FILED
United States Court of Appeal
Tenth Circuit

October 14, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RICKEY RAY WALLGREN, JR.,

Petitioner - Appellant,

v.

RICK WHITTEN,

Respondent - Appellee.

No. 20-6098
(D.C. No. 5:18-CV-00824-F)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH**, Chief Judge, **KELLY** and **HOLMES**, Circuit Judges.

Rickey Ray Wallgren, Jr., an Oklahoma state inmate proceeding pro se,[1] seeks a certificate of appealability (COA) to contest the district court's denial of his 28 U.S.C. § 2254 habeas application. Exercising jurisdiction under 28 U.S.C. § 1291, we deny a COA and dismiss this matter.

BACKGROUND

In October 2014, Petitioner was convicted by a jury of two counts of sexual abuse of a child under twelve years old and was sentenced to two consecutive terms of 25

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] We liberally construe Petitioner's filings but will not serve as his advocate. *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

years' imprisonment. He appealed to the Oklahoma Court of Criminal Appeals (OCCA), which affirmed the convictions. Petitioner then applied for post-conviction relief, raising 46 claims. The state district court denied relief, finding that the majority of the claims were procedurally barred because they were or could have been raised on direct appeal and the remainder of the claims lacked merit. The OCCA affirmed.

In August 2018, Petitioner filed a § 2254 habeas application, raising 50 claims for relief. In a detailed order, the magistrate judge recommended, inter alia, that three of the claims be dismissed as not cognizable on habeas review and that the remainder of the claims be denied as procedurally defaulted or without merit. The district court adopted the recommendation and dismissed Petitioner's application in part, denied it in part, and denied a COA. Petitioner filed a motion to reconsider, which the district court denied. Petitioner now seeks a COA from this court.

DISCUSSION

We may issue a certificate of appealability only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For claims denied on the merits, Petitioner must show that reasonable jurists would regard the district court's rulings on his constitutional claims as debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). And for claims that the court deemed defaulted or non-cognizable, he must show reasonable jurists would find it debatable both that the habeas application states a valid constitutional claim and that the court was correct in its procedural ruling. *Id.* Moreover, the "deferential treatment of state court decisions" under 28 U.S.C. § 2254 "must be incorporated into our consideration of a habeas petitioner's request for COA."

Dockins v. Hines, 374 F.3d 935, 938 (10th Cir. 2004). As such, factual determinations "by a State court shall be presumed to be correct," which Petitioner can rebut only with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). And for claims adjudicated on the merits in state court, Petitioner must show the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d)(1), (2). If that "standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

Petitioner raises dozens of issues in his 69-page combined opening brief and COA application, as amended and supplemented. But he largely repeats the arguments he presented to the district court and does not address the court's rationales for rejecting his contentions, much less show that reasonable jurists could find those rationales debatable.[2]

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[2] Because of the sheer number of arguments in Petitioner's brief, we decline to address each one individually. Nevertheless, by way of example, he contends the district court erred in not granting a stay-and-abeyance so that he could exhaust a claim that the state court lacked jurisdiction under 18 U.S.C. § 1153. But he fails to address the court's finding, which it repeated in several orders, that he did not show good cause. *See Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) (listing factors for a stay-and-abeyance). Petitioner also re-argues the merits of his claims that the jury was exposed to extraneous information, that his wife gave victim-impact statements at sentencing, that he was denied a lesser-included offense instruction, that the DNA evidence was unreliable, and that the trial court admitted evidence of prior bad acts. But he does not address the court's ruling that these claims, among many others, were procedurally defaulted. Similarly, Petitioner re-argues his claim that the jury saw him wearing a leg monitor and heard the monitor's alarm. However, he does not address the court's merits ruling, including that any error was harmless. Lastly, Petitioner argues he should have been allowed to amend his application to raise a due process claim alleging the destruction of evidence. But he does not address the basis for the denial of his request—that the amendment was unduly delayed and would be futile because the claim was unexhausted.

"[W]e will not question the reasoning of a district court unless an appellant actually argues against it." *Clark v. Colbert*, 895 F.3d 1258, 1265 (10th Cir. 2018) (brackets and internal quotation marks omitted); *see also Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1366 (10th Cir. 2015) ("The first task of an appellant is to explain to us why the district court's decision was wrong."). In the rare instance where Petitioner addresses the court's reasoning, he either (1) presents conclusory and perfunctory arguments, which we will not consider, *see United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004);[3] or (2) raises arguments that were not in his habeas application and, thus, are not properly before this court, *see Stouffer v. Trammell*, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013).[4]

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[3] For example, Petitioner contends the district court failed to consider various psychiatric records pertaining to the victims and his wife as part of its actual-innocence analysis. But he cites no evidence to support his characterization of the contents of these records. Petitioner also contests the district court's conclusion that social media posts allegedly authored by his wife did not constitute newly discovered evidence. He relies on affidavits from various individuals who claim to have not seen the posts until after Petitioner's trial. But he does not explain how the belated discovery by these individuals shows that the posts could not have been timely discovered, particularly when, as the district court observed, the posts were dated eight months before his trial.

[4] For example, Petitioner devotes several pages of his brief to whether the state court erred under *Idaho v. Wright*, 497 U.S. 805 (1990), when it admitted a video of a forensic interview of one of the minor victims. But in his habeas application, Petitioner argued the state court erred in admitting the video based on a state statute. He did not cite *Wright*, a Confrontation Clause case, in connection with this claim, nor did he raise a separate Confrontation Clause claim. Additionally, in the supplement to his brief, Petitioner raises a claim that he describes as Oklahoma's "exception to the rule doctrine." Suppl. to Aplt. Opening Br. at 68. Petitioner did not raise this in his habeas application, and in any event, errors of state law are not cognizable in federal habeas review, *Hawes v. Pacheco*, 7 F.4th 1252, 1265 n.10 (10th Cir. 2021). And although he eventually raised his arguments regarding *Wright* and the "exception to the rule doctrine" in his objections to the magistrate judge's recommendation, "[i]ssues raised for the first time" at that stage of the proceedings "are deemed waived." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1310 (10th Cir. 2010) (internal quotation marks omitted).

The lone exception appears to be Petitioner's argument that the district court did not explicitly address one item of evidence during its thorough review and rejection of his claim of actual innocence. *See* Aplt. Opening Br. at 23. Specifically, Petitioner's trial counsel attempted to cross-examine one of the victims—then approximately fifteen years old—with screenshots from her social media page depicting vulgar or sexual content. The trial court sua sponte objected based on relevance and later sustained the State's objection when Petitioner's counsel raised the matter during sentencing. Petitioner insists such evidence would have bolstered his actual-innocence argument, both as a standalone claim for relief and as a gateway for reviewing his procedurally defaulted claims, by undermining the allegation that the victim's behavior had changed due to sexual abuse and by showing that she was an "overly sexualized child" capable of fabricating the allegations against him. *Id.* at 26 (internal quotation marks omitted).

Even with this additional evidence, reasonable jurists would not debate the district court's actual-innocence determination. As with other evidence the court analyzed, such as the younger victim's preliminary hearing testimony, the social media posts are "merely impeaching evidence that would not cause a rational person to doubt [Petitioner's] guilt." *Clayton v. Gibson*, 199 F.3d 1162, 1180 (10th Cir. 1999). The posts also were dated several years after the abuse of this particular victim ceased and, thus, offer little support for his argument regarding their timing. And to the extent her posts indicate she was "overly sexualized," such a characteristic appears more attributable to sexual abuse than Petitioner's speculation that she was otherwise exposed to "sexually explicit photos, material and conversations." Aplt. Opening Br. at 26.

Ultimately, we have thoroughly reviewed the record and Petitioner's filings and conclude that reasonable jurists would not debate the district court's order denying in part and dismissing in part his § 2254 habeas application. Accordingly, we deny a COA.

CONCLUSION

We deny Petitioner's request for a COA and dismiss the matter. We grant his motion to proceed in forma pauperis and deny his remaining motions.[5]

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge

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[5] Petitioner filed a motion for an evidentiary hearing that included an affidavit he executed after he gave notice of appeal. That affidavit is not properly before this court. *See Utah v. U.S. Dep't of Interior*, 535 F.3d 1184, 1195 n.7 (10th Cir. 2008) ("[N]ew evidence not submitted to the district court is not properly part of the record on appeal."). In any event, we deny the motion for an evidentiary hearing. *See Johnson v. Carpenter*, 918 F.3d 895, 909 (10th Cir. 2019) (denying evidentiary hearing for the same reasons the court affirmed the denial of habeas relief). Petitioner also moved to supplement the record and his COA application. To the extent the motions seek to add materials already in the record, such as state court filings and transcripts, the motions are denied as moot. And to the extent the motions seek to add materials that Petitioner never presented to the district court, such as his newly executed affidavit, the motions are denied. *See U.S. Dep't of Interior*, 535 F.3d at 1195 n.7. Finally, Petitioner filed a motion for stay-and-abeyance and a motion for an administrative closing order, both seeking to have this matter stayed pending exhaustion in state court of a claim under *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). *McGirt* held that territory in Oklahoma reserved for the Creek Nation since the 19th century remains "'Indian country'" for purposes of exclusive federal jurisdiction over certain offenses committed "within 'the Indian country'" by an "'Indian.'" 140 S. Ct. at 2459 (quoting 18 U.S.C. § 1153(a)). *McGirt* has no bearing on a resolution of Petitioner's current habeas claims, and he has not contested the district court's denial of his motion to amend his petition to add such a claim. And as noted above, Petitioner also has not challenged the district court's repeated finding that he failed to show good cause for a stay-and-abeyance. *See Rhines*, 544 U.S. at 277-78. We therefore deny his motions for a stay-and-abeyance and an administrative closing order.

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

RICKEY RAY WALLGREN, JR.,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	Case No. CIV-18-824-F
	)	
RICK WHITTEN,	)	
	)	
Respondent.	)	

ORDER

On May 21, 2020, the court, after *de novo* review, entered an order affirming the Report and Recommendation of United States Magistrate Judge Shon T. Erwin. *See*, doc. no. 96. The 63-page Report and Recommendation addressed petitioner, Rickey Ray Wallgren, Jr.'s 28 U.S.C. § 2254 habeas petition, which asserted 50 grounds for relief. In accordance with the Report and Recommendation, the court dismissed petitioner's § 2254 habeas petition as to grounds 44, 45 and 47 and denied it as to the remaining grounds. *Id.* The court also denied several motions filed by petitioner. *Id.* A final judgment was entered by the court that same day. *See*, doc. no. 97.

Early in the § 2254 habeas proceedings, the court also affirmed the order of United States Magistrate Judge Suzanne Mitchell denying petitioner's motion seeking a stay of the habeas proceedings pending the Supreme Court's ruling in Carpenter v. Murphy, 138 S.Ct. 2026 (May 21, 2018) (S.Ct. Case No. 17-1107) and seeking a stay-and-abeyance of the proceedings, if the Supreme Court affirms the Tenth Circuit's ruling in the case. *See*, doc. no. 31.

On June 5, 2020, petitioner filed a motion asking the court to reconsider its May 21st order and judgment. *See*, doc. no. 98. In his motion, petitioner additionally

requests the court to reconsider its ruling as to his stay-and-abeyance motion. *Id.*, ECF p. 9.

Because petitioner's June 5th motion was filed within 28 days from entry of the judgment, the court construes petitioner's motion as a motion to alter or amend the judgment pursuant to Rule 59(e), Fed. R. Civ. P. Rule 59(e), which applies to habeas proceedings, "enables a party to request a district court reconsider a just-issued judgment." Banister v. Davis, ___ S.Ct. ___, 2020 WL 2814300, at *2 (June 1, 2020). It "gives a district court the chance 'to rectify its own mistakes in the period immediately following' its decision." *Id.* (quoting White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 450 (1982)).

Under Tenth Circuit precedent, grounds warranting a Rule 59(e) motion include "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." Servants of the Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir. 2000). A Rule 59(e) motion "may be granted when 'the court has misapprehended the facts, a party's position, or the controlling law.'" Nelson v. City of Albuquerque, 921 F.3d 925, 929 (10th Cir. 2019) (quoting Servants of the Paraclete, 204 F.3d at 1012)). "[I]t may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." Nelson, 921 F.3d at 929 (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n. 5 (2008), quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2810.1, pp. 127-128 (2d ed. 1995)).

Upon review of petitioner's motion, the court concludes there is no basis for Rule 59(e) relief. Petitioner presents no arguments which would satisfy any of the grounds warranting relief under Tenth Circuit precedent. The court therefore finds that petitioner's motion to alter or amend the judgment must be denied.

Accordingly, petitioner's motion to reconsider, filed June 5, 2020 (doc. no. 98), which is construed by the court as a motion to alter or amend the judgment pursuant to Rule 59(e), Fed. R. Civ. P., is **DENIED**.

IT IS SO ORDERED this 9th day of June, 2020.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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

RICKEY RAY WALLGREN, JR.,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	Case No. CIV-18-824-F
	)	
RICK WHITTEN,	)	
	)	
Respondent.	)	

ORDER

Petitioner, Rickey Ray Wallgren, Jr., a state prisoner proceeding *pro se*, commenced this action by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] The habeas petition asserts 50 grounds for relief. During the proceedings, petitioner also filed a motion for evidentiary hearing and a motion to appoint counsel. On March 12, 2020, United States Magistrate Judge Shon T. Erwin issued a 63-page Report and Recommendation, recommending that the court: (1) dismiss grounds 44, 45, and 47 of the habeas petition, (2) deny the remainder of the habeas petition, (3) deny the motion for evidentiary hearing, and (4) deny the motion to appoint counsel.

The court, upon motion, granted petitioner two extensions of time to file an objection to the Report and Recommendation. Petitioner timely filed his objection. Contemporaneous with his objection, petitioner filed a motion seeking leave to file a 99-page handwritten objection. In addition, petitioner filed three motions

[1] Petitioner challenges his state court conviction in the District Court of Pottawatomie County, State of Oklahoma, Case No. CF-2013-516, for two counts of violating 21 O.S. 2011 § 843.5(F)—sexual abuse of a child under twelve. He was sentenced to imprisonment for 25 years on each count and the Pottawatomie County court ordered the sentences to be served consecutively.

requesting the court: (1) reinstate his discovery motions and motion to supplement, (2) reconsider Magistrate Judge Erwin's order striking his motion to supplement, and (3) grant him leave to supplement his motion for evidentiary hearing with a specific request for a hearing pursuant to Remmer v. United States, 350 U.S. 377 (1956).

At the outset, the court grants petitioner's motion seeking leave to file the 99-page handwritten objection. Pursuant to 28 U.S.C. § 636(b)(1), the court has conducted a *de novo* review of the matter. Having done so, the court concurs with the cogent analysis of Magistrate Judge Erwin. The court finds no need to repeat that analysis here. The court finds petitioner's arguments to be without merit. The court accepts, adopts and affirms the Report and Recommendation.

