hire a qualified medical expert to evaluate Petitioner and, during the sentencing proceedings, explain Petitioner's mental impairments and how those impairments, coupled with his difficult childhood, impaired

his ability to regulate emotions and control impulses; and (2) discover and present evidence of Harmon's childhood sexual abuse. Petitioner also contends that he is entitled to de novo review of these claims.

We first address Petitioner's arguments for de novo review that bear upon all of his ineffective assistance of trial counsel claims. Then, we consider each individual ineffective assistance of trial counsel claim, addressing first the arguments for de novo review that apply only to that claim, and then the merits of each of those claims.

a. Arguments for De Novo Review of All Claims

Harmon contends he is entitled to de novo review of all of his ineffective assistance of counsel claims because: (1) the OCCA required Harmon to satisfy a heightened burden on Strickland's prejudice prong; and (2) the OCCA did not hold an evidentiary hearing.

(1.) Heightened Burden

Under Strickland, a court analyzing the prejudice prong must, after "consider[ing] the totality of the evidence," determine whether "*the decision reached would reasonably likely have been different absent the errors.*" Strickland, 466 U.S. at 696 (emphasis added). Several times, the OCCA used imprecise language that arguably misstated that burden. See, e.g., Harmon, No. PCD-2008-919, slip op. at 3 n.3 ("The applicant must state specific facts explaining why each claim was not or could not have been raised in a direct appeal and how it supports a conclusion either that *the outcome of the trial would have been different but for the errors* or that the defendant is factually innocent. 22 O.S.Supp.2006, § 1089 (C)." (emphasis added)); id. at 10 ("We are not convinced that the

information Dr. McGarrahan or a similar expert could have added *would have had a difference in the outcome of this case.*" (emphasis added)).

Petitioner contends the OCCA employed this language in "intentional defiance of Strickland" because the language that the OCCA used tracks the wording of an Oklahoma statute rather than the language the Supreme Court employed in Strickland. That statute provides that petitioners may obtain post-conviction relief when they raise issues that "[s]upport a conclusion . . . that the outcome of the trial would have been different but for the errors." See Okla. Stat. Ann. tit. 22, § 1089(C).

Contrary to Petitioner's argument, we are satisfied that the OCCA applied the correct standard because it properly enunciated that standard on several occasions. First, the OCCA properly described the standard when it initially described the Strickland inquiry. See id. at 4 ("Under Strickland, a petitioner must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable[;] and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding (in this case the appeal) would have been different."); id. at 5 ("Only an examination of the merits of the omitted issue(s) will reveal whether appellate counsel's performance was deficient or whether the failure to raise the issue on appeal prejudiced the defendant, i.e., whether there is a reasonable probability that raising the omitted issue would have resulted in a different outcome in the defendant's direct appeal . . . ."). Second, the OCCA employed the proper language in its concluding paragraph in the section of the opinion that addressed ineffective assistance of counsel. See id. at 17 ("Harmon has not shown a

reasonable likelihood that the outcome of his case would have been different had trial counsel presented the omitted evidence about Lancaster in the first stage of trial or presented the second stage case in mitigation differently with additional evidence. Nor has he shown a reasonable likelihood that the outcome of his appeal would have been different had appellate counsel raised these instances of alleged ineffective assistance of trial counsel.").

We have previously noted that our role is not one of a "strict English teacher, finely dissecting every sentence of a state court's ruling to ensure all is in good order." Grant, 886 F.3d at 905–06. In Grant, the OCCA stated that the petitioner "must demonstrate that trial counsel's performance was so deficient as to have rendered [him], in essence, without counsel." Id. We held that the standard pronounced by the OCCA "deviate[d] from the proper formulation of the Strickland standard." Id. Nevertheless, we concluded that de novo review was not appropriate because "the overall substance of the OCCA's analysis, as well as the result it reached, reflects that the court understood and decided the ineffective-assistance issue under the proper Strickland framework." Id.

Similarly, when a state court determined that a petitioner had "failed to carry his burden of proving that the outcome of the trial would probably have been different but for those errors," the Supreme Court reversed the Sixth Circuit's determination that the state court had acted contrary to federal law because the state-court opinion stated "probably" instead of "reasonably probable." See Holland v. Jackson, 542 U.S. 649, 654–55 (2004). The Supreme Court reasoned that "such use of the unadorned word 'probably' is permissible shorthand when the complete Strickland standard is elsewhere

recited" because AEDPA requires that "state-court decisions be given the benefit of the doubt." Id.

Here, if we construed the OCCA's opinion to intentionally defy Strickland, we would ignore our responsibility to give the state court the benefit of the doubt. Thus, in light of the correct statement of the law found in other parts of the OCCA opinion and our review of the substance of the opinion, we conclude that the short-hand employed at some points in the First APCR Opinion does not entitle Harmon to de novo review of his ineffective assistance of counsel claims.

(2.) Evidentiary Hearing

On collateral review before the OCCA, Petitioner requested an evidentiary hearing. He asserts he is entitled to an evidentiary hearing before the district court—and de novo review based on the record from that hearing—because the OCCA refused his request for a hearing. He argues that: (1) the OCCA misapplied its rules, specifically Rule 9.7(D)(5), to deny his request for a hearing; and (2) the OCCA's standard for granting an evidentiary hearing is more demanding than permitted by federal law.

Rule 9.7(D)(5) provides that:

> A request for an evidentiary hearing is commenced by filing an application for an evidentiary hearing, together with affidavits setting out those items alleged to be necessary for disposition of the issue petitioner is advancing. The application for hearing and affidavits submitted by the petitioner shall be cross-referenced to support the statement of specific facts required in the application for post-conviction relief. See Section 1089(C)(2) of Title 22. The application for an evidentiary hearing shall be filed together with the application for post-conviction relief. See Section 1089(D)(2) of Title 22. *The application for hearing and affidavits must contain sufficient information to show this Court by clear and convincing*

> *evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief.*

Rule 9.7(D)(5), Rules of the Oklahoma Court of Criminal Appeals, Title 22, Ch.18, App., available at http://okcca.net/online/rules/rulesrvr.jsp?r=74 (emphasis added).

To the extent Petitioner asserts he is entitled to relief based on state law, he does not assert a federal claim that we have jurisdiction to address. Thus, we turn to Harmon's contention that the clear and convincing evidence standard set forth in Rule 9.7(D)(5) is inconsistent with federal law because it is more demanding than permitted. Petitioner did not raise this argument before the district court. By failing to do so, he has waived it. See Stouffer v. Trammell, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013) ("We do not generally consider issues that were not raised before the district court as part of the habeas petition.").

b. Medical History and Medical Expert Claim

Petitioner contends that trial counsel was ineffective when counsel failed to: (1) fully investigate and present Petitioner's documented history of mental health disorders; and (2) hire a qualified medical expert to evaluate Petitioner and, during the sentencing proceedings, explain Petitioner's mental impairments and how those impairments, coupled with his difficult childhood, impaired his ability to regulate emotions and control impulses. Specifically, Petitioner argues that a number of red flags in his history should have signaled to his trial counsel that he had cognitive deficits and mental disorders that affected his ability to control his behavior. He also contends that trial counsel should have been aware of certain information in his medical file. He further contends that,

based on those red flags, a qualified mental health professional—who could have testified on his behalf during the sentencing phase—should have evaluated him before his conviction and sentencing.

In support of these arguments, Petitioner attaches the report of Dr. Antoinette McGarrahan, who evaluated him after the jury verdict. In her report, Dr. McGarrahan indicated that the results of her evaluation of Petitioner "reveal[ed] that Mr. Harmon suffers from depression, anxiety, symptoms of posttraumatic stress disorder, borderline personality disorder traits, substance abuse, and antisocial personality disorder." Original Application for Post Conviction Relief at 16, Harmon, No. PCD-2008-919919. She did not opine as to whether medication could effectively treat those conditions.

Dr. McGarrahan's report indicates that:

> The findings of the present examination revealed that, from a cognitive standpoint, Mr. Harmon has average intellectual abilities and generally commensurate neurocognitive functioning across numerous domains assessed. That is, the results showed a pattern of strengths and weaknesses in his brain functioning. He had relative strengths in the areas of sustained visual attention and nonverbal skills and relative weaknesses in the areas of simple and complex verbal memory; complex visual memory, and problem solving and planning skills. Psychological and personality testing results demonstrated overwhelming evidence for serious emotional dysfunction. His responses on these tests indicated that he is ''crying out" for help and sees himself as a damaged individual. He has heightened sensitivity and is overly aroused physiologically. He has experienced one or more traumatic events that continue to cause him distress and he expects to be rejected and abandoned by others. He avoids establishing close relationships with others only to lose them, a pattern that became solidified in his childhood. He clearly has ambivalent feelings for those who were meant to care for him most at times acknowledging the turmoil and abuse his mother and stepfather inflicted directly and indirectly upon him and, at other

> times, countering his negative statements with seemingly completely unrealistic appraisals of these people.

Id. at 14–15. The report also provides additional detail regarding Harmon's difficult childhood and medical history and his family's background and medical history.

After reviewing that evidence, the OCCA rejected Harmon's claim. It reasoned that:

> Post conviction counsel retained Dr. Antoinette McGarrahan to conduct a psychological evaluation and she concluded that Harmon suffers from depression, anxiety, symptoms of posttraumatic stress disorder, borderline personality traits, substance abuse and antisocial personality disorder and that Harmon is mentally ill.
>
> Harmon's jury was aware of his mother's drug use and mental health problems. The evidence showed that Harmon was exposed to drugs in-utero and throughout his childhood and that he, too, used alcohol and drugs at an early age. The evidence further showed that Harmon's childhood was unstable, and wrought with incidences of abuse, neglect, abandonment, and a lack of a consistent nurturing caretaker. Harmon's own expert concedes that it is not difficult to understand, based on Harmon's childhood circumstances and experiences, how Harmon "developed into an aggressive, behaviorally uncontrolled, emotionally dysfunctional, academically "slow'' child who had severe impairment in his ability to relate to others, concentrate, regulate his emotions, and control his impulses." See Attachment 13. Providing Harmon's jury with more information about his mother's mental illness and how it affected her judgment and behavior was neither necessary nor relevant. The social worker provided ample evidence about what shaped Harmon's choices and put his behavior in perspective. We are not convinced that the information Dr. McGarrahan or a similar expert could have added would have made a difference in the outcome of this case.

