

No.

IN THE
Supreme Court of the United States

CODY WAYNE MAYFIELD,

Petitioner,

V.

JIMMY MARTIN, WARDEN

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

APPENDIX A: Opinion of the United States
Court of Appeals for the Tenth Circuit

CODY W. MAYFIELD
NFCC (EN-171)
1605 E. MAIN
Sayre, OK 73662

Pro se Litigant

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

August 30, 2018

**Elisabeth A. Shumaker
Clerk of Court**

CODY WAYNE MAYFIELD,

Petitioner - Appellant,

v.

JIMMY MARTIN,

Respondent - Appellee.

No. 17-6231
(D.C. No. 5:16-CV-00557-HE)
(W.D. Okla.)

ORDER DENYING A CERTIFICATE OF APPEALABILITY

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

Applicant Cody W. Mayfield seeks a certificate of appealability (COA) to appeal the denial by the United States District Court for the Western District of Oklahoma of his application for relief under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring COA to appeal final order in a habeas proceeding in which the detention complained of arises out of process issued by a state court). We deny a COA and dismiss the appeal.

An Oklahoma state-court jury convicted Applicant of two counts of possessing a controlled substance after having two or more felony convictions. On appeal the Oklahoma Court of Criminal Appeals (OCCA) reversed one possession count, but otherwise affirmed. Applicant then filed his § 2254 application.

A COA will issue “only if the applicant has made a substantial showing of the

denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This standard requires “a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court’s resolution of the constitutional claim was either “debatable or wrong.” *Id.*

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides that when a claim has been adjudicated on the merits in a state court, a federal court can grant habeas relief only if the applicant establishes that the state-court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)–(2).

As we have explained, “Under the ‘contrary to’ clause, we grant relief only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts.” *Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004) (brackets and some internal quotation marks omitted). Relief is provided under the “unreasonable application” clause “only if the state court identifies the correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* (brackets and internal quotation marks

omitted). Thus, a federal court may not issue a habeas writ simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. *See id.* Rather, that application must have been unreasonable. *See id.* Therefore, for those of Applicant's claims that the OCCA adjudicated on the merits, "AEDPA's deferential treatment of state court decisions must be incorporated into our consideration of [his] request for [a] COA." *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004).

In this court Applicant asserts four grounds for relief. He first argues that the prosecution submitted "false evidence" at his trial—a picture of a cellophane fragment found in his car that was allegedly tied to a bag containing a controlled substance. The OCCA deemed the photograph relevant and admissible, and the district court concluded that Applicant failed to show that the OCCA unreasonably applied federal law. No reasonable jurist could debate the district court's conclusion.

Applicant next argues that at sentencing the trial court admitted a "pen packet" containing prejudicial materials. On direct appeal the OCCA determined that the error "did not seriously affect the fairness, integrity, or public reputation of the proceedings," given other admissible evidence of Applicant's criminal past and the prosecution's failure to emphasize the problematic material in its closing argument. R., Vol. I at 255. The district court concluded that Applicant had not shown that the OCCA unreasonably applied federal law. No reasonable jurist could debate the district court's conclusion.

Third, Applicant argues that his sentence was improperly enhanced by consideration of a prior felony conviction that was too old to be applicable under the state

enhancement statute. But Applicant did not raise this issue in his § 2254 application. It is therefore not properly before this court. *See Parker v. Scott*, 394 F.3d 1302, 1307 (10th Cir. 2005) (claims not raised in § 2254 application to district court are waived).

Applicant's fourth ground for relief is that he received ineffective assistance of counsel at trial. To establish ineffective assistance, Applicant first has the burden of overcoming "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), by demonstrating that his counsel's performance fell below "an objective standard of reasonableness," *id.* at 688. Second, Applicant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. We can consider the performance and prejudice prongs in either order; if Applicant fails to meet his burden on one prong, we need not consider the other. *See id.* at 697.

Applicant contends that his trial counsel (1) failed to object to the prosecution's mention of a 1993 conviction; (2) failed to object to that conviction's introduction into evidence as part of the pen packet; (3) failed to object to the pen packet's admission; and (4) told the jury at sentencing that Applicant was a drug addict. The first two claims fail because they were not presented in his § 2254 application. *See Parker*, 394 F.3d at 1307. As for claims 3 and 4, the OCCA denied relief on both, stating that "under the deficient performance/prejudice test of *Strickland* . . . , no relief is warranted" because these "alleged deficiencies create no reasonable probability of a different outcome." R. at 256–57. The district court held that the OCCA reasonably applied *Strickland*. No reasonable

jurist could debate the district court's ruling.

We **DENY** a COA and **DISMISS** the appeal. We **GRANT** Applicant's motion to proceed in forma pauperis.

Entered for the Court

Harris L Hartz
Circuit Judge

No.

IN THE

Supreme Court of the United States

CODY WAYNE MAYFIELD,

Petitioner,

V.

JIMMY MARTIN, WARDEN

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

APPENDIX B: Report and Recommendation
of Magistrate Judge, Order of United States
District Court for the Western District
of Oklahoma

CODY W. MAYFIELD
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1605 E. MAIN
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Pro se Litigant

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

CODY WAYNE MAYFIELD,)	
)	
Petitioner,)	
)	
vs.)	NO. CIV-16-557-HE
)	
JIMMY MARTIN, ¹)	
)	
Respondent.)	

ORDER

Petitioner, a state prisoner appearing *pro se*, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 for relief from his state court conviction and sentence. The matter was referred to U.S. Magistrate Judge Suzanne Mitchell for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B) and (C). Judge Mitchell has issued a Report and Recommendation (the “Report”) recommending that the petition be denied. Petitioner has filed an objection to the Report, which triggers a *de novo* review by this court.

A jury in Comanche County convicted Petitioner of two counts of possession of a controlled substance after former conviction of two or more felonies and one count of failure to stop at a red light. In accordance with the jury’s recommendation, the court sentenced petitioner to two life sentences for the possession counts and ten days for the traffic count and ordered all sentences to be served consecutively. Petitioner’s conviction

¹ As Petitioner notes, the Warden of North Fork Correctional Center is now Jimmy Martin. As such, he is now the correct Respondent. See *Jimenez v. Utah*, 665 F. App’x 657 n.2 (10th Cir. 2016).

and sentence on the second count of possession were reversed on appeal by the Oklahoma Court of Criminal Appeals (“OCCA”) which ordered that count be dismissed and Petitioner be resentenced. The OCCA reviewed and rejected Petitioner’s remaining appellate arguments. Petitioner was resentenced to one life sentence on the remaining possession count and ten days on the traffic count. Petitioner did not file for post-conviction relief.