As stated, petitioner filed three motions in addition to his objection. With respect to the motion to reinstate the discovery motions and the motion to supplement and the motion to reconsider the order denying the motion to reconsider Magistrate Judge Erwin's order striking the motion to supplement, the court finds the motions should be denied.

During the proceedings, Magistrate Judge Erwin had directed petitioner to file a reply to respondent's response to the habeas petition. The reply was to be limited to 10 pages in length and was not to be used to reargue points and authorities included in the petition. Doc. nos. 63 and 68. Petitioner had also been advised that arguments outside those already included in his habeas petition and brief would not be considered. Doc. no. 63. Along with his reply,[2] petitioner filed two discovery motions and a motion to supplement including a 109-page handwritten attachment. Doc. nos. 72, 73, and 74. The attachment set forth petitioner's supplemental grounds

[2] Petitioner's reply consisted of 13 handwritten pages and a 141-page handwritten attachment. Magistrate Judge Erwin only permitted the main 13-page document to serve as petitioner's reply. Doc. no. 80.

of error and supplemental brief in support of those grounds. Doc. no. 74-1. Magistrate Judge Erwin entered an order striking the motions because "the matter [had] reached a specific briefing posture" and the "motions [made] a systematic analysis of [petitioner's] purported claims impossible." Doc. no. 76. Petitioner filed a motion requesting this court to reconsider Magistrate Judge Erwin's order striking the motions. Upon review in accordance with 28 U.S.C. § 636(b)(1)(A), the court denied the motion. Doc. no. 83. The court specifically found that petitioner had failed to show that Magistrate Judge Erwin's order was clearly erroneous or contrary to law. *Id.* Petitioner again requests the court to address his discovery motions and the motion to supplement. The court, however, concludes that petitioner has not provided adequate justification for the court to reconsider its ruling—particularly after Magistrate Judge issued his Report and Recommendation with respect to the habeas petition. Moreover, because the court has accepted, adopted and affirmed the Report and Recommendation, the court concludes that there is no basis for discovery and no reason for supplementation of the habeas petition and brief.

Even if the court were to find that petitioner has provided adequate justification for reconsideration of its ruling and were to reinstate the discovery motions and the motion to supplement, the relief requested by those motions would have been denied. Initially, petitioner has not shown good cause for discovery as required by Rule 6 of the Rules Governing Section 2254 Cases in the United States District Courts. *See*, Simpson v. Carpenter, 912 F.3d 542, 576 (10th Cir. 2018) ("Good cause [for discovery] is established where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief.") (quotation omitted).

As to the motion to supplement, a petitioner may amend or supplement a § 2254 habeas petition "as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242; *see also*, Rule 12 of the Rules Governing Section 2254

Cases in the United States District Courts. Petitioner has indicated that his motion is brought pursuant to Rule 15(d), Fed. R. Civ. P. Doc. no. 74. The court need not decide whether petitioner's motion is one to supplement his habeas petition or one to amend his habeas petition. As a general matter, "'the standard used by courts in deciding to grant or deny leave to supplement is the same standard used in deciding whether to grant or deny leave to amend.'" Carter v. Bigelow, 787 F.3d 1269, 1278 n. 6 (10th Cir. 2015) (quoting Fowler v. Hodge, 94 Fed. Appx. 710, 714, 2014 WL 618070, at *4 (10th Cir. 2014)).

Under Rule 15(a)(2), Fed. R. Civ. P., "[t]he court should freely give leave [to amend] when justice so requires." Rule 15(a)(2), Fed. R. Civ. P.; *see also*, Carter, 787 F.3d at 1279 (authorization to supplement pleadings should be liberally granted). However, leave to amend may be denied on "a showing of undue delay, undue prejudice to the opposing party, bad faith or dilatory motive, failure to cure deficiencies by amendments previously allowed, or futility of amendment." Duncan v. Manager, Dept. of Safety, City and County of Denver, 397 F.3d 1300, 1315 (10th Cir. 2005) (quotation omitted); *see also*, United States v. Burbage, 280 Fed. Appx. 777, 782, 2008 WL 2332137, at *4 (10th Cir. 2008).

Petitioner's motion was unduly delayed. The record reflects that petitioner was aware of his claim or claims relating to the alleged "modified" phone call evidence several months before he filed his motion to supplement. *See*, doc. no. 59, ECF pp. 6-8; *see also*, doc. no. 49, ECF p. 44. And it appears he was aware of the factual basis of his claim or claims before he filed his habeas petition. *Id.*; *see also*, doc. no. 94, ECF pp. 6, 14, 19-20. However, petitioner waited to file the motion to supplement until he filed his reply. Petitioner clearly had sufficient time before he filed his reply to file his motion to supplement. He also has not offered any adequate explanation for his delay in filing his motion. *See*, Cleveland v. Havenek, 509 Fed. Appx. 703, 705, 2013 WL 363482, at *2 (10th Cir. 2013) (affirming denial of motion

to supplement for undue delay in filing motion) (unpublished decision cited as persuasive pursuant to 10th Cir. R. 32.1(A)).

Additionally, it would be futile to allow an amendment or supplement to the habeas petition with petitioner's claim or claims because they have not been presented to the state court, and as indicated by respondent, *see*, doc. no. 62, ECF pp. 5-6, are subject to anticipatory procedural bar, and petitioner has not demonstrated cause and prejudice or a fundamental miscarriage of justice to overcome the procedural bar. *See*, Grant v. Royal, 886 F.3d 874, 892 (10th Cir. 2018). And to the extent petitioner is merely seeking to add the purported evidence in support of ground 43 of his petition, the evidence is not new reliable evidence and is not sufficient to open the gateway for the court to review petitioner's procedurally defaulted claims. Lastly, the court concludes that, contrary to petitioner's arguments, neither the Tenth Circuit's decision in Douglas v. Workman, 560 F.3d 1156, 1189-1196 (10th Cir. 2009), nor the district court's decision in Fontenot v. Allbaugh, 402 F. Supp. 3d 1110, 1152-1158 (E.D. Okla. 2019), support allowing supplementation of his habeas petition.

With respect to the request for leave to supplement his motion for evidentiary hearing with a specific request for a hearing pursuant to Remmer, the court finds the motion should be denied. The court, in accepting, adopting and affirming the Report and Recommendation, has denied the motion for evidentiary hearing. Also, the court finds that petitioner has waived the hearing request by failing to raise it before Magistrate Judge Erwin. *See*, *e.g.* 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). Further, petitioner's claims for which he seeks the Remmer hearing are procedurally barred.

A state prisoner may appeal from the denial of federal habeas relief under 28 U.S.C. § 2254 only if the district court first issues a certificate of appealability. *See*,

28 U.S.C. § 2253(c)(1)(A). A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make that showing, a prisoner must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). If the district court denies the "habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the prisoner must, in order to obtain a certificate of appealability, demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* After reviewing the record, the court concludes that petitioner is unable to make the requisite showing for the issuance of a certificate of appealability. Therefore, the court finds that a certificate of appealability should be denied.

Based upon the foregoing, it is hereby **ORDERED** as follows:

1. Petitioner, Rickey Ray Wallgren, Jr.'s "Motion for Leave of the Court to Exceed Page Limits Set by Rules of Procedure to Comply with Orders," filed April 30, 2020 (doc. no. 92), is **GRANTED**;
2. The Report and Recommendation issued by United States Magistrate Judge Shon T. Erwin issued on March 12, 2020 (doc. no. 84) is **ACCEPTED**, **ADOPTED** and **AFFIRMED**;
3. Petitioner, Rickey Ray Wallgren, Jr.'s "Motion for a Federal Habeas Corpus Plenary Hearing 28 U.S.C. § 2254," filed February 18, 2020 (doc. no. 70), "Motion for Appointment of Counsel," filed February 18, 2020 (doc. no. 71), "Objections/Fraud Upon the Court Motion Rule [60](b)

and[/]or Motion to Recall Mandate and[/]or Motion to Reconsider (Doc 76)," filed May 1, 2020 (doc. no. 94), and "Motion to Supplement Evidentiary Hearing Motion with Specific Motion for Remmer Hearing[]," filed May 1, 2020 (doc. no. 95), are **DENIED**;

4. Petitioner, Rickey Ray Wallgren, Jr.'s "Petition[] for the Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [b]y a [P]erson in State Custody Pro [S]e," filed August 24, 2018 (doc. no. 1), is **DISMISSED** as to grounds 44, 45 and 47 and **DENIED** as to the remaining grounds;
5. A certificate of appealability is **DENIED**; and
6. Judgment shall issue forthwith.

IT IS SO ORDERED this 21st day of May, 2020.

STEPHEN P. FRIOT
UNITED STATES DISTRICT JUDGE

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

RICKEY RAY WALLGREN, JR.,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. CIV-18-824-F**
	)	
RICK WHITTEN,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner Rickey Ray Wallgren, a state prisoner appearing *pro se,* has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his state court conviction, a Motion for Evidentiary Hearing, and a Motion to Appoint Counsel. (ECF Nos. 1, 70, 71). Respondent has filed his Response to Petition for Writ of Habeas Corpus (ECF No. 53). For the reasons set forth below, it is recommended that the Court: (1) dismiss Grounds 44, 45, and 47, (2) deny the remainder of the Petition, (3) deny the Motion for Evidentiary Hearing, and (4) deny the Motion for Counsel.

I. FACTUAL BACKGROUND

This case stems from allegations that Petitioner sexually abused his biological daughter, B.W., and his adopted daughter, J.W. The allegations involving J.W. concerned oral and/or anal penetration which occurred on a sailboat belonging to Petitioner and the allegations involving B.W. involved a vaginal rape that occurred in Galveston, Texas in a hotel room.

On July 1, 2013, J.W. told B.W. about the sailboat incident, and B.W. told her mother, Renee Wallgren. Immediately upon the revelation, Ms. Wallgren and her children fled to Paris, Texas. Once in Texas, J.W. and B.W. underwent physical examinations by a trained Sexual Assault Nurse Examiner and were interviewed by a forensic examiner. The interviews led to an arrest warrant for Petitioner and a search warrant for his sailboat, executed by Pottawatomie County officials and the U.S. Marshals. Petitioner was arrested and a blanket from the sailboat was seized. Serology testing on the blanket indicated sperm most likely belonging to Petitioner and skin cells consistent with skin cells belonging to J.W.

II. PROCEDURAL BACKGROUND

On September 12, 2014, a Pottawatomie County jury convicted Mr. Wallgren on two counts of violating 21 O.S. § 843.5(F)—sexual abuse of a child under twelve. Original Record, *State of Oklahoma v. Rickey Ray Wallgren*, Jr., Case No. CF-2013-516 (Pott. Co. Oct. 22, 2014) 140-141 (O.R.). Judgment was entered and Mr. Wallgren was sentenced to a term of 25 years imprisonment on each count, to be served consecutively. (O.R. 160-161).

On June 22, 2015, Mr. Wallgren filed a Direct Appeal in the Oklahoma Court of Criminal Appeals (OCCA), and the OCCA affirmed the conviction. (ECF Nos. 53-1 & 53-2). On February 1, 2017, Petitioner filed an Application for Post-Conviction Relief in the Pottawatomie County District Court, and on July 7, 2017, the district court denied Mr. relief. (ECF Nos. 53-6 & 53-7). Petitioner appealed the denial to the OCCA, and on March 27, 2018, the OCCA affirmed the denial. (ECF Nos. 53-8 & 53-11). On August 24, 2018,

Mr. Walgreen filed the instant habeas Petition and brief in support, alleging 50 grounds of error. (ECF Nos. 1, 49).

As relevant, discussion of various state court rulings on Petitioner's direct appeal and post-conviction proceedings will be necessary. Often, the rulings discuss Petitioner's claims as represented by the enumerated proposition corresponding with each particular claim as raised in the pleading adjudicated—i.e.—"Proposition One." Because the habeas claims are enumerated differently than they were in state court, the following chart is provided for clarification.

Habeas Ground	**Direct Appeal Proposition**	**Post-Conviction Appeal Proposition**
1		4
2		5
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III. STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") governs this Court's power to grant habeas corpus relief. Under the AEDPA, the standard of review applicable to each claim depends upon how that claim was resolved by the state courts. *Alverson v. Workman,* 595 F.3d 1142, 1146 (10th Cir. 2010). "When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed

that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

For claims adjudicated on the merits, "this [C]ourt may grant ... habeas [relief] only if the [OCCA's] decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Hanson v. Sherrod*, 797 F.3d 810, 814 (10th Cir. 2015) (citation omitted). "It is the petitioner's burden to make this showing and it is a burden intentionally designed to be 'difficult to meet.' " *Owens v. Trammell*, 792 F.3d 1234, 1242 (10th Cir. 2015) (citation omitted). The deference embodied in § 2254(d) "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington*, 562 F.3d at 102-103 (citation omitted).

On review of such claims, this Court first determines "whether the petitioner's claim is based on clearly established federal law, focusing exclusively on Supreme Court decisions." *Hanson*, at 824. "A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of [the United States Supreme Court.]" *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). If clearly established federal law exists, this Court then considers whether the state court decision was contrary to or an unreasonable application of clearly established federal law. *See Owens,* 792 F.3d at 1242.

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

The " 'unreasonable application' prong requires [the petitioner to prove] that the state court 'identified the correct governing legal principle from Supreme Court decisions but unreasonably applied that principle to the facts of the prisoner's case.' " *Id.* (citations and internal brackets omitted). On this point, "the relevant inquiry is not whether the state court's application of federal law was *incorrect*, but whether it was 'objectively unreasonable.' " *Id.* (citations omitted). So, to qualify for habeas relief on this prong, a petitioner must show "there was no reasonable basis for the state court's determination." *Id.* at 1242-43 (citation omitted). "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 473 (2007).

In sum, "[u]nder § 2254(d), a habeas court must determine what arguments or theories supported ... the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Harrington,* 562 U.S. at 101–02.

Relief is warranted only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." *Id.* at 102.

Finally, a federal habeas court must "accept a state-court [factual] finding unless it was based on 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Davis v. Ayala*, 135 S. Ct. 2187, 2199 (2015). In other words, when the state appellate court makes a factual finding, the Court presumes the determination to be correct; a petitioner can only rebut this presumption with clear and convincing evidence. *See id.* at 2199-2200; *see also* 28 U.S.C. § 2254(e)(1).

If the state appellate court has not addressed the merits of a claim, the Court exercises its independent judgment. *See Littlejohn v. Trammell*, 704 F.3d 817, 825 (10th Cir. 2013) ("For federal habeas claims not adjudicated on the merits in state-court proceedings, we exercise our 'independent judgment[.]' " (citation omitted). "And, even in the setting where we lack a state court merits determination, '[a]ny state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by clear and convincing evidence.' " *Grant v. Royal*, 886 F.3d 874, 889 (10th Cir. 2018) (quoting 28 U.S.C. § 2254(e)(1)) (citation omitted).

