UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3428

Jason Wayne Oien

Petitioner - Appellant

v.

Chad Pringle, Warden

Respondent - Appellee

Appeal from U.S. District Court for the District of North Dakota - Eastern
(3:18-cv-00197-PDW)

JUDGMENT

Before GRUENDER, KELLY, and GRASZ, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The motion to proceed in forma pauperis is denied as moot. The appeal is dismissed.

April 05, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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Appeal from U.S. District Court for the District of North Dakota - Eastern
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ORDER

The petition for rehearing by the panel is denied.

December 01, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Jason Wayne Oien, Petitioner, vs. Chad Pringle, Warden, Respondent.	)	Case No. 3:18-cv-197 **REPORT AND RECOMMENDATION**

Jason Wayne Oien petitioned for habeas relief under 28 U.S.C. § 2254, asserting six grounds for relief, with some grounds including multiple claims. (Doc. 2). Only one of Oien's claims has been properly exhausted in the state courts. All other claims are procedurally defaulted. As described below, the procedural history of Oien's federal habeas petition is rather extensive, as is the history of the underlying state court proceedings.

Procedural History

After conducting a preliminary review of Oien's petition, this court recommended that ground three—Oien's assertion of a right to indictment by a grand jury—be dismissed, (Doc. 9), and a district judge adopted the recommendation and dismissed ground three, (Doc. 12). This court then ordered the petition served on respondent, and respondent moved to dismiss the remaining grounds in the petition. (Doc. 14). Oien responded to the motion to dismiss and filed supplements to his response. (Doc. 16; Doc. 17; Doc. 18; Doc. 19).

Subsequently, this court ordered that various documents—the petition, Oien's response to respondent's motion to dismiss, and supplements to the response—be

deemed, collectively, as Oien's habeas petition. (Doc. 20). Because of lack of clarity, this court ordered respondent to supplement his motion to dismiss and gave Oien an opportunity to respond to that supplement. Id. Respondent filed an amended motion to dismiss, (Doc. 25), and Oien responded to the amended motion, (Doc. 28).

Respondent's amended motion to dismiss noted Oien had filed a second state post-conviction relief application, (Doc. 27-2), and that application included some of the same grounds for relief Oien raised in his federal habeas petition. In response, Oien acknowledged he had filed a second state post-conviction relief application and requested a stay of his federal habeas case while the state application remained pending. (Doc. 28, pp. 1, 4). This court ordered the case stayed pending resolution of Oien's second state post-conviction relief application. (Doc. 30).

After the North Dakota Supreme Court summarily affirmed the state district court's order denying Oien's second state post-conviction relief application, this court lifted the stay and set deadlines for the parties to submit additional briefing. (Doc. 33). Thereafter, Oien twice moved to stay the case, stating his intent to file a third state post-conviction relief application. (Doc. 34; Doc. 39). This court denied the request for another stay. (Doc. 37; Doc. 41). Both parties have now filed their supplemental briefing. (Doc. 38; Doc. 42; Doc. 44).

Summary of Recommendation

To the extent Oien asserts violations of state law entitle him to federal habeas relief or asserts claims for relief in submissions that have not been deemed part of his federal habeas petition, those claims should be dismissed.

Oien properly exhausted only one claim—alleging trial counsel was ineffective because they coerced him to plead guilty. Considering the merits of that claim, the district judge should conclude the state court's denial of that claim was reasonable and that Oien is therefore not entitled to habeas relief on that claim.

All of Oien's other claims are procedurally defaulted. Because Oien has demonstrated neither cause and prejudice for the default nor that a miscarriage of justice would result if the court did not consider the defaulted claims, those claims should also be dismissed. Respondent's motion to dismiss should be granted, and Oien's habeas petition should be dismissed.

Factual Background

This court's June 4, 2019 order described the relevant factual background:

> After an early morning fight outside a Fargo, North Dakota bar resulted in the death of one individual and injury to two others, an Amended Information charged Oien with murder and three counts of conspiracy to commit aggravated assault.[1] State v. Oien, Cass County Case No. 09-2015-CR-01669, Index #1. Three alleged co-conspirators were charged in separate cases.
>
> On the day Oien's jury trial was scheduled to begin, one of his trial attorneys, Rhiannon Gorham,[2] advised the court that the parties had "quite literally at the eleventh hour reached an agreement" and were "prepared to do a change of plea." (Doc. 13-4, p. 2). The prosecutor stated that, as part of the agreement, a Third Amended Information would be filed in which the

[1] An Information originally charged Oien with three counts of conspiracy to commit aggravated assault. State v. Oien, Cass County Case No. 09-2015-CR-01669, Index #9. After one of the victims died, the Amended Information was filed. A Second Amended Information appears to have added a reference to a subsection of a statute but did not otherwise alter the charges. Id. at Index #184.

[2] In addition to Rhiannon Gorham, Attorney Jessica Ahrendt represented Oien. Prior to their representation, Oien was represented by other counsel for whom Gorham and Ahrendt substituted because of a conflict of interest of previous counsel. (Doc. 13-13, pp. 4-5).

murder charge would be amended to manslaughter and one count of conspiracy to commit aggravated assault—Count 2—would be dismissed. Id. at 2-3. The prosecutor also stated, "[T]here'll be an agreement on the habitual offender so that will double the cap on sentencing."[3] Id. at 3. Gorham responded, "[W]e understood that we would discuss habitual offender at sentencing. We understand the State's position on that. The substance of the agreement, yes, we did agree to." Id.

The court then advised Oien of the nature of Count 1 of the Third Amended Information—the manslaughter charge—and Oien entered a guilty plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970). The court then advised Oien of the nature of Count 3—a conspiracy to commit aggravated assault charge—but Oien did not respond. Id. at 5. Gorham then asked for a recess, and about [thirty] minutes later, the hearing resumed. Id. at 6.[4] The court advised Oien of the rights he would be giving up by pleading guilty and the nature of the charges in Counts 3 and 4, and Oien pleaded guilty to those counts of conspiracy to commit aggravated assault pursuant to Alford. Id. at 6-8.

At the sentencing hearing, the court found Oien to be a habitual offender and therefore enhanced the sentences. (Doc. 13-6, p. 28). The court sentenced Oien to fifteen years of imprisonment on the [manslaughter] conviction and ten years of imprisonment on each of the conspiracy to commit aggravated assault convictions, with all sentences to be served concurrently. (Doc. 13-5).