Harmon, No. PCD-2008-919, slip op. at 9–10.

(1.) Argument for De Novo Review

Petitioner argues that he is entitled to de novo review of this claim because the OCCA misconstrued one of his arguments to contend that counsel should have provided the jury with information regarding the effects of his family's mental health impairments on those family members. He further contends that "the evidence presented in post-conviction of the details and diagnoses of Harmon's mother and that of Harmon's siblings[: (1)] was an important piece to show that *Harmon* was mentally ill"; [(2)]"was primarily offered to show the genetic component of Harmon's illness, and certainly not as something separate"; and [(3)] "countered the prosecutor's theme contrasting Harmon from other family members raised in the same environment." Thus, he claims that "[t]o the extent the OCCA's finding that Harmon failed to prove counsel was ineffective on this score, that finding was unreasonable both factually and legally . . . ."

Those arguments are generally consistent with the arguments Petitioner raised before the OCCA. When seeking post-conviction relief, Harmon argued to the OCCA that "Dr. McGarrahan could have . . . used Mr. Harmon's family's mental health history combined with studies that demonstrate mental illness is often passed down through a family." Original Application for Post Conviction Relief at 13, Harmon, No. PCD-2008-919919. The OCCA denied Petitioner's claim on the second prong of Strickland because the additional evidence "would [not] have made a difference in the outcome of th[e] case." Harmon, No. PCD-2008-919, slip op. at 10.

In contrast, before the district court, Petitioner argued in his petition that "the OCCA unreasonably mischaracterized Mr. Harmon's claim as a complaint that the trial

attorney 'should have hired an expert to address the mental impairments of his family and the effect those impairments have on judgment, reasoning, and behavior,'" and that "[g]oing further afield, the OCCA concluded . . . ['p]roviding Harmon's jury with more information about his mother's mental illness and how it affected her judgment and behavior was neither necessary nor relevant.'" Petition for Writ of Habeas Corpus, at 91–92, Harmon v. Royal, No. CIV-13-80-M, 2016 WL 6693561 (W.D. Okla. Nov. 14, 2016), ECF No. 27 (emphasis omitted) (quoting Harmon, No. PCD-2008-919, slip op. at 9–10). He further argued that the OCCA should have construed his claim to assert that counsel was ineffective because counsel did not hire an expert to evaluate Harmon's mental health even though "[t]he available evidence of the mental illness within Mr. Harmon's family raises a red flag about the likelihood of Mr. Harmon's own mental illness and served to put counsel on notice of the need to hire an expert for Mr. Harmon, not his mother." Id. at 91. Thus, before the district court, Petitioner argued that the mischaracterization went to the first prong of Strickland—that is, that based on the evidence available, trial counsel should have investigated further. He did not argue that the evidence went to the second prong of Strickland—i.e., that the evidence: (1) would show Petitioner was genetically disposed to mental illness; or (2) could counter the prosecutor's theme contrasting Petitioner from other family members raised in the same environment.

Considering the OCCA's opinion in its entirety, we are satisfied that the OCCA generally construed Petitioner's medical history and medical expert claim to address his own mental illnesses and impairments, not his family's mental impairments, when it

determined that he had not shown prejudice. Furthermore, to the extent Petitioner asserts that his argument for prejudice was impaired because the OCCA mischaracterized his family mental health contention, that assertion is raised for the first time (in federal court) on appeal. We do not reach this argument because Petitioner did not raise it before the district court. See Stouffer, 738 F.3d at 1221 n.13.

We also note that Petitioner may be arguing that, on the merits, the absence of this evidence prejudiced him because it prevented him from presenting evidence to the jury that demonstrated: (1) his genetic disposition to mental illness; and (2) the similarities between him and family members raised in the same environment. But Petitioner only raises that argument in the section of his opening brief where he argues that the OCCA's adjudication deserves no deference—which is separate from his merits arguments. In any event, even if we assume he adequately presented that potential merits argument, he did not raise this argument before the district court. [10] Because Petitioner did not raise

[10] Petitioner came closest to asserting this argument when he argued to the district court that the OCCA unreasonably applied federal law because when "[t]he OCCA[] determin[ed that] had counsel presented further evidence of Harmon's siblings' unruly behavior[,] the outcome of his trial would [not] have been different, [it] once again applied the less onerous standard for showing prejudice than demanded by Strickland." Petition for Writ of Habeas Corpus, at 91–92, Harmon, No. CIV-13-80-M, ECF No. 27. The district court rejected that argument because "[a]lthough Petitioner raised that additional claim [regarding unruly sibling behavior] in post-conviction, he has not raised it here. Thus, challenging the unreasonableness of that ruling is of no consequence." Harmon, 2016 WL 6693561, at *30 n.26.

that potential merits argument before the district court, we will not consider it.[11] See id.

(2.) Merits

When we evaluate prejudice, "we must keep in mind the strength of the government's case and the aggravating factors the jury found as well as the mitigating factors that might have been presented if [the petitioner] had been provided effective assistance of counsel."[12] Stafford v. Saffle, 34 F.3d 1557, 1564 (10th Cir. 1994); see also Grant v. Royal, 886 F.3d 874, 905 (10th Cir. 2018) (discussing the factors we consider when evaluating prejudice).

Although (1) no mental health expert presented the jury with a diagnosis or linked Petitioner's background to any specific mental illness, and (2) certain evidence regarding Petitioner's background was not presented to the jury, we are satisfied for a number of reasons that the OCCA's decision in this case is not an unreasonable application of federal law. First, Petitioner presented significant evidence to the jury regarding Petitioner's mother's mental health and substance abuse issues, his exposure to drugs,

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[11] The Respondent did not raise these waiver issues. Regardless, we "may affirm on any basis supported by the record, even if it requires ruling on arguments not . . . presented to us on appeal." Richison, 634 F.3d at 1130.

[12] We note that Petitioner argues that the circumstances surrounding the murder in this case are less egregious than the circumstances surrounding the murders in many other death penalty cases. In our analysis, we have considered the factual circumstances surrounding the murder in this case.

We also note that the jury unanimously found three aggravating circumstances beyond a reasonable doubt, including that the murder was especially heinous, atrocious, or cruel. Petitioner does not challenge those findings. Thus, we also take those findings into account in our analysis.

and his difficult childhood. Furthermore, as the OCCA noted, Dr. McGarrahan indicated that based on Petitioner's genetic and biological predisposition (which she stated was evident from his mother's mental illness and substance dependence), his exposure to drugs in-utero and through second-hand smoke, and his difficult childhood:

> it is not difficult to understand how or unreasonable to expect that he developed into an aggressive, behaviorally uncontrolled, emotionally dysfunctional, academically "slow" child who had severe impairment in his ability to relate to others, concentrate, regulate his emotions, and control his impulses.

See Harmon, No. PCD-2008-919, slip op. at 10 (quoting Original Application for Post Conviction Relief, Attachment 13, at 15, Harmon, No. PCD-2008-919919). Under these circumstances, we are satisfied that the jury was able to connect these factors to his criminal conduct.

Second, Petitioner does not argue that his mental health issues are treatable. See Grant, 886 F.3d at 923 ("[T]he OCCA also could have reasonably concluded that the potency of Dr. Gelbort's organic-brain-damage evidence would have been significantly weakened by the fact that he never indicated that the negative manifestations of Mr. Grant's organic brain damage—for instance, his inability to conform to societal norms—were treatable with medication or other such means."). Indeed, Dr. McGarrahan never opined regarding treatability.

Our own review of Dr. McGarrahan's report also uncovers little evidence that Petitioner's mental health issues are treatable. In her summation of Petitioner's medical history, Dr. McGarrahan indicates that:

> Mr. Harmon underwent a psychological evaluation on 5/16/00 to determine whether he remained eligible for disability services as an adult through the Social Security Administration. The evaluation was performed by J. Michael Jameson, Ph.D. Dr. Jameson diagnosed "antisocial traits" and opined that Mr. Harmon "has no mental limitation severe enough to limit willful progress."

Original Application for Post Conviction Relief, Attachment 13, at 10, Harmon, No. PCD-2008-919919. Regardless, in the absence of argument or a more on-point expert opinion, we cannot conclude both: (1) that Dr. Jameson diagnosed Petitioner in 2000 with the same mental health issues—or the same severity of mental health issues—that Dr. McGarrahan opined affected Petitioner in 2004; and (2) that we should thus construe Dr. Jameson's testimony to conclude that Petitioner could overcome the mental health issues that Dr. McGarrahan diagnosed him with if he engaged in "willful progress."

Third, the additional evidence that Harmon argues would assist him also contains evidence that he suffers from antisocial personality disorder, which weighs against a determination that the absence of this evidence prejudiced him. [13] See, e.g., Littlejohn II,

[13] In her report, Dr. McGarrahan mitigates Petitioner's antisocial personality disorder diagnosis. In full, she states that:

> Mr. Harmon's behavioral history indicates that he suffers from antisocial personality disorder. However, it is important to understand two additional components. First, how Mr. Harmon developed the condition and, second, that he also suffers from mental illness. It is often not stated that antisocial personality disorder and mental illness can and do co-occur. They are not mutually exclusive conditions and Mr. Harmon has both. It is clear that Mr. Harmon was genetically predisposed to mental illness and substance dependence, as his mother suffered from these conditions. Next, toxins were introduced to his system in-utero and throughout his childhood by his mother's constant use of drugs and alcohol

875 F.3d at 564 ("Importantly, courts have characterized antisocial personality disorder as the prosecution's strongest possible evidence in rebuttal. In other words, evidence of antisocial personality disorder tends to present an *aggravating*, rather than mitigating, circumstance in the sentencing context." (quotations and internal citations omitted)).