IV. CLAIMS NOT COGNIZABLE ON HABEAS REVIEW

In Grounds 44, 45, and 47, Mr. Wallgren challenges findings made by the Pottawatomie County District Court and the OCCA in adjudicating his post-conviction application and appeal. (ECF No. 49:81-84, 87). The Court should dismiss these claims.

It is well-established that the federal writ of habeas corpus reaches only convictions in violation of the United States Constitution, laws, or treaties. *See Mabry v. Johnson,* 467 U.S. 504, 507 (1984). In this regard, the Supreme Court has stated that "[f]ederal courts hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." *Smith v. Phillips,* 455 U.S. 209, 221 (1982). The Tenth Circuit Court of Appeals has held that an attempt by a habeas petitioner to challenge "the Oklahoma post-conviction procedures on their face and as applied to him would fail to state a federal constitutional claim cognizable in a federal habeas proceeding." *Steele v. Young,* 11 F.3d 1518, 1524 (10th Cir. 1993); *see also Sellers v. Ward,* 135 F.3d 1333, 1339 (10th Cir. 1998) (holding that an alleged deprivation of due process based on the state appellate court's refusal to grant post-conviction review was not cognizable on federal habeas corpus "because the constitutional error he raises focuses only on the State's post-conviction remedy and not the judgment which provides the basis for his incarceration"); *Hopkinson v. Shillinger,* 866 F.2d 1185, 1219-20 (10th Cir. 1989) (holding that an alleged procedural deficiency in a state's scheme for post-conviction relief did not rise to the level of a federal constitutional claim cognizable in habeas corpus) *overruled on other grounds, Phillips v. Ferguson*, 182 F.3d 769, 772-73 (10th Cir. 1999).

Because Grounds 44, 45, and 47 do not allege issues that are cognizable on habeas review, the Court should dismiss these claims. *See Penate v. Byrd*, No. CIV-16-1442-F, 2017 WL 876033, at *2 (W.D. Okla. Jan. 30, 2017), *report and recommendation adopted,*

No. CIV-16-1442-F, 2017 WL 876311 (W.D. Okla. Mar. 3, 2017) (dismissing Petitioner's challenges to state court decisions as not cognizable on habeas review).

V. STANDARD OF REVIEW FOR REMAINING HABEAS CLAIMS

As stated, if a claim has been adjudicated on the merits in state court, deference under the AEDPA is required. *See supra.* Additionally, a habeas claim is generally subject to procedural bar in federal court when the OCCA declines to consider a claim's merits based on a state procedural rule that is independent and adequate. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). If the rule is independent and adequate, a petitioner must show either cause and prejudice, or a fundamental miscarriage of justice, to overcome the default. *See id.* Finally, if a state court has not addressed the merits of a claim, this Court should address the claim *de novo*. *See supra.*

On direct appeal, the OCCA adjudicated the merits of Propositions 1-3. (ECF No. 53-1). In his habeas petition, Mr. Wallgren has raised these claims as Grounds 41, 36, and 18, respectively (ECF Nos. 1:4-5, 7-8; 49:17, 23-25, 54-55, 75-78). A deferential standard of review applies to these Grounds.

In his post-conviction appeal, the OCCA deemed Propositions 3-20, 22-25 28-31, 33, 36, and 39-42 procedurally barred. (ECF No. 53-11). In his habeas petition, Mr. Wallgren has raised these claims as Grounds 46, 1-17, 19-22, 25-28, 30, 33, 35, 37-39, respectively.[1] (ECF Nos. 1:2-9; 49:2-33, 43-49, 50, 52, 53-73, 84-86). The Court should find these claims to be procedurally barred.

[1] Mr. Wallgren did not raise post-conviction appeal proposition number 38 in the habeas petition or supporting brief. *See* ECF Nos. 1 & 49.

Also in the post-conviction appeal, the OCCA adjudicated the merits of Propositions 26, 27, 34, 35, 37, 43, 44, 46, 47, 48, 49. (ECF No. 53-11). In his habeas petition, Mr. Wallgren has raised these claims as Grounds 23-24, 31, 32, 34, 40, 42, 48, 49-50. (ECF Nos. 1:5-9; 49:33-43, 51-53, 73-75, 79, 87-88).[2] A deferential standard of review applies to those Grounds.

Finally, in the post-conviction proceedings, the OCCA: (1) did not adjudicate the merits of proposition 45, which Petitioner asserts as Ground 43 in his habeas petition[3] and (2) misapprehended the record in adjudicating the merits of proposition 32, which Petitioner asserts as Ground 29 in the habeas petition.[4] Thus, Grounds 43 and 29 should be adjudicated *de novo*.

VI. GROUNDS 1-17, 19-22, 25-28, 30, 32-33, 35, 37-39, & 46

The Court should find that Petitioner's Grounds 1-17, 19-22, 25-28, 30, 32-33, 35, 37-39, and 46 are procedurally barred.

A. The Law of Procedural Bar

A habeas claim is generally subject to procedural bar when the OCCA declines to consider a claim's merits based on a state procedural rule that is independent and adequate. *See Coleman*, at 750. " 'To be independent, the procedural ground must be based solely on state law.' " *Cole v. Trammell*, 755 F.3d 1142, 1159 (10th Cir. 2014)

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[2] Mr. Wallgren did not raise post-conviction appeal proposition number 46 in the habeas petition or supporting brief. *See* ECF Nos. 1 & 49.

[3] *See* ECF No. 53-11:5; *infra*; ECF Nos. 1:8; 49:79-80.

[4] *See* ECF No. 53-11:5; ECF Nos. 1:6; 49:49-50.

(citation omitted). " 'To be adequate, the procedural ground must be strictly or regularly followed and applied evenhandedly to all similar claims.' " *Id.* (citation omitted). If the rule is independent and adequate, a petitioner must show either cause and prejudice, or a fundamental miscarriage of justice, to overcome the default. *See Coleman*, at 750.

B. Petitioner's Claims Not Preserved for Appeal

In his Application for Post-Conviction Relief, Mr. Wallgren raised Grounds 1-17, 19-22, 25-28, 30, 32-33, 35, 37-39, and 46.[5] The Pottawatomie County District Court deemed these claims procedurally defaulted, stating:

1. Petitioner's "allegation of inadequate trial counsel was presented to the Court of Criminal Appeals on direct appeal and cannot be re-asserted in an Application for Post-Conviction Relief;" and

2. "The vast majority of the[] propositions dealt with trial issues that could have been part of the record presented on direct appeal."

(ECF No. 53-7:1).

On appeal, the OCCA affirmed the district court's findings, stating:

> All issues previously ruled upon by this Court are res judicata and all issues not raised in Wallgren's direct appeal, which could have been raised, are waived.
>
> ...
>
> The Post-Conviction Procedure Act is not a substitute for a direct appeal, nor is it intended as a means of providing a petitioner with a second direct appeal. [The Pottawatomie County District Court] correctly determined that Wallgren's claims were either addressed on direct appeal or were waived for failure to raise them on direct appeal.

(ECF No. 53-11:3, 5) (internal citations omitted).

[5] Mr. Wallgren raised additional claims in his application for post-conviction relief, but those will be discussed separately as they were addressed on the merits by the state court.

The claims found to have been procedurally barred under the doctrine of res judicata are Grounds 18 and 39—Petitioner's claims alleging ineffective assistance of trial counsel. Even though the substance of the ineffective assistance claim on direct appeal was limited to the issue as developed in Ground 18, and the substance of Ground 39 was not raised until Petitioner's post-conviction application,[6] the state court's application of res judicata applies to both claims. *See Smallwood v. Gibson*, 191 F.3d 1257, 1267, n.6 (10th Cir. 1999) ("The OCCA has held that raising an ineffective assistance of counsel *claim* on direct appeal, regardless of the basis for the claim, renders all subsequent claims of ineffective assistance res judicata, even if the subsequent claims rest on different bases.") (citing *Hooks v. State,* 902 P.2d 1120, 1122 n. 4 (Okla. Crim. App. 1995) ("we consider this issue—and all instances of trial counsel ineffectiveness which could have been raised but were not—res judicata for purposes of ... post-conviction appeal.")).

The claims found to have been procedurally barred under the doctrine of waiver are Grounds 1-17, 19-22, 25-28, 30, 32-33, 35, 37-38, and 46.

C. Application of Procedural Bar Rules to Petitioner's Claims Not Preserved for Appeal

The Tenth Circuit has recognized the OCCA's findings of waiver and res judicata to be independent and adequate grounds for barring habeas review. *See Thacker v. Workman*, 678 F.3d 820, 835 (10th Cir. 2012) (finding Oklahoma's doctrine of waiver to be independent and adequate); *Broades v. Rudek*, 490 F. App'x 971, 972 (10th Cir. 2012) (finding Oklahoma's doctrine of res judicata to be independent and adequate). Therefore,

[6] *Compare* ECF No. 53-6:37-40 *with* 53-2:23-25; *see* ECF No. 53-6:90-96.

the Court should not address Grounds 1-22, 25-28, 30, 32-33, 35, 37-39, and 46 unless Petitioner shows either: (1) cause and prejudice to excuse the procedural default, or (2) a fundamental miscarriage of justice.

1. Cause and Prejudice

A petitioner may overcome a procedural bar if he can "demonstrate cause for the default and actual prejudice[.]" *Coleman*, at 750. Mr. Wallgren offers no basis for cause and prejudice to overcome the procedural default on Grounds 18 and 39. *See* ECF Nos. 1 & 49. As to Grounds 1-17, 19-22, 25-28, 30, 32-33, 35, 37-38, and 46, Mr. Wallgren contends that his appellate attorney was to blame for not raising the issues on direct appeal. (ECF No. 49:73).

Ineffective assistance of appellate counsel may constitute cause for state procedural default where counsel's performance falls below the minimum standard established in *Strickland v. Washington,* 466 U.S. 668 (1984). *See Murray v. Carrier,* 477 U.S. 478, 488-489 (1986). A *Strickland* claim will be sustained only when: (1) "counsel made errors so serious that counsel was not functioning as 'counsel' " and (2) "the deficient performance prejudiced the defense." *Strickland,* at 687. To establish prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. If a petitioner is unable to show either "deficient performance" *or* "sufficient prejudice," his claim of ineffective assistance fails. *Id.* at 700.

"A claim of appellate ineffectiveness can be based on counsel's failure to raise a particular issue on appeal, although it is difficult to show deficient performance under

those circumstances because counsel need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Cargle v. Mullin,* 317 F.3d 1196, 1202 (10th Cir. 2003) (citation and internal quotation marks omitted). Furthermore, before ineffective assistance of appellate counsel can be considered "cause" to excuse a procedural default, the ineffective assistance of counsel claim itself must have been fairly presented to the state court as an independent claim. *Murray,* at 489; *Edwards v. Carpenter,* 529 U.S. 446 (2000).

In state court, Mr. Wallgren raised the issue of appellate counsel's ineffectiveness as "cause" to excuse the procedural default on Grounds 1-17, 19-22, 25-28, 30, 32-33, 35, 37-38, and 46. *See* ECF Nos. 53-6:97 & 53-8:72. In his application for post-conviction relief Petitioner stated: "Failure to raise all pertinent claim[s], propositional grounds on Direct Appeal that is reliefable [sic]. Propositions stated herein. Supra, infra." (ECF No. 53-6:97). And on appeal, Mr. Wallgren stated: "Failed to recognize appealable grounds failing to raise the issues cognizable for relief.... Filing a defective Appeal. Deficient performance on Direct Appeal. Inadequate performance on Direct Appeal." (ECF No. 53-8:72). In analyzing this claim, the OCCA stated:

> Examining Wallgren's claims of ineffective assistance of counsel, based on appellate counsel's failure to adequately raise these claims, and pursuant to this Court's decision in *Logan* and the *Strickland* standards stated above, we find Wallgren has failed to establish that appellate counsel's performance was deficient or objectively unreasonable and has failed to establish any resulting prejudice. To support his ineffective assistance of appellate counsel claim, Wallgren must show that appellate counsel would have prevailed on direct appeal had he argued trial counsel was deficient and that these enumerated errors resulted in prejudice. His claims as presented in this application for Post-Conviction relief do not support a finding that either trial or appellate counsel was ineffective. This Court has held that "merely conclusory, unprovable, or unspecified claims of ineffective assistance of appellate

> counsel do not raise an issue of material fact." Wallgren's ineffective assistance of trial and appellate counsel claims are without merit.

(ECF No. 53-11:6-7). Because the OCCA reviewed the ineffective assistance of appellate counsel claim on the merits, AEDPA deference applies.

In the habeas petition, Mr. Wallgren asserted appellate counsel's ineffectiveness as cause to excuse the procedural default of numerous claims. (ECF No. 49:73-75). However, he did so in a conclusory manner, simply repeatedly claiming that counsel had failed to assert various claims. *See* ECF No. 49:73 (allegations that appellate counsel "Failed to investigate the case, the appeal other issues appealable on direct appeal, cognizable on direct appeal;" "failed to scrutinize the record for appealable grounds and related issues;" "failed to recognize appealable grounds for relief from the record failing to raise the issues;" "fail[ed] to recognize cognizable [dead bang winner] obvious grounds for direct appeal that was relievable;" "fail[ed] to raise all pertinent claim, propositional grounds on direct appeal that is relievable, all propositions stated herein;" "fail[ed] to know, realize or pick out plain error grounds for direct appeal relief;" "fail[ed] to know or raise ... direct appeal grounds that was objected to in trial court proceedings;" "fil[ed] a defective appeal;" committed "deficient performance on direct appeal;" committed "Inadequate, insufficient performance on direct appeal."). Not only did Petitioner raise the issue only perfunctorily, he failed to argue how appellate counsel's failure to raise the omitted claims would have resulted in a different outcome at trial. (ECF No. 49:73-75).

Utilizing AEDPA deference, the Court should conclude that the OCCA reasonably determined that Mr. Wallgren's claim of ineffective assistance of counsel did not rise to the level of a constitutional violation under *Strickland*. *See Brown v. Sirmons*, 415 F. Supp.

2d 1268, 1312–13 (N.D. Okla. 2006), *aff'd,* 515 F.3d 1072 (10th Cir. 2008) (habeas petitioner's reliance on "a conclusory statement that his appellate counsel was ineffective without supporting facts, authorities or arguments about his appellate counsel's ineffectiveness" coupled with petitioner's failure to show "that his appellate counsel's failure to raise the [omitted] issue ... would have rendered a different result" was insufficient to establish prejudice under *Strickland.*). Because the OCCA's determination was reasonable, the Court should conclude that Petitioner has failed to establish "cause" to excuse the procedural default. *See supra, Murray, Brown,* at 1313 (petitioner's failure to establish prejudice under *Strickland* caused by appellate attorney's alleged ineffectiveness was fatal to his claim of "cause" to excuse state procedural default). Because Mr. Wallgren cannot establish the required "cause" element, the Court need not address the "prejudice" factor. *Steele,* at 1522 n.7 (10th Cir. 1993) (discussing petitioner's defaulted claims under the procedural bar analysis and holding: "As Steele [has] not shown cause, we need not discuss whether he has been actually prejudiced.").

