

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

July 23, 2019

Elisabeth A. Shumaker
Clerk of Court

WILLIS SHANE GORDON,

Petitioner - Appellant,

v.

No. 18-3210

SAM CLINE,

Respondent - Appellee.

ORDER

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk



UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

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June 17, 2019

Elisabeth A. Shumaker
Clerk of Court

WILLIS SHANE GORDON,

Petitioner - Appellant,

v.

SAM CLINE,

Respondent - Appellee.

No. 18-3210
(D.C. No. 5:17-CV-03184-DDC)
(D. Kan.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before PHILLIPS, McKAY, and O'BRIEN, Circuit Judges.

Petitioner Willis Shane Gordon, a state prisoner representing himself pro se, seeks a certificate of appealability to appeal the district court's dismissal of his § 2254 habeas corpus petition.

Petitioner was charged in Kansas state court of one count each of rape, aggravated kidnapping, attempted robbery, and aggravated battery. The first three counts involved a female victim, while the fourth involved a male victim. The female victim testified at trial that she met up with Petitioner to see an apartment he had told her he would help her

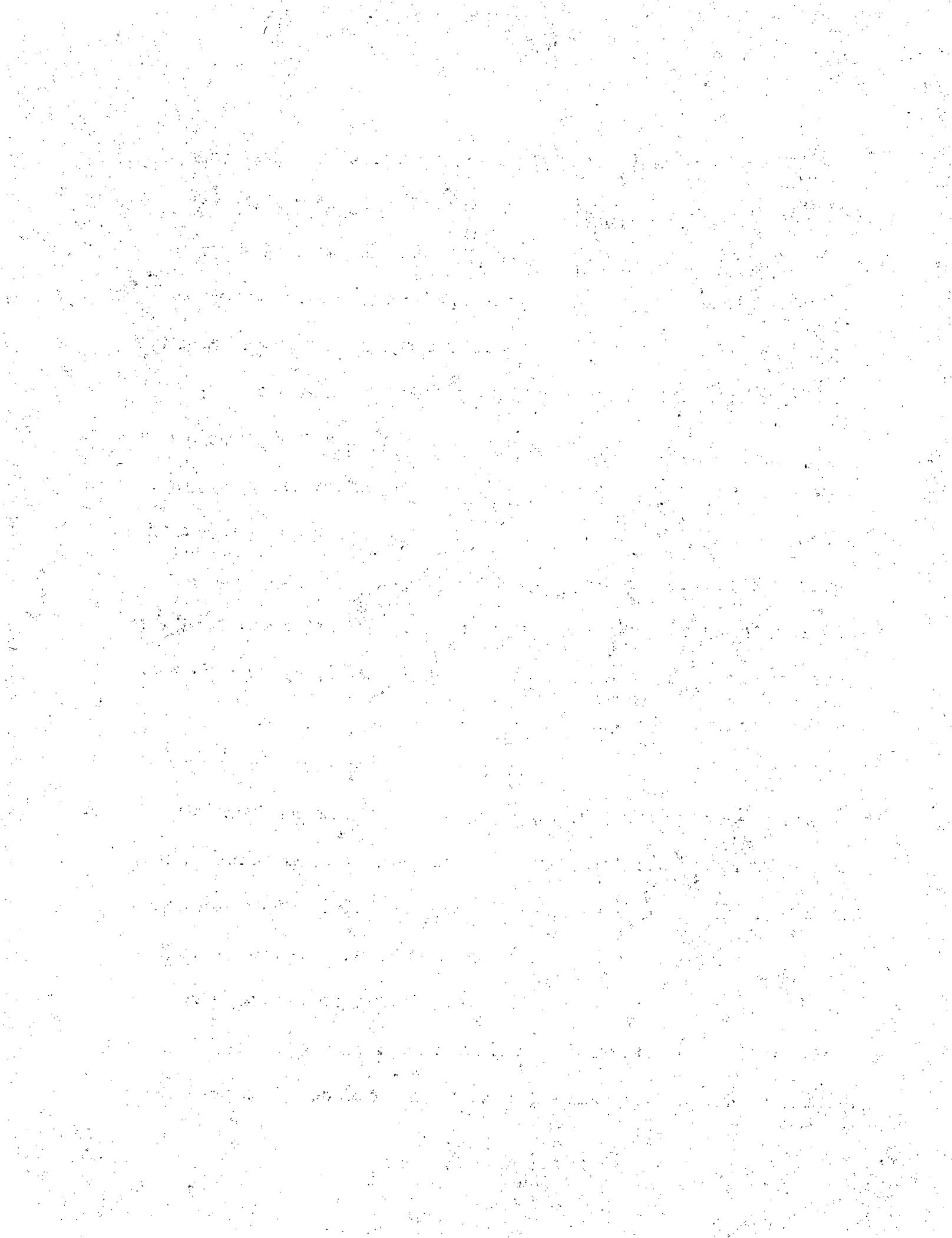
* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

to rent, but soon after they entered the apartment, Petitioner threatened her with a knife, attempted to take her phone away from her—breaking it in the process—then forced her to go into a bedroom, where he raped her. When she was able to escape from the apartment, she saw the male victim, who had given her a ride to the apartment earlier that evening, standing outside. The male victim testified at trial that he had come back to the apartment to see if anything was wrong because he was concerned that the female victim had not been answering his phone calls and texts. He testified that soon after he got there, he saw the female victim running out of the apartment wearing nothing and screaming that “he” had raped her. Petitioner then followed the female victim out of the apartment and began chasing her, so the male victim tackled Petitioner. After Petitioner cut him in the face with a knife, the male victim yelled at the female victim to get the knife away from Petitioner. She was able to do so, and then she ran and found other help. The police arrived soon thereafter.

Petitioner did not deny either that he had sex with the female victim or that he was involved in a fight with the male victim. Instead, he testified at trial that the sex was both consensual and paid, that the male victim came into the apartment and attempted to extort him by threatening to have the female victim run out of the apartment crying rape if Petitioner did not give him the rest of the money he was carrying, and that the male victim began the fight with Petitioner and was cut with his own knife when Petitioner tried to defend himself.

