

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 4, 2021

Christopher M. Wolpert
Clerk of Court

JAMAR J. DRAPER,

Petitioner - Appellant,

v.

JIMMY MARTIN,

Respondent - Appellee.

No. 20-6163
(D.C. No. 5:18-CV-01195-R)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before BRISCOE, BALDOCK, and CARSON, Circuit Judges.

Petitioner Jamar Draper, an Oklahoma state prisoner appearing pro se, requests a certificate of appealability (COA) so that he may appeal the district court's order denying his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Because Draper has failed to make a substantial showing of the denial of a constitutional right, we deny his request for a COA and dismiss the matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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.

I

A

In the early morning hours of May 1, 2009, Draper and two other individuals, Douglas Hendrix and Corey Moreland, went to a home in Langston, Oklahoma, where Claude Sandles and Marcus Whitfield lived. Sandles allegedly owed \$100 to LaDonna Cotton, the mother of Draper's children, for a cell phone that Cotton gave to Sandles. Draper, Hendrix, and Moreland disguised themselves with ski masks or pantyhose over their faces (the record indicates that two of the men wore ski masks and the third used pantyhose; the record does not identify whether Draper wore a ski mask or the pantyhose). The three men (hereinafter the three assailants) were each armed with a firearm.

At approximately 1:30 a.m., the three assailants kicked in the front door and entered the home. Between 1:30 a.m. and 4:00 a.m., the three assailants held Sandles, Whitfield, and their two female companions, L.B. and T.N., against their will at gunpoint. During that time, the three assailants bound and severely beat Sandles and Whitfield. The three assailants also repeatedly raped and sodomized L.B. and T.N. During the course of the siege, the three assailants also searched the home for money and valuable items, and robbed Sandles, Whitfield, and L.B. of personal items. The three assailants also told the four victims that only two of them would survive the night. The siege ultimately ended when either Draper or Moreland accidentally shot Hendrix. That prompted the three assailants to leave the house and allowed the four victims to escape and call the police.

B

On May 2, 2009, Draper was taken into custody and admitted, in part, to his role in the offenses. Draper was subsequently charged in the District Court of Logan County, Oklahoma, with multiple offenses.

On October 4, 2010, Draper pleaded guilty to one count of burglary in the first degree, one count of conjoint robbery with a firearm, one count of assault with a dangerous weapon while masked, four counts of first degree rape, three counts of forcible sodomy, one count of possession of a firearm during commission of a felony, one count of conspiracy, two counts of sexual battery, and one count of kidnapping.

The state trial court sentenced Draper to: (1) twenty-five years' imprisonment, with all but the first fifteen years suspended, on the burglary, robbery, and rape convictions; (2) twenty years' imprisonment, with all but the first fifteen years suspended, on the forcible sodomy convictions; (3) ten years' imprisonment on the possession of a firearm, kidnapping, and one of the conspiracy convictions; and (4) five years' imprisonment on the assault with a dangerous weapon and remaining two conspiracy convictions. The state trial court ordered all of the sentences to run concurrently.

On October 14, 2010, Draper moved to withdraw his guilty plea. That motion was denied by the state trial court on November 12, 2010, after a hearing.

Draper did not file a direct appeal. On August 31, 2012, Draper filed a pro se application for state post-conviction relief alleging that his trial counsel was ineffective and that he was coerced into pleading guilty. The state trial court denied Draper's motion

by written order on November 16, 2012. In doing so, the state trial court found that Draper entered his pleas of guilty knowingly and voluntarily, and that Draper was not coerced into entering his guilty pleas. The state trial court also concluded that Draper's trial counsel was not ineffective.

Draper appealed to the Oklahoma Court of Criminal Appeals (OCCA). In that prose appeal, Draper raised the following issues, several of which were not included in his original application for state post-conviction relief: (1) the state trial court abused its discretion by denying Draper's motion to withdraw his guilty plea; (2) Draper's Double Jeopardy rights were violated when he was convicted of and sentenced for two crimes, first degree burglary and conjoint armed robbery, that covered the same criminal conduct; (3) his trial counsel was ineffective and coerced him into pleading guilty by telling him that he would receive four life sentences if he went to trial; (4) his sentences were excessive because he was only an accessory to many of the crimes; (5) he was charged with sex offenses that he did not personally commit; (6) prosecutorial misconduct; and (7) “[g]uilt [b]y [a]ssociation.” ECF No. 34-5 at 6. The OCCA declined jurisdiction over the appeal on the grounds that it was untimely (i.e., that it “should have been filed . . . on or before December 16, 2012, but was not filed until January 9, 2013”). ECF No. 34-6 at 1.

In April 2013, Draper filed a second application for state post-conviction relief with the state trial court. In that application, Draper argued that (1) he was denied the right to withdraw his guilty plea, (2) his trial counsel was ineffective and misled him into pleading guilty, and (3) the state trial court abused its discretion by refusing to allow him

to withdraw his guilty plea. On January 17, 2014, the state trial court denied Draper's second application as procedurally barred.

On February 2, 2014, Draper filed with the state trial court a third application for state post-conviction relief and a motion for appeal out of time. On June 18, 2015, the state trial court granted Draper's application and recommended that he be allowed to file an appeal out of time with the OCCA. On August 6, 2015, the OCCA granted Draper's request for a certiorari appeal out of time.

On January 26, 2016, Draper, through appointed counsel, filed a petition for writ of certiorari with the OCCA. Draper asserted four propositions of error in his petition: (1) that there was an insufficient factual basis for his guilty plea; (2) his guilty plea was not knowingly and voluntarily made; (3) his convictions for conjoint robbery with a firearm, assault with a dangerous weapon, and possession of a firearm during commission of a felony violated the prohibition against double punishment; and (4) his trial counsel was ineffective in several respects in encouraging him to enter a plea of guilty. On August 12, 2016, the OCCA issued a summary opinion denying Draper's petition and affirming the judgment and sentence of the state trial court.

On June 26, 2017, Draper filed with the state trial court a fourth pro se application for state post-conviction relief arguing that: (1) his convictions for rape, forcible sodomy, burglary in the first degree, and conjoint robbery with a firearm violated the prohibition against double punishment for the same criminal conduct; (2) he was actually innocent of the sex offenses; (3) his due process rights were violated because his trial counsel was ineffective and because the DNA evidence related to the sex offenses was inconclusive;

and (4) the state trial court coerced his confession. The state trial court denied the application, concluding that (1) the doctrine of res judicata barred claims that were raised or could have been raised in Draper's direct appeal, and (2) Draper provided no substantive evidence to support his claim of actual innocence.

On June 22, 2018, Draper filed a pro se petition in error with the OCCA. On September 24, 2018, the OCCA issued a written order affirming the state trial court's denial of post-conviction relief. The OCCA noted that "Draper's claims of double jeopardy, that he was convicted of crimes that he did not actually commit, and that his pleas were coerced were all addressed on direct appeal and are barred from further consideration by res judicata." ECF No. 34-20 at 4. As for Draper's claim of DNA exoneration, the OCCA noted that his "convictions for the charged sexual offenses were based upon his conjoint criminal liability, and his participation in aiding and abetting his co-defendants in committing the charged crimes." *Id.* at 4-5.

C

On December 10, 2018, Draper initiated these proceedings by filing a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Ground One of the petition alleged a double jeopardy violation arising from Draper being "charged twice for one act of crime." ECF No. 1 at 6. Ground Two alleged that Draper was actually innocent of the sex offenses that he pleaded guilty to. Ground Three alleged that "[m]ultiple violations of due process resulted in convictions and sentences that were unlawful and void." *Id.* at 9. In support of Ground Three, Draper alleged that he "had no effective counsel," he was "serving an illegal sentence" because he was "guilty by

association,” and the “D.N.A. [was] inconclusive,” meaning that “he “shouldn’t [have] been charged of sex offenses.” *Id.* Ground Four alleged that his confession was coerced and his guilty plea was involuntary.

On April 2, 2019, the magistrate judge issued a report and recommendation recommending that Draper’s petition be dismissed without prejudice as a mixed petition containing both exhausted and unexhausted claims.

Draper responded by filing an amended petition. Ground One of the amended petition alleged a double jeopardy violation arising out of his convictions for burglary in the first degree and conjoint robbery. ECF No. 18 at 6. Ground Two alleged that Draper was actually innocent of the rape charges. Ground Three alleged that Draper’s trial counsel was ineffective for failing to argue that Draper was actually innocent of the rape charges. Ground Four alleged that Draper’s guilty plea was coerced by his trial counsel and the state trial court.

The district court ultimately denied all four grounds for relief by way of two written orders after consideration of supplemental reports and recommendations issued by the magistrate judge on June 14, 2019, October 16, 2019, and August 13, 2020, respectively. In the first order, issued on February 24, 2020, the district court concluded that Grounds Two and Three lacked merit. With respect to Ground Two, the district court concluded that a claim of actual innocence “cannot, by itself, support the granting of a writ of habeas corpus.” ECF No. 42 at 5 (citing *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001)). With respect to Ground Three, the district court concluded that the OCCA rejected this claim as procedurally barred and that Draper “fail[ed] to

demonstrate cause and actual prejudice or a fundamental miscarriage of justice to overcome the procedural bar.” *Id.* In its second order, issued on October 7, 2020, the district court concluded that Grounds One and Four also lacked merit. With respect to Ground One, the district court concluded that Draper waived this claim by pleading guilty to the crimes and that, in any event, the claim lacked merit when considered in light of Oklahoma law defining the crimes of burglary and conjoint robbery with a firearm. With respect to Ground Four, the district court concluded that it was “apparent from the record that [Draper] was not satisfied with the sentence he received, and in hindsight, that is after sentencing, he challenged the voluntary nature of his decision to plead guilty because of his dissatisfaction.” ECF No. 65 at 3-4. Further, the district court noted, Draper’s “answers during the plea colloquy belie[d] his contention that his plea was not knowingly and voluntarily made.” *Id.* at 4.

The district court denied Draper a COA and entered final judgment in the case on October 7, 2020. Draper filed a notice of appeal on October 19, 2020, and has since filed an application for COA with this court.

II

“A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). “Federal law requires that he first obtain a COA from a circuit justice or judge.” *Id.* (citing 28 U.S.C. § 2253(c)(1)). To obtain a COA, a state prisoner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires the prisoner to “sho[w] 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) (alteration in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In other words, the prisoner must show that the district court’s resolution of the claims was “debatable or wrong.” *Slack*, 529 U.S. at 484. When a district court dismisses a § 2254 claim on procedural grounds, a petitioner is entitled to a COA only if he shows both that reasonable jurists would find it debatable whether he had stated a valid constitutional claim and debatable whether the district court’s procedural ruling was correct. *Id.* at 484-85.