Fourth, as we previously noted, the jury found three aggravating factors. Cf. Littlejohn I, 704 F.3d at 866–67 (applying de novo review, remanding for an evidentiary hearing on organic brain damage, and distinguishing prior cases that denied relief because some of those cases pre-dated relevant Supreme Court precedent and in all of

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> while she was pregnant with him and his exposure to second-hand "crack" and marijuana smoke by his mother's and stepfather's use of these drugs. In addition, when you then add those genetically and biologically predisposing factors to the environment in which Mr. Harmon was raised, a childhood that was unstable, unpredictable, and wrought with repeated incidences of abuse, neglect, abandonment, and a significant lack of a nurturing caretaker, it is not difficult to understand how or unreasonable to expect that he developed into an aggressive, behaviorally uncontrolled, emotionally dysfunctional, academically "slow" child who had severe impairment in his ability to relate to others, concentrate, regulate his emotions, and control his impulses. These ingrained features then became part of his adult character. Further evidence of the strength and persistence of the negative affects Mr. Harmon's childhood experiences had on him are seen in the perpetuation of these very same problems in every one of his siblings, all of whom have exhibited severe behavioral and psychological disturbance and all of whom have, just like Mr. Harmon, been passed around from family member to family member and from juvenile placement to juvenile placement, with no indications of remittance of symptoms.

Original Application for Post Conviction Relief, Attachment 13, at 15, Harmon, No. PCD-2008-919919. While these factors may reduce the negative impact from that diagnosis, the diagnosis still weighs against a determination that the absence of this evidence prejudiced Petitioner.

those cases the underlying murder was either "extensively brutal" in nature or *the fact-finder found three aggravating factors, rather than the two presented in* Littlejohn I). Indeed, the prosecution presented particularly compelling evidence that Petitioner was a continuing threat based on his continued violent criminal conduct both before and after the murder and inside and outside of prison.

Accordingly, applying AEDPA deference to the OCCA's resolution of this claim, we are satisfied that Petitioner is not entitled to habeas relief.

c. Sexual Abuse Claim

Petitioner also contends that trial counsel was ineffective when counsel failed to discover and present evidence that Petitioner was sexually abused as a child. The OCCA rejected this claim. Specifically, it stated that:

> Harmon claims his attorney should have uncovered and presented evidence that he was sexually molested as a child. In support of this claim, he attaches an affidavit from his grandmother about her suspicions that Harmon was sexually abused by a teenage neighbor when Harmon was six or seven years old.[14] See Attachment 19. There is no affidavit, however, from Harmon confirming that he was in fact molested. The burden is on Harmon to show counsel was ineffective, Marshall v. State, 2010 OK CR 8, ¶ 61, 232 P.3d 467, 481, and we cannot find on this record that he has met that burden.

Harmon, No. PCD-2008-919, slip op. at 11–12.

[14] Petitioner's grandmother suspected sexual abuse because Petitioner complained his anus was hurting and bleeding when he went to the bathroom. When the pain continued, she examined his anus for worms and "found his hemroids [sic] were coming out." Original Application for Post Conviction Relief, Attachment 19, at ¶ 7, Harmon, No. PCD-2008-919919.

Petitioner argues that the OCCA unreasonably applied Strickland when it required him to submit an affidavit alleging sexual abuse to show that counsel's investigation was deficient. He contends that "the OCCA asked the wrong question" when it considered "whether trial counsel's investigation into sexual abuse was reasonable." He further contends that the right question was whether trial counsel investigated at all. Id.

Petitioner misconstrues the OCCA's holding. The OCCA did not consider whether Petitioner had shown that his counsel had failed to investigate allegations of sexual abuse. Instead, the OCCA addressed the prejudice prong and determined that Petitioner had not met his evidentiary burden to show that if his counsel had investigated sexual abuse, counsel would have uncovered evidence establishing that Petitioner was sexually assaulted as a child. That method of analysis is consistent with Strickland.

We also do not read the OCCA's opinion to require a petitioner to submit his or her own affidavit to prove sexual assault. Rather, we interpret that decision to hold that the affidavit from Harmon's grandmother was not sufficiently definitive to establish that a sexual assault had occurred. Indeed, Petitioner also presented evidence to the OCCA that he had *not* been sexually abused—in Dr. McGarrahan's report, she indicated that Petitioner had "denied being the victim of any sexual abuse that he could recall." Original Application for Post Conviction Relief, Attachment 13, at 6, Harmon, No. PCD-2008-919919.[15]

[15] In his petition to the district court, Petitioner for the first time provided an affidavit that indicated he had, in fact, been sexually abused. That evidence was not provided to the OCCA, and, as such, we cannot consider it. See Cullen, 563 U.S. at 182

Under these circumstances, the OCCA's determination was not an unreasonable application of Strickland. We are satisfied that the minimal evidence of sexual abuse Petitioner presented to the OCCA does not give rise to any reasonable probability that, if Petitioner's counsel had investigated sexual abuse and presented this evidence to the jury (along with evidence regarding the effects of sexual abuse), the result of the proceeding would have been different.

d. Cumulative Effect of Any Ineffectiveness

Petitioner also contends that he is entitled to habeas relief because the cumulative effect of his ineffective assistance of counsel claims entitles him to such relief.

(1.) Arguments for De Novo Review

Petitioner argues that the OCCA violated Strickland when it made "separate prejudice-based determinations for each element of trial counsel's ineffectiveness" rather than "conduct[ing] an analysis in which the totality of the evidence was considered along with the evidence that could have been presented." He further asserts that "the OCCA piece-mealed its prejudice inquiry and did not conduct an analysis in which the totality of the evidence was considered along with the evidence that could have been presented."

Although not clearly articulated, Petitioner appears to raise two separate arguments: (1) that the OCCA failed to consider each item of evidence when it

("Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively *de novo*."). The same is true of various other items of evidence that Petitioner seeks to rely on that he did not present to the state courts.

determined that Harmon had not been prejudiced; and (2) that the OCCA failed to consider the cumulative effect of counsel's errors.

Petitioner's first argument lacks merit. The OCCA extensively discussed the evidence presented, and Petitioner does not identify any specific item of evidence that the OCCA did not address. Moreover, even if he had identified any such item of evidence, the OCCA's decision is entitled to deferential review even when it fails to discuss all of the evidence. Cf. Lott v. Trammell, 705 F.3d 1167, 1213 (10th Cir. 2013) ("[E]ven in cases . . . where the OCCA summarily disposes of a defendant's Rule 3.11 application without discussing the non-record evidence, we can be sure that the OCCA in fact considered the non-record evidence in reaching its decision.").

Petitioner's second argument also lacks merit. "[W]e . . . presume that when a state court[] says multiple errors caused the defendant no prejudice, the court considered both the individual and cumulative effect of those errors." See Wood v. Carpenter, 907 F.3d 1279, 1302–03 & n.18 (10th Cir. 2018). Thus, we are satisfied that the OCCA considered the cumulative effect of Petitioner's ineffective assistance of counsel claims.

(2.) Merits

Because Petitioner did not provide sufficient evidence to the OCCA to establish that he had been sexually assaulted as a child, he has not shown any prejudice from the corresponding ineffective assistance of counsel claim. Thus, when we cumulate the prejudice from Petitioner's medical evidence and medical expert claim—which we determined was not sufficiently prejudicial on its own—and the sexual abuse claim, we are satisfied that he is not entitled to relief.

For the reasons stated above, we conclude that Petitioner's ineffective assistance of appellate counsel claims lack merit and his ineffective assistance of trial counsel claims are procedurally barred.[16]

B. Whether Certain Statements Made by the Prosecution During the Sentencing Phase Constitute Reversible Prosecutorial Misconduct

Petitioner also asserts that the prosecution made numerous arguments to the jury during the sentencing phase that constitute prosecutorial misconduct. Prosecutorial misconduct can result in constitutional error in two ways. First, it "can prejudice a specific right . . . as to amount to a denial of that right." Littlejohn I, 704 F.3d at 837 (quoting DeRosa v. Workman, 679 F.3d 1196, 1222 (10th Cir. 2012)).

Second, "absent infringement of a specific constitutional right, a prosecutor's misconduct may in some instances render a habeas petitioner's trial 'so fundamentally unfair as to deny him due process.'" Id. (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974)). "This determination may be made only after considering all of the surrounding circumstances, including the strength of the state's case." Malicoat v. Mullin, 426 F.3d 1241, 1255 (10th Cir. 2005). "The fundamental unfairness test applies

[16] Because we have determined that Petitioner's ineffective assistance of counsel claims fail on their merits, an evidentiary hearing is unnecessary. Sandoval v. Ulibarri, 548 F.3d 902, 916 (10th Cir. 2008) ("The dispositive point, we think, is that the district court did not discount Sandoval's evidence but held that the evidence was insufficient to show that he was entitled to habeas relief on his claims. We have found no error in that conclusion. Because the district court took that approach, as we have on appeal, the contention that an evidentiary hearing would have helped Sandoval's case is without merit.").

to instances of prosecutorial misconduct occurring in either the guilt or sentencing stage of trial." Underwood v. Royal, 894 F.3d 1154, 1167 (10th Cir. 2018).

Petitioner challenges two types of improper argument: (1) arguments that arguably limited the mitigation evidence; and (2) arguments that arguably denigrated the mitigation evidence. We address each category in turn.

1. Arguments Limiting the Mitigation Evidence

Petitioner argues that the State used its closing arguments to improperly narrow the jury's consideration of mitigation evidence to only the evidence relevant to Petitioner's moral culpability or blame.

The Supreme Court has indicated on several occasions that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original) (footnote omitted); accord Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). In other words, "a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." Johnson v. Texas, 509 U.S. 350, 361–62 (1993).

Although "there are various ways in which the sentencer . . . might be precluded from considering all mitigating evidence, these ways do not all have the same potency."

Grant, 886 F.3d at 932. The Supreme Court has held, for example, that arguments by prosecutors "are not to be judged as having the same force as an instruction from the court." Boyde v. California, 494 U.S. 370, 384–85 (1990). Those arguments "generally carry less weight with a jury than do instructions from the court." Id. Arguments by prosecutors "are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates . . . ." Id. (internal citation omitted). Instructions from the court, however, "are viewed as definitive and binding statements of the law." Id. Thus, while prosecutorial misrepresentations may "have a decisive effect on the jury, . . . they are not to be judged as having the same force as an instruction from the court." Id. Furthermore, "like the instructions of the court, [arguments from counsel] must be judged in the context in which they are made." Id.