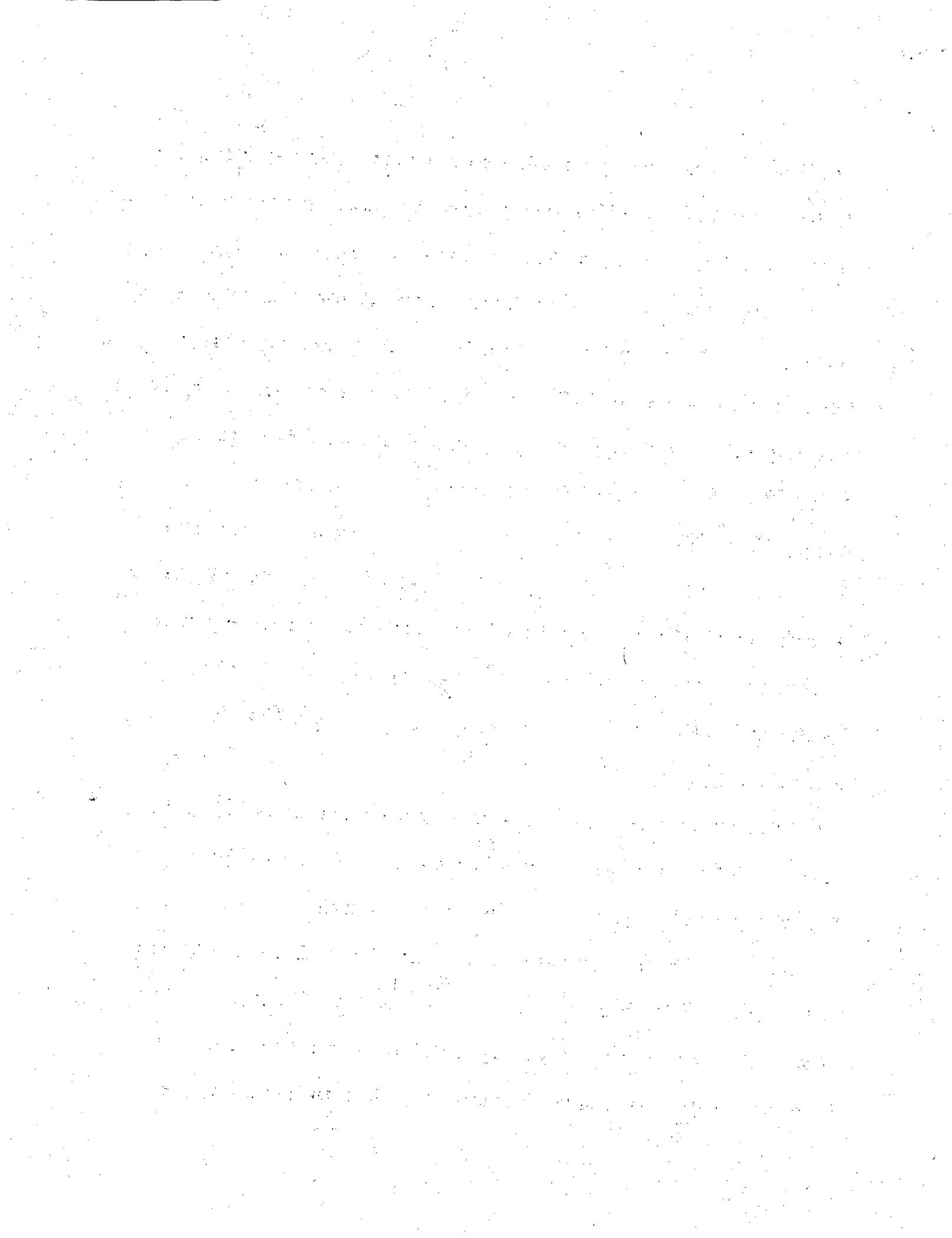
The jury found Petitioner guilty on all of the charges against him. He was sentenced to 460 months of imprisonment based in part on his criminal history. The Kansas Court of Appeals affirmed his convictions and sentence on direct appeal. *See State v. Gordon*, No. 103,029, 2011 WL 420743 (Kan. Ct. App. Jan. 28, 2011). Petitioner then filed a pro se state court motion for habeas relief. The state trial court appointed counsel to represent him in the state habeas proceeding, and counsel filed a modified habeas motion. Following a limited evidentiary hearing, the state trial court denied relief. On appeal, the state appellate court held that Petitioner was procedurally barred from raising most of his appellate arguments because these arguments either were required to be brought on direct appeal or had not been properly raised below; however, the court then analyzed several of these claims on the merits and held that they were alternatively subject to dismissal on the merits. *See Gordon v. State*, No. 112,591, 2016 WL 6137901 (Kan. Ct. App. Oct. 21, 2016). The appellate court accordingly affirmed the dismissal of Petitioner's state habeas motion. The Kansas Supreme Court denied certiorari.

Petitioner then filed the instant petition for federal habeas relief. Construed liberally, this petition asserted five grounds for relief: (1) the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide the defense with (a) photographs taken by a police officer of Petitioner's injured finger, which appeared to have been almost severed by a knife, and (b) a police report detailing the female victim's statements, including her statement that Petitioner's finger was cut because he was holding onto the blade of the knife when she pulled it out of his hands; (2) the prosecutor violated *Doyle v.*



Ohio, 426 U.S. 610 (1976), by asking questions about Petitioner’s silence at the time of arrest; (3) trial and appellate counsel were ineffective for failing to realize and/or argue that the government had violated *Brady* and *Doyle*; (4) Petitioner’s convictions for rape and aggravated kidnapping were multiplicitous; and (5) Petitioner’s sentence was impermissibly increased based on facts not found by a jury. The district court held that the *Brady* claim, *Doyle* claim, and related ineffective assistance claim were all procedurally barred based on the state appellate court’s conclusion that Petitioner had not properly raised these claims. The district court considered Petitioner’s multiplicity claim on the merits, concluding that Petitioner had not shown that the state court’s denial of this claim constituted an unreasonable application of federal law. Finally, the district court declined to consider Petitioner’s sentencing claim on the ground that he had only raised it in his traverse, not in his habeas petition. Petitioner seeks a certificate of appealability to appeal the dismissal of all of these claims.

To receive a certificate of appealability for a claim that the district court addressed on the merits—here, only the multiplicity claim—a petitioner “must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claim[] debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). For claims that were dismissed on procedural grounds—all of the other claims in this case—Petitioner must show both “that jurists of reason would find 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.” *Id.* “Each



component of [this] showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.” *Id.* at 485.

We begin by considering Petitioner’s argument that the government violated *Brady* by failing to provide the defense with evidence that would have corroborated his self-defense theory. Petitioner does not dispute that he failed to raise this claim in his direct criminal appeal; however, he argues that this procedural default should be excused for cause and prejudice because the *Brady* violations only came to light during his state habeas proceedings and the withheld evidence would likely have had an impact on the jury’s verdict. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (“[F]ederal habeas review of [procedurally defaulted] claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.”).

After reviewing the record in this case, we are persuaded that reasonable jurists could not debate the district court’s conclusion that Petitioner failed to satisfy the “prejudice” prong of this test. At trial, all three participants testified that at one point both Petitioner and the female victim had their hands on the knife, and then the female victim pulled it away from Petitioner. It was also undisputed that both Petitioner and the female victim sustained cuts to their fingers, and a police officer agreed that one of Petitioner’s fingers was cut badly enough that it was almost to the point of falling off. Petitioner

argues that if the jury had seen the photographs of his injuries and heard that the victim originally told a police officer that Petitioner's hand was on the blade when she pulled the knife away from him, then the jury would likely have believed his theory of self-defense. We are not persuaded. Contrary to Petitioner's contentions, it was in fact entirely possible for his hand or finger to have ended up on the blade during the course of the struggle even if—as the jury apparently believed—he was the one who originally produced and used the knife. The alleged *Brady* evidence was largely consistent with the evidence introduced at trial, and to the extent it was not, we are not persuaded that it was significant enough to create a reasonable probability that the jury's verdict would have been different if this evidence had been disclosed to the defense. *See United States v. Cooper*, 654 F.3d 1104, 1119–20 (10th Cir. 2011) (holding that defendant seeking new trial based on *Brady* violation must show that suppressed evidence was “material,” meaning “there is a reasonable probability that . . . the result of the proceeding would have been different” if the evidence had been disclosed to the defense; evidence that “would have provided only marginal additional support for the defense” fails to meet this standard (internal quotation marks and brackets omitted)).

We turn then to Petitioner's claim that the prosecutor violated *Doyle* by asking questions about Petitioner's silence at the time of his arrest. The district court denied habeas relief on procedural grounds, which Petitioner contests for numerous reasons. We need not consider his arguments on the procedural question, however, because we are persuaded that reasonable jurists could not debate the state court's resolution of this issue

on the merits. *See Slack*, 529 U.S. at 485. The state appellate court held that this claim failed on the merits because defense counsel opened the door by asking Petitioner if the police had ever asked to hear his side of the story, and the prosecutor only introduced rebuttal testimony from a police officer to clarify that the police were not permitted to question Petitioner about the incident—even though they spent some hours together in the hospital room where he was receiving treatment for his injured fingers—because he had invoked his right to an attorney. *See Gordon*, 2016 WL 6137901, at *7–9. Petitioner has not shown that this holding constituted an unreasonable application of clearly established facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d); *see also United States v. Martinez-Larraga*, 517 F.3d 258, 268 (5th Cir. 2008) (“We, and other circuits, have continued to recognize this ‘open the door’ or ‘reply’ exception to *Doyle* . . .”). We thus conclude that Petitioner is not entitled to a certificate of appealability on this issue.

We are likewise persuaded that reasonable jurists could not debate the state court’s resolution on the merits of Petitioner’s claim of ineffective assistance relating to the alleged *Doyle* and *Brady* violations. Under the circumstances of this case, the state court could reasonably conclude that Petitioner was not prejudiced by defense counsel’s alleged failures to discover or pursue these claims at trial or on direct appeal.

Petitioner’s next argument is that his convictions for rape and aggravated kidnapping were multiplicitous and thus contrary to the Supreme Court’s decision in *Blockburger v. United States*, 284 U.S. 299 (1932). However, the Kansas appellate court

held, based on the language of the pertinent statutes, that each of these offenses required proof of an element that the other offense did not. *See Gordon*, 2016 WL 6137901, at *4–5. This is all that *Blockburger* requires, and we see no error in the state court’s application of this test to the two offenses at issue here. *See Blockburger*, 284 U.S. at 304; *see also, e.g.*, *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (“If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.”). Thus, reasonable jurists could not debate the correctness of the state court’s resolution of this issue.

