No. 15-7041

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PATRICK DWAYNE MURPHY, Appellant/Petitioner, vs. TERRY ROYAL, WARDEN, Oklahoma State Penitentiary, Appellee/Respondent.	Case No. 07-7068 Case No. 15-7041 **DEATH PENALTY CASE** (Brief and attachments submitted digitally and scanned pdf form)

On Appeal from the United States District Court
for the Eastern District of Oklahoma
District Court Case Nos. CIV-03-443-RAW-KEW
CIV-12-191-RAW-KEW
The Honorable Ronald A. White, District Judge

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT IS REQUESTED

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Prior or Related Appeals

There are three prior related appeals to this Court: No. 04-7094 (dismissed for lack of appellate jurisdiction), Order of Dec.16, 2004; No. 07-7068 (held in abeyance and later consolidated with the present appeal), Orders of Nov. 16, 2007 and June 30, 2015; and No. 12-7055 (remanded to the district court to litigate Appellant's procedural claims under *Atkins v. Virginia*, 536 U.S. 304 (2002)), Order of Nov 2, 2012.

Jurisdiction

Patrick Murphy invoked the jurisdiction of the United States District Court for the Eastern District of Oklahoma pursuant 28 U.S.C. § 2254. On August 1, 2007, that court denied relief in CIV-03-144. Doc. 71. On May 5, 2015, the court denied relief in CIV-12-191. Doc. 35. The Opinion in CIV-03-443 is appended as Attachment A and the Opinion in CIV-12-191 is appended as Attachment B. On September 26, 2007, the district court granted a certificate of appealability on three issues. Doc. 82 (CIV-03-144). On May 5, 2015 the district court denied a certificate of appealability. Doc. 35 (CIV-12-191). On January 6, 2016, Judge Murphy granted a certificate of appealability on five additional issues. *See* Case Management Order of Feb. 17, 2015. The jurisdiction of this Court is invoked pursuant 28 U.S.C. § 2253 and Fed. R. App. P. 4(a). Due to multiple remands and proceedings in both state and federal courts Mr.

Murphy offers as an aid the "Case Litigation Timeline" appended as Attachment C.

Statement of Issues Presented for Review

The district court erred in denying relief or an evidentiary hearing on the following constitutional claims:

1. Oklahoma had no jurisdiction to try, convict, and sentence Mr. Murphy to death when both Murphy and the victim were Muscogee (Creek) Nation members and the crime occurred on a restricted allotment located within the undiminished boundaries of the Muscogee (Creek) Nation's reservation. The federal courts have exclusive jurisdiction pursuant the Indian Major Crimes Act, 18 U.S.C. § 1153. *De novo* review is appropriate.

2. Permitting victim's family members to recommend Murphy be put to death was a critical constitutional error that cannot be considered harmless.

3. The district court's failure to follow the abeyance practice of *Rhines v. Weber*, 544 U.S. 269 (2005) prevented Murphy from presenting his substantive claim that he is intellectually disabled and ineligible for execution under *Atkins*, 536 U.S. at 304, 321.

4. Oklahoma's *Atkins* procedures violated the Constitution by terminating the state court inquiry into Murphy's intellectual disabilities because he had an I.Q. score over 75.

5. Murphy was denied his Sixth Amendment right to effective assistance of counsel during the penalty phase because counsel failed to investigate and present compelling mitigating evidence. Jurors never heard of Murphy's exposure to alcohol *in utero* and its effect on his developing brain. Jurors did not know Murphy's parents were alcoholics and his childhood was punctuated with extreme intra-familial violence. They did not know he was a quiet, good-natured, pleasant, and peaceful person who made concentrated efforts to overcome his deprived childhood.

6. Murphy was deprived of his Sixth, Eighth, and Fourteenth Amendment rights because insufficient evidence exists to support that the crime was especially heinous, atrocious, or cruel; no fact finder found the core requirement of this aggravator, due in part to a flawed jury instruction.

7. Murphy was deprived of his Fifth, Eighth, and Fourteenth Amendment rights when the trial court failed to define life without parole.

8. The cumulative effect of errors at both phases of trial deprived Murphy of his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Preliminary Statement
(Record References)

The record of the proceedings will be referenced as follows:

TR OR.	3-volume Original Trial Record followed by page.
TR J. Tr.	5-volume jury trial transcript followed by volume and page.

TR M. Tr.	Trial motion hearing transcripts followed by name, date, and page.
TR PH Tr.	2-volume Preliminary Hearing transcript followed by volume and page.
TR St. Ex.	State trial exhibits identified by number.
TR Df. Ex.	Defense trial exhibits identified by number.
PC	Original Application for Post-Conviction Relief (PCD-2001-1197).
PC Ex.	Original Post-Conviction Exhibits followed by exhibit number.
PC M. Tr.	Post-Conviction motion hearing transcript followed by name, date, and page.
PC 2	2nd Application for Post-Conviction Relief (PCD-2004-32)
PC 2 Ex.	2nd Post-Conviction Exhibits followed by Exhibit letter.
PC 2 (IC) OR	5-volume Original Hearing Record followed by page.
PC 2 (IC) M. Tr.	Remanded Indian country hearing transcript (Vol. I)
PC 2 (IC) St. Ex.	Remanded Indian country hearing state's exhibits(Vol. II) identified by number.
PC 2 (IC) Df. Ex.	Remanded Indian country hearing defense exhibits (Vol. III) identified by number.
PC 2 (ID) OR	7-volume Original Record after remand for intellectual disability jury trial followed by page.
PC 2 (ID) OR Supp.	1-volume Supplement Record after termination of intellectual disability jury trial followed by page.
PC 2 (ID) M. Tr.	Intellectual Disability motion hearing transcripts followed by name, date, and page.
PC 2 (ID) J. Tr.	4-volume intellectual disability 2009 jury mistrial transcripts followed by volume and page.
Doc.	Federal district court documents in CIV-03-443.
Doc.	Federal district court documents in CIV-12-191.
Att.	Attachments to opening brief.

Statement of the Case

Mr. Murphy was charged, conjointly with Billy Jack Long, in the District Court

of McIntosh County, No. CF-1999-164A, with the malice aforethought murder of George Jacobs.[1] TR OR 5-6. The State alleged two statutory aggravating circumstances: 1) the murder was especially heinous, atrocious, or cruel and 2) at the present time, there exists a probability the defendant will commit criminal acts of violence that would constitute a continuing threat to society. TR OR 82-86.

Mr. Murphy's trial was held April 10-14, 2000, before the Honorable Steven W. Taylor. He was represented by James Bowen of the Oklahoma Indigent Defense System (OIDS) and court-appointed counsel Richard Lerblance. The jury found Murphy guilty, TR J. Tr. IV 1160, found both aggravating circumstances, and recommended death. TR J. Tr. V 1401-02. Judgment and Sentence was imposed pursuant the jury's verdict. TR OR 453-55.

On direct appeal Murphy was represented by attorneys hired by OIDS, Steve Presson and Robert W. Jackson. The Oklahoma Court of Criminal Appeals (OCCA) affirmed Murphy's conviction and sentence on May 22, 2002. *Murphy v. State*, 47 P.3d 876 (Okla. Crim. App. 2002) (*Murphy I*). Judge Chapel dissented and would have modified Murphy's sentence to life imprisonment without the possibility of

[1] Billy Jack Long was sentenced to life with the possibility of parole. Kevin King, a juvenile at the time of the offense, pled guilty to second-degree murder and received a 45-year sentence. *See* Case Management Statement of Issues (Case No. 15-7041), Nov.13, 2015, Atts. 2 and 3.

parole (LWOP) based on insufficient evidence the crime was especially heinous, atrocious, or cruel. *Id*. at 888. The OCCA recognized mitigating evidence was presented "that [Murphy] suffers from mild mental retardation."[2] Yet, notably the OCCA concluded the death sentence was "factually substantiated and appropriate." *Id*. Twenty-eight days later the Supreme Court decided *Atkins.*

Murphy, represented by OIDS counsel, filed an Application for Post-Conviction Relief (PC). The OCCA denied relief, but granted an evidentiary hearing on the *Atkins* claim. *Murphy v. State*, 54 P.3d 566 (Okla. Crim. App. 2002) (*Murphy II*). On March 21, 2003, the OCCA again denied relief following remanded proceedings. *Murphy v. State*, 66 P.3d 456 (Okla. Crim. App. 2003) (*Murphy III*). One month later the Supreme Court denied certiorari from direct appeal. *Murphy v. Oklahoma*, 583 U.S. 985 (2003).

Mr. Murphy filed his Petition for Writ of Habeas Corpus in the Eastern District of Oklahoma on March 5, 2004. Doc. 14 (CIV-03-443). Mr. Murphy raised, among other claims, two unexhausted issues: 1) Oklahoma lacked jurisdiction because the crime occurred in Indian country, and 2) Murphy had been denied a jury trial to

[2] In *Atkins* the Supreme Court used the then-accepted term "mental retardation" to describe the group of individuals within the scope of the case's protection. Clinicians and the Supreme Court now use the term "intellectual disability." *See Hall v. Florida*, 134 S.Ct. 1986, 1990 (2014). Here the term "intellectual disability (ID)" will be used unless a direct quote requires otherwise.

determine whether his intellectual disability exempted him from the death penalty. For both claims, Murphy requested his case be held in abeyance until exhaustion, if necessary and not excused, could be accomplished. Doc. 14 at 33, 114-15. Murphy also argued the district court should remand for resentencing following a favorable determination by a jury that he was intellectually disabled. *Id*.

On April 29, 2004, Murphy, represented by *pro bono* counsel, Gary Peterson and Kari Hawkins, again sought collateral relief, raising Indian country jurisdiction and *Atkins* claims. PC 2. The application was filed with 23 days remaining on the one-year statute of limitation imposed by the Antiterrorism and Effect Death Penalty Act (AEDPA). Doc. 41. Despite the unresolved and pending state action, on August 30, 2004, the district court directed the habeas petition be amended to drop all unexhausted claims. Doc. 27. Having lost challenges to hold the case in abeyance to permit exhaustion, Murphy filed an amended habeas petition on September 10, 2004, dropping the unexhausted claims. Docs. 28, 30-31, 33.

Mr. Murphy initiated an appeal to this Court. While the Appellee's jurisdictional challenge was being briefed, OCCA remanded to McIntosh County for an evidentiary hearing on the Indian country issue. *See* Order Remanding, PCD-04-321, Oct. 5, 2004. The Indian country hearing was held on November 18, 2004. This Court terminated the appeal. *See* Court Minute, Dec. 16, 2004 (Case No. 04-7094).

On December 7, 2005, OCCA denied Murphy relief, but remanded for a jury trial on his *Atkins* claim. *Murphy v. State*, 124 P.3d 1198 (Okla. Crim. App. 2005) (*Murphy IV*).

On January 19, 2006, the district court permitted Murphy to amend his habeas petition to include the Indian country issue recently decided in state court. Doc. 45. Murphy notified the court that OCCA, in the same opinion, remanded for a jury trial on the *Atkins* claim. Murphy asserted his right "to present the issue of his mental retardation when the state court proceedings are complete." Doc. 41 at 4.

The *Atkins* proceedings in state trial court moved slowly. Oklahoma first sought clarification of the OCCA's remand order concerning whether the *Blonner v. State*, 127 P.3d 1135 (Okla. Crim. App. 2006) procedures applied. The OCCA responded that the *Atkins* jury trial proceedings were "neither confusing nor in conflict," citing *Lambert v. State*, 71 P.3d 300 (Okla. Crim. App. 2003) and *Salazar v. State*, 84 P.3d 764 (Okla. Crim. App. 2004). *See Murphy v. State*, 127 P.3d 1158 (Okla. Crim. App. 2006) (Mem) (*Murphy V*).

On July 1, 2006, Oklahoma passed title 21 Okla. Stat. § 701.10(b) which provided "in no event shall a defendant who has received an intelligence quotient of seventy-six (76) . . . be considered mentally retarded."

On May 10, 2007, Murphy filed a second motion to stay and abey the habeas

proceedings, notifying the court that his intellectual disability jury trial was scheduled for September 2007. Counsel gave notice that *Rhines v. Weber*, 544 U.S. 269 (2005) supported the abeyance procedure requested. Doc. 66.

On August 1, 2007 the court denied habeas relief, an evidentiary hearing, and the motion to stay and abey proceedings. *Murphy v. Sirmons*, 497 F. Supp. 2d 1257 (E.D. Okla. 2007). The district court granted a certificate of appealability on three issues and Murphy commenced an appeal. Over Appellee's objection, Judge Porfilio ordered the appeal held in abeyance pending state litigation of the *Atkins* claim. *See* Order of Nov. 16, 2007 (Case No. 07-7068). This Court denied Appellee's request to reverse the order. *See* Order of Dec. 4, 2007. The appeal remained in abeyance pending completion of Murphy's state court proceedings.

On September 25, 2007, the State requested the *Atkins* proceedings be terminated, because Mr. Murphy had an IQ score of 76 or above, citing 21 Okla. Stat. § 701.10(b). The trial court denied the motion. PC 2 (ID) OR III 514.

An *Atkins* jury trial was held in McIntosh County September 14-17, 2009. A mistrial was declared because the jury selection procedures in *Blonner*, 127 P.3d at 1140, had not been followed. PC 2 (ID) M. Tr. 9/25/2009 at 4-5, 7. On November 5, 2010, OCCA issued an opinion in *Smith v. State*, 245 P.3d 1233 (Okla. Crim. App.

2010).[3] On December 8, 2010, the prosecutor renewed his request to terminate Murphy's *Atkins* proceedings claiming *Smith* prohibited Murphy from raising his intellectual disability because he had an IQ score of 76 or above. PC 2 OR (ID)VII 1324. On January 27, 2011 the trial court terminated further proceedings and struck the jury trial scheduled to begin on February 7, 2011. PC 2 OR (ID) VII 1419-21. Both parties filed supplemental briefs before the OCCA. On April 5, 2012, the OCCA denied the post-conviction relief action it previously granted. It found, among other things, that the strict-cutoff score in 21 Okla. Stat. § 701.10(b) was consistent with *Atkins*. *Murphy v. State*, 281 P.3d 1283 (Okla. Crim. App. 2012) (*Murphy VI*).

On April 26, 2012, following the conclusion of Murphy's state *Atkins* proceedings and still within the one-year statute of limitation (which had been tolled pending the state determination) Murphy filed a habeas petition. Doc. 7 (CIV-12-191). The petition was amended May 17, 2012. Doc. 10. Finding the petition was filed in good faith and that Murphy had a reasonable argument the petition was non-successive, the district court nonetheless ordered Murphy's motion transferred to this Court. Doc. 18. This Court granted the motion to remand the procedural *Atkins*

[3] Smith was tried after the Supreme Court decided *Atkins*. He claimed, in his successor post-conviction action, that he met the statutory criteria under title 21 Okla. Stat.§ 701.10(b), even though no such challenge had been made at trial, on direct appeal, or in his first state post-conviction action.

claims, but denied the motion to remand the substantive *Atkins* claim. *See* Order of November 1, 2012 (Case No. 12-7055).[4]

The district court denied habeas relief, an evidentiary hearing, and a certificate of appealability on May 5, 2015. Doc. 35. Murphy commenced this appeal, which was joined with the 2007 appeal. Judge Murphy granted a certificate of appealability for five additional issues.

Statement of Facts

A. Patrick Murphy.[5]

On April 24, 1969, Patrick Murphy was born to Elizabeth Gambler Murphy, a member of the Muscogee (Creek) Nation, and Willie Murphy, Sr., an African American. Patrick was the fourth of Elizabeth's five children. Doc. 14 Ex. M ¶¶8, 12-13 (CIV-03-443) (Affidavit of Elizabeth Jane Gambler Murphy). By her own admission, Elizabeth drank beer throughout her pregnancy with Patrick and on one

[4] This Court recognized the district court's refusal to stay the proceedings created second-or-successive complications and noted the possibility Murphy could obtain relief on appeal beyond what could be considered in the motion before the Court. *See* Order of November 1, 2012 nt.1 (No. 12-7055).

[5] The mitigating evidence presented at trial centered on a risk assessment of Jeanne Russell, Ph. D, and a chemical dependency assessment of Bill Sharp, Ph.D. *See* TR J. Tr. V 1227-1314, Df. Exs. 3-4. Many of the additional facts presented here about Murphy's life were not heard by the jury. They were investigated, developed, and presented in subsequent proceedings surrounding ineffective assistance of counsel and intellectual disability claims.

occasion drank "24 cans of Falstaff Beer in a single day." PC Ex. 4 ¶¶2-5 (Affidavit of Elizabeth Murphy). Elizabeth's sister, Amelia Gambler, who lived with or near Elizabeth during the pregnancy, described her sister as "drinking to excess while pregnant" and mainly drinking Ripple brand wine and "home brew" called "chalk."[6] PC Ex. 5 ¶3. (Affidavit of Amelia Gambler). Elizabeth was an alcoholic. After Patrick's birth, Elizabeth had two miscarriages, and nearly a third. She used alcohol as her method to abort unwanted pregnancies. PC Ex. 5 ¶¶4-5.

In elementary school Patrick was tested and determined to be educable-mentally handicapped, a term that was replaced with "mental retardation." PC M. Tr. 10/29/2002 at 42 (Testimony of Jeri Davis, educator and psychometrist for Oklahoma Department of Education). His 1975 score on the Wechsler Primary Preschool Scale of Intelligence (WPPSI) placed his full scale IQ between 65 and 73. *Id*. at 17-22; 31-43. He struggled throughout elementary school with all subjects. *Id*. at 73. Patrick's remedial reading teacher testified his academic scores "were very low" and his vocabulary "was definitely low." Patrick's critical thinking skills were almost non-

[6] "Choc beer" is an abbreviated term for Choctaw Indian beer. The concoction, which was illegal until the later part of the twentieth century, could be brewed in a basement, a garage, a barn, or a kitchen. In describing "choc beer" one Oklahoman said, "It won't hurt nobody 'cause fruit's good for ya, but it'll make you drunker than a fool." http://www.okhistory.org/publications/enc/entry.php?entry=CH046

existent. *Id*. at 58. When asked to write a story or a paragraph, Patrick could only write "two or three lines." *Id*. He had difficulty writing complete sentences that made sense. *Id*. at 75. He had significant limitations in self-direction and communication. His self-esteem was very low. *Id*. at 60. He had to repeat the second grade. By the fifth grade, Patrick was still two or three years behind. *Id*. at 61.

The deprivation in Patrick's community and family served to exacerbate his dysfunction. Patrick lived in a small rural community called Ryal, just outside Henryetta, Oklahoma. The area, known as "the bottoms" is populated almost exclusively with other Creek Nation citizens. The bottoms was very rough, wild, and dangerous. There was "a lot of drinking, gun, knife, and fist fights." Drinking to excess was "a way of life." Doc. 14, Ex. K (Affidavit of Creek Nation Lighthorsemen, Eldon Kelough). "Kids growing up in the bottoms never really had a chance." *Id*.

Veteran Department of Human Services (DHS) social worker, William Robert Hopkins, remembered Patrick well. Hopkins visited the family at least 15 times while investigating welfare fraud and trying to get the children to attend school. He clearly remembered his first visit. Elizabeth and her children were lying in a ditch and Willie Murphy, Sr. "was shooting at them from across the road." Doc. 14, Ex. L ¶¶2-5 (Affidavit of W.R. Hopkins). Patrick's childhood exposure to violence was extreme. He witnessed his mother stab his uncle in the back. He witnessed an aunt shoot the

same uncle in the foot once and in the "rear end" another time. Doc. 14, Ex. M ¶¶18, 21.

Patrick's mother, Elizabeth, had a serious alcohol problem and ran a "jive joint" selling Choc beer from the home. There would be 30-40 cars at Elizabeth's house on an evening. Following weekend drinking parties there would be "mounds of beer cans" outside Patrick's house." Doc. 14, Ex. L ¶¶2-5. Elizabeth's trailer was known as "Murphy's Bar." She let her children drink beer to get them to go to sleep. She put beer in Patrick's bottle when he was an infant "to ease his crying and help him go to sleep." Doc. 14, Ex. M ¶15.

Patrick's mother was repeating a pattern passed down from her father. Wallace Gambler, Sr. drank all the time and brewed his own whiskey. Wallace, Sr. allowed Patrick to get drunk when he was four or five years old. PC Ex. 17 ¶4 (Affidavit of Lisa G. Cooper). Patrick loved this grandfather and was especially close to him. In 1982 Wallace, Sr. was drinking and fell in a ditch. The wound to his arm became gangrenous and eventually led to his death. PC Ex. 7 ¶4 (Affidavit of Angela Barrett). The death of Patrick's grandfather was "very traumatic for him." PC Ex.16.

All the families in the bottoms were "economically impoverished." Doc. 14, Ex. L ¶4. However Patrick's home was one of the worst. *Id*. ¶9. At one point there were nine (9) children living with Elizabeth in her trailer. Four nieces and nephews,

including Billy Jack Long, lived there after their mother died. Two other nephews came to live with Elizabeth when their mother went to prison for knifing a man. Doc. 14, Ex. M ¶¶20, 23. *See also* PC Ex. 6 (Affidavit of Letitia Hurn).

Had Stan White not been Patrick's high school basketball coach he would not have felt safe going to the bottoms. PC Ex. 11 ¶3 (Affidavit of Stanley White). The violence there was rarely reported because it happened within families. PC Ex. 10 ¶3 (Affidavit of Steve McKinney).

According to one of Patrick's junior-high girlfriends, violence was a "common occurrence" in Patrick's home. Willie, Sr. was an alcoholic. PC Ex. 13 ¶2 (Affidavit of Robert Claiborne, Jr.). Willie, Sr. and Willie, Jr. got in fight after fight. There were fights with fists, knives, and firearms. PC Ex. 9 ¶5 (Affidavit of Stephanie Ramirez Loyd). Patrick's uncle, Wallace Gambler, Jr. once pulled a gun on his nephew, Gabriel Ramirez, for putting flowers on Gabriel's mother's grave. Wallace, Jr. also fired shots at Gabriel and one of Patrick's former girlfriends. *Id*.

Patrick's success at basketball from junior high through high school kept him in school. PC Ex. 12 ¶3 (Affidavit of former Ryal School principal, Danny Kennedy). Kennedy felt sports were an "incentive" for Patrick and asked teachers to allow him to participate in PE and sports even if he was not completing his assignments. *See* PC M. Tr. 10/29/2002 at 61-2.

The reports from friends and educators are remarkably similar. Despite the violence Patrick was exposed to in his home, he "was not cruel or violent by nature." PC Ex. 6 ¶6-7. He was a "kind person"– a "nice person," with a "peaceful nature." He was generous with his family and "would do anything to help others." PC Ex. 7 ¶8-9; Ex. 8 ¶3; Ex. 10 ¶2, 4. He always had a smile and was in a "happy mood." PC Ex. 8 ¶3 (Affidavit of Trisha Henley). Patrick had a " respectful and well-behaved manner." He was liked by his teachers and popular with many students. PC Ex. 11 ¶5. His principal never saw any "meanness" in him. PC Ex. 12 ¶3.

Patrick excelled at basketball. His high school coach encouraged him and thought he might be able to play basketball at Connors State College. PC Ex. 11 ¶2 Patrick was admitted to Connors despite his ACT score of 7 because Connors had an "open door" policy. PC 2 (ID) J. Tr. II at 302-03. (Stipulation of Dr. Ann York, Vice-President of Operations of ACT program). The Director of the Upward Bound program at Connors "suspected [Patrick] had been passed along in his small school simply because he was a good athlete there." Doc. 10, Ex. 21 (CIV-12-191) (Affidavit of Gretchen Morgan).

Patrick was unable to stay in college, even after transferring to Haskell[7] to play

[7] Haskell, located in Lawrence, Kansas, had originally been an Indian boarding school. It later served Native American students first as a junior college and then a four-year college, where tuition, books, and room and board were free.

basketball. Haskell's academics were very weak. The school's small group approach permitted students to slip through. If a student showed up in class he would pass. However, Patrick could not pass. Even with tutoring and help from friends to take tests and write essays for him, he dropped out after one year. He could not maintain his eligibility. Doc. 10, Ex. 22, ¶¶1-3 (Affidavit of Patrick Kincaid), Ex. 23 ¶¶2-3, 5 (Affidavit of Lucas Taylor).

Patrick returned to the only place he knew – the bottoms. He married and had three children. He got a job in Henryetta, Oklahoma at a company that manufactured filters. While the duties were not "that difficult," he was a hard-worker. He loved his children and was a caring father. PC Exs. 13 ¶4; 7 ¶9. He divorced. His alcohol consumption progressed. He was a daily user, consuming large amounts of beer each weekday evening, and even greater amounts over the weekend. Tr. Df. Ex. 4. Patrick had various alcohol-related charges and was disciplined for using alcohol at work. However, he had no arrests or charges for crimes involving violence. Indeed, the State relied exclusively on the murder to support the aggravating circumstance of "continuing threat." The only sentencing stage evidence the State presented were the highly prejudicial and unconstitutional statements from the victims asking the jury to return a death sentence. TR J. Tr. V 1216-18.

B. The Crime.

Patrick Murphy was convicted and sentenced to death for the murder of George Jacobs, who had formerly lived with Patrick's common-law wife, Patsy Jacobs. Jacobs started drinking the morning of Saturday, August 28, 1999 and drank all day and into the night. Jacobs, was drinking with his younger cousin, Mark Sumka, a childhood friend of Patrick's. TR J. Tr. III 582-89. Patrick first started drinking with friend, Mark Taylor. They drank steadily until Patrick dropped Taylor off at his home about 8:00 p.m. *Id*. at 659-64, 673-86. Patrick continued to drink and drive the rural roads of McIntosh County with his cousin, Billy Jack Long, and Kevin King.

Jacobs' last stop before the fatal encounter was at Mr. G's Bar, in Vernon, Oklahoma. *Id*. at 589. As Jacobs and Sumka left Mr. G's planning to go to another bar, Jacobs passed out in the passenger seat, with Sumka driving. *Id*. at 625, 632. (The medical examiner later determined Jacobs' post-mortem blood alcohol level was .23%, and the alcohol content of his vitreous fluid was .29%. TR J. Tr. III 761).

Sumka passed Patrick driving toward Mr. G.'s and stopped to talk. Sumka told Patrick he was with George Jacobs. *Id*. at 592. Long and King got out of Patrick's truck and came around to Jacobs' side of the car. Sumka drove away, but Patrick caught up and blocked the car. Long and King again came to the passenger side and started hitting Jacobs. *Id*. at 593-94. Patrick and Sumka stood at the back of Jacobs'

car while the assault continued. Patrick walked forward, and Long immediately struck Sumka in the nose, causing him to bleed profusely. Sumka staggered and upon regaining his senses saw King dragging Jacobs "out of the ditch." Sumka was scared because of how King and Long were "beating on him."[8] He first ran away but then returned to help Jacobs. *Id*. at 595-98.

The three men threatened Sumka, telling him not to tell what he had seen. *Id*. at 598, 641. King hit Sumka in the jaw. Sumka saw Patrick toss a folding knife in the woods. Sumka went to the ditch to check on Jacobs and found him barely breathing. TR J. Tr. III 599-601.