Oien appealed the criminal judgment, his court-appointed appellate counsel moved to dismiss the appeal, and the North Dakota Supreme Court granted that motion. (Doc. 13-8). Oien also filed a Rule 35 motion for reduction of sentence, and the district court denied that motion. Oien appealed the order denying his Rule 35 motion, and the North Dakota Supreme Court dismissed that appeal, stating, "An order denying a request for reduction of sentence under [Rule 35] is not appealable." (Doc. 13-9).

Oien then filed an application for post-conviction relief, in which he raised numerous grounds for relief. (See Doc. 13-11). In its answer, the State appears to have misconstrued Oien's application as asserting only ineffective

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[3] Under certain circumstances, North Dakota's habitual offender statute provides an individual who has two previous felony convictions may be sentenced to an extended term of imprisonment upon a third felony conviction. See N.D. Cent. Code § 12.1-32-09(1)(c).

[4] The record shows a recess taken at 8:50 a.m. and the court having gone back on the record at 9:19 a.m. (Doc. 13-4, p. 6).

> assistance of trial counsel. (See Doc. 13-12). After an evidentiary hearing at which Oien's trial counsel Gorham and Ahrendt testified, (Doc. 13-13), the state court denied Oien's application, addressing only Oien's ineffective assistance of counsel claim and finding "the assistance of trial counsel was neither ineffective nor defective to warrant a new trial," (Doc. 13-14). Oien appealed the state court's order, contending his "attorneys talked and convinced him into agreeing to an Alford Hearing and not going to trial." (Doc. 13-16, p. 9). The North Dakota Supreme Court summarily affirmed the order denying Oien post-conviction relief. (Doc. 13-18).

(Doc. 20, pp. 2-4) (footnotes altered).

Oien's second state post-conviction relief application raised many of the same claims raised in his first application and in his federal habeas petition. (See Doc. 27-2). The State asserted Oien's second application was barred by res judicata and misuse of process under North Dakota Century Code section 29-32.1-12 and was untimely under North Dakota Century Code section 29-32.1-01(2). (Doc. 38-1). The state court appointed counsel to represent Oien, and counsel filed an amended application. In the amended application, Oien alleged (1) trial counsel did not advise him of the habitual offender statute and the possibility of a sentencing enhancement; (2) trial counsel assured Oien he would serve only an eight-year prison sentence if he pleaded guilty; (3) at the time of the change of plea hearing, Oien was taking six prescription medications, which affected his ability to understand, and the court did not ensure Oien was not influenced by those medications at the hearing; and (4) the court did not advise Oien of the minimum and maximum penalties or the ramifications of the habitual offender statute during the change of plea hearing. (See Doc. 38-2, pp. 1-2). Oien contended "he did not knowingly and intelligently enter a guilty plea" and "only did so do to ineffective counsel." Id. at 2.

The state court held a hearing on Oien's second application and denied that application, stating it "previously ruled on this matter and there [was] nothing of substance causing [the court] to change that."[5] (Doc. 38-3, p. 50). The court determined Oien's second application was barred by North Dakota Century Code section 29-32.1-01(2), which generally requires an application for post-conviction relief be filed within two years of a conviction becoming final. Id. Subsequent to the hearing, the court entered an order consistent with its statements on the record. See Oien v. State, No. 09-2019-CV-02175, Index #30 (Cass Cnty. Jan. 28, 2020).

Oien appealed the order denying his second state post-conviction relief application. The North Dakota Supreme Court summarily affirmed the order:

> The court did not err in dismissing Oien's petition barred by misuse of process under N.D.C.C. § 29-32.1-12(2)(a). "Post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues, and defendants who inexcusably fail to raise all of their claims in a single post-conviction proceeding misuse the post-conviction process by initiating a subsequent application raising issues that could have been raised in the earlier proceeding." State v. Atkins, 2019 ND 145, ¶ 12, 928 N.W.2d 441 (quoting Steen v. State, 2007 ND 123, ¶ 13, 736 N.W.2d 457).

Oien v. State, 945 N.W.2d 249 (N.D. 2020) (per curiam).

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[5] In denying Oien's first application, the state court made a factual finding that "Oien pled guilty voluntarily" but described only one claim—ineffective assistance of trial counsel. (Doc. 13-14, pp. 1, 3). Aside from jurisdiction being proper and Oien having the burden of establishing a basis for relief, the only conclusions of law were "the assistance of trial counsel was neither ineffective nor defective to warrant a new trial. The assistance of counsel was not ineffective and did not fall below an objective standard of reasonableness and it did not prejudice [Oien]." Id. at 3-4. That order did not address whether Oien might have been influenced by prescription medications, whether the court inquired about any effects of medications during his change of plea hearing, whether the court properly informed Oien of the relevant penalties, or whether Oien's pleas were knowingly and intelligently entered. See id. at 1-4.

Law and Discussion

Habeas petitions are governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). Under the AEDPA, procedural requirements must be met before a federal court can consider a petitioner's claims on the merits—the claims must be timely[6] and must be properly exhausted before the state courts.[7] Exhaustion of state remedies includes invoking "one complete round" of the state appellate review process as to each claim. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999).

"To satisfy the exhaustion requirement, [a petitioner] must show that he either made a fair presentation of his claims to the state courts or that he has no other presently available state remedies to pursue."[8] Gentry v. Lansdown, 175 F.3d 1082, 1083 (8th Cir. 1999); see also Dixon v. Dormire, 263 F.3d 774, 777 (8th Cir. 2001) (emphasizing that the exhaustion doctrine "turns on an inquiry into what procedures are 'available' under the state law") (quoting O'Sullivan, 526 U.S. at 847). "In habeas, state-court remedies are described as having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability." Woodford v. Ngo, 548 U.S. 81, 92-93 (2006). If a petitioner failed to raise any claims before the state courts in accordance with state procedural requirements and those claims are consequently

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[6] Respondent concedes all of Oien's claims for habeas relief are timely under the AEDPA.

[7] Lack of timeliness and failure to exhaust are affirmative defenses that a respondent generally must assert. Day v. McDonough, 547 U.S. 198, 208 (2006).

[8] Before seeking federal habeas relief, a petitioner must "fairly present" his federal habeas claim to the state courts. Turnage v. Fabian, 606 F.3d 933, 936 (8th Cir. 2010). "To 'fairly present' his claim, the petitioner must [have] present[ed] the same facts and legal theories to the state court that he later presented to the federal courts." Jones v. Jerrison, 20 F.3d 849, 854 (8th Cir. 1994).

barred from state court review, those claims are considered "technically exhausted" rather than unexhausted. Id. at 93.