In his habeas petition, Petitioner lists seven grounds for relief, each of which was raised on direct appeal. Because the OCCA addressed the merits of petitioner’s claims, review is governed by 28 U.S.C. § 2254(d). The Supreme Court has repeatedly acknowledged that § 2254(d) “erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.” Burt v. Titlow, 571 U.S. --, 134 S. Ct. 10, 16 (2013). Relief may only be granted “where there is no possibility fairminded jurists could disagree that the state court’s decision conflicts with this Court’s precedents.” Harrington v. Richter, 562 U.S. 86, 102 (2011). What is required is a showing that the state court’s decision is “objectively unreasonable.” Lockyer v. Andrade, 538 U.S. 63, 75 (2003) (citing Williams v. Taylor, 529 U.S. 362, 409 (2000)).

Petitioner’s first objection² argues that this court should not apply the §2254(d) standard of review to his first, second, and fourth grounds for relief because “reasonable jurists would find the assessment of Mr. Mayfield’s habeas claims debatable.” Doc. #25, p. 3. Petitioner states that “the state court’s determination of the factual issues presented

² Because Petitioner appears pro se, his pleadings are construed liberally. Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

with Grounds One, Two, and Four lacked justification because the errors were understood and comprehended in existing law beyond any possibility for fairminded disagreement” and thus he “effectively rebuts and overcomes the presumption that the OCCA’s determination of the factual issues were correct by clear and convincing evidence.” *Id.*, pp. 4-5.

The court disagrees. The formidable barrier presented when seeking habeas relief “reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice system, not a substitute for ordinary error correction through appeal.” Harrington, 562 U.S. at 102-103. “It is not enough that the state court decided an issue contrary to a lower federal court’s conception of how the rule should be applied; the state court decision must be ‘diametrically different’ and ‘mutually opposed’ to the Supreme Court decision itself.” Bland v. Sirmons, 459 F.3d 999, 1009 (10th Cir. 2006) (quoting Williams, 529 U.S. at 406). The OCCA’s findings regarding these claims for relief are not “objectively unreasonable.” Further, to the extent that Petitioner seeks relief for errors violating state law and the Oklahoma constitution, “[s]tate claims are not cognizable in habeas proceedings unless they are constitutional in nature.” Montoya v. State of N.M., 55 F.3d 1496, 1499 (10th Cir. 1995) (citing Davis v. Reynolds, 890 F.2d 1105, 1109 n.3 (10th Cir. 1989).

Petitioner’s second objection states that “the Magistrate erred in [her] understanding of the facts and thereby incorrectly applied 28 U.S.C. § 2254(a)” when evaluating his first and second grounds for relief. Petitioner’s first ground for relief claims that the introduction of his “pen pack” during the sentencing phase of his trial, violated his Due

Process rights and resulted in an illegally enhanced sentence. This ground is a repetition of his second proposition presented to the OCCA on direct appeal. His second ground for relief claims that the introduction of a photograph of a piece of cellophane violated his rights to a fair trial. This ground is presented as the fourth proposition on direct appeal to the OCCA.

The Report finds “Petitioner cannot show the OCCA unreasonably applied federal law when it found the irrelevant evidence did not render his second-stage trial fundamentally unfair.” Doc. #24, p. 16. Likewise, “Petitioner fails to show the OCCA unreasonably applied federal law when it held, in essence, the photograph did not render Petitioner’s trial fundamentally unfair.” After *de novo* review, the court agrees with the Report. The OCCA rulings are not an unreasonable application of federal law.

To the extent that Petitioner argues that he is entitled to habeas relief because his sentence was improperly enhanced pursuant 21 Okla. Stat. § 51.1, the court notes that this claim was not included in his habeas petition. Nor was it presented to the OCCA on direct appeal. Accordingly, this claim is waived. If Petitioner objects to the Report’s disposition of his seventh ground for relief, that his sentence was excessive, the court agrees with the Report that a sentence within the statutory limits is not an unreasonable application of federal law.

Petitioner’s final objection claims “the magistrate erred in [her] understanding of the facts involved in Mr. Mayfield’s claim of ineffective assistance of Trial Counsel. Petitioner’s ineffective assistance of counsel claim was the sixth proposition presented to the OCCA on direct appeal. Petitioner’s objection alleges ineffective assistance because

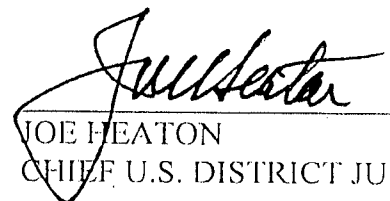
counsel (1) “failed to examine the un-redacted [] PEN Packet,” (2) made no “attempt to examine the DOC PEN Packet for improper-prejudicial information,” (3) failed to object to the admission of [] the PEN Packet,” (4) failed to object to the introduction of Petitioner’s third felony conviction “via the PEN Packet,” and “broke from a viable trial strategy that the prosecution’s case-in-chief was supported by insufficient evidence, and told the jury ‘Mr. Mayfield is an addict.’” Doc. 25, pp. 13-14.

Petitioner’s ineffective assistance of counsel claims were thoroughly presented to the OCCA which held that the “alleged deficiencies create no reasonable probability of a different outcome.” Doc. 14-5, p. 5. Thus, the Report correctly concludes that Petitioner is unable to demonstrate any prejudice from counsel’s actions regarding the pen packet, nor that counsel’s trial strategy was deficient or prejudicial. After *de novo* review, the court concludes the OCCA reasonably applied Strickland v. Washington, 466 U.S. 668 (1984), in finding that Petitioner’s trial counsel was not deficient or prejudicial.

Accordingly, the Report [Doc. #24] is **ADOPTED** and the petition for writ of habeas corpus [Doc. #1] is **DENIED**. A certificate of appealability is also denied.

IT IS SO ORDERED.

Dated this 23rd day of October, 2017.


JOE HEATON
CHIEF U.S. DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**


CODY WAYNE MAYFIELD,)	
)	
Petitioner,)	
)	
vs.)	NO. CIV-16-557-HE
)	
JIMMY MARTIN,)	
)	
Respondent.)	

JUDGMENT

In accordance with the order entered this date, the Petition for Writ of Habeas Corpus [Doc. #1] is **DENIED**

IT IS SO ORDERED.

