

October 18, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOSEPH R. CYR,

Petitioner - Appellant,

v.

SCOTT CROW, Director of the Oklahoma
Department of Corrections,

Respondent - Appellee.

No. 23-6020
(D.C. No. 5:19-CV-01029-HE)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **TYMKOVICH, EID**, and **CARSON**, Circuit Judges.

Joseph R. Cyr, a pro se Oklahoma inmate, seeks a certificate of appealability (COA) to challenge the denial of his 28 U.S.C. § 2254 habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal the denial of a § 2254 petition). Because the denial of relief is not reasonably debatable, we deny a COA and dismiss this matter.

I

An Oklahoma jury convicted Cyr on two counts of first-degree murder with malice aforethought for killing a pregnant woman and her fetus. The woman was a sex

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

APPENDIX A

worker with whom Cyr had intercourse before stabbing 29 times. Her partially decomposed body was found near a trail approximately one month after she disappeared.

The Oklahoma Court of Criminal Appeals (OCCA) upheld Cyr's convictions on direct appeal, and the state courts denied postconviction relief. Cyr then filed a federal habeas petition, which the district court determined contained both exhausted and unexhausted claims. The district court permitted Cyr to exhaust all claims, upon which he returned to federal court and filed an amended habeas petition asserting ten claims. A magistrate judge issued a comprehensive report and recommendation concluding the petition should be denied. Cyr objected to the denial of six claims, and over his objections, the district court adopted the report and recommendation, denied the six claims on their merits, ruled he waived further review of the other claims to which he did not object, and denied a COA. Cyr now seeks a COA from this court on the six claims he pursued in the district court.

II

To obtain a COA, Cyr "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Our analysis accounts for the deferential treatment afforded state court decisions by the Antiterrorism and Effective Death Penalty Act (AEDPA). *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). Under AEDPA, federal habeas relief is prohibited on any claim adjudicated on the merits in state court

proceedings unless the state court'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 "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "We look to the District Court's application of AEDPA to [Cyr's] constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

A. Claim 1: Sufficiency of the Evidence

Cyr first claims there was insufficient evidence to sustain his convictions. Under *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), the evidence is sufficient if, "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." "Review of sufficiency of the evidence under AEDPA adds an additional degree of deference, and the question becomes whether the OCCA's conclusion that the evidence was sufficient constituted an unreasonable application of the *Jackson* standard." *Simpson v. Carpenter*, 912 F.3d 542, 592 (10th Cir. 2018) (internal quotation marks omitted).

Rejecting this claim on direct appeal, the OCCA described the extensive evidence underlying Cyr's convictions, including evidence showing: he had sexual intercourse with the woman on the night of the murders, he was familiar with the area where her body was discovered, he lied to police and attempted to evade their investigation, he cleaned his truck and removed its seat covers to conceal evidence, and decomposition of the woman's body indicated the approximate timeframe when it was abandoned, which

conformed to the time of her calls and texts with Cyr, supporting the prosecution's assertion that she was killed on the night she disappeared. Given this and other evidence, the OCCA determined that any rational trier of fact could have found Cyr guilty beyond a reasonable doubt. The district court concluded that the OCCA's decision was not an unreasonable application of *Jackson*. Although Cyr contends his convictions were procured with circumstantial evidence and by stacking inference upon inference, the question remains whether the district court's conclusion is reasonably debatable. Given the evidence presented to the jury, it is not.¹

B. Claim 2: Jury Instruction

Cyr next contends the trial court improperly instructed the jury on the element of intent necessary to sustain his conviction for the death of the fetus, thereby violating his right to a fair trial. The federal standard is whether the instruction relieved the prosecution of its burden to prove every element of the crime beyond a reasonable doubt. *See Sandstrom v. Montana*, 442 U.S. 510, 523 (1979).² The jury was instructed that Oklahoma law does not require evidence that Cyr knew the woman was pregnant or that he intended to kill the fetus. The OCCA determined the instruction accurately stated the law in Oklahoma and, under the doctrine of transferred intent, Cyr's intent to kill the woman transferred to the fetus to establish the element of intent. Although Cyr disputes

¹ To the extent Cyr's argument implicates the propriety of the jury instructions, we consider it in the context of claim 2.