A petitioner is not automatically entitled to litigate technically exhausted claims in federal court. Id. Rather, if procedural default is raised as an affirmative defense to technical exhaustion, that may bar a technically exhausted claim from federal court review. See Gray v. Netherland, 518 U.S. 152, 162 (1996) (stating a procedural default "provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim"). A federal court cannot review the merits of any procedurally defaulted claim unless the petitioner demonstrates cause and prejudice for the default or demonstrates that a miscarriage of justice would result if the court did not address the merits of a procedurally defaulted claim. McCall v. Benson, 114 F.3d 754, 757 (8th Cir. 1997).

As to claims that were properly exhausted before the state courts, federal habeas relief may not be granted unless a state court's decision was contrary to or an unreasonable application of federal law, or unless the decision was an unreasonable determination of the facts in light of the evidence presented in the state courts. 28 U.S.C. § 2254(d). The Supreme Court has stated that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." Harrington v. Richter, 562 U.S. 86, 102 (2011). The Court further stated, "If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state court proceedings." Id.

1. Petitioner's Asserted Grounds For Relief and Respondent's Affirmative Defenses

A. Ground One

In his first ground, Oien "question[s]" whether the prosecution withheld or tampered with video footage that might have been favorable to his defense. (Doc. 2, p. 2); (see also Doc. 19, pp. 2, 4; Doc. 28, p. 1; Doc. 42, p. 1). He states, "There is question[ ] of whether all video from the scene was presented correctly to Petitioner with Time/Date and ability to prove location. Instead, a video was recorded on a DVD and presented with nothing to authenticate the copy. This leaves a question of tampering." Id. Oien refers to "cropping of tapes" and asserts both his counsel and the prosecution altered videos. (Doc. 16, pp. 1-2; Doc. 18, p. 1; Doc. 19, p. 4; Doc. 28, p. 1; Doc. 42, p. 1). He also refers to "witness tampering" and questionable "interrogation tactics," asserting repeated questioning might have caused co-conspirators to enter "deals of leniency" that the prosecution might not have disclosed. (Doc. 2, pp. 2-3). Oien asserts that "anything stated . . . in every interview need[ed] to be disclosed for the purpose of impeachability." Id. at 2.

Respondent states Oien's first state post-conviction relief application raised the ground one claims, (Doc. 26, p. 2), but those claims were not raised before the North Dakota Supreme Court on appeal of the order denying Oien's first application, unless those claims are considered to have been "generally contained within an ineffective assistance of counsel argument," id. at 6. Respondent also contends Oien did not specify any witness statements he did not receive. Id. at 3. Unless considered part of an

ineffective assistance of counsel claim, respondent argues the claims in ground one, in their entirety, are procedurally defaulted. Id. at 7-8; (Doc. 38, p. 2).

B. Ground Two

In ground two, Oien asserts officers "demand[ed]" he provide keys to his mother's home, where he was living at the time, or officers "would break down the door." (Doc. 2, p. 3). He states they also "demanded and took possession of [his] cell phone without a warrant or probable cause." Id. Respondent contends the claims in ground two were not raised in Oien's first state post-conviction relief application or on appeal of that application and so are procedurally defaulted. (Doc. 26, p. 10; Doc. 38, p. 2).

C. Ground Four

In ground four, Oien asserts that plea agreements in North Dakota are unconstitutional because they deprive an accused of a jury trial, the State is not obligated to abide by the agreement, the accused is not allowed "to back out or to know the terms until the terms are finalized," and only the judge "signs the contract." (Doc. 2, p. 5). Respondent contends the claims in ground four, to the extent they raise a federal constitutional claim, were not raised in Oien's first state post-conviction relief application or on appeal of that application and so are procedurally defaulted. (Doc. 26, p. 11; Doc. 38, p. 2).

D. Ground Five

In ground five, Oien asserts ineffective assistance of trial counsel. He asserts he entered into an agreement to plead guilty to a lesser charge because of "lack of faith" in his counsel. (Doc. 2, pp. 5-6). In his response to respondent's motion to dismiss, he

states his counsel coerced him to plead guilty, stating he would be sentenced to life in prison if he did not. (Doc. 18, p. 1; Doc. 19, p. 1). Respondent contends that even if this court views claim five as exhausted, Oien is not entitled to habeas relief on it. (Doc. 26, pp. 12-13). Alternatively, respondent argues that if this court determines the ineffective assistance of counsel claim in ground five was not properly presented to the state courts, it is procedurally defaulted. Id. at 13; (Doc. 38, p. 2).

E. Ground Six

In ground six, Oien states he was taking multiple prescription medications and argues that negated his culpability. While this court initially construed this claim to assert that Oien was taking multiple medications at the time of the incident, Oien later clarified he was not on medications at the time of the incident but was taking those medications at the time he entered guilty pleas and was "half asleep in [his] own world." (Doc. 19, p. 1; Doc. 28, p. 2). Oien also asserts he should have been ordered to undergo a psychological evaluation. (Doc. 2, p. 6).

Oien also claims his guilty pleas were not voluntary because he was not "reasonably well informed of all the ramifications." Id. He states he believed the habitual offender statute would apply only if he went to trial. (Doc. 16, pp. 1-2). He also states he would never have agreed to plead guilty if he knew he would have been sentenced to fifteen years because at trial the maximum possible sentence would have been twenty years.[9] Id. He states that, during the recess at the change of plea hearing, his counsel

[9] Had he elected to go to trial, Oien would have been tried on the murder charge, and the maximum sentence on the murder charge was actually life without parole. See N.D. Cent. Code §§ 12.1-16-01(1)(b), 12.1-32-01(1).

told him if he pleaded guilty he would serve an eight-year sentence. (Doc. 17, p. 1; Doc. 19, pp. 1-2, 4). He further asserts his medications impacted the voluntariness of his plea. (Doc. 18, p. 1; Doc. 19, pp. 1, 4).

Respondent asserts the medication claims were not raised before the state courts during Oien's first post-conviction relief proceedings and so are procedurally defaulted. (Doc. 26, pp. 14-15). Respondent further asserts Oien's claims related to what his counsel may have told him regarding his potential sentence are also procedurally defaulted because they were not raised before the North Dakota Supreme Court on appeal of the order denying Oien's first state post-conviction relief application. Id. at 15.