Draper fails to meet these standards. In his application for COA, Draper simply repeats the conclusory allegations of error that were contained in his amended habeas petition, and otherwise makes no effort to establish that the district court’s resolution of those claims was debatable or wrong. Moreover, we have reviewed the record in this case, including the pleadings filed by the parties in the district court, the magistrate judge’s reports and recommendations, and the district court’s orders denying the claims contained in Draper’s amended petition. Nothing in the record persuades us that reasonable jurists could debate whether any of the four claims asserted by Draper should have been resolved in a different manner or are otherwise adequate to deserve encouragement to proceed further.

The application for COA is therefore DENIED and the matter is DISMISSED.

Draper's motion to proceed in forma pauperis is DENIED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

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

JAMES J. DRAPER,)
Petitioner,)
v.) Case No. CIV-18-1195-R
JIMMY MARTIN)
Respondent.)

ORDER

Before the Court is the Fourth Supplemental Report and Recommendation (Doc. No. 60) issued by Magistrate Judge Gary M. Purcell pursuant to a referral under 28 U.S.C. § 636(b)(1)(B). Petitioner filed a timely objection to the Report and Recommendation (Doc. No. 61). The timely objection gives rise to the Court's obligation to undertake a *de novo* review of those portions of the Report and Recommendation to which Petitioner makes specific objection. *See* 28 U.S.C. § 636(b)(1)(C). The Court has conducted this *de novo* review, granting Petitioner's filing the liberal construction mandated by *Haines v. Kerner*, 404 U.S. 519 (1972), and Court finds as follows.

As a result of the Court's prior Orders, there remain for consideration two grounds for relief from the Amended Petition. In Ground One, Petitioner argues that his conviction on both Count 1, Burglary in the First Degree, and Count 2, Conjoint Robbery with a Firearm, violated the prohibition against double jeopardy. Petitioner's final contention, Ground Four of the Petition, seeks relief on the basis that his guilty plea was coerced by his trial counsel. Judge Purcell concluded that these claims are subject to *de novo* review,

because the Oklahoma Court of Criminal Appeals did not reach of merits of the claims, erroneously stating that the issues had been addressed on direct appeal. *See Cone v. Bell*, 556 U.S. 449, 466 (2009)(“W]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review.”). He concluded that Petitioner was not entitled to habeas relief on either ground, which will be addressed in turn.¹

With regard to the double jeopardy claim, the Report and Recommendation makes alternative findings—first that the claim was waived—and second that the claim lacked merit when considered *de novo* in light of Oklahoma law defining the crimes of burglary and conjoint robbery with a firearm. The objection to the Report and Recommendation makes only fleeting reference to Petitioner's declaratory judgment claim. He asserts “The U.S.C. court has made contradicting statements on the report and recommendation regarding the Petitioner's involuntary plea deal as well as the Petitioner's double jeopardy claim as well (sic).” (Doc. No. 61, p. 1). The only other reference to double jeopardy is with regard to the alleged ineffective assistance of counsel, a claim not before the Court at this juncture. (Doc. No. 61, p. 2) (“The Trial counsel was supposed to bring up the fact that the case in question would be double Jeopardy”). Objections to a report and recommendation must be timely and specific in order to preserve an issue for *de novo* review. *United States v. One Parcel of Real Property*, 73 F.3d 1057, 1060 (10th Cir. 1996). The above references are wholly insufficient to challenge the findings set forth in the

¹ Although the Court grants liberal construction to Petitioner's objection, it will not craft arguments on his behalf. To the extent the objection is not sufficiently specific or confined to the two claims addressed in the Fourth Supplemental Report and Recommendation, the objection has been disregarded.

Report and Recommendation, and because the objection is too general, failure to sufficiently address the issue constitutes a waiver. *See id.* Accordingly, the Report and Recommendation is ADOPTED with regard to Ground One of the Amended Petition.

In his final ground for relief Petitioner challenged his guilty plea to the fifteen counts as coerced—that is, involuntary—in violation of his rights under the Fourteenth Amendment. In the Report and Recommendation, Judge Purcell recommends that relief be denied on this claim, having reviewed the form entitled “Plea of Guilty and Summary of Facts” and the transcript from the change of plea hearing. Judge Purcell also reviewed the transcript from a hearing held on November 12, 2010, addressing Petitioner’s motion to withdraw his guilty plea.

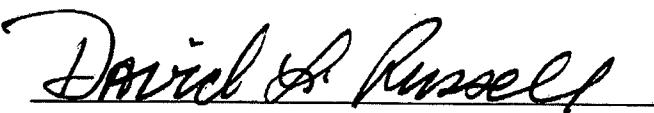
Petitioner’s objection to this finding is slightly more specific than his arguments directed to Ground One. Mr. Draper argues, “[t]he petitioner’s transcript show[s] that the petition did not want plea deal.” (Doc. No. 61, p 1). He further argues, “[w]hen the Trial Counsel stated that Petitioner would be hammered if he went to trial, this rendered the plea deal involuntary. Proving that Petitioner took plea deal under duress Coercion.” (*Id* at p. 3). Judge Purcell addressed and rejected Petitioner’s contention that his counsel’s prediction that going to trial would likely result in a hefty sentence did not render the plea involuntary.² Additionally, Petitioner’s contention that he did not want the plea deal is not supported by the record in the case. It is apparent from the record that Petitioner was not satisfied with the sentence he received, and in hindsight, that is after sentencing, he

² Four of the counts carried the potential for a life sentence.

challenged the voluntary nature of his decision to plead guilty because of his dissatisfaction. His answers during the plea colloquy belie his contention that his plea was not knowingly and voluntarily made, and the Court hereby ADOPTS the Report and Recommendation as to this ground of the Petition.

For the reasons set forth herein, the Court hereby ADOPTS the Fourth Supplemental Report and Recommendation. In accordance with this Order and the Court's prior Orders in this case, judgment shall be entered in favor of the Respondent and the Petition is DENIED. Finally, when a court issues a final order adverse to a Petitioner under 28 U.S.C. § 2254, it must issue or deny a certificate of appealability. See Rule 11 of the Rules Governing Section 2254 Cases. A court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Under this standard, the movant must show that "reasonable jurists could debate whether...the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (internal quotation marks omitted). For the reasons discussed above and in the Court's prior orders, the Court finds that Petitioner has shown neither and thus denies a certificate of appealability.

IT IS SO ORDERED this 7th day of October 2020.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

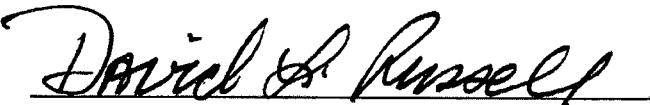
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

JAMAR J. DRAPER,)
vs.)
Petitioner,)
STATE OF OKLAHOMA,)
vs.) No. CIV-18-1195-R
Respondent.)

ORDER

This matter is before the Court on the Report and Recommendation entered by Magistrate Judge Gary M. Purcell on December 11, 2018. Doc. No. 7. Judge Purcell recommended that Petitioner's motion for leave to proceed in forma pauperis be denied and Petitioner ordered to pay the full filing fee of \$5.00 by January 2, 2019. On January 2, 2019, the Court received Petitioner's filing fee. Therefore, the undersigned ADOPTS the Report and Recommendation, denies the Motion for Leave to Proceed in Forma Pauperis as moot, and re-refers this matter to Magistrate Judge Gary M. Purcell for further proceedings consistent with the original referral entered herein.

IT IS SO ORDERED this 3rd day of January 2019.


DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

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

JAMAR J. DRAPER,)
Petitioner,)
v.) No. CIV-18-1195-R
STATE OF OKLAHOMA,)
Respondent.)

REPORT AND RECOMMENDATION

With his Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 Petitioner has filed a motion for leave to proceed *in forma pauperis* (Doc. #2) and supporting documents. Having reviewed said motion, the undersigned finds that Petitioner has sufficient financial resources to pay the \$5.00 filing fee. Because he does not qualify for authorization to proceed without prepayment of the filing fee, Petitioner's motion should be denied, and he should be required to pay the full filing fee for this action to proceed.

RECOMMENDATION

Based on the foregoing findings, it is recommended that the motion for leave to proceed *in forma pauperis* (Doc. #2) be DENIED and the action be

dismissed without prejudice unless Petitioner pays the full filing fee to the Clerk of the Court by January 2nd, 2019. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by January 2nd, 2019, in accordance with 28 U.S.C. § 636 and LCvR 72.1. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996) (“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

This Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 11th day of December, 2018.



GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

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

JAMAR J. DRAPER,)
Petitioner,)
v.) CIV-18-1195-R
JIMMY MARTIN, Warden,)
Respondent.)

SECOND SUPPLEMENTAL REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se*, brings this habeas action under 28 U.S.C. § 2254 challenging his state conviction. The matter has been re-referred to the undersigned Magistrate Judge for proceedings consistent with 28 U.S.C. §636(b)(1)(B). For the following reasons, it is recommended that Respondent's Motion to Dismiss be denied.

I. Background

Petitioner filed his original Petition for Writ of Habeas Corpus in this case on December 10, 2018. Doc. No. 1. Rather than respond to the merits of the Petition, Respondent filed a Motion to Dismiss for Failure to Exhaust State Court Remedies, Doc. No. 12, and a Brief in Support of the Motion to Dismiss. Doc. No. 13. In a Report and Recommendation, the undersigned recommended Respondent's Motion

to Dismiss be granted and the case dismissed without prejudice because Petitioner had filed a “mixed petition” with both exhausted and non-exhausted claims. Doc. No. 17. The undersigned further recommended that Petitioner be allowed to amend his Petition to omit any non-exhausted claims. *Id.* at 12.

While the Report and Recommendation was pending before District Judge David L. Russell, Petitioner filed an Amended Petition. Doc. No. 18. Judge Russell adopted the Report and Recommendation and accepted Petitioner’s Amended Petition. Doc. No. 20. Upon receiving the order re-referring the case, the undersigned ordered Respondent to respond to the Petition. Doc. No. 22.

Rather than respond to the merits of the Amended Petition, Respondent filed a second Motion to Dismiss for Failure to Exhaust State Remedies, Doc. No. 23, and a Brief in Support of the Motion to Dismiss. Doc. No. 24. Petitioner has responded to the Motion. Doc. No. 26.