In this case, the prosecution argued in its closing statement that:

> [Y]ou are doing your civic duty serving on a jury. They argue things to you are mitigating. The position of the State is that's not mitigating evidence that mitigates what he has done. And I will explain this. You check me as you look at the law.
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> . . .
>
> Now, you look at mitigating evidence. And, again, we go back to what Judge Bass told us. Mitigating circumstances are these. They either extenuate or reduce the degree of moral culpability or blame, okay. So it reduced the degree of moral culpability or blame, okay, or circumstances which in fairness, sympathy or mercy can lead you to decide against imposing the death penalty. Now, that's fair enough. So what you do is you look at his mitigating circumstances. Now, the State submits these aren't mitigating at all. That's for you

> to decide, you, not us. So you ask yourselves as you go through here how does any of this reduce his degree of moral culpability.[17]
> . . .
>
> As I was saying, what Judge Bass has told you is mitigating circumstances are those that may extenuate or reduce the degree of moral culpability or blame or circumstances which in fairness, sympathy or mercy may lead you to decide against imposing the death penalty. Under the evidence submitted we submit to you not even close, not even close. But you'll decide that. Let's look at what they talk about is mitigating evidence and then go back to the law that Judge Bass gave you which is circumstances that extenuate or reduce the degree of moral culpability or blame.
>
> It says Marlon Harmon was born to a drug-addicted mother who dumped her breast milk rather than feed it to Marlon Harmon. I submit to you under the evidence presented and under the law Judge Bass gives you, not even close.
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> . . .
>
> But under the evidence and the law when the Judge says facts and circumstances that extenuate or reduce the degree of moral culpability or blame, the State submits to you that's not mitigating.

On rebuttal, the prosecution also argued that:

> Circumstances that may extenuate or reduce the degree of moral culpability or blame or which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty. Consider what you have heard. But in regard to each one of those you ask yourself how does this reduce

[17] The Petitioner objected to the argument at this point based on the emphasis on moral culpability. The judge did not issue a ruling within the jury's hearing. Instead, he called the parties to sidebar. After the discussion at sidebar, the judge concluded:

> I tell you what, this is real easy to avoid. We are so far down the road at this point it's really easy to avoid. And that is to frame it - frame your argument that you submit that the evidence is, okay.

.

> the degree of moral culpability or blame. Ask yourself that with regard to each one of those. Don't ask yourself has the State shown beyond a reasonable doubt.

The judge instructed the jurors that:

> Mitigating circumstances are 1) circumstances that may extenuate or reduce the degree of moral culpability or blame, or 2) circumstances which in fairness, sympathy or mercy may lead you as jurors individually or collectively to decide against imposing the death penalty. The determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case.

The judge identified fourteen specific mitigating circumstances supported by evidence. Some mitigating circumstances were not directly related to moral culpability or blame—such as testimony that Harmon's grandfather loved and wanted Marlon, his family treated Harmon well, and when his grandfather died it was a great loss to Harmon.

In addition, the judge informed the jury that "[y]ou must consider all the previous instructions [from the guilt phase] that apply together with these additional instructions [for the sentencing phase] and not just part of them. Together they contain all the law and rules you must follow in deciding this case."

The OCCA determined that the prosecution's arguments were not improper. It reasoned that:

> The prosecutor in this case . . . did not urge the jury to categorically disregard the proffered mitigation evidence, but instead argued that the evidence offered in mitigation did not support an inference of reduced culpability. ("You know, you look at the mitigating evidence that they proffer. It's proper. You consider it."). The prosecutor went on to say that any mitigating evidence did not outweigh the aggravating circumstances established by the State. In the end, the prosecutor invited jurors to consider all Harmon's mitigating evidence, weigh it against the aggravating circumstances, and find that the death penalty was appropriate. The prosecutor's

> argument, while often pointed or skeptical, did not preclude the jury from considering all the mitigating evidence . . . Harmon's jury was properly instructed on the definition of mitigating evidence, the evidence Harmon presented, and the duties of a juror.

Harmon, 248 P.3d at 943–44.

We have addressed similar arguments by Oklahoma prosecutors numerous times. See, e.g., Underwood, 894 F.3d at 1171–73; Grant, 886 F.3d at 935–36; Hanson v. Sherrod, 797 F.3d 810, 851–52 (10th Cir. 2015). In each of those cases, we held that the OCCA did not unreasonably apply federal law when it determined that the prosecution's arguments were not impermissible.

For example, in Underwood, the prosecutor, in closing arguments, contended that certain mitigating evidence was irrelevant:

> [F]or some of the circumstances, the prosecution's main or only attack invoked . . . [the jury instruction's] "moral culpability or blame" framework. Regarding Mr. Underwood's alleged exposure to trauma and mistreatment by his peers, the prosecution stated: "[L]et's say he was. Does that reduce his blame for the killing of [J.B.]?" Id. at 2518. Regarding Mr. Underwood's alleged family support, the prosecution stated: "How does that, the fact that you have family and friends, reduce your blame for a crime?" Id. at 2520. Regarding Mr. Underwood's alleged inability to obtain appropriate employment due to various psychiatric disorders, the prosecution stated: "So? How does that lessen his blame or culpability for the crime that he didn't have a very good job?" Id. at 2523. And regarding Mr. Underwood's alleged significant family history of mental illness, the prosecution stated simply: "So?" Id.

Underwood, 894 F.3d at 1171–72. Nevertheless, "[a]fter remarking on each of the [potential mitigating] circumstances . . . , the prosecution concluded by advising the jury to 'look at all of those mitigators' and to 'decide what that means . . . .' In its rebuttal

closing argument, the prosecution repeated many of the same points highlighted above." Id. at 1172.

The jury instructions in that case: (1) defined "[m]itigating circumstances" as "those which, in fairness, sympathy, and mercy, *may extenuate or reduce the degree of moral culpability or blame*" and instructed that "[t]he determination of what circumstances are mitigating is for you to resolve under the facts and circumstances of this case"; (2) identified 15 potential mitigating circumstances, including some circumstances which a jury would not ordinarily deem to extenuate or reduce moral culpability or blame; (3) instructed the jury that it could consider other mitigating circumstances, if it determined those circumstances existed; and (4) clarified that the court's instructions "contain all the law and rules you must follow." Id. at 1171–72 (emphasis in original).

The OCCA determined that the prosecution's arguments were not impermissible. On review of the district court's denial of a federal habeas petition, we determined that prior precedent dictated that the petitioner was not entitled to relief because the OCCA's determination was not unreasonable.

We similarly view Petitioner's challenge as foreclosed by our prior precedent.[18] Here, while the prosecution may have focused on blame and moral culpability, the prosecution also indicated several times that fairness, sympathy, and mercy could justify

[18] We do not agree with Harmon that this case is materially different from our prior cases merely because the judge addressed defense counsel's objection at sidebar, rather than issuing a ruling within the jurors' hearing.

relief from the death penalty. Moreover, the jury instructions indicated that considerations of fairness, sympathy and mercy could justify such relief, independent of moral culpability and blame. Indeed, the jury instructions expressly stated as much and also enumerated various mitigating circumstances, some of which did not relate to blame and moral culpability. The jury instructions also instructed the jury that the instructions contained all the law that the jury must follow. Accordingly, we hold that the OCCA's determination that the prosecution's arguments were not improper was not an unreasonable application of federal law.

2. Arguments Denigrating the Mitigation Evidence

We turn now to the prosecution's arguments that allegedly denigrated Petitioner's mitigation evidence. In its closing argument during sentencing, the prosecution argued:

> The truth of what was going on is the defendant, I submit to you, he had a double life going. They put on an expert to tell you how bad it was, how many risk factors, had to sleep on porches. You know, that's really not what you heard. What you heard was person after person cared about him. I submit to you those people were put on there as human shields. Put a 13-year-old child on the witness stand? He has made victims out of them. He, his choices, his decisions.

In its rebuttal argument, the prosecution reiterated that theme:

> Ms. Hammarsten spoke at length a moment ago about this 13-year-old girl, his little sister. It's heart-wrenching. It's heart-wrenching for her and for me to sit there and listen to that. You'll notice neither me or Mr. Deutsch got up and cross-examined her. I wished her God speed getting back to Arkansas as quick as possible where she lives and away from this. She's a victim of this. As a matter of fact while she was talking I added her right at the bottom to the list of Marlon Harmon's victims. I also put his daughter on there. His daughter is a victim. Right there with everybody else we can call it Marlon Harmon's victims.

> . . .
>
> There are victims in this case. The people who testified weren't all. In mitigation here I submit to you [sic] are victims of him.

The prosecutors also argued that:

> If anybody tries to give you a guilt trip about the job that you swore to do, don't you take delivery of it. Don't take delivery of that. You swore to do justice in this case. You go up there, you look at the evidence and you follow the law the Judge has given you and you do what you believe justice is.

Petitioner argued on appeal that the prosecutors engaged in misconduct when they referred to Petitioner's witnesses as victims and human shields and characterized at least a portion of defense counsel's closing argument as a guilt-trip. The OCCA rejected the claim (which also challenged other additional comments that Petitioner does not challenge here). It held, on direct appeal, that:

> With two exceptions, we see nothing in any of the comments, individually or cumulatively, that exceeds the wide latitude parties have to discuss the evidence and reasonable inferences from the evidence.
>
> . . .
>
> In two instances . . . the prosecutor's remarks came very close to crossing the line of permissible argument. We are troubled by the prosecutor's argument that Harmon's mitigation witnesses were put on as "human shields" and by his exhortation to the jury not to let anyone give them a "guilt trip" about doing their job.
>
> We addressed similar remarks recently in Cuesta–Rodriguez and found such remarks "come very close to crossing" the line of proper argument. Cuesta–Rodriguez, 2010 OK CR 23, ¶ 99, 241 P.3d at 244. We cautioned prosecutors in future cases to keep their argument focused on the evidence and to avoid making comments that serve no purpose but to denigrate the defense. Id. We repeat this warning. Nevertheless, we do not find that any of these

> comments, individually or cumulatively, contributed to Harmon's death sentence.

Harmon, 248 P.3d at 943–44.

As an initial matter, Petitioner contends that we should not defer to the OCCA's decision on this issue because the OCCA applied the wrong standard. That is, he argues that the OCCA should have considered whether the arguments violated a specific right to present mitigation evidence, instead of whether the comments rendered the trial fundamentally unfair under the Due Process Clause.