F. Other Claims

Though not recognized in this court's earlier order construing Oien's asserted grounds for relief, respondent contends any "claims about a filing regarding a plea withdrawal" are procedurally defaulted. Id. at 15-16. Oien states he wrote to the North Dakota Supreme Court after his change of plea hearing and before his sentencing hearing requesting to withdraw his guilty pleas, but the North Dakota Supreme Court did not respond. (Doc. 16; Doc. 17; Doc. 18, p. 1; Doc. 19, pp. 1, 3-4; Doc. 28, pp. 2-3; Doc. 42, pp. 1, 6). Respondent states he did not locate the letter in any of Oien's state cases, and this court has located no record of the letter Oien describes.

Though not raised in his initial federal habeas petition, Oien arguably raised two other potential claims in his later submissions, which have been deemed part of his habeas petition. In the later submissions, Oien asserts application of North Dakota's habitual offender statute violated Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), and his prior convictions did not qualify as

felonies (or would not now qualify as felonies in light of recent state legislation) that would have triggered application of the habitual offender statute. (Doc. 18).

To the extent Oien's claims assert violations of state law, he is not entitled to habeas relief on either of those claims. A federal court can consider petitions for habeas relief "only on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Federal habeas relief is not available to correct errors of state law. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Any claims asserting violations of state law should therefore be dismissed. To the extent Oien's claims assert violations of federal law, respondent asserts "Oien's claims are technically exhausted, procedurally defaulted, and should be dismissed." (Doc. 38, p. 2). Thus, respondent has sufficiently asserted Oien's other potential claims, to the extent they are cognizable in a federal habeas petition, are procedurally defaulted.

2. Claims Not Sufficiently Raised in the Federal Habeas Petition

Documents Oien filed after respondent's amended motion to dismiss or after the stay of this case was lifted might be construed as raising claims of (1) ineffective assistance of direct appeal counsel and post-conviction counsel,[10] and (2) insufficient evidence to support Oien's convictions.[11] (See Doc. 28, pp. 2-4; Doc. 42, pp. 2-3, 7). In

[10] In an earlier submission, which the court deemed part of Oien's petition, Oien made a reference to ineffective assistance of appellate counsel, (Doc. 19, p. 4), but did not state facts supporting such a claim as required by Rule 2(c)(2) of the Rules Governing Section 2254 Cases. Additionally, it appears Oien might have made that reference in an attempt to demonstrate cause and prejudice for the procedural default of his claims, rather than having made that reference in support of an independent claim.

[11] Oien's insufficient evidence claim overlooks that he pleaded guilty.

supplemental briefing filed after the stay was lifted, Oien addresses arguments and testimony that were before the state courts in connection with his second state post-conviction relief application. (Doc. 42, pp. 1-7).

To the extent Oien raised any cognizable claims in his most recent filings, the district judge should not consider those claims because Oien did not raise those claims in any submissions this court has construed as Oien's habeas petition. Rule 2(c) of the Rules Governing Section 2254 Cases requires that a petition "specify all grounds for relief available to the petitioner" and "state the facts supporting each ground." Any claims Oien raised in his later submissions should therefore be dismissed.

3. Trial Counsel's Alleged Coercion to Enter Guilty Pleas

As discussed above, respondent asserts all of Oien's claims are procedurally defaulted and barred from federal review. However, Oien properly raised one claim before the North Dakota Supreme Court in accordance with the State's procedural rules—an ineffective assistance of counsel claim alleging trial counsel coerced him to plead guilty—and that claim is therefore not procedurally defaulted.

On appeal of the order denying his first state post-conviction relief application, Oien asserted:

> Attorney Ahrendt's representation of Mr. Oien dealt mainly with the State[']s [habitual] offender filing against him. Attorney Gorham's representation of Mr. Oien dealt with all the other issues in Mr. Oien's case. These issues included investigation and interviewing [the] State's witnesses, reviewing police reports, finding weaknesses in the State's case, and the fact that State's witness statements not only contradicted what others said about the facts in his case but also contradicted what that witness had said in his or her prior statements about the case.

> Ms. Gorham's statements about her conversations with Mr. Oien prior to convincing him to do an Alford plea indicate Mr. Oien didn't want to plead and wanted to go to trial.
>
> Ms. Gorham's testimony about the problems with the State's case indicate that she couldn't and didn't know what the result would be if Mr. Oien had gone to trial.
>
> CONCLUSION
>
> Mr. Oien's attorneys talked and convinced him into agreeing to an Alford Hearing and not going to trial. Had he gone to trial there is a good possibility he would have been found not guilty.

(Doc. 13-16, pp. 8-9) (emphasis and paragraph numbering omitted).

In grounds five and six of Oien's federal habeas petition, he asserts trial counsel coerced him to plead guilty during their conversations before the change of plea hearing and during a recess of that hearing. Oien's appellate brief demonstrates that claim was presented to the North Dakota Supreme Court, and this court will therefore consider the merits of that claim.

To establish a claim of ineffective assistance of counsel, a petitioner must show his counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687 (1984). In Strickland, the Supreme Court established a two-pronged test for analyzing ineffective assistance of counsel claims. First, a petitioner must show his counsel's conduct was objectively unreasonable. Second, a petitioner must demonstrate he was prejudiced by his counsel's performance. Under the prejudice prong, a petitioner must prove "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 694. Both prongs of the

Strickland test—error and prejudice—must be satisfied to prevail on an ineffective assistance of counsel claim.

In reviewing ineffective assistance of counsel claims, courts apply a strong presumption that counsel provided "adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. A court reviewing counsel's performance must make every effort to avoid hindsight and second-guessing. Id. at 689. Under the Strickland standard, counsel's strategic decisions regarding plausible options, made after thorough investigation of both law and facts, are virtually unchallengeable. Id. at 690. Additionally, each claim of ineffectiveness must be separately considered because the "cumulative effect of alleged trial counsel errors is not grounds for granting habeas relief." Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006).

A "doubly deferential" standard of review applies to Oien's ineffective assistance of counsel claims. See Knowles v. Mirzayance, 556 U.S. 111, 123 (2009). In other words, the court must take a "highly deferential look at counsel's performance [under Strickland] through the deferential lens of § 2254(d)." Cullen v. Pinholster, 563 U.S. 170, 190 (2011) (citations and internal quotation marks omitted). So long as a state court's application of Strickland was reasonable, a petitioner cannot succeed on an ineffective assistance of counsel claim under § 2254(d)'s standard.