Sumka then left with the other three men, leaving Jacobs in the ditch and Jacobs' car on the road. Sumka did not see who cut Jacobs but said Patrick told him he did it. TR J. Tr. III 603, 643. Sumka spent the rest of the night with Patrick's mother. Patrick went to his nearby trailer. TR J. Tr. III 617-618.

The law enforcement officers responded to a call about an injured man on Vernon Road and arrived soon after the four men left the scene. TR J. Tr. II at 273, 283. Jacobs was dead; his body was lying by his car and his dismembered genitals

[8] Jacobs had contusions, lacerations, and abrasions on his face and head and 3 fractured ribs from the beating. There was no evidence of defensive wounds. The medical examiner assumed if the head injuries occurred first, as they must have according to Sumka's testimony, then Jacobs was unconscious at the time of the later incised wounds, that were potentially fatal. TR J. Tr. III 767.

were in the road about 18 feet away. TR J. Tr. II 274. Officers, armed with a search warrant, entered Mr. Murphy's trailer about noon the following day and took him into custody for Jacobs' murder. In a statement Mr. Murphy made to the police, he admitted hitting and cutting Jacobs, but denied killing him. TR St. Ex. 5.

Summary of the Argument

Mr. Murphy, a member of the Muscogee (Creek) Nation was sentenced to death by the state of Oklahoma for the first-degree murder of another member of the Muscogee (Creek) Nation. The crime occurred on or near a rural road in McIntosh county called Vernon Road. The site is within the original reservation boundaries of the Muscogee (Creek) Nation and on an allotted portion of the reservation that has never been diminished. One-twelfth mineral interest of the land allotted to original Muscogee (Creek) allottee, Lizzie Smith, continues to be owned by her heirs and remains restricted against alienation. The federal court had exclusive jurisdiction and all of Oklahoma's rulings, including its support of its own jurisdiction, were void *ab initio* and are due no deference.

Mr. Murphy did not receive a fair trial and fair sentencing. Murphy, a man with significant intellectual limitations and a brain that was damaged *in utero* by exposure to alcohol, grew up in an impoverished home plagued by generational violence and alcohol abuse located within a broader impoverished Creek community that was also

plagued by violence and alcohol abuse. Despite his limitations he became a hard worker and a good father. He had no prior record of violence. His family, friends, teachers, and coaches found his involvement in the crime to be completely out of character for him. The trial attorneys failed to investigate the mitigating explanation that could have convinced jurors a life sentence was appropriate.

Mr. Murphy was in the throes of his own alcohol addiction when he and his two co-defendants killed George Jacobs. Yet, he stands to be executed because he was prevented from presenting a claim that would have exempted him from the death penalty. He stands to be executed because the jury never heard compelling mitigating evidence, which would have convinced at least one juror to vote for a sentence less than death. He stands to be executed despite that the only aggravating evidence presented and promoted by the State clearly exceeded that which is permitted by the Constitution under *Payne v. Tennessee*, 501 U.S. 808 (1991).

Mr. Murphy's jury unconstitutionally found the crime was cruel, heinous, or atrocious, despite no instruction or evidence to support that George Jacobs consciously suffered pain prior to his death. The jury also did not know that had they given Murphy a sentence of life without parole (LWOP), he would never be released from prison.

All of these errors, individually, and together, combined to deprive Murphy of

a fair trial. The Court should grant relief and remand the case to the district court with orders for the Writ to issue.

Standard of Review

The uniqueness of the Indian country jurisdiction claim requires the federal courts to review it *de novo* and without the deference required under AEDPA. This will be addressed more fully below.

For Murphy's remaining errors, this Court reviews legal determinations of a district court *de novo* and factual determinations for clear error. In reviewing a Habeas Petition, this Court's review is additionally governed by AEDPA. Under AEDPA, when a state court has considered a claim on the merits, this Court can reverse if the decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" or "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(c)(1)-(2). This Court's *de novo* review of the district court's legal analysis of the state court decision permits rebuttal of any factual findings. *Saiz v. Ortiz*, 392 F.3d 1166, 1176 (10th Cir. 2004).

When a state court has not considered a claim on the merits, this Court "is not constrained by the deference principles in § 2254(d)" and reviews the district court's legal decisions *de novo* and factual findings for clear error. *Cargle v. Mullin*, 317

F.3d 1196, 1212 (10th Cir. 2003); *Allen v. Mullin*, 368 F.3d 1220, 1234 (10th Cir. 2004). Where a district court has not conducted an evidentiary hearing and has before it only those facts developed in state court, this Court independently reviews those facts. *Id*.

PROPOSITION I

Federal Courts Have Exclusive Jurisdiction Because This Crime Occurred in Indian Country and Both Mr. Murphy and Mr. Jacobs Were Citizens of the Muscogee (Creek) Nation.

A. Where Claim Was Raised.

This claim was first raised in Murphy's initial Petition. Doc. 14 at 18-34 (CIV-03-443). Mr. Murphy argued Oklahoma's judgment was void *ab initio* and that procedural defaults and exhaustion principles of AEDPA were inapplicable to this unique federal claim. *Id*. He requested an evidentiary hearing. Doc. 22 at 4-9. As a precautionary matter Murphy filed for collateral relief in state court. PC 2.[9] While state proceedings were pending the district court forced Murphy to drop this claim. Doc. 27, 33. He later incorporated it into his Second Amended Petition. Doc. 54 at 10-30. The district court denied relief and an evidentiary hearing. *Murphy,* 497 F.

[9] There was no hearing on whether the boundaries of the Muscogee (Creek) reservation were disestablished, although the OCCA remanded for that purpose. The trial court, at the State's urging, refused to admit or consider evidence concerning the issue. The OCCA acknowledged the trial court's error but concluded it was alleviated by an offer of proof and was therefore "harmless." *Murphy IV*, 124 P.3d at 1207.

Supp. 2d at 1286-93.

B. Argument Summary.

Mr. Murphy, a member of the Muscogee (Creek) Nation ("Nation") has been sentenced to death in state court for the first-degree murder of another member of the Nation – George Jacobs. The crime occurred on or beside a rural road in McIntosh county called Vernon Road. The site is Indian country on two alternative grounds. First, the site is on a restricted Muscogee (Creek) allotment known as the Lizzie Smith allotment.[10] The allotment retains Indian country status under 18 U.S.C. § 1151(c) because the one-twelfth mineral interest owned by the heirs of the allottee remains restricted against alienation, and Indian titles to the land have not been extinguished. Alternatively, regardless of its restricted or unrestricted status, the site is Indian country under 18 U.S.C. § 1151(a) because it is within the original boundaries of the Nation's reservation. The boundaries of that domain have never been disestablished by clear congressional action.[11] Because jurisdiction over

[10] Should the court determine the crime site is Indian country as defined by § 1151(c), it will be unnecessary to determine whether the site is located within a reservation as defined by § 1151(a).

[11] The term "reservation" encompasses lands set aside under the superintendence of the federal government and held in trust by the United States, as well as "domains," such as that of the Nation, set aside as a dependent Indian nation but owned in fee. The two terms will be used interchangeably.

Murphy's crime rests exclusively with the United States, he is "in custody in violation of the . . . laws . . . of the United States." 28 U.S.C. § 2254 (a). Federal habeas relief should be granted in his favor.

C. AEDPA Deference Principles Do Not Apply.

Oklahoma usurped the exclusive jurisdiction of the federal courts by prosecuting a case without jurisdiction to do so. It then favorably adjudicated its own jurisdiction. Typical AEDPA standards for review of state court merits adjudications do not apply. Congress, through AEDPA, has no authority to curtail this Court's full review of the facts and law relevant to its own jurisdiction. Therefore, review should be *de novo*.

This Court has found it unnecessary to squarely address whether the principle of *de novo* review of Indian country jurisdictional issues extends to collateral attacks of state court criminal convictions after the passage of AEDPA. *See Magnan v. Trammell*, 719 F.3d 1159, 1164 (10th Cir. 2013) (concluding it need not address this "difficult question" because even under AEDPA's deferential standards of review Oklahoma was without jurisdiction over Seminole allotment). In *Magnan* one judge found "substantial merit" to the argument this Court need not defer to the state court adjudication. 719 F.3d at 1177 (Hartz, J., concurring). A full and complete determination of whether the federal court has exclusive jurisdiction to prosecute

Murphy should rest with Article III courts applying *de novo* review.

1. Jurisdiction Is the Core Consideration of Habeas Proceedings and an Issue Historically Entitled to *De Novo* Review.

Common law courts in 1789 had authority to provide habeas relief if the committing court lacked jurisdiction. Before passage of any federal habeas corpus legislation "a court disposing of a habeas corpus petition could . . . go behind the conviction . . . to verify the formal jurisdiction of the committing court." *Swain v. Pressley*, 430 U.S. 372, 384-85 (1977) (Burger, C.J., concurring in part and concurring in judgment). This historical perspective illustrates "the trial court's jurisdiction has historically been the core consideration of habeas proceedings." *Magnan*, 719 F.3d at 1177 (Hartz, J. concurring).

Reviewing the "core consideration" *de novo* is not inconsistent with AEDPA. AEDPA standards are premised on Congress's belief that state courts are competent to decide issues of federal law in state criminal cases. *See Washington v. Schriver*, 255 F.3d 45, 62 (2d Cir. 2001) (Calabresi, J., concurring). However, that belief presupposes state courts have jurisdiction to decide such issues in the first place. If a state court lacks jurisdiction, then deference to its rulings is wholly unwarranted. *See Ex parte McCardle*, 74 U.S. 506, 514 (1868) ("Without jurisdiction the court cannot proceed at all in any cause"); *Scott v. McNeal*, 154 U.S. 34, 46 (1894) (concluding judgment by state court without jurisdiction violates Due Process

Clause). Simply put, "[t]he basis for federal jurisdiction is a question of law to be reviewed *de novo*." *See U.S. Aviation Underwriters, Inc. v. Pilatus Bus. Aircraft, Ltd.,* 582 F.3d 1131, 1138 (10th Cir. 2009).

The federal courts' respect for state court judgments does not extend to instances when state courts act outside their subject matter jurisdiction. *See Kalb v. Feuerstein*, 308 U.S. 433, 439-40 (1940) (affording no deference to state court judgment and independently determining jurisdiction was exclusively federal). This Court in a related context said:

> The fundamental constitutional principles supporting independent federal inquiry into the title status of Indian land apply with even greater force to disputes over Indian country jurisdictional status. Jurisdictional status of land implicates not only ownership, but also the core sovereignty interests of Indian tribes and the federal government in exercising civil and criminal authority over tribal territory.

HRI, Inc. v. E.P.A., 198 F.3d 1224, 1245-46 (10th Cir. 2000). Federal courts should have the final determination of whether a case falls within its exclusive grant of jurisdiction.

2. *De Novo* Review By This Court is Consistent With the Well-Established Principle that Congress Cannot Confer Article III Judicial Decision-Making on State Courts.

The fundamental concern about separation of powers reinforces the principle federal courts should be the final arbiter of their own exclusive jurisdiction. Congress does not have plenary power over the mechanisms of judicial review. Indeed, "Article

III could. . . [not] preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's 'judicial Power' on entities outside Article III." *Stern v. Marshall*, 564 U.S. 462, 484 (2011). *See Murray's Lessee v. Hoboken Land & Imp. Co.,* 59 U.S. 272, 284 (1855) (stating "we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty . . .").

The concept that Congress cannot remove independent review of facts or legal issues that provide the bases for Article III jurisdiction is familiar to military courts, legislative courts, and administrative agencies. The law and facts that form the bases of those entities' jurisdiction do not receive deferential review reserved for other findings. *See e.g., Adamo Wrecking Co. v. United States*, 434 U.S. 275, 282-83 (1978) (precluding judicial review of validity of "emission standard" in criminal case does not bar review of whether regulation is an "emission standard"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (concluding citizenship is an "essential jurisdictional fact" in deportation proceedings that cannot be determined by a "purely executive order"); *United States v. Grimley*, 137 U.S. 147, 150 (1890) (finding without doubt that civil courts may inquire into jurisdiction of a court-martial).

The Supreme Court conditioned Congress's power to create non-Article III

courts upon assurances that determinations of "fundamental" or "jurisdictional" facts would be reviewed *de novo* as their "existence is a condition precedent to the operation of the statutory scheme." *Crowell v. Benson*, 285 U.S. 22, 54, 62-64 (1932). Here, jurisdiction is the condition precedent to the operation of AEDPA's statutory scheme and requires *de novo* review.

D. The Uncontested Facts Establishing Exclusive Federal Jurisdiction.

The legal determination of whether the crime occurred in Indian country as defined in 18 U.S.C. § 1151(a) or (c) has been consistently contested. However, certain critical facts underlying that dispute are largely uncontested.

1. The Site of the Crime.

The mortal wounds to George Jacobs were inflicted either in the ditch adjoining the eastern side of Vernon Road or in the eastern half of that road. TR J. Tr. II 273, 430-32, 524-25. Both these locations are in the S/2 of the NW/4 of Section 27, Township 29 North, Range 13 East, McIntosh County, State of Oklahoma. PC 2 (IC) Df. Exs. 6, 13-14.

2. The Lizzie Smith Allotment is Restricted.

The crime occurred on or beside the road running through the original allotment of Lizzie Smith, a full-blood member of the Nation. In 1903 Smith received "all right, title, and interest" to the land by Allotment Deed from the Nation's

Principal Chief. PC 2 (IC) Df. Ex.14 (Affidavit and Title Opinion of Keith Ham). Smith received the property in fee simple, subject to restrictions against its alienation. PC 2 (IC) Df. Ex. 16 (Allotment Deed). Smith's son, Joe McGilbray, a full-blood member of the Nation, owns an undivided restricted 1/18th mineral interest in the property. PC 2 (IC) Df. Ex. 5 (Nation Enrollment Certificate). Roy T. Ussrey, the husband of one of Smith's daughters, owns an undivided restricted 1/36th mineral interest in the property and has more than one-half Indian blood. PC 2 (IC) Df. Ex. 14. Their restricted ownership is predicated on federal laws that extended the "restricted status of ownership from inception of the title to the present date."[12] PC 2 (IC) Df. Ex. 14.

3. The Crime Site is Located Within the Nation's Reservation.

The crime site is located on land that was set aside by the federal government for the Nation as a permanent home. *See* Treaty of Mar. 24, 1832, 7 Stat. 366, art. XIV; Treaty of June 14, 1866, 14 Stat. 785. It lies within both the historical and political boundaries of the Nation.[13] PC 2 (IC) Df. Ex. 16; PC 2 (IC) M. Tr. 161-62.

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[12] One of the most recent and comprehensive laws governing disposition of restricted lands of Five Tribes' citizens is Act of August 4, 1947, 61 Stat. 731, § 3.

[13] The dispute between the parties concerns whether the boundaries of the Nation were disestablished by Congress for purposes of determining the reservation statue of the site. It is undisputed the site of the crime was within the Nation's political and historical boundaries.

The territorial boundaries of the Nation encompass eleven counties in east-central Oklahoma, including McIntosh County where the crime site is located. PC 2 (IC) OR I 93-94,153, *see also* (Map of Oklahoma and Indian Territories, 1892, Library of Congress Call No. G4021.E1), attached as Attachment D.

4. Both Patrick Murphy and George Jacobs are Members of the Muscogee (Creek) Nation.

Both Patrick Murphy and George Jacobs are enrolled members of the Nation. PC 2 (IC) Df. Exs. 2, 4.

E. Historical Development of "Indian country" Definitions.

Tribal territory has always held a separate status under federal law. Tribes exercise "substantial governing powers within their territory . . . all to the exclusion of state law." Felix S. Cohen, *Handbook of Federal Indian Law* 21 (1982). Federal laws that apply in tribal territory include those that govern the punishment of serious criminal offenses in Indian country. The development of definitions of "Indian country" arose early and were often connected to criminal jurisdictional conflicts.

Title 18 U.S.C. §§ 1151 and 1153 operate together to preclude the exercise of state criminal jurisdiction over certain offenses and certain offenders.

Title 18 U.S.C. § 1151, enacted in 1948, provides:

> [T]he term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent,

> and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The term Indian country is "the oldest and most pervasive statutory term used for Indian lands under federal protection." *See Cohen* at 29-31 (describing early use of interchangeable terms that when read as a whole appear "to apply to lands owned and occupied by tribal Indians wherever they were located"). However, for years there were no statutory definitions and the determinations of what comprised Indian country were left to the courts.

The three categories of land designated as "Indian country" in the 1948 codification of § 1151 were based on Supreme Court decisions made in 1913 and 1914. *See Donnelly v. United* States, 228 U.S. 243, 269 (1913) (rejecting argument reservation was not Indian country because it was established after statehood and *original* Indian title had been extinguished); *United States v. Sandoval*, 231 U.S. 28, 47 (1913) (characterizing Pueblo lands as "dependent Indian communities" whether found within United States territory or within or without the limits of a state); and *United States v. Pelican*, 232 U.S. 442, 449 (1914) (finding a single trust allotment

"set apart for the use of the Indians" to be Indian country).[14] The Court later clarified that *Pelican* applied equally to restricted allotments such the Smith allotment. *United States v. Ramsey*, 271 U.S. 467, 470 (1926) (concluding term "Indian country" applies to allotment "carved out of the Osage Indian reservation and conveyed in fee to the allottee. . . subject to a restriction against alienation").

The Major Crimes Act, enacted in 1885, now found in 18 U.S.C. § 1153 provides:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

As originally enacted the Major Crimes Act made no reference to "Indian country" but, instead, referred to any "reservation" within the State and Territories. Act of Mar. 3, 1885, 23 Stat. 385 § 9; *see John*, 437 U.S. at 647 nn.16, 22.

The Major Crimes Act remained in the same form until amended in 1932 to add incest to the list of crimes covered, to delete reference to the Territories, and to add

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[14] Later decisions confirmed early Supreme Court conclusions. *See United States v. McGowan*, 302 U.S. 535, 539 (1938) (determining Reno Colony was "Indian country" and finding no distinction between "colony" and "reservation"); *United States v. Chavez*, 290 U.S. 357 (1933) (sustaining Pueblo lands as Indian country in the New Mexico Enabling Act of June 20, 1910); and *United States v. John*, 437 U.S. 634, 649 (1978) (finding lands in Mississippi validly set aside for Mississippi Choctaws were Indian country).

rights-of-way running through reservations to the definitions of Indian country. Act of June 28, 1932, 47 Stat. 336 (codified as amended at 18 U.S.C. §§ 1151, 1153, 3242). In 1948 express reference to "reservation" was deleted in favor of the term "Indian country." Later amendments enlarged the crimes covered, but made no other substantial changes. *John*, 437 U.S. at 647, n.16.

The crime site is Indian country under § 1151(c) ("all land within the limits of any Indian reservation") regardless of its status as a restricted or unrestricted allotment ("all Indian allotments, the Indian titles to which have not been extinguished"). Alternatively, its is Indian country under § 1151(a). The legal history of the Nation elucidates the terms "reservation" and "allotment" as uniquely applicable to the Nation and its citizens and illustrates their continued vitality.

F. History of the Muscogee (Creek) Nation in Indian Territory.

1. Forced Removal and Reestablishment in Indian Territory.

The Cherokee, Choctaw, Creek, Chickasaw, and Seminole Tribes, who became known as the Five Civilized Tribes ("Five Tribes"), occupied lands in the southeastern United States for hundreds of years and had long operated sophisticated systems of government.[15] It was during this period the Supreme Court decided

[15] The Creeks were described as "culturally advanced" and politically sophisticated. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1119 (D.D.C. 1976) *aff'd. sub nom Harjo v. Andrus*, 581 F.2d 949 (D.C. 1978).

landmark cases establishing special status for Indian Tribes. *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). These decisions remain the foundational basis for federal Indian law today.

An aggressive removal policy ultimately resulted in the Creeks ceding their lands in Alabama and Georgia in a series of treaties. In 1832 the Creeks exchanged their lands for new land in Indian Territory that was "solemnly guarantied" to them. They were promised they would be "allowed to govern themselves" and that no State or Territory would ever have the right to pass laws to govern them. 7 Stat. 366, art. XIV. The boundaries of the Nation's "permanent home" and "country" were established. 1833 Treaty with the Creeks, 7 Stat. 417, Feb. 14, 1833, art. II. The United States agreed to "grant a patent, in fee simple, to the Creek nation of Indians" which was to continue as long as the Creeks existed as a nation and occupied the land assigned to them." *Id*. at art. III.

The tragic and deadly *Trail of Tears* followed for the Creeks when they were forcibly removed to their lands in Indian Territory.[16]

The Treaty of 1856 between the United States and the Creek and Seminole

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[16] *See* Angie Debo, *Rise and Fall of the Choctaw Republic* (1934); Angie Debo, *And Still the Waters Run* (1940)*;* Angie Debo, *The Road to Disappearance: A History of the Creek Indians*, (1941); Angie Debo, *The Five Civilized Tribes of Oklahoma* (1951)*;* and Grant Foreman*, Indian Removal: The Emigration of the Five Civilized Tribes of Indians* (1932).

Nations, which separated their domains, again carried forth promises the Nations would be secure "in the unrestricted right of self-government" and "no state or territory" would "ever pass laws for the government" of their tribes. 1856 Treaty with the Creeks and Seminoles, 11 Stat. 699, Aug. 7, 1856, arts. IV & XV. "No portion" of "Creek country" was to be "included within, or annexed to, any Territory or State" and the Nation was to have "full jurisdiction over persons and property, within [its] respective limits." *Id*. arts. II & IV. The United States also promised to remove non-member intruders from the Nation's country. *Id*.

2. Penalties for Alliance with Confederacy.

Based upon support of the Confederacy in the American Civil War, the Nation was forced to cede and convey to the United States "the west half of their entire domain." 1866 Treaty with the Creeks,14 Stat. 785, art. III. The Treaty reaffirmed previous treaty obligations and provided that protective federal legislation "shall not in any manner interfere with or annul the present tribal organization, rights, laws, privileges, and customs." *Id*. at art. X.

The Nation operated a robust government within its diminished reservation. However, the population of non-Indians living in Indian Territory burgeoned and the federal government did not honor its promises to remove intruders, despite repeated pleas by the Creeks. *Kleppe*, 420 F. Supp. at 1121.

3. Allotment Coercion and Failed Efforts to Destroy the Nation's Government.

The Nation escaped the nationwide devastating effect of the General Allotment Act of 1887, known as the Dawes Act, on numerous tribes whose land titles were held in trust by the United States. Act of Feb. 8, 1887, 24 Stat. 388, (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381).[17] Because the United States did not hold title to Five Tribes lands and had no authority to execute allotment deeds or deeds to non-Indian settlers, the Five Tribes were excluded from the Act's provisions. Instead, pressure increased to make Five Tribes' land available to non-Indian settlers. Congress enacted a series of laws designed to force the execution of allotment deeds by executive officers of the Five Tribes.

Rather than remove non-Indian intruders from the Nation's land, Congress slowly expanded federal law enforcement for their protection. In 1889 Congress established a federal court in Muskogee, Indian Territory. Act of Mar. 1, 1889, 25 Stat. 783. The new court assumed exclusive federal jurisdiction over lesser offenses committed by Indians against non-Indians or committed by non-Indians without

[17] The Dawes Act was implemented in western Indian Territory, resulting in the allotment of lands of several tribes to individual tribal members. This opened up unallotted land to non-Indian ownership and paved the way for establishment of a territorial government in the western portion of Indian Territory. L. Susan Work, *The Seminole Nation of Oklahoma* 18 (2010).

regard to race and over certain civil cases between United States citizens and Indian Territory residents. However, it confirmed the Nation would continue to resolve civil disputes between persons of "Indian blood" and prosecute offenses committed by one Indian upon the person or property of another Indian. Id. § 6. *See Talton v. Mayes*, 163 U.S. 376, 381-82 (1896) (finding murder committed in 1892 by member of Cherokee Nation against another tribal member within Cherokee Nation's jurisdiction and federal statutes had no application).

On May 2, 1890 Congress enacted the Organic Act, which carved Oklahoma Territory out of the western portion of Indian Territory and created a territorial government. The Nation was not subject to the territorial government, and no such government was formed in diminished Indian Territory. Act of May 2, 1890, 26 Stat. 81§ 1. The lands held by the Nation remained subject only to federal and tribal authority. *See id*. at 93-94 §§ 29-30; *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Com'n*, 829 F.2d 967, 977 (10th Cir. 1987).

In 1893 Congress created the "Dawes Commission," which was authorized to negotiate with the Five Tribes "for the purpose of extinguishment of the . . . tribal title" to their lands and enable the creation of a state embracing Indian Territory. Act of Mar. 3, 1893, 27 Stat. 612, 645 § 16. The Five Tribes resisted and Congress passed additional coercive measures. Act of Mar. 1, 1895, 28 Stat. 693; Act of June 7, 1897,

30 Stat. 62.

In 1898 Congress adopted the Curtis Act, which called for mandatory allotment and threatened abolition of tribal governments under certain conditions. Act of June 28, 1898, 30 Stat. 495. In 1901 the Nation bowed to federal pressure and entered into an allotment agreement. The 1901 agreement provided that Creek lands, with some exceptions, would be allotted "all right, title, and interest of the Creek Nation" by fee patent. The allotments were subject to restrictions against alienation. Creek Allotment Act of Mar. 1, 1901, 31 Stat. 861, 868 § 23; Supplemental Creek Allotment Act of June 30, 1902, 32 Stat. 500.

Although the Curtis Act contemplated termination of the Nation's government, this threat never came to pass. The validity and enforceability of Five Tribes laws continued to be recognized. *See Morris v. Hitchcock*, 194 U.S. 384 (1904) (recognizing Chickasaw permit taxes); *Walker v. McLoud*, 138 F. 394 (8th Cir. 1905) *aff'd* 204 U.S. 302 (1906) (recognizing duty of federal government to enforce Choctaw laws). Two days prior to the deadline for the dissolution of the Nation's government, Congress in a joint resolution continued "tribal existence and present tribal governments in full force and effect." Act of Mar. 2, 1906, 34 Stat. 822. The Five Tribes Act, enacted the following month, was the last congressional act to deal comprehensively with the Five Tribes prior to statehood. Act of April 26, 1906, 34

Stat. 137; *see Kleppe*, 420 F. Supp. at 1129 (concluding that "Congress had declined to terminate the tribal existence or dissolve the tribal governments, despite all of its earlier intentions to do so, and despite the fact that its failure to do so rendered some of the other provisions of the Five Tribes Act ineffective").

4. Statehood.

One month after ratification of the Five Tribes Act, Congress approved the Oklahoma Enabling Act in order to merge Oklahoma and Indian Territories into a state. The Enabling Act identified some protection of Indian rights by providing that nothing in the new state's constitution could be construed to limit or impair the rights of Indians in Oklahoma and Indian Territories so long as such rights remain un-extinguished. It also provided the constitution could not be construed to limit or impair the authority of the federal government to make any law or regulation respecting such Indians, their land, property or other rights that it would have been competent to make before enactment. The Enabling Act also required the state to disclaim any rights to all lands owned or held by any Indian, tribe, or nation. Act of June 16, 1906, 34 Stat. 267, §§ 1, 3. Congress recognized the Nation's boundaries were still intact by placing the "*territory*" of the "*Creek Nation*" within a specific federal district for congressional representation. *Id*. at § 6 (emphasis added).