Petitioner challenges his convictions pursuant to a negotiated guilty plea to fifteen felony charges: Burglary in the First Degree (Count 1), in violation of Okla. Stat. tit. 21, § 1431; Conjoint Robbery with a Firearm (Count 2), in violation of Okla. Stat. tit. 21, § 801; Assault with a Dangerous Weapon While Masked (Count 3), in violation of Okla. Stat. tit. 21, § 1303; Rape in the First Degree (Counts 4, 7, 13, and 14), in violation of Okla. Stat. tit. 21, § 1111; Forcible Sodomy (Counts 5, 6 and 8), in violation of Okla. Stat. tit. 21, § 888; Possession of a Firearm During the

Commission of a Felony (Count 9), in violation of Okla. Stat. tit. 21, § 1287; Conspiracy (Count 10), in violation of Okla. Stat. tit. 21, § 421; Sexual Battery (Counts 11 and 12), in violation of Okla. Stat. tit. 21, § 1123(B); and Kidnapping (Count 15), in violation of Okla. Stat. tit. 21, § 741.

The Honorable Donald L. Worthington, Logan County District Judge, accepted Petitioner's guilty plea and sentenced him in accordance with his negotiated plea agreement to twenty-five years' imprisonment on each of Counts 1, 2, 4, 7, 13 and 14, with all but the first fifteen years suspended; twenty years' imprisonment on Counts 5, 6 and 8 with all but the first fifteen years suspended; ten years' imprisonment on Counts 9, 10, and 15; and five years' imprisonment on Counts 3, 11 and 12. Sentences on all counts were ordered to be served concurrently.¹

A. Petitioner's Direct Appeal

The trial court denied Petitioner's timely-filed motion to withdraw his guilty plea. Petitioner then filed his first Application for Post-Conviction Relief, seeking an appeal out-of-time. The Oklahoma Court of Criminal Appeals (OCCA) granted his application, and Petitioner, represented by new counsel, raised the following claims on direct appeal:

¹ See Case No. Case CF-2009-100, Logan County District Court. The docket sheet may be viewed at <https://www.oscn.net>. Last accessed June 14, 2019.

1. Petitioner's guilty plea was based on an insufficient factual basis in that he did not rape anyone, did not aid and abet in the rape, and he was found guilty by association. Doc. No. 13-3 at 13-18.
2. Petitioner's plea was unknowingly and involuntarily made because Petitioner did not understand the theory of conjoint criminal liability, he had no input into the statement of the factual basis he read in the trial court, and his attorney coerced him into pleading guilty by telling him he would get "hammered" by a jury; *Id.* at 19-22
3. Petitioner's convictions for multiple felony counts of Conjoint Robbery with a Firearm, Assault with a dangerous Weapon while Masked and Possession of a Firearm During the Commission of a Felony are convictions for the same act; *id.* at 24-25; and Petitioner's convictions for rape, sodomy and kidnapping, *id.* at 26-27, are also convictions for the same act.
4. Petitioner did not receive effective assistance of counsel in that counsel did not raise the issue of double punishment, incorrectly advised him of his possible liability regarding conjoint liability and repeatedly advised that if he proceeded to trial he would "get hammered." *Id.* at 28-29.

The OCCA denied Petitioner's appeal on August 12, 2016. Doc. No. 13-4.

B. Petitioner's First Federal Habeas Action

On October 25, 2016, Petitioner filed his first case in this Court seeking habeas relief. *See Draper v. Farris*, CIV 16-1231-R, Doc. No. 1 (filed Oct. 25, 2016). Respondent moved to dismiss the case as a mixed petition containing both exhausted and non-exhausted grounds for relief. United States Magistrate Judge Bernard Jones, to whom the case had been referred for initial proceedings, recommended respondent's motion be granted. *See Report and Recommendation,*

CIV 16-1231-R, Doc. No. 17. Judge Jones found Petitioner had exhausted state court remedies as to the following grounds for relief:

1. that Petitioner's convictions on multiple counts of rape and forcible sodomy violated the Double Jeopardy Clause; and
2. that Petitioner had been found guilty by association for crimes he did not actually commit.

Conversely, Judge Jones found Petitioner had not exhausted state court remedies with respect to his other grounds for habeas relief:

Grounds Three, Five, Seven, Eleven, Twelve, and Thirteen are wholly unexhausted. Ground One is unexhausted in so far as it brings a double-jeopardy and double-punishment claim related to Petitioner's first-degree burglary and conjoint-robbery-with-a-firearm convictions. Ground Nine is unexhausted with regard to his claim regarding DNA evidence (which the Court construes as an actual innocence claim).

Doc. No. 13-1 at 9.

United States District Judge David Russell adopted the Report and Recommendation in Case No. CIV16-1231-R, Doc. No. 19, and allowed Petitioner to file an amended petition.

Petitioner filed an amended petition, but he again raised an unexhausted ground for relief, and respondent moved to dismiss the amended petition on that basis. Judge Jones agreed and recommended dismissal, finding Petitioner had not presented to the state courts his ground for relief that the trial court had coerced Petitioner to plead guilty. Doc. No. 24-2 at 4-5. Judge Russell adopted the Report and Recommendation and dismissed the amended petition without prejudice.

C. Petitioner's Final Application for Post-Conviction Relief

While Petitioner's amended petition was pending before this Court in Case No. CIV-16-1231-R, Petitioner filed another application for post-conviction relief in the trial court attempting to exhaust more grounds for relief. A copy of this application for post-conviction relief is attached to Respondent's Brief in Support of Motion to Dismiss. Doc. No. 24-5. On appeal, the OCCA affirmed the trial court's denial of post-conviction relief on the following claims:

1. Petitioner's right to be free of double jeopardy and double punishment was violated as he was convicted of Burglary in the First Degree and Conjoint Robbery with a firearm;
2. Petitioner was actually innocent of the charges of rape and the subsequent convictions based on inconclusive DNA evidence;
3. Petitioner was deprived of effective assistance of counsel because counsel did not argue Petitioner was actually innocent of the convictions for rape based on the DNA evidence; and
4. Petitioner's guilty plea was coerced by the trial court as demonstrated by the type-written statement that Petitioner read, but did not write.

Doc. Nos. 24-5; 24-8.

D. Petitioner's Amended Complaint Case No. 18-1195-R

Petitioner raises the following grounds for relief in his Amended Petition:

Ground One: Double Jeopardy. Petitioner's right to be free of double jeopardy was violated as he was convicted of Burglary in the First Degree and Conjoint Robbery.

Ground Two: Actual Innocence. Petitioner was actually innocent of the charges of Rape and the subsequent conviction based on inconclusive DNA evidence.

Ground Three: Ineffective Assistance of Counsel. Petitioner was deprived of effective counsel because counsel did not argue Petitioner was actually innocent of the conviction for rape based on the DNA evidence.

Ground Four: Coerced Plea Deal. Petitioner's guilty plea was coerced by trial counsel (Court) as demonstrated by the type-written statement made by trial court that Petitioner read, but did not write himself.

Doc. No. 18 at 5-9.

II. Exhaustion Requirement

The United States Supreme 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." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (citations omitted). But the Supreme Court has declined to "decide where to draw the line between new claims and claims adjudicated on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 186 n.10 (2011).

The exhaustion requirement is based on the doctrine of comity. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). Its purpose is "to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (citations omitted).

To exhaust a claim, a petitioner must have “fairly presented” the claim to the state’s highest court. *See Picard v. Conner*, 404 U.S. 270, 275-76 (1971). A petitioner “must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). To satisfy the exhaustion requirement, a prisoner must afford the state court the “opportunity to apply controlling legal principles to the facts bearing upon (his) constitutional claim,” *Picard*, 404 U.S. at 277 (internal quotation marks and citation omitted). “A document filed *pro se* is to be liberally construed, and a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.” (internal quotation marks omitted). *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

III. Analysis

Respondent agrees Petitioner’s first and second grounds for relief have now been exhausted through his applications for post-conviction relief. Doc. No. 24 at 9. Respondent contends, however, that Petitioner has not exhausted his state court remedies with respect to his third and fourth grounds for relief. The undersigned disagrees.

In Ground Three, Petitioner claims he was deprived of effective assistance of counsel “because counsel did not argue Petitioner was actually innocent of the

conviction for rape based on the DNA evidence.” Doc. No. 18 at 8. According to Respondent, Petitioner has never raised an ineffective assistance of counsel claim based on the failure of either his trial attorney or his appellate attorney to argue he was actually innocent of the rape charge based on the lack of DNA evidence. Doc. No. 24 at 9.

In his final application for post-conviction relief, Petitioner raised the same issue now before this Court. On post-conviction appeal of the denial of Petitioner’s final application for post-conviction relief, the Oklahoma Court of Criminal Appeals (“OCCA”) stated:

In an order entered April 23, 2018, filed April 24, 2018, The District Court of Logan County, the Honorable Phillip C. Corley, District Judge, denied Draper’s request for relief. Judge Corley noted that Draper’s claims of ineffective assistance of trial counsel were made on direct appeal and in prior post-conviction applications, and those claims were addressed and denied, barring them from further consideration.

Doc. No. 24-8 at 3. The OCCA’s Order contradicts Respondent’s contention that Petitioner’s third ground for relief was not exhausted. Thus, it is recommended that this Court allow Petitioner’s third ground for relief to proceed.

In Ground Four, Petitioner claims his guilty plea was coerced, as demonstrated by the fact that the typewritten statement he read before the trial court was not written by him. Doc. No. 18 at 9. Respondent contends Petitioner has never raised this exact ground for relief before the state courts. Doc. No. 24 at 11-12.

In his most recent application for post-conviction relief, however, Petitioner provided the following facts to support his claim that his guilty plea was coerced:

Confession was a type-written statement from the trial court, not from Petitioner. Trial court coerced the confession in order to allow the involuntary plea deal.

Doc. No. 24-5 at 6. The state district court denied relief on this claim and others based on the doctrine of *res judicata*, and the OCCA affirmed on the same basis. Thus, Petitioner raised this ground for relief before the state courts, exhausting his state court remedies. It is therefore recommended that Petitioner be allowed to proceed with his fourth ground for relief. Because Petitioner has exhausted his state court remedies as to all claims, Respondent's Motion to Dismiss for Failure to Exhaust should be denied, and the Respondent be ordered to respond to the Petition (Doc. No. 18).