Finally, Petitioner argues that his sentence was impermissibly increased based on facts not found by a jury. The district court did not address this claim because the court believed Petitioner had not raised this argument in his habeas petition. Reading the petition liberally, we agree with Petitioner that this argument was actually raised. Nevertheless, we conclude that Petitioner is not entitled to a certificate of appealability on this issue because reasonable jurists could not debate the state court’s resolution of this claim on the merits. *See Slack*, 529 U.S. at 485. Petitioner contends that his sentencing violated the Supreme Court’s holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” He argues that the Kansas sentencing scheme goes beyond “the fact of a prior conviction” because it considers whether prior offenses were

“person” or “nonperson” offenses and recommends increased sentences for a defendant who has committed “person” offenses. *See* Kan. Stat. Ann. § 21-6811; *see also* Kan. Sentencing Guidelines Desk Reference Manual App. D at 2 (2009). However, it is clear from the record that the sentencing court did not look at the underlying facts of Petitioner’s past criminal offenses. Certain prior offenses were classified as “person” offenses based on the statutory elements of those offenses, not based on any individualized factfinding about Petitioner’s specific conduct in those cases. Petitioner has not shown that this constituted an unreasonable application of federal law; indeed, this approach appears to be consistent with the Supreme Court’s categorical approach for federal courts to apply in determining whether a defendant’s prior offense should be characterized as a “violent felony”—a characterization which, like Kansas’s “person” characterization of prior offenses, may affect the length of the defendant’s sentence. *See Taylor v. United States*, 495 U.S. 575, 600 (1990). Accordingly, Petitioner has not shown that reasonable jurists could debate the state court’s resolution of this claim under the deferential standard required by § 2254(d).

We therefore **DENY** Petitioner’s request for a certificate of appealability and **DISMISS** the appeal.

Entered for the Court

Monroe G. McKay
Circuit Judge

**UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

JUDGMENT IN A CIVIL CASE

WILLIS SHANE GORDON,

Petitioner,

v.

CIVIL NO. 17-3184-DDC

SAM CLINE,

Respondent.

- JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- DECISION BY THE COURT.** This action came before the Court. The issues have been considered and a decision has been rendered.

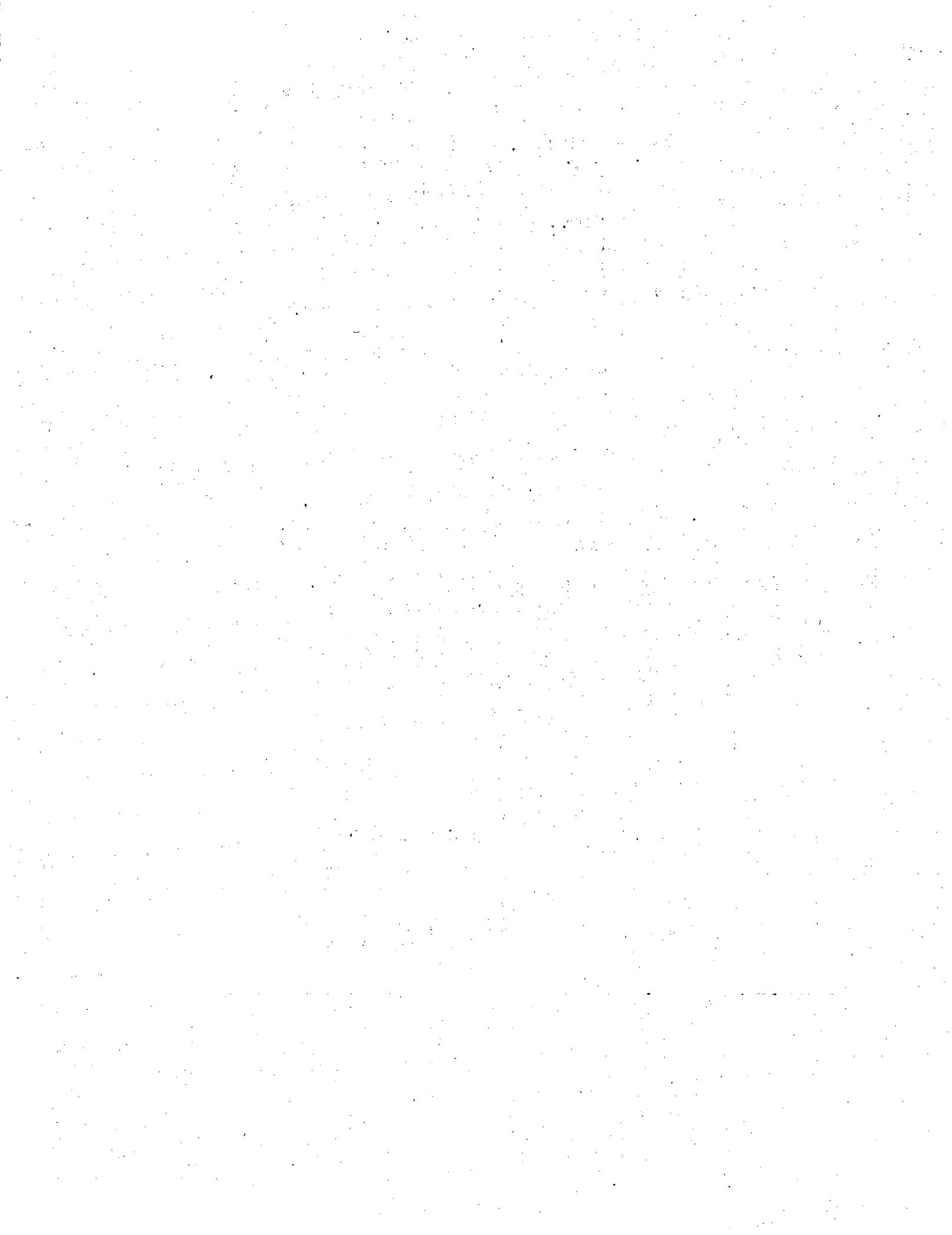
IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is denied.

Entered on the docket 09/13/18

Dated: September 13, 2018

TIMOTHY M. O'BRIEN, CLERK

s/S. Nielsen-Davis
Deputy Clerk



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

WILLIS SHANE GORDON,

Petitioner,

v.

Case No. 17-3184-DDC

SAM CLINE,

Respondent.

MEMORANDUM AND ORDER

This matter comes before the court on Willis Shane Gordon's pro se¹ Petition for Writ of Habeas Corpus (Doc. 1), respondent's Answer and Return (Doc. 19), and petitioner's Traverse (Doc. 30). Petitioner was convicted in Kansas state court for aggravated kidnapping and rape. He claims his convictions were procured in a way that violated the Constitution. For reasons explained below, the court denies the Petition.