Dated this 23rd day of October, 2017.



JOE HEATON
CHIEF U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

CODY WAYNE MAYFIELD,

Petitioner,

v.

TRACY McCOLLUM,¹

Respondent.

Case No. CIV-16-557-HE

REPORT AND RECOMMENDATION

Petitioner, appearing pro se, seeks a writ of habeas corpus under 28 U.S.C. § 2254. Doc. 1. United States Chief District Judge Joe Heaton referred the matter to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). Doc. 22. Respondent filed a response, Doc. 14, the jury-trial transcripts (TR) and original record (OR), Doc. 16, and Petitioner replied, Doc. 20. For the reasons set forth below, the undersigned recommends the court deny habeas relief.

¹ Petitioner is currently housed at the North Fork Correctional Facility, Doc. 13, which is now a state-run correctional center. As such, the correct Respondent is Tracy McCollum, the North Fork Correctional Facility Warden. See *Jimenez v. Utah*, 665 F. App'x 657 n.2 (10th Cir. 2016) ("The correct respondent was the Warden of the Utah State Prison, since the proper respondent in a habeas corpus action is always the petitioner's custodian.").

I. Introduction.

In relevant part, the State charged Petitioner, in Case No. CF-2013-532, with possession of a controlled drug (cocaine) with intent to distribute and possession of a controlled dangerous substance (methamphetamine), both after two or more prior felony convictions. OR 17, 69.² A jury in Comanche County, Oklahoma, acquitted Petitioner on the intent to distribute cocaine charge, but found him guilty of the lesser included offense of possessing cocaine (Count One). *Id.* at 116-17. The jury also found Petitioner guilty of possessing methamphetamine (Count Two). *Id.* at 119. Per the jury's recommendation, the trial court sentenced him to two consecutive life sentences. *Id.* at 118, 120, 138.

Petitioner appealed, and the Oklahoma Court of Criminal Appeals (OCCA) held that Petitioner's convictions for possession of two drugs found in a single container violated the Double Jeopardy clause and "reversed and remanded" Count Two (possession of methamphetamine) "with instructions to dismiss." Doc. 14, Ex. 5, at 2. However, the court affirmed the trial court on Petitioner's remaining arguments. *Id.* at 2-5. Thereafter, the trial court complied with the OCCA's directive, and amended the Judgment and Sentence

² Citations to the parties' pleadings and attached exhibits will refer to this Court's CM/ECF pagination. Citation to the state court records will refer to the original pagination. Additionally, when quoting Petitioner, the undersigned has altered some capitalization for ease of reading.

to reflect only a conviction on Count One for unlawful possession of a controlled dangerous substance after two or more prior felony convictions. *Id.* Ex. 2.

Petitioner then proceeded to this Court.

II. Petitioner's habeas claims.

Petitioner raises seven claims for relief. In Grounds One and Two, Petitioner alleges the trial court improperly admitted his un-redacted "pen packet" and a prejudicial photograph. Doc. 1, at 6, 8. In Ground Three, Petitioner claims his convictions for possessing both cocaine and methamphetamine in the same bag violate the Double Jeopardy clause. *Id.* at 11. In Ground Four, Petitioner alleges his trial counsel was ineffective. *Id.* at 14. In Ground Five, Petitioner challenges the sufficiency of evidence at preliminary hearing, and in Ground Six, he challenges the sufficiency of evidence at trial. *Id.* at 17, 20. Finally, in Ground Seven, Petitioner alleges his two life sentences are excessive. *Id.* at 23.

The undersigned addresses Petitioner's sufficiency of the evidence claims first (Grounds Five and Six).

III. Standard of review for habeas relief.

"When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011); *see*

also Johnson v. Williams, 568 U.S. 289, 301 (2013). A petitioner is entitled to federal habeas relief only if that merits-based adjudication “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]” Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d). “It is the petitioner’s burden to make this showing and it is a burden intentionally designed to be ‘difficult to meet.’” *Owens v. Trammell*, 792 F.3d 1234, 1242 (10th Cir. 2015) (citation omitted). This standard “reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice system, not a substitute for ordinary error correction through appeal.” *Harrington*, 562 U.S. at 102-03.

This Court first determines “whether the petitioner’s claim is based on clearly established federal law, focusing exclusively on Supreme Court decisions.” *Hanson v. Sherrod*, 797 F.3d 810, 824 (10th Cir. 2015); *see also Hooks v. Workman*, 689 F.3d 1148, 1163 (10th Cir. 2012). Clearly established federal law consists of Supreme Court holdings in cases where the facts are similar to the facts in the petitioner’s case. *See House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008). If clearly established federal law exists, this Court then considers whether the state court decision was contrary to or an unreasonable application of that clearly established federal law. *See Owens*, 792 F.3d at 1242.

“A state court’s decision is ‘contrary to’ clearly established federal law ‘if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts.’” *Id.* (citations omitted). Notably, “[i]t is not enough that the state court decided an issue contrary to a lower federal court’s conception of how the rule should be applied; the state court decision must be ‘diametrically different’ and ‘mutually opposed’ to the Supreme Court decision itself.” *Id.* (citation omitted).

The “‘unreasonable application’ prong requires [the petitioner to prove] that the state court ‘identified the correct governing legal principle from Supreme Court decisions but unreasonably applied that principle to the facts of the prisoner’s case.’” *Id.* (citations and internal brackets omitted). On this point, “the relevant inquiry is not whether the state court’s application of federal law was *incorrect*, but whether it was ‘objectively unreasonable.’” *Id.* (citations omitted). So, to qualify for habeas relief on this prong, the petitioner must show “‘there was no reasonable basis’ for the state court’s determination.” *Id.* at 1243 (citation omitted). “In other words, ‘so long as fairminded jurists could disagree on the correctness of the state court’s decision,’ habeas relief is unavailable.” *Id.* (citation omitted); *see also Harrington*, 562 U.S. at 103 (“As a condition for obtaining [federal habeas relief], a state prisoner must show that the state court’s ruling on the claim being presented in federal court was

so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”).

IV. Analysis of Petitioner’s state law claims.

In large part, Petitioner claims the alleged errors violated state law and the Oklahoma constitution. Docs. 1, 2, *passim*. But even if such violations occurred, they would not entitle Petitioner to federal habeas relief. *See Davis v. Reynolds*, 890 F.2d 1105, 1109 n.3 (10th Cir. 1989) (“Alternative state claims, whether grounded in state statutes or the State Constitution, are not cognizable under 28 U.S.C. § 2254(a).”). Therefore, the undersigned recommends the court deny any claim based on the violation of Oklahoma’s statutes or constitution.