2. Fundamental Miscarriage of Justice

Because he did not show "cause" and "prejudice," Mr. Wallgren can only overcome the procedural bar if he is able to demonstrate a fundamental miscarriage of justice. *See Coleman,* at 750. To do so, Petitioner must make a " 'credible' showing of actual innocence." *Frost v. Pryor,* 749 F.3d 1212, 1231 (10th Cir. 2014). That is, he must " 'support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' " *Id.* at 1232 (citation omitted). "The gateway

should open only when a petition presents 'evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.' " *McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013) (citation omitted).

In Grounds 17 and 43, Mr. Wallgren alleges his actual innocence. (ECF Nos. 1:4, 38 & 49:23, 79-81). But none of Petitioner's arguments are sufficient to find that a fundamental miscarriage of justice had occurred which would excuse the procedural default. In Ground 17, Petitioner alleges his actual innocence based on:

1. testimony from the preliminary hearing, which was not admitted at trial, that J.W. had "no memory of any abuse" and was "told what to say in her forensic video and SANE exam;"

2. a statement made by B.W. during an interview, which was not admitted at trial, that "Wallgren did not abuse [J.W.]"

3. a statement made by B.W., that was not admitted at trial, that she had only made the allegations against Petitioner in retaliation for him "being mean to her mother;"

4. statements from the victims at trial regarding their lack of memory;

5. Petitioner's belief that testimony from the victims at the preliminary hearing and trial had been "coached;"

6. testimony from the forensic interviewer that "she had 'coaching concerns based on what was shared with' her 'at the beginning of the forensic interview;' "

7. electronic postings dated January 5 and 6, 2014, allegedly written by Renee Wallgren, stating that Mr. Wallgren was innocent and she had "lied about everything" and "made the girls lie;" and

8. post-trial testimony from a divorce hearing where Ms. Wallgren allegedly testified that she had concocted the abuse allegations to avoid kidnapping charges.

(ECF No. 49:23). The Court should conclude that this evidence does not establish a fundamental miscarriage of justice.

First, the preliminary hearing testimony which allegedly contradicted J.W.'s trial testimony is considered "merely impeaching evidence... [in]sufficient to invoke the fundamental miscarriage of justice exception." *Clayton v. Gibson*, 199 F.3d 1162, 1180 (10th Cir. 1999), *holding modified by McGregor v. Gibson*, 248 F.3d 946 (10th Cir. 2001).

Second, Mr. Wallgren relies on a video interview wherein he alleges that B.W. stated that Petitioner did not abuse J.W. (ECF No. 49:23). According to Petitioner, the trial court did not allow the videotape into evidence, but Mr. Wallgren also stated that B.W. testified to the same at trial. (ECF No. 49:23). For two reasons, this evidence is not sufficient to undermine the confidence in the trial. First, according to Mr. Wallgren, the excluded evidence was consistent with B.W.'s trial testimony, which the jury heard. It was not, therefore, considered "new." Second, Petitioner has taken B.W.'s trial testimony out of context. When read in its entirety, B.W. stated that she had told her mother that she believed nothing was happening to J.W. because she was afraid that if she told her mother the truth, DHS would take J.W. away from the family. Trial Transcript, Vol. III, *State of Oklahoma v. Wallgren*, Case No. CF-2013-516 (Pott. Co. Okla. Sept. 11, 2014) 441 (Trial TR. Vol. III).

Third, Petitioner points to a statement made by B.W. that she "was only making these [abuse] allegations in retaliation for Wallgren 'being mean to her mother.' " (ECF No. 49:23). But when read in its entirety, however, the report which recorded the statement actually reads: "at one point in the interview ... [B.W.] tried to erase all of it

from her mind. She gave the reason that her dad was mean to her mom as to why she had decided to tell now." Post-Conviction Original Record, *State of Oklahoma v. Wallgren*, Case No. PC-2017-794 (Okla. Ct. Crim. App. Oct. 20, 2017) (Post-Conviction O.R.). Thus, contrary to Petitioner's suggestion that B.W. had made up the abuse allegations because Petitioner had been "mean to [B.W.'s] mother," the report indicates that B.W. had only been motivated to talk about the abuse because Petitioner had been "mean to her mom." This evidence is insufficient to undermine the conviction.

Fourth, Petitioner cites trial testimony from the victims regarding their lack of memory, but such evidence is not "new"—the jury heard the testimony and was able to assess the victim's credibility.

Fifth, regarding Petitioner's belief that the victims' testimony at the preliminary hearing and trial had been "coached," Mr. Wallgren offers nothing more than speculation as to this fact. Speculation is insufficient to meet the extremely high burden required to invoke the miscarriage of justice exception.

Sixth, Petitioner's claim that the forensic interviewer "had 'coaching concerns based on what was shared with' her 'at the beginning of the forensic interview' "[7] was taken out of context. At trial, what the forensic interviewer actually stated was that J.W. had told the interviewer that "her mom had told her to say the bad words" when describing the abuse. (Trial TR. Vol. III 391). Then on cross-examination, Petitioner's attorney asked the forensic interviewer: "And the fact that she answered that she had been told what to say, is that an indication of potential coaching?" (Trial TR. Vol. III 397-

[7] (ECF No. 49:23).

398). The examiner responded: "It could be." (Trial TR. Vol. III 398). Thus, contrary to Petitioner's implied allegation that the forensic interviewer had testified that the victims had been "coached" as to what to say, the record proves otherwise.

Seventh, Mr. Wallgren references electronic postings dated January 5 and 6, 2014, allegedly written by the victim's mother, his ex-wife, stating that Mr. Wallgren was innocent and she had "lied about everything" and "made the girls lie." *See* ECF No. 49:23; (Post-Conviction O.R. 366, 367). But as noted by the Pottawatomie County District Court, the messages were dated 8 months prior to Petitioner's trial, and are "not newly discovered." (ECF No. 53-7:2).

Eighth, Mr. Wallgren references post-trial testimony from a divorce hearing where Ms. Wallgren allegedly: (1) "admit[ted] that she only concocted these false allegations [of sexual abuse] to avoid charges related to kidnapping" and (2) "told [B.W.] to tell doctors and nurses that [she] was sexually abused by some stranger[.]" (ECF No. 49:23). Although this is the only evidence cited by Petitioner which post-dated the trial, it is not sufficient to undermine the confidence in the outcome of the trial as Mr. Wallgren has taken Ms. Wallgren's testimony out of context.

At the divorce hearing, Ms. Wallgren testified that when she took B.W. to be examined at a hospital in Paris, Texas, she had initially told her daughter to tell the doctor that a stranger had abused her because that was the only way she could get B.W. to go to the doctor. (Post-Conviction O.R. 49). In fact, at trial, B.W. testified that she had "come up with some of" the story to tell the doctors that she had been raped by a stranger because she "didn't want to tell them that [her] father did it to her[.]" (Trial TR. Vol. III

453). But when they arrived at the hospital, Ms. Wallgren testified (at the divorce hearing) that she told B.W. to tell the truth, that it was Mr. Wallgren who had abused [B.W.], because, "if we didn't have proof that he had done something to her that he was going to call the cops and say I kidnapped these kids." (Post-Conviction O.R. 51). When read in its entirety, the evidence does not show that Ms. Wallgren had lied about the abuse to avoid kidnaping charges. And the jury was already privy to the testimony regarding the "stranger rape" story, as it had come out on B.W.'s cross-examination. Under such circumstances, the Court should find that Petitioner's evidence as set forth in Ground 17 is neither "new" nor sufficiently strong to undermine the Court's confidence in the verdict.

In Ground 43, Petitioner alleges his actual innocence based on:

1. "inherently incredible out-rageous [sic], un-trustworthy and beyond belief scientifically and medically impossible and impeached" testimony;

2. an allegation that the date of the alleged offenses had only been "guessed at and speculated over;"

3. electronic postings allegedly written by the victim's mother, stating that Mr. Wallgren was innocent and she had "lied about everything" and "made the girls lie;"

4. a statement from B.W. that she had only made the allegations against Petitioner in retaliation for him "being mean to her mother;"

5. J.W.'s failure to identify Petitioner as her abuser in court;

6. testimony from the forensic interviewer that "she had 'coaching concerns based on what was shared with' her 'at the beginning of the forensic interview;' "

7. testimony from J.W. during the preliminary hearing which conflicted with her testimony at trial regarding whether Petitioner was on the boat on the date of the alleged abuse;

8. a lack of trauma indicated on either victim following both SANE examinations;

9. testimony from Ms. Wallgren regarding the absence of DNA evidence at the scene of the crime at the times the alleged abuse occurred;

10. post-trial testimony from a divorce hearing where Ms. Wallgren allegedly testified that she had concocted the abuse allegations to avoid kidnaping charges;

11. a statement from J.W. at trial regarding her lack of memory;

12. inconsistent statements from Ms. Wallgren regarding a potential motive to have fabricated the allegations against Petitioner; and

13. evidence which provides Mr. Wallgren an alibi to the alleged crimes.

(ECF No. 49:79-81). The Court should conclude that this evidence does not establish a fundamental miscarriage of justice.

First, Petitioner's allegations of "inherently incredible out-rageous [sic], untrustworthy and beyond belief scientifically and medically impossible and impeached" testimony are not supported by any specific examples of such testimony. *See* ECF No. 49:79. Accordingly, these allegations provide no support for Petitioner's claim of actual innocence. *See Hall v. Bellmon,* 935 F.2d 1106, 1110 (10th Cir. 1991) (stating that a pro se litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based.").

Second, Petitioner alleges "the date of the offenses is violative, no actual Date, no Date has been pin pointed, guessed at and speculated over[.]" (ECF No. 49:79). In support, Petitioner refers to "PCR Ground 1." (ECF No. 49:79). In Proposition One of his post-conviction application, Mr. Wallgren takes issue with the fact that the charges in the Amended Information do not provide an exact date that the abuse allegedly occurred, as

to either victim. *See* ECF No. 53-6:5-7. But the charges had been known to Petitioner since November 4, 2013, the day the Amended Information was filed. (O.R. 34-35). It does not, therefore, qualify as "new" evidence that had not been presented at trial.

Third, as discussed, the electronic postings allegedly authored by Ms. Wallgren do not qualify as "newly discovered." *See supra*.

Fourth, as discussed, B.W.'s trial testimony which allegedly contradicted a statement she made in her forensic interview, was not "new"—she made the allegedly inconsistent statement at trial. *See supra*. And, as discussed, Petitioner's allegation that B.W. stated that she only made the allegations against Petitioner in retaliation for him "being mean to her mother," was taken out of context and insufficient to undermine the confidence in the trial's outcome. *See supra*.

Fifth, Petitioner alleges that J.W. failed to identify Mr. Wallgren as her abuser when she testified "Huh I don't know" when asked whether her dad was in the courtroom when she testified. (ECF No. 49:80, 81). But as discussed, this allegation concerns J.W.'s trial testimony and is not considered "new" evidence.

Sixth, as discussed, Petitioner's allegations regarding the forensic interviewer's testimony about "coaching concerns" misrepresented the actual testimony. *See supra*.

Seventh, Petitioner points to allegedly conflicting testimony presented by B.W. at the preliminary hearing and at trial. According to Mr. Wallgren, at the preliminary hearing, B.W. testified that she "thought" Petitioner was on the boat the day of the alleged abuse. (ECF No. 49:80). Petitioner alleges that this testimony conflicted with B.W.'s trial testimony, wherein she stated that she had seen J.W. and Petitioner "both go up [to the

boat.]" (ECF No. 49:80). But a review of the transcript from the preliminary hearing reveals that no conflict exists—B.W. did not state she "thought" Petitioner was on the boat. Instead, she testified that "[Petitioner] was out there [on the boat]." Transcript of Preliminary Hearing, *State of Oklahoma v. Wallgren*, Case No. CF-2013-516 (Pott. Co. Okla. Oct. 31, 2013) (Preliminary Hearing TR. 40).

Eighth, Petitioner alleges a "lack of trauma" in both SANE exams and in "[a]ll police and incident reports." (ECF No. 49:80). The SANE reports Defendant cites were dated July 3 and July 5, 2013. (O.R., Defendant's Exhibits 2 & 3). These reports were introduced at trial and are not considered "new" evidence. And Petitioner's references to "[a]ll police and incident reports" is too conclusory to qualify under the actual innocence exception.

Ninth, Petitioner alleges that Ms. Wallgren and Pottawatomie County Sherriff's Office Lieutenant Kevin VanDuser testified regarding the absence of DNA evidence at the scene of the crime when the alleged abuse occurred. (ECF No. 49:80). In support, Petitioner cites trial testimony from Ms. Wallgren where she had stated: "no they were not." (ECF No. 49:80). But this testimony was in response to a question posed to Ms. Wallgren regarding the presence of household items on the boat when Ms. Wallgren and the children returned home from Texas. (Trial TR. Vol. III 290-291). She had been asked whether the items on the boat had been on the boat before she had left for Texas, and she had given the quoted response. *Id.* Petitioner also cites testimony from Lt. VanDuser who stated that Petitioner "had packed the boat." (ECF No. 49:80). But: (1) the supporting transcript page reference given by Petitioner does not reflect such testimony

and (2) such testimony would not support Petitioner's theory regarding the absence of DNA evidence.

Tenth, Petitioner cites post-trial testimony from a divorce hearing where Ms. Wallgren allegedly testified that she had concocted the abuse allegations to avoid kidnapping charges. (ECF No. 49:80). But as discussed, such allegations misconstrued Ms. Wallgren's actual testimony and are insufficient to undermine the confidence in the trial's outcome.

Eleventh, Petitioner cites to a statement from J.W. at trial regarding her lack of memory. (ECF No. 49:81). But Petitioner's generalized claim that J.W. testified that she sometimes "forgot things" is not "new" evidence sufficient to undermine the conviction.

Twelfth, Petitioner cites to a post-trial statement from Ms. Wallgren which she made during the divorce hearing that she "want[ed] everything." (ECF No. 49:81). According to Mr. Wallgren, this statement contradicted Ms. Wallgren's trial testimony that she "want[ed] nothing from [Mr.] Wallgren." (ECF No. 49:81). According to Petitioner, Ms. Wallgren's trial testimony was "to eliminate motive." (ECF No. 49:81). But beyond this statement, Petitioner does not argue how the post-trial testimony was sufficient to undermine the confidence in the trial's outcome and the Court should conclude that it was not.