The United States Supreme Court has never applied a specific-right analysis under analogous circumstances. It did, however, apply a specific-right analysis in Caldwell v. Mississippi, 472 U.S. 320 (1985). There, the Supreme Court concluded that specific-right analysis was appropriate where the prosecutor argued that the appellate courts, rather than the jury, would be ultimately responsible for the petitioner's death because "the prosecutor's argument sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment[] . . . ." Caldwell v. Mississippi, 472 U.S. 320, 340 (1985).

In Cuesta-Rodriguez, we concluded that "prosecutors' stray comments" regarding the moral culpability and blame instruction were "a far cry from" the facts in Caldwell and held the OCCA's failure to apply the more demanding specific-right analysis was not an unreasonable application of federal law as determined by the United States Supreme Court. 916 F.3d at 913–14. We are satisfied that our prior reasoning applies with equal

force here. Thus, the OCCA's failure to apply specific-right analysis is not contrary to clearly established federal law as determined by the United States Supreme Court.

We are also satisfied that the OCCA did not otherwise unreasonably apply Supreme Court law. In Cuesta-Rodriguez, we held that the petitioner was not entitled to habeas relief when, in its closing statement, the prosecution: (1) stated "And as far as them tearfully pleading for his life there, I say to you on behalf of the State, ladies and gentlemen, shame on him for putting them in that position. Shame on him for making them act as a human shield between justice and himself" and later reiterated "you know, shame on him. He puts those people in a terrible position"; (2) after defense counsel's closing argument, told the jury that "what you've heard for 20 minutes is the guilt trip" and, after defense counsel objected and the judge ordered the prosecution to rephrase, clarified that "You know, when I say guilt trip, you don't need to feel guilty about doing your job. He's the one that brought us together. It is his actions. And I want to talk about that because you can consider sympathy absolutely"; (3) told the jury not to feel guilty if they were sitting on the jury because they were doing their civic duty; and (4) argued that the petitioner's "actions brought us here. Sentence him accordingly." Cuesta-Rodriguez, 916 F.3d at 896–97. The OCCA determined that only the first guilt trip statement—"what you've heard for 20 minutes is the guilt trip"—was improper, and that the error was harmless. Id. at 907.

We determined that the OCCA reasonably applied federal law. We concluded that the OCCA reasonably determined that only the first guilt trip comment was improper because: (1) we had denied habeas relief in cases involving similar comments in other

cases; (2) defense counsel had not contemporaneously objected to the "shame-on-him and human-shield comments"; (3) defense counsel had invited the prosecution's comments when counsel improperly attempted to elicit sympathy for the petitioner's family based on the pain they would feel if the jury sentenced the petitioner to death; and (4) the prosecution's comments did not "prevent[] the jury from examining the defense's mitigation evidence." Id. at 907–10. We also concluded that the OCCA reasonably determined that the first guilt trip statement was harmless because "we find it hard to imagine that the jurors thought they were prohibited from considering any of the mitigating evidence they heard at the resentencing hearing." Id. at 914–15 (quoting Hanson, 797 F.3d at 852).

Turning back to the case before us, the OCCA arguably did not clearly determine whether: (1) none of the challenged arguments were impermissible; or (2) the prosecution (a) permissibly referred to Petitioner's witnesses as victims, and (b) impermissibly stated that Petitioner placed his mitigation witnesses on the stand as human shields and that the jury should not let anyone give them a guilt trip for doing their job, but those impermissible statements were harmless.[19] Regardless, the OCCA also indicated, "we do

[19] In Cuesta-Rodriguez v. Oklahoma, the OCCA held that that statement "pushe[d] beyond the limits of permissible argument because it was not a comment on the evidence, but instead was an obvious attempt to denigrate Cuesta–Rodriguez's mitigation defense." 241 P.3d 214, 244 (Okla. Crim. App. 2010). It held that the other comments only came "very close to crossing this line." Id.

In contrast, here, the OCCA stated, in apparent contradiction, both: (1) that the two remarks it identified "exceed[ed] the wide latitude parties have to discuss the evidence and reasonable inferences from the evidence"; and (2) that those remarks only

not find that any of these comments, individually or cumulatively, contributed to Harmon's death sentence." Id. at 944. Thus, we are satisfied that even if the OCCA determined that the comments were improper, it also determined that none of the comments rendered the sentencing proceedings fundamentally unfair.

Taking into account the jury's determination that three aggravating factors applied, we conclude for several reasons that the OCCA did not unreasonably apply federal law. First, the comments in this case are very similar to comments we previously held do not support habeas relief. See, e.g., Cuesta-Rodriguez, 916 F.3d at 914–15; Simpson, 912 F.3d at 587 (holding that a sentencing proceeding was not rendered fundamentally unfair when the prosecutor improperly denigrated the Petitioner's mitigation evidence by suggesting he "should be ashamed for relying on . . . [his] family support and mental health"). And as in Cuesta-Rodriguez, we find it hard to imagine that the jurors thought they were prohibited from considering any of the mitigating evidence they heard at the sentencing hearing.

Second, defense counsel only objected to: (1) the prosecution's statement to the jury that the jurors were doing their civic duty; and (2) the prosecution's moral culpability and blame arguments. Defense counsel did not object to any of the statements Petitioner challenges here.[20] That failure weighs against a determination that the

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"came very close to crossing the line of permissible argument." Harmon, 248 P.3d at 943–44.

[20] The OCCA noted that "Harmon objected to some of the remarks, but not to others. Those that were not preserved by timely objection will be reviewed for plain error

prosecution's statements rendered the sentencing proceeding fundamentally unfair. See Cuesta-Rodriguez, 916 F.3d at 908; Le v. Mullin, 311 F.3d 1002, 1013 (10th Cir. 2002) ("Counsel's failure to object to the comments, while not dispositive, is also relevant to a fundamental fairness assessment.").

Third, defense counsel repeatedly elicited testimony from Petitioner's family members that they loved Petitioner. During her closing statement, defense counsel highlighted that testimony, including testimony from the mother of Petitioner's daughter that Petitioner's daughter loved him. Defense counsel urged the jury not to impose the death penalty in part because Harmon had a daughter, who loved him and deserved a father. Counsel also urged the jury to show mercy for his daughter. That argument, like the argument in Cuesta-Rodriguez, was improper. See Coleman v. Saffle, 869 F.2d 1377, 1393 (10th Cir. 1989) (holding that evidence that family members loved the petitioner was not mitigating evidence because it did not concern his conduct, his character or record, or any of the circumstances of the offense). Defense counsel's improper argument also weighs against a determination that the prosecution's statements on

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only." Harmon, 248 P.3d at 943. Regardless, the OCCA determined that the claim lacked merit under federal law, and "when a state court applies plain error review in disposing of a federal claim, the decision is on the merits to the extent that the state court finds the claim lacks merit under federal law," Douglas v. Workman, 560 F.3d 1156, 1171 (10th Cir. 2009); see also Thornburg v. Mullin, 422 F.3d 1113, 1124–25 (10th Cir. 2005) (holding that "no practical distinction" exists between Oklahoma's "formulations of plain error . . . and the federal due-process test").

rebuttal rendered the sentencing proceeding fundamentally unfair.[21] See Cuesta-Rodriguez, 916 F.3d at 908; cf. Tiger v. Workman, 445 F.3d 1265, 1267–68 (10th Cir. 2006) ("The district court found that the giving of the erroneous instruction was not fundamentally unfair [as to deny the petitioner due process] when Tiger's counsel invited the error. In his application for a COA, Tiger provides no argument to persuade us that this decision was reasonably debatable, nor do we have any reason to believe that the 'invited error' doctrine is so fundamentally unfair that its application was contrary to clearly established federal law." (footnote omitted)).

Considering these factors together, we conclude that the OCCA did not unreasonably apply federal law when it determined that the prosecution's statements did not, individually or cumulatively, violate Petitioner's due process rights.

C. Whether the Admission of Testimony Regarding, and Videotape of, Battle and Harmon's Conversation was Harmless Error

Petitioner argues that the admission of the videotape and his conversation with Battle was not harmless error.[22] On that basis, he contends that we must set aside his

[21] The prosecution in this case referred to Petitioner's witnesses as human shields and as victims (for the first time) before defense counsel presented her closing argument. Regardless, in Cuesta-Rodriguez, we determined that this factor did not apply to "the human-shield and the first shame-on-him comments"—presumably because those comments were made before defense counsel presented his closing argument—but nevertheless determined that the OCCA did not unreasonably apply federal law because defense counsel's improper argument was merely one factor to consider. See 916 F.3d at 908 n.25. We see no reason to conclude differently here.

[22] The Respondent does not argue that Harmon's statement to Battle was admissible. We assume that the trial court's admission of that evidence was error.

conviction and, in the alternative, set aside his sentence.[23]

On habeas review, we may only hold that a constitutional error was not harmless if, after applying de novo review, we determine that the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); see also Davis v. Ayala, 135 S. Ct. 2187, 2198 (2015); Fry v. Pliler, 551 U.S. 112, 120 (2007). That harmless error standard requires a greater showing of prejudice than the standard that state courts must apply on direct appeal. See Brecht, 507 U.S. at 637; Chapman, 386 U.S. at 24; Malone v. Carpenter, 911 F.3d 1022, 1029-30 (10th Cir. 2018).

We first address whether we must set aside Petitioner's conviction. We next consider whether we must vacate his death sentence.

1. Guilt Phase Prejudice

As a preliminary matter, we note that the prosecutors in this case repeatedly showed the video of Petitioner's purported confession and emphasized it during closing argument. Those actions weigh in favor of a determination that the evidence was not harmless. See, e.g., id. at 25 (holding that the error was not harmless when "the state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents

[23] We granted a COA on "whether the introduction of Mr. Harmon's incriminating statements to his co-defendant, Jasmine Battle, had a substantial and injurious effect on the jury's verdicts." The Respondent contends that at least a portion of that claim is procedurally barred. We will assume that the claim is not procedurally barred because that assumption does not alter the outcome of this appeal.

and purposes, the inferences from the facts in evidence had to be drawn in favor of the State"). Moreover, the Supreme Court has identified defendants' confessions as powerful evidence that "is like no other evidence." Arizona v. Fulminante, 499 U.S. 279, 296 (1991). Taken together, these factors lend significant credence to Petitioner's claim that the error was not harmless.