V. Analysis of Petitioner’s federal claims.

The court should likewise deny habeas relief on Petitioner’s federal claims.

A. Grounds Five and Six: alleged insufficiency of the evidence at preliminary hearing and at trial.

In Ground Five, Petitioner alleges the State failed to “present sufficient evidence to establish [at the preliminary hearing] (1) probable cause that a crime was committed and (2) probable cause to believe that the defendant committed the crime.” Doc. 1, at 17. So, according to Petitioner, the State

lacked sufficient evidence “to bind Petitioner over for trial” *Id.* In Ground Six, Petitioner alleges there was insufficient evidence at trial to prove he constructively possessed a controlled dangerous substance. *Id.* at 20.

The OCCA rejected both claims on direct appeal. As to Ground Five, the appellate court reviewed for “plain error” and found none. Doc. 14, Ex. 5, at 3.

On Ground Six, the OCCA held:

In his sufficiency challenge to the evidence at trial, [Petitioner] argues the State failed to prove his constructive possession of the drugs beyond a reasonable doubt. The Court must therefore determine “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.”

[Petitioner’s] argument confuses the concept of constructive possession with the sufficiency of the mostly circumstantial evidence to prove his *actual* possession of drugs just before abandoning them in the hope of avoiding prosecution. [Petitioner] “was not found in actual physical possession of contraband . . . his guilt or innocence must be determined by the inferences which the circumstantial evidence against him properly supports.” Circumstantial evidence supports the inference that [Petitioner] actually possessed the drugs discarded along his path of escape, and was guilty as charged.

Id. at 3-4 (citations omitted).

1. Clearly established law.

The United States Supreme Court clearly established the constitutional right to sufficient evidence of guilt in *Jackson v. Virginia*. 443 U.S. 307, 324 (1979); see *Lott v. Trammell*, 705 F.3d 1167, 1219 (10th Cir. 2013) (agreeing

that *Jackson* provided “the clearly established law applicable to [an insufficient evidence] claim”). Under this decision, the question is “whether, after viewing the evidence 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.” *Jackson*, 443 U.S. at 319. *Jackson*’s standard for evidence sufficiency “must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law.” *Id.* at 324 n.16.

2. The elements of possession of a controlled dangerous substance.

To convict a defendant for unlawful possession of a controlled dangerous substance in Oklahoma, the State must prove he: (1) knowingly and intentionally, (2) possessed, (3) a controlled dangerous substance. *See Okla. Stat. tit. 63, § 2-402(A)(1); see also OUJI-CR No. 6-6.* “[D]ominion and control over the thing possessed” can be established by circumstantial evidence. *White v. State*, 900 P.2d 982, 986 (Okla. Crim. App. 1995). Finally, “possession may be either actual or constructive” *Id.* (internal quotation marks and citation omitted).

3. The alleged insufficiency of evidence at preliminary hearing (Ground Five).

In Ground Five, Petitioner seeks habeas relief because the State allegedly lacked sufficient evidence to bind him over for trial. Doc. 1, at 17. However, Petitioner’s “claim that there was insufficient evidence presented in

his preliminary hearing for the state to bind him over for trial is not redressable by way of a habeas petition.” *Powers v. Dinwiddie*, 324 F. App’x 702, 704 (10th Cir. 2009). This is because “[a] § 2254 petition challenges the validity of a state prisoner’s conviction and sentence, . . . and the Supreme Court has long held that an ‘illegal arrest or detention does not void a subsequent conviction[.]’” *Id.* (citations omitted). Since Petitioner “was ultimately convicted, his claim regarding the sufficiency of the evidence at his preliminary hearing cannot be grounds for habeas relief.” *Id.* So, the court should deny habeas relief on Ground Five. *See Cleveland v. Sharp*, No. CIV-13-1281-F, 2016 WL 4708249, at *8 n.15 (W.D. Okla. July 28, 2016) (unpublished report & recommendation) (noting if petitioner had raised his insufficiency of the evidence at preliminary hearing claim “independently, and not as a Sixth Amendment ineffective assistance claim, habeas relief would similarly be denied” citing *Powers*), *adopted*, 2016 WL 4705580 (W.D. Okla. Sept. 8, 2016) (unpublished order), *certificate of appealability denied*, 672 F. App’x 824 (10th Cir. 2016), *reh’g denied*, (10th Cir. Dec. 21, 2016), *cert. denied*, 137 S. Ct. 2166 (2017).

4. The alleged insufficiency of evidence at trial (Ground Six).

The court should find the OCCA reasonably applied federal law when it rejected Petitioner's sufficiency of the trial evidence claim.

The State presented evidence at trial that the Comanche County Sheriff's Department was conducting surveillance on a "[k]nown drug house" in Lawton, Oklahoma on October 8, 2013. TR Vol. I, at 125-26, 146, 189-90. When Officers William Stidham and Kevin Duran observed a dark Nissan leaving the residence, they followed the vehicle for approximately half an hour. *Id.* at 126-27, 189-90. Petitioner later admitted he was the Nissan's driver. *Id.* at 167. Thereafter, Officer Bill Bybee took over following the Nissan. *Id.* at 129, 160. When Petitioner failed to stop at a red light, Officer Bybee attempted to make a traffic stop. *Id.* at 161. Rather than stopping however, Petitioner increased speed until he reached a parking lot, exited the car, and began running west. *Id.* at 161-63. Officer Bybee identified the suspect as a "black male wearing a bluish gray shirt." *Id.* at 131. Officer Bybee stayed with the vehicle, *id.* at 164, and Officers Stidham and Duran—who had been following at a distance—followed Petitioner westbound. *Id.* at 133. When they apprehended Petitioner, he had several hundred dollars in cash in his pocket. *Id.* at 134 & State's Ex. 14. Officers began searching the nearby alley and backyards; in one they discovered Petitioner's shirt and then nearby, they

found a plastic bag containing two separately wrapped white substances. TR Vol. I, at 135-38, 167-68, 180. These substances tested positive for cocaine and methamphetamine. *Id.* at 118 & State's Ex. 17. Officers also found a cellophane bag in Petitioner's car, matching the plastic bags containing the drugs. TR Vol. I, at 166.