Oklahoma's Constitution was ratified on September 17, 1907 and contained

provisions mandated by the Enabling Act "forever disclaim[ing] all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation." Okla. Const. art. 1, § 3.

5. Continued Loss of Five Tribes Land to Non-Indians.

The Creek allotment process established allotments of 160 acres, with 40 acres being a homestead allotment. At statehood, 18,712 allotments had been deeded to Creek and Creek freedmen,[18] with freedmen receiving 6,807 of them. 21 U.S. Dept. of Interior Annual Report of Commission to Five Civilized Tribes 8-9 (1914). Within twenty years allotment restrictions had been removed by order of the Secretary of Interior or Congress on 14,050,244 of the original 15,794,218 acres allotted to individual Five Tribe members through implementation of federal statutes allowing Secretarial approval of certain conveyances and removing restrictions on other conveyances based on the Indian blood quantum of heirs. *See* 70th Cong., 1st sess., S. Rep. No. 982 (May 3, 1928). Congressional legislation, whether intended or unintended, resulted in ownership of allotments becoming fractionalized into undivided restricted and unrestricted interests.[19]

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[18] Freedman was the word used to describe African American residents of Indian Territory, most of whom were slaves freed after the American Civil War.

[19] The abuses by the federal government and Oklahoma courts in failing to protect the rights of allottees were the subject of scathing reports. Mott, *A National*

6. Oklahoma Has Historically Made Invalid Assertions of Jurisdiction Over Indian Country.

Oklahoma ignored key provisions in the Enabling Act, the Oklahoma Constitution, and the Treaties and congressional acts detailed above, and began asserting civil and criminal jurisdiction over Five Tribes citizens in matters arising on restricted allotments or otherwise arising within the boundaries of the Five Tribes' domains. Not unexpectedly, Oklahoma took legal positions in support of its own jurisdiction. *Ex parte Nowabbi,* 61 P.2d 1139, 1156 (Okla. Crim. App. 1936), (overruled in *State v. Klindt*, 782 P.2d 401, 403-04 (Okla. Crim. App. 1989) concluding Oklahoma had jurisdiction over the murder of a Choctaw citizen by another Choctaw citizen, despite that murder occurred on a restricted allotment); *see* 11 Okla. Op. Att'y Gen. 345 (1979) ("Oklahoma exercised jurisdiction over all of the lands of the former Five Civilized Tribes based on longstanding caselaw").

Oklahoma could not legally acquire jurisdiction just by virtue of a declaration of jurisdiction. *See Indian Country,* 829 F.2d at 976-77 (finding "unpersuasive" Oklahoma's argument that it acquired complete jurisdiction of Five Tribe members

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Blunder, 2,4 (discussing attached Report of M.L. Mott and including "Indian Appropriation Bill Speech") (hereafter cited as Mott Report). See Attachment E. *See also* Meriam and Associates*, Problem of Indian Administration*, 801, *available at* http://www.narf.org/nill/resources/meriam.html?gclid=CJjT6KPfh84CFQeTaQodwuUO4w.

and their lands within former Indian Territory based upon "combination of federal legislation enacted prior to statehood and language in the Oklahoma Enabling Act"). In *Indian Country,* this Court recognized that Congress intended to "preserve its jurisdiction and authority over Indians and their lands" in Oklahoma until it terminated tribal governments, assimilated Indians, and completely dissolved the tribal land base. However, these "events never occurred" and were "goals that Congress later expressly repudiated." *Indian Country,* 829 F.2d at 979.

When Congress enacted Public Law No. 66-280 ("P.L. 280") in 1953, Oklahoma was offered the option of voluntarily assuming complete civil and criminal jurisdiction over Indian country within its boundaries.[20] Oklahoma was so assured in its jurisdictional grab, it declined. Fifteen years later P.L. 280 was amended to require tribal consent to acquire such jurisdiction. Act of Aug. 15, 1953, 67 Stat. 588, amended by Pub. L. No. 90-284, Act of Apr. 11, 1968, 82 Stat. 80, codified 25 U.S.C. §§ 1321-26. Oklahoma has never requested tribal consent, nor has it been given.

Oklahoma courts ultimately recognized that Oklahoma improperly assumed jurisdiction of eastern Oklahoma. *See May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77, 82-85 (Okla. 1986) (finding tribal allotments belonging to Seneca and Quapaw

[20] Oklahoma was considered one of the states that would need to amend its constitution and enact affirmative legislation to obtain jurisdiction.

Tribes are Indian country and Oklahoma had not validly obtained jurisdiction over them by series of events culminating in Oklahoma statehood); *see also Klindt*, 782 P.2d at 403-04 (overruling *Ex parte Nowabbi* and noting "[t]here is ample evidence to indicate that the *Nowabbi* Court misinterpreted the statutes and cases upon which it based its opinion").

Oklahoma's recognition of a "strong presumption" that tribal sovereignty be afforded a "high degree of protection from infringement by state governments" has been applied in some cases. *See Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) citing *May*, 711 P.2d at 84. In *Cravatt*, OCCA rejected the United States' position that Oklahoma has exclusive jurisdiction of former Chickasaw territory as a "result of congressional enactments around the turn of the century." *Cravatt*, 825 P.2d at 279. Additionally the court found the existence of fractional, undivided interests that were free from restrictions did not permit Oklahoma to assume jurisdiction under an "exceptional circumstance" test. *Id*.

However, OCCA reversed itself when the fractional restricted interests were in the mineral estate. *See Murphy IV*, 124 P.3d at 1206; *Magnan v. State*,[21] 207 P.3d

[21] In *Magnan* this Court did not address the issue of whether Indian title is extinguished when restricted undivided mineral interests remained but found the state did not have jurisdiction because the required approval by the Secretary of Interior lifting the restrictions to surface interests was never properly obtained. *Magnan*, 719 F.3d at 1176.

397, 405 (Okla. Crim. App. 2009) (using a "contacts and interests rationale" to conclude a fractional interest in the mineral estate, though restricted against alienation, is insufficient to deprive Oklahoma of criminal jurisdiction).

Overall OCCA has been inconsistent in its treatment of Indian country jurisdiction in Five Tribes territory. Most recently in *Murphy* and *Magnan*, OCCA returned to the wrong-minded notion that Indian country jurisdiction issues "deprive Oklahoma of criminal jurisdiction" as though the Nation had deliberately acted to take away from Oklahoma something that is not its to take. The correct approach is to acknowledge that Oklahoma courts never had jurisdiction to begin with.

G. Titles to the Restricted Allotment Have Not Been Extinguished.

The plain language of title 18 U.S.C. § 1151(c) and the clearly established law of *Pelican*, 232 U.S. at 449 and *Ramsey*, 271 U.S. at 470 confirm this crime occurred on a restricted "Indian allotment[], the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151(c). Both the well-settled general rules of statutory construction and the unique rules that apply to Indian law issues support the conclusion this allotment is Indian country.

The ordinary meaning of words in a statute must "be given effect unless there are clear expressions of legislative intent to the contrary." *Escondido Mutual Water*

Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984). There is no ambiguity or contextual confusion over the ordinary meaning of key words in the statute:

- The words "Indian allotments," as codified in 1948, incorporate the ordinary meaning articulated by the Supreme Court. "Indian allotments" include allotments with restrictions against alienation. *See Ramsey*, 271 U.S. at 470.

- The word "titles" means "the union of ownership, possession, and custody that constitutes the legal right[s] to control and dispose of property." *Black's Law Dictionary*, (10th ed. 2014), *available at* Westlaw BLACKS. Congress's use of the plural is intentional; multiple titles held by different individuals in the same allotment was anticipated.

- The word "extinguished" means "to terminate." *Black's Law Dictionary* (10th ed. 2014), *available at* Westlaw BLACKS.

The "titles" of Joe McGilbray and Roy T. Ussrey to undivided interests in the land where the crime occurred are restricted against alienation. Each man has the right to convey his interests, but only if the restrictions against alienation are legally lifted or the conveyance is approved by a state court, acting as a federal instrumentality. Act of Aug. 4, 1947, 61 Stat. 731; *Springer v. Townsend*, 336 F.2d 297, 400 (10th Cir. 1964) (finding state court acts as federal instrumentality in state court proceedings under 1947 Act for approval of a deed to restricted Creek land). These restricted Indian titles have not been terminated and remain as they were at the time they were inherited.

The historical treatment of Five Tribes allotments enlightens congressional intent. Congress expected there to be fractional and undivided interests in the Nation's allotments. Congress was aware some titles would be restricted against alienation and others would not. *See* 25 U.S.C. § 375 (permitting Oklahoma's partition laws to apply to fractionalized, undivided, and restricted interests in allotments).

In effect, Oklahoma is asking this Court to disregard the clear language of the statute and assume that Congress's intent was to remove an allotment from the purview of "Indian country" status if some "titles" had been extinguished, but other "titles" had not. This Court cannot revise legislation when the consequence is to further limit tribal rights. *See Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2034 (2014) ("This Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress 'must have intended' something broader").

1. Faulty State Court Rulings.

a. The Trial Court.

The State presented no evidence that the Indian titles had been extinguished. Indeed, that mineral rights to the property remained restricted was undisputed. This was confirmed by title examiner, Keith Ham, Creek Nation Assistant Realty Officer,

Jeff O'Dell, and federal Indian law expert, Sharon Blackwell. *See* PC 2 (IC) Df. Ex. 14, St. Ex. 1, PC 2 (IC) M. Tr. 169-70; 189-90. Indeed, Ms. Blackwell, former Deputy commissioner for the Bureau of Indian Affairs ("BIA") and Field Solicitor in the Tulsa field office, explained the federal government's policies designed to protect the "valuable" mineral interests of Five Tribes members. Her testimony that the mineral estate is the "dominant" estate was undisputed. PC 2 (IC) M. Tr. 191-96, 203-04, 211.

The State primarily defended its jurisdiction on the grounds Vernon Road was owned by Oklahoma. PC 2 (IC) OR 945-48. Characterizing the allotment as "virtually wholly unrestricted," the State urged that its strong interest in enforcing its penal laws on public highways justified a finding that Oklahoma has jurisdiction. PC 2 (IC) OR 949. The trial judge adopted the State's view in its entirety. PC 2(IC) OR 956-65.

b. The OCCA.

The OCCA found the crime did not occur on land "ceded to the State," and concluded Oklahoma's interest was "in the nature of an easement or right-of-way." *Murphy IV*, 124 P.3d at 1202. Recognizing the State presented no evidence controverting expert evidence from the title examiner and the realty officer, OCCA concluded that title to the land upon which Vernon Road lies was conveyed, in fee simple, to Lizzie Smith as the owner of the land that abutted the road. *Id*. at 1203-04.

Despite recognizing the undisputed expert evidence that there remained fractional, undivided mineral interests that are restricted against alienation and had not been extinguished, OCCA nonetheless concluded "the Indian title to the tract formerly allotted to Lizzie Smith has been extinguished *for purposes of criminal jurisdiction* over the crime in question." *Id*. at 1206 (emphasis added). In reaching this conclusion, OCCA unreasonably determined facts. It also used its own comparative law approach, contrary to *Pelican* and *Ramsey* and other principles of federal Indian law which are well-established by the Supreme Court. The OCCA found as follows:

> We find it significant that federal authorities have never attempted to exercise jurisdiction over this crime in the five years since it occurred. Meanwhile, the State of Oklahoma has spent considerable time and money prosecuting and defending Petitioner in the district and appellate courts.
>
> A fractional interest in an unobservable mineral interest is insufficient contact with the situs in question to deprive the State of Oklahoma of criminal jurisdiction. When two jurisdictions are competing for jurisdiction over a particular issue (or seeking to determine which has jurisdiction), it is an established principle of comparative law to look at the contacts each jurisdiction has with the subject matter at issue. Here, the subject matter is criminal jurisdiction, and the State of Oklahoma's contacts and interests in the subject property overwhelm the fractional interest an Indian heir may own in an unseen mineral estate.

Murphy IV, 124 P.3d at 1206.

c. The OCCA's Unreasonable Determination of Facts.

First, OCCA should not have considered the manner in which federal authorities have acted by not exercising jurisdiction or not challenging state jurisdiction. *See HRI, Inc.*, 198 F.3d at 1246 (quoting *Indian Country,* 829 F.2d at 974 ("[T]he past failure to challenge Oklahoma's jurisdiction over Creek Nation lands . . . does not divest the federal government of its exclusive authority over relations with the Creek nation or negate Congress's intent to protect Creek tribal lands and Creek governance with respect to those lands"). The unreasonableness of OCCA's determination is further illustrated by the fact that it was a state agent who erroneously sited the crime to begin with, mistakenly determining that the murder did not occur on the Lizzie Smith allotment. TR J. Tr. III 421; TR St. Ex. 13; PC 2 (IC) M. Tr. 50.

Second, the extent to which Oklahoma spent time and money prosecuting and defending Murphy is entirely irrelevant – and unreasonable. Those facts cannot be considered in determining whether restricted Indian titles to land where the crime occurred have been extinguished. Expert Sharon Blackwell had federal responsibility for managing and protecting the restricted interests of Five Tribes members. She testified the restricted mineral interests that remain on the Smith allotment make it "Indian country" within the meaning of federal law. PC 2 (IC) M. Tr. 199. *See also*

United States v. Hellard, 322 U.S. 363, 366 (1944) ("Restricted Indian land is property in which the United States has an interest"). The State presented no contrary facts. Thus, OCCA's factual determinations ignoring critical undisputed evidence and relying on irrelevant evidence were unreasonable. 28 U.S.C. § 2254(d)(2), *see also Magnan*, 719 F.3d at 1174 (finding OCCA's conclusion Oklahoma had jurisdiction over a Seminole allotment was based on unreasonable determinations of fact).

d. The OCCA's Adjudication is "Contrary to" and an "Unreasonable Application" of Supreme Court Law.

The OCCA's comparative law approach is "contrary to" clearly established Supreme Court law. This approach not only fails to adopt and apply the clearly established law of *Pelican* and *Ramsey*, but also bypasses the fundamental Supreme Court principles of federal Indian law. Congressional intent to extinguish Indian title must be reflected by "clear and plain" language. *See United States v. Santa Fe Pac. R. R. Co.*, 314 U.S. 339, 353 (1941) (finding "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards"). These clearly developed principles were ignored by OCCA, and its own "minimum contacts" analysis was substituted.

There is nothing in § 1151(c) that clearly and plainly illustrates Congress intended to treat mineral and surface interests differently for determining whether restricted titles had been extinguished, nor can such intent be inferred from

congressional silence. *See N.L.R.B. v. Pueblo of San Juan,* 276 F.3d 1186, 1196 (10th Cir. 2002) (disagreeing that "silence establishes [a] statute's intent to preempt tribal authority"). If Congress had intended to limit the definition of an Indian country allotment to a single unified title it could have said so. It did not.

It is undisputed the titles to these restricted mineral interests are protected by the federal government. When restricted mineral rights are at issue, the BIA retains aspects of its classic trust relationship with the mineral owners in the management of those assets. *See* Cohen at 535-36.; *see also* William Canby, *American Indian Law* 384 (3d ed. 1998) (leasing on allotted lands allowed with approval of the Secretary of the Interior and requires BIA supervision). These incidents of the trust relationship merely confirm what is clear from the plain reading of § 1151 – this property's Indian country status cannot be disregarded simply because there are other unrestricted interests. *Cf. HRI, Inc.*, 198 F.3d at 1254 (noting the split nature of surface and mineral rights does not alter the analysis of Indian country status of the land).[22]

Finally, OCCA substituted its own "minimum contacts" analysis for the

[22] Even if severance of the mineral and surface estate could affect the determination of Indian country, it would do so in favor of mineral rights, which are "dominant" and thus superior to surface rights. Howard R.Williams and Charles J. Meyers, *Manual of Oil and Gas Terms* 302 (9th ed. 1994) (recognizing that once severed, the mineral estate becomes the dominant estate, and the surface estate becomes the servient estate).

analysis required by the Supreme Court. The "minimum contacts" standard is not used in the Indian law jurisdictional context. The OCCA drew on an approach used when courts determine whether a forum state has sufficient contact with a litigant to have personal jurisdiction. *Cf. Walden v. Fiore*, 134 S.Ct. 1115, 1124 (2014) (finding Georgia police officer lacked the minimal contacts that were prerequisite to Nevada's exercise of personal jurisdiction over him). The personal jurisdiction inquiry is vastly different from the inquiry regarding whether federal courts have *exclusive subject matter jurisdiction* of major crimes occurring in Indian country. In a correct analysis, courts do not determine which government (state or federal) has the most contacts with the situs of the crime. Jurisdiction over Indian country is an incident of Indian sovereignty. If tribal jurisdiction were subject to OCCA's "minimum contacts" analysis, then every state would have jurisdiction over all Indian restricted and trust allotments within its borders, because minimum contacts could easily be found.

2. The Flawed District Court Opinion.

The district court erroneously applied AEDPA deference to determine whether federal courts have exclusive jurisdiction here.[23] *Murphy,* 497 F. Supp. 2d at 1267. The district court also suggested reviving additional theories to support state court

[23] *See supra* at 25-29 (arguing *de novo* review for this unique federal question is appropriate.).

jurisdiction that have been soundly rejected, were not supported by the evidence, and were, thus, clearly erroneous.

The district court began its analysis by stating: "this court would note that Oklahoma exercised jurisdiction over all of the lands of the former Five Civilized Tribes based on longstanding caselaw from statehood. . . ." *Murphy,* 497 F. Supp. 2d at 1289. Although the court ultimately acknowledged both Oklahoma courts and this Court had specifically rejected this "longstanding caselaw," it still inserted the fallacies from that caselaw into its decision.

First, the district court ignored the Supreme Court's early recognition of the exclusive judicial authority of Five Tribes over their members and the unique strength of Five Tribes' treaty provisions. *See In re Mayfield*, 141 U.S. 107 (1892) (ruling federal courts had no authority to try tribal member for adultery) and *Talton*, 163 U.S. at 381-82. (upholding jurisdiction of Cherokee Nation's court over murders of tribal citizens by tribal citizens).

Second, by focusing on the "tribal courts were abolished" language from the discussion of the Curtis Act in *Marlin v. Lewallen*, 276 U.S. 58 (1928), the district court perpetuated the misperception that Oklahoma assumed full authority over Indians and their lands at statehood. *Murphy*, 497 F. Supp. 2d at 1289. This misperception has been repeatedly rejected. The Nation's government, including its

courts, clearly persisted and survived the enactment of the Curtis Act. *See Indian Country*, 829 F.2d at 978 (finding Congress did not intend or act "to completely abolish Creek Nation jurisdiction over tribal lands, to divest the federal government of its authority, or to permit the assertion of jurisdiction by the State of Oklahoma"). *See also Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1447 (D.C. Cir. 1988) (holding Curtis Act did not limit the Nation's power to establish tribal courts with civil and criminal jurisdiction). The district court's suggestion there is vitality to a long rejected argument is clearly erroneous. In *United States v. Sands*, 968 F.2d 1058, 1061 (10th Cir. 1992) this Court rejected the same "frequently raised, but never accepted" argument that criminal jurisdiction was conferred upon Oklahoma for a crime that occurred on a restricted Creek allotment as a result of several congressional enactments, including the Curtis Act and Oklahoma Enabling Act.

Third, the district court returned to another failed argument by noting "it could be argued that Oklahoma had, in fact, assumed jurisdiction prior to the enactment" of P.L. 280. *Murphy*, 497 F. Supp. 2d at 1289, n.25. In P.L. 280 Congress specifically granted several states jurisdiction over Indian country within their borders. However Oklahoma was a state that could assume jurisdiction only by amending its constitution. 67 Stat. 588, §§ 5-7. That a counter-argument might be possible has been repudiated. *Indian Country*, 829 F.2d at 980 (recognizing Oklahoma failed to

act to assume jurisdiction under P.L. 280). *See also Klindt*, 782 P.2d at 403 (finding under P.L. 280 Oklahoma could have assumed jurisdiction over any Indian country within its borders, but "never acted" to do so).

Last, in endorsing the reasonableness of OCCA's adjudication, the district court imposes a burden on Petitioner that does not legally exist. Whether Indian titles to the allotment have been extinguished cannot depend on whether Murphy "fails to identify an arguable nexus between the restricted Indian mineral interest and the crime of murder." *Murphy*, 497 F. Supp. 2d at 1291. There is no authority that would impose such a burden.

The district court ignores this Court's teachings by relying on other impermissible factors. In *Sands* this Court admonished the government that it is not "empowered" to decide an Indian country jurisdiction issue on the grounds that law enforcement of a checkerboard of Indian and non-Indian land would be "easier." Yet, the district court's alarmist analysis considers those very grounds:

> This Court finds, however, that 'checkerboard' jurisdiction based not upon the observable surface estates, but upon the subsurface estates, would indeed be not only a novel approach, but also a totally unworkable and unenforceable approach. Such an approach would require an extensive title research prior to assumption of jurisdiction by either the state or federal court every time a crime occurs. Additionally, as recognized by the Oklahoma Court of Criminal Appeals, in situations where supposed heirs of the original allottee have never been judicially determined, a quiet title suit would have to be initiated before assumption of jurisdiction by either governmental entity could occur

> thereby returning Oklahoma to the anarchy which existed prior to the establishment of federal court in the former Indian territory.

Murphy, 497 F. Supp. 2d at 1291-92. Under *Sands* the district court determination based on such factors is clearly erroneous.

However, even if such factors were relevant, no anarchy would result. First, Oklahoma has jurisdiction to prosecute all non-Indians for crimes committed on Indian country. *See United States v. McBratney*, 104 U.S. 621 (1881); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Arrests of Native Americans make up less than 1% of all adult arrestees in Oklahoma. *See* Oklahoma State Bureau of Investigation, Uniform Annual Crime Reports 2002-2014.[24] Second, the likelihood these Native Americans would commit crimes on allotments with unextinguished Indian titles is even rarer. Third, even if those two unlikely events coincided, the determination of whether the site of the crime is Indian country is not a difficult one requiring extensive research the district court feared. Indeed, expert testimony confirmed that the BIA and the Nation's realty office regularly accomplishes such research. Indeed, federal, state, and tribal prosecutors have access to complete title records through the BIA. For the Creeks, the Division of Land Titles and Records ("DLTR") and one of its Land Titles and Records Offices ("LTRO") in Muskogee are

[24] https://www.ok.gov/osbi/Publications/Annual_Reports.html.

responsible for maintaining "the Indian Land Record of Title and for examining and determining the completeness and accuracy of the records, certifying the findings of examination and reporting the status of title to Indian trust and restricted lands."[25] Last, the district court's concern that lawlessness (or anarchy) would exist while title determinations were made, is alleviated by Creek deputation agreements with state, federal, and local law enforcement.[26]

3. Conclusion.

Both OCCA and the district court made the jurisdictional issue concerning the restricted allotment unnecessarily complicated. The lower courts contorted the issue by dividing the "observable" from the "unobservable," by attempting to distinguish between crimes that occur on the surface and those that do not, and by adopting a comparative "contact and interest" approach. This approach fosters confusion by suggesting an allotment could be Indian country for some purposes and not for others. Simply put, this is a restricted allotment with Indian titles that have not been extinguished. It does not matter whether the restricted titles were in the surface or subsurface, nor whether the restricted titles are for small parts of the whole. What

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[25] http://www.bia.gov/WhoWeAre/BIA/OTS/DLTR/index.htm.

[26] The Nation joined the 2006 Deputation Agreement between Governor Brad Henry and the BIA. *See* Nation's 2010 and 2013 Deputation Agreements. Attached here as Attachment F.

matters is that until the restricted titles in the Lizzie Smith allotment are extinguished, the allotment remains Indian country for all purposes of civil and criminal jurisdiction. It is undisputed that Oklahoma title examiners, the federal government (through the BIA) and the Nation treat the land as a restricted allotment the Indian title to which has not been extinguished. So should this Court.

H. Congress Did Not Disestablish the 1866 Boundaries of the Nation's Reservation with Creek Allotment Acts and Enabling Act.

1. Procedural History of Claim.

The OCCA remanded for an evidentiary hearing after post-conviction counsel raised the issue that the Nation's reservation was not disestablished or diminished by Congress. The trial court refused to permit evidence to be presented – a trial error OCCA deemed "unfortunate." *Murphy IV*, 124 P.3d at 1207. The OCCA determined the "extended offer of proof" alleviated the error. The only proffer referenced was from the experts who concluded "the historical boundaries of the Creek Nation remained intact even after the various Creek lands were subjected to the allotment process." *Id*. However, OCCA specifically refused to "step in and make such a finding" because this Court declined to answer the same question in *Indian Country*. *Id*. In other words, OCCA did not adjudicate a question central to the claim before it.

Despite OCCA's declination, the federal district court applied AEDPA principles, concluding the adjudication was not contrary to nor an unreasonable

application of clearly established law. *Murphy,* 497 F. Supp. 2d at 1290.

This Court should apply *de novo* review. *See supra* at 25-29.

2. The Boundaries of the Nation's Reservation are Intact.

a. No Explicit Congressional Language Disestablished the Reservation.

The power to disestablish a reservation or diminish its boundaries rests solely with Congress. The Supreme Court recognizes this as the "first and governing principle" in the analysis. *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Congress' intent to divest a reservation of its land must be explicit. *Id. citing United States v. Celestine*, 215 U.S. 278, 285 (1909). The "starting point" in determining whether Congress evidenced a clear intent to disestablish a reservation begins with the most probative evidence – the "statutory text." *Nebraska v. Parker*, 136 S.Ct. 1072 (2016).

The "[c]ommon textual indications of Congress' intent to diminish reservation boundaries" are not present here. *See Parker,* 136 S.Ct. at 1079. In the Creek Allotment Acts there are no explicit references to cession or other language evidencing the present and total surrender of tribal interests. There are no explicit references to Congress' commitment to pay the Nation a fixed sum to surrender tribal claims or to compensate it for opened lands. There are no explicit provisions restoring portions of the reservation to the "public domain." *Id*; *see* 31 Stat. 861; 32 Stat. 500. These acts, like the 1882 statute in *Parker*, simply do not bear the required "hallmarks

of diminishment." *Parker*, 136 S.Ct. at 1079.

Likewise, there are no explicit disestablishment provisions in the Enabling Act. Indeed, that act protected the Nation's rights by providing that nothing in Oklahoma's Constitution could be construed to limit or impair the rights of the Nation and its citizens as long as such rights remain unextinguished. In expressly preserving its own authority over the Nation's "lands" and placing the "territory" of the "Creek Nation" within a specific federal district for congressional representation, Congress recognized there was no diminishment of the Nation's domain. *See* 34 Stat. 267.

Although Congress may have intended to eventually dissolve the Nation's land base and carry through with the threat to abolish its government, this never happened. Indeed, these initial goals were later "expressly repudiated." *Indian Country,* 829 F.2d at 979 (finding Enabling Act expressly preserved federal authority "over the Indians, their lands and property"). In *Sands* the Court rejected the government's arguments federal laws surrounding allotments and statehood reflected congressional intent to subject the Nation's citizens to state law. 968 F.2d at 1061. In *Cravatt*, OCCA found "no foundation" to the United States' argument that "as a result of congressional enactments around the turn of the century" Oklahoma acquired jurisdiction in Indian country. 825 P.2d at 279; *see also United States Express Co. v. Friedman,* 191 F. 673, 678-79 (8th Cir. 1911) (rejecting broad contention "Indian

Territory ceased to be Indian country upon the admission of Oklahoma as a state"). *See also Kleppe*, 420 F. Supp. at 1129. The misperception the Nation was terminated at statehood and no longer had lands subject to its governmental authority cannot be supported by any explicit congressional language. The Enabling Act does not bear the necessary "hallmarks of diminishment." *Parker*, 136 S.Ct. at 1079.