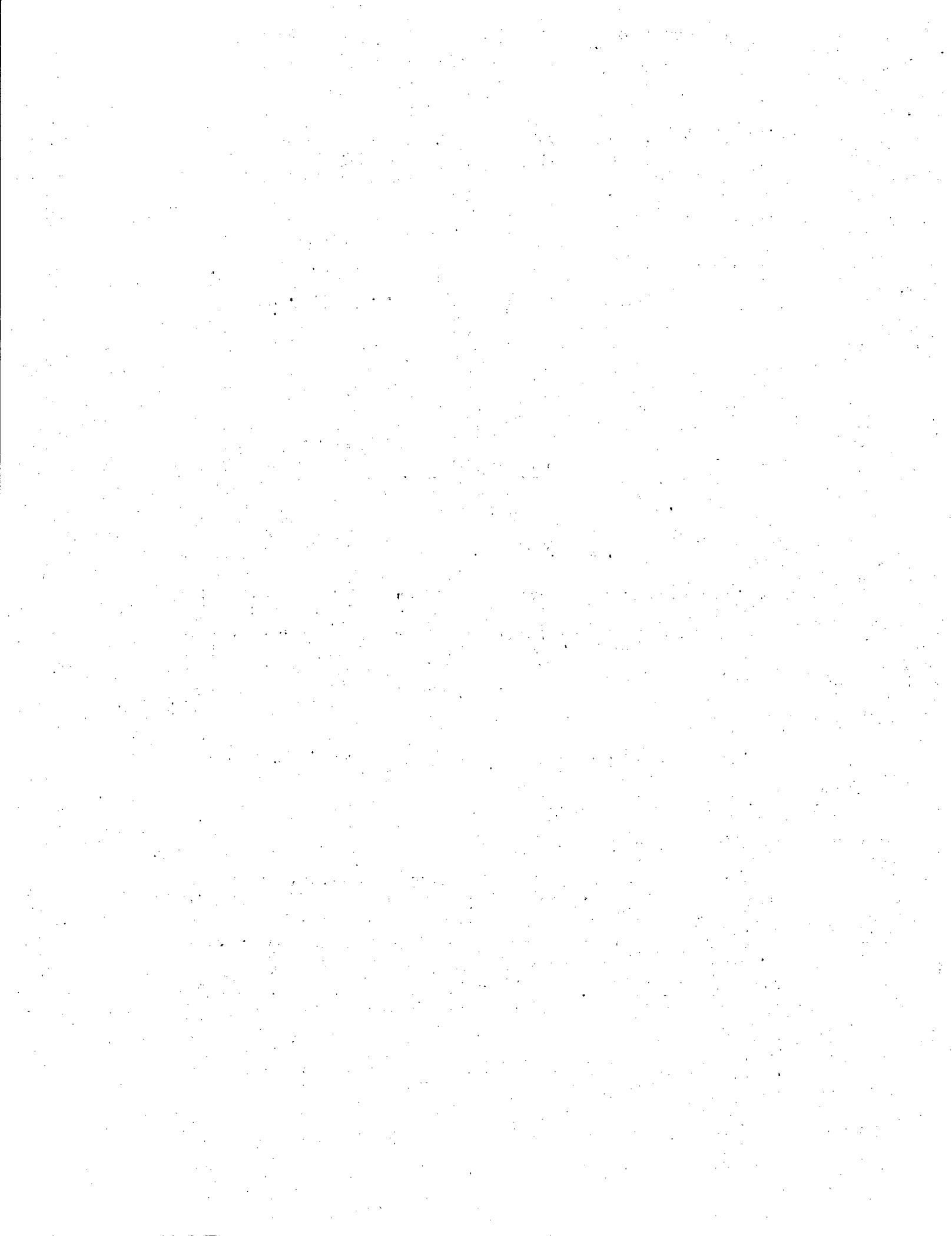
I. Facts

The Kansas Court of Appeals summarized the facts of petitioner's state-court case this way:

In his underlying criminal case,

[Petitioner] was charged with one count each of rape, aggravated kidnapping, attempted robbery, and aggravated battery after B.H. claimed that she was the victim of these crimes. At the ensuing jury trial, B.H. testified that she was kidnapped, raped, robbed, and battered by [petitioner], but [petitioner] claimed that B.H. arranged to have consensual sex for money. The jury found [petitioner] guilty on all counts, and he received a controlling sentence of 460 months' imprisonment.

¹ Because petitioner proceeds pro se, the court construes his filings liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam).



On his direct appeal, [petitioner] raised three issues: (1) ineffective assistance of counsel; (2) failure of the district court to give a limiting instruction; and (3) violation of his constitutional rights by enhancing his sentence based on a criminal history that had not been proven to a jury beyond a reasonable doubt. Another panel of this court dismissed his ineffective assistance of counsel claim for lack of jurisdiction, rejected his other two claims, and affirmed his convictions. The Kansas Supreme Court denied [petitioner's] petition for review on November 4, 2011.

On June 5, 2012, [petitioner] filed a timely, and lengthy, pro se [Kan. Stat. Ann. §] 60-1507 motion. His primary pleading was nine pages long and is essentially the habeas pleading form. In that pleading, specifically in paragraphs 10 and 11, he raised a violation under *Brady v. Maryland*, 373 U.S. 83 (1963), contending the prosecution withheld important information about the cell phones used by the victim and police, and contends that had the jury seen the full text messages between the victim and him the jury may have reached a different verdict. Then in paragraph 20, where the form requests the movant to list how his counsel had been ineffective, [petitioner] appended a 35-page attachment discussing in detail his allegations of ineffective assistance of counsel. [Petitioner] also filed contemporaneously a 15-page "Affidavit of Case Law in Support of Habeas Corpus."

After reviewing this extensive pleading, the district court appointed counsel to represent [petitioner] on July 9, 2012. Interestingly, the court did not appoint someone from the appointment list but instead appointed an attorney specifically requested by [petitioner]. After a number of continuances granted at [petitioner's] counsel's request, on January 23, 2013, [petitioner's] counsel filed a modified [Kan. Stat. Ann. §] 60-1507 motion intended to replace [petitioner's] original 60-1507 motion. This amended motion was far more succinct—only 10 pages—and was filed beyond the 1-year limitation period for filing 60-1507 motions.

In his modified motion, [petitioner] raised 13 grounds of relief. He argued his trial counsel was ineffective for: (1) lack of pretrial investigation; (2) failure to present evidence in support of his theory of defense, [*i.e.*,] self-defense; (3) failure to maintain adequate pretrial contact with [petitioner]; (4) failure to strike a potential juror from the jury as requested by [petitioner]; (5) failure to object during . . . the State's questions regarding [petitioner's] silence after arrest; (6) failure to make appropriate trial objections; (7) failure to call a character witness requested by [petitioner]; (8) failure to assert multiplicity or merger defenses; (9) failure to contest certain convictions at [petitioner's] sentencing; (10) failure to take [petitioner's] desired trial strategy into proper consideration; (11) failure either to obtain certain discovery for trial or failure to provide this discovery to [petitioner]; (12) appellate counsel was ineffective during [petitioner's] direct appeal; and (13) the State failed to turn over exculpatory evidence.

At the preliminary hearing held on October 24, 2013, [petitioner's] counsel indicated that the movant would proceed on the modified motion. In a written order

filed November 18, 2013, the district court granted [petitioner] an evidentiary hearing on six of his grounds of relief and dismissed the remaining seven. These six grounds for relief were denied after the evidentiary hearing.

Gordon v. State, 382 P.3d 484, 2016 WL 6137901, at *1–2 (Kan. Ct. App. Oct. 21, 2016) (unpublished table decision) (internal citations and quotations omitted).

Petitioner timely appealed the Kansas state district court’s decision to the Kansas Court of Appeals. *Id.* at *2. In that appeal, petitioner raised four issues: (1) whether his original trial counsel was constitutionally ineffective when he failed to argue that the aggravated kidnapping and rape charges violated the double jeopardy clause; (2) whether his original trial attorney was ineffective when he failed to present petitioner’s desired defense; (3) whether the government committed a *Brady* violation at his original criminal trial; and (4) whether the government committed a *Doyle* violation during his original criminal trial. *See generally id.*

The Kansas Court of Appeals affirmed the district court. It rejected petitioner’s first argument, concluding that the aggravated kidnapping and rape convictions did not violate the Double Jeopardy Clause. *Id.* at *5. On petitioner’s second argument, the Kansas Court of Appeals construed his appeal as arguing that his original trial counsel was ineffective for failing to find photographs or hospital records that would have bolstered his claim that B.H. and an acquaintance of hers robbed and attacked him—not the other way around. *Id.* The appeals court concluded that it could not consider this argument because petitioner never raised that issue before the habeas trial court. *Id.* at *6.

The Kansas Court of Appeals also refused to consider the next two issues raised by petitioner—*i.e.*, whether the government had committed a *Brady* violation and whether it had committed a *Doyle* violation. *Id.* at *5–9. Generally, the court of appeals explained, Kansas law prevents a court from addressing any argument raised in a habeas petition when the petitioner never raised it on his direct appeal. *Id.* at *7–8. And petitioner articulated no reason why that

general rule should not apply. *Id.* Eight months later, the Kansas Supreme Court declined to review his case. On October 23, 2017, petitioner filed his Petition for Writ of Habeas Corpus in this court.