As discussed above, Oien asserts his trial counsel coerced him to plead guilty. At the hearing on Oien's first state post-conviction relief application, Attorney Gorham described her multiple conversations with Oien prior to his change of pleas. (Doc. 13-13, pp. 5-7, 15-17, 21, 34, 39, 43). She testified Oien knowingly chose to plead guilty and

further testified she and Attorney Ahrendt thoroughly discussed the ramifications of that decision with Oien. Id. at 13, 20. She testified Oien, through discussions with trial counsel, became "educated in [certain] respects of the law," including the offenses with which he was charged and the habitual offender statute. Id. at 39, 51. She testified she explained Oien's rights to him before the change of plea hearing and did nothing to overpower Oien's will, did not yell at him, and did not threaten him. Id. at 39-40. She testified about Oien's reluctance to plead guilty on the day trial had been scheduled to begin and about discussions they had that day:

> A We had come into court to deal with some of the motions before we brought the jury in, and at that time, [Oien] had indicated that he wasn't sure about taking the plea anymore. I think we took between a half hour and 45 minutes, maybe even longer, where the judge allowed us a recess and I went back with [Oien] in a private room and had a discussion with him. My co-counsel went back with his family because [Oien] had said his family's input was very important to him in making this decision.
>
> So [my co-counsel] kind of went between his family and coming back to talk with us. So not only had we gone over the plea extensively the day before, but even the morning of, the judge allowed us additional time to make sure that this plea - - this joint recommendation is what Mr. Oien wanted to do.
>
> Q Okay. And you explained to him that it was entirely his decision?
>
> A Absolutely. We came prepared to go to trial. We were ready to start voir dire that day if he wanted to. In fact, even though he said at 11:00 o'clock at night that he wanted to take the plea, as a defense attorney, I was still ready to go to trial the next day.

Id. at 40-41. Attorney Gorham further testified, "I can't speak to internally what [Oien] understood. All I can speak to is that we discussed this ad nauseam with [Oien] and I provided him with the information as many times as - - [,]" and Oien "indicated" he understood. Id. at 50.

Attorney Ahrendt also testified about her discussions with Oien. She testified Oien was aware the State was seeking an enhancement of penalties under the habitual offender statute and they had discussed it multiple times well before Oien decided to change his pleas and after that time. Id. at 54-57, 66-67, 70-71. She testified they discussed Oien's prior felony convictions that subjected him to the enhancement and Oien's contentions that the enhancement should not apply. Id. at 56-57, 67. She described her practice if the State gives notice of its intent to seek application of the habitual offender statute and testified she followed that practice in Oien's case:

> A Anytime I am discussing habitual offender, it is something that, for the most part, my clients do not like, do not agree with, and don't understand why it's being proposed to them.
>
> And so that's generally - - when I'm given notice from the State, I have to have the discussions with my client of here's what it is, here's what it means, here's what the State is going to do, and here's what we can do to respond to it. And so this was done with Mr. Oien. His response is pretty typical of almost everyone that I've ever had with habitual offender, which is that they do not agree with it and they don't think it should be used against them.

Id. at 65. Attorney Ahrendt further testified:

> A I tried to make it abundantly clear to Mr. Oien that it was very, very likely that he would be deemed a habitual offender. . . .
>
> . . . .
>
> But I was very clear with him that it was my belief that [the State] would show that he was a habitual offender and that he would be deemed a habitual offender because it's fairly easy under the law to do so. . . .

Id. at 69. Attorney Ahrendt testified she had no concerns that Oien might have been confused during their discussions, stating, "When I advise my clients on habitual offender, I'm very clear as to what my opinion is going to be." Id. at 71. When asked if it

was possible Oien did not understand because he had not graduated from high school and numerous motions had been filed and discussed with him, she testified, "Regarding habitual offender, I think it is very, very, very unlikely, but it is possible." Id. at 73.

Considering trial counsel's testimony at the hearing, Oien did not establish trial counsel coerced him to plead guilty or took objectively unreasonable actions under the Strickland standard. The district judge should therefore conclude the state court's denial of that ineffective assistance of trial counsel claim was reasonable under § 2254(d).

4. Procedural Default

Oien raises other ineffective assistance of trial counsel claims in his federal habeas petition that were not fairly presented to the state courts. In ground one, Oien asserts trial counsel altered videos. That assertion was not part of the ineffective assistance of trial counsel claim Oien presented to the North Dakota Supreme Court. Additionally, any ineffective assistance of trial counsel claim Oien makes involving taking prescription medications, which he arguably raises in ground six, was similarly not presented to the North Dakota Supreme Court. All of Oien's other claims, except that trial counsel coerced him to plead guilty, were either determined to be barred from state court review for misuse of process (those raised on appeal of the order denying Oien's second post-conviction relief application) or would be barred from state court review for misuse of process (those not raised on appeal of either of the orders denying him post-conviction relief). Because Oien did not properly invoke "one complete round"

of the appellate process and is therefore barred from raising those claims before the state courts for misuse of process,[12] those claims are procedurally defaulted.[13]

The court could consider Oien's procedurally defaulted claims only if Oien demonstrated cause and prejudice for the default or demonstrated a miscarriage of justice would result if this court did not address the merits of the defaulted claims. As cause for his procedural default, Oien asserts he did not properly raise some claims because of ineffective assistance of direct appeal counsel, because of ineffective assistance of post-conviction counsel, and for various other reasons. He also asserts a miscarriage of justice would result if this court did not consider his defaulted claims because he is actually innocent of the offenses for which he was convicted. The court must consider any asserted cause for default before the court can address a claim of actual innocence. Dretke v. Haley, 541 U.S. 386, 393-94 (2004).[14]

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[12] Under North Dakota Century Code section 29-32.1-12, misuse of process is an affirmative defense that can be raised in state court post-conviction proceedings. Misuse of process is defined to include any "claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous postconviction proceeding." N.D. Cent. Code § 29-32.1-12(2)(a). North Dakota courts regularly enforce that procedural defense. See State v. Steen, 736 N.W.2d 457, 462 (N.D. 2007); Laib v. State, 705 N.W.2d 845, 848 (N.D. 2005); Johnson v. State, 681 N.W.2d 769, 775-76 (N.D. 2004).