RECOMMENDATION

Based on the foregoing findings, it is recommended that Respondent's Motion to Dismiss be DENIED. The parties are advised of their right to file an objection to this Second Supplemental Report and Recommendation with the Clerk of this Court by July 5th, 2019, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Second Supplemental Report and Recommendation results in waiver of appellate review of the recommended ruling. *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991); *cf. Marshall v. Chater*, 75 F.3d 1421, 1426

(10th Cir. 1996) (“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

This Second Supplemental Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motions not specifically addressed herein are denied.

ENTERED this 14th day of June, 2019.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

February 4, 2021

JAMAR J. DRAPER,

Petitioner - Appellant,

v.

JIMMY MARTIN,

Respondent - Appellee.

No. 20-6163
(D.C. No. 5:18-CV-01195-R)
(W.D. Okla.)Christopher M. Wolpert
Clerk of Court

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before BRISCOE, BALDOCK, and CARSON, Circuit Judges.

Petitioner Jamar Draper, an Oklahoma state prisoner appearing pro se, requests a certificate of appealability (COA) so that he may appeal the district court's order denying his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Because Draper has failed to make a substantial showing of the denial of a constitutional right, we deny his request for a COA and dismiss the matter.

* 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.

I

A

In the early morning hours of May 1, 2009, Draper and two other individuals, Douglas Hendrix and Corey Moreland, went to a home in Langston, Oklahoma, where Claude Sandles and Marcus Whitfield lived. Sandles allegedly owed \$100 to LaDonna Cotton, the mother of Draper's children, for a cell phone that Cotton gave to Sandles. Draper, Hendrix, and Moreland disguised themselves with ski masks or pantyhose over their faces (the record indicates that two of the men wore ski masks and the third used pantyhose; the record does not identify whether Draper wore a ski mask or the pantyhose). The three men (hereinafter the three assailants) were each armed with a firearm.

At approximately 1:30 a.m., the three assailants kicked in the front door and entered the home. Between 1:30 a.m. and 4:00 a.m., the three assailants held Sandles, Whitfield, and their two female companions, L.B. and T.N., against their will at gunpoint. During that time, the three assailants bound and severely beat Sandles and Whitfield. The three assailants also repeatedly raped and sodomized L.B. and T.N. During the course of the siege, the three assailants also searched the home for money and valuable items, and robbed Sandles, Whitfield, and L.B. of personal items. The three assailants also told the four victims that only two of them would survive the night. The siege ultimately ended when either Draper or Moreland accidentally shot Hendrix. That prompted the three assailants to leave the house and allowed the four victims to escape and call the police.

B

On May 2, 2009, Draper was taken into custody and admitted, in part, to his role in the offenses. Draper was subsequently charged in the District Court of Logan County, Oklahoma, with multiple offenses.

On October 4, 2010, Draper pleaded guilty to one count of burglary in the first degree, one count of conjoint robbery with a firearm, one count of assault with a dangerous weapon while masked, four counts of first degree rape, three counts of forcible sodomy, one count of possession of a firearm during commission of a felony, one count of conspiracy, two counts of sexual battery, and one count of kidnapping.

The state trial court sentenced Draper to: (1) twenty-five years' imprisonment, with all but the first fifteen years suspended, on the burglary, robbery, and rape convictions; (2) twenty years' imprisonment, with all but the first fifteen years suspended, on the forcible sodomy convictions; (3) ten years' imprisonment on the possession of a firearm, kidnapping, and one of the conspiracy convictions; and (4) five years' imprisonment on the assault with a dangerous weapon and remaining two conspiracy convictions. The state trial court ordered all of the sentences to run concurrently.

On October 14, 2010, Draper moved to withdraw his guilty plea. That motion was denied by the state trial court on November 12, 2010, after a hearing.

Draper did not file a direct appeal. On August 31, 2012, Draper filed a pro se application for state post-conviction relief alleging that his trial counsel was ineffective and that he was coerced into pleading guilty. The state trial court denied Draper's motion

by written order on November 16, 2012. In doing so, the state trial court found that Draper entered his pleas of guilty knowingly and voluntarily, and that Draper was not coerced into entering his guilty pleas. The state trial court also concluded that Draper's trial counsel was not ineffective.

Draper appealed to the Oklahoma Court of Criminal Appeals (OCCA). In that pro se appeal, Draper raised the following issues, several of which were not included in his original application for state post-conviction relief: (1) the state trial court abused its discretion by denying Draper's motion to withdraw his guilty plea; (2) Draper's Double Jeopardy rights were violated when he was convicted of and sentenced for two crimes, first degree burglary and conjoint armed robbery, that covered the same criminal conduct; (3) his trial counsel was ineffective and coerced him into pleading guilty by telling him that he would receive four life sentences if he went to trial; (4) his sentences were excessive because he was only an accessory to many of the crimes; (5) he was charged with sex offenses that he did not personally commit; (6) prosecutorial misconduct; and (7) “[g]uilt [b]y [a]ssociation.” ECF No. 34-5 at 6. The OCCA declined jurisdiction over the appeal on the grounds that it was untimely (i.e., that it “should have been filed . . . on or before December 16, 2012, but was not filed until January 9, 2013”). ECF No. 34-6 at 1.

In April 2013, Draper filed a second application for state post-conviction relief with the state trial court. In that application, Draper argued that (1) he was denied the right to withdraw his guilty plea, (2) his trial counsel was ineffective and misled him into pleading guilty, and (3) the state trial court abused its discretion by refusing to allow him

to withdraw his guilty plea. On January 17, 2014, the state trial court denied Draper's second application as procedurally barred.

On February 2, 2014, Draper filed with the state trial court a third application for state post-conviction relief and a motion for appeal out of time. On June 18, 2015, the state trial court granted Draper's application and recommended that he be allowed to file an appeal out of time with the OCCA. On August 6, 2015, the OCCA granted Draper's request for a certiorari appeal out of time.

On January 26, 2016, Draper, through appointed counsel, filed a petition for writ of certiorari with the OCCA. Draper asserted four propositions of error in his petition: (1) that there was an insufficient factual basis for his guilty plea; (2) his guilty plea was not knowingly and voluntarily made; (3) his convictions for conjoint robbery with a firearm, assault with a dangerous weapon, and possession of a firearm during commission of a felony violated the prohibition against double punishment; and (4) his trial counsel was ineffective in several respects in encouraging him to enter a plea of guilty. On August 12, 2016, the OCCA issued a summary opinion denying Draper's petition and affirming the judgment and sentence of the state trial court.

On June 26, 2017, Draper filed with the state trial court a fourth pro se application for state post-conviction relief arguing that: (1) his convictions for rape, forcible sodomy, burglary in the first degree, and conjoint robbery with a firearm violated the prohibition against double punishment for the same criminal conduct; (2) he was actually innocent of the sex offenses; (3) his due process rights were violated because his trial counsel was ineffective and because the DNA evidence related to the sex offenses was inconclusive;

and (4) the state trial court coerced his confession. The state trial court denied the application, concluding that (1) the doctrine of res judicata barred claims that were raised or could have been raised in Draper's direct appeal, and (2) Draper provided no substantive evidence to support his claim of actual innocence.

On June 22, 2018, Draper filed a pro se petition in error with the OCCA. On September 24, 2018, the OCCA issued a written order affirming the state trial court's denial of post-conviction relief. The OCCA noted that "Draper's claims of double jeopardy, that he was convicted of crimes that he did not actually commit, and that his pleas were coerced were all addressed on direct appeal and are barred from further consideration by res judicata." ECF No. 34-20 at 4. As for Draper's claim of DNA exoneration, the OCCA noted that his "convictions for the charged sexual offenses were based upon his conjoint criminal liability, and his participation in aiding and abetting his co-defendants in committing the charged crimes." *Id.* at 4-5.

C

On December 10, 2018, Draper initiated these proceedings by filing a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Ground One of the petition alleged a double jeopardy violation arising from Draper being "charged twice for one act of crime." ECF No. 1 at 6. Ground Two alleged that Draper was actually innocent of the sex offenses that he pleaded guilty to. Ground Three alleged that "[m]ultiple violations of due process resulted in convictions and sentences that were unlawful and void." *Id.* at 9. In support of Ground Three, Draper alleged that he "had no effective counsel;" he was "serving an illegal sentence" because he was "guilty by

association,” and the “D.N.A. [was] inconclusive,” meaning that “he “shouldn’t [have] been charged of sex offenses.” *Id.* Ground Four alleged that his confession was coerced and his guilty plea was involuntary.

On April 2, 2019, the magistrate judge issued a report and recommendation recommending that Draper’s petition be dismissed without prejudice as a mixed petition containing both exhausted and unexhausted claims.

Draper responded by filing an amended petition. Ground One of the amended petition alleged a double jeopardy violation arising out of his convictions for burglary in the first degree and conjoint robbery. ECF No. 18 at 6. Ground Two alleged that Draper was actually innocent of the rape charges. Ground Three alleged that Draper’s trial counsel was ineffective for failing to argue that Draper was actually innocent of the rape charges. Ground Four alleged that Draper’s guilty plea was coerced by his trial counsel and the state trial court.

The district court ultimately denied all four grounds for relief by way of two written orders after consideration of supplemental reports and recommendations issued by the magistrate judge on June 14, 2019, October 16, 2019, and August 13, 2020, respectively. In the first order, issued on February 24, 2020, the district court concluded that Grounds Two and Three lacked merit. With respect to Ground Two, the district court concluded that a claim of actual innocence “cannot, by itself, support the granting of a writ of habeas corpus.” ECF No. 42 at 5 (citing *LaFavers v. Gibson*, 238 F.3d 1263, 1265 n.4 (10th Cir. 2001)). With respect to Ground Three, the district court concluded that the OCCA rejected this claim as procedurally barred and that Draper “fail[ed] to

demonstrate cause and actual prejudice or a fundamental miscarriage of justice to overcome the procedural bar.” *Id.* In its second order, issued on October 7, 2020, the district court concluded that Grounds One and Four also lacked merit. With respect to Ground One, the district court concluded that Draper waived this claim by pleading guilty to the crimes and that, in any event, the claim lacked merit when considered in light of Oklahoma law defining the crimes of burglary and conjoint robbery with a firearm. With respect to Ground Four, the district court concluded that it was “apparent from the record that [Draper] was not satisfied with the sentence he received, and in hindsight, that is after sentencing, he challenged the voluntary nature of his decision to plead guilty because of his dissatisfaction.” ECF No. 65 at 3-4. Further, the district court noted, Draper’s “answers during the plea colloquy belie[d] his contention that his plea was not knowingly and voluntarily made.” *Id.* at 4.