² Cyr's contention that the instruction was allegedly incorrect under state law provides no basis for federal habeas relief. *See Estelle v. McGuire*, 502 U.S. 62, 71-72 (1991).

the OCCA's application of the transferred-intent doctrine, which he says the jury never considered, the district court correctly recognized that the OCCA's determination is binding on federal habeas review. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (overruling circuit-court conclusion that transferred-intent doctrine was inapplicable under state law, because "a state court's interpretation of state law, *including one announced on direct appeal of the challenged conviction*, binds a federal court sitting in habeas corpus" (emphasis added)). The district court therefore concluded that the OCCA's decision was neither contrary to, nor an unreasonable application of, the federal standard. Bound by the OCCA's determination that the transferred-intent doctrine applied under Oklahoma law, the district court's conclusion is not reasonably debatable.

C. Claim 3: Prior Bad Acts

Cyr also claims he was denied a fair trial by the admission of evidence disclosing prior bad acts: his sexual habits and disdain for using condoms, his efforts to persuade past sexual partners to abort their pregnancies, and a video he sent depicting a cow being slaughtered. The OCCA rejected this claim on direct appeal, concluding that evidence of Cyr's sexual habits and disdain for using condoms was probative of motive because it clashed with the woman's insistence on using condoms and her strong-willed personality. The OCCA also determined that evidence Cyr demanded that past sexual partners have abortions was irrelevant to motive, but he failed to show prejudice and thus its admission was harmless. Similarly, the OCCA ruled that evidence of the cow-slaughtering video was irrelevant but, again, Cyr failed to show prejudice. The district court concluded the OCCA did not unreasonably apply clearly established federal law.

Reasonable jurists would not debate the district court's conclusion. To warrant relief, admission of the prior bad-act evidence must have denied Cyr a fundamentally fair trial. *See Estelle v. McGuire*, 502 U.S. 62, 67-68, 70 (1991). The evidence of Cyr's sexual habits and disdain for using condoms was probative of motive, and its admission did not result in a trial that was fundamentally unfair. *See id.* at 68-69 (explaining that evidence of victim's prior injuries was admissible under state law to establish intent and did not result in a fundamentally unfair trial); Okla. Stat. tit. 12, § 2404(B) (providing that evidence of other bad acts may be admitted to show motive). Neither does the improperly admitted evidence—that Cyr demanded that previous sexual partners abort their pregnancies and that he sent the cow-slaughtering video—warrant relief, because, in light of all the other evidence before the jury, this evidence did not render the trial fundamentally unfair.³

D. Claim 4: Cumulative Error

Cyr next contends cumulative error warrants habeas relief. The OCCA rejected this claim on direct appeal, concluding there was no cumulative error because the aggregated errors did not affect the outcome of the proceedings. The federal standard requires a “substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (internal quotation marks omitted). The district court, in adopting the magistrate judge’s report and recommendation, determined

³ Cyr contends the district court’s decision is debatable under authority from this court, but he must support his claim with clearly established Supreme Court precedent, without which habeas relief is unavailable. *See Simpson*, 912 F.3d at 568.

the OCCA's decision was not contrary to, or an unreasonable application of, the federal standard. Considering in the aggregate the two errors discussed above, in view of the rest of the evidence, the district court's decision is not reasonably debatable. *See Cargle v. Mullin*, 317 F.3d 1196, 1220 (10th Cir. 2003) (explaining that cumulative-error analysis is "expressed as an aggregate of all errors found to be harmless" and "determined by conducting the same inquiry as for individual error" (internal quotation marks omitted)).