In all treaties between the United States and the Nation the language of disestablishment or diminishment was explicit. In 1832 the Nation "ceded" its aboriginal homelands to the United States in exchange for the promise of a "patent or grant" for its "country" in what is now Oklahoma. In 1856 the Nation "ceded" a portion of its reservation to the Seminole Nation.[27] In 1866 the Nation ceded and conveyed the west half of "their domain" to the United States for $975,168. The Nation's domain was specifically referred to as the "reduced Creek reservation." 14 Stat. 785, art. IX.

The use of explicit language of disestablishment and diminishment in former treaties confirms Congress did not intend to disestablish the Nation's domain. *See Parker*, 136 S.Ct. at 1080. In *Mattz v. Arnett*, the Supreme Court found it inappropriate to infer a congressional intent to terminate a reservation when Congress

[27] The treaties promised the Creek Nation it would be allowed to govern itself without interference from any state or territory. *See* 11 Stat. 699, art. IV, XIV; 14 Stat. 785, art. X.

was fully aware of what means could be used to effect a termination. 412 U.S. 481, 504 (1973). Congress could have employed explicit disestablishment language, but did not. The difference in the language from the 1832, 1833, 1856, and 1866 treaties to that in the allotment acts and Enabling Act "undermines" the claim Congress intended to diminish reservation boundaries. *Parker*, 136 S.Ct at 1080. Mr. Murphy's federal Indian law expert confirmed the facts and law surrounding this issue.[28]

b. Contemporaneous Historical Evidence Confirms Congress Did Not Intend to Disestablish the Nation's Reservation.

To overcome "the lack of clear textual signal," historical evidence – the second consideration in the diminishment analysis – must "unequivocally" reveal a "widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Parker*, 136 S.Ct. at 1080, citing *Solem*, 465 U.S. at 471. No such unequivocal historical evidence is in this record. The district court made two broad unsupported statements about the historical evidence: 1) there is "no question, based on the history of the Creek Nation, that Indian reservations do not exist in Oklahoma," and 2) there is "no doubt the historic territory of the Creek

[28] Ms. Blackwell, offered a brief legal history of Creek Nation's treaties and allotment acts and concluded that "[t]he Creek act of allotment lacks the specific and unequivocal congressional statement required to effectuate a diminishment or disestablishment." She also concluded "the exterior territorial boundaries of the Creek Nation were not altered by the acts of allotment which specifically perpetuated rights affirmed under prior treaties." PC 2 OR (IC) 153-55.

Nation was disestablished as a part of the allotment process." *Murphy*, 497 F. Supp. 2d at 1290. However, the court does not illuminate what history it relies on or how that history reveals a *contemporaneous* understanding the Nation's domain would be diminished as a result of allotment.

Contemporaneous understanding that the Nation's boundaries remained intact after allotment acts is illustrated by *Buster v. Wright*, 135 F. 947 (8th Cir. 1905). In *Buster* the court rejected non-Indian merchants' argument the 1901 Creek Allotment Act deprived the tribe of authority to impose taxes on non-members' fee lands within the reservation. The Court found the allotment act did not limit the Nation's territorial sovereignty:

> [N]either the establishment of town sites nor the purchase nor the occupancy by noncitizens of lots therein withdraws those lots or the town sites or their occupants from the jurisdiction of the government of the Creek Nation.

Id. at 952-53. Looking specifically at whether Congress intended to deprive the Nation of its power to exact permit taxes on non-member land within the existing reservation, the court said:

> [T]he conclusive presumption is that [Congress] intended to make no such contract, and that the power of the Creek Nation to exact these taxes. . . [was] neither renounced, revoked nor restricted, but that they remained in full force and effect after as before the agreement of 1901.

Id. at 954. Its conclusion that the Nation's territorial sovereignty was retained

following passage of the allotment act was described as "irresistible." *Id*. at 953. *See also Hitchcock*, 194 U.S. at 393 (interpreting Curtis Act to permit continued exercise of Chickasaw legislature).

Here, Oklahoma presented no historical evidence surrounding the passage of the allotment acts and the Enabling Act that *unequivocally* supports a finding the existing reservation boundaries would be disestablished.[29]

c. Subsequent Demographic History and Subsequent Treatment of the Land by Government Officials Cannot Be Relied on to Find Disestablishment.

The third consideration in the disestablishment analysis is subsequent demographic history and treatment of the land by government officials. While these factors can sometimes serve as "clue[s]" as to what Congress expected would happen as a result of its legislation, they also have "limited interpretive value." *Solem*, 465 U.S. at 472, 474; *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998). The Supreme Court has never relied solely on this "third consideration" to find diminishment. *Parker*, 136 S.Ct. at 1075.

The increase of non-Indian intruders into Indian Territory was occurring before the allotment acts and Enabling Act were passed. In 1890 the population of

[29] Oklahoma should not be allowed to present such evidence unless this Court determines evidentiary disputes regarding the historical evidence should be resolved in a federal evidentiary hearing.

Indian Territory was 180,169, and by 1900 it was 387,202. Bureau of the Census, Abstract of the Twelfth Census of the United States, 1900 (3d ed. 1904).

In 1890 the Nation had 15,000 members and exercised, within their defined territory, the "powers of a sovereign people." *Turner v. United States*, 248 U.S. 354 (1919). Thus, the Nation's citizens were the minority within their own territory before the allotment acts and statehood. Though the influx of non-Indian land owners within the Nation's domain increased in the twenty years after allotment, this surge in non-Indian settlement was expected. An expected demographic change is the "'least compelling' evidence in the diminishment analysis." *Parker*, 136 S.Ct at 1082, quoting *DeCoteau*, 420 U.S. 425, 447 (1975) and *Yankton Sioux*, 522 U.S. at 356.

The treatment of disputed lands by governmental officials also has "limited interpretative" value. Oklahoma illegally asserted jurisdiction over Five Tribes territory until the precedent was overruled and criticized. *See supra* at 42-45. In *Parker* similar equitable considerations could not overcome text which was "devoid" of language indicative of Congress' intent to diminish.[30] *Parker*, 136 S.Ct. at 1082. Indeed, nearly 40 years ago, the Supreme Court rejected the idea that a state's

[30] The Tribe in *Parker* had been almost entirely absent from the disputed territory for more than 120 years and had not enforced its regulations, maintained offices, provided social services, or hosted tribal celebrations there. Likewise, the federal government, with a few exceptions, had treated the disputed land as Nebraska's. 136 S.Ct. at 1082-83.

longstanding exercise of jurisdiction, even with federal acquiescence, could deprive a tribe of jurisdiction to prosecute a crime that occurred in its territory. *John*, 437 U.S. at 635-36.

d. Conclusion.

Applying the analysis from *Parker* confirms Congress did not intend to disestablish the Nation's reservation. Also, the standard rules of federal Indian law apply in Oklahoma. Those standards require any ambiguities to be resolved in favor of protecting rights of the Nation and its citizens.

3. Lower Court Opinions.

Neither OCCA nor the district court should be afforded deference for the reservation adjudications. *See supra at* 25-29.

a. The OCCA.

The OCCA specifically declined to decide the central claim. Moreover, what it did say was "contrary to" controlling Supreme Court law and amounted to unreasonable determinations of facts under 28 U.S.C. § 2254(d)(1)(2).

The OCCA was not convinced by the offer of proof that the tract "qualifies as a reservation." *Murphy IV*, 124 P.3d at 1207. Only by cherry-picking Ms. Blackwell's affidavit could OCCA conclude there never was a "formal" reservation. This ignores the Nation's legal history and controlling authority from both the Supreme Court and

this Court. The Nation's domain was a "reservation" as recognized by 18 U.S.C. § 1151(a). Whether a territory is Indian country does not depend on how it is denominated, but whether it was "validly set apart for use by the Indians . . . under superintendence of the Government." *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 511 (1991). *See also Indian Country*, 829 F.2d at 973 (noting "[a] formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status"). The Nation's domain was validly set aside with federal superintendence. The OCCA's fact determination otherwise was unreasonable and contrary to law.

The OCCA made an additional unreasonable (and wrong) determination that "no *case* is cited for the position that the individual Creek allotments remain part of an overall Creek reservation that still exists today." *Murphy IV*, 124 P.3d at 1207 (emphasis added). It is unclear whether the OCCA is referring to Ms. Blackwell's or post-conviction counsel's failure to cite a "case." In any event, both specifically cited controlling Supreme Court cases.[31] Indeed, if OCCA made an adjudication, it did so

[31] Ms. Blackwell offered the OCCA the authority of *Celestine* and *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) that only Congress can diminish or disestablish a reservation and that acts of allotment do not dissolve an Indian reservation in the absence of specific congressional language evidencing such intent. Likewise, post-conviction counsel steered OCCA to *Indian Country U.S.A.* for the disestablishment issue. PC 2 (IC), Supplemental Brief of Petitioner at 8 n.6. *See also* PC 2 (IC) OR at 66 (citing *Solem* to support argument the Nation's domain was not

by unreasonably ignoring the clearly established Supreme Court law it was provided.

b. The District Court.

The federal district court's "no doubt" "no question" opinion was reached by specifically refusing to apply general principles of federal Indian law – principles that favor tribal authority over their lands in any analytical framework. Additionally the court ignored the "first and governing principle" of the *Parker* analysis and instead relied on *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005). The court wrongly credited Oklahoma's longstanding exercise of authority over the allotted Nation's domain as definitive proof the reservation had been disestablished. *Murphy,* 497 F. Supp. 2d at 1290. The court ultimately deferred to OCCA under AEDPA, repeating OCCA's factually unreasonable statement that there was never a "formal" reservation. *Id*. The district court's opinion was clearly erroneous.

PROPOSITION II

The OCCA Once Again Ignored Supreme Court Law by Allowing Improper Victim Impact Evidence to Be Introduced and Argued in Violation of Mr. Murphy's Fifth, Eighth, and Fourteenth Amendment Rights. The District Court Should Have Granted Relief for This Flagrant and Repeated Constitutional Violation.

A. Where Claim Was Raised.

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disestablished by the "acts of allotment and other federal legislation adopted in the early 20th century").

This claim was raised in Murphy's First Amended Petition. Doc. 33 at 68-72 (CIV-03-443). The district court denied relief. *Murphy*, 497 F. Supp. 2d at 1278-81.

B. Argument and Authorities.

1. The Constitutional Violation.

During the sentencing phase, the prosecutor called only three witnesses to testify. These relatives of George Jacobs read their victim impact statements, with one reading two statements (his own and that of a relative who could not attend trial). The entirety of the State's second-stage evidence covers only seven transcript pages.[32] TR J. Tr. V 1219-26. Each of the three witnesses provided unconstitutional evidence. The prosecutor then exacerbated the constitutional violation by explicitly relying upon the clearly unconstitutional testimony in the State's rebuttal.

The first witness was Reuban Harjo. After telling the jury he could not understand why Murphy would want to kill his brother, Mr. Harjo then testified "Mr. Murphy should get the death penalty for taking an innocent life. I pray that he will not ever get out of jail and do bragging." TR J. Tr. V 1219-20.

Next up was Frank Jacobs, another brother. Mr. Jacobs similarly testified, "And I believe in the Bible. I believe an eye for an eye and they should be put to death." TR

[32] In addition to the three witnesses called, the State also formally re-alleged all of the evidence introduced in the first stage. TR J. Tr. V 1216.

J. Tr. V 1221. Frank Jacobs also read a statement from his sister, Irene, which concluded "I hope you see that no one in the world should ever be free to commit such a crime." TR J. Tr. V 1222-23.

Nadine Francisco, Mr. Jacobs' sister, concluded the State's penalty-stage evidence. Ms. Francisco's entire testimony was one page in length and concludes by telling the jury, "I just hope and pray that these killers just get the most severe punishment. There is no mercy for them." TR J. Tr. V 1225.

In the span of only seven pages, four members of the victim's family impermissibly opined as to an appropriate sentence. But the prosecutor made the problem worse. At the very end of the State's rebuttal closing argument, the prosecutor summarized each family member's testimony and reminded the jury the victim's family had asked them to impose the death penalty. TR J. Tr. V 1398. With that reminder firmly in mind, the jurors retired to deliberate. TR J. Tr. V 1400.

2. Contrary to Clearly Established Supreme Court Law, the OCCA Ruled the Challenged Victim Impact Testimony Was Permissible.

Each individual's plea for the death penalty violated the Constitution. Clearly established law provides that testimony urging a sentencing recommendation, and any Oklahoma law that permits it, is unconstitutional. In *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled in part by Payne v. Tennessee*, 501 U.S. 808 (1991), the Court prohibited both victim impact evidence in capital cases and "opinions as to what

conclusions the jury should draw from the evidence." 482 U.S. at 508-09.

In *Payne*, the Court overruled *Booth* but only to the extent it prohibited evidence concerning the character of the victim or the impact of the homicide on the victim's family. 501 U.S. at 825-30 and n.2. The rationale advanced for the decision in *Payne* was that sentencing phase evidence of "specific harm caused by the defendant" was relevant to a determination of moral culpability and hence permissible under the Eighth Amendment. *Id*. at 825.

Payne, however, expressly recognized that *Booth* "also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." *Payne*, 501 U.S. at 830, n.2. In footnote 2, the Court made it quite clear it was *not* overruling this portion of *Booth*.

> *Our holding today is limited* to the holdings of *Booth v. Maryland* and *South Carolina v. Gathers,* that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing.

Id. (emphasis added, internal citations omitted).

In other words, *Payne* departed from *Booth* only on whether the jury could hear *facts* concerning the impact of the crime. *Booth*'s prohibition on *opinion* evidence from victim's family members remained intact. Justice Souter and Justice Kennedy, whose votes were essential to the Court's opinion in *Payne*, emphasized the point in

concurrence.

> This case presents no challenge to the Court's holding in *Booth v. Maryland* that a sentencing authority should not receive a third category of information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence.

Id. at 835 n.1.

The Supreme Court case law could not be clearer. And this Court has acknowledged the prohibition against recommending a sentence remains in full force even after *Payne*.

> However, *Payne* did not overrule the prohibitions in *Booth* against the admission of "information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence."

United States v. McVeigh, 153 F.3d 1166, 1217 (10th Cir. 1998) (citation omitted); *see also Hain v. Gibson*, 287 F.3d 1224, 1238 (10th Cir. 2002) (recognizing the Supreme Court left this "significant" portion of *Booth* untouched).

Despite the clarity of Supreme Court precedent, and that of this Court, OCCA held in this case (as it has done many times before and since) that *Payne* overruled *Booth* in its entirety, including the parts of *Booth* that explicitly were not overruled. Specifically, OCCA held it was permissible for the government's witnesses to express their opinions about what sentence the jury should impose. *Murphy I*, 47 P.3d at 885. But even under Oklahoma's unconstitutional approach to victim impact evidence,

OCCA still found some of the evidence presented to be improper. *Id.* Nonetheless, in the end, OCCA ignored the admission of all the improper evidence and concluded "the victim impact evidence was not 'so unduly prejudicial that it render(ed) the trial fundamentally unfair.'" *Id.* at 886, *quoting Payne*, 501 U.S. at 825.

None of OCCA's conclusions are entitled to deference. Its principal holding was clearly contrary to *Booth*. Moreover, to the extent OCCA attempted to engage in any sort of harmless error review, that conclusion also was contrary to *Booth* and *Payne*. The only "error" OCCA found was one witness' brief comment about believing in "an eye for an eye." *Murphy I*, 47 P.3d at 885. Ignoring all the other prohibited testimony and weighing only one error, OCCA concluded the evidence was not "'so unduly prejudicial that it render(ed) the trial fundamentally unfair.'" *Id.* at 886, *quoting Payne*, 501 U.S. at 825. The OCCA thus applied the wrong harmless error standard. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993). Because OCCA failed to consider all the improper evidence and applied the wrong standard, its conclusion the error was harmless is not entitled to deference. Therefore, review of this issue is *de novo*.

3. The District Court Correctly Ruled the OCCA's Decision was Contrary to *Booth* and *Payne*, But Erred in Finding the Error Harmless.

In reviewing this claim, the district court correctly ruled OCCA's decision [regarding the admission of the challenged victim impact evidence] "is contrary to 'clearly established Federal law, as determined by the Supreme Court of the United States.'" *Murphy*, 497 F. Supp. 2d at 1282. The court then, however, clearly erred in concluding the error was harmless. *Id.* at 1283. Specifically, the court concluded that the unconstitutional victim impact evidence "did not have a substantial and injurious effect or influence in determining the jury's recommended death sentence." *Id.* This conclusion is a legal determination that must be reviewed *de novo*, and should be reversed by this Court.

Although the district court did not cite the case by name, in concluding the introduction of the unconstitutional victim impact evidence was harmless, the court adopted language from the *Brecht* standard. *See Brecht*, 507 U.S. at 637 (holding an error is harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict"). In applying that standard, "'a substantial and injurious effect exists if a court finds itself in grave doubt about the effect of the error on the jury's sentencing decision.'" *Dodd*, 753 F.3d at 997, *quoting Lockett v. Trammell*, 711 F.3d 1218, 1232 (10th Cir. 2013). Although "an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final

judgment," *Brecht*, 507 U.S. at 634, "when a court is 'in virtual equipoise as to the harmlessness of the error' under the *Brecht* standard, the court should 'treat the error. . . as if it affected the verdict.'" *Fry v. Pliler*, 551 U.S. 112, 121 n.3 (2007); *see also Dodd*, 753 F.3d at 997. Under these standards, the district court clearly erred in finding the error harmless.

As an initial matter, it is debatable whether the *Brecht* standard should even apply in this case. Although the Supreme Court held in *Brecht* that the more demanding standard set out above generally should apply to collateral review of trial-type errors,[33] the Court also allowed the possibility that some errors could be so egregious and repetitive that habeas relief would be justified even if the *Brecht* standard could not be satisfied. Specifically, the Court noted:

> Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

Brecht, 507 U.S. at 638 n.9. Because this is the unusual case the Court forecasted in *Brecht*, habeas relief should be granted regardless of whether the Court determines the error to be harmless under *Brecht*.

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[33] This standard contrasts with the *Chapman* harmless beyond-a-reasonable-doubt standard that applies on direct review. *See Chapman,* 386 U.S. at 18.

Not only was the error here egregious – each and every one of the government's second stage witnesses provided unconstitutional victim impact evidence and the prosecutor exacerbated those repeated errors by reminding the jury of them immediately before deliberations began – but it is pervasive in Oklahoma, and OCCA has clearly indicated that it has no intention of putting an end to the unconstitutional practice.

This, unfortunately, was not the first time the OCCA misapplied *Booth* and *Payne*. In fact, this case represents one in a startling series of erroneous rulings by OCCA. This Court has found *Booth* violations by OCCA on at least 11 occasions. *See Dodd,* 753 F.3d at 996 (10th Cir. 2013); *Grant v. Trammell*, 727 F.3d 1006 (10th Cir. 2013); *Lockett*, 711 F.3d at 1218; *Lott v. Trammell*, 705 F.3d 1167 (10th Cir. 2013); *DeRosa v. Workman*, 679 F.3d 1196 (10th Cir. 2012); *Selsor v. Workman*, 644 F.3d 984 (10th Cir. 2011); *Welch v. Workman (Gary Welch)*, 639 F.3d 980 (10th Cir. 2011); *Welch v. Sirmons (Frank Welch)*, 451 F.3d 675 (10th Cir. 2006); *Hooper v. Mullin*, 314 F.3d 1162 (10th Cir. 2002); *Willingham v. Mullin*, 296 F.3d 917 (10th Cir. 2002); *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002). Although this Court found the error to be harmless in all of those cases except *Dodd*, it still clearly notified OCCA and Oklahoma prosecutors that its practice was unconstitutional. Those clear rulings notwithstanding, Oklahoma continues undaunted in applying its

clearly unconstitutional practice.

Oklahoma's continued and repeated acceptance of improper victim impact evidence "can only be construed as intentional disobedience of the federal Constitution." *DeRosa v. Workman*, 696 F.3d 1302, 1305 (10th Cir. 2012) (Lucero, J. dissenting from denial of rehearing *en banc*). "When the highest court in a state has adopted a practice that violates the Constitution 'beyond any possibility for fairminded disagreement,'" *id., quoting Harrington v. Richter*, 562 U.S. 86, 103 (2011), the type of egregious error forecasted in *Brecht* is clearly present.

More disturbing than Oklahoma's repeated history of non-compliance with *Booth* is its clearly-stated intention to continue that history. In OCCA's most recent ruling allowing victims to offer their opinion requesting a death sentence, it recognized that this Court "has routinely disagreed with [OCCA's] reasoning on this issue" but nonetheless concluded that "the Tenth Circuit's interpretation of this issue is not binding" on Oklahoma courts. *Bosse v. State*, 360 P.3d 1203, 1226 (Okla. Crim. App. 2015). One judge of that court went even further, despite acknowledging this Court's repeated rulings about the unconstitutional nature of Oklahoma's practice:

> We have continued to approve of the use of characterizations and opinions about the crime, the defendant, and the appropriate sentence as evidence in capital sentencing proceedings. . . . Until the United States Supreme Court issues a definitive opinion on the issue, *we will continue to apply [the same rule]*.

Id. at 1240 (Lumpkin, V.P.J., concurring in part/dissenting in part)(emphasis added).[34] Of course, the Supreme Court *has* given a "definitive" ruling prohibiting the type of victim impact evidence at issue here. It did so almost thirty years ago in *Booth*. In the three decades since *Booth*, the Supreme Court has not retreated from that holding.

Because this case presents the unusual, deliberate and especially egregious error foretold in *Brecht*, this Court should grant the writ regardless of whether it finds the error substantially influenced the verdict. Assuming, however, this Court concludes this case does not justify an exception to *Brecht*, the record overwhelmingly supports a conclusion that the error was not harmless. Therefore, under either scenario, the writ should issue.

The Supreme Court perfectly described the prejudice that flows from this improper category of victim impact evidence when it ruled it unconstitutional.

> [T]he formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant. . . . The admission of these emotionally charged opinions as to what conclusions the jury should draw from the evidence clearly is inconsistent with the reasoned decisionmaking we require in capital cases."

Booth, 482 U.S. at 508-09.

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[34] A Petition for a *Writ of Certiorari* has been filed in *Bosse* and has been scheduled for the Supreme Court's September 26, 2016 conference. *Shaun Michael Bosse v. Oklahoma*, No. 15-9173.

This case, in many ways, is similar to the error that justified habeas relief in *Dodd*. In that case, this Court found it "peculiar"[35] that the State argued on appeal that the "victims' sentencing recommendations did not have a substantial effect on the sentence even though it went to the extraordinary length of eliciting that recommendation from six, and perhaps seven, of the eight witnesses it called at the sentencing phase of the trial." *Dodd*, 753 F.3d at 997. Here, every witness called by the State in the sentencing phase of the trial was asked to make an unconstitutional sentence recommendation. Indeed, one of those witnesses, not only gave his own improper sentence recommendation, but also related the improper recommendation of his sister. The State's entire case in aggravation consisted of victim impact evidence. One wonders why the State would have made the effort to ask every one of its witnesses what sentence they wanted if it did not think that testimony would have an impact on the verdict.

Similarly, after eliciting opinion testimony regarding death being the appropriate sentence from each of the State's penalty-phase witnesses, the prosecutor then finished the State's rebuttal argument by reminding the jury of what each of those witnesses had said and what sentence they each recommended. TR J. Tr. V

[35] The Court also referred to the government's position in *Dodd* as "chutzpah." *Dodd*, 753 F.3d at 997. The State's position in the instant case can be described the same way.

1398. Clearly, the prosecutor knew very well what would work. McIntosh County, Oklahoma, where the trial was held, is a small rural county.[36] Being part of such a small community, the prosecutor would have known very well what type of information would be persuasive. Moreover, having had the opportunity to observe each juror throughout the presentation of evidence, the prosecutor would have had a unique perspective on how evidence was being received. The experienced prosecutor, with knowledge of the dynamics of the small community and first-hand observation of the jurors' reaction to the evidence, ended his closing argument by highlighting the family members' sentencing recommendation. This was intentionally meant to influence the jury's sentencing decision. As this Court has noted

> For this court to decide that such testimony did not have a substantial effect on the jury would be to impugn the expertise of a very experienced and highly successful prosecutor, whose firsthand knowledge of Oklahoma capital juries far exceeded what we could possibly acquire.

Dodd, 753 F.3d at 997, *citing Napue v. Illinois*, 360 U.S. 264, 270-71 (1959)

In concluding the improper victim impact evidence was harmless, the district court stated as follows:

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[36] According to official United States Census data, in 2000 when the trial was held, there were only 15,053 residents in the county over the age of 18 and therefore eligible to serve on the jury. *See* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF (last visited June 17, 2016).

> [T]he prosecution alleged, and the jury found, the existence of two aggravating factors, both of which were amply supported by the evidence. In light of the jury's finding that the murder was especially heinous, atrocious, or cruel and that Petitioner posed a continuing threat to society, this Court finds that the improper aspects of the victim impact evidence simply did not play and could not have played a substantial role in the jury's assessment of the death penalty in this particular case. Further, the overall length of the victim impact testimony relative to the length of the entire trial and the fact Petitioner offered four witnesses after the objectionable portion of the testimony, convinces this Court that the evidence did not infect the trial with unfairness such that the resulting conviction was a denial of due process.

Murphy, 497 F. Supp. 2d at 1283. None of these reasons support a conclusion the improper evidence and argument were harmless.

First, the existence of two aggravating factors should carry little weight in the harmless error analysis.[37]

> [I]n *Kotteakos v. United States*, the case that gave birth to the *Brecht* standard, the Court declared that the harmless-error inquiry "cannot be merely whether there was enough [evidence] to support the result." 328 U.S. 750, 765 (1946).

DeRosa, 696 F.3d at 1305-06 (Lucero, J. dissenting from denial of rehearing *en banc*). Rather, "under *Brecht*, [the court] must focus on 'whether the error itself had substantial influence.' . . . . The fact that a capital defendant committed a horrible

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[37] To the extent the Court factors these aggravators into the analysis, Murphy challenges the existence of the "heinous, atrocious and cruel" factor. *See* Proposition VI. One OCCA judge agreed the evidence was insufficient to support this aggravator. *Murphy I*, 47 P.3d at 888 (Chapel J., concurring in part/dissenting in part).

crime cannot be an excuse to repeatedly ignore constitutional errors at sentencing." *Id.* at 1306, *quoting Kotteakos*, 328 U.S. at 765. Focusing on the error itself, as *Kotteakos* and *Brecht* require, confirms this error is indeed worthy of habeas relief.