[13] The State's two-year limitations period for filing post-conviction relief applications may also bar the state courts from considering any future post-conviction relief application Oien might file. Under North Dakota Century Code section 29-32.1-01(2) and (3), an application for post-conviction relief must be filed within two years of the date a conviction becomes final, unless the petitioner establishes an exception.

[14] The court must also address all nondefaulted claims for comparable relief before addressing a claim of innocence. Dretke, 541 U.S. at 393-94. The court addressed Oien's nondefaulted claim that trial counsel coerced him to plead guilty in section 3 above.

5. Cause and Prejudice

Oien asserts he did not raise some claims on direct appeal because of ineffective assistance of appellate counsel. Similarly, he asserts he did not raise some claims in his post-conviction relief applications because of ineffective assistance of post-conviction counsel. The court therefore considers whether either assertion establishes sufficient cause and prejudice for procedural default of Oien's claims.

A. Ineffective Assistance of Direct Appeal Counsel

In some circumstances, ineffective assistance of direct appeal counsel may constitute "cause" to excuse procedural default. But, before it can establish cause for a procedural default, the petitioner must have presented the ineffective assistance of direct appeal counsel claim to the state courts as an independent claim. Murray v. Carrier, 477 U.S. 478, 489 (1986). Oien, however, did not present a claim of ineffective assistance of direct appeal counsel to the state courts.

Any claim of ineffective assistance of direct appeal counsel that Oien might present to the state courts in a future application for post-conviction relief would be barred from state court review for misuse of process. Consequently, that claim is procedurally defaulted.[15] If an ineffective assistance of direct appeal counsel claim is itself defaulted, it cannot constitute cause excusing procedural default, unless a petitioner also establishes cause and prejudice for the default of the ineffective

[15] This court construes respondent's assertion that all of Oien's claims are procedurally defaulted, (Doc. 38, p. 2), to extend to Oien's contention that some of his claims are procedurally defaulted because of ineffective assistance of direct appeal counsel.

assistance of direct appeal counsel claim. Edwards v. Carpenter, 529 U.S. 445, 452-52 (2000).

Oien has not asserted any cause for not raising his ineffective assistance of direct appeal counsel claim before the state courts. Because he has not established cause and prejudice for the default of that claim, ineffective assistance of direct appeal counsel cannot excuse the procedural default of any other claim.

B. Ineffective Assistance of Post-Conviction Relief Counsel

Oien asserts he did not raise some claims during his initial post-conviction proceedings because his post-conviction counsel failed to follow his directives. (Doc. 28, p. 4). Specifically, he asserts post-conviction counsel failed to explain to the state trial court that Oien's trial counsel were involved with the altering of videos. Id. at 3. He also contends his post-conviction counsel knew Oien had taken prescription medications before he entered his guilty pleas, though he does not assert he directed post-conviction counsel to raise that issue. Id.

Generally, an attorney's failure to raise a claim in post-conviction proceedings cannot constitute cause for a procedural default because there is no federal constitutional right to counsel in post-conviction proceedings. Colman v. Thompson, 501 U.S. 722, 752-53 (1991). As to Oien's claim that post-conviction counsel should have raised Oien's claim about prescription medications affecting his ability to enter knowing, intelligent, and voluntary pleas, Oien had no right to effective assistance of post-conviction counsel on that claim, which Oien should have raised on direct appeal.[16]

[16] This court recognizes Oien also asserts ineffective assistance of direct appeal counsel as cause for his procedural default, but, as previously discussed, that claim itself

Thus, post-conviction counsel's alleged negligence as to the medication claim, to the extent it does not raise an ineffective assistance of trial counsel claim, cannot constitute cause for Oien's procedural default.

There is a narrow exception to the general rule that ineffective assistance of post-conviction counsel cannot constitute cause for a procedural default: in limited circumstances ineffective assistance of post-conviction counsel may establish cause for a petitioner's default of ineffective assistance of trial counsel claims. Martinez v. Ryan, 566 U.S. 1, 17 (2012); Franklin v. Hawley, 879 F.3d 307, 312 (8th Cir. 2018). Under Martinez, a petitioner establishes cause where (1) state law requires the ineffective assistance of counsel claim be raised in post-conviction proceedings, (2) the post-conviction proceeding was the initial proceeding as to the claim, (3) the claim was "substantial," and (4) the cause consisted of there being no counsel or ineffective assistance of counsel within the meaning of Strickland. Trevino v. Thaler, 569 U.S. 413, 423 (2013) (citing Martinez, 566 U.S. at 14-18). Trevino extended Martinez to circumstances where it is highly unlikely in the typical case that a defendant would have a meaningful opportunity to raise an ineffective assistance of counsel claim on direct appeal. Id. at 423-29.

North Dakota law generally requires ineffective assistance of trial counsel claims to be raised in post-conviction proceedings rather than on direct appeal. State v. Cody, 896 N.W.2d 647, 650 (N.D. 2007). The hearing on Oien's first post-conviction relief

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is defaulted and therefore cannot constitute cause to excuse his default.

application was the initial proceeding as to his ineffective assistance of trial counsel claims. Thus, Oien meets the first two of the four Martinez/Trevino elements.

As to the third element, a claim is considered "substantial" when it has "some merit." Martinez, 566 U.S. at 14 (citing Miller-El v. Cockrell, 537 U.S. 322 (2003)) (describing standards for issuance of certificates of appealability). A claim has "some merit" when reasonable jurists could debate whether the issue should have been resolved differently. Miller-El, 537 U.S. at 336; see also Smith v. Baker, 960 F.3d 522, 535 (9th Cir. 2020). Additionally, under Strickland, a petitioner must show post-conviction counsel's failure to raise a claim that had some merit was objectively unreasonable and petitioner was prejudiced by that failure.

As to Oien's claim that trial counsel was ineffective because they altered video, counsel on his first post-conviction application—Attorney Phyllis Ratcliffe—explored the possibility of altered video with Attorney Gorham at the hearing on that application.

> Q Let's talk about the videos. There were a number of videos taken in the case.
>
> A Not videos taken. There were surveillance cameras throughout Rick's Bar. There were several in the interior of the bar itself, and there was one in the interior of the off-sale liquor store. And the off-sale liquor store is attached to the bar and there's an entrance between the off-sale liquor store and the bar. There are no exterior cameras that we saw. And then there's no cameras at Speck's [Bar] that we knew of.
>
> Q Mr. Oien believes, and I think he has shared this with you, that he believes some of the videos were cropped. Can you address that?
>
> A Absolutely. He is in part, correct. The interior of the videos, the surveillance cameras, the time was off. So when you would see, for example, someone walk across the bar at, you know, 11:22, you might see it from a different camera at an angle and doing the exact same thing, but at 11:06. So they were off by a certain time period.

