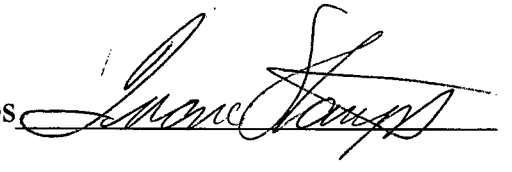
Appendix A

Tenth Circuit Denial of

Certificate of Appealability

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that this exhibit is a true and correct copy of the original. See 28 U.S.C. §1746; 18 U.S.C. §1621.

Ivan Stamps  Date: 6/5/19

FILED
United States Court of Appeals
Tenth Circuit

February 12, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

IVAN STAMPS,

Petitioner - Appellant,

v.

MICHAEL MILLER,

Respondent - Appellee.

No. 18-1393
(D.C. No. 1:17-CV-01672-RM)
(D. Colorado)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **LUCERO**, **HARTZ**, and **McHUGH**, Circuit Judges.

Ivan Stamps, a Colorado state prisoner acting pro se,[1] seeks a certificate of appealability ("COA") in order to challenge the district court's denial of his petition for relief under 28 U.S.C. § 2254 ("§ 2254 petition"). Exercising our jurisdiction under 28 U.S.C. § 1291, we deny Mr. Stamps's application for a COA.

*This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and 10th Circuit Rule 32.1.

[1] Because Mr. Stamps is appearing pro se, we liberally construe his pleadings. *Ogden v. San Juan Cty.*, 32 F.3d 452, 455 (10th Cir. 1994). "[T]his rule of liberal construction stops, however, at the point at which we begin to serve as his advocate." *United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009).

I. BACKGROUND

The State of Colorado charged Mr. Stamps with four counts of aggravated robbery, one count of attempted robbery, two counts of second-degree assault on a peace officer, one count of attempted second-degree assault on a peace officer, and one count of criminal impersonation. After a trial at which Mr. Stamps represented himself, a jury convicted him as charged, and the court sentenced him to 292 years in prison.

Mr. Stamps appealed to the Colorado Court of Appeals ("CCA"). His appeal raised the following issues: (1) eyewitness identification testimony admitted at trial should have been suppressed as the fruit of an unduly suggestive showup;[2] (2) the evidence was insufficient to support certain of his convictions; (3) the trial court should have instructed the jury on abandonment as an affirmative defense to attempted robbery; (4) certain photographs should have been suppressed for, among other reasons, being unfairly prejudicial; (5) prosecutorial misconduct warranted reversal; (6) the trial court should not have permitted the refiling of three aggravated robbery charges previously dismissed; (7) the criminal information failed to confer jurisdiction; and (8) outrageous governmental conduct warranted reversal. The CCA affirmed the judgment of the trial

[2] "A 'showup' is a procedure where a single individual is exhibited to a witness and the witness is asked whether she can identify the individual as the perpetrator of the crime being investigated." *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1263 n.2 (8th Cir. 1996); *see also United States v. Wade*, 388 U.S. 218, 229 (1967) ("The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an 'identification parade' or 'showup,' as in the present case . . . .). Here, shortly after apprehending Mr. Stamps, the police drove him to the eyewitnesses, took him out of an unmarked police car, and asked the witnesses whether he was the perpetrator.

court on all counts and denied Mr. Stamps's appeal. Mr. Stamps later petitioned the Colorado Supreme Court ("CSC") for a writ of certiorari which was also denied.[3]

Mr. Stamps then filed a § 2254 petition in the United States District Court for the District of Colorado, raising the following four claims:

1. Whether prosecution acquired jurisdiction of the court through use of a fraudulent verification affidavit;
2. Whether the concerted action by three different government agencies to produce a fraudulent affidavit rises to the level of outrageous government conduct;
3. Whether the trial court should have permitted the refiling of charges that were previously dismissed (counts seven, eight, and nine); and
4. Whether eyewitness identifications of the defendant should have been suppressed as the fruit of an unduly suggestive identification procedure, and whether the trial and appeal courts failed to apply the *Niel v. Biggers* identification test in an objectively unreasonable manner. ROA at 523–531.

Upon initial consideration of Mr. Stamps's claims and the relevant standards applicable to a § 2254 petition under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the district court determined that Mr. Stamps had not exhausted Claims One and Three in state court and that those unexhausted claims were procedurally barred from federal habeas review. The district court then directed the State of Colorado to file an answer addressing the merits of the exhausted claims, Two and Four.[4] After

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[3] Though Mr. Stamps only raised two issues in his petition for certiorari, Colorado Appellate Rule 51.1 "permits state prisoners to exhaust all available state remedies without seeking discretionary relief from the CSC." *Ellis v. Raemisch*, 872 F.3d 1064, 1077 (10th Cir. 2017).

[4] Ordinarily, when faced with a "mixed petition"—one containing both exhausted and unexhausted claims—a district court must "either (1) dismiss the entire petition without prejudice in order to permit exhaustion of state remedies, or (2) deny the entire petition on the merits." *Wood v. McCollum*, 833 F.3d 1272, 1273 (10th Cir. 2016) (internal quotation marks omitted). When the unexhausted claims would be procedurally

receiving the state's answer and a reply from Mr. Stamps, the district court concluded that Claims Two and Four lacked merit and the court dismissed the remainder of Mr. Stamps's § 2254 petition and further denied a COA.

Mr. Stamps timely filed with this court a combined application for a COA and opening brief challenging the district court's denial of his § 2254 petition.

II. CERTIFICATE OF APPEALABILITY

To appeal the district court's denial of his § 2254 petition, Mr. Stamps must first obtain a COA, which is available only if Mr. Stamps can establish "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Making this showing requires Mr. Stamps to demonstrate 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." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Here, the district court concluded Mr. Stamps had failed to meet his burden and denied him a COA.

The standard for our review of the district court's decision varies, depending on the grounds for its denial of the § 2254 petition. When the district court has disposed of a claim on procedural grounds, such as failure to exhaust, we will issue a COA only when the petitioner meets a two-part standard, showing both that "jurists of reason would find

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barred in state court, however, the court may properly deem the unexhausted claims to be barred from federal habeas review and address the exhausted claims. *Harris v. Champion*, 48 F.3d 1127, 1131 n.3 (10th Cir. 1995).

it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 478; *see Coppage v. McKune*, 534 F.3d 1279, 1281 (10th Cir. 2008) ("If the application was denied on procedural grounds, the applicant faces a double hurdle.").

When the district court has rejected constitutional claims on the merits, however, the petition must demonstrate only "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. To satisfy this standard, Mr. Stamps need not show that some jurists would grant his § 2254 petition; he need only prove "something more than the absence of frivolity or the existence of mere good faith." *Miller-El*, 537 U.S. at 338 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)).

In his application to this court, Mr. Stamps raises the same four claims he presented to the district court, two of which the district court disposed of on procedural grounds and two of which it rejected on the merits.[5] We address the claims in Mr. Stamps's petition in the order addressed by the district court, considering its procedural rulings first before turning to the claims decided on the merits.

A. *District Court's Procedural Rulings*

To successfully challenge a state conviction, a § 2254 petitioner must demonstrate either that he has exhausted all available remedies in state court or that "there is an

[5] Although Mr. Stamps has renumbered his claims in his opening brief and application for a COA, we will refer to the claims as numbered in his § 2254 petition.

absence of available State corrective process" or "circumstances exist that render such process ineffective to protect" his rights. 28 U.S.C. § 2254(b)(1).[6]

In general, a petitioner's federal constitutional claim "has been exhausted when it has been 'fairly presented' to the state court." *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006). Although a petitioner need not cite "book and verse on the federal constitution," *id.* (internal quotation marks omitted), he or she should "include reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle [him or her] to relief." *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996). "[T]he crucial inquiry is whether the substance of the petitioner's claim has been presented to the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim." *Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012) (internal quotation marks omitted).