Nevertheless, we ultimately conclude that the conduct in this case was harmless. Because Petitioner was convicted of felony-murder, he would have been guilty of the charged crime even if someone else shot and killed the victim. See Okla. Stat. Ann. tit. 21, § 701.7(B) (providing that a defendant is guilty of first-degree murder if he or "any other person takes the life of a human being during, or if the death of a human being results from, the commission or attempted commission" of certain crimes). The prosecution presented overwhelming evidence of Petitioner's participation in the underlying crime:

> Harmon's presence at the crime scene was established by his palm print in blood on a piece of paper behind the store counter; an eyewitness identification of Harmon as the man seen running from the store with a gun immediately before the bleeding victim emerged and collapsed; the testimony of an accomplice that she drove Harmon to commit the robbery, heard gunshots, and upon his return to the car saw blood on Harmon's hands; evidence that Harmon used the victim's stolen credit cards within fifteen minutes of the robbery as well as several other times over the next day; and evidence that Harmon had told an associate he had to "plug" a man.

Harmon, 248 P.3d at 933–34.

We are satisfied that although we would normally expect the video to strongly affect jurors, the overwhelming evidence of guilt in this case renders any alleged

impropriety harmless.[24] Cf. United States v. Chanthadara, 230 F.3d 1237, 1247–53 (10th Cir. 2000) (holding that a judge's publicized statement—viewed by multiple jurors—that the defense's story was a "smoke screen" was harmless for several reasons, including that: (1) the defendant was charged with felony murder; and (2) the government presented overwhelming evidence comparable to the evidence presented here to establish that the defendant participated in the underlying felony).

2. Sentencing Phase Prejudice

We now turn to sentencing phase prejudice. The videotape and Battle's testimony regarding the videotaped encounter primarily address Petitioner's guilt, rather than factors relevant to his sentencing. Nevertheless, guilt-phase error may also influence the jury's determination of sentence, resulting in penalty-phase error. Cf. Cargle, 317 F.3d at 1208 (permitting cumulation of guilt phase and penalty phase error when analyzing a cumulative error claim because "claim[s] of error at the penalty phase may be cumulated with guilt-phase error, so long as the prejudicial effect of the latter influenced the jury's determination of sentence"). But "given the procedural and temporal distance of guilt-phase error from the penalty proceeding, we have noted that the chance or degree of carry-over prejudice to the penalty phase may be attenuated." Id.

[24] Petitioner also challenges the reliability of certain evidence presented in this case. For example, he contends Battle had a motive to lie because some evidence indicated that her paramour, Christopher Lancaster, may have been a participant in the crime or even the shooter. Regardless, we are not satisfied that the evidence is dispositively weakened.

Here, we are satisfied that the prejudicial effect from the video and Battle's testimony was minimal during the sentencing proceeding. Although the video and Battle's testimony regarding the statements Petitioner made in that video are evidence that Petitioner was involved in the crime, most of that evidence does not tend to identify Petitioner as the shooter or otherwise weigh in favor of the death penalty. Cf., e.g., United States v. McCullah, 76 F.3d 1087, 1101–02 (10th Cir. 1996) (holding that evidence of a coerced confession was harmless in the guilt phase, but not the sentencing phase, because the confession was the only evidence that the defendant was unrepentant).

There is one exception: Battle states in the video that a third individual was not involved in the crime, which arguably strengthens the evidence that Petitioner was the shooter. But that statement is entirely consistent with the rest of her extensive trial testimony and thus adds little to the case against Petitioner. Moreover, the abrupt manner in which she made that statement might raise suspicion in the jury's mind that someone other than Petitioner *was* involved—a third person who could have pulled the trigger. That inference would weigh *against* a death sentence for Petitioner.

Thus, the only potential prejudice at sentencing would result from decreased "residual doubt"—doubt that would not permit acquittal but might motivate a juror to vote against the death penalty—regarding Petitioner's innocence. Cf., e.g., Lockhart v. McCree, 476 U.S. 162, 181 (1986) (noting "residual doubts" by a jury during the guilt phase are effective grounds for argument in the capital sentencing phase). In light of the jury's determination that three aggravating factors applied, we conclude that such incremental residual doubt does not warrant setting aside Petitioner's sentence.

D. Cumulative Error

Petitioner also argues that cumulative error requires us to set aside his conviction and his death sentence. Cumulative error analysis requires the Court to cumulate: (1) any prejudice from harmless error; (2) any prejudice from prosecutorial misconduct (even if the court concludes a petitioner asserted no meritorious Due Process claim because the prosecution's conduct did not render the proceeding fundamentally unfair); (3) any prejudice from exculpatory evidence withheld from the petitioner (even if the court concludes a petitioner asserted no meritorious Brady claim because the withheld evidence was not material); and (4) any prejudice from ineffective assistance of counsel (even if the court concludes a petitioner asserted no meritorious ineffective assistance of counsel claim due to lack of prejudice under Strickland). Cargle, 317 F.3d at 1207. When a cumulative error claim addresses sentencing rather than guilt, "claim[s] of error at the penalty phase may be cumulated with guilt-phase error, so long as the prejudicial effect of the latter influenced the jury's determination of sentence." Id. at 1208. We apply the Brecht standard to all cumulative error claims. See id. at 1224.

1. Guilt Phase Cumulative Error

The only guilt phase errors are the trial court's admission of Battle's testimony regarding her videotaped meeting with Petitioner and the videotape itself. We have already held that the prejudice from that evidence does not warrant granting Petitioner habeas relief with respect to his conviction. See supra Part III.C.1.

2. Sentencing Phase Cumulative Error

Before we address the cumulated sentencing phase error, we identify the claims from which we aggregate prejudice. On cumulative error review in this case, we do not aggregate any prejudice from Petitioner's ineffective assistance of appellate counsel claims because no *trial* prejudice can stem from ineffective assistance of appellate counsel. We also do not consider prejudice from Petitioner's procedurally-barred ineffective assistance of trial counsel claims. See Cuesta-Rodriguez, 916 F.3d at 916; Simpson, 912 F.3d at 572–73, 603–04.

With respect to Petitioner's prosecutorial misconduct claims, we only consider prejudice from the prosecution's statements that Petitioner claims denigrated his mitigation evidence. See Cuesta-Rodriguez, 916 F.3d at 917 ("Having concluded earlier that only one applicable error survives—the initial guilt-trip comment, that's the only prosecutorial misconduct we include in our [cumulative error] analysis . . . Because we assume, without deciding, that the Confrontation Clause error was error, we have more than one error to address, and so we proceed to the cumulative-error analysis"). We also consider prejudice from the trial court's admission of the videotape and Battle's related testimony. In light of the minimal sentencing phase prejudice from the videotape and Battle's related testimony and the lack of synergistic effect between these errors, we are not satisfied that the combined prejudice from these errors entitles him to habeas relief. Thus, his cumulative error claim fails.

IV. Conclusion

We AFFIRM the district court's denial of federal habeas relief under 28 U.S.C. § 2254 as to Petitioner's conviction and as to his death sentence. We DENY Petitioner's motion to expand his COA.

16-6360 – Harmon v. Sharp

HARTZ, **J**., Circuit Judge, concurring

I join Judge Carson's opinion. I write separately only to comment on Judge Holmes's concurrence.

There is much in Judge Holmes's concurrence with which I agree. In particular, this court should not grant habeas relief on a claim not raised in district court. After all, we do not grant relief on a civil cause of action not raised in district court; and we require particular specificity when pleading habeas claims, *see, e.g.*, 28 U.S.C. § 2254 Rule 2(c), (governing content of § 2254 application).

I am reluctant, however, to go so far as to say that there is never a place for plain-error review of matters not properly preserved during proceedings in district court in habeas cases. (I am not addressing the quite different issue of review of matters not preserved during the original criminal trial, as was the case in *Thornburg v. Mullin*, 422 F.3d 1113, 1124–25 (10th Cir. 2005).) Yes, in postconviction proceedings we must be very deferential to the prior final judgments in the criminal proceedings, whether in state or federal court. But plain-error review does not concern the relationship between the original criminal proceeding and postconviction proceedings; rather, it concerns the relationship between the appellate court and the trial court in the same postconviction proceeding. Absent specific contrary direction by the rules of procedure or statute, I do not see why that relationship should be different in postconviction proceedings. *See* 28 U.S.C. § 2254 Rule 12 (Federal Rules of Civil Procedure apply to § 2254 proceedings to the extent they are not inconsistent with the § 2254 rules or applicable statutes); 28

U.S.C. § 2255 Rule 12 (similar). Indeed, some of the law relied on in the concurrence is directly derived from non-habeas law. For example, the concurrence cites *Goode v. Carpenter*, 922 F.3d 1136, 1149 (10th Cir. 2019), as its first authority after stating, "However, in the AEDPA context, our precedent usually has treated arguments that petitioners have not advanced before the district court as waived—*viz*., not subject to review at all." Holmes concurrence at 3. But *Goode* relied principally on *Simpson v. Carpenter*, 912 F.3d 542, 565 (10th Cir. 2018), which relied solely on *FDIC v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999), which was not a habeas case.

There may well be circumstances in which plain-error review is appropriate in postconviction proceedings. Consider a case in which the federal district court properly conducts an evidentiary hearing. What if the prisoner does not object when the district court makes an erroneous procedural or evidentiary ruling? I would think that we might consider applying plain-error review if properly raised.

I commend Judge Holmes for raising an issue that this court has not considered adequately. But I would be cautious in stating a global conclusion.

No. 16-6360, *Harmon v. Sharp*

Holmes, J., concurring.

I join the majority's thoughtful and thorough opinion in full. I write separately to address a significant issue relating to the application of preservation principles in the habeas context. Specifically, I write to explain why the State's invocation of our forfeiture/plain-error jurisprudence is inappropriate in the context of habeas review under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. In my view, efforts to transplant this jurisprudence into our body of AEDPA law contradict our precedent's mandate and are misguided. I attempt to explain why.