E. Claims 5 & 6: Ineffective Assistance of Counsel

Last, Cyr claims his appellate counsel rendered ineffective assistance. Under *Strickland v. Washington*, he must show counsel's performance was both deficient and prejudicial. 466 U.S. 668, 688, 692 (1984). Our assessment of counsel's performance is always "highly deferential," but "[t]he challenge is even greater for a petitioner under § 2254, as our review in such circumstances is doubly deferential." *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) (internal quotation marks omitted). "[W]e defer to the state court's determination that counsel's performance was not deficient and, further, defer to the attorney's decision in how to best represent a client." *Id.* (internal quotation marks omitted).

To succeed on an [ineffective-assistance] claim premised on the failure to raise an issue on appeal, a petitioner must show both that (1) appellate counsel performed deficiently in failing to raise the particular issue on appeal and (2) but for appellate counsel's deficient performance, there exists a reasonable probability the petitioner would have prevailed on appeal.

Davis v. Sharp, 943 F.3d 1290, 1299 (10th Cir. 2019). When a petitioner asserts counsel was deficient in failing to raise an issue on appeal, we examine the merits of the omitted

issue, and, if meritless, “its omission will not constitute deficient performance.” *Id.* (internal quotation marks omitted).

Cyr contends appellate counsel was ineffective in failing to raise trial counsel’s alleged ineffectiveness in failing to seek suppression of evidence from his cellphone, home, trucks, and girlfriend without a valid warrant. He also contends appellate counsel was ineffective in failing to raise trial counsel’s alleged ineffectiveness in failing to object to prosecutorial misconduct—misrepresenting that his truck’s seat covers were stained with blood.⁴ The state postconviction court rejected these claims, and the OCCA affirmed the denial of relief. The federal district court concluded that the OCCA’s decision was not an unreasonable application of federal standards under *Strickland*.

The district court’s decision is not reasonably debatable. The state postconviction court observed that Cyr “fail[ed] to demonstrate that any evidence admitted at trial would have been properly excluded had counsel sought suppression based on the alleged Fourth Amendment violations.” R., Vol. IV at 717. Indeed, although Cyr asserts trial counsel should have sought to suppress the evidence in question because his Fourth Amendment rights were violated, he provides no evidentiary basis to support a suppression motion. *See Harte v. Bd. of Comm’rs*, 864 F.3d 1154, 1162 (10th Cir. 2017) (explaining a warrant is invalid “if there is substantial evidence to support deliberate falsehood or reckless disregard for the truth, and the exclusion of false statements would undermine the

⁴ Cyr raised this theory during state postconviction proceedings in two separate ineffective-assistance-of-appellate-counsel claims, one based on 24 instances of alleged prosecutorial misconduct, *see* R., Vol. IV at 382-84 (Subclaim 14, instance 5), and a second based on 13 instances of alleged misconduct, *see id.* at 389 (Subclaim 5).

existence of probable cause”). Without making that showing, he cannot establish that his appellate counsel’s performance was deficient in failing to pursue trial counsel’s alleged ineffectiveness.

Neither can Cyr establish that his appellate counsel was ineffective in failing to raise trial counsel’s alleged ineffectiveness for failing to object to prosecutorial misconduct. The underlying claim required him to demonstrate that the prosecution’s discussion of stains on the truck seat covers “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The state postconviction court ruled that the prosecution’s comments “were appropriately based on the evidence presented and reasonable inferences that could be drawn from it.” R., Vol. IV at 718. Indeed, the trial record confirms the prosecution accurately represented to the jury that presumptive testing of the seat covers for blood was positive but subsequent lab testing did not confirm blood was present. Although Cyr cites *Miller v. Pate*, 386 U.S. 1 (1967), to argue that a prosecutor’s knowing misrepresentation of evidence constitutes a denial of due process, there was no similar misconduct here. Consequently, Cyr fails to show that he was denied due process, that trial counsel was ineffective in failing to object, and that appellate counsel was deficient in failing to raise this claim on appeal. It follows, then, that the district court’s decision is not reasonably debatable.

III

For the foregoing reasons, we deny a COA and dismiss this matter.

Entered for the Court

Joel M. Carson III
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

November 21, 2023

Christopher M. Wolpert
Clerk of Court

JOSEPH R. CYR,

Petitioner - Appellant,

v.