When a petition contains unexhausted claims, a federal court may apply an "anticipatory procedural bar" to those claims if "the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000) (quoting *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991)). This anticipatory bar will preclude a claim from federal habeas review if the claim has "been defaulted in state court on an independent and adequate state procedural ground, unless the petitioner

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[6] Mr. Stamps does not argue either "absence of available State corrective process" or that "circumstances exist that render such process ineffective." 28 U.S.C. § 2254(b)(1)(i), (ii). Accordingly, he must have exhausted all available state-court remedies to challenge his conviction on federal habeas.

can demonstrate cause and prejudice or a fundamental miscarriage of justice." *Anderson v. Sirmons*, 476 F.3d 1131, 1140 (2007) (internal quotation marks omitted).

To demonstrate cause and prejudice, a petitioner must show that "some objective factor external to the defense impeded . . . his efforts to comply with the state procedural rules," *Coronado v. Ward*, 517 F.3d 1212, 1215 (10th Cir. 2008) (internal quotation marks omitted), and "actual prejudice as a result of the alleged violation of federal law," *Byrd v. Workman,* 645 F.3d 1159, 1167 (10th Cir. 2011). The fundamental miscarriage of justice exception will excuse failure to exhaust only when "a constitutional violation has probably resulted in the conviction of one who is *actually innocent*." *Selsor v. Kaiser*, 22 F.3d 1029, 1034 (10th Cir. 1994).

The district court determined that Mr. Stamps failed to exhaust Claims One and Three because he did not "fairly present" them to the state court. Because the state court would now find them procedurally barred, and because Mr. Stamps could show neither cause and prejudice nor a fundamental miscarriage of justice, the district court further concluded that Claims One and Three were subject to an anticipatory procedural bar and precluded from federal habeas review.

After careful consideration of the district court's order and the record on appeal, we conclude that jurists of reason would not find it debatable that the district court correctly disposed of Claim One on procedural grounds. And although we conclude that jurists of reason would find it debatable that the district court correctly disposed of Claim Three on procedural grounds, they would not find it debatable that Mr. Stamps's petition does not state a valid claim of the denial of a constitutional right with respect to Claim

Three. Accordingly, we deny Mr. Stamps's request for a COA on Claims One and Three for the reasons set forth below.

1. Claim One—Fraudulent Affidavit

In Claim One of his petition, Mr. Stamps asserts that the Colorado state court acquired jurisdiction over him through an allegedly fraudulent affidavit, submitted by the prosecution, in which a detective swore to the accuracy of statements contained in Mr. Stamps's charging document, a criminal information. The CCA held jurisdiction was proper, despite any defect in the affidavit, because "it is well settled in Colorado that a defect in the affidavit verifying the information does not deprive the court of subject matter jurisdiction." ROA at 343.

The district court determined that Mr. Stamps failed to exhaust Claim One because he relied only on state law when addressing this claim in his opening brief to the CCA. Accordingly, the district court found Mr. Stamps failed to allege a violation of federal law with respect to Claim One on direct appeal. And because Colo. R. Crim. P. 35(c)(3)(VII) bars Mr. Stamps from returning to state court to exhaust this claim, he is procedurally barred from seeking federal habeas review.

Jurists of reason would not find this procedural ruling debatable. Mr. Stamps's opening brief to the CCA relies exclusively on state law to mount a jurisdictional challenge to his conviction. Nowhere with respect to Claim One does this brief include reference to a "specific federal constitutional guarantee," *Gray*, 518 U.S. at 162–63, and therefore the brief did not put the state court on notice of a federal constitutional claim. *Prendergast*, 699 F.3d at 1184. Although the brief seeks broad relief in the form of

reversal of his convictions and dismissal of the case, citing the Fourteenth Amendment, "it is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Gray*, 518 U.S. at 163.

Mr. Stamps may not now repackage the state jurisdictional challenge he made before the CCA as a federal due process challenge to obtain federal habeas relief. *See Bland*, 459 F.3d at 1012 ("[P]resentation of a 'somewhat similar' claim is insufficient to 'fairly present' a federal claim before the state courts."). His argument that the improperly verified information failed to confer jurisdiction on the state court depends on an alleged deviation from the requirements of state law, not the federal constitution. *See Scott v. People*, 490 P.2d 1295, 1298 (Colo. 1971) ("Verification of an information is required by statute."); *see also Poe v. Caspari*, 39 F.3d 204, 207 (8th Cir.1994) ("Jurisdiction is no exception to the general rule that federal courts will not engage in collateral review of state court decisions based on state law . . . ."); *Chandler v. Armontrout*, 940 F.2d 363, 366 (8th Cir.1991) ("The adequacy of an information is primarily a question of state law and we are bound by a state court's conclusion respecting jurisdiction . . . . This determination of jurisdiction is binding on this [federal] court."); *Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.1991) ("We are not persuaded that a constitutional violation necessarily occurs when the convicting state court acts without jurisdiction purely as a matter of state law."). Thus, Mr. Stamps's federal due process challenge is unexhausted.

Because Rule 35(c)(3)(VII) bars Mr. Stamps from returning to state court to exhaust his federal due process claim,[7] the district court concluded it is barred from federal habeas review unless he can demonstrate cause and prejudice or a fundamental miscarriage of justice. *Anderson*, 476 F.3d at 1139 n.7. Mr. Stamps points to no objective factor that impeded his efforts to comply with procedural rules and therefore cannot meet the cause-and-prejudice standard. Nor does Mr. Stamps allege that he is actually innocent in support of a fundamental-miscarriage-of-justice argument.

Accordingly, jurists of reason would not debate that the district court correctly imposed an anticipatory procedural bar, and we deny a COA as to Claim One.

2. Claim Three—Refiling of Charges

In Claim Three of his petition, Mr. Stamps asserts the state trial court violated his due process rights when it permitted the refiling of previously-dismissed charges against him. The CCA concluded that any error in the refiling of these charges was harmless. The district court dismissed Claim Three after concluding that Mr. Stamps had not fairly presented it to the state court as a federal constitutional issue.

"[J]urists of reason would find it debatable whether the district court was correct in its procedural ruling" as to the fair presentation of Mr. Stamps's federal due process claim in the state court proceedings. *Slack*, 529 U.S. at 478. In his opening brief on direct

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[7] Mr. Stamps does not dispute that Rule 35(c)(3)(VII) is an independent and adequate state ground precluding federal habeas review, and our case law would not support such an argument. *See LeBere v. Abbott*, 732 F.3d 1224, 1233 n.13 (10th Cir. 2013) (listing unpublished cases finding Rule 35(c)(3)(VII) to be an independent and adequate state ground precluding federal habeas review).

appeal to the CCA, Mr. Stamps argued it is a "violation of Due Process for the prosecutor to dismiss cases for the sole purpose of refiling them in a different case." He also asserted that the "rules and statutes governing the commencement of criminal proceedings exist to protect against 'constitutionally prohibited' prosecutorial harassment" and that, in his case, the prosecutor was "similarly . . . prohibited from refiling the three previously dismissed counts." As support, Mr. Stamps cited a Colorado case, *People v. Abrahamsen*, in which the CSC considered whether a "pattern of dismissal of counts [by the prosecutor], followed by refiling of the same counts" violated the "concept of fundamental fairness guaranteed by the due process clause of the federal and Colorado constitutions." 489 P.2d 206, 209 (Colo. 1971). Jurists of reason could debate, though they would not necessarily agree, whether Mr. Stamps put the CCA on notice of a federal claim.

But to satisfy the two-part standard governing our authority to grant a COA when the district court has dismissed a petition on procedural grounds, Mr. Stamps must also show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right." *Slack*, 529 U.S. at 478. To determine whether Mr. Stamps has met this requirement, we "simply take a quick look at the face of the [petition] to determine whether the petitioner has facially alleged the denial of a constitutional right." *Paredes v. Atherton*, 224 F.3d 1160, 1161 (10th Cir. 2000) (internal quotation marks omitted).

In his petition, Mr. Stamps alleges the prosecution originally filed two separate complaints against him, each of which contained multiple charges. The prosecution later

moved to dismiss one of those complaints, then refiled those charges, together with the charges in the undismissed complaint, in a combined criminal information containing all the charges on which Mr. Stamps was ultimately convicted. Mr. Stamps further alleges the prosecution failed to file a written statement of good cause for dismissing and refiling the charges in violation of Colo. Rev. Stat. Ann. § 16-5-205 (West 2018); Colorado Crim. P. 7(c)(1) and (c)(4), and *People v. Williams*, 987 P.2d 232, 236 (Colo. 1999); and that the result was so fundamentally unfair as to deprive him of his right to due process of law.