II. Legal Standard

When reviewing a state prisoner's challenge to matters decided in state court criminal proceedings, federal law "requires federal courts to give significant deference to state court decisions" on the merits. *Lockett v. Trammell*, 711 F.3d 1218, 1230 (10th Cir. 2013). So, a federal court should not grant a state prisoner habeas relief for "any claim that was adjudicated on the merits in State court proceedings" unless the prisoner can show that: (1) that the adjudication of the claim "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) that the adjudication of the claim "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). "Clearly established Federal law" refers to the Supreme Court's holdings—not dicta. *Lockett*, 711 F.3d at 1231. An adjudication is "'contrary to' a clearly established law if it 'applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts.'" *Id.* (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A factual determination "made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The petitioner has the burden of rebutting this presumption of correctness by clear and convincing evidence. *Id.*

III. Discussion

In his federal court Petition, petitioner raises four grounds for relief. First, he argues, the government committed a *Brady* violation by failing to disclose photographs showing petitioner's injuries after the incident leading to his arrest. In his second ground for relief, he argues that his aggravated kidnapping and rape convictions violate the Fifth Amendment's Double Jeopardy Clause because they arose out of the same conduct. Next, he contends, his original trial counsel was ineffective for failing to (A) find the missing photographs and (B) object to testimony about his silence after he invoked his Fifth Amendment right to remain silent. Finally, he asserts that the testimony about his silence after he invoked his Fifth Amendment right to remain silent violates *Doyle v. Ohio*, 426 U.S. 610, 619 (1976).² Respondent argues that the court should dismiss petitioner's writ. Specifically, he argues that petitioner procedurally defaulted on his first, third, and fourth grounds for relief. And he argues that the Kansas Court of Appeals correctly decided the second ground for relief.

The court agrees with respondent. The court first addresses petitioner's first, third, and fourth grounds for relief, explaining why they are procedurally barred. Then, the court addresses petitioner's contention that his aggravated kidnapping and rape convictions violated the Double Jeopardy Clause.

A. Procedural Default

Procedural default can occur in two ways: (1) when a state court clearly dismisses an issue on a state procedural ground that is both independent of federal law and adequate to

² In his Traverse—but not in his Petition—petitioner asserts that the trial court sentenced him while considering facts that the jury never found, violating *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Specifically, he argues that part of the Kansas Sentencing Grid is unconstitutional because it enhances a defendant's sentence due to earlier “person” felonies without a jury finding that defendant committed a “person” felony. The court cannot consider this argument because petitioner asserts it for the first time in his Traverse. See *Thompkins v. McKune*, 433 F. App'x 652, 660 (10th Cir. 2011) (“[A]rguments raised for the first time in a traverse are not properly presented to the district court . . .”).

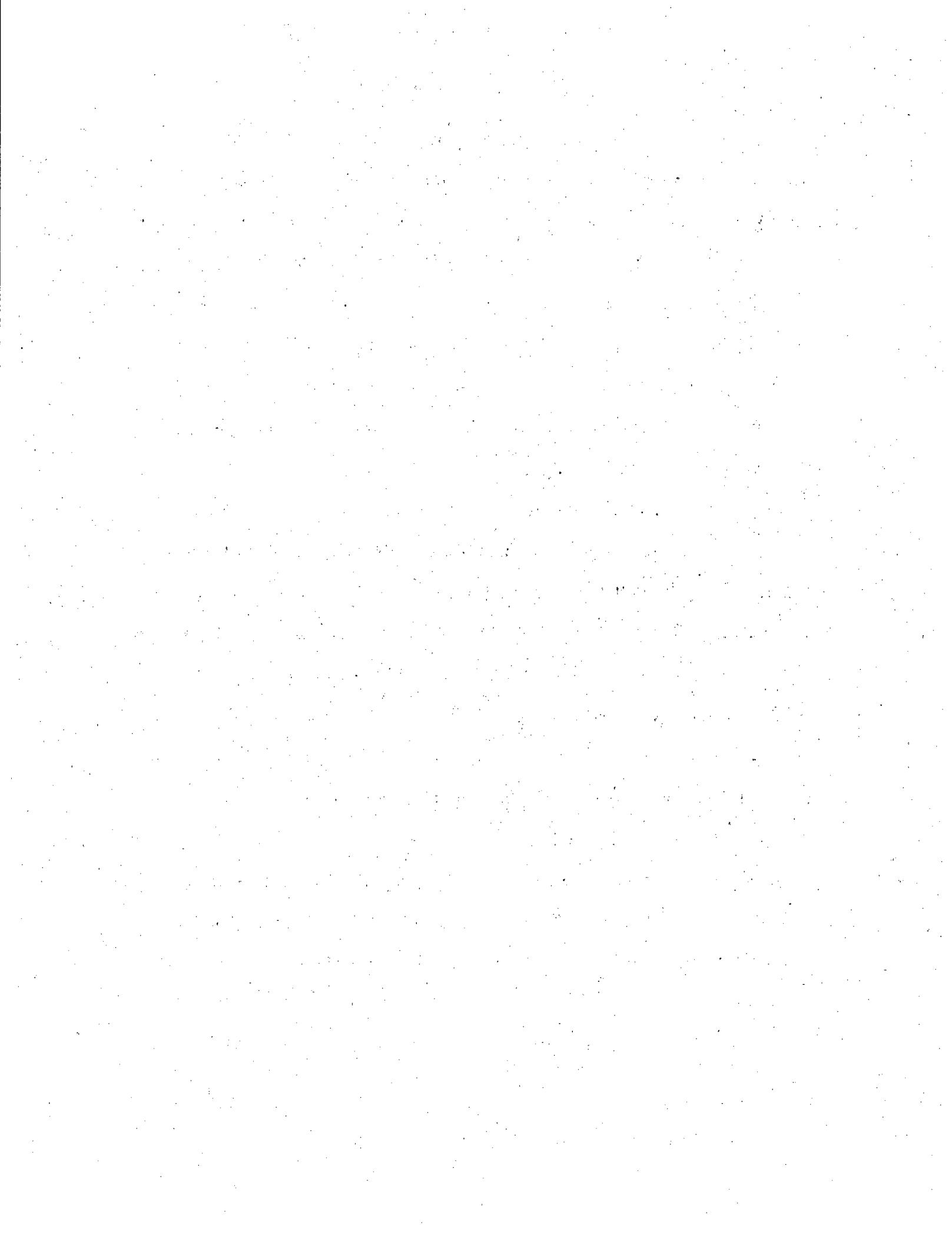
support the judgment; or (2) when the petitioner fails to exhaust available state remedies and would be procedurally barred from presenting the issue if it was brought in state court. *Griffin v. Scnurr*, 640 F. App'x 710, 717 (10th Cir. 2016). “A state procedural ground is independent if it relies on state law, rather than federal law, as the basis for the decision,” and “adequate” if it is “strictly or regularly followed and applied evenhandedly to all similar claims.” *Hickman v. Spears*, 160 F.3d 1269, 1271 (10th Cir. 1998) (internal citations and quotations omitted). A petitioner exhausts his claim once he “fairly present[s]” the claim to state courts. *Picard v. Connor*, 404 U.S. 270, 275 (1971). It is “not sufficient merely that the federal habeas applicant has been through state courts.” *Id.* at 275–76.

Under the procedural default doctrine, a federal court cannot review claims that were procedurally defaulted in state court unless the applicant can “demonstrate either [1] cause and prejudice for the default or [2] that a fundamental miscarriage of justice would result if his claim is not considered.” *Bowles v. Kansas*, No. 15-3049-JTM, 2016 WL 3759508, at *1 (D. Kan. July 14, 2016); *accord Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Respondent argues that petitioner procedurally defaulted on three of his Petition’s grounds for relief: the first, third, and fourth. The next three subsections discuss, in turn, each ground for relief and explain why they are procedurally barred.