The district court denied Draper a COA and entered final judgment in the case on October 7, 2020. Draper filed a notice of appeal on October 19, 2020, and has since filed an application for COA with this court.

II

“A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). “Federal law requires that he first obtain a COA from a circuit justice or judge.” *Id.* (citing 28 U.S.C. § 2253(c)(1)). To obtain a COA, a state prisoner must make “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires the prisoner to “sho[w] 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) (alteration in original) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). In other words, the prisoner must show that the district court’s resolution of the claims was “debatable or wrong.” *Slack*, 529 U.S. at 484. When a district court dismisses a § 2254 claim on procedural grounds, a petitioner is entitled to a COA only if he shows both that reasonable jurists would find it debatable whether he had stated a valid constitutional claim and debatable whether the district court’s procedural ruling was correct. *Id.* at 484-85.

Draper fails to meet these standards. In his application for COA, Draper simply repeats the conclusory allegations of error that were contained in his amended habeas petition, and otherwise makes no effort to establish that the district court’s resolution of those claims was debatable or wrong. Moreover, we have reviewed the record in this case, including the pleadings filed by the parties in the district court, the magistrate judge’s reports and recommendations, and the district court’s orders denying the claims contained in Draper’s amended petition. Nothing in the record persuades us that reasonable jurists could debate whether any of the four claims asserted by Draper should have been resolved in a different manner or are otherwise adequate to deserve encouragement to proceed further.

The application for COA is therefore DENIED and the matter is DISMISSED.
Draper's motion to proceed in forma pauperis is DENIED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

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

JAMAR J. DRAPER,)
Petitioner,)
v.) CIV-18-1195-R
JIMMY MARTIN, Warden,)
Respondent.)

THIRD SUPPLEMENTAL REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se*, has filed an Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 challenging his state conviction. Doc. No. 18. Respondent has filed a Response, Doc. No. 34, and Petitioner has replied. Doc. No. 37. The matter has been referred to the undersigned Magistrate Judge for proceedings consistent with 28 U.S.C. §636(b)(1)(B). For the following reasons, it is recommended that the Petition for Writ of Habeas Corpus be denied.

I. Background

Petitioner challenges his convictions pursuant to a negotiated guilty plea to fifteen felony charges: Burglary in the First Degree (Count 1), in violation of Okla. Stat. tit. 21, § 1431; Conjoint Robbery with a Firearm (Count 2), in violation of Okla. Stat. tit. 21, § 801; Assault with a Dangerous Weapon While Masked (Count 3), in

violation of Okla. Stat. tit. 21, § 1303; Rape in the First Degree (Counts 4, 7, 13, and 14), in violation of Okla. Stat. tit. 21, § 1111; Forcible Sodomy (Counts 5, 6 and 8), in violation of Okla. Stat. tit. 21, § 888; Possession of a Firearm During the Commission of a Felony (Count 9), in violation of Okla. Stat. tit. 21, § 1287; Conspiracy (Count 10), in violation of Okla. Stat. tit. 21, § 421; Sexual Battery (Counts 11 and 12), in violation of Okla. Stat. tit. 21, § 1123(B); and Kidnapping (Count 15), in violation of Okla. Stat. tit. 21, § 741.

The Honorable Donald L. Worthington, Logan County District Judge, accepted Petitioner's guilty plea and sentenced him in accordance with his negotiated plea agreement to twenty-five years' imprisonment on each of Counts 1, 2, 4, 7, 13 and 14, with all but the first fifteen years suspended; twenty years' imprisonment on Counts 5, 6 and 8 with all but the first fifteen years suspended; ten years' imprisonment on Counts 9, 10, and 15; and five years' imprisonment on Counts 3, 11 and 12. Sentences on all counts were ordered to be served concurrently.

Doc. No. 34-1.

Petitioner filed a timely notice to withdraw his plea, Doc. No. 34-2, which the trial court denied after a hearing. Petitioner subsequently filed several applications for post-conviction relief in the trial court. Ultimately, the trial court granted Petitioner's Third Application for Post-Conviction Relief, recommending that the Oklahoma Court of Criminal Appeals ("OCCA") grant Petitioner an appeal out-of-

time. Doc. No. 34-12. The OCCA granted certiorari appeal out-of-time, and counsel was appointed to represent Petitioner. Doc. No. 34-13. The OCCA considered the following four issues raised by Petitioner through appellate counsel:

1. Whether the factual basis for the plea was insufficient;
2. Whether Petitioner's plea was knowingly and voluntarily made;
3. Whether convictions for multiple counts violate the prohibition against double punishment under state law and the Double Jeopardy clause; and
4. Whether Petitioner received effective assistance of trial counsel.

The OCCA considered the merits of Petitioner's claims and affirmed Petitioner's convictions. Doc. No. 34-16. Subsequently, Petitioner exhausted his state court remedies as to other claims by filing applications for post-conviction relief that were denied by both the trial court and the OCCA as procedurally defaulted.

II. Issues Raised

Petitioner raises the following issues in this habeas action:

1. Ground One: Double Jeopardy. Petitioner's convictions for Burglary in the First Degree and Conjoint Robbery constituted double jeopardy.
2. Ground Two: Actual Innocence. Petitioner was actually innocent of the charges of Rape and the subsequent conviction based on inconclusive DNA evidence.
3. Ground Three: Ineffective Assistance of Counsel. Petitioner was deprived of effective counsel because counsel did not argue

Petitioner was actually innocent of the conviction for Rape based on the DNA evidence.

4. Ground Four: Coerced Plea Deal. Petitioner's guilty plea was coerced by "trial counsel (Court)" as demonstrated by the typewritten statement made by the trial court that Petitioner read, but did not write himself.

III. Review of Procedurally Barred Claims

Respondent contends all of Petitioner's grounds for habeas relief, as raised in the instant Petition, are barred from habeas review based on the doctrine of procedural default. The OCCA applied the doctrine of *res judicata* to bar all claims Petitioner raised in applications for post-conviction relief after having asserted those claims on direct appeal. Under the doctrine of waiver, the OCCA found all claims raised for the first time in applications for post-conviction relief filed after disposition of Petitioner's direct appeal were likewise barred from review.

A. Federal Habeas Review of Procedurally Barred Claims

Federal habeas courts must respect procedural bars applied by state courts, so long as those bars are based on state procedural laws independent of federal law and applied even-handedly by the state courts. In other words, the state procedural bar must be both independent and adequate to apply to claims raised on federal habeas review. *Davila v. Davis*, ___ U.S. ___, 137 S. Ct. 2058, 2062 (2017).

As noted above, the OCCA relied on the doctrines of *res judicata* and waiver in finding Petitioner's claims raised in post-conviction applications filed after his

direct appeal were barred from further review. It is well-established that the procedural bars set forth in Oklahoma's Post Conviction Procedure Act, Okla. Stat. tit. 22, § 1086, are both independent and adequate procedural bars. *See, e.g., Welch v. Workman*, 639 F.3d 980, 994 n. 6 (10th Cir. 2010) ("Under Oklahoma law, claims previously raised and rejected are barred by *res judicata* Both the *res judicata* bar to claims previously rejected in the state courts and the waiver rule for claims not previously raised . . . are included in Okla. Stat. tit. 22, §§ 1086 and 1089, and both are regularly and even-handedly applied by the state courts.") (internal quotation marks and citation omitted); *Ellis v. Hargett*, 302 F.3d 1182, 1186 (10th Cir. 2002) (stating that Okla. Stat. tit. 22, § 1086 "is an independent and adequate state ground for denying habeas relief").

B. Overcoming a Procedural Bar in a Federal Habeas Action

Where, as here, all habeas claims raised are barred from federal habeas review based on an independent and adequate state ground, a petitioner may overcome the bar only by demonstrating either cause for the default and actual prejudice or by demonstrating that a fundamental miscarriage of justice will occur if the Court does not review the defaulted claim. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). *See also Davila v. Davis*, 137 S. Ct. at 2062 ("A state prisoner may be able to overcome [a procedural] bar, however, if he can establish 'cause' to excuse the

procedural default and demonstrate that he suffered actual prejudice from the alleged error”).

“Cause” for a procedural default exists where something external to the petitioner, something that cannot fairly be attributed to him, impeded his efforts to comply with the state’s procedural rule. *Smith v. Allbaugh*, 921 F.3d 1261, 1267–68 (10th Cir. 2019).

The miscarriage of justice exception to the bar from considering claims procedurally defaulted in the state courts requires a petitioner to “supplement[] his constitutional claim with a colorable showing of factual innocence.” *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (quotations omitted)).

IV. Analysis

A. Double Jeopardy—Burglary in the First Degree and Conjoint Robbery

Petitioner alleges his right to be free of double jeopardy was violated because he was convicted of both Burglary in the First Degree and Conjoint Robbery. Doc. No. 18 at 5.

On direct appeal, Petitioner’s argument that his convictions for multiple counts violated the prohibition against double jeopardy did not include the issue he raises before this Court. *See* Appellate Brief, Doc. No. 34-14. Rather, Petitioner challenged his convictions for Conjoint Robbery with a Firearm (Count 2), Assault

with Dangerous Weapon While Masked (Count 3), and Possession of a Firearm During Commission of a Felony (Count 9). *Id.* at 25.

Citing Okla. Stat. tit. 21, § 11(a),¹ and the Double Jeopardy Clause, Petitioner also challenged his convictions and sentences for Sexual Battery, Rape, Sodomy and Kidnapping, arguing the charging document stated that the kidnapping was “for the purpose of committing Sexual Battery, Rape and Sodomy” and should not have been treated as a separate crime. Doc. No. 34-14 at 27.

In its Summary Opinion dated August 12, 2016, the OCCA rejected Petitioner’s argument, finding that each crime for which he was convicted and punished was “separate and distinct” from the others and required “dissimilar proof.” Doc. No. 34-16 at 4-5.

Petitioner first challenged his convictions for Burglary and Conjoint Robbery on double jeopardy grounds in an Application for Post-Conviction Relief filed on July 21, 2017. Doc. No. 34-17. The trial court denied his application based on the doctrine of *res judicata*, finding that his claims had either been raised, or could have been raised, on direct appeal. Doc. No. 34-18. On appeal of the denial of post-conviction relief, the OCCA agreed and barred the double jeopardy claim from further review. Doc. No. 34-20 at 4.