The district court's reliance on the fact Murphy called four witnesses after the introduction of the improper evidence should carry no weight. First, nothing about the testimony of those four witnesses undid the fact all the State's witnesses impermissibly asked the jury to impose the death penalty. If the district court's purpose in noting this testimony was to suggest it somehow put distance between the improper evidence and the jury's deliberations, thus lessening its impact, the court ignored that the prosecutor ended his rebuttal closing argument by reminding the jury about the improper evidence.

C. Conclusion.

Although the district court was correct OCCA's decision upholding the victim impact evidence and argument was contrary to clearly established federal law, the district court erred in concluding the error was harmless. This Court should reverse the district court and grant the Writ.

PROPOSITION III

The District Court Erred in Refusing to Stay and Abey Mr. Murphy's Habeas Corpus Case.

A. Where Claim Was Raised.

This claim was raised by motion. Docs. 28,[38] 66 (CIV-03-443). Mr. Murphy previously suggested abeyance of his Petition in his Reply to Oklahoma's Response, Doc. 18 at 7, 28 and requested it again in his ultimate combined Reply. Doc. 65 at 5 In the first amended Petition, Murphy also requested the Court adjudicate the matter "as law and justice requires." Doc. 33 at 80. The district court denied the first motion and accompanying motion to present argument by minute order. Docs. 30 and 31. The district court denied the second motion (Doc. 66) in the Opinion and Order. *Murphy*, 497 F. Supp. 2d at 1294-95.

B. Argument.

1. Introduction.

In response to Murphy's mention that he was pursuing issues in a successor state post-conviction application, the district court made it quite clear that unexhausted issues were not welcome in Murphy's habeas petition. Doc. 27. This approach was already incompatible with post-AEDPA circuit jurisprudence allowing stays for completion of state court exhaustion.

Prominent among the claims Murphy was pursuing in state court was his claim

[38] In Doc. 29, Murphy also requested an opportunity to present oral argument on this Motion.

that he is intellectually disabled and thus constitutionally ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). Mr. Murphy twice asked the district court to stay his habeas proceedings, and made yet other related requests in his pleadings. Both stay motions (and related requests) should have been granted. Because the stays were refused, Murphy never received federal review of a claim OCCA once found of sufficient quality to require a jury trial. If either of those decisions to deny abeyance were in error – and both were – this case should be remanded for amendment with and consideration of Murphy's intellectual disability claim, absent penalty phase relief on some other issue.

2. First Request to Stay and Abey.

On September 7, 2004, just days after the district court announced its hostility to unexhausted claims and ordered them to be removed on pain of dismissal, Murphy filed his Motion for Stay of Habeas Proceedings and Request to Hold Habeas Petition in Abeyance Pending Exhaustion of Claims in State Court. Doc. 28. The Motion to Stay and Abey was well grounded, and indeed requested an approach routinely followed. *Rose v. Lundy* states "a district court must dismiss habeas petitions containing both unexhausted and exhausted claims." 455 U.S. 509, 522 (1982). Notwithstanding the mandatory language used, most courts had already concluded that, because *Lundy* was decided prior to the 1996 enactment of AEDPA, its directive

to dismiss mixed petitions should not be taken literally, given significant changes in the habeas landscape. To do so would be to blindly apply the case out of context. The district court's application of *Lundy* was a stunning outlier as was its summary denial of the requested abeyance by minute order. Doc. 30.

Lundy was issued "before Congress significantly altered habeas corpus procedure by imposing a one-year statute of limitations and sharply limiting the grounds for second or successive petitions. After AEDPA, the procedure for accomplishing complete exhaustion merits reconsideration for several reasons." *Zarvela v. Artuz*, 254 F.3d 374, 379 (2d Cir. 2001). The reasons include the fact that

> *Lundy* had no occasion to consider alternative procedures for accomplishing total exhaustion.The issue there was only whether the habeas court should proceed to adjudicate a mixed petition. Some courts had said yes, and some had said no. [Citation omitted.] The Supreme Court ruled a habeas court cannot proceed to adjudicate a mixed petition. The Court never discussed whether dismissing a petition's unexhausted claims and staying its exhausted claims could provide an acceptable alternative to dismissing the petition in its entirety.

Id. Additionally, "the enactment of AEDPA has altered the context in which the choice of mechanics for handling mixed petitions is to be made" and"[s]taying the exhausted claims would be a traditional way to 'defer' to another court 'until' that court has had an opportunity to exercise its jurisdiction over a habeas petitioner's unexhausted claims," which is what "*Lundy* is primarily about." *Id.*; *see also Duncan v. Walker*, 533 U.S. 167, 182-83 (2001) (Stevens, J., with whom Souter, J., joins,

concurring in part and in the judgment) ("[T]here is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies"). The Second Circuit concluded that Zarvela's petition should have been stayed "with only the unexhausted claims dismissed"[39] and that he was entitled to have his petition remanded and treated as if it had been stayed. 254 F.3d at 382-83.

The Second Circuit incorporated the concept that entry into state court for further exhaustion and return therefrom should be reasonably prompt. *Id*. at 381. Here, Murphy was already in state court addressing Oklahoma's evolving approach to intellectual disability when the district court pronounced the threat of dismissal. He would have returned promptly to federal court for any necessary amendment following the state intellectual disability proceedings, a process also contemplated in and allowed by *Zarvela*. Indeed, Murphy did return promptly and amend his Indian country (and lethal injection) claims when those were fully adjudicated in state court. Doc. 41, 45. At that point, the intellectual disability claim was still pending in state court. Notably, Murphy had been granted an *Atkins* jury trial, as he pointed out. Doc. 41, Attachment A, Ex. 3; *Murphy IV*, 124 P.3d at 1208. However, by the time the

[39] The Court reached that conclusion because it deemed this the correct relief under the circumstances although it was not even akin to the dismissal requested by Petitioner. *Id*. at 383.

state courts finished with the intellectual disability issues the district court had already denied the Petition.

As the Second Circuit observed, some other circuits had already approved of post-AEDPA stay and abeyance procedures, in various forms. 254 F.3d at 380, citing *Freeman v. Page,* 208 F.3d 572, 577 (7th Cir. 2000) (recommending district courts stay mixed petitions); *Calderon v. United States District Court* (*Taylor*), 134 F.3d 981, 986-88 (9th Cir. 1998) (recommending district courts "dismiss only the unexhausted claims... and stay the remaining claims").

As later reflected in *Jackson v. Roe*, 425 F.3d 654, 658 (9th Cir. 2005), *Taylor* did not allow for staying mixed petitions but, as shown, did allow for unexhausted claims only to be dismissed and exhausted petitions to be stayed and potentially amended following exhaustion.

Abeyance for exhaustion was an approved practice in yet other circuits. *Crews v. Horn,* 360 F.3d 146, 154 (3d Cir. 2004) (following *Zarvela*'s principles but allowing mixed petition to be stayed; noting exhaustion rule prohibits only granting relief on unexhausted claims). *Crews* correctly observed that "[v]irtually every other Circuit" had also adopted a stay and abeyance procedure and characterized the Eighth Circuit as the only one to "come out the other way." *Id*. at 152.

Mr. Murphy advised the district court of this case law incorporating a variety

of stay approaches. *See also Nowaczyk v. Warden,* 299 F.3d 69, 79 (1st Cir. 2002) (concluding it is an abuse of discretion to dismiss rather than stay - even a fully exhausted petition - pending exhaustion of other claim in state court); *Scott v. Dugger*, 891 F.2d 800, 802 (11th Cir. 1989) (staying execution and federal habeas proceedings pending exhaustion of state remedies in pre-AEDPA case); In *Hill v. Anderson*, 300 F.3d 679, 683 (6th Cir. 2002), the Court adopted *Zarvela* and remanded to the district court to dismiss Hill's *Atkins* claim "to be considered by state court and to stay his remaining claims pending exhaustion of state court remedies."

This Court itself had ordered stay/abeyance in some cases. In *Hatch v. Oklahoma*, 58 F.3d 1447, 1452 (10th Cir. 1995) this Court recounted a history in which the district court dismissed a habeas petition but, on appeal, this Court held the appeal in abeyance "pending petitioner's exhaustion of his claims in state court." Such an appellate abeyance is hardly unfamiliar to this case. This Court similarly held Murphy's appeal in abeyance while his claim of intellectual disability was litigated in state court. In *Knapp v. Henderson*, 166 F.3d 347, No. 97-1188, 1998 WL 778774 (10th Cir. 1988) (unpublished disposition), Doc. 28, ex. 1, finding an exhaustion issue, this Court ordered the district court to hold Appellant's habeas petition in abeyance pending exhaustion of state remedies. Also, in *Newsted v. Gibson*, 158 F.3d 1085, 1088 (10th Cir. 1998) this Court described without disapproval the district

court's procedure of holding the habeas petition in abeyance pending exhaustion of claims in state court, then allowing amendment.

Further, not long before this abeyance request was submitted, Justices O'Connor, Ginsberg, Breyer, Stevens, and Souter noted the procedure with approval. *See Pliler v. Ford*, 542 U.S. 225, 234 (2004) (O'Connor, J., concurring) ("seven of the eight Circuits to consider it have approved stay-and-abeyance as an appropriate exercise of a district court's equitable powers"); *see also id*. at 237 (Breyer, J., dissenting, joined by Justices Stevens and Souter) ("What could be unlawful about this procedure"). Mr. Murphy also advised the district court that, just one week after issuing the decision in *Pliler*, the Court granted certiorari in a case from the Eighth Circuit – the only circuit to flatly prohibit the stay/abeyance procedure. *See Rhines v. Weber*, 542 U.S. 936 (2004) (granting certiorari to decide question of whether a federal court can stay rather than compel dismissal of mixed habeas corpus petition). Mr. Murphy suggested the Eighth Circuit's approach would be overturned. Yet, before that further support accrued, and just two days after the stay motion was filed, the district court summarily denied the motion in full.

3. The Second Motion to Abey.

While Murphy's Petition (now amended to incorporate Indian country claims) remained pending before the district court and his OCCA-ordered jury trial on mental

retardation was pending in McIntosh County, Murphy, through counsel, filed another Motion for Stay and Abeyance of Habeas Proceedings. Doc. 66. As relevant here, this request sought an abeyance for the intellectual disability claim. Contemporaneously with the Motion, Murphy's Combined Reply said the court should "wait to adjudicate the issues in Mr. Murphy's Petitions for Writ of Habeas Corpus until all the issues can be considered together on a full state court record." Doc. 65 at 5.

By this time, *Rhines* had come out, much as Murphy had predicted, rejecting the Eighth Circuit's parsimonious and out-of-context reading of *Lundy*. Mr. Murphy so apprised the court and also advised it of the long-standing support for stay and abeyance, support that had continued in yet more cases since the last motion. Doc. 66 at 4-6. He again apprised the court of jurisprudential reasons for granting an abeyance in that many of his claims would be mooted if the intellectual disability issues were resolved in his favor.

Mr. Murphy again apprised the court that his intellectual disability claims were meritorious enough that the OCCA remanded them for a jury trial. Respondent blamed Murphy for not having "presented a mental retardation claim to [the district court] since he elected to drop an unexhausted claim on that subject which was raised in his original petition." Doc. 67 at 2. Of course, that ignored the court's own prior order banning claims that were not fully exhausted. Respondent did not contest the

merits of the intellectual disability issue pending in state court. Doc. 68 at 4. Nor did he contest that Murphy had time remaining on his statute of limitations given the pending state court proceedings.

Rhines, which itself involved a mixed petition, allowed even mixed petitions to be stayed under certain circumstances, 544 U.S. at 272, and certainly supports that fully exhausted petitions could be stayed as well under the stay, abeyance, and amendment models followed by some Circuits. *Rhines* provided it would likely be an abuse of discretion to deny a stay when the elements of good cause for failure to exhaust a potentially meritorious claim and lack of intentional dilatory litigation tactics are present. 544 U.S. at 277-78, *see also Fairchild v. Workman,* 579 F.3d 1134, 1152 (10th Cir. 2009). Mr. Murphy met all three criteria.

First, OCCA's ongoing revision of its treatment of Murphy's intellectual disability claim showed it was far from finished litigating the claim when Murphy requested abeyances. *Murphy IV*, 124 P.3d at 1208 (acknowledging "[OCCA's] mental retardation jurisprudence has been in a state of flux since *Atkins v. Virginia* was handed down" and that "various procedural changes" had taken place after "Petitioner's mental retardation claim was the first such claim addressed" by OCCA following *Atkins*; remanding for a jury trial). It can hardly be said that allowing the state court to finish going first frustrates AEDPA's purposes. *Rhines*, 544 U.S. at 276-

77. Mr. Murphy really did not need an excuse for belatedly going to state court; he had been there and was returning as needed to challenge and complete an evolving process.

Second, as part of that ongoing process, OCCA's remand for a jury trial showed the potential merit of the claim.[40] It is certainly not the "plainly meritless" claim *Rhines* said was not worth a stay. 544 U.S. at 277 (describing the requisite merit threshold).

Third, Murphy was actively litigating the claim throughout, showing that he was not engaging in any intentionally dilatory tactics. He was just trying to get his claim fully heard in state court following that court's own implicitly acknowledged misstep. The time it took the state court to fully process claims, here in an experimental and changing process, can hardly be considered dilatory. Respondent has accused Murphy of being dilatory but never identified steps he could have taken that would have been more expeditious. Allowing the entire petition to be dismissed certainly would not have been more expeditious. As noted, Murphy was already litigating in state court when the stays were requested and demonstrated a propensity to return promptly to

[40] True enough, the evolving process eventually devolved and Murphy's claim warranting a jury trial oddly became a claim the Oklahoma courts booted because of a score over 75, but that had not happened when the district court erroneously denied the motions nor did it suddenly make the claim plainly meritless when the state devolution occurred. *Murphy VI*, 281 P.3d at 1290.

federal court when the state court finished with his claims. He bested, and showed the probability of besting, the 30-day transition periods suggested in *Rhines* on both ends. 544 U.S. at 278.

The district court took no action on the second abeyance motion until it erroneously denied that motion when it denied the habeas petition on August 1, 2007. The Court ruled:

> The issue of mental retardation is not currently pending before this Court. Therefore, any state court proceedings addressing that issue are not relevant to the issues currently before this Court. For these reasons, this Court finds Petitioner has failed to establish good cause for this Court to grant a stay in this matter.

Murphy, 497 F. Supp. 2d at 1294-95.

That ruling ignored the history of such stay practice in courts of this Circuit and the practices endorsed by other Circuits, capped by *Rhines*. It was an outlier – wrong as a matter of law. As shown, that ruling was also an abuse of discretion. If by "good cause" the court meant the kind of possible merit referenced in *Rhine*s, Murphy had shown he had a claim remanded for a state court jury trial. As shown above, the other *Rhines* factors had been met as well. If the district court was addressing good cause for failure to exhaust, the court ignored the history of Murphy's state court activity as he attempted to work through an evolving process.

These erroneous procedural rulings have unnecessarily complicated the

proceedings rather than achieve any comity or policy interest. The denial of an abeyance in some form was clearly erroneous and an abuse of discretion.

4. This Court's Handling of the Intellectual Disability Issue So Far.

Mr. Murphy appealed from the district court's opinion denying the Writ and his abeyance motions in Case No. 07-7068. By Order entered November 16, 2007, this Court, through Judge Porfilio, ruled: "Appellant's motion to hold this matter in abeyance pending litigation of the Petitioner's mental retardation claims in state court is granted. All proceedings in this Court are in abeyance until further order." When Respondent objected to the abeyance, this Court, through a panel Order entered December 4, 2007, denied the objection and maintained the abeyance in effect.

After the state proceedings concluded Murphy filed a second-in-time habeas petition concerning his procedural and substantive *Atkins* claims. The district court transferred the petition to this Court. In that proceeding, this Court remanded the procedural *Atkins* claims. Addressing the posture of the substantive *Atkins* claims there at issue, this Court observed:

> One aspect of the appeal [in No. 07-7068] is procedurally related to the motion currently under review: the district court's decision refusing to stay proceedings in the first habeas action. Had the stay been granted, it would have obviated the second-or-successive complications raised by the need for Mr. Murphy to file a second habeas application after exhausting the rest of his claims in state court. Thus it is at least possible he may obtain relief on appeal beyond that which we may consider here, and our disposition of the instant motion is not intended to presume or

> constrain the merits panel's resolution of the stay issue or any other matter before it on Mr. Murphy's appeal from the denial of his first habeas application.

Order at 3, n.1, Nov. 12, 2012 (Case No. 12-7055).

The instant claim presents that open procedural question for resolution.

C. Conclusion.

Mr. Murphy should be allowed to litigate his substantive ineligibility for a death sentence in federal court. This Court should reverse the district court on the procedural handling of Murphy's substantive intellectual disability, find that the court should have held his Petition in abeyance during the pendency of the state court intellectual disability proceedings, allowed same to catch up to the federal proceedings, and be addressed there. Finally, this Court should order a remand to accomplish the same.

PROPOSITION IV

> **The District Court Should Have Issued the Writ Due to Oklahoma's Newly-Minted and Unconstitutional Blockade of *Atkins*[41] Relief for All With Any I.Q. Test Score of Over 75 – A Cut Off that Suddenly Ended an OCCA-Ordered Inquiry into Mr. Murphy's Intellectual Disability.**

A. Where Claim Was Raised.

This claim was raised in Murphy's Amended Petition. Doc. 10 (CIV-12-191).

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[41] *Atkins*, 536 U.S. at 316 (holding execution of intellectually disabled violates the Eighth Amendment).

The district court denied relief. Doc. 35 at 4-19.

B. Argument and Authorities.

Whether Murphy is mentally retarded, and thus ineligible for the death penalty, is a question that remains open due to Oklahoma's back-and-forth procedures for deciding that critical question. Oklahoma's cut off of inquiry if any I.Q. score is 76 or more[42] is not the "appropriate" mechanism "to enforce the Constitutional restriction" mandated by *Atkins*. 536 U.S. at 316. It creates the constitutionally impermissible risk that *Atkins*' promise of excluding the intellectually disabled from execution will not be fulfilled. This is not the first time Oklahoma has undermined constitutional guarantees with restrictions that frustrate the purpose of those guarantees and virtually assure they will be violated. *Cooper v. Oklahoma*, 517 U.S. 348 (1996) (holding Oklahoma's procedures impermissibly allowed some who were incompetent to be unconstitutionally put to trial). This cutoff is contrary to and an unreasonable application of both *Atkins* and *Cooper*.

Mr. Murphy was once judicially declared not to be intellectually disabled. *Murphy III*, 66 P.3d at 461. Yet, OCCA later decided a jury trial was required to

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[42] Okla. Stat., tit. 21, § 701.10b provides: [I]n no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test administered by a licensed psychiatrist or psychologist, be considered mentally retarded and, thus, shall not be subject to any proceedings under this section.

resolve the question. *Murphy IV*, 124 P.3d at 1208. A jury determination that Murphy was not disabled was nullified because the requisite peremptory challenges were not allowed for this sensitive retrospective determination. *Murphy V*, 281 P.3d at 1287. Before the matter could be retried, Oklahoma's statute, which cuts off any possibility of an individual with any I.Q. score of 76 or more ever being declared intellectually disabled was applied, cutting off the inquiry and leaving the core question unresolved. *Id*. at 1291.

Thus, as matters now stand, Murphy is on track for execution though he, at minimum, may be constitutionally ineligible for that punishment. That dilemma illustrates the profound constitutional problem created by Oklahoma's 76 cut-off regime.

Of those deemed intellectually disabled since *Atkins*, 46% had an I.Q. score over 75; 20% had a score over 80. John H. Blume, et al., *A Tale of Two (and Possibly Three) Atkins: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 Wm. & Mary Bill Rts. J. 393, 404 (2014) (based on 46 reported decisions). Similar results once obtained in Oklahoma. *See e.g., Pickens v. State*, 126 P.3d 612, 616 (Okla. Crim. App. 2005) (finding only one score of 70 necessary to establish "mental retardation" despite additional scores of 76 and 79 and reducing sentence to LWOP); *Snow v. State*, 87 P.3d 626 (Okla.

Crim. App. 2004)(finding appellant entitled to *Atkins* trial despite I.Q. scores of 77and 83).[43] Yet all of those individuals would have been executed under Oklahoma's new cut-off regime – headed there summarily based on a disqualifying score. This data reveals an obvious constitutional disaster in the making under Oklahoma's new 76 cut-off regime.

"Atkins did not give the states unfettered discretion to define the full scope of the constitutional protection." *Hall v. Florida*, 134 S.Ct. 1986, 1998 (2014). "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in *Atkins* could become a nullity." *Id*. at 1999. Under Oklahoma's restrictive regime it may well have already become a nullity for Murphy and for many others who are intellectually disabled but have scores above 75.

The jury inquiry into Murphy's intellectual disability was hardly ordered on a whim. It was ordered because there is substantial evidence Murphy may be intellectually disabled. For example:

- Mr. Murphy presented sufficient evidence during the sentencing phase of his trial to justify an instruction that he was mentally retarded. *Murphy I*, 47 P.3d at 888.[44]

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[43] Snow, too, was ultimately deemed ineligible for execution.

[44] Dr. Sharp testified Murphy scored a 67 on an abbreviated version of the WAIS, the score indicated he was "mentally retarded" and was consistent with previous I.Q. testing that resulted in a diagnosis that Murphy was "educable mentally

- Mr. Murphy was formally diagnosed to be in need of placement in a "special education class for the educable mentally handicapped." PC M. Tr. 10/29/2002 at 41. Being EMH was the same as being "mentally retarded." *Id*. at 42. The school psychometrist gave Mr. Murphy the WPPSI and he scored below 75 – in a range between 65-73. *Id*. at 38.

- Mr. Murphy struggled in school and needed remedial assistance because he was such a slow learner and his performance was "very poor." PC M. Tr. 10/29/2002 at 55-57; 73. His academic scores were "very low," his vocabulary "was definitely low," his "critical thinking skills" were nearly non-existent. *Id*. at 58. When in the fifth or sixth grade, his critical thinking skills were at only a second-grade level. *Id*. at 61. When asked to write a story, he could only write 2 or 3 lines. *Id.* at 58. He would not read aloud because he could not read well. *Id*. at 59. He had "a lot of difficulty writing a complete sentence." *Id*. at 75.

- A majority of OCCA found Murphy "provided sufficient evidence in his post-conviction appeals to raise a fact question on this issue, thereby warranting a trial on [his] mental retardation claim." *Murphy IV*, 124 P.3d at 1208.

It is this last that makes it abundantly clear that the *only* reason Murphy did not get a jury trial on his claim was because two out of four of his I.Q. scores were above 75.

The impact of OCCA's response in this case could forever disqualify any but the most severely intellectually disabled from avoiding the death penalty. That result would directly violate *Atkins* itself, as confirmed in *Hall*, 134 S.Ct. at 1998 and *Brumfield v. Cain*, 135 S.Ct. 2269 (2015).

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handicapped" (EMH), the equivalent term for "mentally retarded." TR J. Tr. V 1289-90, 1295.

Hall expresses the reasonable interpretation of *Atkins* and *Atkins'* goals: "No legitimate penological purpose is served by executing a person with intellectual disability. [citing *Atkins*]." *Hall*, 134 S.Ct. at 1992.

Florida's cut off at 70 suffered from several flaws. Of those, Oklahoma's cut off at 76 solves only the failure to consider the standard error of measurement (SEM). Oklahoma's regime nonetheless suffers, at minimum, from these flaws:

> Pursuant to this mandatory cutoff, sentencing courts cannot consider even weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or inability to adapt to his social and cultural environment.

Hall, 134 S.Ct. at 1994.

Also, like Florida's, Oklahoma's cutoff: "takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence." *Id*. at 1995.

Finally, this cutoff creates "an unacceptable risk that persons with intellectual disability will be executed." *Id*. at 1990. That risk is vast. Mr. Murphy is just one of the first upon whom it is being inflicted. Unless and until the cut-off is declared unconstitutional, as it should be, he will be far from the last. Before the cut-off was installed, the experience with Mr. Pickens, Mr. Snow, and others showed the system now in place and visited upon Murphy would result in execution of the intellectually disabled. It is hardly cynical to imagine that Oklahoma's limiting evasion of *Atkins* is

intentional. This boundary is out of bounds per *Atkins*.

This Court has recently decided that, at least, the cutoff statute's failure to account for the *Flynn* effect does not violate the Constitution. *Smith* v. *Duckworth*, ___ F.3d ___, 2016 WL 3163056 (10th Cir. 2016). The Court construed Smith's argument as based on the SEM and/or the *Flynn* effect. Finding the Oklahoma statute includes the SEM and that consideration of the *Flynn* effect was not required by clearly established law in effect when OCCA adjudicated Smith's claim, this Court denied relief. *Id*. at *5-8. Petitioner most respectfully disagrees with that opinion and hopes it will be revisited.

As the Court is aware, the *Flynn* effect, or norm obsolescence, describes the reality that, as I.Q. tests become more distant from when they were normed to the population as a whole, they provide increasingly inflated scores. "There is a scientific and professional consensus that the *Flynn* effect is a scientific fact." Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect, in The Death Penalty and Intellectual Disability* 155, 158 (Edward Polloway ed., 2015). Adjusting for the effect in the *Atkins* setting is also the consensus best or standard practice. *Id*. at 160-161. "[T]he global scores impacted by the outdated norms should be adjusted downward by 3 points per decade (0.3 points per year) of norm obsolescence." *Id*. at 165. The older test norms reflect a level of performance that is lower than that of individuals in

contemporary society. American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support,* 36 (11th ed. 2010) (AAIDD); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) 36 (5th ed. 2013). "[B]est practices *require* recognition of a potential *Flynn* Effect when older editions of an IQ test (with corresponding older norms) are used in the assessment . . . of an IQ score."AAIDD at 37. (emphasis added).; AAIDD, *User's Guide Mental Retardation: Definition, Classification, and Systems of Support,* 20-21 (10th ed. 2007) (endorsing correction for age of norms, providing example). Exclusion of this scientific reality from legal proceedings conflicts with the Supreme Court's direction to rely on clinical standards. This Court recognized in *Smith* that:

> The Court in *Atkins* did, however, base its analysis on clinical definitions of intellectual disability, and the Court has since recognized that such definitions 'were a fundamental premise of Atkins [citing *Hall*].

Smith, 2016 WL 3163056 at *5. Because *Atkins* based its analysis on clinical practice and because clinical practice embraces the *Flynn* effect, the *Flynn* effect is a necessary consideration, whether under *Atkins* or *Hall*.[45] This Court's precedent should be

[45] Of course, where the basic principles are established in one case, this Court has, quite properly, had no difficulty in relying on illumination from subsequent cases in assessing either a claim or OCCA's adjudication thereof. *Hall's* illumination of the *Atkins*' constitutional restriction is no different than the Supreme Court's reiteration and clarification of *Strickland* in *Williams v. Taylor*, 529 U.S. 362 (2000).

revised to reflect this.

Application of *Flynn* and/or other scientifically supported adjustments is not essential to Murphy's challenge. However, a *Flynn* perspective and/or consideration of other scientific facts would shed more light on the problem. Both Dr. Bianco's 2001 score of 80 and Dr. Hall's 2002 score of 82 were obtained on the WAIS-III instrument normed in 1995. Both the *Flynn* effect and also the separate fact that WAIS-III produced inflated scores from the beginning mean that those scores are inaccurately high. Doc. 10, Ex. 12, at 98 (affirming initial error of at least 1.65 points *plus* applicable norm obsolescence error). Due to reliability issues with the WAIS-III, Dr. Flynn has recommended WAIS III scores be "set aside and subjects tested on the WAIS-V and the Stanford-Binet 5." *Id.* Scores that arguably should be "set aside" are the shaky foundation for the 76 cut-off implemented here. This circumstance should further undermine confidence in Oklahoma's *Atkins*-limiting regime.