It was actually [counsel for the State] who emailed me and indicated the exact minute and seconds that the videos were off. And by viewing all the videos and matching them up with the actions of the individuals in the bar and going through all of the videos together, I was able to put together a timeline of what was happening. It wasn't necessarily as important exactly what time it was, just that the videos were matching up and we could align everything so that we could tell which event occurred subsequent to which event.

Specifically, Mr. Oien did bring up this issue at the very beginning of our case, so we were very aware of this. And I know that Ms. Ahrendt and myself, and we actually had a dedicated paralegal and a dedicated law clerk working on the case as well, reviewed all of the videos. What we looked for were inconsistencies in the videos. We were looking for clips where maybe a person was performing an action here, and then the next second was doing something completely different that would indicate where maybe the video was cut or edited in any way. We did not see any indication of that.

Mr. Oien had suggested that he - - there was one part of the video that showed him exiting one of the bar doors, and he said he never stopped at that bar door and stood there for the amount of time that the video showed. For the extent of the technology needed to edit the video like that and the time and the professional - - I should say the professional quality of editing, I don't believe the State has access to that kind of editing, and because we didn't see any indication of the video being broken up or any indication of missing tape, we did not feel that we had cause to request the amount of money it would have cost to have the technician review the video for any edits.

Q When you were putting together the various scenes and overlaying, I suppose you overlaid some of them against the others, and so is it your testimony then that you are comfortable that there was no cropping done of the videos?

A What I would say is I reviewed the videos for hours upon hours. I actually went through and made a chart. And in some instances where the action was important, I went second by second of what was going on in each part of the bar. And I probably had six feet of computer paper where I went through second by second of what happened in Rick's bar.

I would say that that just goes to everyone exiting [the] bar and a surveillance camera going out the window. There were no video events of what happened over at Speck's or between Rick's and Speck's.

> To the best of my knowledge, I didn't see any indication of editing for the portions of video that I had access to.

(Doc. 13-13, pp. 14-17) (see also id. at 36) (additional testimony by Attorney Gorham stating she "very thoroughly looked for any indication of editing" but found none).

Considering Attorney Gorham's testimony, Oien's claim that trial counsel were ineffective by editing video is not "substantial" within the meaning of Martinez/Trevino. Additionally, Attorney Ratcliffe raised and explored the issue of cropped video at the first post-conviction hearing, and Ratcliffe was not ineffective under the Strickland standard. Thus, Attorney Ratcliffe's conduct does not constitute cause for Oien's default of the claim under the Martinez/Trevino standard.

Arguably, Oien raises a claim of ineffective assistance of trial counsel involving his trial counsel's knowledge he entered guilty pleas while on prescription medications. It is unclear whether Oien asserts Attorney Ratcliffe was ineffective by failing to raise an ineffective assistance of trial counsel claim on that basis. Nonetheless, this court addresses whether Attorney Ratcliffe's alleged failure to do so constitutes cause under Martinez/Trevino.

As discussed above with regard to Oien's properly exhausted claim that trial counsel coerced him to plead guilty, both trial attorneys testified they believed Oien understood what was happening at the change of plea hearing and was not confused. Id. at 50, 69. At his change of plea hearing, Oien stated he understood that by pleading guilty he was giving up certain rights, understood the court was not required to follow the State's or defense counsel's sentencing recommendations, and understood the potential maximum and minimum penalties, though the trial court did not advise Oien

of those penalties at the change of plea hearing.[17] (Doc. 13-4, pp. 5-7). Oien did not raise a claim regarding medication in his first state post-conviction relief application, which he filed pro se, (see Doc. 13-11), and has not indicated he directed Attorney Ratcliffe to raise the issue. Further, though she did not mention Oien taking prescription medications, Attorney Ratcliffe argued that Oien did not understand his rights when he entered his guilty pleas. Id. at 75-76, 81. Even if Oien's ineffective assistance of counsel claim has some merit, he has not demonstrated Attorney Ratcliffe's failure to raise that claim in the post-conviction proceedings was objectively unreasonable given the circumstances described above. Because Oien has not established Attorney Ratcliffe was ineffective under Strickland, he has not established cause for his default of the claim under Martinez/Trevino.

On appeal of the order denying Oien's first state post-conviction relief application, Oien was represented by Attorney Benjamin Pulkrabek. To the extent Oien argues Attorney Pulkrabek should have raised certain claims on appeal, counsel's failure to do so does not constitute cause for Oien's procedural default. The narrow exception that ineffective assistance of post-conviction counsel may constitute cause for a procedural default is limited to initial collateral proceedings and does not extend to claims of counsel's errors in appeals from initial proceedings. Martinez, 566 U.S. at 16; Franklin, 879 F.3d at 313. Thus, any failure of Attorney Pulkrabek cannot establish cause for Oien's procedural default.

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[17] Nor did the trial court inquire whether Oien had taken any substances that might have affected his ability to understand the change of plea hearing. (See Doc. 13-4).

C. Other Arguments Regarding Cause To Excuse Default

Oien argues several other bases demonstrate cause for his procedural default. He states his initial trial counsel, who later withdrew, brought detectives to a jail where Oien was confined and those detectives told Oien that if he did not give them keys to Oien's mother's house, they would break down the door. (Doc. 28, p. 3). Oien states that same attorney had Oien undergo a polygraph test but the results of that test were "hidden from the State" because a retired police officer who administered the test was once partners with the "detectives that were going against [Oien]." (Doc. 28, p. 3). Oien also states he never saw the results of the polygraph test. (Doc. 19, p. 1). Oien asserts Attorney Gorham told him that if he entered Alford pleas to the charges, he could still file an appeal and have a jury trial. (Doc. 28, p. 3). Oien asserts the individual who completed his pre-sentence investigation report told him he would have a psychological evaluation but that was never completed. (Doc. 28, p. 3). Oien contends an attorney initially appointed to represent him on direct appeal, but who later withdrew, "signed [Oien's] illegal sentence on habitual [offender] without [Oien] knowing" and that attorney later told Oien that if he wanted to proceed with his appeal, Oien would need to request another attorney.[18]

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[18] On January 17, 2017, after Oien filed a notice of appeal, Attorney Benjamin Pulkrabek was appointed to represent Oien. State v. Oien, No. 09-2015-CR-01669, Index #238 (Cass Cnty. Jan. 17, 2017). On February 1, 2017, the North Dakota Supreme Court entered an order of temporary remand at the State's request so that the trial court could amend the judgment to specify Oien was sentenced as a habitual offender. Id. at Index #240. The trial court entered an amended judgment that same day. Id. at Index #241. About one month later, Attorney Pulkrabek requested to withdraw, and new counsel, Scott Diamond, was appointed to represent Oien on direct appeal. Id. at Index #246.