Thirteenth, Mr. Wallgren cites three pieces of alibi evidence in support of his actual innocence claim. (ECF No. 49:81). The Court should reject Petitioner's argument, however, because alibi evidence would merely constitute corroborating evidence, and is entirely speculative. *See Stafford v. Saffle,* 34 F.3d 1557, 1561–62 (10th Cir. 1994)

(holding corroborative or speculative evidence is insufficient to meet the high threshold for actual innocence); *Hickmon v. Mahaffey*, 28 F. App'x 856, 858 (10th Cir. 2001) (rejecting petitioner's reliance on alibi evidence in support of his actual innocence claim).

In sum, the Court should conclude that none of the evidence cited by Petitioner in Grounds 17 or 43 is sufficient to open the gateway for this Court to review Mr. Wallgren's procedurally defaulted claims. Because Mr. Wallgren cannot establish a fundamental miscarriage of justice, the Court should conclude that Grounds 1-22, 25-28, 30, 32-33, 35, 37-39, and 46 are procedurally barred.

VII. GROUND 43

In Ground 43, Petitioner alleges his actual innocence, as described above. *See supra*. Although the OCCA stated that it assessed the merits of Ground 43, it did so, stating: "[t]he claims presented at propositions 41-46 all alleged plain error or excessive sentence[.]" (ECF No. 53-11). However, Ground 43, presented as proposition 42 in Petitioner's Application for Post-Conviction Relief and as proposition 45 in Mr. Wallgren's post-conviction appeal, clearly alleged actual innocence, contrary to the OCCA's statement that such claim had "alleged plain error or excessive sentence." *See* ECF Nos. 53-6:103-105 & 53-8:6, 73-74). Thus, without an actual adjudication on the merits of Ground 43, the Court should review this claim *de novo*[8] and deny habeas relief.

The United States Supreme Court has never recognized freestanding actual innocence claims as a basis for federal habeas relief. To the contrary, the Court has repeatedly rejected such claims, noting instead that "[c]laims of actual innocence based

[8] *See supra*.

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 proceedings." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). In rejecting such claims, the Court has observed that "[f]ew rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence." *Id.* at 401.

The Tenth Circuit has echoed the Supreme Court in this regard, stating: "actual innocence does not constitute a freestanding basis for habeas relief." *Farrar v. Raemisch*, 924 F.3d 1126, 1131 (10th Cir. 2019). Thus, the Court should conclude that habeas relief is not warranted on Ground 43.

VIII. GROUNDS 23, 24, & 36

In Grounds 23, 24, & 36, Petitioner challenges various evidentiary rulings/procedural errors allegedly committed by the trial court. (ECF Nos. 1:5, 7; 49:33-43; 54-55). The Court should deny habeas relief on these Grounds.

A. Clearly Established Law/Standard of Review

"Federal habeas corpus relief does not lie for errors of state law" such as a violation of a state's evidence code. *Estelle v. McGuire*, 502 U.S. 62, 67 (1991) (internal quotation marks omitted); *see, e.g., Durbin v. Province*, 448 F. App'x 785, 787 (10th Cir. 2011) ("It is not the responsibility of a federal habeas court to cure errors from the state court concerning state law."). The Court "will only consider state law evidentiary questions on habeas 'if the alleged error was so grossly prejudicial that it fatally infected the trial and

denied the fundamental fairness that is the essence of due process.' " *Id.* at 787 (quoting *Revilla v. Gibson*, 283 F.3d 1203, 1212 (10th Cir. 2002)).

B. Grounds 23 & 24

In Grounds 23 & 24, Petitioner alleges that he was denied: (1) "numerous pieces of beneficial evidence" and (2) "alibi and exculpatory beneficial witnesses," both of which "would have changed the outcome of the trial." (ECF No. 49:33, 41). The OCCA denied these claims on the merits in adjudicating Petitioner's post-conviction appeal. (ECF No. 53-11:4-5). The Court should conclude that the OCCA's determination was reasonable.

The Tenth Circuit Court of Appeals has applied the "fundamental unfairness" test in evaluating a habeas petitioner's claims of wrongfully excluded evidence and witnesses. *See Cummings v. Evans*, 161 F.3d 610, 618 (10th Cir. 1998) (applying fundamental unfairness test to claims alleging exclusion of evidence); *Richmond v. Embry*, 122 F.3d 866, 874 (10th Cir. 1997) (applying fundamental unfairness test to claims alleging exclusion of witnesses). But Due Process challenges of this sort require a ruling unfavorable to the petitioner as a prerequisite to relief. Here, the OCCA found Grounds 23 & 24 to be "frivolous" in the absence of any findings that the trial court had actually excluded any evidence or witnesses. *See* ECF No. 53-7:2 (stating that the claims are "frivolous"); ECF No. 53-11:4-5 (OCCA's order adopting the findings of the district court). The OCCA stated:

> Addressing Wallgren's claims of procedural errors which Wallgren alleged occurred during trial, [the Pottawatomie Country District Court] found that the record in Wallgren's case did not support these claims. The court noted that on December 4, 2013, Wallgren's motion for Full Discovery, Inspection, and Production of Exculpatory Evidence was granted[,] and [o]n February 25, 2014, almost seven months before the actual trial took place,

> Wallgren announced that he was ready for trial. At trial, Wallgren did not attempt to call any witnesses that the trial court interfered with.

(ECF No. 53-11:4-5). Because the trial court had not wrongfully excluded any evidence or witnesses, Petitioner cannot now claim that his trial was rendered fundamentally unfair because he believes that certain evidence should have been admitted and certain witnesses should have been called to testify.[9]

C. Ground 36

In Ground 36, Petitioner alleges that the trial court "erroneously admitted video and audio recording of [J.W.'s] interviews without making the requisite statutory findings, denying [him] of due process and a fair trial." (ECF Nos. 1:7; 49:54).[10] Petitioner raised Ground 36 in his direct appeal as proposition Two. *Compare* ECF Nos. 1:7; 49:54-55 *with* ECF No. 53-2:20-22. The OCCA adjudicated the claims on the merits and denied relief. *See* ECF No. 53-1:3-4. This Court should conclude that the OCCA's determination was reasonable and not contrary to Supreme Court precedent.

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[9] Within his challenge to the exclusion of witnesses, Mr. Wallgren alleges that he was denied the right to testify on his own behalf—that his trial attorney "discouraged [him] from testifying." (ECF No. 49:42). Arguably, this statement could raise an independent claim under the Due Process Clause which protects a defendant's right to testify on his own behalf at a criminal trial, *see Rock v. Arkansas,* 483 U.S. 44, 51 (1987), or a challenge to trial counsel's effectiveness as outlined in *Strickland, supra.* But both challenges are belied by the record, as Petitioner clearly stated his choice not to testify. *See* Trial TR. Vol. IV 618-619 (Petitioner's attorney: "It's not my decision to make for you or anyone else to make for you. Is it your decision that you're not going to testify?" Mr. Wallgren: "Yes, sir.").

[10] Mr. Wallgren actually alleges that the trial court "erroneously admitted video and audio recording of *one of the children's* interviews without making the requisite statutory findings, denying [him] of due process and a fair trial." (ECF Nos. 1:7; 49:54) (emphasis added). But the only videotaped interview that was admitted into evidence was from J.W. *See* Trial TR. Vol. III at 355.

1. Background

Forensic interviewer, Rebecca Peevy, videotaped her interview with J.W. regarding the sexual abuse allegations against her father. (O.R., State's Exhibit 4). At trial, the State moved to introduce the videotape into evidence and the parties argued as to the propriety of the videotape's admission under 12 O.S. § 2803.1. *See* Trial TR. Vol. III 333-346. Under that statute, a statement made by a child who is under the age of 13, which describes any act of sexual contact performed with or on the child is admissible in criminal proceedings if certain requirements are met. 12 O.S. § 2803.1 The relevant statute provides that such statement is admissible if:

> 1. The court finds, in a hearing conducted outside the presence of the jury, that the time, content and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy. In determining such trustworthiness, the court may consider, among other things, the following factors: the spontaneity and consistent repetition of the statement, the mental state of the declarant, whether the terminology used is unexpected of a child of similar age or of an incapacitated person, and whether a lack of motive to fabricate exists;
>
> and
>
> 2. The child ... either:
>
> a. testifies or is available to testify at the proceedings in open court or through an alternative method pursuant to the provisions of the Uniform Child Witness Testimony by Alternative Methods Act or Section 2611.2 of this title, or
>
> b. is unavailable as defined in Section 2804 of this title as a witness. When the child or incapacitated person is unavailable, such statement may be admitted only if there is corroborative evidence of the act.

12 O.S. § 2803.1 (eff. Nov. 1, 2013). Subsequent to the parties' arguments, the Court held a § 2803.1 hearing, outside the presence of the jury, and made the following findings:

> I thought there were several moments where [J.W.] spontaneously said things that would be expected of a child of a similar age. The grammar was what would be expected of a child of that age. The terminology for body parts, and actually things like saying a thousand days, although we understand as adults that's not accurate, I think that provides further indicia of reliability since it came spontaneously from a child. Obviously, no adult would ever tell her to say that.
>
> I suppose a totality of the circumstances would have to include what we've already heard from the mother in terms of how this thing all started. The story we heard from the mother was that J.W. told B.W. that the defendant had put his penis in her mouth, and that B.W. told her mother and J.W. that he had done similar things to her. And so I suppose we would have expected to hear about that during this forensic interview, but that didn't come out at all. Instead this other act came out. So I guess that cuts both ways, too.
>
> You could question the reliability because its inconsistent with the previous story that was told. However, that makes it more spontaneous that it's not been a rogue repetition of some story that's already been rehearsed.
>
> So the Court's prepared to make its finding and the Court does find that, considering the time and content and totality of the circumstances surrounding the taking of the statement, that it is inherently trustworthy and may be played for the jury provided that the other conditions are met, and that would be that J.W. either testifies or is made available to testify, or that she is unavailable. But we don't anticipate that.

(Trial TR. Vol. III 352-353). The videotape was then introduced into evidence and played for the jury in its entirety. (Trial TR. Vol. III 385).

On direct appeal, Mr. Wallgren argued that the trial court had improperly admitted the interview into evidence without making a finding under 12 O.S. § 2803.1 regarding

whether J.W. had had a motive to fabricate the allegations in the video. *See* ECF No. 53-2:20-22. Utilizing a plain error standard of review, the OCCA denied the claim, stating:

> Appellant asserts that 12 O.S. 2011, § 2803.1 requires that the court determine whether a lack of motive to fabricate exists but that the trial court failed to address this requirement. We find that Appellant has not shown the existence of an actual error in the present case.
>
> This Court has determined that the list of permissive "factors" set forth in § 2803.1 are not exclusive. Instead, the trial court is to determine whether the time, content and totality of circumstances surrounding the taking of the statement provides sufficient indicia of reliability so as to render it inherently trustworthy.
>
> The trial court held the requisite reliability hearing, reviewed the time, content and totality of the circumstances surrounding the taking of the statement. The trial court determined that the child's statements were spontaneous; her consistent repetition of sexual abuse at the hands of Appellant lacked the rogue repetition of a rehearsed story; the statements detailed sexual conduct in age-appropriate terminology; and concluded that it was unlikely that an adult had told the child what to say. The record adequately established that the child's statements were inherently trustworthy. As the trial court properly admitted the recording of the forensic interview, we find that Appellant has not shown error, plain or otherwise, occurred.

(ECF No. 53-1:3-4) (internal citations omitted).

2. Habeas Relief is not Warranted

In the petition, Mr. Wallgren states that the trial court "erroneously admitted video and audio recording of [J.W.'s] interviews without making the requisite statutory findings, denying [him] of due process and a fair trial." (ECF Nos. 41:7; 9:54). But he does not argue, as he did on direct appeal, that the trial court failed to determine whether, under 12 O.S. § 2803.1, J.W. had a motive to fabricate the allegations in the video. Instead, Petitioner argues:

- the trial court wrongfully excluded B.W.'s videotaped interview;
- B.W.'s video should have been played "so as to dispute the claims made in [J.W.'s] video";
- the forensic examiner had "coaching concerns" in connection with J.W.'s interview;
- his ex-wife had posted electronic communications regarding Petitioner's innocence; and
- at the preliminary hearing, J.W. testified as to having no memory of the alleged abuse.

(ECF No. 49:54-55).

To the extent Petitioner argues that the videotaped interview was not properly admissible under Oklahoma's child hearsay statute, he has not established an entitlement to relief. *See Estelle, supra*. Additionally, Petitioner has failed to establish that his Due Process rights were violated. Under 12 O.S. § 2803.1., the trial court was only required to conduct a hearing, outside the jury's presence, and consider whether the time, content and totality of circumstances surrounding the taking of the statement provided sufficient indicia of reliability so as to render it inherently trustworthy. 12 O.S. § 2803.1. As noted by the OCCA, "lack of motivation to fabricate" was only one of several "permissive" factors exemplified by the statute when considering whether the statement was inherently trustworthy. *See* ECF No. 53-1:4; 12 O.S. § 2803.1.

The OCCA found no error, "plain or otherwise." (ECF No. 53-1:4). "Oklahoma's formulation of the plain-error standard is virtually identical to the constitutional test for due process." *Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015). So, when the OCCA rejected Petitioner's claim under the plain-error standard, the decision "effectively

disallowed the possibility of a due process violation." *Id.* at 1011. This Court must then defer to the OCCA's ruling unless it unreasonably applied the due process test. *Thornburg v. Mullin*, 422 F.3d 1113, 1125 (10th Cir. 2005). As discussed, the trial court performed its duty under 12 O.S. § 2803.1 and did not err by failing to make a separate finding regarding J.W.'s motivation for making the allegations. Petitioner's arguments involving B.W.'s interview, "coaching concerns," electronic communications, and J.W.'s testimony from the preliminary hearing are not relevant to the issue and are not supportive of the claim. As a result, the Court should conclude that the OCCA's determination on this issue was neither contrary to, nor an unreasonable application of Supreme Court precedent, and deny habeas relief on Ground 36. *See Hamburger v. Allbaugh*, No. CIV-13-921-F, 2016 WL 3675877, at *5 (W.D. Okla. May 24, 2016), *report and recommendation adopted*, No. CIV-13-0921-F, 2016 WL 3676794 (W.D. Okla. July 6, 2016).

IX. GROUND 41

In Ground 41, Petitioner alleges that insufficient evidence existed to sustain the conviction. (ECF Nos. 1:8; 49:75-78). The Court should deny habeas relief on this ground.

A. Clearly Established Law/Standard of Review

The United States Supreme Court clearly established the constitutional right to sufficient evidence of guilt in *Jackson v. Virginia.* 443 U.S. 307, 324 (1979); *see Lott v. Trammell*, 705 F.3d 1167, 1219 (10th Cir. 2013) (agreeing that *Jackson* provided "the clearly established law applicable to [an insufficient evidence] claim"). Under this decision, the question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. *Jackson's* standard for evidence sufficiency "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324, n.16.