Petitioner argues this evidence fails to prove he constructively possessed the drugs, explaining "possession may be inferred if the contraband is found in a place which is exclusively accessible or used by the accused, or subject to his dominion and control[.]" Doc. 1, at 20. But as the OCCA pointed out, Petitioner seems to confuse actual possession as proven with circumstantial evidence, with constructive possession. That is, the State did not attempt to prove constructive possession; i.e., they did not suggest Petitioner had dominion and control of the backyard or that he had exclusive access to the backyard where the drugs were located. Instead, the State argued Petitioner had *actually* possessed the drugs before he tossed them away in the backyard. TR Vol. I, at 219-20. To support this argument, the State relied on circumstantial evidence that Petitioner: (1) had been at a known drug house; (2) ran from law enforcement; (3) discarded his shirt near where the drugs were found; (4) had a large quantity of cash in his pocket; and (5) had a cellophane bag in his car, similar to the ones containing the drugs. *Id.* at 220-221, 224-29.

Viewing this evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The court must find the OCCA reasonably applied federal law when it rejected Petitioner's insufficiency of the trial evidence claim on the merits.

B. Grounds One and Two: Petitioner's claims involving improperly admitted evidence.

In Grounds One and Two, Petitioner alleges the trial court improperly admitted prejudicial evidence, namely, his un-redacted "pen packet," and a photograph. Petitioner claims the evidence deprived him of a fundamentally fair trial under the federal constitution.³

Related to Ground One, the OCCA reviewed for plain error and held:

Certain information contained in the pen pack, including evidence of prison disciplinary proceedings, [Petitioner's] religious affiliation, suspended sentences, early release, and charging details on prior convictions, was erroneously admitted at sentencing. However, considering the remaining evidence of [Petitioner's] criminal record, and the State's lack of emphasis on inadmissible evidence in the closing argument during sentencing, we find the error did not seriously affect the fairness, integrity, or public reputation of the proceeding.

³ Contrary to Respondent's assertion otherwise, *see* Doc. 14, at 3, 18, Petitioner clearly challenged the trial court's admission of the photograph under the federal due process claim on direct appeal. *See id.* Ex. 3, at 33 (beginning his argument about the photograph's alleged improper admission with: "A criminal defendant has a due process right to a fundamentally fair trial by a jury. U.S. Const. amends. VI, XIV[.]").

Doc. 14, Ex. 5, at 2-3.

For Ground Two, the appellate court found:

Relevant photographs are admissible if their probative value is not substantially outweighed by the danger of unfair prejudice or other countervailing factors. The photograph was relevant to the issues at trial and properly admitted.

Id. at 4.

1. Clearly established law.

Petitioner's arguments focus on the State's introduction of evidence in violation of Oklahoma law. However, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). "Nevertheless, when a state court admits evidence that is 'so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.'" *Ochoa v. Workman*, 669 F.3d 1130, 1144 (10th Cir. 2012) (citation omitted); *see also Williamson v. Parker*, --- F. App'x ---, 2017 WL 2986898, at *2 (10th Cir. 2017) ("Although federal habeas relief does not extend to the remedying of state law evidentiary errors, an exception applies when a state court admits evidence that is so unduly prejudicial that it renders the trial fundamentally unfair." (citation and internal quotation

marks omitted)). So, the court's concern is not whether the trial court admitted the evidence in violation of Oklahoma law, but whether the OCCA reasonably determined the evidence did not render Petitioner's trial fundamentally unfair. *See, e.g., Ochoa*, 669 F.3d at 1144 (holding that the question of whether evidence renders a trial fundamentally unfair is made "without regard to whether the evidence was properly admitted pursuant to state law" (citing *Estelle*, 502 U.S. at 67-68)).

2. The State's introduction of Petitioner's unredacted "pen pack" (Ground One).

Petitioner first complains the trial court allowed the State to introduce his "entire 'pen packet'" which contained irrelevant and prejudicial information, including: (1) "prior criminal allegations"; (2) an affidavit from the district attorney; (3) institutional misconduct and disciplinary records; (4) prior suspended sentence revocations; (5) Petitioner's religious affiliation; (6) an affidavit of probable cause; and (7) outdated prior convictions. Doc. 1, at 6. This evidence was admitted in the trial's "second stage." *Id.* As noted above, the OCCA agreed the trial court had erroneously admitted evidence relating to Petitioner's "prison disciplinary proceedings, . . . religious affiliation, suspended sentences, early release, and charging details on prior convictions" but held "it [did] not seriously affect the fairness, integrity, or public reputation of the proceedings." Doc. 14, Ex. 5, at 2-3.

In making this ruling, the OCCA applied a “plain error” standard. *Id.* at 2. Notably, “Oklahoma’s formulation of the plain-error standard is virtually identical to the constitutional test for due process.” *Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015). So when the OCCA “rejected [Petitioner’s] claim under the plain-error standard, the decision effectively disallowed the possibility of a due process violation.” *Id.* This Court must then defer to the OCCA’s ruling unless it “unreasonably applied” the due process test. *Thornburg v. Mullin*, 422 F.3d 1113, 1125 (10th Cir. 2005) (internal brackets and citation omitted); *see also Eizember v. Trammell*, 803 F.3d 1129, 1138 n.1 (10th Cir. 2015) (finding, “under [Tenth Circuit] precedents,” that “if a state court on plain error review denies relief on a federal claim by deciding there was no federal law error at all . . . our standard AEDPA standards apply”). With this, the court should find the OCCA reasonably applied federal law when it rejected Petitioner’s due process claim in Ground One.

As the OCCA noted, the State did not emphasize Petitioner’s prison disciplinary proceedings, religious affiliation, suspended sentences, early release, or charging details on prior convictions during its second-stage closing argument. TR Vol. II, at 14. Instead, the State simply stated:

This packet contains the history of the defendant while he was in DOC. It has his fingerprints, it has his pictures, and it has certified copies of J and S’s or judgment and sentences of the three prior felonies that the defendant was convicted of. You are all going to get to take this back with you and you get to take a look

at it. I submit to you, this alone shows that the defendant has been convicted of three prior felonies beyond a reasonable doubt.

Id. Further, Petitioner had, in fact, been convicted of three former felonies and his life sentence was therefore within the statutory range. *See infra* § V(E)(2). Under such circumstances, Petitioner cannot show the OCCA unreasonably applied federal law when it found the irrelevant evidence did not render his second-stage trial fundamentally unfair. *See, e.g., Goudeau v. Allbaugh*, No. CIV-13-241-M, 2016 WL 775791, at *10 (W.D. Okla. Jan. 29, 2016) (unpublished report & recommendation) (collecting cases holding petitioner cannot show evidence contributed to a fundamentally unfair sentencing where sentence fell within statutory guidelines), *adopted*, 2016 WL 815327 (W.D. Okla. Feb. 29, 2016) (unpublished order), *appeal dismissed*, No. 16-6069 (10th Cir. June 22, 2016).