As a threshold matter, relief under § 2254 is not available for errors of state law. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) ("[I]t 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."). Thus, to the extent that Mr. Stamps alleges violations of Colorado state statutes or rules of criminal procedure relating to the dismissal and refiling of charges, his claim is not cognizable on federal habeas.

And although Mr. Stamps alleges a violation of the fundamental fairness required by the Fourteenth Amendment, he provides no federal authority, nor has this court's independent research uncovered any, for the proposition that the one-time dismissal of charges for the purpose of refiling and consolidating them with the charges in a separate case implicates, much less violates, fundamental fairness or any other constitutional right. Accordingly, jurists of reason would not "find it debatable whether the petition states a

valid claim of the denial of a constitutional right," and we deny a COA as to Claim Three. *Slack*, 529 U.S. at 478.

B. District Court's Merits Rulings

For a COA to issue on either of Mr. Stamps's remaining claims, he must demonstrate "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484. To do so, Mr. Stamps must sufficiently allege that the state-court decisions he challenges are "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; 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(d)(1), (2). Bearing in mind our deference to state-court determinations on the merits under AEDPA, and limiting ourselves to a "general assessment of [the claims'] merits" as opposed to a "full consideration of the factual or legal bases adduced in support of the claims," *Miller-El*, 537 U.S at 336, we conclude that jurists of reason would not find the district court's assessment of these claims debatable or wrong.

1. Claim Two—Outrageous Governmental Conduct

In Claim Two, Mr. Stamps asserts that a detective, notary public, and deputy district attorney involved in his case engaged in outrageous governmental conduct in violation of his constitutional right to due process by respectively swearing to, notarizing, and submitting a fraudulent affidavit verifying the charges set forth in his criminal information.

The CCA established the facts relevant to this claim as follows.[8] On February 13, 2013, a prosecutor created and signed the criminal information filed in Mr. Stamps's case. When the prosecutor filed the information with the trial court the next day, he attached a detective's notarized affidavit, dated February 4, 2013, stating "I have personal knowledge that each offense set forth in this Information was committed as charged." ROA at 468. Because the detective executed the affidavit before the criminal information had been created, "it could not have properly verified the information as filed." ROA at 469. The CCA concluded, however, that the deficiency in the affidavit appeared to result from the dismissal and refiling of charges, and even if the prosecution should have obtained a new affidavit to verify the information, the improperly-dated affidavit did not so "shock the universal sense of justice" as to rise to the level of outrageous governmental conduct. ROA at 346.

The district court agreed, observing that the Supreme Court has never applied the Due Process Clause to invalidate a conviction for outrageous governmental conduct. And although this court has recognized the existence of an outrageous conduct defense (requiring the defendant to show that "the government's conduct [was] so shocking, outrageous, and intolerable the conduct offends the universal sense of justice," *United States v. Lacey*, 86 F.3d 956, 964 (10th Cir. 1996) (internal quotation marks omitted)), we have never invalidated any conviction on such grounds. Lacking any precedent,

[8] AEDPA requires federal courts to presume the state court correctly determined factual issues. 28 U.S.C. § 2254(e)(1). Mr. Stamps can rebut this presumption only with "clear and convincing evidence," *id.*, which he makes no attempt to do.

Mr. Stamps cannot show the state court's decision to be contrary to, or an unreasonable application of, clearly established Federal law. Nor has Mr. Stamps shown that the state court's decision that the defective affidavit resulted from the dismissal and refiling of charges, as opposed to intentional fraud, rests upon an unreasonable determination of the facts.

No reasonable jurist would find the district court's rejection of this claim on the merits debatable or wrong. Accordingly, we deny a COA as to Issue Two.

2. Claim Four—Eyewitness ID Suppression

In Claim Four, Mr. Stamps asserts that the state court misapplied the five-factor test for determining eyewitness credibility established by the Supreme Court in *Niel v. Biggers*, 409 U.S. 188 (1972). Specifically, Mr. Stamps contends that two eyewitnesses' identifications of him resulted from unconstitutionally suggestive procedures and the testimony should therefore have been suppressed as unreliable.

As relevant to this claim, the victim of a carjacking, M.A., and a witness to the carjacking, B.W., both identified Mr. Stamps as the perpetrator of the carjacking in one-on-one showup procedures. Mr. Stamps alleges that, during each showup, he was taken out of a police car, in handcuffs, with officers on both sides of him holding his arms. At a hearing on Mr. Stamps's motion to suppress, the trial court heard no testimony from the eyewitnesses themselves but did hear testimony from officers who were present at the time of the showups. The trial court noted that much of the officers' testimony was

hearsay but allowed their testimony because Mr. Stamps did not object.[9] Ultimately, the trial court denied Mr. Stamps's motion to suppress, and both M.A. and B.W. testified at trial.

The CCA determined the trial court had correctly applied the five factors of *Biggers* to determine that M.A.'s testimony was reliable, even if the procedure surrounding her identification of Mr. Stamps was suggestive. *See Neil*, 409 U.S. at 199–200 (setting forth the five factors to determine reliability as (1) "the opportunity of the witness to view the criminal at the time of the crime"; (2) "the witness' degree of attention"; (3) "the accuracy of the witness' prior description of the criminal"; (4) "the level of certainty demonstrated by the witness at the confrontation"; and (5) "the length of time between the crime and the confrontation"). The trial court considered that (1) M.A. saw the perpetrator run at her from approximately thirty feet away; (2) she was paying attention to his face and the gun; (3) she gave a "pretty detailed description" of the perpetrator matching Mr. Stamps; (4) she indicated ninety-nine percent certainty in her identification; and (5) only sixty to ninety minutes passed between the crime and the identification. ROA at 352. Although the CCA ruled the trial court had erred in finding B.W.'s identification reliable, it deemed the error harmless because B.W.'s testimony

[9] Mr. Stamps argues the trial court should have been prevented from using police testimony in place of eyewitness testimony when assessing the *Biggers* factors. But he points to no clearly established law as determined by the United States Supreme Court in support of this claim. Nor does he offer any clearly established law in support of his conclusory argument that the trial court should have held a second, separate hearing to determine reliability. Neither argument, therefore, can support his petition for federal habeas relief. 28 U.S.C. § 2254(d)(1).

served only to corroborate M.A.'s properly-admitted testimony and the government presented evidence that Mr. Stamps was apprehended in M.A.'s stolen car in possession of a fake gun shortly after the carjacking.

With regard to M.A.'s testimony, as the district court observed, the CCA applied the clearly established federal law of *Neil v. Biggers* to determine that M.A.'s testimony was reliable and had been properly admitted despite the suggestive pre-trial identification procedure. *See* 409 U.S. at 199–200. Because reliability is a factual issue, we presume the state court's determination to be correct, and Mr. Stamps can only overcome this presumption by a showing of "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Mr. Stamps makes no attempt in his § 2254 petition to meet that burden.

With respect to B.W.'s testimony, we consider whether reasonable jurists would debate the district's conclusion that the CCA reasonably applied harmless-error analysis. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Evans v. Lock*, 193 F.3d 1000, 1002–03 (8th Cir. 1999) (improper identification testimony subject to harmless error analysis); *United States v. Ciak*, 102 F.3d 38, 42–43 (2d Cir. 1996) (same); *United States v. Watkins*, 741 F.2d 692, 695–96 (5th Cir. 1984) (same); *Marshall v. United States*, 436 F.2d 155, 158-61 (D.C. Cir. 1970) (same). The harmless-error determination is based upon a thorough review of the state court record. *See Herrera v. Lemaster*, 225 F.3d 1176, 1179 (10th Cir. 2000). Under *Brecht*, even assuming the admission of B.W.'s testimony amounted to constitutional error, it does not warrant habeas relief unless it "had a substantial and injurious effect" on the jury's verdict. 507 U.S. at 637. A

"substantial and injurious" effect exists only if we find ourselves in "grave doubt about the effect of the error on the jury's verdict." *Bland*, 459 F.3d at 1009.