The State argues that Petitioner "failed to adequately present [multiple] argument[s] in [the federal] district court," that these arguments are "forfeited," and that, "in light of Petitioner's failure to request plain error review," these arguments "should not be considered by this Court." Aplee.'s Resp. Br. at 14 n.3 (citing *Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015)); *see id.* at 30–31 ("These arguments are forfeited and, in light of Petitioner's failure to request plain error review, should not be considered by this Court." (citing *Hancock*, 798 F.3d at 1011)); *id.* at 65–66 ("Petitioner did not make this argument below, and does not request plain error review. This Court should not consider this argument." (citing *Hancock*, 798 F.3d at 1011)).

Outside of the AEDPA context, I ordinarily would agree that a litigant's

failure to raise a ground of alleged error in the district court results in the forfeiture of that ground, and, consequently, the only review available is for plain error. *See United States v. Battles*, 745 F.3d 436, 445 n.9 (10th Cir. 2014) ("Ordinarily, when a defendant forfeits a claim by failing to raise it before the district court, we apply plain-error review."); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011) (noting that if a legal theory "simply wasn't raised before the district court, we usually hold it forfeited"); Ian S. Speir & Nima H. Mohebbi, *Preservation Rules in the Federal Courts of Appeals*, 16 J. APP. PRAC. & PROCESS 281, 284 (2015) ("Forfeiture . . . happens not by a deliberate act, but by neglecting to present an argument to the district court."). However, if the litigant does not invoke and argue under the plain-error rubric on appeal, then the ground is deemed effectively waived and our court ordinarily will not consider it at all. *See Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1259–60 (10th Cir. 2018) ("We ordinarily deem arguments that litigants fail to present before the district court but then subsequently urge on appeal to be forfeited. Typically, such arguments 'may form a basis for *reversal* only if the appellant can satisfy the elements of the plain error standard of review.' Consequently, a litigant's 'failure to argue for plain error [review] and its application on appeal—surely marks the end of the road for an argument for reversal not first presented to the district court'—*viz.*, ordinarily, we will not

review the argument at all." (alteration in original) (citations omitted) (quoting *Richison*, 634 F.3d at 1130–31)); *accord Fish v. Kobach*, 840 F.3d 710, 729–30 (10th Cir. 2016).

However, in the AEDPA context, our precedent usually has treated arguments that petitioners have not advanced before the district court as waived—*viz.*, not subject to review at all.[1] *See, e.g.*, *Goode v. Carpenter*, 922 F.3d 1136, 1149 (10th Cir. 2019) ("[W]e do not consider an issue that was not adequately raised in the federal district court."); *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015) ("We have long applied the rule that we do not consider issues not raised in the district court to bar not only 'a bald-faced new issue' presented on appeal, but also situations 'where a litigant changes to a new theory on appeal that falls under the same general category as an argument presented [below].' *Because the argument was not raised in his habeas petition, it is waived on appeal*." (alteration in original) (emphasis added) (citation omitted) (quoting *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 722 (10th Cir. 1993))); *Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013) ("We do not generally consider issues that were not raised before the district court as part of the habeas petition."); *Heard v. Addison*, 728 F.3d 1170, 1175 (10th Cir.

[1] Of course, "we have discretion to consider arguments a petitioner raises for the first time on appeal" and we have utilized *that* discretion in the AEDPA context. *Jones v. Warrior*, 805 F.3d 1213, 1219 n.2 (10th Cir. 2015); *see id.* ("We exercise that discretion here.").

2013) ("We do not reach [petitioner's argument] in this case, however, because . . . we conclude that [petitioner] never raised such a claim, in his petition or otherwise, before the federal district court."); *Parker v. Scott*, 394 F.3d 1302, 1327 (10th Cir. 2005) (deeming "waived" certain ineffective-assistance claims where petitioner "fail[ed] to assert them in his district court habeas petition"); *Jones v. Gibson*, 206 F.3d 946, 958 (10th Cir. 2000) (explaining that "[p]etitioner did not make [an] argument in his revised habeas petition," and so "this court need not consider it"); *Rhine v. Boone*, 182 F.3d 1153, 1154 (10th Cir. 1999) (refusing to address issue of when limitations period began running for § 2254 petition "[b]ecause we will generally not consider issues raised on appeal that were not first presented to the district court"); *see also Grant v. Royal*, 886 F.3d 874, 909 (10th Cir. 2018) (collecting cases), *cert. denied*, 139 S. Ct. 925 (2019).[2]

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[2] Other circuits largely appear to agree that a petitioner waives arguments that he or she has failed to advance before the district court in a § 2254 petition. *See Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 474 (3d Cir. 2017) (concluding that the petitioner "waived any challenge to the conspiracy conviction and instructions" because the record "nowhere reflects that [the petitioner] raised these claims in his § 2254 petition"), *cert. denied sub nom. Mathias v. Brittain*, 138 S. Ct. 1707 (2018); *Ben-Yisrayl v. Neal*, 857 F.3d 745, 747 (7th Cir. 2017) ("Claims not made in the district court in a habeas petition are deemed waived and cannot be raised for the first time on appeal." (quoting *Johnson v. Hulett*, 574 F.3d 428, 432 (7th Cir. 2009))); *Logan v. Gelb*, 790 F.3d 65, 70 (1st Cir. 2015) (per curiam) (explaining that petitioner "failed to include this argument in his habeas petition; it is thus waived"); *Coley v. Bagley*, 706 F.3d 741, 755 (6th Cir. 2013) (concluding that an "argument was not raised in the habeas petition and was not included in the COA, and may not be considered now"); *Xiong v. Felker*, 681 F.3d 1067, 1075 (9th Cir. 2012) ("Habeas claims not raised in the petition before the district court are not cognizable on appeal."

To be sure, we have on occasion—but infrequently—invoked the forfeiture/plain-error rubric in the AEDPA context, notably in *Bush v. Carpenter*, 926 F.3d 644, 657 n.4 (10th Cir. 2019), *Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015), and *Hanson v. Sherrod*, 797 F.3d 810, 843 (10th Cir. 2015).[3] But we have not attempted in these cases to explain why this

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(quoting *Belgarde v. Montana*, 123 F.3d 1210, 1216 (9th Cir. 1997))); *see also Thompson v. Davis*, 916 F.3d 444, 460 (5th Cir. 2019) (explaining that an "argument does not appear to have been raised in the district court, and is waived"); *Hardy v. Comm'r, Ala. Dep't of Corr.*, 684 F.3d 1066, 1084 (11th Cir. 2012) (noting that because a petitioner "did not present [certain] claims to the District Court, we will not entertain them in the first instance" (footnote omitted)). *But see Brende v. Young*, 907 F.3d 1080, 1084 (8th Cir. 2018) (per curiam) ("Issues not properly preserved at the district court level and presented for the first time on appeal ordinarily will not be considered by this court as a basis for reversal *unless there would be a plain error resulting in a miscarriage of justice*." (emphasis added) (quoting *Fritz v. United States*, 995 F.2d 136, 137 (8th Cir. 1993))). I acknowledge that some of these circuits may not use the precise definitions of "forfeiture" and "waiver" that we have embraced. *Cf. Richison*, 634 F.3d at 1127–29 (explaining the differences between waiver and forfeiture but acknowledging that "this court's cases haven't always been so precise in distinguishing between waiver and forfeiture").

[3] *See also Eizember v. Trammell*, 803 F.3d 1129, 1140 (10th Cir. 2015) ("Because there's nothing in Mr. Eizember's district court petition resembling the argument the dissent now seeks to advance on his behalf, he forfeited such a contention there." (citing *Richison*, 634 F.3d at 1128)); *Banks v. Workman*, 692 F.3d 1133, 1140 (10th Cir. 2012) (stating "[petitioner's] failure to present [an] issue to the district court means we must apply the plain error standard," but then "overlooking" this question because "even assuming [petitioner] had preserved [his argument], it fails on the merits" (citing *Richison*, 634 F.3d at 1130–31)). Notably, in invoking the forfeiture/plain-error rubric, *Eizember* and *Banks* both expressly relied on *Richison*—a case that clarified that this rubric applies in the direct-appeal context, not only to criminal cases where it had been routinely applied, but also, with full force, to civil cases. *See Richison*, 634 F.3d at 1129 ("It would be highly anomalous, we think, to afford civil

rubric—well established in the direct-appeal context—is applicable in AEDPA's collateral-review context. And, as even a brief examination will reveal, the underpinning of these cases is weak at best.

Without explanation, *Bush* cites only to *Hancock* for its invocation of the possibility of plain-error review. 926 F.3d at 657 n.4. And *Hancock*—which the State cites in support of its argument for plain-error review—notably relies in turn on a habeas case arising in the *non-AEDPA*, federal immigration context. 798 F.3d at 1011 (citing *Olmos v. Holder*, 780 F.3d 1313, 1327 (10th Cir. 2015)).[4] For its part, *Hanson*'s reference to plain-error review relied on a portion

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appellants like Mr. Richison a more forgiving standard than we provide criminal defendants, especially as the Supreme Court has cautioned us (repeatedly) against creating unwarranted exceptions to plain error review in the criminal context."). Given "the unique nature of habeas proceedings," which exhibit certain characteristics of civil proceedings, *Sloan v. Pugh*, 351 F.3d 1319, 1323 (10th Cir. 2003), it is significant that *all* of the AEDPA habeas cases from our court—not just these two—that have invoked the forfeiture/plain-error rubric were decided *after Richison.* Insofar as these cases may have been directly or indirectly influenced by *Richison*'s unequivocal application of this rubric to civil cases, they failed to grapple with the fact that *Richison* was decided in the distinct context of direct appeals or, more specifically, to explain why the preservation rubric applicable in the direct-appeal setting should apply as well in the context of AEDPA habeas proceedings.