3. The State's introduction of an allegedly prejudicial photograph (Ground Two).

Petitioner next argues the trial court allowed the State to introduce an irrelevant and prejudicial photograph of a cellophane wrapper found in his car. Doc. 1, at 8. On this claim, the OCCA held the evidence was relevant and thus properly admitted under Oklahoma law. Doc. 14, Ex. 5, at 4. Again, the court should find reasonable the OCCA's implicit finding that the evidence did not therefore render Petitioner's trial fundamentally unfair.

According to Petitioner, the photograph was irrelevant and prejudicial because “the piece of cellophane in the photograph” was “never proved to be torn, or compared to the actual bag” and “could not prove Petitioner had dominion and control over the bag of drugs found in the back yard of a residence yards away.” Doc. 1, at 8. But as discussed above, the State did not attempt to prove Petitioner had dominion and control over the drugs located in the yard, but that he had actually possessed the drugs. *See supra* § V(A)(4). And, Officer Bybee gave his opinion the “piece of cellophane [found in the car] . . . was possibly . . . the same type of cellophane [the drugs were found in].” TR Vol. I, at 167.

“Evidence is not unfairly prejudicial simply because it is damaging to [the defendant].” *United States v. Caraway*, 534 F.3d 1290, 1301 (10th Cir. 2008) (citation omitted). Instead, it is only unfairly prejudicial “if it makes ‘a conviction more likely because it provokes an emotional response in the jury or otherwise tends to affect adversely the jury’s attitude toward the defendant wholly apart from its judgment as to his guilt or innocence of the crime charged.’” *United States v. McGlothlin*, 705 F.3d 1254, 1266 (10th Cir. 2013) (citation omitted). In sum, Petitioner fails to show the OCCA unreasonably applied federal law when it held, in essence, the photograph did not render Petitioner’s trial fundamentally unfair.

C. Ground Three: Petitioner's Double Jeopardy claim.

In Ground Three, Petitioner claims his convictions for possessing both cocaine and methamphetamine in the same bag violate the Double Jeopardy clause. Doc. 1, at 11. The undersigned recommends the court deny this claim as moot. The OCCA agreed with this same argument on direct appeal and reversed one of Petitioner's two convictions for possessing a controlled dangerous substance. Doc. 14, Ex. 5, at 2; *see also id.* Ex. 2. As there is no relief this Court can now grant Petitioner, his Double Jeopardy claim is moot. *See Romero v. Franklin*, 244 F. App'x 224, 226 (10th Cir. 2007) (denying petitioner's certificate of appealability where the district court properly held petitioner's double jeopardy claim "was rendered moot by the OCCA's dismissal" of one of the two relevant convictions).

D. Ground Four: Petitioner's ineffective assistance of trial counsel claim.

According to Petitioner, his trial counsel was constitutionally ineffective for failing to: (1) move to dismiss one count of possession of a controlled dangerous substance on Double Jeopardy grounds; (2) object to the admission of the unredacted "pen packet"; (3) file a motion to quash after the State failed to present sufficient evidence to bind Petitioner over for trial at the preliminary hearing; and that he (4) erroneously argued Petitioner was an addict with no

evidence in support. Doc. 1, at 14. The OCCA rejected this claim on direct appeal, holding:

[Petitioner] argues that counsel rendered ineffective assistance by failing to raise his double jeopardy claim, file a motion to quash, object to improper evidence, and an improper reference to [Petitioner's] addiction in argument. Reviewing these claims according to the deficient performance/prejudice test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 1064, 80 L.Ed.2d 674 (1984), no relief is warranted. [Petitioner's] double jeopardy complaint is mooted by dismissal of Count 2. Counsel's other alleged deficiencies create no reasonable probability of a different outcome.

Doc. 14, Ex. 5, at 4-5.

1. Clearly established law.

Under clearly established law, Petitioner must demonstrate his attorney's performance was deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 690-91 (1984). A court will only consider an attorney's performance "deficient" if it falls "outside the wide range of professionally competent assistance." *Id.* at 690. "[P]rejudice" involves "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"Surmounting *Strickland's* high bar is never an easy task." *Harrington*, 562 U.S. at 105 (internal quotation marks and citation omitted). That is, "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult [as] [t]he standards created by

Strickland and § 2254(d) are both highly deferential and when the two apply in tandem, review is doubly so.” *Id.* (internal quotations marks and citations omitted). So, “[w]hen § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.*

2. Trial counsel’s failure to object to a Double Jeopardy violation.

Petitioner first alleges his trial attorney was ineffective for failing to raise a Double Jeopardy objection to the State charging him with two counts of possession of a controlled dangerous substance. Doc. 1, at 14. However, the OCCA reversed one conviction, thus mooting the underlying claim. *See supra* § V(C). For the same reason, Petitioner’s related ineffective assistance of trial counsel claim is also moot. *See Thompson v. Jones*, No. CIV-10-190-RAW-KEW, 2013 WL 5276099, at *1, *5 (E.D. Okla. Sept. 18, 2013) (unpublished order) (“Because the OCCA reversed petitioner’s convictions for Count 4 and Count 11, his ineffective assistance of counsel claim regarding instructions for those charges . . . [is] moot.”), *appeal dismissed*, No. 13-7064 (10th Cir. Oct. 22, 2013).

3. Trial counsel’s failure to object to the admission of the unredacted “pen packet.”

Petitioner next alleges his trial counsel should have objected to the State’s introduction of his unredacted “pen packet,” Doc. 1, at 14, and, indeed,

the OCCA held some of the evidence contained therein was irrelevant and erroneously admitted. Doc. 14, Ex. 5, at 2-3. However, the OCCA also found the admission did not “seriously affect the fairness, integrity, or public reputation of the proceedings” and the appellate court’s implicit conclusion that the evidence did not render Petitioner’s sentencing fundamentally unfair was a reasonable application of federal law. *Supra* § V(B)(2). Since Petitioner cannot therefore show any prejudice in the trial attorney’s failure to object, the court should find the OCCA reasonably applied *Strickland* in rejecting this claim on direct appeal.

4. Trial counsel’s failure to move to quash when the State allegedly failed to provide sufficient evidence to bind him over at preliminary hearing.