SCOTT CROW, Director of the Oklahoma
Department of Corrections,

Respondent - Appellee.

No. 23-6020
(D.C. No. 5:19-CV-01029-HE)
(W.D. Okla.)

ORDER

Before **TYMKOVICH**, **EID**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

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

Entered for the Court



CHRISTOPHER M. WOLPERT, Clerk

APPENDIX B

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

| | | |
|-------------------------------------|---|--------------------|
| JOSEPH R. CYR, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | NO. CIV-19-1029-HE |
| |) | |
| SCOTT CROW, Director of the |) | |
| Oklahoma Department of Corrections, |) | |
| |) | |
| Respondent. |) | |

ORDER

Petitioner Joseph Richard Cyr was convicted of two counts of murder in Oklahoma state court based on the deaths of Jaymie Adams and the fetus she was carrying at the time of her death. After a direct appeal and other proceedings in state court, petitioner, proceeding *pro se*, filed this case seeking habeas relief under 28 U.S.C. § 2254. The court referred the matter to U. S. Magistrate Judge Suzanne Mitchell for proceedings consistent with 28 U.S.C. § 636(b).

Initially, this was stayed so that petitioner could exhaust certain claims. Thereafter, Judge Mitchell ordered a response from the state to which petitioner replied. Judge Mitchell has now issued a comprehensive Report and Recommendation addressing each of petitioner's ten grounds for relief and recommending that the petition be denied. Petitioner has objected to the Report's conclusions as to his first, second, fifth, sixth, seventh, and eighth grounds for relief, which triggers *de novo* review as to those grounds. Petitioner has

APPENDIX C

waived his right to appellate review as to the third, fourth, ninth, and tenth grounds for relief.

Petitioner raised the first six grounds for relief in his direct appeal to the Oklahoma Court of Criminal Appeals. His last four grounds were raised in his application for post-conviction relief. The OCCA affirmed the trial court both on direct appeal and as to the denial of the application for post-conviction relief. As stated more fully in the Report, petitioner is entitled to habeas relief only if the OCCA's adjudication of petitioner's claims "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d). "[S]o long as 'fairminded jurists could disagree' on the correctness of the decision," habeas relief is unavailable. Harrington v. Richter, 562 U.S. 86, 101 (2011). Further, claims based on state-law errors provide no basis for federal relief. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

Petitioner's first ground for relief is that the evidence against him was insufficient to prove guilt beyond a reasonable doubt. He objects to the Report's recommendation that the OCCA reasonably determined that there was sufficient evidence to support his convictions. He emphasizes that the case against him was based entirely upon circumstantial evidence and that the only way the jury could have found him guilty was by stacking inference on inference. A petitioner is entitled to habeas relief if, taking the evidence in the light most favorable to the state, "no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979).

Whether the evidence is direct evidence or circumstantial evidence does not alter the constitutional standard. Here, the OCCA's application of the Jackson standard, concluding that a rational trier of fact could have found petitioner guilty beyond a reasonable doubt, was not unreasonable under the applicable standard of review. Petitioner's first ground does not make out a basis for relief.

Petitioner's second ground for relief is that the trial court gave an improper jury instruction, violating his right to due process and a fair trial. The challenged instruction addressed the intent element necessary to be proved as to the murder count based on the death of the fetus. A jury instruction violates a defendant's due process rights when it relieves the prosecution of its burden to prove every element of the crime beyond a reasonable doubt. Sandstrom v. Montana, 442 U.S. 510, 523 (1979).

The OCCA addressed this argument on direct appeal and determined that the intent element necessary to convict petitioner of first-degree murder as to the fetus was met through the doctrine of transferred intent. The OCCA determined that Oklahoma's transferred intent rule applied, such that the malice aforethought attributable to Adams transferred to the unborn fetus. That conclusion is one of state law as to which the OCCA's determination is final and binds this court. Therefore, the court agrees with the Report's conclusion that the OCCA's determination — that the prosecution was not relieved of its burden to prove an essential element of the subject offense — was not unreasonable. Plaintiff's second ground does not show a basis for relief.