None of these assertions constitute cause for Oien's procedural default because each event occurred before direct appeal counsel withdrew Oien's appeal. Oien could have requested that direct appeal counsel raise those claims rather than dismissing the appeal. Or those claims could have been raised in the initial post-conviction proceedings. None of Oien's assertions adequately explain why any of Oien's defaulted claims were not properly presented to the state courts and so do not constitute cause excusing procedural default.

6. Miscarriage of Justice—Actual Innocence

Lastly, Oien contends he is actually innocent of the offenses for which he was convicted. (Doc. 17, p. 1; Doc. 28, p. 2). By meeting requirements for an actual-innocence gateway claim, a petitioner who demonstrates he is actually innocent may proceed with claims that would otherwise have been procedurally barred. Schlup v. Delo, 513 U.S. 298, 327 (1995). An actual-innocence gateway claim requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Id. at 324.

Oien describes certain evidence—including the victim's medical records, lack of video evidence from Speck's Bar, the lack of DNA evidence, his polygraph results, and the alleged cropping of videos—which he asserts demonstrates he is innocent. (Doc. 17, p. 1; Doc. 19, pp. 2, 4). However, none of that evidence, or lack thereof, is new because it was available before Oien changed his pleas. The remaining arguments Oien makes in support of his claim of innocence relate to Oien's underlying claims for habeas relief, see id., and also do not constitute new, reliable evidence. Thus, Oien has not met the

requirements for an actual-innocence gateway claim, and the district judge should not consider Oien's procedurally defaulted claims on the merits.

Recommendation

Oien is not entitled to habeas relief for violations of state law or for claims not asserted in his habeas petition. Oien has not demonstrated the state court's denial of his claim that trial counsel were ineffective by coercing him to plead guilty was unreasonable under § 2254(d). The remainder of Oien's claims are procedurally defaulted and barred from federal review because Oien has not demonstrated cause or prejudice for the default or demonstrated a miscarriage of justice would result if the court did not consider the defaulted claims. This court therefore **RECOMMENDS** that respondent's motion to dismiss, (Doc. 25), be **GRANTED** and that Oien's petition for habeas relief be **DISMISSED**.

Based upon the entire record, the district judge should conclude that dismissal of the petition is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. This court therefore **RECOMMENDS** that a certificate of appealability not be issued. See Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997) (finding that a district court has the authority to issue certificates of appealability under § 2253(c)). This court further **RECOMMENDS** that the district judge find any appeal would be frivolous, could not be taken in good faith, and may not be taken in forma pauperis.

Dated this 9th day of October, 2020.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge

NOTICE OF RIGHT TO OBJECT[19]

Any party may object to this Report and Recommendation by filing with the Clerk of Court no later than **October 23, 2020**, a pleading specifically identifying those portions of the Report and Recommendation to which objection is made and the basis of any objection. Failure to object or to comply with this procedure may forfeit the right to seek review in the Court of Appeals.

[19] See Fed. R. Civ. P. 72(b); D.N.D. Civ. L.R. 72.1.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Jason Wayne Oien,	)	
	)	
Petitioner,	)	**ORDER ADOPTING REPORT AND RECOMMENDATION**
	)	
vs.	)	
	)	Case No. 3:18-cv-00197
Chad Pringle, Warden,	)	
	)	
Respondent.	)	

Petitioner Jason Wayne Oien filed a motion for writ of habeas corpus under 28 U.S.C. § 2254 on October 1, 2018. Doc. No. 2. The petition raised six grounds for relief. After a preliminary review, Magistrate Judge Alice R. Senechal recommended dismissal of Oien's third ground for relief. Doc. No. 9. Judge Daniel L. Hovland adopted the recommendation and dismissed ground three. Doc. No. 12. Judge Senechal then ordered the remainder of the petition served on Respondent Chad Pringle. Doc. No. 9. Following several intervening procedural maneuvers, Pringle moved to dismiss the petition on July 9, 2019. Doc. No. 25. A stay ensued to allow Oien to pursue a second round of post-conviction relief in state court. Doc. No. 30. On June 30, 2020, Judge Senechal lifted the stay after the denial of Oien's state post-conviction relief application and then entertained supplemental briefing. Doc. No. 33.

On October 9, 2020, Judge Senechal issued a Report and Recommendation in which she recommended that Pringle's motion to dismiss be granted and Oien's petition for habeas relief be dismissed. Doc. No. 45. Oien filed an objection to the Report and Recommendation on October 16, 2020. Doc. No. 46.

Upon review of the relevant legal authority, Oien's objection, and the entire record, the Court agrees with Judge Senechal's thorough analysis. Accordingly, the Court **ADOPTS** the Report and Recommendation (Doc. No. 45) in in its entirety. Pringle's motion to dismiss (Doc.

No. 25) is **GRANTED**. Oien's motion for writ of habeas corpus under 28 U.S.C. § 2254 (Doc. No. 2) is **DISMISSED WITH PREJUDICE**. The Court certifies that an appeal from the dismissal of the motion may not be taken in forma pauperis because such an appeal would be frivolous and cannot be taken in good faith. Coppedge v. United States, 369 U.S. 438, 444-45 (1962). Based upon the entire record, dismissal of the motion is not debatable, reasonably subject to a different outcome on appeal, or otherwise deserving of further proceedings. Therefore, the Court will not issue a certificate of appealability. Barefoot v. Estelle, 463 U.S. 880, 893 n.4 (1983); Tiedeman v. Benson, 122 F.3d 518, 520-22 (8th Cir. 1997). If Oien desires further review of his motion, he may request the issuance of a certificate of appealability by a circuit judge of the Eighth Circuit Court of Appeals.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 26th day of October, 2020.

/s/ Peter D. Welte
Peter D. Welte, Chief Judge
United States District Court