¹ Section 11 states, “an act or omission which is made punishable in different ways by different provisions of this title may be punished under such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of the law[.]”

In his Reply, Petitioner contends his trial counsel was ineffective in failing to make an argument to demonstrate Petitioner's convictions violated the Double Jeopardy Clause and in failing to argue that Petitioner was "actually innocent" of some of the crimes based on inconclusive DNA evidence found on the rape victims.

Doc. No. 37 at 2.

An attorney's constitutionally deficient performance constitutes cause when it is an external factor behind a petitioner's failure to comply with state procedural rules. *Smith v. Allbaugh*, at 1268 (10th Cir. 2019) (*citing Davila v. Davis*, 137 S. Ct. at 2065). But a petitioner must show more than deficient performance of his attorney; he must show *constitutionally* deficient performance.

An attorney's performance is constitutionally deficient if a defendant can show both that the attorney performed deficiently (i.e., "that counsel's representation fell below an objective standard of reasonableness") and that the deficient performance caused prejudice (i.e., "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

Smith v. Allbaugh at 1268 (citations omitted). In this case, Petitioner has not demonstrated his trial counsel was ineffective in failing to raise this double jeopardy argument in the hearing on Petitioner's Motion to Withdraw his plea. The hearing was focused on the voluntariness of Petitioner's plea, not a belated attempt to raise claims of legal, as opposed to actual, innocence. Moreover, even if the performance of Petitioner's trial attorney fell below an objective standard of reasonableness,

Petitioner cannot demonstrate he was prejudiced by the deficient representation because he was appointed different counsel and granted an appeal-out-of-time where the addition double jeopardy argument could have been raised.²

The “fundamental miscarriage of justice” exception to the procedural default rule “is a markedly narrow one, implicated only in extraordinary cases where a constitutional violation has probably resulted in the conviction of one who is actually innocent.” *Magar v. Parker*, 490 F.3d 816, 820 (10th Cir. 2007). *See also Herrera v. Collins*, 506 U.S. 390, 404 (1993) (“The fundamental miscarriage of justice exception is available only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.” (quotations omitted)). “[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar [or] . . . expiration of the statute of limitations.” *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). The Court’s opinion in *McQuiggin* makes clear the limitations on its holding: “[T]enable actual-innocence gateway pleas are rare: ‘[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of [] new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.’” *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

² Petitioner does not contend his appellate counsel’s performance was deficient.

Petitioner has demonstrated neither cause for the default and actual prejudice, nor that a fundamental miscarriage of justice will occur if the Court does not consider Petitioner's defaulted double jeopardy claim.

B. Actual Innocence

The Supreme Court has never recognized a stand-alone claim of actual innocence. “[A]n assertion of actual innocence, although operating as a potential pathway for reaching otherwise defaulted constitutional claims, does not, standing alone, support the granting of the writ of habeas corpus.” *LaFevers v. Gibson*, 238 F.3d 1263, 1265 n. 4 (10th Cir. 2001) (*citing Herrera v. Collins*, 506 U.S. at 400-01 (“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”)). Further, “[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.” *Sellers v. Ward*, 135 F.3d 1333, 1338-39 (10th Cir. 1998) (discussing *Herrera*). Accordingly, the Court finds that Petitioner's stand-alone claim of actual innocence is not cognizable in these habeas proceedings, and should be denied for that reason.

C. Ineffective Assistance of Counsel

Petitioner contends he was deprived of effective assistance of counsel because trial counsel did not argue at the hearing to withdraw his guilty plea that Petitioner

was actually innocent of the convictions for rape based on inconclusive DNA evidence. Doc. No. 18 at 8.

On direct appeal, Petitioner contended his trial counsel was ineffective because there was an inadequate factual basis for his plea, because counsel did not properly advise him regarding his “mutual and conjoint liability” and because counsel did not raise a double punishment objection. Doc. No. 34-14 at 23-24.

In Petitioner’s subsequent Application for Post-Conviction Relief, Doc. No. 34-18, Petitioner argued his trial counsel was ineffective because of “multiple violations of Petitioner’s right to due process” and because counsel did not argue that Petitioner was actually innocent of some of the charged sex crimes based on inconclusive DNA results. Doc. No. 34-17 at 5. The trial court denied post-conviction relief, noting that Petitioner had raised an ineffective assistance of counsel claim before and had asserted no reason for failing to raise his new ineffectiveness of counsel argument in his direct appeal. Doc. No. 34-18 at 2. The OCCA affirmed the denial of post-conviction relief. Doc. No. 34-20 at 3-4. Petitioner waived review of the new iteration of the ineffective assistance of counsel claim before the state courts, and that claim is barred from review in this Court. Petitioner has demonstrated neither cause and prejudice nor his “actual innocence.” To be credible, a claim of actual innocence requires an applicant “to support his allegations of constitutional error with new reliable evidence—whether it be

OCCA stated in its opinion affirming the district court's denial of post-conviction relief that:

Draper's claims of double jeopardy, that he was convicted of crimes that he did not actually commit, *and that his pleas were coerced* were all addressed on direct appeal, and are barred from further consideration by *res judicata*.

Doc. No. 34-20 at 4. Regardless, it appears Petitioner did not actually raise the claim currently under consideration in his direct appeal. If, as this Court finds, Petitioner raised this claim for the first time in his Application for Post-Conviction Relief filed after disposition of his direct appeal, his claim would be subject to a procedural bar, the proper basis of which would be Petitioner's waiver of the claim. Petitioner does not attempt to demonstrate cause and prejudice to excuse his procedural default, nor does he claim a miscarriage of justice would occur if this Court does not consider this procedurally barred claim.

V. Conclusion

All of the claims Petitioner raises in his Amended Petition are barred from habeas review by this Court. The state courts barred these claims, applying independent and adequate state procedural rules. Petitioner has failed to overcome the state procedural bars, as required for merit review of otherwise procedurally barred habeas claims. Thus, the Amended Petition for Writ of Habeas Corpus should be denied.

RECOMMENDATION

Based on the foregoing findings, it is recommended that Petitioner's Amended Petition, Doc. No. 18, be DENIED. The parties are advised of their right to file an objection to this Third Supplemental Report and Recommendation with the Clerk of this Court by November 5th, 2019, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Third Supplemental Report and Recommendation results in waiver of appellate review of the recommended ruling. *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991); *cf. Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) (“Issues raised for the first time in objections to the magistrate judge’s recommendation are deemed waived.”).

This Third Supplemental Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motions not specifically addressed herein are denied.

ENTERED this 16th day of October, 2019.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

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

JAMAR J. DRAPER,

Petitioner,

No. CIV-18-1195-R

v.

JIMMY MARTIN, Warden,

Respondent.

FOURTH SUPPLEMENTAL REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing *pro se*, has filed this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Doc. No. 1 (“Pet.”). Petitioner is challenging his convictions for multiple crimes in the District Court of Logan County, Case No. CF-2009-100. Respondent has responded to the Petition and filed the relevant state court records. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B).

For the following reasons, it is recommended the Petition be denied.

I. Background

In 2009, Petitioner entered a plea of guilty pursuant to a plea deal on the following charges: Count 1, Burglary in the First Degree; Count 2, Conjoint Robbery with a Firearm; Count 3, Assault with a Dangerous Weapon While Masked; Counts 4, 7, 13, and 14, Rape – First Degree; Counts 5, 6, and 8, Forcible Sodomy; Count

9, Possession of a Firearm During Commission of a Felony; Count 10, Conspiracy; Counts 11 and 12, Sexual Battery; and Count 15, Kidnapping. Pet. at 1; Doc. No. 47 (“Resp.”) at 1-2; Oklahoma State Courts Network, Logan County District Court, Case No. CF-2009-100.¹ The trial court sentenced Petitioner to twenty-five years imprisonment with all but the first fifteen years suspended on Counts 1, 2, 4, 7, 13, and 14, twenty years imprisonment with all but the first fifteen years suspended on Counts 5, 6, and 8, ten years imprisonment on Counts 9, 10, and 15, and five years imprisonment on Counts 3, 11, and 12. Resp. at 2; Doc. No. 34-1 at 1-2. The trial court ordered that the sentences run concurrently. *Id.*

This case was based on events that occurred in the early morning hours of May 1, 2009.² On the night of April 30, 2009 and early morning of May 1, 2009, roommates Claude Sandles and Marcus Whitfield had their female friends, L.B. and T.N., over to their home in Langston, Oklahoma to socialize. Doc. No. 47-2 at 2, 3, 29, 54, 70-71. At the end of the evening, Mr. Sandles and L.B. went into his bedroom and Mr. Whitfield and T.N. went into his bedroom. *Id.* at 3, 70-72.

The mother of Petitioner’s children, LaDonna Cotton, was allegedly owed \$100.00 for a cell phone that she gave to Mr. Sandles. *Id.* at 87. Petitioner and two

¹ See <https://www.oscn.net/dockets/GetCaseInformation.aspx?db=logan&number=CF-2009-100>.

² In his Response, Respondent set out the facts underlying the case, supported by citations to the state record of proceedings. Resp. at 6-11. Because those facts are supported by the record and Petitioner did not dispute the same, the facts herein are taken substantially from the Response.

co-defendants, Douglas Hendrix and Corey Moreland, went to Mr. Sandles' home. *Id.* at 87-88. Two of the co-defendants wore ski masks and one co-defendant wore pantyhose over his face.³ *Id.* at 27-28, 55-56, 68-69. Each co-defendant was armed with a firearm. *Id.* at 55-56. At approximately 1:30 a.m., the armed and masked co-defendants kicked in the front door of Mr. Sandles and Mr. Whitfield's home. *Id.* at 67. They then kicked in Mr. Sandles' bedroom door. *Id.* at 57. The co-defendants began yelling and beating Mr. Sandles and asking him where the money was located. *Id.* at 4-5, 57-59. Mr. Whitfield heard the commotion from his bedroom and told T.N. to hide in his closet because they were being robbed. *Id.* at 30, 73. A co-defendant kicked in Mr. Whitfield's door, pointed a gun at his head, and told him to get on the ground. *Id.* at 30, 75. L.B. was escorted at gunpoint to Mr. Whitfield's room to retrieve her purse. *Id.* at 5. While L.B. was retrieving her purse from Mr. Whitfield's closet, one co-defendant spotted T.N. inside and pulled her out. *Id.* at 6. At gunpoint, L.B. was forced to give the co-defendants her debit card. *Id.* at 5-6.