1. *Brady* Violation (Ground 1)

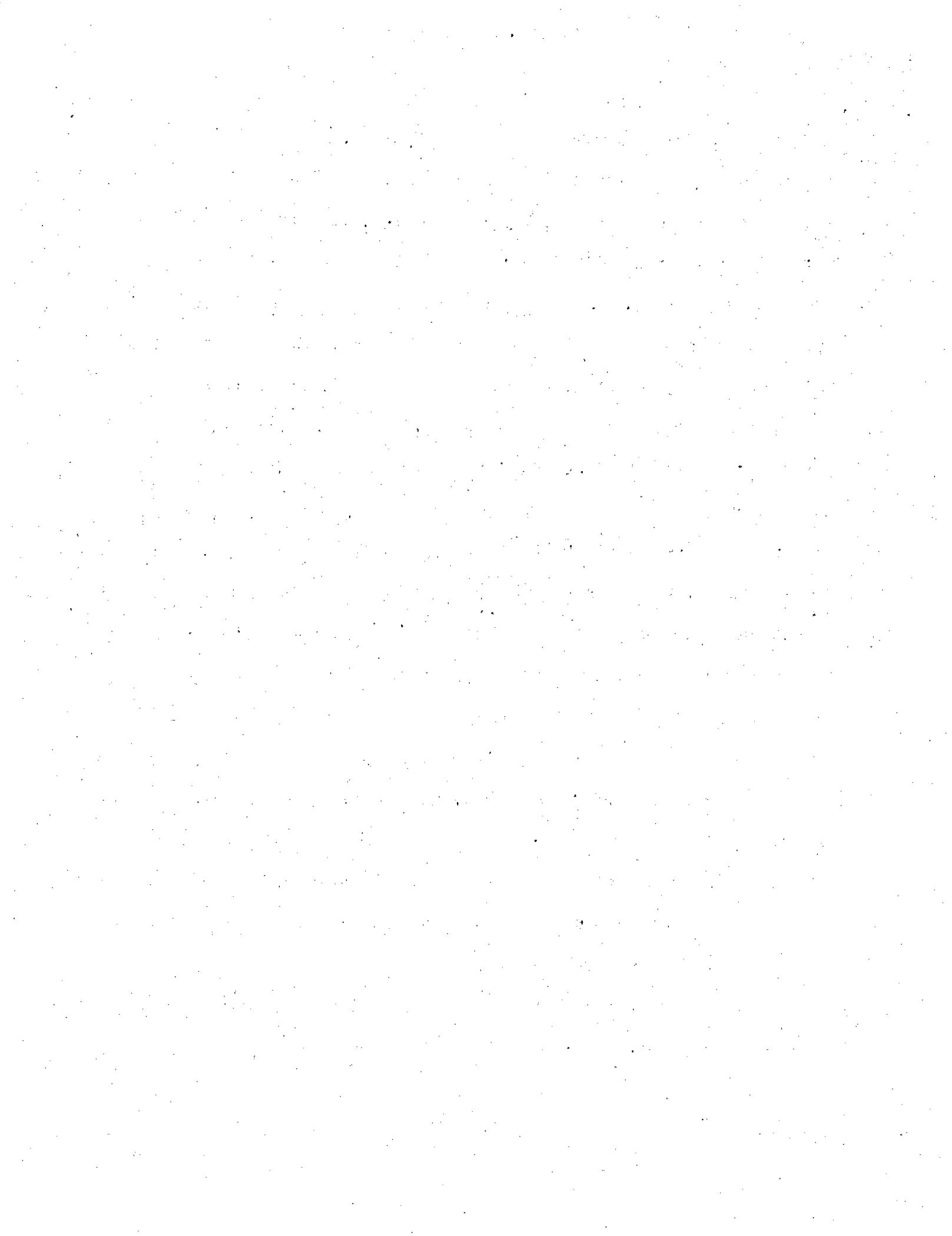
Petitioner argues that the state committed a *Brady* violation when it did not produce photographs of petitioner’s injuries after his encounter with B.H.—the victim. The government commits a *Brady* violation when it withholds evidence that is favorable to a defendant and “the evidence is material either to guilt or to punishment.” *Brady*, 373 U.S. at 87.



At trial, petitioner argued that he never raped or kidnapped B.H. Instead, he contended, B.H. had consensual sex with him and then B.H. and her acquaintance robbed petitioner. Petitioner tried to escape but the acquaintance tackled him. A fight ensued, and the acquaintance drew a knife. Petitioner contended that he raised his hands in self-defense, and the knife cut his finger, causing significant bleeding. Petitioner argues that the government should have disclosed photos of his injuries because these photos would have helped him prove his version of events.

Respondent argues that petitioner procedurally defaulted on this ground for relief because the Kansas Court of Appeals concluded that petitioner waived this argument by failing to raise it when he initially appealed his convictions. Specifically, the Kansas Court of Appeals held, “We reject [petitioner’s] claim on the ground that it should have been raised in his direct appeal.” *Gordon*, 2016 WL 6137901, at *7. It continued. “It is well established that motions filed under [Kan. Stat. Ann. §] 60-1507 are not to be used as substitutes for a direct appeal or a second appeal, and issues that could have been raised in the direct appeal are res judicata meaning they are barred from consideration.” *Id.* This reasoning is based on an independent and adequate state law ground and thus the court cannot consider it, absent exceptional circumstances. *See Gleason v. McKune*, No. 11-3110-SAC, 2012 WL 2952242, at *15 (D. Kan. July 19, 2012) (“The Kansas Court of Appeals affirmed [the Kansas district court’s] decision, reasoning that a [Kan. Stat. Ann. §] 60-1507 motion cannot be used as a substitute for either a direct appeal or a second appeal and that Petitioner failed to establish exceptional circumstances which would have excused his failure to raise this claim on direct appeal. This is an adequate and independent state ground, which bars reconsideration by this court.”).

Petitioner argues that the court should review this ground for relief despite his procedural default because he can show good cause and prejudice. Specifically, he asserts he never knew



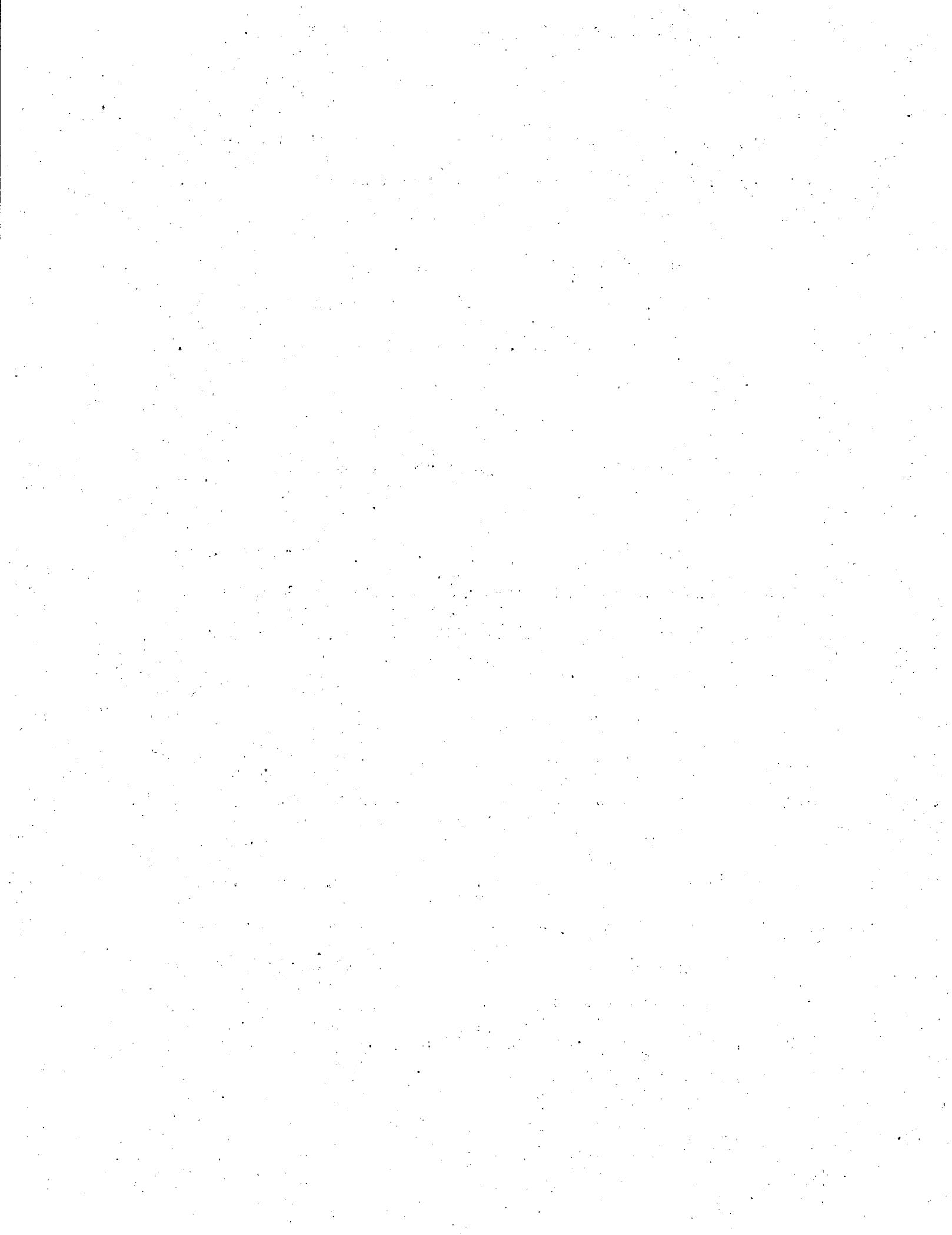
the photographs existed until his state habeas proceedings because the government never revealed their existence until then. And petitioner can show actual prejudice, he argues, because the photos would have corroborated his side of the story.