Here, the district court found the CCA had reasonably determined that any presumed error in the admission of B.W.'s testimony was harmless because (1) B.W.'s identification merely corroborated M.A.'s properly-admitted testimony and (2) Mr. Stamps was apprehended in the stolen vehicle while in possession of a fake gun shortly after the carjacking. As a result, the district court concluded that nothing in the record shows the admission of eyewitness testimony against Mr. Stamps was "so grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Revilla v. Gibson*, 283 F.3d 1203, 1212 (10th Cir. 2002) (internal quotation marks omitted).

Because no reasonable jurist would find the district court's rejection of this claim debatable or wrong, we deny a COA as to Claim Four.

III. IN FORMA PAUPERIS MOTION

Mr. Stamps filed a motion to proceed in forma pauperis on appeal, which the district court denied. "In order to succeed on his motion, an appellant must show a financial inability to pay the required filing fees and the existence of a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal." *DeBardeleben v. Quinlan*, 937 F.2d 502, 505 (10th Cir. 1991). Mr. Stamps has not met this burden; our review of the record reveals no non-frivolous argument in support of his appeal. Accordingly, we also deny Mr. Stamps's motion to proceed in forma pauperis on appeal.

IV. CONCLUSION

Because Mr. Stamps fails to make a substantial showing of the denial of a constitutional right, we **DENY** his request for a COA and **DISMISS** the appeal. We also **DENY** Mr. Stamps's motion to proceed in forma pauperis on appeal.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

Appendix B

Exhibit B

Order Denying Habeas Corpus Relief

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that this exhibit is a true and correct copy of the original. See 28 U.S.C. §1746; 18 U.S.C. §1621.

Ivan Stamps Ivan Stamps Date: 6/5/19

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 17-cv-01672-RM

IVAN STAMPS,

Applicant,

v.

WARDEN MICHAEL MILLER, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

This matter is before the Court on the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, ECF No. 7, filed *pro* se by Applicant Ivan Stamps. The Application challenges the validity of Applicant's criminal conviction in Case No. 13CR428 in the El Paso County District Court in Colorado Springs, Colorado.

I. Background

In Applicant's direct appeal the Colorado Court of Appeals (CCA) summarized the background of Applicant's criminal case as follows:

> On January 26, 2013, the driver of a black Subaru Outback was carjacked at gunpoint at a gas station in Colorado Springs. Later that afternoon, a man entered a Jo-Ann Fabrics store three miles away, showed the cashier a gun, and demanded money from the register. When the cashier refused, the man took several candy bars and left. The cashier saw him drive away in a black Subaru with no license plates. A few minutes later, a man robbed a nearby King Soopers at gunpoint and left in a black Subaru Outback with no license plates.

Four days later, on January 30, a state trooper initiated a traffic stop on a Subaru Outback with no license plates. The Outback sped away, crossed a field, and emerged on a different road. A man with a gun got out and ran toward a car driven by B.W, who had stopped when he saw the car cross the field. In an effort to evade the man, B.W. put his car in reverse but side-swiped the car behind him, a Nissan Xterra driven by M.A. The man then carjacked M.A.'s Xterra at gunpoint and drove away.

A few minutes later, a man entered a nearby TCF Bank and covered his face with a scarf or a ski mask. Two employees who were counting cash in the drawers fled to the back room, fearful that they were about to be robbed. The man left without taking anything. Another teller remained at the counter throughout the incident, oblivious to what was happening.

A short time later, the stolen Xterra was spotted, stopped at a red light. Several police cars approached the intersection, activated their emergency lights, and attempted to box in the Xterra. The driver proceeded through the red light and collided with three police cars, injuring two officers. When arrested, the driver gave a false name to police, but he was eventually identified as defendant Stamps.

Shortly after the arrest, both B.W. and M.A. identified the driver as the man who carjacked the Xterra in one-on-one showups. They also later identified Stamps at trial. Police searched the Xterra and found a BB gun that looked like a black handgun, which M.A. testified did not belong to her.

Stamps was charged with the counts set forth above [four counts of aggravated robbery, one count of attempted robbery, two counts of second degree assault on a peace officer, one count of attempted second degree assault on a peace officer, and one count of criminal impersonation] and elected to represent himself. At trial, he argued misidentification with respect to the aggravated robberies of the Outback, Jo-Ann Fabrics, King Soopers, and the Xterra. Although he did not testify, he argued in opening and closing that he found the Xterra with the keys in the ignition after the carjackings and robberies were committed by someone else. He admitted entering TCF Bank but denied attempting to rob anyone.

The jury convicted Stamps as charged, and he was sentenced to a total of 292 years in prison.

People v. Stamps, No. 14CA0704, 1-3 (Colo. App. Apr. 21, 2016); ECF No. 7-14 at 4-6.

Applicant's petition for certiorari review of the CCA's denial of his direct appeal was denied. ECF No. 7-16.

Applicant initiated a 28 U.S.C. § 2254 action in this Court on July 10, 2017, and submitted his four claims on a proper Court-approved form on September 13, 2017. ECF No. 7. On September 14, 2017, Magistrate Judge Gordon P. Gallagher directed Respondents to file a Pre-Answer Response and to address the affirmative defenses of timeliness under 28 U.S.C. § 2254(d), and exhaustion of state court remedies under 28 U.S.C. § 2254(b)(1)(A), if Respondents intended to raise either or both in this action.

Respondents filed a Pre-Answer Response, ECF No. 21, on October 31, 2017, and Applicant filed a Reply, ECF No. 23, on November 17, 2017. On January 18, 2018, the Court entered an Order for Answer in Part, Dismissal in Part, and State Court Record, ECF No. 25. The January 18 Order dismissed Claims One and Three and directed Respondents to file an answer that addresses the merits of Claims Two and Four. ECF No. 25 at 16.

The remaining claims for review on the merits are as follows:

> (1) (Claim Two) The concerted action by three different government agencies to produce a fraudulent affidavit rises to the level of outrageous government conduct and violates the Due Process Clause; and
>
> (2) (Claim Four) The eyewitness identifications of the defendant should have been suppressed as the fruit of an unduly suggestive identification procedure, and the trial and appeal courts failed to apply the *Niel v. Biggers* identification test in an objectively reasonable manner.

Respondents filed an Answer, ECF No. 27, on January 31, 2018, addressing the remaining claims on the merits. Applicant filed a Reply, ECF No. 32, on March 8, 2018. After

reviewing the Application, the Answer, the Reply, and the state court record, the Court concludes that the Application should be dismissed with prejudice for the following reasons.

II. Legal Standard

A. *Pro Se* Standard of Review

Applicant is proceeding *pro se*. The Court, therefore, reviews the Application liberally and holds the pleading "to a less stringent standard than those drafted by attorneys." *Trackwell v. United States*, 472 F.3d 1242, 1243 (10th Cir. 2007) (citations omitted); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that an applicant can prove facts that have not been alleged, or that a respondent has violated laws in ways that an applicant has not alleged. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983). An applicant's *pro se* status does not entitle him to an application of different rules. *See Montoya v. Chao*, 296 F.3d 952, 958 (10th Cir. 2002).

B. 28 U.S.C. § 2254

Title 28 U.S.C. § 2254(d) provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Applicant bears the burden of proof under § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

A claim may be adjudicated on the merits in state court even in the absence of a statement of reasons by the state court for rejecting the claim. *Harrington v. Richter*, 562 U.S. 86, 98 (2011). In particular, "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* (collecting cases). Thus, "[w]hen 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." *Id.* at 99. "Where there has been one reasoned state judgment rejecting a federal claim," federal habeas courts should presume that "later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991).

Even "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*. 562 U.S. at 98. In other words, the Court "owe[s] deference to the state court's *result*, even if its reasoning is not expressly stated." *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999). Therefore, the Court "must uphold the state court's summary decision unless [the Court's] independent review of the record and pertinent federal law persuades [the Court] that its result contravenes or unreasonably applies clearly established federal law, or is

based on an unreasonable determination of the facts in light of the evidence presented." *Id.* at 1178. "This 'independent review' should be distinguished from a full de novo review of the petitioner's claims." *Id.*

The Court reviews claims of legal error and mixed questions of law and fact pursuant to 28 U.S.C. § 2254(d)(1). *See Cook v. McKune*, 323 F.3d 825, 830 (10th Cir. 2003). The threshold question a court must answer under § 2254(d)(1) is whether Applicant seeks to apply a rule of law that was clearly established by the Supreme Court at the time his conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. Furthermore,

> clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

House v. Hatch, 527 F.3d 1010, 1016 (10th Cir. 2008). If there is no clearly established federal law, that is the end of the Court's inquiry pursuant to § 2254(d)(1). *See id.* at 1018.