A habeas court reviews a sufficiency-of-the-evidence claims under a "twice-deferential standard." *Parker v. Matthews*, 567 U.S. 37, 43 (2012). First, a reviewing court will only set aside a jury verdict on grounds of insufficient evidence "if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam). Second, "a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge" unless "the state court decision was 'objectively unreasonable.' " *Id.* (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)).

B. Background

As stated, a jury convicted Mr. Wallgren of two counts of violating 21 O.S. § 843.5(F). (O.R. 140-141). On direct appeal, Mr. Wallgren alleged that the evidence was insufficient to sustain the convictions, arguing a lack of corroborating evidence. (ECF No. 53-2:17-19). The OCCA denied relief on the merits, stating:

> In Proposition One, Appellant challenges the sufficiency of the evidence supporting his convictions. Reviewing the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the offenses beyond a reasonable doubt. The child victims' testimony was not incredible, unsubstantial, or so thoroughly impeached as to be unworthy of belief. Instead, the girls' testimony was clear, unambiguous and consistent. Thus, it did not require corroboration as a matter of law. Even so, other evidence sufficiently corroborated the girls' statements. Evidence recovered from Appellant's sailboat, including DNA evidence, corroborated the six-year-old's account. The mother's observation of Appellant in the older girl's room corroborated her account. Both girls' accounts were corroborated by the behavioral changes that they displayed during and after Appellant sexually abused them. Proposition One is denied.

(ECF No. 53-1:2-3). The Court should conclude that the OCCA's determination was reasonable.

C. Habeas Relief Not Warranted

To analyze this claim, the Court must refer to the substantive elements of the criminal offense as defined by Oklahoma law. *See Jackson, supra.* In Oklahoma, sexual abuse of a child under 12 requires a showing that: (1) a person responsible for the child's health, safety, or welfare; (2) willfully/maliciously engaged in; (3) sexual conduct; (4) with a child under the age of twelve. Okla. Stat. tit. 21, § 843.5(F) (2011); (O.R. 127). Testimony from Ms. Wallgren, J.W., B.W., Lt. VanDuser, Detective Chris Bean, Antje Stambaugh, and DNA evidence provide evidence to satisfy the substantive elements of the crimes in support of the convictions.

At trial, Ms. Wallgren testified that prior to 2012, B.W. was Petitioner's "baby girl" and "could do no wrong" in Petitioner's eyes. Trial Transcript Vol. II, *State of Oklahoma v. Wallgren*, Case No. CF-2013-516 (Pott. Co. Sept. 10, 2014) 188 (Trial TR. Vol. II). Following a trip to Galveston, however, which just involved Petitioner and B.W., Ms. Wallgren stated things changed between the two and they despised one another. *Id.* at 189-190, 221. At that time, B.W. would have been 13 years old and J.W. would have been 6 years old. *See id.* at 182. Ms. Wallgren also stated that at that time, Petitioner's attitude toward J.W. changed—that "J.W. became ... like B.W. was when they were little, his little buddy. Petitioner wouldn't—he—before, he would never care if she had some candy or an extra pop. But after that, he made sure J.W. got whatever J.W. wanted." *Id.* at 191.

On July 1, 2013, Ms. Wallgren went grocery shopping and left Petitioner home with the three children. *Id.* at 195. When Ms. Wallgren left, Petitioner was outside, working on his sailboat. *Id.* at 196. When Ms. Wallgren returned, she observed J.W. coming from the boat, walking into the house. *Id.* at 197. Shortly thereafter, B.W. told J.W. "Tell Mom what you just told me." *Id.* at 199. Ms. Wallgren testified that J.W. stated that "Dad had sex with her in her mouth." *Id.* After J.W.'s revelation, Ms. Wallgren testified that B.W. stated "I believe her, Mom. He's done it to me my whole life." *Id.* That day, Ms. Wallgren left with her children, without telling Petitioner, and drove to Paris, Texas. *Id.* at 202-204. In hindsight, Ms. Wallgren testified that red flags existed which were indicative of sexual abuse. For example, once, in October 2010, Ms. Wallgren witnessed Petitioner leaving B.W.'s room in the middle of the night with his zipper undone. *Id.* at 208. After the events of July 2014, Ms. Wallgren testified to her daughters' behavioral changes—that B.W. "no longer wants to deal with anybody" and J.W. is "scared to death of men." *Id.* at 212-213.

On July 2, 2013, Ms. Wallgren took B.W. to a hospital in Paris, Texas in an attempt to "prove that [Petitioner] had done something to ... [her]." *Id.* at 205-206, 252. Ms. Wallgren stated that she was scared that if anyone found out about the allegations involving J.W., DHS would remove her from the home, because she was still legally a ward of the state. *Id.* at 206. B.W. also testified that she did not want to tell hospital officials that her father had raped her, but instead wanted to say that someone else had assaulted her. (Trial TR. Vol. III 452-455, 477). The following day, both children underwent physical examinations performed by a Sexual Assault Nurse Examiner. *Id.* at

306. These findings were documented in a "SANE" report for each child. *Id.* at 306-313; (O.R., Defendant's Exhibits 2 & 3—marked for identification purposes, but not admitted into evidence).

Paris, Texas Detective Chris Bean testified that the SANE report indicated that B.W. had reported vaginal penetration and oral copulation. *Id.* at 309-310. Detective Bean also testified that the SANE report for J.W. indicated that she been a victim of oral copulation. *Id.* at 313-314. Detective Bean also read a statement from J.W.'s SANE report which stated that she had said: "My daddy, he touched my butt with his wiener. He said don't tell nobody. He said he would whip me. He touched my mouth with his wiener. He tee-tee'd in my mouth. I spit it out. He said swallow next time." *Id.* at 317-318.

Subsequently, both B.W. and J.W. were interviewed by Ms. Peevy, at the Children's Advocacy Center in Paris, Texas. (Trial TR. Vol. III 382-383; 402-403). J.W.'s interview was entered into evidence as State's Exhibit 4, but B.W.'s interview was not entered into evidence. *See* Trial TR. Vol. III 355, 384-385. In J.W.'s interview, she stated:

- her dad had hurt her and had been "sexing" her;
- in her home and on the sailboat, Petitioner had taken her clothes off, taken his clothes off, and "got on [her]" and put his "wiener" in her "butt;"
- Petitioner would put "white stuff" from a bottle with a baby on it on his wiener and "it was cold" and one time he did not use the baby stuff and his wiener would not go in her butt.

(O.R., State's Exhibit 4).

At trial, J.W. testified that she went on the boat with her dad, but she did not like it because of something that he would do to her on the boat. *Id.* at 360-361. When given diagrams of a girl and boy, J.W. drew a circle around the buttocks of the girl and stated

that was the part of her body that hurt. (O.R., State's Exhibit 1; Trial TR. Vol. III 362). She then drew a circle around the penis of the boy diagram and stated that was the part of her dad's body that made her hurt. (O.R., State's Exhibit 2; Trial TR. Vol. III. 362). J.W. testified that the hurting happened lots of times. (Trial TR. Vol III 363-364, 369-370).

B.W. also testified about the events of July 1, 2013. According to B.W., she and her siblings were home alone with Petitioner and she observed Petitioner and J.W. go to the boat. *Id.* 414. At one point, J.W. came into the house, holding a soda, and stated that Petitioner had given it to her for helping him. *Id.* at 415. B.W. described J.W.'s demeanor as "off" and stated that she would not look B.W. in the eye. *Id.* at 415-416. B.W. kept asking J.W. what she did in the boat, and she finally told B.W. that "Dad sexted her." *Id.* at 416. B.W. testified that Petitioner had begun molesting her at age four, when he touched her vagina with his hand. *Id.* at 416-417. B.W. described another incident of molestation which occurred at night. She had been sleeping and was awakened by Petitioner touching her vagina with his hands, followed by an unsuccessful rape attempt. *Id.* at 419-420. Finally, B.W. testified that Petitioner had raped her during a trip to Galveston, in a hotel room. *Id.* at 420, 431-432.

Lt. VanDuser viewed the videotaped interviews of B.W. and J.W. and determined that probable cause existed to obtain an arrest warrant for Petitioner and a search warrant for his property where the alleged crime against J.W. had occurred. *Id.* at 504-507. As part of the search, a blanket and a sheet were taken from the sailboat and sent to the Oklahoma State Bureau of Investigation (OSBI) for testing. Trial Transcript, Vol.

IV, *State of Oklahoma v. Wallgren*, Case No. CF-2013-516 (Pott. Co. Okla. Sept. 12, 2014) 510 (Trial TR. Vol. IV). OSBI criminologist Antje Stambaugh testified that the blanket contained both epithelial skin cells and sperm and that the probability of the sperm belonging to anyone other than Petitioner was one in 3.44 quintillion. *Id.* at 590. Ms. Stambaugh also testified that although she could not find a "complete match" concerning the epithelial cells, the probability of the cells belonging to anyone other than J.W. was one in 33.2 thousand. *Id.* at 591.

In support of his claim that the evidence was insufficient to sustain the conviction, Petitioner presents three arguments, none of which have merit. First, Mr. Wallgren argues that the blanket containing the DNA evidence "was not at the scene of the crime at the time the state claims the crime occurred and was transferred to the sailboat and contaminated prior to the search and seizure." (ECF No. 49:75). In support of this claim, Petitioner cites testimony from Ms. Wallgren regarding the state of her home when she had returned from Texas. Ms. Wallgren testified that the girls' things had been destroyed and "food, silverware, [and] dishes[,] [e]verything [Petitioner] thought he needed to be on that boat was packed on the boat." (Trial TR. Vol. III 290). In response to a follow up question, Ms. Wallgren testified that those items had not been on the boat when she had fled the home. *Id.* Petitioner points to the follow up response as proof that the blanket containing the DNA evidence had not been on the boat when Ms. Wallgren left. (ECF No. 49:75-76). But Petitioner has misstated the evidence, as Ms. Wallgren never testified accordingly. Petitioner also cites testimony from his mother, Jaylene Wallgren, who had stated that at some point following the accusations, she had helped Petitioner pack the

boat with "sheets, blankets, [and] pillows." (Trial TR. Vol. IV 641). But Mrs. Wallgren did not testify that after July 1, 2013, she had packed the exact blanket seized and tested at the OSBI.

Second, Mr. Wallgren points to J.W.'s testimony from the preliminary hearing where she testified that she did not remember what happened to her in Oklahoma or why she went to Texas. (ECF No. 49:77). But J.W. provided detailed statements regarding the sexual abuse in her forensic interview, which was played for the jury.

Finally, Mr. Wallgren points to: (1) an alleged inconsistency in B.W.'s testimony regarding whether Petitioner and J.W. were in the boat together on July 1, 2013 and (2) the story that B.W. had initially conceived to tell the doctor in Paris, Texas, that she had been assaulted by a stranger, and not Petitioner. (ECF No. 49:78). Neither of these allegations are sufficient to undermine the conviction. First, as discussed, no conflict existed between B.W.'s testimony at the preliminary hearing and at trial. *See supra;* Preliminary Hearing TR. 40 (B.W.'s testimony that "[Petitioner] was out there [on the boat]."); (Trial TR. Vol. III 414) ("Dad and J.W. were in the boat."). Second, B.W. explained that she had concocted the "stranger rape" story because she was ashamed to tell the doctor that her father had raped her. But she eventually explained to the doctor, and at trial, that it was Petitioner who had raped her.

Viewing the forgoing evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable

doubt. Thus, the Court should conclude that the OCCA reasonably applied federal law when it rejected Petitioner's claim of insufficient evidence.[11]

X. GROUND 40

In his Application for Post-Conviction Relief and subsequent appeal, Petitioner raised numerous conclusory allegations, alleging ineffective assistance of appellate counsel. (ECF Nos. 53-6:97-101; 53-8:66-68.). The OCCA addressed these claims on the merits, stating:

> Examining Wallgren's claims of ineffective assistance of counsel, based on appellate counsel's failure to adequately raise these claims, and pursuant to this Court's decision in *Logan* and the *Strickland* standards stated above, we find Wallgren has failed to establish that appellate counsel's performance was deficient or objectively unreasonable and has failed to establish any resulting prejudice. To support his ineffective assistance of appellate counsel claim, Wallgren must show that appellate counsel would have prevailed on direct appeal had he argued trial counsel was deficient and that these enumerated errors resulted in prejudice. His claims as presented in this application for Post-Conviction relief do not support a finding that either trial or appellate counsel was ineffective. This Court has held that "merely conclusory, unprovable, or unspecified claims of ineffective assistance of appellate counsel do not raise an issue of material fact." Wallgren's ineffective assistance of trial and appellate counsel claims are without merit.

(ECF No. 53-11:6-7). In Ground 40, Petitioner has asserted the same "laundry list" of conclusory allegations against his appellate attorney that he had previously asserted in state court. *See* ECF No. 49:73-75. The Court should: (1) apply deference under the

[11] Although the OCCA did not cite *Jackson,* it ultimately concluded that ""[r]eviewing the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of the offenses beyond a reasonable doubt," (ECF No. 53-1:2), a formulation identical to *Jackson's.* "That the OCCA did not cite *Jackson* is of no moment; state courts need not refer to, or even be aware of, controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Matthews v. Workman*, 577 F.3d 1175, 1183, n.2 (10th Cir. 2009).

AEDPA, (2) conclude that the OCCA's determination was reasonable, and (3) deny habeas relief.

A. Clearly Established Law/Standard of Review

Ineffective assistance of counsel claims are reviewed under the framework laid out in *Strickland v. Washington*, 466 U.S. 668, (1984).[12] Under *Strickland*, a petitioner "must show both that his counsel's performance 'fell below an objective standard of reasonableness' and that 'the deficient performance prejudiced the defense.' " *Byrd v. Workman*, 645 F.3d 1159, 1167 (10th Cir. 2011) (emphasis omitted) (quoting *Strickland*, 466 U.S. at 687–688). A defendant can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. *Strickland*, 466 U.S. at 687-88. There is a "strong presumption that counsel's conduct falls within the range of reasonable professional assistance." *Id.* at 688. In making this determination, a court must "judge ... [a] counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. Moreover, review of counsel's performance must be highly deferential. "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689.

To establish the second prong, a defendant must show that counsel's deficient performance prejudiced the defense, to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

[12] The *Strickland* standard applies to both ineffective assistance of appellate counsel claims and ineffective assistance of trial counsel claims. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

been different." *Id.* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. The likelihood of a different result "must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. "These two prongs may be addressed in any order, and failure to satisfy either is dispositive." *Victor Hooks v. Workman*, 689 F.3d 1148, 1186 (10th Cir. 2012).