Petitioner's fifth ground for relief is that his due process right to a fundamentally fair trial was violated by the admission of evidence of prior bad acts. The disputed evidence

involved testimony from prior sex partners of petitioner to the effect that, despite their requests or insistence to the contrary, he refused to use a condom during sexual intercourse and that he ejaculated inside them during sex. There was also testimony that, once pregnancy resulted, he asked sexual partners to have abortions. In addition, petitioner objects to the admission of evidence of a text message he sent to a friend which included a link to a graphic video of a cow being slaughtered.

The OCCA concluded that the evidence of petitioner's attitude and conduct as to condoms and ejaculation was properly admitted as it, coupled with evidence of the victim's strong-willed personality, her insistence on condom use and not ejaculating inside her, and the surrounding circumstances, went to the issue of motive. It concluded the evidence as to abortions did not bear on the issue of motive and should not have been admitted, but that petitioner had not demonstrated any prejudice to him from the admission. Similarly, the OCCA concluded the text message from petitioner to a friend sending a link to a video of a cow being slaughtered should not have been admitted but the error was harmless.

As noted in the Report, the question on federal habeas review is whether the admission of the prior bad acts evidence resulted in a fundamentally unfair trial. Knighon v. Mullin, 293 F.3d 1165, 1171 (10th Cir. 2002). Tested against this standard, petitioner has not shown a sufficient basis for relief. The OCCA's determination as to the admissibility of the evidence as to condom usage and the like was not unreasonable. Similarly, its conclusion that the error from admission of the abortion and cow evidence was harmless was not unreasonable in light of the substantial evidence of guilt in the record. Petitioner's fifth ground does not provide a basis for habeas relief.

Petitioner's sixth ground argues that cumulative error by the trial court warrants a new trial. Here, apart from the error as to admission of the prior bad acts evidence referenced above, there is no error to "cumulate." And, as the Report correctly notes, petitioner has made no persuasive showing that admission of that evidence had a "substantial and injurious" impact on the jury's determination of a verdict. Hanson v. Sherrod, 797 F.3d 810, 852 (10th Cir. 2015). Petitioner's sixth ground does not establish a basis for relief.

Petitioner's seventh and eighth grounds for relief assert claims for ineffective assistance of appellate counsel. In the seventh ground, petitioner contends his appellate counsel was ineffective in failing to assert on direct appeal that his trial counsel failed to (1) file a motion to suppress warrants; (2) challenge the veracity of his arrest warrant; (3) file a motion to suppress his cellphone evidence; (4) file a motion to suppress evidence as outside the scope of a warrant; (5) file a motion to suppress evidence from his trucks; (6) challenge for dismissal of his second count; (7) file a motion to suppress cell phone evidence from his girlfriend; (8) obtain expert DNA testimony; (9) object to the publishing of inadmissible hearsay evidence; (10) call an exculpatory witness; (11) investigate and properly cross examine the medical examiner; (12) object to the reading of text messages by a witness; (13) consult with petitioner regarding supplemental jury instructions; and (14) object to prosecutorial misconduct. Petitioner's eighth ground for relief was that appellate counsel was ineffective for failing to raise claims of prosecutorial misconduct.

To show that counsel's performance was ineffective, parties must show that counsel failed to act "reasonably considering all the circumstances" and "that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 688-94 (1984). Under Strickland, there is a strong presumption that counsel provide adequate assistance and exercise reasonable professional judgment. Cullen v. Pinholster, 563 U.S. 170, 189 (2011). That standard, like the § 2254(d) standard, is "highly deferential and when the two apply in tandem, review is doubly so." Harrington v. Richter, 562 U.S. 86, 105 (2011).