If a clearly established rule of federal law is implicated, a court must determine whether the state court's decision was contrary to or an unreasonable application of that clearly established rule of federal law. *See Williams*, 529 U.S. at 404-05.

> A state-court decision is contrary to clearly established federal law if: (a) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (b) "the state court confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from [that] precedent." *Maynard* [*v. Boone*], 468 F.3d [665,] 669 [(10th Cir. 2006)] (internal quotation marks and

> brackets omitted) (quoting *Williams*, 529 U.S. at 405, 120 S. Ct. 1495) (citation omitted0. "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.' " *Williams*, 529 U.S. at 405, 120 S. Ct. 1495 (citation omitted).
>
> A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts. *Id.* at 407-08, 120 S. Ct. 1495. . . .

House, 527 F.3d at 1018.

A court's inquiry pursuant to the "unreasonable application" clause is an objective inquiry. *See Williams*, 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law." *Maynard*, 468 F.3d at 671. The Supreme Court has also stated:

> [E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. [I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court.

Richter, 562 U.S. at 101 (internal quotation marks omitted). In conducting this analysis, the Court "must determine what arguments or theories supported or . . . could have supported[ ] the state court's decision" and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme]

Court." *Id.* at 102. In addition, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Under this standard, "only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254." *Maynard*, 468 F.3d at 671; *see also Richter*, 562 U.S. at 102 (stating that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable").

> As a condition for obtaining habeas corpus from a federal court, 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.

Richter, 562 U.S. at 103.

The Court reviews claims asserting factual errors pursuant to 28 U.S.C. § 2254(d)(2). *See Romano v. Gibson*, 278 F.3d 1145, 1154 n.4 (10th Cir. 2002). Section 2254(d)(2) allows a court to grant a writ of habeas corpus only if the relevant state court decision was based on an unreasonable determination of the facts in light of the evidence presented to the state court. Pursuant to § 2254(e)(1), the Court must presume that the state court's factual determinations are correct, and Applicant bears the burden of rebutting the presumption by clear and convincing evidence. "The standard is demanding but not insatiable . . . [because] '[d]eference does not by definition preclude relief.' " *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

Finally, the Court's analysis is not complete "[e]ven if the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law." *Bland*

v. Sirmons, 459 F.3d 999, 1009 (10th Cir. 2006). "Unless the error is a structural defect in the trial that defies harmless-error analysis, [I] must apply the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993) . . . ." *Id.*; *see also Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (providing that a federal court must conduct harmless error analysis under *Brecht* anytime it finds constitutional error in a state court proceeding regardless of whether the state court found error or conducted harmless error review). Under *Brecht*, a constitutional error does not warrant habeas relief unless the Court concludes it "had substantial and injurious effect" on the jury's verdict. *Brecht*, 507 U.S. at 637. "[A] 'substantial and injurious effect' exists when the court finds itself in 'grave doubt' about the effect of the error on the jury's verdict." *Bland*, 459 F.3d at 1009 (citing *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)). "Grave doubt" exists when "the matter is so evenly balanced that [the Court is] in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435.

The Court makes this harmless error determination based upon a thorough review of the state court record. *See Herrera v. Lemaster*, 225 F.3d 1176, 1179 (10th Cir. 2000). "In sum, a prisoner who seeks federal habeas corpus relief must satisfy *Brecht*, and if the state court adjudicated his claim on the merits, the *Brecht* test subsumes the limitations imposed by AEDPA." *Davis v. Ayala*, --- U.S. ---, 135 S. Ct. 2187, 2199 (2015) (citing *Fry*, 551 U.S. at 119-120).

If a claim was not adjudicated on the merits in state court, and if the claim also is not procedurally barred, the Court must review the claim *de novo* and the deferential standards of § 2254(d) do not apply. *See Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004).

III. Analysis

A. Claim Two-Fraudulent Affidavit Rises to Outrageous Governmental Conduct

Applicant asserts that Detective Gregory swore to the truth of a "non-existent document," and State Department Notary Ballejos administered an oath over the document. ECF No. 7 at 8. Applicant further asserts that Deputy District Attorney Albright should not have accepted the affidavit, because he knew Detective Gregory swore to the truth of the "Information" before it was created. ECF No. 7 at 8. Applicant contends that his Fourteenth Amendment rights were violated, because the three government agents committed perjury, or subornation of perjury, and as a result have engaged in "serious unethical conduct" which rises to the level of outrageous governmental conduct. *Id.* Applicant further contends that if the prosecution knowingly filed a fraudulent affidavit it is fraud on the court. *Id.* at 9. Applicant concludes that he was denied his right to due process, because the courts' actions were an abuse of discretion and fundamentally unfair. *Id.*

The CCA addressed this claim as follows:

> B. Trial Court Proceedings
>
> Stamps was advised of the charges in 13CR428 on January 31, 2013. At that time there were six charges arising from the events of January 30, 2013: aggravated robbery, attempted robbery, attempt to influence a public servant, and three counts of first degree assault.
>
> On February 7, the People requested additional time to prepare the information. The prosecutor signed the information on February 13 and filed it on February 14. The charges differed from the initial advisement as follows:
>
> - attempt to influence a public servant was changed to criminal impersonation;

- the three counts of first degree assault were changed to two counts of second degree assault and one count of attempted second degree assault; and

- the three counts of aggravated robbery that had been filed as a separate case and dismissed were added to this case.

The information was filed with a supporting affidavit by Detective Gregory, which was dated and notarized on February 4, 2013. The affidavit stated, "I have personal knowledge that each offense set forth in this Information was committed as charged."

On August 8, 2013, after the July 25 motions deadline and nearly six months after the information was filed, Stamps moved to dismiss the case for lack of jurisdiction based on an alleged defect in the information. Nevertheless, the court considered the motion at a hearing on August 15. Stamps argued that the affidavit was defective because it was executed on February 4, but the information that it purported to verify was not created until February 13. The court ruled that because Stamps waived his right to a preliminary hearing, he waived this claim challenging the validity of the information.

C. Analysis

We conclude that Stamps waived his right to challenge the information, but on a different basis than that found by the trial court. *See People v. Manyik*, 2016 COA 42, ¶ 69 ("We may affirm the court's ruling on any ground supported by the record.").

Section 16-5-203, C.R.S. 2015, provides that "[w]here the defendant has not had or waived a preliminary hearing, there shall be filed with the information the affidavit of some credible person verifying the information upon the personal knowledge of the affiant that the offense was committed."

Assuming without deciding that such an affidavit was required under the procedural posture of this case, we nevertheless reject Stamps's [sic] contention that the alleged defect in the affidavit deprived the court of jurisdiction over the case. It is well settled in Colorado that a defect in the affidavit verifying the information does not deprive the court of subject matter jurisdiction. *See Workman v. People*, 174 Colo. 194, 199-200, 483 P.2d 213, 216 (1971) (false affidavit did not render information invalid where defendant failed to make a timely objection); *Quintana v. People*, 168 Colo. 308, 312-13, 451 P.2d 286, 288 (1969) (minor defect in the supporting affidavit did not deprive the court of jurisdiction); *Bustamante v. People*, 136 Colo. 362, 365, 317 P.2d 885, 887 (1957) (lack of supporting affidavit was not a jurisdictional defect). The

verification of the information is for the benefit of the defendant, and any insufficiency is waived unless the defendant makes a timely objection. *Workman*, 174 Colo. at 200, 483 P.2d at 216; *Quintana*, 168 Colo. at 313, 451 P.2d at 288.

Here, the detective's supporting affidavit was executed after both cases had been filed, but apparently before the prosecution created the information that combined all of the charges in one case. Thus, the affidavit could not have properly verified the information as filed. The prosecution should have obtained a new supporting affidavit when it filed the information, particularly because some of the charges differed from the initial advisement. Nevertheless, its failure to do so did not deprive the court of jurisdiction, nor are we persuaded that it amounted to fraud.