As the OCCA noted, the proper method for challenging the lack of sufficient evidence at a preliminary hearing is through a motion to quash. Doc. 14, Ex. 5, at 3. Petitioner’s attorney did not file such a motion, and the OCCA therefore reviewed his insufficiency of the preliminary hearing evidence claim for only plain error. *Id.* The OCCA found no error. *Id.*

At a preliminary hearing in Oklahoma, the State must only provide enough evidence to establish: “(1) probable cause that a crime was committed, and (2) probable cause to believe that the defendant committed the crime.” *State v. Juarez*, 299 P.3d 870, 873 (Okla. Crim. App. 2013). Relevant here, “the State is not required to prove the defendant’s guilt with certainty,” only that

“it is *reasonable* to believe that the defendant committed the offense(s) at issue.” *Id.*

Much like they did at trial, Officers Stidham and Duran testified at the preliminary hearing that they were surveilling a house for potential drug activity when they observed a Nissan leave the residence. TR PH, at 4, 33-34. Officer Bybee testified he eventually took over following the Nissan, and after he attempted a traffic stop, a man jumped out of the car and fled on foot. *Id.* at 23-24. Petitioner admitted he was the Nissan’s driver. *Id.* at 27. Officers Stidham and Bybee apprehended Petitioner and found his discarded shirt nearby. *Id.* at 6-8. Upon further search, the officers then discovered a bag of drugs “just east of where the shirt was located.” *Id.* at 9-10.

As the OCCA held, this testimony established probable cause the crime of possession of a controlled dangerous substance was committed, and it was *reasonable* to believe Petitioner committed the crime. So, Petitioner cannot show the trial court would have likely granted a motion to quash based on insufficient evidence at preliminary hearing. Under such circumstances, trial counsel had no obligation to file the motion and the court should find the OCCA reasonably applied *Strickland* in rejecting this allegation. *See, e.g., Williams v. Trammell*, 782 F.3d 1184, 1202-06 (10th Cir. 2015) (holding the OCCA reasonably applied *Strickland* to find no deficient performance in the trial attorney’s failure to lodge a meritless objection).

5. Trial counsel's argument Petitioner was an addict.

Finally, Petitioner complains his attorney told jurors Petitioner was an addict with "no evidence to support this argument." Doc. 1, at 14. The court should again find no merit in this claim. *After* the jury convicted Petitioner, his trial attorney told jurors Petitioner was "an addict, [and] has been an addict for a long time." TR Vol. II, at 15. The attorney then asked the jurors to sentence Petitioner to the minimum sentences, "run together," so Petitioner could obtain treatment. *Id.*

An attorney's handling of closing arguments is considered a strategic decision, and is therefore afforded great deference. *See Moore v. Gibson*, 195 F.3d 1152, 1179-80 (10th Cir. 1999) (holding counsel's concessions during closing were presumed "sound trial strategy"). Here, Petitioner fails to establish counsel's conduct was either deficient or prejudicial, and thus the OCCA reasonably applied *Strickland* in rejecting the claim.

E. Ground Seven: the alleged excessiveness of Petitioner's two life sentences.

In Ground Seven, Petitioner alleges a constitutional violation because the jury rendered "excessive sentences in violation of the Double Jeopardy Clause, when Petitioner was sentenced to two life sentences" Doc. 1, at 23. Again, the OCCA reversed one of Petitioner's two possession convictions leaving him with only one life sentence. Doc. 14, Ex. 5, at 2; *see also id.* Ex. 2.

So, Petitioner's excessive sentence claim based on two life sentences is moot. Additionally, the OCCA reasonably concluded Petitioner's remaining life sentence was not constitutionally excessive. *Id.* Ex. 5, at 5.

1. Clearly established law.

The Supreme Court has clearly established "the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." *Ewing v. California*, 538 U.S. 11, 21 (2003) (citation omitted). However, "outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* (citation and internal brackets omitted). Indeed, the court "afford[s] wide discretion to the state trial court's sentencing decision, and challenges to that decision are not generally constitutionally cognizable, unless it is shown the sentence imposed is outside the statutory limits or unauthorized by law." *Dennis v. Poppel*, 222 F.3d 1245, 1258 (10th Cir. 2000). Generally then, habeas review "ends once [the court] determine[s] the sentence is within the limitation set by statute." *Id.*; see also *Doyle v. Jones*, 452 F. App'x 836, 843 (10th Cir. 2011) ("Because the sentence 'was within the statutory range provided by Oklahoma law,' the district court denied relief [on petitioner's excessive sentence claim]. No reasonable jurist could debate the district court's decision." (citation omitted)).

2. Petitioner's sentence.

In relevant part, Petitioner was convicted of possessing a controlled dangerous substance after three former felonies. Doc. 14, Ex. 2. In Oklahoma, his punishment range was therefore “six years to life imprisonment.” Okla. Stat. tit. 63, § 2-401(B)(2) (directing punishment for possessing a controlled dangerous substance at “not less than two (2) years nor more than life”); *id.* tit. 21, § 51.1(C) (permitting sentence enhancement for any person having been twice convicted of a felony offense to “a term in the range of three times the minimum term . . . to life imprisonment”). Since Petitioner’s life sentence falls within the statute’s limitation, the court cannot say the OCCA unreasonably applied federal law when it rejected this claim on the merits.

VI. Recommended ruling and notice of right to object.

For the reasons discussed above, the undersigned recommends the court deny the petition for habeas relief.⁴


The undersigned advises the parties of their right to object to this report and recommendation by August 29, 2017, under 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises the parties that failure to make timely objection to this report and recommendation waives their right to

⁴ Throughout his petition, Petitioner seeks appointment of counsel and an evidentiary hearing. Doc. 1, at 7, 10, 12, 15, 18, 21, 24. Petitioner made the same requests in independent motions, Docs. 4, 5, which the undersigned denied. Doc. 23.

appellate review of both factual and legal issues contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This report and recommendation disposes of all issues referred to the undersigned Magistrate Judge in this matter.

Entered this 9th day of August, 2017.


SUZANNE MITCHELL
UNITED STATES MAGISTRATE JUDGE

No.

IN THE
Supreme Court of the United States

CODY WAYNE MAYFIELD,

Petitioner,

V.

JIMMY MARTIN, WARDEN

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

APPENDIX C: Opinion for the Oklahoma Court of
Criminal Appeals

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APPENDIX C

CLIENT'S COPY

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RECEIVED

CODY WAYNE MAYFIELD,

NOT FOR PUBLICATION

JAN 21 2016

Appellant,

v.