And just as this Court applied *Williams* in cases with *Strickland* claims that were decided by OCCA prior to *Williams*, so should it apply *Hall* to cases with *Atkins* claims. *See Anderson v. Sirmons*, 476 F.3d 1131, 1144, 1146-47 (10th Cir. 2007); *Smith v. Mullin*, 379 F.3d 919, 943 (10th Cir. 2004); *Ellis v. Hargett*, 302 F.3d 1182, 1187 (10th Cir. 2002). *See also e.g., Hanson v. Sherrod*, 797 F.3d 810, 835 (10th Cir. 2015) (apparently applying, *inter alia*, *Sears v. Upton*, 561 U.S. 945 (2010) illumination in assessing *Strickland* claim under AEDPA). Recognizing that *Hall* does nothing more than clarify *Atkins*, both the Sixth and Seventh Circuits have applied *Hall* in cases with *Atkins* claims that were adjudicated by the state courts well before *Hall* was decided. *Van Tran v. Colson*, 764 F.3d 594, 612-13 (6th Cir. 2014); *Pruitt v. Neal*, 788 F.3d 248, 264, 267 (7th Cir. 2015).

Flynn effect or not, WAIS-III initial inaccuracy or not, the statute and Oklahoma's application thereof presents reliability concerns and thus violates *Atkins'* constitutional command. Enforcement of this cut-off is contrary to and an unreasonable application of *Atkins*, because it does not reliably prevent the execution of the intellectually disabled. Instead, it allows it. Moreover, even though the standard incorporates the SEM it violates clinical standards in that it allows just one test to exclude an individual where clinicians would consider more. None of these correct conclusions are foreclosed by *Smith.*

A dispositive observation the Supreme Court, through Justice Kennedy, made about Mr. Hall could and should be made about Murphy as well:

> *Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime*. . . Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. *The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.*

134 S.Ct. at 2001 (emphasis added). Oklahoma's procedures are also inadequate as the risk of an unconstitutional execution is too great to bear. Oklahoma's limiting statute and OCCA's endorsement of it to end *the very inquiry it ordered* are unreasonable factually and legally.

This Court should reverse with directions to grant the Writ.

PROPOSITION V

The District Court Erred in Denying Mr. Murphy's Claim His Lawyer Was Ineffective in the Penalty Phase.

A. Where Claim Was Raised.

This claim was raised in Murphy's First Amended Petition. Doc. 33 at 17-45 (CIV-03-443). The District Court denied relief. *Murphy*, 497 F. Supp. 2d at 1268-72.

B. Arguments and Authorities.

1. Introduction.

In second-stage proceedings, jurors were led to believe Murphy had some vague, minimal brain damage because drinking alcohol destroys brain cells. TR J. Tr. V 1298. The sentencing picture in one or more jurors' minds would surely have been transformed had they known he had a specific severe brain disorder that he had from birth through no fault of his own. PC Ex. 16 at 4.

Jurors' minds also would have been transformed had they known the true story of Murphy's life instead of the story embodied in the prosecutor's uncontested closing statement that he had "a good life and raising." TR J. Tr. V 1395. A minimally competent background investigation would have resulted in a vastly different picture, one of a young man who was resilient and likeable despite growing up under extremely violent and depraved family circumstances. PC Ex. 7 at ¶9; Doc. 33 Ex. L

at ¶9. Trial counsel's belated, woefully inadequate second-stage investigation inexorably led to a deficient sentencing-stage presentation, which greatly prejudiced Murphy.

2. What Was Presented.

Counsel's purported last-minute theme was that Murphy, an alcoholic, was low risk for future violence in the alcohol-free structure of prison. Four witnesses testified. The first two were experts. Psychologist Jeanne Russell assessed Murphy's future risk for violence, and Dr. Bill Sharp, assessed his alcoholism. Dr. Sharp also referenced Murphy's mild mental retardation. TR J. Tr. V 1227-1313.

The last two witnesses were Murphy's mother Elizabeth Murphy, and Murphy himself. Although unprepared, Ms. Murphy did convey some information. For example, she testified her son was a good boy but got in trouble when people called him racist names. TR J. Tr. V 1316, 1319.

The majority of her testimony was "less than coherent." Doc. 33 at 25 (CIV-03-443). At one point she said Murphy's father "[w]as around," and at another point she said he "wasn't there for him at all." TR J. Tr. V 1317, 1319. At one point she said Murphy changed and suddenly started drinking heavily after a car crash approximately two years prior; later she acknowledged the car crash was actually ten years prior. TR J. Tr. V 1323-24, 1334.

More than anything, her testimony was about herself: what she did, how a life or death sentence would affect her,[46] and how she would not be any kind of a mother at all if she didn't defend her son. TR J. Tr. V 1320-22, 1328. She portrayed no understanding of mitigation or the sentencing scheme, and seemed at one point, to not understand that the jurors were duty bound to render a judgment and sentence in her son's case.[47]

Like his mother, Murphy did convey some useful information, but the negative greatly outweighed the positive. He apologized to the victim's family and acknowledged he let down his own family as well, especially his three young children. TR J. Tr. V 1336-37. But Murphy flatly denied his role in the murder was significant enough to be found guilty of first-degree murder. TR J. Tr. V 1339. He quoted Bible verses while appearing to preach down to the jury, was completely unprepared to answer why he delayed until after he was found guilty to apologize to the victim's family, and was unable to clear up issues that were bound to come up, from resolving the confusion over how much beer he regularly drank, to answering whether he denied

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[46] "[I]f they [the jury] can forgive and go on that would be a lot better for me." TR J. Tr. V 1328.

[47] Had she had an understanding she could have told jurors incredible mitigating information. Instead, when asked what she would like to say to them she said: "I wouldn't pass no judgment on him. I would just let him live, with whatever he decided [] he wants." TR J. Tr. V 1325.

committing the crime or just denied remembering whether he committed the crime. TR J. Tr. V 1340-54.

Like his mother, Murphy did not seem to understand mitigation or the sentencing process. As mitigation witnesses, Elizabeth and Patrick Murphy were unmitigated disasters.

3. What Could Have and Should Have Been Presented.

a. Humanizing Information About Mr. Murphy's Life and Characteristics.

The jurors did not get a feel for Patrick Murphy or his life story. Evidence humanizing him as a real person instead of a monster was easy to find using the most basic investigative techniques.

Stan White, Murphy's high school basketball coach, knew young Patrick to be hardworking, well-mannered, athletically-gifted, and well-liked by students and teachers. PC Ex. 11. When Ryal School principal Danny Kennedy read news of Murphy's arrest, he thought it was surely a misprint. PC Ex. 12. When Kennedy's wife, who was the school secretary, learned that it was indeed Patrick was charged, she cried for a week. PC Ex. 12. While they all liked Murphy, school officials also knew the tough circumstances in which he was raised. Coach White knew Murphy's neighborhood was so rough and dangerous he would have been afraid to go there if he had not been the coach. PC Ex. 11. Principal Kennedy once arrived at Murphy's

house and found a fire burning in the middle of the living room. PC Ex. 12.

Classmates, too, would have praised and humanized Patrick as a real person with positive, redeeming qualities, while also describing his deprived circumstances. Tricia Henley noted Murphy was once voted "most likeable" by his classmates, consistent with his positive and happy attitude and character trait of not talking badly of anyone. PC Ex. 8. She also noted he lived in a part of the county so dangerous her mother would not let her go there. *Id.* Stephanie Loyd noted he was a hard worker who stood out for wanting to make something out of his life, and he was kind and caring and loved by many people at school. PC Ex. 9. She also noted he had an extremely difficult home life, and she personally witnessed the excessive drinking and violence, including multiple instances of gunplay. *Id.*

Classmate/teammate Steve McKinney played basketball with Patrick and knew him as a nice person who avoided trouble and had a peaceful and good-natured character. PC Ex. 10. He also noted Murphy came from a place known for shootings, drinking, and violence. *Id.* Emerging from the statements of friends is not a picture of a mean-spirited person emulating bad examples around him, but rather a picture of a caring and likeable young man with dreams and ambitions trying to overcome obstacles of poverty and dysfunction to make a better life.

Co-workers portray a positive picture as well. One co-worker, Robert Claiborne,

for example, knew Murphy well and could attest to his hardworking nature and positive performance at the filter plant where he worked. Claiborne also knew of Murphy's difficult and chaotic childhood, but saw Murphy grow into a good, valuable and caring person who loved his children dearly. PC Ex. 13.

The fiasco of Patrick's and his mother's testimony would have been remedied by proper investigation, preparation, and presentation of Patrick and his mother, *and* by properly investigating, preparing, and presenting other family testimony. Murphy's sister, Angela Barrett, knew about the extreme violence and toxic family environment Murphy grew up with, as well as his kind and giving nature. PC Ex. 7. As Barrett explained, Patrick resiliently emerged from an explosive family environment and set out on his own, but never forsook the family. And he was often pitching in to buy things needed by the children still in the home. *Id.* Cousin Leticia Hurn could have revealed the damaging verbal and emotional abuse suffered by Patrick and the other children in Murphy's childhood home, and discussed how the home was a gathering place for violent, scary and dangerous alcohol-fueled disputes between Murphy's mother and her siblings. PC Ex. 6. Leticia saw Murphy's mother stab her brother in the back with a butcher knife. *Id.*

Of course, Murphy and his mother could have presented a wealth of valuable life history information had Mr. Bowen properly prepared his case and prepared them.

The difference is stark when one compares the trial testimony of Murphy and his mother to the information in their post conviction affidavits. The jury in no way received the "fullest information possible concerning the defendant's life." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978). Perhaps the most compelling life history fact of all, though, was the damage done to Murphy's brain before he was born.

b. The Involuntary Physical Alteration of Mr. Murphy's Brain Structure.

Patrick Murphy was damaged by his mother from conception. Elizabeth Murphy admitted to drinking every day, and at least one time that she can remember (early on before she realized she was pregnant), she drank 24 cans of Falstaff beer. PC Ex. 4. Her sister's blunt affidavit reveals much more and gets to the heart of the matter: Elizabeth Murphy was physically and chemically dependent on alcohol, she would drink "whatever was available," and she drank to excess while pregnant with Patrick. PC Ex. 5. This is all consistent with the alcohol-drenched "Murphy's Bar" environment of the entire Murphy family and Murphy home.

Board-certified psychiatrist and neurology specialist John R. Smith, M.D. diagnosed Murphy with Fetal Alcohol Syndrome/Fetal Alcohol Effect (FAS/FAE). He characterized it as a "severe brain disorder"/"severe brain defect," and noted its existence was clear. PC Ex. 16 at 4-5.

Dr. Smith did more than just diagnose severe brain damage, he also explained

why it was so critically important in mitigating the crime, linking it to Murphy's chemical dependence on alcohol and extreme drunkenness at the time of the crime. As Dr. Smith explained, "[e]ven a small amount of intoxication would make him much more vulnerable" to cognitive malfunctioning, inappropriate responses, disinhibited behaviors, and particularly disinhibited behaviors related to strong emotions. PC Ex. 16 at 4-5. Jurors need and want to understand a crime, and Dr. Smith's explanatory and sympathy-garnering evidence ties everything together and helps provide real understanding.

4. Lower Court Decisions.

Mr. Murphy filed an application for an evidentiary hearing in his state post-conviction proceeding, which OCCA noted "must contain sufficient information" to show "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." *Murphy II*, 54 P.3d at 564.[48] OCCA then stated:

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[48] This Court held that a petitioner's IAC claim determined by the OCCA's Rule 3.11 (analogous to OCCA's Rule 9.7 applied here), was not owed deference because it did not "replicate the federal standard." *Wilson v. Workman*, 577 F.3d 1284, 1300 (10th Cir. 2009)(*en banc).* Shortly after *Wilson*, in a stroke of revisionist history, OCCA"clarified" the standard for granting a Rule 3.11 evidentiary hearing is not more onerous than the *Strickland* standard. *Simpson v. State,* 230 P.3d 888, 905-06 (Okla. Crim. App. 2010). Based on *Simpson*, a panel decision of this Court held denial of a request for an evidentiary hearing by OCCA "operates as an adjudication on the merits of the *Strickland* claim and is therefore entitled to

> Here, we find these affidavits and evidentiary materials do not contain **sufficient** information to show this Court by clear and convincing evidence that the materials sought to be introduced have or are likely to have support in law and fact to be relevant to Petitioner's ineffective assistance claims, i.e., that in the presentation of mitigating evidence counsel "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" or that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.
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> . . . the post-conviction affidavits and evidentiary materials do not demonstrate a failure by Petitioner's trial counsel to present mitigating evidence of a constitutionally deficient magnitude, as that in *Williams*.
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> . . . we cannot say, in accordance with *Williams*, that there was "a reasonable probability that the result of the sentencing proceeding would have been different" if competent counsel had presented the materials and explained their significance. In our opinion, Petitioner's trial and appellate counsels' performances did not constitute the denial of reasonably competent assistance of counsel under prevailing professional norms.

Id. at 564-65. *See also Murphy I,* 47 P.3d at 886-87.

The district court noted courts need not address both ineffective-assistance prongs. *Murphy*, 497 F. Supp. 2d at 1269. It repeatedly acknowledged the reality that

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deference under § 2254(d)(1)." *Lott v. Trammell*, 705 F.3d 1167, 1215 (10th Cir. 2013). However, based on the "law of the circuit" doctrine, *see, e.g., Gulf Power Co. v. Fed. Commc'ns Comm'n,* 226 F.3d 1220, 1224 (11th Cir. 2000), one panel of the Court cannot overrule circuit precedent. *See United States v. Walling*, 936 F.2d 469, 472 (10th Cir. 1991). Also, the situation here arose in 2002, many years before OCCA began its revisionary ways. Murphy's claim should be reviewed *de novo*.

OCCA's determination was founded on the prejudice prong. *Id*. at 1269, 1271.[49] The district court did the same.[50] Applying AEDPA, it concluded as follows:

> [T]his Court finds, based upon the record herein, that the Oklahoma court's decision regarding prejudice was not an unreasonable application of Supreme Court precedent to the facts of this case. Accordingly, Petitioner's claim for relief based on ineffective assistance of counsel is denied.

Id. at 1272.

5. Deficient Performance in All Aspects.

a. Introduction.

The OCCA barely referenced deficient performance, and only on its way to its prejudice determination. To the extent it spoke of performance, it was in terms of trial *presentation*, and whether counsel *presented* mitigation evidence of "constitutionally deficient magnitude." *Murphy II*, 54 P.3d at 564.[51]

However, counsel failed in all aspects of his performance. He failed to

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[49] Because OCCA's decision rested solely on prejudice, this Court reviews performance *de novo*. *See Rompilla v. Beard*, 545 U.S. 374, 390 (2005); *Wiggins v. Smith*, 539 U.S. 510, 542 (2003).

[50] The district court spoke skeptically regarding Murphy's deficient performance claim before calling his argument over deficient performance misplaced due to the prejudice-prong basis of OCCA's decision. *Murphy,* 497 F. Supp. 2d at 1270-71. The district court's skepticism is refuted in the next section, *infra*.

[51] The idea mitigation evidence can be quantified with a benchmark amount that makes counsel's assistance constitutionally effective or ineffective is unreasonable in itself, and portends an unreasonable understanding of *Strickland*.

investigate, prepare, and present readily available and compelling mitigation evidence which would likely have led to a different sentencing decision. Mr. Murphy's counsel also failed to use effectively the limited evidence he gathered.

Some background helps grasp the enormity of the deficient performance and how it happened. Mr. Murphy's lead trial counsel, James Bowen, worked at OIDS. In ten tumultuous months, Bowen tried four capital cases, and each client was sentenced to death. *See*, e.g., *Banks. v. State*, 43 P.3d 390 (Okla. Crim. App. 2002) (tried from September 20 to September 29, 1999); *Grant v. State*, 58 P.3d 783, 788 & n.2 (Okla. Crim. App. 2002) (tried from February 29 to March 14, 2000); *McElmurry v. State*, 60 P.3d 4 (Okla. Crim. App. 2002) (tried from June 12 to June 16, 2000). Murphy was third in that terrible sequence of trials. His trial started ***less than a month*** after John Grant's trial ended, and was conducted from April 10 to April 14, 2000.

These were extraordinarily unreasonable time constraints for capital trial preparation, no matter which version of Guideline 6.1 of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases is consulted. Capital cases are rich and complex, and there are no shortcuts. Time must be taken to develop a relationship with the client (and other key witnesses), and fully investigate and develop all possible lines of defense. It is altogether unsurprising, then, to learn that Bowen was found to be ineffective in the case he tried immediately prior to

Murphy's case by multiple jurists, multiple times, culminating in an uncontested determination by the district court and this Court that Bowen's performance was deficient. *Grant v. Trammell,* 727 F.3d 1006, 1018 (10th Cir. 2013); *Id.* at 1027-42 (Briscoe, J., concurring in part and dissenting in part).

All, in all, it was a "horrendous schedule," Doc. 33 at 27; *see also generally* Doc. 33 at 19-27. Bowen could not effectively investigate, much less prepare and present, the different areas of available mitigation evidence on behalf of Murphy, as he was required to do.

This law is well established:

> We have frequently stated, "In a capital case the attorney's duty to investigate ***all possible lines of defense*** is strictly observed". . . an attorney must have chosen not to present mitigating evidence after having investigated the defendant's background, and that choice must have been *reasonable* under the circumstances. . . . "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."

Stouffer v. Reynolds, 168 F.3d 1155, 1167-68 (10th Cir. 1999) (emphasis added and internal citations omitted). *See also, e.g., Fairchild v. Workman*, 579 F.3d 1134, 1146 (10th Cir. 2009). The "possible lines of defense" in Murphy's mitigation case, easily inquired into through basic mitigation investigative techniques, were badly neglected by ineffective counsel.

b. Failure to Investigate, Develop, and Present Mitigating Information About Mr. Murphy's Background, Life History, and Character.

Trial counsel Bowen presented some background information about Murphy, but "[t]he Supreme Court has squarely rejected the notion that, when counsel has '*some* information with respect to petitioner's background,' counsel has necessarily fulfilled his constitutional duty to investigate and present a case in mitigation." *Anderson v. Sirmons*, 476 F.3d 1131, 1145 (10th Cir. 2007) (quoting *Wiggins v. Smith*, 539 U.S. 510, 527 (2003) (emphasis in original)). In this case Bowen did not investigate all the key lines of mitigation under the time constraints he was under, and no one has suggested he investigated the usual leads, worked up the witnesses, and *then* made the bad decision not to use all the flattering and sympathetic testimony of Murphy's friends, co-workers, school officials, and relatives. That is simply not what happened.

Mr. Bowen's affidavit is self-serving,[52] but is revealing on this point and others. When advised by post-conviction counsel of all the compelling affidavit testimony from friends, classmates, and school officials, Mr. Bowen did *not* say he investigated

[52] Bowen was a far cry from the apocryphal defense attorney falling on his sword to help an old client. Instead, he was more like the real-world typical lawyer who is hesitant to admit any inadequacies. *Cannon v. Mullin*, 383 F.3d 1152, 1173 (10th Cir. 2004).

these key mitigation areas and then chose not to present them. He could not because he did not.[53] What he did was acknowledge the picture he presented was "inadequate," while vaguely placing the blame for this on his so-called "focus":

> I can acknowledge that we did not present an adequate picture of Mr. Murphy's violent and neglected home life, nor did we present witnesses who could have spoken of Patrick as a friend, a classmate, or a former student. . . . . My decision was to focus on his mental retardation and not present evidence that would possibly contradict, or call into question the fact that he was mentally retarded.

PC Ex. 14 at ¶11.

The fact is Bowen did not investigate these witnesses.[54] He did not investigate the usual, available lines of mitigation. This, in itself, is deficient performance. *Rompilla*, 545 U.S. at 383-90; *Porter v. McCollum*, 558 U.S. 30, 39-40 (2009); *Sears v. Upton*, 561 U.S. 945, 951-52 (2010); *Wiggins*, 539 U.S. at 523 (noting the question

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[53] Evidence shows Bowen did not investigate these prototypical mitigation areas/witnesses. *See, e.g.,* Doc. 34 at 4 and Doc. 65 at 10 for lengthy list of affiants who stated they were not contacted by the defense.

[54] In addition to not contacting prototypical mitigation witnesses, the few contacted were not properly engaged. *See, e.g.,* Doc. 34 at 4-5 and Doc. 65 at 10-11 for a description of affiants noting the defense explained nothing about the case and failed to learn what they could have contributed. Sister Angela Barrett is a good example, as she was barely talked to once, and the investigator never got out of his car. PC Ex. 7, ¶9. Her affidavit exemplifies how the district court did *not* strictly hold counsel to his duties as is required in a capital case. In its footnote four, it cited the affidavit as *supportive* of counsel's performance. *Murphy*, 497 F. Supp. 2d at 1270 n.4.

is whether "the investigation supporting counsel's decision . . . *was itself* reasonable"). In any event, Bowen's self-serving explanation of focusing on mental retardation does not hold water.

Mr. Bowen had no time to form a coherent pretrial strategy and reasonably choose his course. He did not have the benefit of Dr. Sharp's expert opinion on alcoholism until immediately before trial. Dr. Sharp did not interview Murphy until two weeks before trial. TR J. Tr. IV 900. Dr. Sharp's draft report, which made reference to mental retardation, was the first and only report alerting Bowen to issues of mental retardation, and was faxed to him at 21:07 (9:07 p.m.) on April 6, 2000, Thursday evening before the Monday start of trial. TR Df. Ex. 4. There was not enough time for a thorough and cogent theme regarding alcoholism *or* mental retardation.[55]

Moreover, mental retardation was not the focus of counsel's pre-trial strategy or theme, nor was it featured prominently in his presentation. It was not investigated,[56]

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[55] Bowen did not do *anything* ahead of time regarding second stage. Continuing-threat expert Jeanne Russell did not interview Murphy until shortly before trial, did not complete her report until the day before trial, and counsel did not receive her report until April 11, 2000, on the second day *after* trial had started. *See* fax line and content of TR St. Ex. 3. *See also* Doc. 33, Ex. G at ¶22.

[56] Basic mitigation work, like gathering school records and talking to school officials, was not done. Much was easily found later in preparing for Murphy's post-conviction *Atkins* hearing. *See, e.g.,* Proposition IV at 96.

and was not mentioned in opening or closing argument. It was discussed by Dr. Sharp only briefly and in the context of explaining why his testing of Murphy might reflect an artificially low IQ. TR J. Tr. 1290-96.

Bowen's after-the-fact statement he decided not to present evidence that would conflict with Murphy's intellectual impairment is unavailing, and not just because mental retardation was not a focus of his mitigation case. The conflict is nonexistent. A review of post-conviction affidavits reveals nothing that would affect the scientific factors considered in evaluating mild mental retardation. It would not have damaged his case for the jury to hear things like Murphy was once voted "most likeable," PC Ex. 8 ¶2, or that he is kind and good to his family. PC Ex. 7 ¶8.

Moreover, Murphy's sentencing in 2000 was not a post-*Atkins* situation where, *after careful investigation and evaluation of each witness*, it conceivably might have been sound strategy not to call a certain witness due to *Atkins*-related concerns. Here, the witnesses were not investigated and evaluated, no witness would have damaged Dr. Sharp's brief comments, and there was no set of factors to zealously strive for or protect in pursuit of a categorical capital sentence bar. Counsel would have known the witnesses were not averse to any theme or testimony by Dr. Sharp *had he investigated*. He did not.

Counsel's deficient performance involved more than just deficient investigation;

it also involved failures to explain, provide context, or otherwise prepare the few witnesses the defense did contact. *See, e.g.,* Doc. 34 at 4-5; Doc. 65 at 10-11. And the fiasco of the testimony of Patrick and his mother could have been remedied by getting to know them, and having some feel for the family situation from talking to other family members. Bowen was not just inartful, he did not come to know his client, his client's mother, or anything about their lives.

While there is some ambiguity and disagreement between the affidavits of the Murphys and Bowen on the issue of exactly how little Bowen prepared them for their sentencing testimony,[57] the proof is in the pudding. A review of their testimony tells the story of an unprepared attorney presenting two unprepared witnesses who did damage to the case. They did not even understand the concept of mitigation. The time-intensive but necessary development of trust, rapport, and communication was missing. As a result, facts were missed and understanding was lost.

In sum, there was no strategic decision to forego valuable mitigation evidence regarding Murphy's background, life history, and character – counsel simply did not investigate and therefore did not know what was available. *Hooper v. Mullin*, 314 F.3d 1162, 1170-71 (10th Cir. 2002) (finding failure to pursue reasonable avenues of

[57] This is another area that would have benefited by an evidentiary hearing pursuant OCCA's supposed lower threshold. See footnote 56.

investigation without any idea of what the investigation might reveal was not an informed strategic decision and required relief from death sentence); *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (finding "no strategic decision at all because [counsel] was ignorant of various other mitigation strategies he could have employed"); *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000) (finding failure to investigate life history information from family members and close acquaintances who were obvious and easily available sources of mitigation evidence was ineffective). Under *de novo* (or other) review, Bowen's performance must be found deficient.

c. Failure to Follow Red Flags and Effectively Investigate, Develop, and Present Brain Damage Evidence.

Mr. Bowen waited until the last minute before looking for mitigation experts. He did not have the benefit of Dr. Sharp's expert assessment until late Thursday evening before the Monday start of trial. TR Df. Ex. 4. That report recommended a neuro-psychological consultation "related to his poor impulse control and cognitive deficits." TR Df. Ex. 4. At the sentencing proceeding itself Dr. Sharp further noted his recommendation for a neurological exam, citing a need to gauge the seriousness of Murphy's brain damage. TR J. Tr. V 1297-98, 1310.

Effective counsel would not have waited until the last second. Effective counsel would have followed up on such important and obvious red flags. Trial counsel was

clearly not effective. Trial counsel did nothing.

Post-conviction counsel took heed of the repeated neuro-psychological requests and hired John R. Smith, M.D., who specialized in neurology and psychiatry. Dr. Smith found Murphy showed clear-cut signs of *organic brain damage*, which was characterized as a "severe brain defect." PC Ex. 16 at 4-5.

It is absolutely crucial, where supported by evidence (as it was here), to pursue recommended evaluations of a defendant because neuropsychological and psychiatric impairment are common among capital defendants. 1989 ABA Guidelines, 11.4.1 (D)(2)(C) (preparation for the sentencing phase of a capital case must include collecting information like medical histories, including mental heath/injury information); *id.* at 11.8.3 (preparation for the sentencing phase); *id*. at 11.8.6 (presentation of the sentencing case). *See also* 2003 ABA Guidelines, 4.1 (commentary).

While there were "plenty of 'red flags' pointing up a need" for a follow-through that would have uncovered severe brain damage, the follow-through sadly did not occur. *Rompilla,* 545 U.S. at 392; *see also Wiggins*, 539 U.S. at 524-27 (finding deficient performance for not carrying a mitigation investigation further given the leads available). As such, this Court "would be hard-pressed to conclude ... counsel was not constitutionally deficient in failing to follow up on the red flags." *Littlejohn*

v. Trammell, 704 F.3d 817, 863 (10th Cir. 2013).