Consequently, Stamps was required to raise a timely objection to avoid waiver of this claim. *See* Crim. P. 12(b)(2)-(3); *Workman*, 174 Colo. at 200, 483 P.2d at 216. Because he failed to object to the information before the motions deadline set by the court, we conclude that he waived the issue. [footnote omitted].

Even if Stamps had preserved this objection, Stamps has not demonstrated that he was prejudiced by the improperly verified information. There was no major defect in the information itself, such as lack of an essential allegation, and he was never under a misapprehension as to the nature of the charges. *See Quintana*, 168 Colo. at 312-13, 451 P.2d at 288 (considering these factors and concluding that the defendant was not prejudiced by a defect in the supporting affidavit). Accordingly, we conclude that reversal is not required.

V. Outrageous Governmental Conduct

Stamps contends that the trial court abused its discretion in denying his motion to dismiss based on outrageous governmental conduct by the detective who signed the affidavit and the prosecutor who filed it. We disagree. To successfully assert the defense of outrageous governmental conduct, "a defendant must show that his constitutional due process rights have been violated by the actions of government officials to such a degree as to violate fundamental fairness and shock the universal sense of justice." *People v. McDowell*, 219 P.3d 332, 336 (Colo. App. 2009). "Whether the circumstances presented bar prosecution under principles of due process is for the trial court to determine based upon the totality of facts in a given case." *People v. Medina*, 51 P.3d 1006, 1011 (Colo. App. 2001), *aff'd sub nom. Mata-Medina v. People*, 71 P.3d 973 (Colo. 2003). We will not overturn the court's ruling absent an abuse of discretion. *Id.*

> Stamps raised this defense in pretrial motions and at trial. The trial court addressed the motions at trial and found that the actions of the detective and the prosecutor with respect to the supporting affidavit did not rise to the level of outrageous governmental conduct.
>
> As discussed above, the deficiency in the affidavit appears to have resulted from the dismissal and refiling of charges. We conclude that even if the prosecution should have obtained a new affidavit to properly verify the information, the court did not abuse its discretion in ruling that the failure to do so did not rise to the level of outrageous governmental conduct warranting dismissal.

Stamps, No. 14CA0704 at 12-17; ECF No. 7-14 at 15-20.

An applicant may be entitled to habeas relief in a § 2254 action if he shows an alleged violation of state law resulted in a denial of due process. *See Aycox*, 196 F.3d at 1179-80 (citing *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). "[T]he deprivation occasioned by the state's failure to follow its own law must be arbitrary in the constitutional sense; that is, it must shock the judicial conscience." *Aycox*, 196 F.3d at 1180 (10th Cir. 1999) (internal quotation marks omitted); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (suggesting that only in rare circumstances, a determination of state law can be "so arbitrary or capricious as to constitute an independent due process . . . violation"). Plaintiff's challenge to Detective Gregory's premature affidavit does not assert such a due process violation in this action.

Applicant filed multiple pretrial motions, which are based on the prosecution's failure to file a motion to join the Informations filed in Colorado Criminal Case Nos. 13CR428 and 13CR468, when Case No. 13CR468 was dismissed and only Case No. 13CR428 was pursued. *See* Case No. 13CR428 Court File at 67-68, 70-71, 79-81, 98-101, and 106-112. The trial court addressed these motions, including Applicant's lack of credible verification claim (Detective Gregory's affidavit) at the August 15, 2013 pretrial hearing. *See* Aug. 15, 2013 Pretrial Hr'g at 3-9 and 31-33. The court determined that, because Applicant had waived the preliminary

hearing, probable cause was established, and any lack of credible verification by Detective Gregory was moot. Aug. 15, 2013 Pretrial Hr'g at 31-33.

The trial court also addressed Applicant's outrageous government conduct claim on January 15, 2014, the last day of trial. Jan. 15, 2014 Trial Tr. at 4-12. Applicant conceded in a colloquy with the trial court that he did not have additional grounds to support outrageous government conduct. *Id.* at 7. Applicant also stated that he only was challenging the sufficiency of the Complaints/Informations that were filed originally in Case Nos. 13CR428 and 13CR468, because the probable cause affidavits were only notarized and not sworn to as required by state law. *Id.* at 7-8. Applicant contended that the cases should be dismissed because state statute was not followed. *Id.* at 9.

The trial court determined that Applicant's due process rights were not violated because the probable cause affidavit was sufficient to provide the court with the facts needed to support holding Applicant in custody, and the Informations were sufficient to notify Applicant of the charges filed against him. *Id.* at 11. The court concluded that violating the notary public statute did not merit dismissal of the charges against Applicant. *Id.*

Finally, at the February 20, 2014 Habitual Trial, Applicant argued that Detective Gregory's affidavit to support the February 14, 2013 Information was dated February 4, 2013. Feb. 20, 2014 Habitual Trial at 4-11. It was not clear from the colloquy at the habitual trial between the judge, applicant, and the prosecution if Applicant had specifically raised the date issue previously when he challenged validity of the February 14 Information based on Detective Gregory's predated affidavit. *Id.* at 7-8. The trial court, however, found that, to the extent

Detective Gregory violated Colo. Rev. Stat. § 16-5-203, or some other law, the court was not without jurisdiction and denied Applicant's motion. *Id.* at 11.

The Court has reviewed the court file in Case No. 13CR428 and does not find support for Applicant's claim that he was denied due process with respect to Claim Two. Applicant arguments challenging the validity of the February 14, 2013 Information were conclusory and vague and failed to assert any due process violation based on either the officer, the notary, or the prosecution failing to follow a state rule or statute. Applicant does not assert how the predated affidavit was intended to commit fraud on the court, how it failed to provide sufficient notice of the charges against him, and how it disallowed him to prepare his defense. The Complaint and Information in Case No. 13CR428 are fully descriptive of the offenses charged against Applicant. *See* Case No. 13CR428 Court File at 1-6. Even if a constitutional error were found, Applicant fails to demonstrate the predated verification of the Information was prejudicial.

Furthermore, the notion that outrageous government conduct can violate the Due Process Clause of the Fifth Amendment has its roots in the Supreme Court's entrapment decisions, in which the Court recognized that "the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them." *Sherman v. United States*, 356 U.S. 369, 380 (1958). In *United States v. Russell*, 411 U.S. 423 (1973), the Supreme Court first recognized the possibility that it "may some day be presented with a situation in which the conduct of law enforcement is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32 (citing *Rochin v. California*, 342 U.S. 165 (1952)).

In *Hampton v. United States*, 425 U.S. 484 (1976), the Court narrowed the outrageousness doctrine alluded to in *Russell*, holding that "[t]he limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity in question violates some protected right of the Defendant." *Id.* at 490. The Court explained:

> To sustain petitioner's contention here would run directly contrary to our statement in Russell that the defense of entrapment is not intended "to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations."

Id. at 490 (quoting *Russell*, 411 U.S. at 435).

Although some circuit courts acknowledge an outrageous government conduct defense, the Supreme Court has never applied the Due Process Clause to invalidate a conviction based on outrageous governmental inducement. Moreover, while the Court of Appeals for the Tenth Circuit has recognized the defense of outrageous government conduct, *United States v. Spivey*, 508 F.2d 146 (10th Cir. 1975), it has yet to uphold such a finding. "To succeed on an outrageous conduct defense, the defendant must show either (1) excessive government involvement in the creation of the crime, or (2) significant governmental coercion to induce the crime." *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994). The relevant inquiry when assessing claims of outrageous government conduct is whether, considering the totality of the circumstances, the government's conduct is so shocking, outrageous, and intolerable the conduct offends the universal sense of justice. *United States v. Lacey*, 86 F.3d 956, 964 (10th Cir. 1996) (internal quotations and citations omitted).

Nothing about Detective Gregory's predated affidavit established fraud on the court or outrageous government conduct. The failure by the prosecution to obtain a properly dated affidavit is no more than a violation of a state statute, which does not rise to the level of outrageous government conduct, let alone state a violation of Applicant's due process rights.

As found by the CCA, and this Court's review of the records, the denial of Claim Two did not result in a decision that was contrary to, or involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States and did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This claim, therefore, lacks merit and will be dismissed.