[4] Whatever the other differences, I note that the comity, finality, and federalism interests that favor applying a rule of waiver in the AEDPA context—discussed more below—are absent in the immigration context, and that this distinction should make us hesitant to import our forfeiture/plain-error rubric from the immigration context into the AEDPA context. *Cf.* Speir & Mohebbi, *supra*, at 291 ("The principles of waiver, forfeiture, and plain error constitute the general rules of preservation, but there are some legal contexts in which these rules either don't apply or have unique application.").

of *Thornburg v. Mullin*, 422 F.3d 1113 (10th Cir. 2005), that was discussing the Oklahoma Court of Criminal Appeals's ("OCCA's") application of *its own plain-error rule* to an objection that state trial counsel failed to make. *Hanson*, 797 F.3d at 843; *see Thornburg*, 422 F.3d at 1124–25 ("Mr. Thornburg's counsel did not object to this testimony. Confining *its* analysis to plain-error review, the OCCA wrote . . . ." (emphasis added)). But at no point in *Thornburg* did we suggest that the forfeiture/plain-error rubric should be applied to arguments that habeas petitioners fail to make to *federal district courts*. Because *Hanson* relied on *Thornburg* for this proposition, its forfeiture/plain-error holding lacks persuasive force. Moreover, none of these cases purport to actually apply the familiar plain-error test. *See generally United States v. Rosales-Miranda*, 755 F.3d 1253, 1258 (10th Cir. 2014) (reciting the plain-error test and collecting related cases).[5]

Suffice it to say that, even if one were inclined at first blush to ignore the foundational weaknesses of these cases and to adhere to them in the AEDPA context in the interests of *stare decisis*, a closer examination of the full body of our caselaw actually would reveal that *stare decisis* demands the obverse. This is because, under our intra-circuit conflict rule, we must follow the earlier authority

[5] Indeed, I am not aware of any Supreme Court or Tenth Circuit case that has actually applied the familiar plain-error test in resolving an argument that a petitioner failed to present in federal habeas proceedings governed by AEDPA.

that has spoken on a particular issue, and, in this instance, that is the cases, such as *Parker*, that have applied our waiver doctrine to arguments that petitioners fail to make in federal district court habeas proceedings under AEDPA. *See, e.g.*, *United States v. Sabillon-Umana*, 772 F.3d 1328, 1334 n.1 (10th Cir. 2014) ("In cases of conflicting circuit precedent our court 'follow[s] earlier, settled precedent over a subsequent deviation therefrom.'" (quoting *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996))).

To be sure, "[a] court considering discordant decisions must first determine whether the perceived conflict between them is real," and "[i]f at all possible, the opinions should be harmonized." BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT § 36, at 300 (2016); *see Carter v. Bigelow*, 787 F.3d 1269, 1280 (10th Cir. 2015) (discerning a "far more reasonable interpretation" of prior Tenth Circuit precedent than found by the district court that "harmonizes with existing authority"); Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 19 (2009) ("[I]nconsistency between two panel decisions is not necessarily an intra-circuit split, however. A third panel will first attempt to reconcile the conflicting cases before concluding that a true intra-circuit split exists."). But, regrettably, there is "irreconcilable" discord and dissonance among our prior opinions regarding this preservation issue. *McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004) (en banc)

(explaining "that when there is an *irreconcilable* conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed" (emphasis added)); *cf.* GARNER, *supra*, at 306 (asking whether "the reasoning or theory of . . . prior circuit authority [was] clearly irreconcilable with the reasoning or theory of intervening higher [i.e., Supreme Court or en banc] authority" (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc))). In other words, it is not "at all possible" to harmonize these cases. GARNER, *supra*, at 300.

For example, *Parker* clearly held—in reliance on earlier circuit precedent—that several claims were "waived" because petitioner "fail[ed] to assert them in his district court habeas petition." 394 F.3d at 1327 (citing *Jones*, 206 F.3d at 958, and *Rhine*, 182 F.3d at 1154). But our subsequent contrary authority views the identical failure to assert claims in a habeas petition as a mere "forfeiture." *See, e.g.*, *Bush*, 926 F.3d at 657 n.4; *Hancock*, 798 F.3d at 1011; *Hanson*, 797 F.3d at 843. And *Parker* and the cases it cites clearly predate this contrary authority, and so we must follow our earlier cases and treat the arguments that Petitioner did not advance in his habeas petition as waived instead of merely forfeited. *See Sabillon-Umana*, 772 F.3d at 1334 n.1. Therefore, the State's reliance on *Hancock* as support for its invocation of the forfeiture/plain-error rubric in the AEDPA context is misguided.

Even if our caselaw did not preclude application of the forfeiture/plain-error rubric in the AEDPA habeas context—which it does—it would not be clear what role plain-error review would play in this collateral-review context, where petitioners already must overcome AEDPA's intentionally deferential, fairminded-jurist standard. *See Harrington v. Richter*, 562 U.S. 86, 101–02 (2011) (noting that a state court's merits resolution should not be disturbed so long as "'fairminded jurists could disagree' on the correctness of the state court's decision," and that AEDPA's standard was "meant to be" "difficult to meet" (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))); *cf. Engle v. Isaac*, 456 U.S. 107, 134 (1982) ("The federal courts apply a plain-error rule for direct review of federal convictions. FED. RULE CRIM. PROC. 52(b). Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns."); *United States v. Frady*, 456 U.S. 152, 164 (1982) ("Because it was intended for use on direct appeal, however, the 'plain error' standard is out of place when a prisoner launches a collateral attack against a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal."); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) ("The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the

constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.").

On the other hand, waiver would seem to be an apt preservation doctrine to apply when an AEDPA petitioner fails to present an argument to the district court because, under federal habeas rules, a petition "*must* . . . specify all the grounds for relief available to the petitioner." RULE 2(c)(1), RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS (emphasis added); *cf. Mayle v. Felix*, 545 U.S. 644, 655 (2005) (explaining this standard is "more demanding" than the notice pleading required in civil complaints). As such, habeas petitions under AEDPA are the documents that define the legal terrain of the litigation—that is, they define the universe of arguments that fall within the scope of the habeas litigation. Consequently, it seems logical that, if a party seeks to present a claim or ground for relief on appeal that was not presented to the district court in his or her habeas petition, the court should treat such a claim or ground for relief as waived, rather than merely forfeited.

Put another way, such an extra-petition argument would be outside the boundaries of the habeas litigation and, therefore, should be deemed waived and not considered at all. *Cf. Cheek v. Peabody Coal Co.*, 97 F.3d 200, 202 (7th Cir. 1996) ("Although Cheek's complaint did not refer, either directly or indirectly, to sexual harassment, she asserted both in response to Peabody's motion for

summary judgment and on appeal that her claim was based not only on a theory of disparate treatment but on one of hostile environment sexual harassment as well. That theory, however, was waived because of its omission from Cheek's complaint.");[6] *cf. also Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002) (noting that "claims, issues, defenses, or theories of damages not included in the pretrial order are waived").

Indeed, a leading commentator in the habeas field, Brian Means, appears to hold a similar view. In one of his treatises discussing the above-quoted language of Rule 2(c)(1), he states that "[a] district court may not grant relief on a claim not alleged in the federal habeas petition" and, more specifically, that "[a] federal court"—seemingly, including a federal appellate court—"*may not resurrect* arguments or claims that a petitioner 'had abandoned by the time he [or she] went

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[6] Though requiring more than notice pleading, *see Mayle*, 545 U.S. at 655, in significant respects, "an application for habeas corpus relief" is "the equivalent of a complaint in an ordinary civil case." *Woodford v. Garceau*, 538 U.S. 202, 203 (2003); *see Williams v. Coyle*, 167 F.3d 1036, 1038 (6th Cir. 1999) ("The filing of an application for a writ of habeas corpus is analogous to the filing of a civil complaint, and the Federal Rules of Civil Procedure may be applied to habeas proceedings to the extent that those rules do not conflict with the specific rules governing § 2254 cases."); *Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1287 n.3 (9th Cir. 1997) ("Filing an application for a writ is analogous to filing a complaint, which commences a civil case under Fed. R. Civ. P. 3."), *overruled on other grounds,* 163 F.3d 530 (9th Cir. 1998) (en banc); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 481 (2007) ("A habeas petition is formally a civil complaint . . . ."); *cf. Rodriguez v. Fla. Dep't of Corr.*, 748 F.3d 1073, 1076 (11th Cir. 2014) (equating "a state's answer to a § 2254 petition" with "an answer to a complaint").

into federal court,'" i.e., by not including them in his or her habeas petition. BRIAN R. MEANS, FEDERAL HABEAS MANUAL § 8:1, Westlaw (updated May 2019) (quoting *Reaves v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1137, 1148–49 (11th Cir. 2017)); *see id.* (citing *McGhee v. Watson*, 900 F.3d 849, 853 (7th Cir. 2018), where the appellate court stated that "[petitioner's] failure to raise [claims] in his § 2254 petition is a waiver"); *accord* BRIAN R. MEANS, POSTCONVICTION REMEDIES § 12:2, Westlaw (updated July 2019).

Finally, applying the preservation doctrine of waiver to claims or grounds for relief that petitioners omit from their habeas petitions is congruent with the "comity, finality, and federalism" interests that "Congress intended AEDPA to advance." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). Assuming a district court does not "summarily dismiss the petition," it then "orders the State to file an answer" that "address[es] the allegations in the petition." *Felix*, 545 U.S. at 656 (quoting RULES 4, 5(b), RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS). In order to protect the "delicate balance" that necessarily exists when the federal government reviews state criminal adjudications, the Supreme Court has warned us "to limit the scope of federal intrusion" and "to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams*, 529 U.S. at 436. As with "the doctrines of procedural default and abuse of the writ," enforcement of our normal waiver

rules would prevent habeas petitioners from subjecting States to late-blooming arguments on appeal and would serve "to vindicate the State's interest in the finality of its criminal judgments." *McCleskey v. Zant*, 499 U.S. 467, 493 (1991); *cf. Bucklew v. Precythe*, --- U.S. ----, 139 S. Ct. 1112, 1133 (2019) ("Both the State and the victims of crime have an important interest in the timely enforcement of a sentence." (quoting *Hill v. McDonough*, 547 U.S. 573, 584 (2006))).

In light of all this, there should be no doubt that, under the proper reading of our precedent's mandate, the waiver doctrine—not the forfeiture/plain-error rubric—should be applied to arguments that habeas petitioners proceeding under AEDPA seek to advance for the first time on appeal (i.e., arguments that petitioners failed to present to the federal district court). And, even if we were free from the constraints of that precedent (which we are not), there would be much to commend the same (i.e., waiver) approach in the AEDPA context, and I would follow it here. Accordingly, the State's invocation of the forfeiture/plain-error rubric here is mistaken. Any arguments not raised in Petitioner's habeas petition should be deemed waived, not merely forfeited. Having offered this clarification of how our preservation principles apply in the AEDPA context, I join the majority's thoughtful and thorough opinion in full.