In denying petitioner's application for post-conviction relief, the state district court properly stated the Strickland standard and noted that petitioner needed to show both that counsel's performance was deficient and that the deficiency caused him prejudice. That court noted petitioner's fourteen subclaims of error and concluded that petitioner had failed to demonstrate prejudice. Doc. #63-14, p. 4 ("Having reviewed each of these challenges, the Court finds Petitioner has not shown a reasonable probability that the outcome of his trial would have been different but for counsels' alleged deficiencies."). With respect to the failure to raise the alleged prosecutorial misconduct, the court stated: "After thoroughly reviewing the challenged comments in the context of the entire record, the Court concludes that Petitioner's trial was not rendered fundamentally unfair by prosecutorial misconduct. By and large, the comments at issue here were within the wide range of latitude afforded both parties and were appropriately based on the evidence and reasonable inferences that could be drawn from it."

The OCCA, after setting forth the proper standards for reviewing claims of ineffective assistance of counsel, affirmed the district court's denial of petitioner's application. Doc. #63-17, p. 4 ("We find no merit in the claim that Petitioner was denied

effective assistance of appellate counsel as alleged in his post-conviction application.”). It did so in summary fashion but, as the Report correctly notes, AEDPA’s deferential standard of review nonetheless applies.

In sum, as the Report noted, both the state district court and the OCCA properly identified the Strickland standard and concluded petitioner was not denied effective assistance of appellate counsel. Petitioner’s objection recites various errors he claims the Magistrate Judge made in reviewing those conclusions, but the court concludes they are unpersuasive. Petitioner has failed to establish that, but for the alleged errors, there is a reasonable probability that the results of his trial and application for post-conviction relief would have been different. In light of the doubly deferential standard applicable to claims of ineffective assistance of counsel in this context, the court concludes petitioner’s seventh and eighth grounds for relief do not show a basis for habeas relief.

Therefore, for the reasons stated here and in the Report, and after *de novo* review of the matters to which petitioner has objected, the court **ADOPTS** the Report and Recommendation [Doc. #79]. Petitioner’s amended petition for habeas relief [Doc. #57] is **DENIED**. Further, the court concludes that a certificate of appealability should not issue because petitioner has failed to demonstrate “a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

Dated this 7th day of February, 2023.



JOE HEATON
UNITED STATES DISTRICT JUDGE

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


| | | |
|-------------------------------------|---|--------------------|
| JOSEPH R. CYR, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| vs. |) | NO. CIV-19-1029-HE |
| |) | |
| SCOTT CROW, Director of the |) | |
| Oklahoma Department of Corrections, |) | |
| |) | |
| Respondent. |) | |

JUDGMENT

In accordance with the order entered this date, petitioner's amended petition for habeas relief, Doc. #57, is **DENIED**.

IT IS SO ORDERED.

Dated this 7th day of February, 2023.



JOE HEATON
UNITED STATES DISTRICT JUDGE

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

| | | |
|----------------------------|---|-------------------------|
| JOSEPH R. CYR, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. CIV-19-1029-HE |
| |) | |
| SCOTT CROW, |) | |
| Director of the Oklahoma |) | |
| Department of Corrections, |) | |
| |) | |
| Respondent. |) | |

REPORT AND RECOMMENDATION

Petitioner Joseph Richard Cyr, proceeding pro se, seeks a writ of habeas corpus under 28 U.S.C. § 2254. Doc. 57.¹ United States District Judge Joe Heaton referred the matter to the undersigned Magistrate Judge for proceedings consistent with 28 U.S.C. § 636(b)(1)(B), (C). Docs. 4, 32.² Respondent filed a response, Doc. 63, which includes as attachments

¹ Petitioner's original habeas motion contained both exhausted and unexhausted claims. Doc. 24 (Report and Recommendation, Apr. 16, 2020, *adopted in part by* Doc. 28 (Order, May 19, 2020)). This Court administratively stayed proceedings pending Petitioner's litigation of his unexhausted claims in state court. Doc. 28. After Petitioner had exhausted his available state court remedies, the Court reopened proceedings and ordered Petitioner to file amended pleadings. Doc. 32. The Court now considers Petitioner's Amended Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2254, Doc. 57, filed August 26, 2021.