The lower courts unreasonably propped up Bowen's performance through his own self-serving affidavit, albeit in reaching their decisions based on the prejudice prong. Again, however, a close reading of Bowen's affidavit reveals many questions and unreasonable determinations of fact derived therefrom. At the very least a close reading of that affidavit (and others) points to denial of a much-needed evidentiary hearing.[58] *See, e.g.* PC at 40 ("Murphy has made the 'clear and convincing' showing that this evidence is relevant ... for an evidentiary hearing").

There is so much the Bowen affidavit does not say, so many questions it presents. Why, for example, was Elizabeth Murphy questioned "on several occasions" regarding drinking during her pregnancy with Patrick if not for the fact that red flags abounded for the same? Why did Bowen discuss the absence of physical signs of FAE with Dr. Russell if not for the fact that red flags abounded for FAE? Why did he only discuss the absence of physical signs? When faced specifically with the affidavit of sister Amelia Gambler, who undisputedly lived with Elizabeth Murphy while she was pregnant, and who unequivocally swore Elizabeth Murphy badly abused alcohol while

[58] OCCA pointed to supposed evidentiary inconsistencies/weaknesses in the service of its prejudice-prong determination, discussed *infra*. The requisites were clearly met and the analysis of both prongs would benefit from a full evidentiary hearing on IAC.

pregnant with Patrick, why did Bowen only vaguely allude to questioning others about the matter?

Bowen stated had he known "the above information I would have developed it as much as possible and presented it in mitigation." PC Ex. 14, ¶9. But what Bowen did know was that he had a psychologist recommending a neuro-psychological evaluation to gauge the seriousness of Murphy's brain damage. Such an evaluation could have taken the ephemeral idea that drinking vaguely causes brain damage and transformed it into a diagnosis of severe brain damage. There were blazing red flags for further evaluation that Bowen should have developed but did not.

Considering the blaring red flags undeveloped by woefully unequipped and time-strapped counsel, the numerous unanswered questions raised by his affidavit, and the putative lower-than-*Strickland* standard applicable for granting evidentiary hearings, OCCA made the all-too-familiar decision to base its resolution of the claim on a flat prejudice-prong ruling. The prejudice adjudication, however, was badly flawed and unreasonable as well.

6. Prejudice.

Trial counsel failed to present the sympathetic evidence of Petitioner's abusive and deprived life circumstances, his severe organic brain damage, and his resilience and positive character traits. These types of powerful and compelling mitigation

evidence are of vital importance. *Sears,* 561 U.S. at 949 (involving frontal lobe damage); *Porter,* 558 U.S. at 41 (recognizing mental health/mental impairment and family background); *Rompilla*, 545 U.S. at 390-93 (discussing mental health issues and life history); *Wiggins*, 539 U.S. at 537 (involving excruciating life history); and *Williams*, 529 U.S. at 395-96 (recognizing "nightmarish childhood" and mental health issues).

The missed evidence of Murphy's "childhood deprivation" and "troubled history" alone are enough to satisfy the prejudice prong. *Wiggins,* 539 U.S. at 535. Combine that with "severe" brain deficits/defects, and the prejudice simply cannot be rationalized away. As this Court has stated numerous times:

> Evidence of organic mental deficits ranks among the most powerful types of mitigation evidence available. "Counsel in capital cases must explain to the jury why a defendant may have acted as he did—must connect the dots between, on the one hand, a defendant's *mental problems*, life circumstances, and personal history and, on the other, his commission of the crime in question."

Littlejohn, 704 F.3d at 864 (internal citations omitted).

OCCA's no-prejudice determination in this case was manifestly unreasonable, and based on unreasonable determinations of fact and law. Title 28 U.S.C. § 2254(d)(1) and (d)(2) are implicated.

The first basis OCCA presented for finding no prejudice went to the *quantity* of mitigating evidence presented, *i.e.*, that it was not "of a constitutionally deficient

magnitude." *Murphy II*, 54 P.3d at 564. OCCA vaguely noted the post-conviction materials "tell us more," but then rationalized "that will almost always be the case." *Id.*

In *Williams*, a lawyer who presented some mitigating evidence was deemed ineffective for not discovering and presenting more. 529 U.S. at 369 (noting counsel offered Williams's mother, two neighbors, and a taped excerpt from a statement by a psychiatrist). Neither the presentation of some mitigating evidence, or even the presentation of a "superficially reasonable mitigation theory" precludes relief. *Sears*, 561 U.S. at 954-55. Indeed, the Supreme Court noted in *Sears* it had recently granted relief in *Porter,* yet another instance where a facially credible mitigation case was presented but important elements were missed. 558 U.S. at 43. The Court emphasized *Porter* was a case where AEDPA deference applied so that the Court also had to, and did, find the state court determination unreasonable. *Sears*, 561 U.S. at 955. OCCA's reliance on the idea of a constitutionally sufficient magnitude of mitigating evidence being presented, and its straw man rationalization that post-conviction actions will always be able to present more, are unavailing. *See Murphy II,* 54 P.3d at 564.

Next, OCCA found the post-conviction evidence to be too conflicting. OCCA's sins in evaluating the evidence start small and build to an especially important unreasonable determination of fact.

OCCA takes the most limited and parsimonious view of the mitigation. The copious sympathetic and humanizing information about Murphy's life and characteristics are ignored; nothing negative can be said about it. OCCA only discussed the evidence surrounding the finding of the "severe brain disorder," i.e., FAS/FAE. *See, Id*. at 565 n.8.

As to the amount of drinking Elizabeth Murphy did while pregnant with Patrick, her process of becoming increasingly more candid about her drinking was understandable and explainable. As previously discussed, a review of her sentencing testimony reveals she did not have a clue about the sentencing process or the goals of mitigation. Moreover, paralleling trial counsel being "hesitant to raise his own trial adequacies," *Cannon,* 383 F.3d at 1173, so too might a mother be hesitant or unable to fully remember and fully grasp the amount of drinking she did while pregnant.

What she did acknowledge in her post-conviction affidavit was bad enough.[59] And, as noted, Ms. Murphy's sister presented a clear-eyed and believable account of

[59] Even one binge before realizing one is pregnant, or drinking two full beers a night while pregnant, can cause significant damage to the brain. *See, e.g.,* http://www.nofas.org/light-drinking which contains a wealth of information about the dangers of even very light drinking. Among the nuggets: "The vast majority (over 85%) of children with damage from prenatal alcohol exposure have no physical birth defects, only cognitive and/or behavioral consequences," and "[o]f all the substances of abuse (including cocaine, heroin, and marijuana), alcohol produces by far the most serious neurobehavioral effects in the fetus."

Ms. Murphy's true dependence on and abuse of alcohol while pregnant with Patrick. Moreover, it was in perfect keeping with the alcohol-drenched atmosphere described by all when it came to the Murphy household.

Some conflict is inevitable, and the conflicting information was known to the expert on the issue, Dr. Smith. What is important is that the evidence of Ms. Murphy's drinking while pregnant would have contributed to an undermining of confidence in the death sentence rendered in Murphy's case.

Where OCCA went the farthest astray was in trying to cast aspersions on Dr. Smith's expert opinion. First, OCCA noted a sentence in Bowen's self-serving affidavit where he discussed the absence of facial deformity characteristics of Fetal Alcohol Syndrome (FAS) with his risk-assessment expert, after she saw Murphy a few days before trial was to begin. Again, what is more illuminating from Bowen's affidavit is what he does not say. He does not say whether they discussed all the symptoms/characteristics/red flags for FAS/FAE that were obviously in existence, he does not say whether they discussed the fact the vast majority (over 85%) of children with damage from prenatal alcohol exposure have no physical birth defects, and he does not say whether they knew this or whether Russell had expertise or was qualified in any way to advise counsel about FAS/FAE.

The fact is Dr. Russell was a basic psychologist trained to do risk assessments.

She certainly could not and did not conduct the repeatedly-recommended neuro-psychological consultation "related to his poor impulse control and cognitive deficits" which was proposed to determine the extent of his brain damage. TR Df. Ex. 4.

Instead of crediting the last-second, drive-by discussion of no facial deformities, OCCA (and the district court) should have credited the trained neuro-psychological consultation. OCCA did the opposite and in the process made unreasonable factual determinations about that consultation while ignoring Dr. Smith's expertise. One unreasonable determination of fact was that Dr. Smith made his diagnosis based on the "contradictory evidence and nothing more." 54 P.3d at 565, n.8. To the contrary, Dr. Smith used his vast expert knowledge and experience as a board-certified *psychiatrist* specializing in neurology. PC Ex. 16, affidavit of John R. Smith, M.D. Moreover, contrary to OCCA's factual determination, he specifically used his expertise *in his evaluation of Mr. Murphy,* and that evaluation pointed strongly to FAS/FAE:

> From the mental status examination, he shows difficulty in comprehension. He has very low abstracting skills. He is very concrete in his thinking and answers. All of these characteristics are in keeping with someone with an Organic Brain Dysfunction, such as Fetal Alcohol Syndrome/Fetal Alcohol Effect Syndrome. The brain dysfunction is the same. The latter does not show the facial abnormalities of the former.

PC Ex. 16 at 3. This scientific expertise, and *application* of expertise to the facts as shown through Murphy's examination, destroys OCCA's erroneous diminution of the evidence. Dr. Smith also said:

> To quote further from Dr. Bianco's neuropsychological examination,[60] "It is likely alcohol intoxication even to a relatively mild degree might likely impair Mr. Murphy's judgment and ability to problem solve and inhibit inappropriate responses to various situations." Even a small amount of intoxication would make him much more vulnerable to these factors than the average person.
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> It is *clear* . . . that this patient, in fact, has a severe brain disorder . . . That impairment is Fetal Alcohol Syndrome/Fetal Alcohol Effect Syndrome.
>
> . . .
>
> It is *clear* that he suffered, severely, all of his life. . . . There is certainly difficulty in problem solving and the disinhibition in relationship to strong emotions that are frequently seen in people with FAS. The FAS/FAE qualifies as a severe brain defect, which seriously affected his functioning.

PC Ex. 16 at 4-5 (emphasis added).

This undeniably compelling evidence was unreasonably discounted by OCCA and ignored by the district court. It is of special import for multiple reasons. First, brain damage in and of itself, (and even more so "clear" brain damage existing through no fault of the defendant) is the absolute zenith of valuable mitigation evidence. For example:

> Evidence of organic brain damage is something that we and other courts, including the Supreme Court, have found to have a powerful mitigating effect . . . the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability,

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[60] Neuropsychologist Faust Bianco's examination was presented to OCCA on direct appeal, another strike against OCCA's unreasonable determination that Dr. Smith's opinion came only from "this contradictory evidence." *Murphy II*, 54 P.3d at 565 n.8.

altering the causal relationship between impulse and action.

Hooks v. Workman, 689 F.3d 1148, 1205 (10th Cir. 2012).

This is more than just an important diagnosis or a powerful category of evidence. It is revelatory. Dr. Smith connected the dots and explained the evidence's importance, linking Murphy's severe brain disorder to his chemical dependence on alcohol and extreme drunkenness at the time of the crime.

The effect is undeniably powerful. It underscores there was something physically damaged in Murphy's brain from birth, and there is nothing which garners more sympathy from jurors. *Smith,* 379 F.3d at 943. The prejudice in this case is manifest, and OCCA's and district court's decisions were unreasonable on multiple fronts.

The State always points to disturbing details of the crime in response, but any notion that the death penalty is somehow foreordained, even in very highly aggravated capital cases, has been rejected by the Supreme Court. For example, Terry Williams was found to have suffered prejudice although he engaged in the brutal murder of a friend for a few dollars; although considerable additional aggravating evidence had been presented against him, including vicious assaults of elderly individuals so severe they left one victim in a vegetative state; and despite well supported expert testimony he was a continuing threat. *Williams*, 529 U.S. at 367-69, 399.

The analytical approach in *Williams* is consistent with *Strickland*'s formulation of the prejudice test. *Strickland*, 466 U.S. at 693-95. *Strickland* does not require proof of prejudice beyond a reasonable doubt, by clear and convincing evidence, or even by a preponderance of the evidence. *Id*. at 695 (rejecting these evidentiary tests as too stringent). The "reasonable probability" test is a standard that distinguishes between errors that are insignificant and those that reasonably may have made a difference. Whenever confidence in the outcome is undermined, prejudice is established. *Id.* at 694. And in Oklahoma it only takes one juror. *Wiggins,* 539 U.S. at 537.

One or more jurors *easily* could have been swayed after getting information about the deprived and sympathetic context to Murphy's life, and finding out about Murphy's severe brain defect affirmatively linked to the circumstances of the crime. To say Mr. Bowen's ineffectiveness does not undermine confidence in the outcome of Murphy's sentencing is to deny the very concept of mitigation evidence; it is to deny a whole body of jurisprudence. The Writ must issue accordingly.

PROPOSITION VI

Insufficient Evidence Exists to Support of the Especially Heinous Atrocious or Cruel Aggravating Circumstance and Due, in Part to a Flawed Jury Instruction, Subsequently Repaired, No Fact Finder Found the Core Requisite of this Aggravating Circumstance.

A. Where Claim Was Raised.

This claim was raised in Murphy's First Amended Petition. Doc. 33 at 45-55

(CIV-03-443).[61] The district court denied relief. *Murphy*, 497 F. Supp. 2d at 1274.

B. Argument and Authorities.

1. Introduction and Preliminary Facts.

Before a sentence of death can be handed down in Oklahoma, the prosecution must allege and prove beyond a reasonable doubt the existence of one or more aggravating factors, and that those found outweigh the mitigating circumstances. OKLA. STAT. tit. 21, § 701.11. In this case, the prosecution alleged two aggravating factors: that the murder was especially "heinous, atrocious, or cruel" ("H.A.C.") and that there existed the possibility the defendant "will commit criminal acts of violence that would constitute a continuing threat to society." TR OR 310-15.

The jury was given only this definition of the H.A.C. aggravating circumstance:

> INSTRUCTION NUMBER 4
>
> As used in these instructions, the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.
>
> The phrase "especially heinous, atrocious, or cruel" is directed to those crimes where the death of the victim was preceded by torture of the victim or serious physical abuse.

TR OR 404.

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[61] The claim was incorporated into the Second Amended Petition. Doc. 54 at 1.

In a case like Murphy's, where reliance is on the serious physical abuse prong of the aggravator, conscious suffering of the victim is the *sine qua non* of this aggravating circumstance. *See Derosa v. State*, 89 P.3d 1124, 1156 (Okla. Crim. App. 2004); *Spears v. State*, 900 P.2d 431, 443 (Okla. Crim. App. 1995) (describing "conscious during the beating" as the "critical inquiry in determining whether a murder was especially heinous, atrocious or cruel"). Yet, the jury was not so instructed.

The jury found the both aggravating factors, that they outweighed the mitigating factors, and fixed Murphy's punishment at death. TR OR 420-21.

On direct appeal Murphy claimed there was insufficient evidence as a matter of law to support the H.A.C. aggravating circumstance. Further, Murphy claimed that the jury instructions inadequately informed the jury of findings it must make to support the aggravator. *Murphy I*, 47 P.3d at 883-84 (rejecting "*de novo* review claim" and instructional definition claim).

The OCCA did not disagree that the jury must find conscious suffering of pain to support the H.A.C. aggravator. Implicitly recognizing the issue was conscious suffering, that is precisely the question – indeed the only question – it examined under the sufficient evidence standard. *Id*. at 884. As noted, however, the court rejected proposed *de novo* review, and instead looked at the evidence in the light most

favorable to the prosecution. *Id*. at 883. On that basis, the court concluded there was sufficient evidence to support the jury's findings. *Id*. The court then peremptorily rejected the contention that the jury instructions, which fail to require a finding of conscious suffering of pain, were erroneous. *Id*. at 884.

Judge Chapel, dissenting in part, would have modified the sentence to life without parole:

> I would vacate and modify the sentence to life without parole because the heinous, atrocious or cruel aggravator should be stricken for insufficient evidence leaving only the continuing threat aggravator. I would not attempt to reweigh the evidence under the circumstances of this case because I do not believe that an appellate court could reasonably conclude that the jury would have imposed the death sentence if it had not considered the heinous, atrocious, or cruel aggravator.

Id. at 888. That was the reasonable result.

Subsequently, as discussed below, OCCA amended the jury instruction to reveal the conscious suffering requisite to juries going forward. Murphy never received the benefit of this instruction. His jury was in the dark as to what was required.

With evidence of conscious suffering quite weak at best, and the medical examiner unable to definitively say whether the decedent remained conscious, no fact finder ever determined the decedent consciously suffered as required for a proper finding. The foundation for Murphy's death sentence is thus built on quicksand.

2. Some Illuminating History.

While the instant claim is not premised primarily on a void for vagueness theory, the troubled past of Oklahoma's H.A.C. aggravating circumstance is worth noting. This Court once held that this aggravator failed to perform the narrowing mandated by the Eighth and Fourteenth Amendments. *Cartwright v. Maynard*, 822 F.2d 1477, 1478-79 (10th Cir. 1987) (en banc) (holding the aggravator to be unconstitutionally vague), *aff'd*, 486 U.S. 356 (1988). Oklahoma subsequently narrowed the application of the aggravator to cases involving torture or serious physical abuse. *Stouffer v. State*, 742 P.2d 562, 563 (Okla. Crim. App. 1987). Oklahoma has defined torture as the infliction of great physical anguish or extreme mental cruelty and physical abuse that requires evidence of conscious physical suffering. *Cheney v. State*, 909 P.2d 74, 80 (Okla. Crim. App. 1995). Not only is conscious suffering required but "conscious suffering of more than the brief duration necessarily accompanying virtually all murders." *Medlock v. Ward*, 200 F.3d 1314, 1324 (10th Cir. 2000) (Lucero, J., concurring).[62]

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[62] While this Court has accepted the aggravator as narrowed since *Maynard*, the Court also questions from time to time whether the circumstance has returned or is returning to its vague and unmoored historical roots. *See, e.g.*, *Romano v. Gibson,* 239 F.3d 1156, 1176-77 (10th Cir. 2001) (noting "Oklahoma cases . . . have begun to blur the common understanding of the requisite torture and conscious serious physical suffering, more and more often finding the existence of these elements in almost every murder"); *Thomas v. Gibson*, 218 F.3d 1213, 1227-29 (10th Cir. 2000);

3. Paucity of Evidence.

The evidence here does not describe a conscious suffering death. The medical examiner could not say that Mr. Jacobs was conscious. TR J. Tr. III 774. OSBI criminalist confirmed the medical examiner's findings that there were no defensive wounds on Jacobs. TR J. Tr. III 767; TR J. Tr. II 464. No one testified Jacobs spoke during the attack which ended his life. Indeed, as the following exchanges demonstrate, Murphy stated repeatedly in his OSBI interview Jacobs *had not talked*.

> Jones: Was he talking?
>
> Murphy: *No*. His, his breathing, his stomach. And we, we both, me and Mark was sitting there. He was still breathing. He's sayin oh – that was it. . . .

TR M. Tr. 4/6/2000 Ex. 2 (Post-Arrest Statement Patrick Murphy Aug. 29, 1999) at 108 (emphasis added).

Later in that same interview, Murphy confirmed Jacobs was not talking and simply repeated the agent's prompting - by saying that all Jacobs did was groan:

> Jones: Did he, he say anything or just groan?
>
> Murphy: Just groan.

Id. at 141. Mr. Sumka, a witness to most of the event, testified Jacobs said nothing. TR J. Tr. III 601.

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and *Medlock*.

The medical examiner testified further that:

- the victim's condition was *not* inconsistent with being unconscious throughout the attack TR J. Tr. III 778;
- there was a relatively short time between the onset of injuries and death (TR J. Tr. III 771;
- the victim's post-mortem blood alcohol level was .23%, and the alcohol content of his ocular vitreous fluid was .29%, making him significantly intoxicated TR J. Tr. III 761, 765-66.

4. Flawed Instruction Begets Flawed Analysis.

a. Belated Remedy Illuminates the Problem.

As noted, it cannot be implied Murphy's jury found he consciously suffered because it was not asked to make such assessment. Rather it was left blind as to the core requisite of the aggravating circumstance it was to decide upon. After this glaring deficiency was inflicted on Murphy, and after unconstitutionally and unreasonably affirming his condemnation to death, OCCA made a belated effort to repair the deficiency.

In 2004 OCCA decided, henceforth, juries must be specifically instructed on the element of conscious suffering of pain. *DeRosa*, 89 P.3d at 1156. Instead of the instruction Murphy's jury received, telling them only that the phrase "'especially heinous, atrocious, or cruel' is directed to those crimes where the death of the victim

was preceded by torture of the victim or serious physical abuse,"[63] jurors are now informed, in pertinent part:

> You are instructed that the term "torture" means the infliction of either great physical anguish or extreme mental cruelty. You are further instructed that you cannot find that "serious physical abuse" or "great physical anguish" occurred ***unless you also find*** that the victim experienced ***conscious physical suffering*** prior to his/her death.

Id. at 1156 (emphasis added). The OCCA promulgated the new uniform jury instruction because it agreed with Oklahoma the change was warranted in light of *Ring v. Arizona*, 536 U.S. 584, 589 (2002)[64] which requires the jury pass on any fact which increases a maximum punishment. *DeRosa*, 89 P.3d at 1155-57 n.162.

Considering the constitutional adequacy of a capital sentencing instruction in *Mills v. Maryland*, 486 U.S. 367 (1988) the Supreme Court held: "*We can and do infer from . . . changes [in jury instructions that there is] at least some concern on the part of [the state] court that juries could misunderstand the previous instructions . . . .*" *Id*. at 382 (emphasis added). The same must be said here. Murphy's jury instructions were not clear, did not require a jury finding on the requisite of conscious suffering, and were therefore constitutionally deficient.

In an obvious effort to protect death sentences issued prior to the needed

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[63] *See* TR OR 404 (Jury Instruction No. 4, Penalty Phase).

[64] *Ring* stemmed from *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

revision, OCCA expressly stated that their new instruction revealing the conscious suffering requirement "should not be interpreted as a ruling that the former uniform instruction was legally inaccurate or inadequate." *DeRosa,* 89 P.3d at 1156.[65] However, OCCA added this telling admission: "Rather, [the new instruction] is intended to more fully inform the jury regarding the findings that must be made in order to properly apply the aggravator and ensure a jury determination is made regarding each of these findings." *Id*. Here, the jury was not informed whatsoever of the conscious suffering "finding[] that must be made in order to properly apply the aggravator." *Id*. Nor was a jury determination made as to that critical, but hidden, question.

In *Mills*, actions spoke louder than words of constitutional assurance like those OCCA uttered here before admitting the repair was needed to properly inform sentencing jurors. Prior to *Mills* reaching the Supreme Court, the Maryland Court of Appeals had found the instruction and verdict form in that case constitutionally sound. 486 U.S. at 371-72. The Supreme Court even found the Maryland court's assessment "plausible." *Id*. at 377. Yet, the Maryland court's plausible assessment did not stop the Supreme Court from drawing a very different inference from the subsequent repair

[65] The OCCA found DeRosa was not prejudiced because a similar and "actually more demanding" instruction on conscious suffering was given in his case. *DeRosa*, 89 P.3d at 1157.

of the claimed constitutional problem.

Here, OCCA's actions also speak far louder than its passing endorsement of the instruction as constitutionally sound. The Supreme Court has accorded little credit and no control to state court labeling that may evade constitutional requirements. *See Ring,* 536 U.S. at 602. The correct label is one OCCA also placed: the change was necessary to inform sentencing jurors of the findings needed to apply this aggravating circumstance.

As the new uniform instructions make clear (in the absence of mental cruelty which was not alleged in this case) proof of conscious suffering is required. *DeRosa*, 89 P.3d at 1156 (holding new instruction does not change the legal requirements as they have "existed up until this time"). Serious physical abuse requires proof of conscious suffering. *Id*. To sustain this verdict, we must know that the jury found conscious suffering – and, again, the problem is that this jury was never asked to make that finding. Nor, as noted, did OCCA make it, even if that were allowed under *Ring* (it is not). The OCCA's reliance on a jury finding that was never made due to instructional failure, as OCCA subsequently admitted, was patently unreasonable. The OCCA's determination was contrary to and an unreasonable application of clearly established federal law, both factually and legally.

b. Additional Dimensions of the Violation.

The Supreme Court requires that where the jury is the final sentencer, the jury must be informed of "all facets of the sentencing process." *Walton v. Arizona*, 497 U.S. 639, 653 (1990), overruled in part by *Ring*, 536 U.S. at 598 (requiring jury sentencing in all capital cases); *Mills*, 486 U.S. at 377 n.10 (requiring proper sentencing instructions). A jury must also make the determination of all the factors which enhance a sentence. *Apprendi*, 530 U.S. at 490. Here, despite its presence as an integral element of the H.A.C. aggravator, the jury never found that Jacobs consciously suffered. Indeed, neither did OCCA as it relied on a phantom jury finding in conducting its sufficiency analysis. Murphy's basic due process rights and rights to a fair trial and reliable capital sentencing proceeding were thus violated. *See Spears v. Mullin*, 343 F.3d 1215, 1258-59 (10th Cir. 2003) (Hartz, J., concurring). To the extent conscious suffering is part of the Eighth Amendment narrowing of the aggravating circumstance, as it appears to be, the failure to inform is also an Eighth Amendment narrowing violation. *See supra* discussion under Some Illuminating History. The OCCA's ruling was contrary to and an unreasonable application of law, factually and legally.

Mr. Murphy was also entitled, pursuant to state law, to a fair jury determination of the H.A.C. aggravating circumstance. OKLA. STAT. tit. 21, § 701.11. The Oklahoma

law entitlement created a liberty interest within the protection of the Fourteenth Amendment. *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). Oklahoma interfered with the sentencing process by hiding a core aspect of the capital sentencing calculus from the jury, in this case, the need for a finding of conscious suffering of pain. Accordingly, Oklahoma also violated, and violated unreasonably, Murphy's liberty interest in jury sentencing, just as it did in Mr. Hicks's case in 1980.

Finally, even under *Lewis v. Jeffers*, 497 U.S. 764 (1990), absent the instructional failure and OCCA's application of a standard inadequate to the circumstances, OCCA erred in finding the weak evidence before it in this scenario sufficient. *See supra*, Paucity of Evidence. In the face of this evidence, OCCA had to engage in rank speculation about the murder which has been expressly rejected as impermissible in *Thomas v. Gibson*, 218 F.3d at 1228 n.17 & 1227.

5. Judge Hartz's Guidance from *Spears*.

Judge Hartz summed up the fundamental constitutional problem succinctly in his concurrence in *Spears*.