The burden on a habeas petitioner when pursuing an ineffective assistance of counsel claim is "particularly difficult." *Johnson v. Carpenter*, 918 F.3d 895, 900 (10th Cir. 2019). Utilizing deference under the AEDPA, a habeas petitioner is not entitled to relief on his claim of ineffective assistance of counsel unless he demonstrates that the OCCA's adjudication was contrary to, or an unreasonable application of, *Strickland v. Washington*, 466 U.S. 668 (1984). '[T]he standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.' " *Id.* at 900, (citing *Richter*, 562 U.S. at 105) (citations omitted). The habeas court's only task, then, is to determine "whether reasonable jurists could agree with the OCCA that [the attorney] acted reasonably." *Id.*

B. Habeas Relief is not Warranted

In support of this claim, Mr. Wallgren alleges the following examples of appellate counsel's alleged ineffectiveness:

1. failed to ... consult with [Petitioner] over the direct appeal and direct appeal interest as noted by Appellate Counsel's affidavit submitted *March 26, 2015* attached to extension of time. Counsel ignored Wallgren's ["6 page letter"] to raise all issues stated herein and chose to discuss the matter with trial counsel;

2. Failed to contact others whom was informing appellate counsel of various appealable violations[] as noted by numerous affidavits submitted on post conviction;

3. Failed to investigate the case, the appeal other issues appealable on direct appeal, cognizable on direct appeal;

4. failed to scrutinize the record for appealable grounds and related issues;

5. failed to recognize appealable grounds for relief from the record failing to raise the issues;

6. failure to know the law;

7. failure to adequately, research the law;

8. failure to recognize cognizable [dead bang winner] obvious grounds for direct appeal that was relievable;

9. failure to raise all pertinent claim, propositional grounds on direct appeal that is relievable, all propositions stated herein;

10. failure to know, realize or pick out plain error grounds for direct appeal relief;

11. failure to know or raise plain error or direct appeal grounds that was objected to in trial court proceedings;

12. filing a defective appeal the state agreed ... States [sic] response states [sic] counsel was woefully incompetent, violated OCCA rules had one witness confused for another;

13. failure to interview anyone over the direct appeal and related issues some individuals available at all times and from the record itself;

14. deficient performance on direct appeal;

15. Inadequate, insufficient performance on direct appeal;

16. Violations objected to on the record, on its face, plain error, reported cognizable but not raised on direct appeal that was appealable [examples of which include;] propositions stated herein; wife beater prior crimes, offenses, bad acts, reputation, arrest and the details stated herein as propositions; wife taking the stand against petitioner spousal privilege, prejudice, *supra;* Prosecutor standing behind Wallgren and pointing etc... as noted by counsel; verbally and physically abused other people; Date unspecified, no known date of the offense; Hearsay violations supra; He'll kill you etc.; Objection The court allowing a non-victim impact statement by Renee Wallgren; suicide attempt; Ineffective Counsel, *supra;* Prosecutorial mis-

conduct, *supra*; Judicial misconduct, *supra*; Juror violations *supra*; Denial of Defense *supra*; Wrongful exclusion of evidence *supra*; Suppression of evidence, tainted-contaminated evidence, DNA *supra*; Court failed to sequester the jury *supra* [Wait in the hallway 30 minutes]; Recantation supra; Examinations; went to school with my son [my dad shot] Bullying her; Always fighting with someone; Objections Denied Court made an individualized ruling preserving issue; Use of cell phones in court broadcasting trial ... photo of Wallgren taken during trial ... Cell phone on the stand used to receive trial proceedings before testimony [May I turn off my cell phone]; Facebook postings [suck my dick] Court sua sponte objected to DA and court Denied the impeachment supra Objection sustained move on past; [Stack] of other evidence not used Impeachments-Alibi; Beating his son Canyon [We'll be safe if he goes to prison] Canyon did not testify was not part of the case; DNA testing not enough to test not suitable, could not distinguish, [unknown contributors] DNA not at the scene at the time the state claims the crime occurred supra; Jurors going to sleep, dozing off, napping [yawns] noted; DA; 'He took [J.W.'s] life He took [B.W.'s] life you heard him testify he took both their lives Petitioner did not testify, burden shifting and wrongfully aligning cases; Juror [I also have the evidence] What evidence? *supra* Jurors allowed to deliberate with [documents] Det Vandusers report No. 2013 1078 page 7 names the [somebody] Wallgren supposedly [killed before]; Door Open over objection jury heard discussion over *Miranda* [Let's wait until the door shuts]; Ex-parte communication between the judge and DA as noted by the Court; The state has... or the court has...secondly, the state has apparently;

17. Outburst and disturbances Objected too incited by the DA ["I noticed you making eye contact may I ask why?] that carried over into the hallway in front of the jury as noted by state witness Renee Wallgren during sentencing [His uncle came at us in court] Bailiff not tending to jurors or witnesses as noted by the court;

18. Recommendations for gynecologist—Medical reports—with held by the state see SANE reports {last page of each report} Expert opinion and reports Actual Innocence, Renee Wallgren spoke of additional reports, and told Casey Graham that she took both girls to a Gynecologist in Oklahoma City; and

19. Appellate counsel failed to use Pre-Liminary hearing sentencing hearing Divorce hearing all testimonial and beneficial, exculpatory and offered impeachment. All five volumes of evidence here in to show the *OCCA* that the state victims impeachment, falsity, discrepancies, inconsistencies, confessions, subordination, recantation, evidence not at the scene SANE offers Alibi Date of 7-2-13[.] Many of the propositions jump off the page at just a causal reading of the record. Appellate counsel raised Ineffective counsel, such claims are presumptively dismissible and virtually all will be dismissed.

(ECF No. 49:73-75) (internal citations omitted). Finally, Mr. Wallgren states: "Petitioner attempted to communicate with counsel, appellate counsels [sic] response was a denial to come see petitioner in confidence, and to send petitioner information about ["food stamps in Arkansas"] that has nothing to do with this case[.] Counsel was directed to investigate Wallgren's alibi witnesses and information. Instead appellate counsel chose to lie to Wallgren's family and claim he had already filed the brief, which contradicts his own affidavits filed on *May 26, 2015* in which counsel discusses receiving a ["6 page letter"] from Wallgren in which petitioner raised all grounds stated herein." (ECF No. 49:75).

Although Petitioner provides various examples of ways in which he believes his appellate attorney rendered ineffective assistance, the vast majority of his allegations are conclusory and lack factual support. (ECF No. 49:73-75). In addition, Petitioner fails to argue how *any* of the alleged deficiencies had resulted in prejudice to him. (ECF No. 49:73-75). As a result, the Court should conclude that the OCCA's rejection of this claim was not contrary to, nor an unreasonable application of *Strickland*. *See Cummings v. Sirmons*, 506 F.3d 1211, 1234 (10th Cir. 2007) (Without a more precise identification of what ... [petitioner] is referring to, it is impossible to determine whether there is any merit to this argument. Thus, we conclude [petitioner] has failed to establish the existence of either *Strickland* prong with respect to this claim."); *Allen v. Mullin*, 368 F.3d 1220, 1235 (10th Cir. 2004) ("As to the ineffective assistance of appellate counsel claim, it has been inadequately briefed. We will therefore not consider it."); *Bradford v. Williams*, 479 F. App'x 832, 835 (10th Cir. 2012) (rejecting habeas petitioner's list of claims regarding

counsel's ineffectiveness in the absence of "few (if any) factual details" in support of the ineffectiveness claims and any explanation regarding how counsel's actions has allegedly been prejudicial); *Pavatt v. Trammell*, No. CIV-08-470-R, 2014 WL 1745019, at *54–55 (W.D. Okla. May 1, 2014), *aff'd in part, rev'd in part sub nom. Pavatt v. Royal*, 859 F.3d 920 (10th Cir. 2017), *opinion amended and superseded on denial of reh'g,* 894 F.3d 1115 (10th Cir. 2017), *opinion vacated on reh'g en banc sub nom. Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019), and *aff'd in part, rev'd in part sub nom. Pavatt v. Royal*, 894 F.3d 1115 (10th Cir. 2017), and *opinion vacated on reh'g en banc sub nom. Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019), and *aff'd sub nom. Pavatt v. Carpenter*, 928 F.3d 906 (10th Cir. 2019) (declining consideration of petitioner's "laundry list" of claims regarding appellate counsel's alleged ineffectiveness which included "vague references [such] as 'failed to raise the error in the admission of irrelevant evidence,' 'did not identify all the prosecutorial misconduct that there was,' 'failed to raise issues relating to evidentiary foundations of evidence,' and 'failed to conduct any investigation or interview any potential witnesses.' "). Habeas relief is not warranted on Ground 40.

XI. GROUND 29

In Ground 29, Mr. Wallgren complains of "[l]eg-monitor violations." (ECF No. 49:49-50). Specifically, Petitioner argues that he was prejudiced as a result of: (1) having to wear a "[leg-monitor with light] attached to a large black ankle-bracelet in full visibility to the jury"; (2) which had to be re-charged "during breaks and recess in front of the un-sequestered jury in the court house hallway;" (3) without the requisite pre-trial hearing under *Sanchez-Gomez*. (ECF No. 49:49) (alterations in original). Petitioner alleges that

the aforementioned conditions "robbed [him] of his cloak of innocence[,] made him, nervous, appear guilty and appear to be dangerous." (ECF No. 49:49) (alterations in original). In his Application for Post-Conviction Relief, Mr. Wallgren asserted this claim as Proposition 29, wherein he refers to the ankle monitor as "prison garb." *See* ECF No. 53-6:66 ("Petitioner was forced to be tried in [Prison Garb] which equates an [Ankle monitor bracelet] with an [alarm] and flashing light, which would [go off] during the trial and proceedings."). The Pottawatomie County District Court rejected this claim on the merits, stating: "As for proposition number 29 there is no record made of the petitioner ever appearing in prison garb before the jury." (ECF No. 53-7:2). The OCCA referenced the district court's findings and agreed, denying the claim on the merits. (ECF No. 53-11:5).

An initial issue concerns the definition of "prison garb." Mr. Wallgren specifically equated "prison garb" with his ankle monitor and *not* a prison uniform, as the term might suggest. Here, the record reflects that Mr. Wallgren was required to wear an ankle monitor as a condition of his bond, and was presumably wearing it during the trial. (O.R. 20-21). Thus, under Petitioner's definition of "prison garb," the state court's findings on this issue would appear to be inaccurate—the state court found that Petitioner was not required to appear before the jury in "prison garb," but the record suggests that Petitioner was required to wear the ankle monitor during trial.

"It is clear that, where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable." *Byrd v. Workman*, 645

F.3d 1159, 1171–72 (10th Cir. 2011) (citation omitted). However, because "Section 2254(d)(2) ... is a daunting standard... an unreasonable determination of the facts does not, itself, necessitate relief." *Id.* at 1172. Rather, in order to receive relief under this clause, the petitioner must show that the state court's adjudication of the claim "resulted in a decision that was *based on* an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2) (emphasis added).

Mr. Wallgren's claim under § 2254(d)(2) ultimately fails because he cannot show that the OCCA's "decision"—i.e., the overall determination of the court—was "based on" an unreasonable determination of the facts. Even if the Court assumes that the OCCA's ruling concerning the "prison garb" claim arguably relied on an unreasonable determination of certain facts (e.g., whether Petitioner appeared in "prison garb" before the jury as that term is defined by Petitioner) that would not end the Court's inquiry. The Court must "review the OCCA's *decision* and not its reasoning." *Id.* at 1172 (citations omitted); *see also Saiz v. Ortiz,* 392 F.3d 1166, 1176 (10th Cir. 2004) ("[W]e focus on the *result* of the state court decision, not its reasoning." (emphasis added)). Here, the state court rejected Mr. Wallgren's allegations that the "leg monitor violations" had resulted in prejudice. (ECF Nos. 53-7 & 53-11). Under *Byrd,* the Court should examine this issue *de novo. See Byrd,* at 1172. For three reasons, the Court should deny habeas relief on Ground 29.

First, Mr. Wallgren offers little more than speculation regarding the purported prejudicial effect of the leg monitor on his conviction, and it is well-established that such speculation alone cannot give rise to a "reasonable probability" that the outcome of the

trial would have been different. *See, e.g., Hale v. Gibson,* 227 F.3d 1298, 1325 (10th Cir. 2000) ("Mere speculation that the jury might have returned a lesser prison sentence ... is not sufficient to show prejudice."); *United States v. Boone,* 62 F.3d 323, 327 (10th Cir. 1995). ("[A]ll that the Defendant urges is speculation, ... [and] [a]ccordingly, he cannot establish prejudice.").

Second, "[e]ven assuming the ankle monitor was worn during trial and was visible to the jury, [Mr. Wallgren] has not identified any Supreme Court holding expressly extending the general prohibition on restraining a criminal defendant with visible shackles to the factual situation presented here." *Higgins v. Addison*, 395 F. App'x 516, 519 (10th Cir. 2010); *see House v. Hatch,* 527 F.3d 1010, 1017 (10th Cir. 2008) ("[T]he threshold determination that there is no clearly established federal law is analytically dispositive in the § 2254(d)(1) analysis."). In support of his claim, Mr. Wallgren relies on *Estelle v. Williams*, 425 U.S. 501 (1976); *Illinois v. Allen*, 397 U.S. 337 (1970); and *Sheppard v. Maxwell*, 384 U.S. 333 (1966). (ECF No. 49:50). But none of these cases are applicable here.

In *Estelle*, the issue concerned a habeas petitioner's challenge to having to stand trial while wearing a prison issue uniform. *Estelle*, at 502-503. Here, however, Mr. Wallgren specifically equated "prison garb" with his ankle monitor and *not* a prison uniform. Thus, Petitioner's reliance on *Estelle* is misplaced. In *Allen*, the issue concerned a habeas petitioner's removal from the courtroom during trial due to his disruptive conduct—which did not occur this case. Finally, in *Sheppard*, the issue concerned an alleged violation of Due Process owing to the influence of pretrial publicity—an issue also

not present in the instant case or alleged by Mr. Wallgren. In the absence of controlling Supreme Court precedent, Petitioner is not entitled to habeas relief.

Third, there was overwhelming evidence of Mr. Wallgren's guilt presented at trial. *See supra*. It is more likely that this evidence is what lead to the jury's impression of Petitioner, not the presence of the ankle monitor. *See Maybin v. McKune*, No. 01-3459-DES, 2002 WL 1162440, at *7 (D. Kan. May 28, 2002) (concluding that any error associated with petitioner's claim that presence of leg restraint prejudice him in the eyes of the jury was harmless in light of overwhelming evidence of petitioner's guilt). In light of the forgoing, the Court should deny habeas relief on Ground 29.