B. Claim Four-Failure to Suppress Unduly Suggestive Identification Procedure and to Apply the *Niel v. Biggers* Identification Test in an Objectively Reasonable Manner

Applicant asserts that the trial court found the "showup identification procedure" suggestive and ordered an evidentiary hearing. ECF No. 7 at 13. Applicant further asserts that the court applied the *Niel v. Biggers* test to determine the eyewitness reliability. *Id.* Applicant also asserts that the test is a two-step process that requires (1) a finding that the procedure was suggestive; and (2) proof by the prosecution that the there is an "independent origin" for the identification. *Id.* Applicant contends that, because the eyewitness did not testify at the hearing and the court relied on the statements of the officers, the court failed to comply with the all five prongs of the *Biggers* test and violated his due process rights. *Id.*

The CCA addressed this claim as follows:

VI. Motion to Suppress Identifications

Stamps contends that the trial court erred in denying his motion to suppress the out-of-court and in-court identifications made by M.A. and B.W., alleging that they were the product of unduly suggestive show-up procedures. We conclude that M.A.'s identifications were properly admitted and, although B.W.'s identifications should have been suppressed, the error in admitting them was harmless beyond a reasonable doubt.

A. Standard of Review

We review the constitutionality of pretrial identification procedures as a mixed question of law and fact. *People v. Whittiker*, 181 P.3d 264, 272 (Colo. App. 2006). The trial court's findings of fact are entitled to deference, but we may give different weight to those facts and may reach a different conclusion in light of the legal standard. *Id.*

We apply the constitutional harmless error standard to determine whether any error warrants reversal. *People v. Martinez*, 2015 COA 37, ¶ 10. Under that standard, reversal is not required if the error was harmless beyond a reasonable doubt. *Id.*

B. Applicable Law

"A pretrial identification procedure violates a defendant's due process rights if it is so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *People v. Dotson*, 55 P.3d 175, 178 (Colo. App. 2002) (citation omitted). One-on-one show-up identifications are not per se violative of due process, but they are disfavored because of their strong potential for unnecessary suggestiveness. *People v. Theus-Roberts*, 2015 COA 32, ¶ 8 (citing *People v. Mascarenas*, 666 P.2d 101, 109 (Colo. 1983)). They may be permissible and reasonable in situations where immediate identification would facilitate an ongoing criminal investigation. *Id.* The reasonableness of the show-up procedure, however, must be measured against the potential for irreparable misidentification. *Id.*

In challenging the admissibility of out-of-court identifications, the defendant bears the burden of showing that the procedure was impermissibly suggestive. *Whittiker*, 181 P.3d at 272. If the defendant meets that burden, the burden shifts to the prosecution to show that the identification was nevertheless reliable under the totality of the circumstances. *Id.* The factors to consider in making this determination are: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of any prior description of the criminal; (4) the level of certainty demonstrated at the time of the identification; and (5) the time between the crime and the

identification. *Id.* These factors are weighed against the corrupting effect of the suggestive identification itself. *Mascarenas*, 666 P.2d at 109.

C. Trial Court Proceedings

Before trial, Stamps moved to suppress all out-of-court and in-court identifications by M.A. and B.W. The court held a suppression hearing and heard testimony from Stamps and two officers regarding those identifications. M.A. and B.W. did not testify at the suppression hearing.

The first officer testified that she interviewed M.A. at the scene of the carjacking. According to the officer's testimony, M.A. reported that while she was driving, the car in front of her backed up and sideswiped her. She looked up and saw a man with a gun outside her door. He ran toward her with his gun pointed at her and yelled, "Bitch, get out." He yanked open the door, and she got out and ran away from the car. M.A. described the man as a black male in his thirties, around five feet six inches tall, with the stature of a "jockey." M.A. thought he had facial hair but could not be certain.

The officer heard that the stolen vehicle may have been found and asked M.A. whether she could identify the carjacker. M.A. said she "wasn't certain but she was willing to go look." The officer explained that she did not know whether the carjacker would be there, but if M.A. could identify him, she should say so.

They arrived at a chaotic scene with numerous patrol cars stopped in the middle of an intersection. M.A. immediately identified her Xterra. Stamps was then brought out of an unmarked patrol car, and M.A. identified him as the carjacker. She said she was "99 percent sure" of the identification.

The second officer testified about B.W.'s identification. The officer described B.W. as "one of the witnesses" in the vicinity of the carjacking but could not say where he was when the crime occurred. According to the officer's testimony, B.W. said he "got a pretty good look" at the carjacker and would be willing to identify him. The officer told B.W. that he would take him to a different location to "identify a possible individual that he saw leaving the Troy Hill-area," and that "it may or may not be the individual he saw from before." They drove to an intersection blocked off by police cars, and a man in handcuffs stepped out of an unmarked police car. B.W. immediately identified him as the carjacker, saying he was "95 percent sure."

Stamps testified that he was arrested and placed in the back of a police vehicle before the showups. He said there were eight to ten police cars, around twenty spectators, and news reporters in the area. He stated that during each showup, he was taken out of the car in handcuffs with officers on both sides holding his arms.

The court ruled that the show-up identifications did not violate due process and denied Stamps's [sic] motion to suppress. It noted that the People did not offer any testimony from the eyewitnesses who identified Stamps and that much of the officers' testimony was hearsay. Nevertheless, the court considered the testimony because Stamps did not make a hearsay objection.

The court found that there were seven or eight police cars and a number of bystanders and reporters in the vicinity of the showups. It also found that Stamps was in handcuffs during the showups, with a uniformed officer standing next to him and other officers nearby.

The court ruled that M.A.'s identification was nonetheless reliable based on the five factors, finding that (1) she saw the perpetrator run at her from approximately thirty feet away; (2) she was paying attention to his face and the gun; (3) she gave "a pretty detailed description" of the perpetrator that matched Stamps; (4) she indicated that she was ninety-nine percent certain of her identification; and (5) only sixty to ninety minutes passed between the crime and the identification.

The court stated that B.W.'s identification was "a close call" because it had no information regarding the first three factors - his opportunity to view the criminal, his degree of attention, or a prior description. Nevertheless, based on B.W.'s level of certainty, the court concluded that his identification was also reliable.

Although it denied the motion to suppress, the court stated that its findings and conclusions were "preliminary" and that it would readdress the motion based on the witnesses' testimony at trial.

Both M.A. and B.W. identified Stamps at trial and testified about their prior out-of-court identifications. At the close of evidence, the court summarily reaffirmed its ruling denying the motion to suppress the identifications.

D. Analysis

As an initial matter, to the extent the People rely on trial testimony from M.A. and B.W. as support for the court's suppression ruling, we will not consider that testimony in determining whether the court erred in denying the motion to suppress.

A trial court generally must *rule* on a motion to suppress based on the evidence presented at the suppression hearing, not on the evidence later presented at trial. (citation omitted). *See Moody v. People*, 159 P.3d 611, 614 (Colo.

2007). Likewise, we must confine our review to the testimony developed at the suppression hearing in determining whether the court erred in denying the motion to suppress. *Martinez*, ¶ 15 n.5. Otherwise, "the prosecution would, in effect, be accorded a second opportunity to pad the appellate record at trial by injecting evidence that could be used on appeal to affirm what would otherwise be an erroneous suppression ruling." *Moody*, 159 P.3d at 614.

However, we may consider the entire record, including the evidence presented at trial, to determine whether any error in denying the motion to suppress was harmless. *Martinez*, ¶ 15 n.5.

Based on the evidence presented at the suppression hearing, we conclude that the court did not err in denying the motion to suppress M.A.'s out-of-court identification. The court addressed the suggestive features of the show-up procedure and found that M.A.'s identification was nonetheless reliable based on the five- factor test. Each of the five factors weighed in favor of reliability, and the court's findings with respect to those factors are supported by the officer's testimony at the hearing. The officer gave detailed information about M.A.'s reported observations of the carjacker during the crime, and her prior description of him was detailed and accurate. Although the officer's testimony regarding M.A.'s observations was hearsay, it was admitted without objection. Under these circumstances, the court did not err in ruling that M.A.'s out-of-court identification was reliable and admissible. Consequently, M.A.'s out-of-court and in-court identifications were properly admitted at trial.