> The function of a criminal trial is not simply for the prosecution to put on enough evidence that a jury *could* find the defendant guilty. The jury has a role to play. The prosecution's evidence counts for naught unless the jury is convinced by it. People do not go to jail because the prosecution presented enough evidence. They go to jail because their juries, after reviewing the evidence, find guilt beyond a reasonable doubt.
>
> *Likewise, people are not executed simply because the prosecution put on*

> *enough evidence to justify the death penalty. They can be executed only if the appropriate decision maker finds the necessary factual predicates for the death penalty.*

Spears, 343 F.3d at 1258 (emphasis added) (finding further that, as the term "conscious suffering" appears nowhere in the jury instructions, it cannot be concluded that the "jury found conscious suffering"). In *Spears*, as here:

> the evidence at trial could readily support the conclusion that the victim suffered serious physical abuse (a severe beating and. . . some [knife] wounds) before death (as required by the instruction) but after having lost consciousness. Thus, in light of the instructions given here, a verdict that the crime was 'especially heinous, atrocious, or cruel' does not necessarily imply a finding of conscious suffering.

Id. at 1258-59 (explanation added).

As Judge Hartz concluded:

> The issue here is not a technicality. Nothing is more central to our system of justice than having a factfinder decide the facts. It is not for this court to decide whether Spears and Powell deserve the death penalty. But we must reverse their sentences when no one has made the findings required by Oklahoma law.

Id. at 1259. Judge Hartz concurred in result and said he would set aside the death penalties of the petitioners in *Spears* "because no state decisionmaker – jury or judge – has found that the victim consciously suffered while being murdered." *Id*. at 1256-57. The same analysis applies here.

6. The District Court Opinion.

With respect to the sufficiency of the evidence for the H.A.C. circumstance, the

district court said OCCA's determination there was sufficient evidence for a jury to find the circumstance was not an unreasonable determination of fact pursuant 28 U.S.C. § 2254(d)(2). However, as noted, that alleged factual determination of sufficient evidence did not have a reasonable premise (factual or legal) because the jury did not make and could not have made the requisite finding of conscious suffering. Put differently, regardless of the sufficiency of the evidence, no fact finder has ever faced squarely, and never answered, the key question: whether the decedent consciously suffered. The district court's reliance on OCCA is built on OCCA's reliance on the jury, and the jury did not even know it was to assess the core conscious suffering question. This logical tower is without foundation and must fall.

The district court applied *Jeffers*, 497 U.S. at 782 to the sufficiency question. Doc. 71 at 19-20. *Jeffers* essentially imports the "rational fact finder" test from *Jackson v. Virginia*, 443 U.S. 307 (1979), into the finding of aggravating circumstances, asking whether viewed in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jeffers*, 497 U.S. at 781.

However, in both *Jeffers* and *Jackson* there was no question that the existence of the requisite facts had been found. *Jackson*, 443 U.S. at 309-11 (observing that in a "bench trial" the "trial judge, declaring himself convinced beyond a reasonable doubt

that the petitioner had committed first degree murder, found him guilty of that offense"); *Jeffers*, 497 U.S. at 770-71 (Arizona Supreme Court independently applying requisite factors determined that "remarks made by [respondent], while at the same time beating his victim, establish" aggravating circumstance).[66] *Jackson*, then *Jeffers,* recognized such a finding under the requisite standard is a first-order requirement of the Constitution per, *inter alia*, *In re Winship*, 397 U.S. 358 (1970). *Jackson*, 443 U.S. at 316-18 (discussing *Winship* guarantee then noting "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt," noting inquiry extends beyond whether the jury properly instructed);[67] *Jeffers,* 497 U.S. at 781-82 (noting "standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts"). The *Jackson/Jeffers* sufficiency test represents a second order safety net to further insure the evidence was sufficient and guard against a rogue finding on inadequate evidence.

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[66] The Arizona Court also independently determined cruelty was not established because a requirement of conscious suffering was not met. *Id.* at 770.

[67] Interestingly, *Jackson* actually expanded somewhat constitutional protections in that it endorsed a second tier test stricter than the no evidence test applied by the Court of Appeals. *Id*. at 320.

Judge Hartz correctly observed something the district court missed - something this case shares with *Spears*:

> [T]here is a critical difference between *Lewis* and the cases now on appeal. In *Lewis* the Court was reviewing 'the Arizona Supreme Court's *finding* that respondent had relished the killing [and]. . . . that respondent had inflicted gratuitous violence.' *Id*. at 783-84, 100 S.Ct. 3092 (emphasis added). Thus, an appropriate decision maker in that case had already made the requisite findings, something not done here.

343 F.3d at 1259 (Hartz, concurring) (emphasis in original).[68] This egregious constitutional misstep was made by both the district court and by OCCA when it blithely conducted deferential review of a non-existent finding.

Perhaps a jury facing the core conscious suffering question would have found the requisite suffering present based on the thin evidence - much more likely not, given the unanimity requirement. The OCCA, in pursuit only of the sufficiency question, noted some evidence the decedent groaned or said the indistinct, "oh." *Murphy I*, 47 P.3d at 883. The OCCA noted blood was on the decedent's shoes so he may have been "upright at one point." *Id*. On the other hand, as discussed, there were no defensive wounds whatsoever and no one heard the decedent cry out for help or

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[68] For the same reason, Judge Hartz rejected the applicability of this Court's treatment of the conscious suffering requirement in *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999) as restating *Lewis* and starting from the "assumption that the state court had found the factual predicates for the aggravating circumstance . . . " *Id*. at 1259. Of course, it is also true that, since *Moore*, OCCA has further illuminated the problem through its explicit and implicit admissions in *DeRosa*.

make any articulate protest.[69] A mere possibility of conscious suffering can hardly matter here where no one has made the determination. The ready plausibility that conscious suffering was unproven is deeply troubling given that it leaves Murphy headed for execution without a proper determination he is eligible for same.

The district court also said this Court has previously ruled the aggravating circumstance is narrow enough to meet constitutional standards. Doc. 71 at 25, citing *Workman v. Mullin*, 342 F.3d 1100, 1115-16 (10th Cir. 2003) (finding aggravator adequately narrows class of murderers eligible for the death penalty). But the present challenge is focused on failure to inform jurors of the core requisite of conscious suffering and absence of a finding thereof, whether or not the circumstance is constitutionally narrowed. Certainly, if and to the extent the aggravator fails to narrow the class of individuals eligible for the death penalty as required e.g. by *Maynard*, that would be a separate violation. Whether or not Oklahoma is violating the narrowing requirement, it is violating *Mills*, *In re Winship*, and the other Due Process and Eighth Amendment reliability concerns expressed here and by Judge Hartz. Even if this capital sentence does not violate the Constitution in one way, it may and does violate it in these other ways. Judge Hartz also observed that more than the narrowing requirement was in play in a case such as this. *Spears*, 343 F.3d at 1259. The district

[69] The OCCA unreasonably ignored or discounted these non-speculative facts.

court erred in this respect as well.

C. Conclusion.

There is, in sum, insufficient evidence to support the H.A.C. aggravating factor. Even if there had been sufficient evidence to support the submission of this aggravator to the jury, the instructions on this aggravator were so flawed as to deny Murphy his constitutional rights. The jury was not required to find, among other things, that the victim had consciously suffered pain – a finding which OCCA acknowledges is required to support the aggravator. Oklahoma's use of the H.A.C. aggravator violated Murphy's Sixth, Eighth and Fourteenth Amendment rights. The OCCA acted contrary to, and unreasonably applied, clearly established federal law as well as unreasonably assessed facts in light of the evidence presented at trial. Accordingly, this Court should reverse with directions to grant the Writ.

PROPOSITION VII

The District Court Erred in Denying Relief Concerning the Failure to Provide Adequate Information on the Life Without the Possibility of Parole Sentencing Option.

A. Where Claim Was Raised.

This claim was raised in Murphy's First Amended Petition. Doc. 33 at 72-75

(CIV-03-443).[70] The district court denied relief. *Murphy*, 497 F. Supp. 2d at 1283-84.

B. Argument.

Prior to trial, Murphy filed a Motion to Allow Evidence of Life Without the Possibility of Parole (LWOP). TR OR 175. Counsel argued he was asking the jury to be informed by both the court and attorneys that "life without parole simply means life without parole, that you never come up for parole." TR M. Tr. 2/24/2000 at 34. The Motion was denied with the exception that argument would be allowed on LWOP's meaning. *Id*. at 35.

Mr. Murphy's jury was instructed the possible sentences were life, LWOP, or death. TR OR 401. Murphy was alleged to be a continuing threat. TR OR 402. The court provided no further instruction as to the meaning or effect of the LWOP sentence and allowed no evidence.

1. The Constitutional Violation.

The Supreme Court has thrice emphasized existence of a true life without parole option must be conveyed to sentencing jurors. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), *Shafer v. South Carolina,* 532 U.S. 36 (2001), and *Kelly v. South Carolina*, 534 U.S. 246 (2002), the Court held that jurors must know if they have a

[70] The claim was raised in the initial petition and also incorporated into the Second Amended Petition. Doc. 54 at 1.

sentencing option that will keep a convicted murderer from ever being paroled to the streets. In *Simmons* South Carolina had a life sentence option, but no parole could be had from that sentence. 512 U.S. at 158. The Court observed that failing to inform jurors of the unavailability of parole inherent in that sentencing option violated the Constitution.

This Court has observed the core principle found in *Simmons* and *Shafer* is avoidance of a "false choice" between sentencing a defendant to death and a sentence from which he is due to be, or may be, paroled. *Johnson v. Gibson,* 254 F.3d 1155, 1166 (10th Cir. 2001) ("*Simmons* rests upon eliminating a jury's misunderstanding" so that a jury will not perceive a false choice between death and only a limited period of incarceration); *see also Id.* at 1167-68 (Henry, J., concurring); *Mayes v. Gibson*, 210 F.3d at 1294 (describing false choice and noting *Simmons* requirement that jury be "notified" of parole ineligibility). If, in fact, the jury has a sentencing option that renders the defendant parole-ineligible, the clarity of that option is essential to avoid such a false choice.

Effective parole limitations matter in the capital sentencing calculus. Four Supreme Court Justices have said the Constitution requires information about even lesser limitations on parole be presented to a capital sentencing jury. *Brown v. Texas*, 522 U.S. 940 (1997) (opinion respecting denial of certiorari). *Brown* suggests the

Simmons rule might require admission of evidence to show a defendant's parole prospects were limited, a defendant was ineligible for parole for a certain period of time, and that people become less dangerous over time. *Brown* cites a number of studies indicating that the number of potential jurors who view non-death sentencing options as appropriate increases dramatically when there are limitations on parole, even if parole is not eliminated completely as a future possibility.

The Court's false choice and accurate sentencing information concerns are multiplied by twelve when one considers all twelve capital sentencing jurors must agree on a death sentence. This Court noted this important sentencing reality exists in Oklahoma. *Castro v. Oklahoma*, 71 F.3d 1502, 1516 (10th Cir. 1995), and the Supreme Court confirmed it was a critical consideration in *Wiggins*, 539 U.S. at 537. Thus, the misunderstanding of one or more jurors is very likely to be an outcome-critical misunderstanding.

Finally, the Supreme Court's emphasis on what the jury understands is important. In *Shafer*, the Supreme Court focused on what was actually "conveyed" to the sentencing jury. 532 U.S. at 54. *Shafer* also says the jury must "be informed." *Id*. at 51. In 2002, the Supreme Court decided *Kelly*, the third case in the LWOP trilogy. In *Kelly*, as in the preceding cases, the Supreme Court found it "significant that [d]isplacement of 'the longstanding practice of parole availability' remains a relatively

recent development, and 'common sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole.'" *Kelly*, 534 U.S. 246, 257 (2002). *Kelly* re-emphasized the point made in *Shafer* that it was necessary to "convey a clear understanding" to the jury. *Id*. The Court found this necessary and wanting in *Kelly* even though, as here, no note was sent out evidencing juror confusion. *Id.* at 256.

The OCCA has determined, subsequent to Murphy's case, "the situation we face in Oklahoma is that a fair number of jurors do not comprehend the plain meaning of the life imprisonment without the possibility of parole sentencing option and question whether the offender is truly parole ineligible." *Littlejohn v. State*, 85 P.3d 287, 293 (Okla. Crim. App. 2004).[71] The OCCA's concern arose although Oklahoma has a sentence denominated as life and one denominated as LWOP. *Id.* at 293. The OCCA finally admitted in *Littlejohn* that historical experience in "case after case" with jury notes "casts at least some doubt on our premise that the punishment options are self-explanatory." *Id*. Hence came OCCA's recognition and fact finding recognizing belatedly the "situation" of juror confusion "we face in Oklahoma." *Id*. The OCCA's

[71] The OCCA's finding is consistent with what researchers learn in capital juror interviews. For example, one in five California capital jurors actually believe a defendant sentenced to life without parole will not be released. William J. Bowers and Benjamin J. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605, 696 (1999).

finding in *Littlejohn* means that *Simmons* violations have been routinely occurring in Oklahoma capital cases. This epidemic of juror confusion concerning the most potentially attractive alternative to the death penalty has a cause; one identified by the Supreme Court and, belatedly by OCCA, *viz*. the long history of parole in this country. *Kelly*, 534 U.S. at 257; *Littlejohn*, 85 P.3d at 293.

This Court has previously looked at this problem area in the context of jury notes and responses thereto. This Court granted relief when the trial court affirmatively misdirected the jury about the option in response to a note. *See e.g. Johnson,* 254 F.3d at 1165-67. However, the Court withheld relief in cases where the trial court did not add to the confusion, believing, contrary to OCCA's well-experienced revelation in *Littlejohn*, that the meaning of the options could be conveyed by the labels attached to them. *See e.g., Mayes*, 210 F.3d at 1294. In Littlejohn's habeas appeal, this Court denied relief but also observed:

> While Mr. Littlejohn's argument may have some appeal insofar as it takes issue with the reality that "a fair number of jurors [still] do not [fully] comprehend the plain meaning of the life imprisonment without the possibility of parole sentencing option [in Oklahoma]." *Littlejohn II*, 85 P.3d at 293, we are constrained to apply precedent that – relying on *Simmons*, *Shafer, and Kelly* on substantially similar facts – compels the denial of relief.

Littlejohn v. Trammell, 704 F.3d at 831. Most recently, in *Fairchild v. Trammell*, 784 F.3d 702, 715 (10th Cir. 2015), this Court also found it was constrained by AEDPA,

and by precedent, to deny relief.

2. The Opinions Below.

Mr. Murphy was a victim of the ongoing epidemic of *Simmons* violations. He asserted his constitutional claim before OCCA, which held he did not request an instruction further defining LWOP; he requested only "to produce *evidence* to the jury during the second stage regarding distinctions between the sentencing options, relief available from the Department of Corrections, and the conditions and restrictions associated with a sentence of life without parole." *Murphy I*, 47 P.3d at 886. This factual premise was incorrect and unreasonable. Murphy *also* asked in his motion argument for the court to instruct the jury that life without parole means what it says and that "you never come up for parole." TR M. Tr. 2/24/2000 at 34.

The OCCA held also Murphy's counsel was allowed to argue the meaning of LWOP and did so "telling jurors that they had the option of 'putting him in prison for the rest of his life . . . don't give him the possibility of parole.'" *Murphy I*, 47 P.3d at 886. Nor, the court observed, did this case involve a jury note. *Id*. These premises for the denial of relief are contrary to, and unreasonable failures to properly apply *Kelly*.

> But it cannot matter that Kelly's jury did not ask the judge for further instruction on parole eligibility, whereas the *Simmons* and *Shafer* juries did. [citations omitted]. Time after time appellate courts have found jury instructions to be insufficiently clear without any record that the jury manifested its confusion; one need look no further than *Penry v. Johnson*, 532 U.S. 782 . . ., for a recent example.

534 U.S. at 256. That should have disposed of the no note premise. *Kelly*, if faithfully and reasonably applied, should also have disposed of the premise that defense counsel made an argument to the jury. *Id*. at 257 (counsel's closing that stressed Kelly would be in prison for the rest of his life and would never see "the light of daylight again" did not make Kelly's jury "better informed than Simmons' or Shafer's on the matter of parole eligibility").

The OCCA's third premise was that the meaning of LWOP is self-explanatory and that, consequently, an instruction on its meaning is not required. 47 P.3d at 886. Just two years later in *Littlejohn*, OCCA admitted this self-explanatory premise did not reflect the situation in Oklahoma. The contrary finding in *Littlejohn* was based on compelling evidence already largely accumulated at the time of the Murphy decision.[72]

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[72] As reflected in the "case after case" observation in *Littlejohn*, OCCA had long experience with this problem including observing similar jury notes in many prior cases. 85 P.3d at 292-93. Judges in the minority repeatedly observed these notes could only mean, regardless of how plain anyone might suggest the instructions were, the core concept that LWOP meant no eligibility for parole simply was not being conveyed. In *Malicoat v. State*, 992 P.2d 383 (Okla. Crim. App. 2000), Judge Chapel's summary of his concerns could not have been clearer:

> Our error in failing to require instruction as to the meaning of life without parole is of constitutional magnitude and has, in my judgment, resulted in death sentences for many who would otherwise have received the life without parole sentence.

Id. at 400 n.43. In *Johnson v. State,* Judge Chapel observed: "The reason why jurors repeatedly ask this question is because they are confused. They want, need, and

The OCCA recognized the ongoing epidemic of jury confusion.

It was unreasonable for OCCA to fail to recognize this situation in or before Murphy's case. It was unreasonable for OCCA to fail to adequately remedy the ongoing violation for Murphy and even to this day. The Constitution demands relief in the form of jurors adequately informed of the true nature of the compelling throw away the key alternative to a death sentence. The district court incorrectly found OCCA's decision was "not an unreasonable determination of clearly established federal law as determined by the Supreme Court of the United States." *Murphy*, 497 F. Supp. 2d at 1284. For the reasons just adduced, the district court erred in reaching this conclusion and denying relief. Not only was OCCA's decision factually and legally unreasonable, in some dispositive parts it was flat out contrary to Supreme Court precedent.

3. This Court's Precedent.

As the district court pointed out, this Court has operated on a form of the self-

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deserve an answer." 928 P.2d 309, 321 (Okla. Crim. App. 1996). Judge Strubhar also voiced her concerns. *Howell v. State,* 967 P.2d 1221, 1229 (Okla. Crim. App. 1998). In case after case, OCCA saw these jury notes and judges were alarmed. *See, e.g., Mollett v. State*, 939 P.2d 1, 15 (Okla. Crim. App. 1997); *Welch v. State*, 968 P.2d 1231, 1254 (Okla. Crim. App. 1998); *Ochoa v. State*, 963 P.2d 583, 605 n.100 (Okla. Crim. App. 1998); *Taylor v. State*, 998 P.2d 1225, 1239, 1241 (Okla. Crim. App. 2000). In *Littlejohn*, a majority of OCCA finally accepted what had long been obvious to reasonable jurists.

explanatory premise. *Murphy*, 497 F. Supp. 2d at 1284. And, as elucidated above, the Court has so far found itself bound by AEDPA and precedent to continue down that path. Of course, OCCA has been seeing and debating the jury notes for longer than this Court and every OCCA judge sees *every* case. So, OCCA was very well-positioned to see the real-experience flaws in the self-explanatory theory emerge. It should have seen the flaws much earlier as some judges did, attempting to sound the alarm. This Court has apparently seen the disturbing "reality" but is conscientiously following precedent. *Littlejohn*, 704 F.3d at 831. Here, unlike in *Littlejohn* and *Fairchild*, OCCA's ruling was unreasonable (and contrary to law) for the reasons adduced. If, however, this Court finds precedent constrains relief in this case as well, this issue should be considered *en banc*. The reality is that many are being sentenced to death – and executed – based on a grievous misunderstanding that could be readily corrected but that OCCA refuses to adequately correct. The OCCA's unconstitutional allowance of that reality is unreasonable.

C. Conclusion.

The Constitution requires jurors to be adequately informed via instruction and/or evidence. Relief should be granted or *en banc* review conducted.

PROPOSITION VIII

The Writ Should Also Have Issued for Cumulative Error.

A. Where Claim Was Raised.

This claim was raised in Murphy's First Amended Petition. Doc. 33 at 79-81 (CIV-03-443).[73] The district court denied relief. *Murphy*, 497 F. Supp. 2d at 1283.

B. Argument and Authorities.

In *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003), this Court granted the Writ, in part, for cumulative error in a case involving multiple types of error. Here, as in *Cargle*, multiple constitutional violations had a synergistic effect on the penalty verdict. 317 F.3d at 1221.

In *Cargle*, this Court said:

> claims should be included in the cumulative-error calculus if they have been individually denied for insufficient prejudice. Indeed, to deny cumulative-error consideration of claims unless they have first satisfied their individual substantive standards for actionable prejudice "would render the cumulative error inquiry meaningless, since it [would] . . . be predicated only upon individual error already requiring reversal." *Willingham v. Mullin*, 296 F.3d 917, 935 (10th Cir. 2002).

317 F.3d at 1207. This teaching from *Cargle* specifically included ineffective assistance claims. Thus, when such claims are denied for a lack of prejudice, they should be part of the cumulative error consideration.

The cumulative consideration required in *Cargle* is required as well by the

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[73] The claim was raised in the initial petition and incorporated in Murphy's Second Amended Petition. Doc. 54 at 1.

Supreme Court. As the Supreme Court has said, no individual error can be harmless unless it is harmless in context, including in context of other errors. *O'Neal v. McAninch*, 513 U.S. 432, 436-38 (1995). In explaining its decision in *O'Neal*, the Court recited this illustrative language from *Kotteakos*, 328 U.S. at 764-65:

> If, when all is said and done, the [court's] conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand . . . . But if one cannot say, with fair assurance, after *pondering all that happened* without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

O'Neal, 513 U.S. at 437-38 (emphasis added).[74] Thus, cumulative error consideration – "pondering all that happened" – is also required by this Supreme Court precedent. *Id*.[75] That consideration should take place for each error. Cumulative error is a means

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[74] *Chambers v. Mississippi*, 410 U.S. 284, 298, 302-03 (1973), has also been recognized as clearly establishing the cumulative error doctrine. *Parle v. Runnels*, 505 F.3d 922 (9th Cir. 2007).

[75] Respondents have sometimes proffered the notion there is no Supreme Court authority for cumulative error. That proposition has been squarely rejected by this Court. *Hanson v. Sherrod*, 797 F.3d 810, 852, n.16 (10th Cir. 2015). This Court has repeatedly rejected that theory. In the same footnote, *Hanson* also holds that *Darks v. Mullin*, 327 F.3d 1001, 1017 (10th Cir. 2003) previously negated this notion and held instead that cumulative error *is* reviewable as part of the clearly established right to a fair trial and due process. *Hanson*, 797 F.3d at 852 n.16.

of assuring that process is complete. Even where the prejudice or harm from an individual error is not enough, the combined harm may well warrant relief for cumulative error.

Several errors under review here impacted the all-important and inherently sensitive penalty-phase verdict. As the Court knows, all jurors must agree on a death sentence; any one juror can steer the verdict to a competing severe punishment such as life without parole. *Wiggins,* 539 U.S. at 537 (holding that unanimous structure of capital sentencing scheme means that prejudice showing requires only a "reasonable probability that at least one juror would have struck a different balance"). In *Castro,* 71 F.3d at 1516, this Court had already made the same observation specific to Oklahoma's capital sentencing scheme.

To begin summarizing the errors, Oklahoma persists in violating the Constitution through unbridled offering up of pleas for a death by the decedent's family members. *See* Proposition II. It is certain that these opinions were constitutionally impermissible. The issue is the prejudice or harm arising therefrom — harm the prosecutor essentially admitted by offering these opinions and pressing them in closing argument. Moreover, the Supreme Court itself spoke definitively to the inherent harm when it said these opinions can "serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence . . . ."

Booth, 482 U.S. at 508-09. And, this time, these targeted opinions were offered in a capital sentencing phase impacted by other violations. *See* Propositions V, VI, and VII.[76]

The harm from this clear victim-opinion violation is more than sufficient in and of itself to require the Writ to issue. Per *Cargle*, it should also be considered in the context of the harm from the other penalty phase constitutional errors before the Court. Indeed, one of the issues considered for cumulative impact in *Cargle* was victim impact evidence, though not the "special concerns underlying the categorical prohibition" on requests for the death penalty. 317 F.3d at 1224 (observing that "the effect of the improper victim impact evidence was highlighted by the conspicuous absence of counterbalancing mitigation evidence from the defense").[77]

Also under consideration here, as in *Cargle*, is trial counsel's ineffective assistance at the penalty phase. As noted, breach of that foundational constitutional guarantee was one of the issues found to have cumulative effect in *Cargle*. 317 F.3d at 1224. Counsel's failures kept the jury in the dark or dim light as to several important

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[76] Because the prejudice from these violations was discussed in detail in the foregoing propositions, Murphy incorporates those discussions in an effort to avoid undue repetition.

[77] That this case *does* implicate those "special concerns" is a compelling reason to grant relief for this clear error alone. In the alternative, it should surely be considered in the cumulative error calculus as was the lesser error in *Cargle*.

sentencing considerations discussed *supra* in Proposition V and incorporated here. Those considerations include Murphy's impoverished upbringing in "the bottoms," his brain impairments stemming in part from fetal alcohol exposure, and his mental retardation, matters about which jurors were inadequately informed.

Another penalty-phase cumulative consideration is the sufficiency of proof and jury instructions on the key element of the H.A.C. aggravating circumstance. It is no small matter that relief for evidentiary sufficiency is, at the least, up for debate. The evidence for conscious suffering was, at best, very weak. Not one of the witnesses heard the victim articulate any statement and the medical examiner agreed he may have been unconscious. There were no defensive wounds. It is even more profound that the sentencing jury was kept in the dark also as to the requirement that it find conscious suffering to find the aggravating circumstance. This is far from a reliable death sentence for this additional reason. Indeed, reasonable jurist Hartz would have reversed a case for just keeping the *sine qua non* for the aggravator from the sentencing jury. *Spears*, 343 F.3d at 1258-59.

This Court's review for cumulative error is *de novo*. The OCCA said it found no error and thus no cumulative error. *Murphy I*, 47 P.3d at 887. That no-error determination included the abject and egregiously contrary to law failure to recognize the blatant victim opinion violation. In this situation and in any situation where

OCCA did not cumulate *all* the errors ultimately found, this Court has held federal review is *de novo*. *Malicoat v. Mullin*, 426 F.3d 1241, 1262-63 (10th Cir. 2005); *Welch,* 451 F.3d 675, 710 (10th Cir. 2006); *Cargle*, 317 F.3d at 1224. The district court denied cumulative error review because it found only the victim impact opinion error. *Murphy*, 497 F. Supp. 2d at 1294. If this Court finds error among the other issues, as it should, its review will be completely independent. These issues will warrant relief individually and in context but they also warrant relief for cumulative error.

CONCLUSION

For the reasons stated, Patrick Murphy respectfully requests this Court reverse with instructions to grant the Writ of Habeas Corpus, finding the federal courts have exclusive jurisdiction over this crime, requiring remand and amendment to raise Mr. Murphy's substantive *Atkins* claim, granting sentencing relief, or alternately, reversing and remanding with instructions to hold an evidentiary hearing.

STATEMENT REGARDING ORAL ARGUMENT

Counsel believes the scrutiny of this case would be aided by oral argument. Therefore, counsel requests oral argument.

Respectfully submitted,

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As required by FED. R. APP. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 40,123 words.

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s/Patti Palmer Ghezzi

Patti Palmer Ghezzi

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I hereby certify that on this 5th day of August, 2016, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrant:

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