XII. GROUNDS 31 & 32

In Ground 31, Petitioner alleges that his ex-wife's family used their cell phones to "allow witness Renee and [B.W.] to align each others testimony and refute defense counsel claims[.]" (ECF No. 49:51). In support, Petitioner points to: (1) a Facebook photo which showed Ms. Wallgren's brother with a cell phone in his pocket; (2) the fact that B.W. asked the trial judge if she could turn her cell phone off during her testimony; and (3) a statement from the judge in the Wallgrens' divorce trial that "some ones cell-phone is on." (ECF Nos. 1:6; 49:51). In Ground 32, Petitioner alleges that his ex-wife's family "were allowed to use cell phone to broadcast trial proceedings" and coach the child witnesses. (ECF Nos. 1:6; 49:32-33). In post-conviction proceedings, the Pottawatomie County District Court denied these claims, stating: "the allegation of cell phone and coaching on the witness stand ... is not supported by any record and is patently frivolous."

(ECF No. 53-7:2).[13] The OCCA affirmed the district court, stating: "There was no evidence supporting Wallgren's allegation of cell phone use in the courtroom during trial and coaching of witnesses from the gallery." (ECF No. 53-11:5). The Court should presume the correctness of the state court's factual findings regarding the alleged cell phone use and coaching. See *Davis v. Ayala*, 135 S. Ct. 2187, 2199-2200 (2015). Mr. Wallgren can only rebut this presumption with clear and convincing evidence. *See id.* at 2199-2200; *see also* 28 U.S.C. § 2254(e)(1). Here, the "evidence" on which Petitioner relies is neither clear nor convincing. Habeas relief on Grounds 31 & 32 is not warranted.

XIII. GROUND 34

In Ground 34, Petitioner complains that he was prejudiced due to the size of the courtroom where he was tried. (ECF Nos. 1:7; 49:52-53). The OCCA found no merit to this claim,[14] and the Court should conclude that this determination was reasonable.

Mr. Wallgren asserts three challenges to the courtroom size: (1) the courtroom's small size "alienated" the jury because they had to be sent into the hallway during every defense objection; (2) the jury overheard a discussion regarding Petitioner's right to remain silent; and (3) Petitioner was seated in such a way that he was "forced to face the jury." (ECF No. 49:52-53). None of these allegations rise to the level of a constitutional violation.

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[13] Even though the district court referred to this claim "proposition number 31," *see* ECF No. 53-7:2, the allegations the court addressed spanned two propositions—numbers 31 and 32. *See* ECF No. 53-6:68-70.

[14] (ECF No. 53-11:5).

First, the example Petitioner provides regarding the alleged "alienation" is when the Court asked the jury to step into the hallway while the parties discussed the cross-examination of B.W. *See* ECF No. 49:52; (Trial TR. Vol. III 495). But Mr. Wallgren does not argue how the jury having to leave the courtroom had prejudiced him.

Second, Petitioner alleges that the jury overheard a "discussion of Wallgren exercising his right to remain silent." (ECF No. 49:52). Specifically, Petitioner points to a statement from the court to the parties to "wait until the door shuts" to continue a discussion which had begun after the jury was instructed to leave the courtroom. (ECF No. 49:52). But Petitioner does not point to anything in the discussion which might have been prejudicial to him and the record reflects that when the discussion began, the jury had already exited the courtroom. (Trial TR. Vol. III 513).

Third, Petitioner states that the courtroom where he was tried "was strategically used to co[nfront] the witnesses and prejudice the defendant because all other courtrooms in the Pottawatomie County courthouse do not have the defendant facing the jury[,] only courtroom 2." (ECF No. 49:53). But Petitioner does not argue how his proximity to the jury in "courtroom 2" had prejudiced him.

Simply put, Mr. Wallgren has failed to develop this argument. He alleges "prejudice" owing to the size of the courtroom, but without any supporting argument regarding how he was allegedly prejudiced, Petitioner's conclusory assertions fail to demonstrate his entitlement to habeas relief on this claim. *See Humphreys v. Gibson,* 261 F.3d 1016, 1022 n. 2 (10th Cir. 2001) (rejecting habeas allegations because they were "conclusory" (citation omitted)); *see also United States v. Blanca–Leon,* 317 F. App'x 836,

838 (10th Cir. 2009) ("Conclusory assertions are insufficient to establish ineffective assistance of counsel.") (citation omitted). Habeas relief is not warranted on Ground 34.

XIV. GROUND 42

In Ground 42, Petitioner alleges "The conviction improperly rest[s] upon suspicion, guesswork, sympathy, speculation and compassion which can not sustain the conviction with an emphasis placed upon sex offenses." (ECF No. 49:79). The OCCA found no that no plain error existed with respect to this claim. (ECF No. 53-11:5). This Court should find the OCCA's determination reasonable.

In support of Ground 42, Mr. Wallgren presents five instances of "suspicion, guesswork, sympathy, speculation and compassion" which he believes undermined his conviction.

First, Petitioner alleges that "The Date of the alleged offense is unstable and untrustworthy and no actual Date, too remote in time to even pinpoint an accurate date for a defense." (ECF No. 49:79). A liberal reading of the entire petition reveals that Mr. Wallgren's argument is focused on the fact that the Amended Information, the charging document in this case, did not pinpoint a specific date of abuse as to each victim, but instead provided a range of dates when the abuse could have occurred.

Petitioner correctly asserts that the Amended Information only provided a range of dates as to the alleged abuse of both victims. As to B.W., the Amended Information alleged the abuse to have occurred between January 1, 2004 and August 1, 2012. (O.R. 34). And as to J.W., the Amended Information alleged the abuse to have occurred between July 5, 2010 and September 6, 2010. *Id.* But in *Hamling v. United States*, 418

U.S. 87, 117 (1974), the United States Supreme Court explained that "[a] charging instrument is sufficient if it sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense." Here, the Amended Information complied with *Hamling*, and Petitioner's challenge regarding the same does not entitle him to relief.

For the remaining allegations involving "suspicion, guesswork, sympathy, speculation and compassion," Petitioner states:

1. "DNA does not match in part, is unknown in part, not enough to test in part, not at scene of crime in part;"

2. "Victims answers to specific events are 'I don't know or 'I forgot' 'I can't remember;' "

3. "The alleged cannot remember details, specifications of the events [forgot] much of the violations, specifics, incidents, surmization [sic], guessing, speculation cannot sustain the conviction especially a sex offense, Inconsistencies, non-truthfulness, recantation, delays un-trustworthiness;" and

4. "State documents demonstrate the states confusion, speculation witness claims are of offenses for either the beginning or the end of the abuse span over 2 years for age of offense."

(ECF No. 49:79). The Court should conclude that these arguments are conclusory and incoherent, as Petitioner has failed to provide any specific factual support for these claims. Accordingly, the Court should deny habeas relief on Ground 42. *See McGinnis v. Wyoming*, 407 F. App'x 303, 304 (10th Cir. 2011) ("in the context of [petitioner's] rambling and often incoherent pleadings, we emphasize that [d]espite the liberal construction afforded pro se pleadings, the court will not construct arguments or theories

for the plaintiff in the absence of any discussion of those issues.") (citation omitted); *Thomas v. Patton*, No. CIV-13-578-F, 2015 WL 2131228, at *26 (W.D. Okla. May 6, 2015) (finding that petitioner's "incoherent references" and "bare conclusory allegations" were insufficient to warrant habeas relief).

XV. CUMULATIVE ERROR

In Grounds 48 and 49, Petitioner raises cumulative error based on alleged errors in Grounds 1-47. (ECF Nos. 1:9; 49:87). The OCCA rejected this claim on the merits. (ECF No. 53-11:5). The Court should conclude that this determination was not contrary to, nor involved an unreasonable application of, Supreme Court precedent.

"In the federal habeas context, the only otherwise harmless errors that can be aggregated are federal constitutional errors, and such errors will suffice to permit relief under cumulative error doctrine only when the constitutional errors committed in the state court trial so fatally infected the trial that they violated the trial's fundamental fairness." *Littlejohn v. Trammell*, 704 F.3d 817, 868 (10th Cir. 2013) (internal quotation marks omitted). As that language suggests, "[c]umulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors." *Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998); *accord Ellis v. Raemisch*, 872 F.3d 1064, 1090 (10th Cir. 2017); *cf. Cargle v. Mullin*, 317 F.3d 1196, 1206-07 (10th Cir. 2003) (noting that a cumulative-error analysis performed when there has been no adjudication on the merits of the cumulative-error claim "aggregates all errors found to be harmless," including with respect to claims that "have been individually denied for insufficient prejudice" (internal quotation marks omitted)).

The Tenth Circuit has recognized that a circuit split exists regarding whether the cumulative-error inquiry is considered "clearly established" federal law under 28 U.S.C. § 2254(d)(1). *See Cole*, 755 F.3d at 1177 n.14. The Tenth Circuit also has stated that its precedent "may very well signal where our court has come down on the issue—*viz.*, that cumulative-error analysis is clearly established law." *Id.* (internal quotation marks omitted); *cf. Hanson*, 797 F.3d at 852 ("Because the OCCA considered the merits of the cumulative error claim, we review its decision through the deferential lens of AEDPA."); *Bland v. Sirmons*, 459 F.3d 999, 1029 (10th Cir. 2006) ("Because the OCCA concluded that the cumulative errors did not deprive [the defendant] of a fair trial, we must defer to its ruling unless it constitutes an unreasonable application of the cumulative-error doctrine.").

Pursuant to *Cole*, the Court should conclude that the OCCA's decision rejecting Petitioner's cumulative-error claim was not unreasonable or contrary to clearly established federal law. Having demonstrated no constitutional error, Petitioner lacks "two or more actual errors" to accumulate, and Petitioner cannot show a violation of fundamental fairness under § 2254(d) (or otherwise). *Moore*, 153 F.3d at 1113; *see Littlejohn*, 704 F.3d at 868. Thus, habeas relief on Grounds 48 and 49 is not warranted.

XVI. GROUND 50

In Ground 50, Petitioner alleges: "Petitioner request[s] of the Court plain error review and relief." (ECF Nos. 1:9; 49:88). In support of this claim, Mr. Wallgren states: "Each ground individually and jointly, demanding a New Trial due to the same." (ECF No. 49:88). Ground 50 does not allege a violation of the Constitution and the Court should

deny habeas relief on the same. *See* 28 U.S.C. § 2254(a). (stating that a district court may only consider a habeas petition when the petitioner argues that he is "in custody in violation of the Constitution or laws or treaties of the United States.").

XVII. PETITIONER'S MOTION FOR AN EVIDENTIARY HEARING

Petitioner has filed a Motion for Evidentiary Hearing. (ECF No. 70). However, the Supreme Court has clarified that "evidence introduced in federal court has no bearing on a § 2254(d)(1) review." *Cullen v. Pinholster*, 563 U.S. 170, 184-85 (2011). So, "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id.* at 185. As discussed, the OCCA adjudicated Petitioner's claims raised in Grounds 18, 23, 24, 31, 32, 34, 36, 40, 41, 42, 48-50, *see supra*, and this Court's review is thus limited to determining whether the state court's adjudication was reasonable under § 2254(d)(1).

As illustrated above, Petitioner has not overcome § 2254(d)(1)'s deference, so the undersigned recommends that the Court deny Petitioner's request for an evidentiary hearing for those claims. *See Sanchez v. Wyoming*, 577 F. App'x 883, 885 (10th Cir. 2014).

For the claims in Grounds 1-17, 19-22, 25-28, 29, 30, 33, 35, 37-39, 43, and 46, that the OCCA did not review on the merits, Petitioner is only entitled to an evidentiary hearing by " '(1) showing he was diligent in developing the factual basis for his claim in state court ...; and (2) asserting a factual basis that, if true, would entitle him to habeas relief.' " *Hanson v. Sherrod*, 797 F.3d 810, 836 (10th Cir. 2015) (*citing Boyle v. McKune*,

544 F.3d 1132, 1135 (10th Cir. 2008)). "Consistent with that standard, 'an evidentiary hearing is unnecessary if the claim can be resolved on the record.' " *Boyle*, 544 F.3d at 1136 (citation omitted).

Here, Petitioner did request an evidentiary hearing in state court on these claims. *See* ECF No. 53-11. However, because the claims are procedurally defaulted, the Court should deny Petitioner's request for an evidentiary hearing. *See Thacker v. Workman*, 678 F.3d 820, 836 (10th Cir. 2012) ("Because, however, [petitioner's] [habeas] claim is procedurally barred, the district court did not err in failing to conduct an evidentiary hearing.").

XVIII. PETITIONER'S MOTION FOR APPOINTMENT OF COUNSEL

Mr. Wallgren has filed a Motion for Appointment of Counsel. (ECF No. 71). The Court should deny the Motion.

There is no constitutional right to counsel in a habeas corpus proceeding. *Swazo v. Wyoming Dept. of Corrections State Penitentiary Warden*, 23 F.3d 332, 333 (10th Cir. 1994). Rather, appointment of counsel in habeas corpus proceedings is generally left to the discretion of the trial court. *Id.*

The Court has considered the factors and circumstances of Plaintiff's case bearing on the need for counsel. Here, Petitioner argues for appointment of counsel because:

1. He is a layman with no legal experience;
2. He has limited access to a law library;
3. The issues in his case are "complicated and difficult;"
4. The facility is often on lockdown;

5. He has "absolutely no understanding of how to conduct ... a hearing;"
6. Investigations are necessary to substantiate his actual innocence;
7. Witnesses exist that should have been called at trial;
8. "Production of evidence;"
9. Witnesses need to be interviewed to establish his alibi;
10. "Communications;"
11. "Testing, scientific evidence, evidence gathering, scientific investigations;"
12. "Examinations;"
13. His incarceration restricts him from filing timely briefs; and
14. "Expert issues."

(ECF No. 71:1-2).

Through his numerous and loquacious filings, Mr. Wallgren has demonstrated a more than adequate ability to litigate his own case. *See* ECF Nos. 1, 9, 11, 17, 18, 19, 21, 22, 23, 29, 30, 32, 35, 36, 40, 42, 43, 49, 50, 57, 59, 60, 61, 66, 67, 69, 70, 71, 72, 73, 74. He alleges that incarceration has prevented him from filing timely briefs, but Mr. Wallgren has never been penalized for a late filing and has been given numerous extensions of time, when requested and when warranted. *See* ECF Nos. 65 & 68. Furthermore, many of his listed "rationales" for seeking counsel are not self-evident—i.e.—"examinations," "communications," "testing, scientific evidence, evidence gathering, scientific investigations;" "expert issues;" and "production of evidence." Accordingly, the Court should deny Plaintiff's Motion for Appointment of Counsel.

XIX. RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

It is recommended that the Court: (1) dismiss Grounds 44, 45, and 47, (2) deny the remainder of the Petition, (3) deny the Motion for Evidentiary Hearing, and (4) deny the Motion for Counsel.

The parties are advised of their right to file an objection to this Report and Recommendation with the Clerk of this Court by **March 30, 2020**, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The parties are further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

STATUS OF REFERRAL

This Report and Recommendation terminates the referral by the District Judge in this matter.

ENTERED on March 12, 2020.

Shon T. Erwin

SHON T. ERWIN
UNITED STATES MAGISTRATE JUDGE

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