Case No. F-2014-830

FROM COURT OF
CRIMINAL APPEALS

THE STATE OF OKLAHOMA,

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 21 2016

Appellee.

SUMMARY OPINION

MICHAEL S. RICHIE
CLERK

LEWIS, JUDGE:

Appellant, Cody Mayfield was tried by jury and found guilty of Counts 1 and 2, possession of a controlled dangerous substance, in violation of 63 O.S. Supp.2012, § 2-402; and Count 3, failure to stop at a red light, a misdemeanor, in violation of 47 O.S. 2011, § 11-202, in the District Court of Comanche County, Case No. CF-2013-532.¹ The jury found Appellant guilty after former conviction of two (2) or more felonies and sentenced Appellant to life imprisonment in Counts 1 and 2, and ten (10) days in jail in Count 3. The Honorable Keith B. Aycock, District Judge, pronounced judgment and ordered the sentences served consecutively. Mr. Mayfield appeals in the following propositions of error:

1. Mr. Mayfield's convictions on two counts of possession of a controlled dangerous substance violate the protections against double jeopardy;
2. The trial court erred in admitting some of the irrelevant and highly prejudicial information within the "pen packet;"

¹ The jury acquitted Appellant of the charge in Count 1 of possession of a controlled dangerous substance with intent to distribute, but convicted him of the lesser offense of possession of a controlled dangerous substance.

3. The State failed to prove, beyond a reasonable doubt, that Mr. Mayfield constructively possessed the methamphetamine or cocaine;
4. The trial court erred in admitting the irrelevant and prejudicial photograph of a piece of cellophane;
5. There was insufficient evidence to bind Mr. Mayfield over for trial on both the charge of possession of a controlled dangerous substance and possession of a controlled dangerous substance with intent to distribute;
6. Petitioner was denied effective assistance of counsel;
7. Mr. Mayfield's sentence is excessive and should be modified.

Appellant claims in Proposition One that his convictions for possession of two drugs in a single container violate double jeopardy under the holdings of *Watkins v. State*, 1991 OK CR 119, ¶ 6, 829 P.2d 42, 43 and *Lewis v. State*, 2006 OK CR 48, ¶ 10, 150 P.3d 1060, 1063. Despite the failure to object, the State confesses the error. Count 2 is reversed and remanded with instructions to dismiss. No further relief is necessary.

In Proposition Two, Appellant asserts that information within the "pen packet" was erroneously admitted. Appellant failed to object at trial, waiving all but plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692-93. To obtain relief, Appellant must show a plain or obvious error affected the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764. The Court will correct plain error only when it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Barnett v. State*, 2012 OK CR 2, ¶ 3, 271 P.3d 80, 82.

Certain information contained in the pen pack, including evidence of prison disciplinary proceedings, Appellant's religious affiliation, suspended

sentences, early release, and charging details on prior convictions, was erroneously admitted at sentencing. However, considering the remaining evidence of Appellant's criminal record, and the State's lack of emphasis on inadmissible evidence in the closing argument during sentencing, we find the error did not seriously affect the fairness, integrity, or public reputation of the proceedings. Proposition Two is denied.

In Propositions Three and Five, Appellant argues that the evidence was insufficient to bind him over after preliminary examination, or to convict him at trial. The procedure for challenging sufficiency of the evidence to support a magistrate's order of commitment for trial is a motion to quash for insufficient evidence. 22 O.S.2011, § 504.1; *State v. Davis*, 1991 OK CR 123, ¶ 4, 823 P.2d 367, 369. Appellant has waived this claim. Reviewing for plain error, as defined above, we find none.

In his sufficiency challenge to the evidence at trial, Appellant argues the State failed to prove his constructive possession of the drugs beyond a reasonable doubt. The Court must therefore determine "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 204.

Appellant's argument confuses the concept of constructive possession with the sufficiency of the mostly circumstantial evidence to prove his *actual* possession of drugs just before abandoning them in the hope of avoiding

prosecution. Appellant "was not found in actual physical possession of contraband . . . his guilt or innocence must be determined by the inferences which the circumstantial evidence against him properly supports." *Johnson v. State*, 1988 OK CR 246, ¶ 7, 764 P.2d 530, 532. Circumstantial evidence supports the inference that Appellant actually possessed the drugs discarded along his path of escape, and was guilty as charged. Propositions Three and Five are denied.

Proposition Four claims that the court erroneously admitted a photograph of a piece of cellophane found in Appellant's car. We review the admission of photographs for abuse of discretion. *Grissom v. State*, 2011 OK CR 3, ¶ 58, 253 P.3d 969, 989. Relevant photographs are admissible if their probative value is not substantially outweighed by the danger of unfair prejudice or other countervailing factors. 12 O.S.2011, §§ 2401, 2403. The photograph was relevant to the issues at trial and properly admitted. Proposition Four is denied.

In Proposition Six, Appellant argues that counsel rendered ineffective assistance by failing to raise his double jeopardy claim, file a motion to quash, object to improper evidence, and an improper reference to Appellant's addiction in argument. Reviewing these claims according to the deficient performance/prejudice test of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 1064, 80 L.Ed.2d 674 (1984), no relief is warranted. Appellant's double jeopardy complaint is mooted by dismissal of Count 2. Counsel's other

alleged deficiencies create no reasonable probability of a different outcome. Proposition Six is denied.

Proposition Seven contends that the remaining life sentence should be modified in the interest of justice. We will not modify a sentence within the statutory range unless under all the facts and circumstances of the case the sentence is "so excessive as to shock the conscience of the Court." *Watts v. State*, 2008 OK CR 27, ¶ 10, 194 P. 3d 133, 137 (quoting *Freeman v. State*, 1994 OK CR 37, ¶ 38, 876 P.2d 283, 291. Appellant's remaining life sentence is not shocking to the conscience, given his prior record of criminal activity. Proposition Seven is denied.

DECISION

The judgment and sentence of the District Court of Comanche County in Count 2 is **REVERSED AND REMANDED WITH INSTRUCTIONS TO DISMISS**. The remaining counts are **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

**AN APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY
THE HONORABLE KEITH B. AYCOCK, DISTRICT JUDGE**

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OPINION BY LEWIS, J.
SMITH, P.J.: Concurs
LUMPKIN, V.P.J.: Concurs
JOHNSON, J.: Concurs
HUDSON, J.: Concurs

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