The court assumes, without deciding, that petitioner could show good cause. But petitioner cannot demonstrate any prejudice from the government's error. To show prejudice, petitioner must show that the evidence would have had more than a negligible effect on the trial. *Ochoa v. Workman*, 451 F. App'x 718, 731 (10th Cir. 2011). Here, several witnesses testified that petitioner had severe injuries after his fight with the acquaintance—including B.H. and a police officer who responded to the scene. So, the jury heard extensive evidence about petitioner's injuries. And the government never disputed these injuries. Any photographs of these injuries, at most, would have allowed the jury to visualize injuries they knew about already. Also, these photographs would do little to inform the jury who started the fight or why petitioner and the acquaintance were fighting. The court denies this first ground for relief because petitioner has failed to demonstrate prejudice.

2. Ineffective Assistance of Counsel (Ground 3)

In his third ground for relief, petitioner argues that his trial counsel was ineffective in two distinct ways. First, he argues that his trial counsel should have discovered the *Brady* violation. And second, petitioner contends, his trial counsel should have objected to testimony about his silence after police arrested him. He has procedurally defaulted on these claims as well.

When discussing petitioner's claim that his trial counsel was ineffective because he never discovered the *Brady* violation, the Kansas Court of Appeals said, "At no point in his amended [habeas] motion did [petitioner] complain that his counsel was ineffective for failing to find photographs or hospital records; he does so for the first time on appeal." *Gordon*, 2016 WL



6137901, at *5. It continued, “As a general rule, we will not consider an allegation of ineffective assistance of counsel raised for the first time on appeal.” *Id.* This is an independent and adequate bar to the court considering this claim. *See Reynolds v. Hannigan*, No. 95-3559-DES, 1999 WL 33177300, at *7 (D. Kan. Mar. 22, 1999) (finding Kansas state-court rule against raising an issue for the first time on appeal independent and adequate), *adopted*, 53 F. Supp. 2d 1149 (D. Kan. 1999).

Petitioner argues that he raised this issue before the trial court that heard his habeas motion, highlighting several pro se motions he filed. But, the Kansas Court of Appeals explained, “[g]enerally[,] the factual aspects of a claim of ineffective assistance of counsel require that the matter be resolved through a [Kan. Stat. Ann. §] 60-1507 motion or through a request to remand the issue to the district court for an evidentiary hearing” *Gordon*, 2016 WL 6137901, at *5 (internal alterations omitted) (emphasis added) (quoting *State v. Galaviz*, 291 P.3d 62, 77 (Kan. 2012)). Petitioner failed to request either step. So, under Kansas law, petitioner failed to preserve this issue properly and the court cannot consider it.

Petitioner’s ineffective assistance of counsel claim based on his trial counsel’s failure to object to the *Doyle* violation also is procedurally barred. Under *Doyle v. Ohio*, a prosecutor cannot use a defendant’s post-arrest silence to impeach his credibility. 426 U.S. at 619. The Kansas Court of Appeals never addressed this claim of ineffective assistance of counsel directly. It declined to do so because, “[s]ignificantly, [petitioner] does not argue his counsel was ineffective for failing to object [to the *Doyle* violation].” *Gordon*, 2016 WL 6137901, at *7.

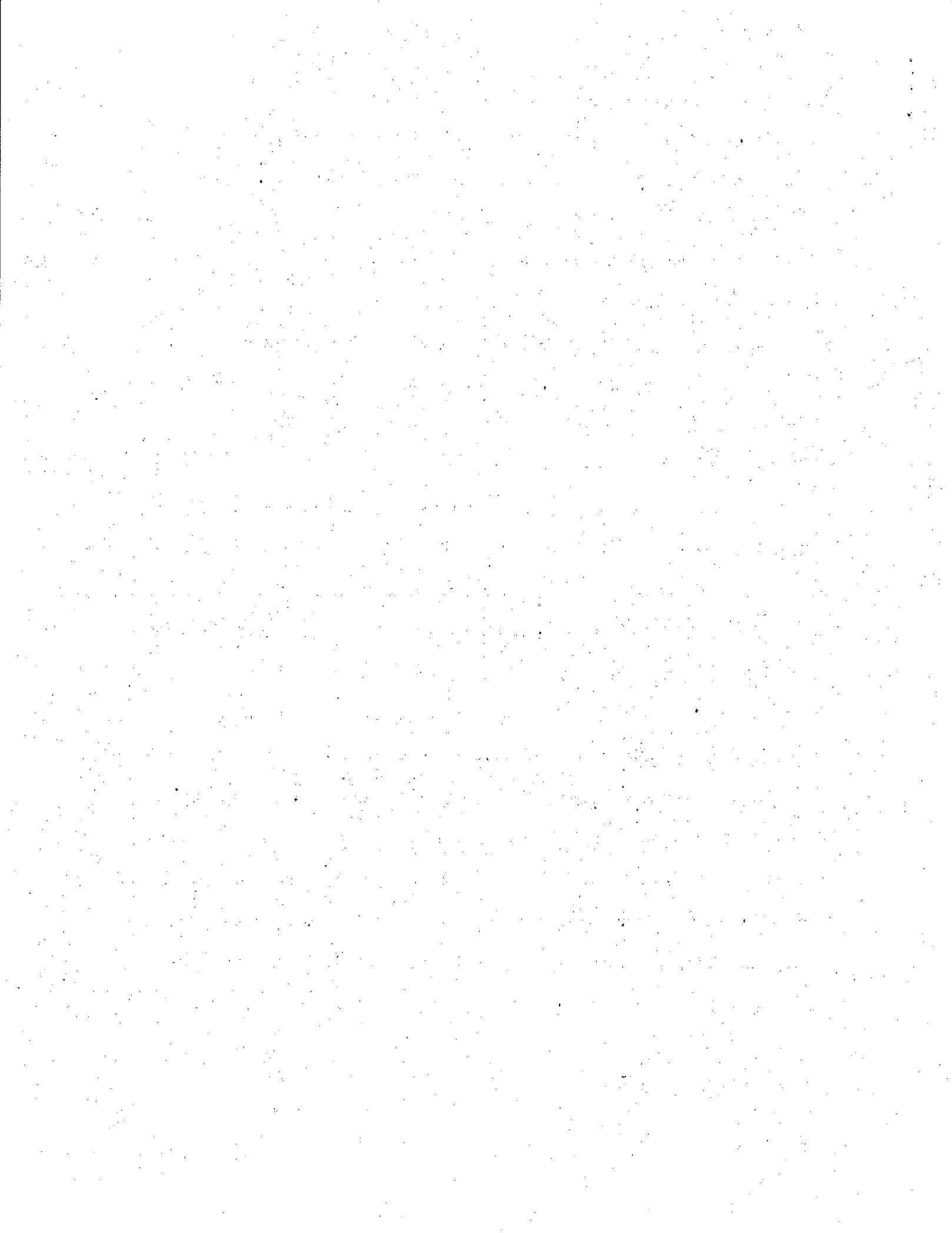
The court cannot consider this argument because the state court never addressed it. *Coleman*, 501 U.S. at 731 (“This Court has long held that a state prisoner’s federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any



of his federal claims.”). Petitioner claims that he fairly presented this issue to the trial court presiding over his habeas motion. But this argument does not negate the fact that this issue never was “properly presented to the highest state court”—in this case, the Kansas Court of Appeals. *Brown v. Shanks*, 185 F.3d 1122, 1124 (10th Cir. 1999) (quoting *Dever v. Kan. State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994)). Petitioner cites no good cause for his failure to assert this argument before the Kansas Court of Appeals. Nor does he argue that the court’s failure to review this claim will result in a miscarriage of justice. The court denies petitioner’s writ based on the third ground for relief.