The co-defendants held the four victims against their will from approximately 1:30 a.m. until 4:00 a.m. *Id.* at 82. During this time, Mr. Sandles and Mr. Whitfield were bound with duct tape and beaten. *Id.* at 60, 76-77. The co-defendant in pantyhose and a co-defendant in a ski mask took L.B. and T.N. to a bedroom where

³ For the sake of clarity, Petitioner, Mr. Moreland, and Mr. Hendrix are referred to collectively as "co-defendants."

the co-defendants vaginally raped both of them. *Id.* at 7-9, 31-33. L.B. testified that after the co-defendants finished raping T.N. and L.B. the first time, they switched and raped the other victim. *Id.* at 7-8. T.N. testified that after she was raped the first time from behind, the same co-defendant raped her the second time while she laid on the bed in Mr. Sandles' room. *Id.* at 34-35. After the co-defendant in pantyhose had finished raping L.B., he then forced her at gunpoint to perform fellatio on him until he ejaculated. *Id.* at 8-10. L.B. feared for her life. *Id.* at 11. After the co-defendant in a ski mask finished vaginally raping T.N., he forced her to perform fellatio until he ejaculated. *Id.* at 36-37. L.B. and T.N. did not consent to any of the sexual offenses committed against them and were threatened with a firearm to perform the sexual acts. *Id.* at 24-25, 47-48. While the co-defendants raped the victims, the other armed co-defendant held Mr. Sandles and Mr. Whitfield in another room. *Id.* at 77-78.

The co-defendants told Mr. Sandles and Mr. Whitfield to open their mouths and the co-defendants placed guns in their mouths, telling them to bite down on the barrels. *Id.* at 62-63, 79. T.N. was forced into Mr. Whitfield's room and vaginally raped for the third time. *Id.* at 43-44. Following this rape, T.N. rejoined L.B., Mr. Sandles, and Mr. Whitfield in the living room. *Id.* at 44-45.

The co-defendants violently stomped on Mr. Sandles and Mr. Whitfield with their feet, threw stereo equipment on their backs, jumped from the couch onto their

backs, and struck them with the stocks of the firearms. *Id.* at 13, 17, 44-45, 61, 63, 76-77. A co-defendant took L.B. to a separate room and vaginally raped her twice. *Id.* at 13-16. After these two rapes, L.B. rejoined T.N., Mr. Sandles, and Mr. Whitfield in the living room with all the co-defendants. *Id.* at 27.

In the living room, the co-defendant masked in pantyhose forced T.N. and L.B. to perform fellatio on him at gunpoint. *Id.* at 17-19, 46. The armed co-defendants then forced L.B. and T.N. to put their mouths on each other's vaginas. *Id.* at 19-20, 39-40. Afterward, a co-defendant forced L.B. to perform fellatio on him. *Id.* at 20. The co-defendants told the four victims that only two of them would survive. *Id.* at 25-26.

Throughout the night, the co-defendants demanded to know where the money and weed were located. *Id.* at 42, 48, 49, 75-76. While two co-defendants held the individuals against their wills, the other co-defendant searched the home for money and valuable items. *Id.* at 48, 81. Altogether, the co-defendants robbed Mr. Sandles of his clothes, electronics, wallet, and Xbox, Mr. Whitfield of his DVD player, and L.B. of her debit card and iPod. *Id.* at 6, 22-23, 66.

Although Mr. Sandles and Mr. Whitfield were already bound, L.B. and T.N. were forced to tie them up with a cord and a belt. *Id.* at 12-13, 49. When a co-defendant decided L.B. did not tie the cord tight enough, he slapped her. *Id.* at 12-13. The three co-defendants then took Mr. Whitfield into the garage while T.N.,

L.B., and Mr. Sandles remained in the living room. *Id.* at 21, 49, 64, 80. The victims heard a gunshot. *Id.* at 21, 50, 64, 80. T.N. realized that one of the co-defendants had accidentally shot another co-defendant. *Id.* at 50. The three co-defendants instructed the victims to stay down and left the house. *Id.* at 51. The four victims subsequently left the house and called the police. *Id.* at 51-53.

One of the co-defendants, Mr. Hendrix, was shot and he went to a hospital for treatment. *Id.* at 84-85. After the victims reported the crimes to law enforcement, Oklahoma State Bureau of Investigation Agent Michael Dean investigated the case. *Id.* at 83. Agent Dean spoke with Mr. Hendrix and identified Petitioner in surveillance footage images at the hospital where Mr. Hendrix was being treated for a gunshot wound. *Id.* at 84-85. On approximately May 2, 2009, Petitioner was taken into custody and told Agent Dean that Ms. Cotton was the mother of two of his children and that Mr. Sandles had a cell phone for which Ms. Cotton was paying and he felt Mr. Sandles should give her the money. *Id.* at 86, 87. Petitioner initially denied sexually assaulting L.B. and T.N. *Id.* at 89. He then admitted that he attempted to rape L.B. but could not obtain an erection, so he forced L.B. to perform fellatio on him and that resulted in his ejaculating. *Id.* at 91. Petitioner admitted that the three co-defendants planned the burglary with the intent to obtain money by force. *Id.* at 87-89. Petitioner admitted that while one co-defendant searched the residence for valuables, the other co-defendants would confine the four victims at

gunpoint. *Id.* at 90. He admitted taking property from the residence. *Id.* at 89-90.

Petitioner's post-conviction appellate history is lengthy and set out fully in this Court's previous Order. *See* Doc. No. 42. Thus, there is no reason to repeat the same herein. Of relevance currently is this Court's previous conclusion that Petitioner's second ground for relief does not present a cognizable claim for habeas relief and his third ground is procedurally barred from review. *Id.* at 5. Accordingly, the only grounds for relief remaining at issue are Petitioner's first ground, in which he contends his convictions for Burglary in the First Degree and Conjoint Robbery with a Firearm violate his right to be free of double jeopardy, and his fourth ground, in which he argues his guilty plea was coerced. Pet. at 5, 9-10.

In the Response, Respondent contends Petitioner has waived his double jeopardy claim and alternatively, it is without merit. Resp. at 12-21. Additionally, Respondent contends the record establishes Petitioner's guilty plea was knowing and voluntary. *Id.* at 29. Because the Oklahoma Court of Criminal Appeals failed to properly address either of these claims when presented, this Court provides both grounds for relief a *de novo* review. Doc. No. 42 at 2-5 (citing *LeBere v. Abbott*, 732 F.3d 1224, 1234 n.12 (10th Cir. 2013); *Gipson v. Jordan*, 376 F.3d 1193, 1996 (10th Cir. 2004)).

II. Standard of Review of Constitutional Claims

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a

federal court cannot grant habeas relief with respect to a state prisoner's constitutional claim that was adjudicated on the merits in state court proceedings unless the state court decision (1) 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) "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). The AEDPA directs courts to "ensure a level of 'deference to the determinations of state courts,' provided those determinations did not conflict with federal law or apply federal law in an unreasonable way." *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (quoting H.R. Conf. Rep. No. 104-518, p. 111 (1996)).

Under this standard, a writ of habeas corpus will issue only if "a state court's application of federal law . . . is so erroneous that there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Nevada v. Jackson*, 569 U.S. 505, 508-09 (2013) (quotations omitted). Under this deferential standard, even a showing of "clear error will not suffice." *White v. Woodall*, 572 U.S. 415, 419 (2014) (quotations omitted).

"[W]hether a state court's decision was unreasonable must be assessed in light of the record the [state appellate] court had before it." *Holland v. Jackson*, 542 U.S. 649, 652 (2004) (citations omitted). Consequently, federal habeas "review is limited to the record that was before the state court that adjudicated the claim on the merits."

court must defer to that conclusion.” *Jump*, 28 F. App’x at 768 (quoting *Cummings*, 161 F.3d at 614). “In the absence of clear legislative intent, courts must apply the *Blockburger* test, which provides that ‘where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.’” *Smith v. Allbaugh*, No. 13-CV-0476-JHP-TLW, 2016 WL 3039885, at *4 (N.D. Okla. 2016) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

In this case, Petitioner’s convictions did not constitute multiple punishments for the same offense in violation of the Fifth Amendment because each offense requires proof of a fact the other does not. Indeed, the Tenth Circuit has considered whether convictions for robbery and burglary under Oklahoma law generally violate double jeopardy and concluded they do not.

Under *Blockburger*, multiple convictions do not violate double jeopardy if each offense requires proof of an element not contained in the other. *United States v. Dixon*, 509 U.S. 688, 696 [] (1993). Under Oklahoma law, different elements are required to prove burglary and robbery, *compare* Okla. Stat. tit. 21, § 1431 (setting forth elements of burglary in first degree) *with id.* § 791 (setting forth elements of robbery), and it is therefore not a violation of double jeopardy to charge a defendant with both crimes based on a single criminal episode. *Cannon v. State*, 827 P.2d 1339, 1342 (Okla. Crim. App. 1992).

Jump, 28 F. App’x at 768 n.5.

As referenced in *Jump*, Oklahoma law defines Burglary in the First Degree as

breaking into and entering the “dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein . . .” Okla. Stat. tit. 21, § 1431. By contrast, Conjoint Robbery with a Firearm is defined as “[a]ny person or persons who, with the use of any firearms . . . robs any person or persons, or who robs . . . any . . . residence . . . inhabited or attended by any person or persons at any time, either day or night . . .” Okla. Stat. tit. 21, § 801. Thus, Burglary in the First Degree required only breaking into a house with the intent to commit a crime, while Conjoint Robbery with a Firearm required the use of a firearm in robbing or attempting to rob an individual. *See supra*.

Moreover, the Oklahoma Court of Criminal Appeals has explained, “[B]urglary and other offenses committed within the structure burgled do not merge, and conviction of both does not violate double jeopardy protections. The burglary . . . was complete when he entered the victims’ residence with the intent to commit a crime. The offenses [he] committed after entry [were] separate and distinct.” *Taylor v. State*, 889 P.2d 319, 339 (Okla. Crim. App. 1995) (footnotes omitted). *See Jump, 28 F. App’x at 768* (“[I]f the highest state court determines that the legislature intended to punish separate offenses cumulatively, a federal habeas court must defer to that conclusion.” (quotations omitted)).

Thus, the undersigned concludes Petitioner’s convictions did not constitute multiple punishments for the same offense in violation of the Fifth Amendment

because each offense requires proof of a fact that the other does not. Additionally, this conclusion is supported by the determination of the Oklahoma Court of Criminal Appeals, to which the federal courts must defer. *Jump*, 28 F. App'x at 768; *Taylor*, 889 P.2d at 339. Accordingly, Petitioner's first ground for relief is meritless, and habeas relief should be denied.