However, we conclude that the court erred in failing to suppress B.W.'s identification. Unlike with M.A., the People presented very little evidence regarding B.W.'s independent observation of the carjacker at the time of the crime. The only information the officer provided was that B.W. witnessed the crime, reported that he got a "pretty good look" at the carjacker, and was ninety-five percent certain when he identified Stamps. As the court acknowledged, the People presented no evidence regarding B.W.'s opportunity to observe the carjacker or degree of attention, and there was no information about a prior description.

These reliability factors must be weighed against the suggestiveness of the procedure itself, *Mascarenas*, 666 P.2d at 109, which in this case included displaying the suspect in handcuffs, surrounded by police officers and patrol cars, and near the stolen vehicle.

Given the suggestiveness of the showup and the dearth of evidence regarding B.W.'s independent observations, we conclude that the court erred in determining that B.W.'s identification was reliable. Without more information, B.W.'s high level of certainty was insufficient to render the identification reliable

> under the totality of the circumstances. Accordingly, we conclude that the court erred in denying the motion to suppress B.W.'s out-of-court and in-court identifications.
>
> Nevertheless, we conclude that the error does not require reversal. At trial, Stamps was identified by M.A. as the person who carjacked her car, and her identification was properly admitted. B.W.'s identification merely corroborated the victim's identification. Moreover, the People presented evidence that Stamps was apprehended in the stolen Xterra with a fake gun only a short time after the carjacking. Under these circumstances, we conclude that the error in admitting B.W.'s out-of-court and in-court identifications was harmless beyond a reasonable doubt. *See Martinez*, ¶¶ 10, 15.

Stamps, No. 14CA0704, at 18-27; ECF No. 7-14 at 21-30

Generally, federal habeas corpus relief does not lie to review state law questions about the admissibility of evidence. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The question is whether, "considered in light of the entire record, its admission resulted in a fundamentally unfair trial." *Knighton v. Mullin*, 293 F.3d 1165, 1171 (10th Cir. 2002) (citing *McGuire*, 502 U.S. at 67-68)). Federal courts may only interfere with state evidentiary rulings when the rulings in question are "so unduly prejudicial that it renders the trial fundamentally unfair. . . ." *See Lott v. Trammell*, 705 F.3d 1167, 1190 (10th Cir. 2013) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)); *see also Tucker v. Makowski*, 883 F.2d 877, 881 (10th Cir. 1989) (State court rulings on the admissibility of evidence are not questioned in federal habeas actions unless they "render the trial so fundamentally unfair as to constitute a denial of federal constitutional rights.") (internal quotations marks and citations omitted).

In this context, "due process concerns arise only when law enforcement officers use an identification procedure that is both suggestive and unnecessary." *Perry v. New Hampshire*, 565 U.S. 228, 238-239 (2012) (summarizing relevant standards clearly established in prior Supreme Court decisions). Furthermore, even if law enforcement officers use a suggestive and

unnecessary identification procedure, the resulting identification need not be suppressed unless, based on the totality of the circumstances, "improper police conduct created a substantial likelihood of misidentification." *Id.* at 239. (internal quotation marks omitted). The Supreme Court has identified the following five factors that courts must consider to determine whether a particular identification procedure created a substantial likelihood of misidentification:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

As set forth above, the CCA on direct appeal applied this clearly established law by finding that (1) M.A. saw the perpetrator run at her from approximately thirty feet away; (2) she was paying attention to his face and the gun; (3) she gave "a pretty detailed description" of the perpetrator that matched Stamps; (4) she indicated that she was ninety-nine percent certain of her identification; and (5) only sixty to ninety minutes passed between the crime and the identification.

Applicant contends that due to (1) M.A.'s inability to describe the face or clothing of the individual who stole her car at gunpoint; (2) the suggestiveness of the showup scene based on the number of police vehicles and presentation of Applicant being removed from an unmarked police car while wearing handcuffs; and (3) B.W.'s inability to provide a description of the individual who ran towards his car, the prongs of the *Bigger* test were not met. ECF No. 7 at 15.

Pursuant to § 2254(e)(1), the Court must presume that the state court's factual determinations are correct and Applicant bears the burden of rebutting the presumption by clear

and convincing evidence. Applicant does not disagree with either M.A.'s or B.W.'s statements. The findings by the trial court at the pretrial motion to suppress hearing are supported by the record, *see* Dec. 19 and 20, 2013 Pretrial Suppression Hrg's, and Applicant fails to rebut the presumption of correctness of these facts with clear and convincing evidence.

Applicant's arguments do not demonstrate that based on the totality of the circumstances, the police conduct created a substantial likelihood of misidentification. Even if, as the CCA found, B.W.'s high level of certainty was insufficient to render the identification reliable, M.A.'s identification provided sufficient detail as required under *Bigger* that any suggestiveness of the presentation of Applicant in handcuffs, by the unmarked police car with police officers is overweighed by M.A.'s identification of (1) his stature; (2) his having a gun; (3) close in time to the incident; and (4) immediate recognition of Applicant with a 99% claim of accuracy.

Furthermore, "[t]rial error 'occur[s] during the presentation of the case to the jury,' and is amenable to harmless-error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial.']" *Brecht*, 507 U.S. at 629 (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991). "Unless the error is a structural defect in the trial that defies harmless error analysis, [the Court] must apply the harmless error standard of *[Brecht]* . . . ." *Bland*, 459 F.3d at 1009; *see also Davis*, 135 S. Ct. at 2197 ("For reasons of finality, comity, and federalism, habeas [applicants] are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice.") (internal quotation marks omitted); *Fry*, 551 U.S. at 121-22 (providing that a federal court must conduct harmless error analysis under *Brecht* anytime it finds constitutional error in a state court proceeding regardless of whether the state court found error or conducted harmless error review).

A constitutional error does not warrant habeas relief unless the Court concludes it "had substantial and injurious effect" on the jury's verdict. *Brecht*, 507 U.S. at 637. "A 'substantial and injurious effect' exists when the court finds itself in 'grave doubt' about the effect of the error on the jury's verdict." *Bland*, 459 F.3d at 1009 (citing *O'Neal*, 513 U.S. at 435). "Grave doubt" exists when "the matter is so evenly balanced that [the Court is] in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435.

As noted by the CCA, B.W.'s identification was harmless beyond a doubt because the prosecution presented evidence that Applicant was apprehended in the stolen vehicle with a fake gun within a short time after the hijacking of the vehicle. This finding supports the CCA's finding that B.W.'s identification did not have a substantial and injurious effect on the jury's verdict.

Nothing in the state court record indicates that the CCA's finding was so prejudicial that Applicant was denied due process. The CCA's decision regarding Claim Four is not contrary to or an unreasonable application of clearly established rule of federal law or an unreasonable determination of the facts in light of the evidence presented to the state court. This claim, therefore, lacks merit and will be dismissed.

The Court also notes that Applicant argues in the Reply, ECF No. 32 at 17, that he did not have the opportunity to confront and cross-examine the eyewitnesses once the identification procedure was "held suggestive." The Court has reviewed Applicant's opening brief on direct appeal, ECF No.7-11, and finds that Applicant failed to present this claim to the CCA, which denies Applicant the opportunity to raise this claim for the first time in a 28 U.S.C. § 2254 action in this Court. *See* 28 U.S.C. § 2254(b)(1) (an application for a writ of habeas corpus may not be

granted unless it appears that the applicant has exhausted state remedies or that no adequate state remedies are available or effective to protect the applicant's rights); *see also O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994).

IV. Conclusion

For the foregoing reasons, it is

ORDERED that the Application, ECF No. 7, is dismissed with prejudice. It is

FURTHER ORDERED that the issuance of a Certificate of Appealability pursuant to 28 U.S.C. § 2253(a) is denied. Applicant has not made a substantial showing of the denial of a constitutional right such that reasonable jurists could disagree as to the disposition of his petition pursuant to the standards of *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). *See* 28 U.S.C. § 2253(c)(2). It is

FURTHER ORDERED that it is certified pursuant to 28 U.S.C. § 1915(a)(3) any appeal from this Order is not taken in good faith, and, therefore, *in forma pauperis* status will be denied for the purpose of appeal. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal he must also pay the full $505.00 appellate filing fee or file a motion to

proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

DATED this 13th day of September, 2018.

BY THE COURT:

RAYMOND P. MOORE
United States District Judge