3. *Doyle* Violation (Ground 4)

Next, petitioner argues that the court should grant his writ because the prosecution committed a *Doyle* violation at his original trial. In addressing this argument, the Kansas Court of Appeals said, “When considering this issue, we first must reject it on res judicata grounds. Like [petitioner’s] *Brady* violation argument, his contention of a *Doyle* violation is a trial error that should have been raised on direct appeal. As [petitioner] has not articulated a reason why it was not, our consideration of the issue is barred.” *Gordon*, 2016 WL 6137901, at *8. As the court explained above, the Kansas rule that a prisoner cannot litigate any issue he didn’t raise in his initial appeal is an independent and adequate state rule that prevents the court from reviewing the issue. *See Gleason*, 2012 WL 2952242, at *15. And petitioner cannot claim that his original trial counsel’s ineffectiveness constitutes good cause for his failure to raise the issue because petitioner failed to preserve that claim. *See Edwards v. Carpenter*, 529 U.S. 446, 452–53 (2000) (holding that a petitioner cannot use ineffective assistance of counsel as “good cause” to avoid the procedural default rule when petitioner has failed to present his ineffective assistance of



counsel claim properly to the state court). The court denies petitioner's habeas writ on the fourth ground for relief.

B. Merits of Petitioner's Double Jeopardy Argument (Ground 2)

The Kansas Court of Appeals did decide one of the claims petitioner raises here on its merits: his claim that the aggravated kidnapping and rape convictions violate the Double Jeopardy Clause. Petitioner argues that these convictions violate the Double Jeopardy Clause because they punish him for the same conduct twice, citing *Grady v. Corbin*, 495 U.S. 508 (1990). In *Grady*, the Supreme Court held that the Double Jeopardy Clause bars the government from prosecuting a defendant for a crime that requires the government to establish that defendant engaged in conduct for which he was convicted already. *Id.* at 521. For example, in *Grady*, the Supreme Court held that the Double Jeopardy Clause prohibited the government from charging a defendant with negligent homicide for killing someone while driving because he already was convicted for driving while intoxicated—the very act that led to defendant killing someone. *Id.* at 523. But the Supreme Court expressly overruled this test in *Grady*. See *United States v. Dixon*, 509 U.S. 688, 703 (1993) (“We have concluded, however, that *Grady* must be overruled.”). Instead, the proper test to determine whether two convictions violate the Double Jeopardy Clause is “whether each offense contains an element not contained in the other.” *Id.* at 696. Here, aggravated kidnapping and rape each have elements that the other does not. Aggravated kidnapping requires the jury to find that petitioner confined the victim. *Gordon*, 2016 WL 6137901, at *5. And a rape conviction requires the jury to find that petitioner had sexual intercourse with someone who did not give consent. *Id.* at *4. Ground two thus provides no basis for relief.

C. Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases provides, “The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” “A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). To satisfy this standard, the movant must demonstrate that “‘reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.’” *Saiz v. Ortiz*, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v. Dretke*, 542 U.S. 274, 282 (2004)). While this standard does not require a movant to demonstrate that his appeal will succeed, he must “prove something more than the absence of frivolity or the existence of mere good faith.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (quotation marks omitted). “This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it.” *Id.* at 336.

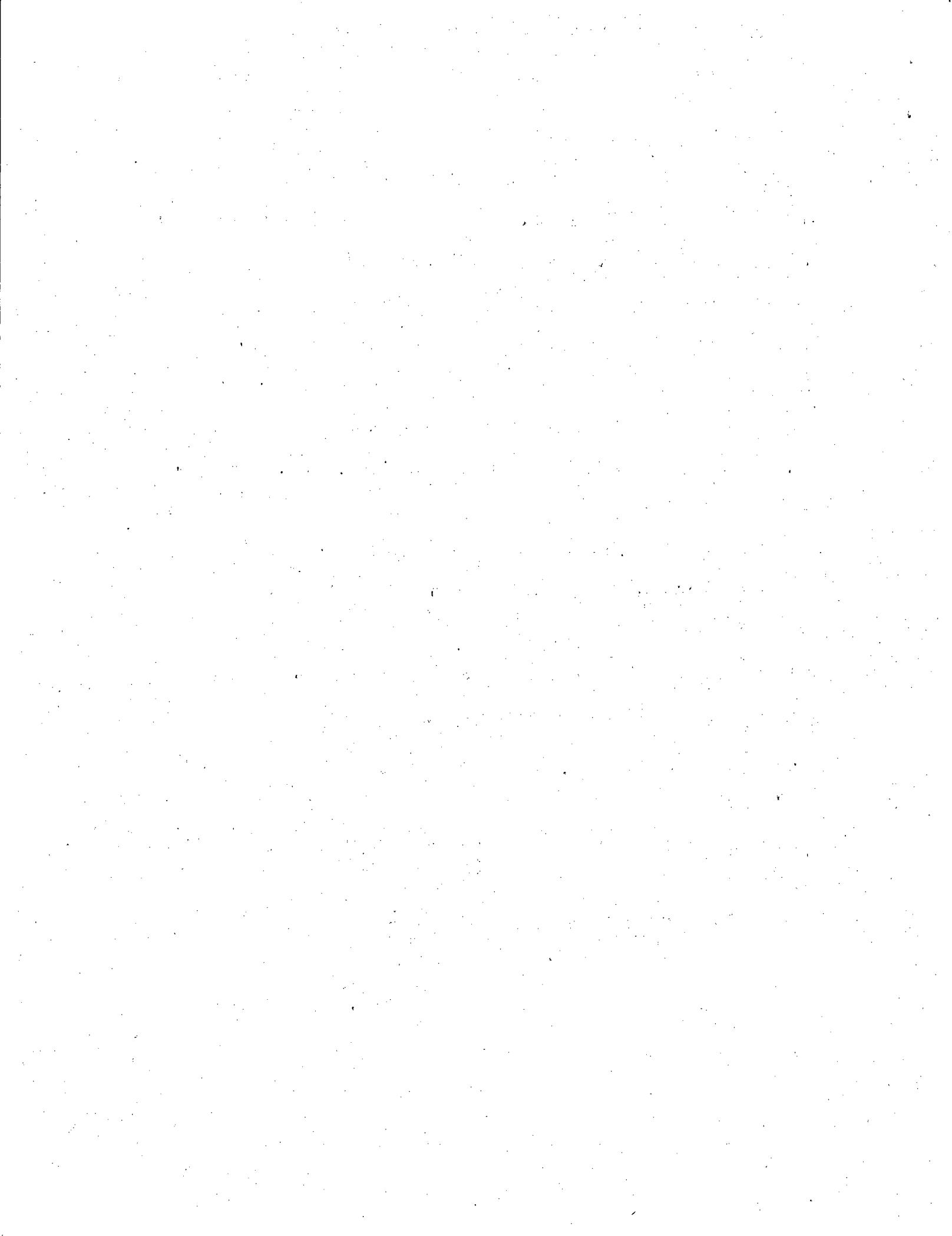
The rulings that the court has made here are not the type that reasonable jurists could debate or would conclude were wrong. The court thus declines to issue a certificate of appealability for this Order.

IV. Conclusion

For reasons explained above, the court denies the Petition for Writ of Habeas Corpus (Doc. 1).

IT IS THEREFORE ORDERED BY THE COURT THAT the Petition for Writ of Habeas Corpus (Doc. 1) is denied.

IT IS FURTHER ORDERED THAT the certificate of appealability is denied.



IT IS SO ORDERED.

Dated this 13th day of September, 2018, at Topeka, Kansas.

s/ Daniel D. Crabtree
Daniel D. Crabtree
United States District Judge