IV. Guilty Plea

In his final ground for relief, Petitioner contends the trial court and his trial counsel coerced him into entering his guilty pleas. Pet. at 9. In support of this assertion, he argues said coercion is "demonstrated by the type-written statement made by trial court that Petitioner read, but did write himself." *Id.*

The Due Process Clause of the Fourteenth Amendment requires that a defendant knowingly and voluntarily enter a plea of guilty. *Boykin*, 395 U.S. at 242. "On review, a federal court may set aside a state court guilty plea only for failure to satisfy due process." *Cunningham v. Diesslin*, 92 F.3d 1054, 1060 (10th Cir. 1996). "The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quotations omitted). A guilty plea is constitutional "if the circumstances demonstrate that the defendant understood the nature and the consequences of the charges against him and . . . voluntarily chose to plead guilty." *Miles v. Dorsey*, 61 F.3d 1459, 1466 (10th

Cir. 1995); *see also Boykin*, 395 U.S. at 242-44 (explaining that a federal court will uphold a state court guilty plea if the circumstances demonstrate the defendant understood the nature and the consequences of the charges against him and voluntarily chose to plead guilty).

Here, the record shows that on October 4, 2010, Petitioner appeared with trial counsel and entered guilty pleas to the charges against him in Case No. CF-2009-100. Doc. No. 34-1 at 1-3. The “plea of guilty and summary of facts” form reflects Petitioner knew he was charged with each of the fifteen felony offenses, and the form shows the range of punishment for each crime. *Id.* at 7-17. Petitioner signed this form indicating that he (1) had read and understood the document; (2) understood the nature and consequences of the proceeding; (3) had read and understood the charges; (4) had discussed the charges and any possible defenses with his attorney; and (5) understood the range of punishment for the crimes charged. *Id.* at 8, 9, 10, 17, 20-21. Petitioner also indicated on the plea form that he understood that the court was not bound by any agreement or recommendation and that the court could sentence him within the range of punishment listed in the form. *Id.* at 10.

The guilty plea form informed Petitioner that if he went to trial (1) he had a right to counsel; (2) he was presumed innocent of the charges; (3) he had a right to remain silent; (4) he had the right to confront the witnesses against him; (5) he had a right to call witnesses and to present a defense; (6) the State was required to prove

his guilt beyond a reasonable doubt; (7) a jury verdict would have to be unanimous; and (8) he could waive jury trial and be tried by a judge. *Id.* Petitioner acknowledged that he understood these rights, that he had discussed these rights with counsel, that he understood he was waiving these rights by pleading guilty, and that he was pleading guilty of his own free will without coercion or compulsion of any kind. *Id.* at 10, 11. Petitioner indicated that he had not been forced to enter the pleas or promised anything by anyone to enter his pleas. *Id.* at 11. The factual basis for the pleas reflects the following statement, which the Petitioner read in court:

On or about May 1, 2009, at approximately 1:00 a.m. I followed Ladonna Cotton to the residence of Mathis Whitfield and Claude Sandles located in Logan County, State of Oklahoma. Along with Corey Moreland and Douglas Hendrix we entered the residence without permission after Douglas Hendrix kicked in the door. My purpose in forcibly entering the house was to take money, by force if necessary, for Ladonna Cotton. We had firearms which were pointed at the four occupants inside. They were Mathis Whitfield, Claude Sandles, a female known to me by the initials L.B., and a female known to me by the initials T.N. All four were held at gunpoint and forced to remain in the residence while I searched the house for money and property. Although I may not have personally performed every criminal act committed in the residence that morning, I did act conjointly with Douglas Hendrix and Corey Moreland in all of those criminal acts and I admit that I am criminally responsible for all of those acts, and therefore guilty of those acts.

While acting in concert with Hendrix and Moreland I was a conjoint participant in the rape, forcible sodomy and sexual battery of both females. The women were raped multiple times. The men were beaten. Throughout the time at the residence all three of us were present in the house and masked the entire time.

Id. at 11, 19; Doc. No. 47-2 at 99-100.

Petitioner's signature on the guilty plea and summary of facts form attests that his attorney completed the form, that he had gone over the form with his attorney, that he understood the contents of the form and agreed with the answers contained therein, and that the answers on the form were true and correct. Doc. No. 34-1 at 12, 17. At the plea hearing, the court noted Petitioner "had been to college so I trust there is no mystery in [your] written plea of guilty," to which Petitioner responded, "No." Doc. No. 47-2 at 95. Petitioner also acknowledged in court that he had a right to a jury trial, to confront the witnesses against him, a right to remain silent upon which the State could not comment, a right to testify, that a jury was waiting to try his case should he so choose, and that he was waiving each of those rights by entering a guilty plea. *Id.* at 93-95. Petitioner then entered a guilty plea to each of the charges against him and read the factual basis for those charges aloud in court. *Id.* at 95-104.

On October 14, 2010, Petitioner, through counsel, timely filed an application to withdraw plea. Doc. No. 34-2 at 1. In his application, Petitioner stated that he did not fully understand or appreciate the consequences of his plea and that he was not guilty of at least one of the offenses. *Id.* In a letter attached thereto, Petitioner stated that when he entered his guilty plea, he "didn't know they wanted me to have paper time until the day I signed" and "I was told the mother of my children would not do no time in prison if I took the deal that is a form of blackmail . . ." *Id.* at 2. He also asserted that the statement he read in court at the plea hearing "was not from me but

it was from my public defender" *Id.*

The court held a hearing on Petitioner's application on November 12, 2010. Doc. No. 47-2 at 105. During the hearing, Petitioner's attorney testified that the two of them together drafted the factual basis for his guilty plea that Petitioner later read aloud in court.

Q. Okay. In the course of speaking with him - - may I ask counsel to look at the factual basis Exhibit C on State's Exhibit 1, Counsel, what is that?

A. That is a statement of factual basis, Exhibit C, that would accompany a plea of guilty summary of facts, and it is about two paragraphs that Mr. Draper and I composed and he signed off on [on October 2, 2010].

Q. And did he sign off on this in front of three other witnesses?

A. That is correct.

Q. Was his signing off on this statement voluntary?

A. It was.

Q. And you said that both or the two of you had drafted it together; is that correct?

A. That is correct.

Q. When you went over this with Mr. Draper, did he appear to understand these three paragraphs actually, the last saying therefore I plead guilty to all counts?

A. He did. In fact, we spent quite a bit of time going over the exact language because he was very concerned about specifically what it was that he was admitting to doing.

...

Q. And did you discuss with Mr. Draper the concept of conjoint criminal guilt?

A. We spent a lot of time on that, and that was probably one of the biggest obstacles in this case because Mr. Draper had trouble understanding the concept that he was being held criminally liable for actions he himself did not commit; but that his co-defendants were the ones that had specifically committed.

Id. at 107-08.

Petitioner's testimony at the plea hearing revealed that he accepted the plea deal because he was afraid he would fare worse at trial. *Id.* at 109-13. Petitioner stated that his defense counsel drafted the factual basis he read aloud in court, however, he also admitted that it was based on his responses to counsel's questions.

Q. Okay. Did [defense counsel] ask you questions in order to fill out the factual basis?

A. Yes, he did.

Q. And you answered those questions.

A. Yes, I did.

Q. And the reason you actually did the plea was because you felt like you were going to get hammered if you went to trial?

A. Oh, yes. That's what he told me. You are going to get hammered. You are going to get hammered. You are going to get hammered.

Id. at 111. Additionally, Petitioner indicated that since pleading guilty, "several people" had told him that "under the accessory theory you can't be charged with crimes your co-defendants committed." *Id.* at 112. However, he also admitted that

his counsel had explained to him that he could be charged when you are acting conjointly with others. *Id.* Finally, Petitioner conceded that the reason he was seeking to withdraw his plea is that he did not like the sentences he received. *Id.* at 113. The trial court denied Petitioner's application. Doc. No. 34-2 at 3.

In reviewing the record as a whole, the undersigned finds Petitioner understood the nature and consequences of his plea. Regardless of who drafted the statement he read during the plea hearing, Petitioner was clearly aware of its contents and contributed to the same, signed the guilty plea and summary of facts form, stated repeatedly both in the form and during the plea hearing that he understood his rights and that he was waiving those rights, and that he understood the charges against him, as well as his potential sentences.

Additionally, defense counsel's statement to Petitioner that he was likely to "get hammered" at trial does not change the voluntary nature of his pleas. "The Tenth Circuit has found that a guilty plea can be voluntary despite trial counsel's 'vigorous urg[ing]' that his client plead guilty because the attorney believed it was in his client's best interest." *Jackson v. Jordan*, No. CIV-04-1653-T, 2006 WL 2321486, at *10 (W.D. Okla. Aug. 9, 2006) (quoting *Miles*, 61 F.3d at 1470). "Indeed, one central component of a lawyer's job is to assimilate and synthesize information from numerous sources and then advise clients about what is perceived to be in their best interests." *Jackson*, 2006 WL 2321486, at *10. Furthermore, in light of the evidence

presented at the preliminary hearing, Petitioner must have known that given the heinous nature of the crimes, his plea deal likely represented less than what a jury would have imposed. *Hoffman v. Young*, 23 F. App'x 885, 888-89 (10th Cir. 2001) (finding the petitioner understood the nature and consequences of his guilty plea and noting that given the nature of his crime, was likely aware the plea deal was less than he would have faced from a jury).

“It is [Petitioner’s] burden to show that his guilty plea was not knowing or voluntary.” *U.S. v. Jim*, 786 F.3d 802, 810 (10th Cir. 2015). The undersigned finds Petitioner has not met this burden and this ground for habeas relief should be denied.

RECOMMENDATION

Based on the foregoing findings, it is recommended the Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 be DENIED. Petitioner is advised of his right to file an objection to this Fourth Supplemental Report and Recommendation with the Clerk of this Court by September 2nd, 2020, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Fourth Supplemental Report and Recommendation would waive appellate review of the recommended ruling. *Moore v. United States of America*, 950 F.2d 656 (10th Cir. 1991); *cf. Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996) (“Issues raised for the first time in objections to the magistrate judge’s

recommendation are deemed waived.”).

This Fourth Supplemental Report and Recommendation disposes of all issues referred to the undersigned Magistrate Judge in the captioned matter, and any pending motion not specifically addressed herein is denied.

ENTERED this 13th day of August, 2020.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**