² Citations to a court document are to its electronic case filing designation and pagination. Except for capitalization, quotations are verbatim unless otherwise indicated.

APPENDIX D

Petitioner's state-court filings and those courts' decisions, as well as portions of the original record for Oklahoma County Case No. CF-2013-2102 (OR). Petitioner filed a reply brief. Doc. 71. For the reasons set forth below, the undersigned recommends the Court deny habeas corpus relief.

I. The facts underlying Petitioner's convictions.

An Oklahoma County jury convicted Petitioner of two counts of malice murder—Count I, first-degree murder with malice aforethought, for Jaymie Adams's death; and Count II, first-degree murder with malice aforethought, for the death of her fetus. Doc. 57, at 1. The OCCA's factual findings, presumed correct under 28 U.S.C. § 2254(e)(1), are as follows:

Sometime during the early hours of December 10, 2011, [Petitioner] killed Jaymie Adams. Adams was married to Justin Adams, was seven or eight weeks pregnant, and was also a sex worker. At 11:21 p.m. on December 9, 2011, [Petitioner] called Adams and arranged to meet her at a McDonald's in Midwest City. Adams called her husband after 11:37 p.m., saying she was on her way to that appointment. Adams called [Petitioner] three more times while she drove to the restaurant. Her last phone call to [Petitioner] was at 12:12 a.m. on December 10, and at 12:16 a.m. she texted Justin [Jaymie's husband], "He's here." Beginning at 12:53 a.m., several calls and text messages were made from Adams's cell phone, near a cell tower closer to Lake Stanley Draper, nearer where her body was found. At that time her husband received a text saying, "He never showed." At 12:56 a.m., a text was sent to a different client from the previous evening, offering to meet again. At 1:06 a.m., a call was made to a rental company, and at 1:08 a.m., two calls were made to another previous client. At 1:09 a.m., a call was made to [Petitioner's]

phone. [Petitioner's] phone was off and did not receive calls or messages or use data from 12:14 a.m. to 1:47 a.m.

Adams's body was discovered approximately one month later on January 7, 2012, near a dirt bike trail in southeast Oklahoma City, on the outskirts of Lake Stanley Draper. She was nude except for a white coat, which had cuts that corresponded to stab wounds on Adams's body. She had been stabbed 29 times on her upper abdomen, back, neck, and head. One stab wound pierced the skull and entered her brain. Adams's jaw was broken into three pieces. Adams's unborn child died as a result of Adams's death, not the stab wounds. Forensic evidence suggested the body had been at the location since Adams was reported missing.

On the night of her disappearance, Justin Adams didn't see Adams's 12:53 a.m. text until after 3:00 a.m. Worried, he texted her, asking whether she was okay, but received no reply. He and his mother, Tina Clarke, searched for Adams and eventually found her minivan parked at a Midwest City McDonalds. They reported Adams missing at approximately 5:00 a.m. After talking with police, Justin and Clarke accessed Adams's phone records. Justin found [Petitioner's] number in the call log and called it. [Petitioner] told Justin he spoke with Adams on December 9 but said he did not meet her.

[Petitioner] arrived home at 2:00 a.m. on December 10 and woke up his girlfriend, Rebecca Schultz, who thought he was so late because he had been unfaithful; the two fought till 3:00 a.m. Later that morning, the family went out for breakfast at a restaurant next to where Adams's minivan was still parked. Afterwards, [Petitioner] asked Schultz to help him wipe down the interior of his truck. [Petitioner] also ran it through a car wash and bought four new tires. Later, [Petitioner] tried to convince Schultz these activities happened on the following weekend, not the weekend Adams disappeared. He also insisted he got home on the 10th at midnight, not 2:00 a.m., and that the family had breakfast at their home that morning. Over the next few months, as the case generated significant publicity, [Petitioner] demanded

that Schultz tell him she believed he could not have done anything to Adams.

Police assigned to Adams's missing person case initially focused suspicion on her husband Justin. However, the investigation also included [Petitioner] and Adams's other recent clients. On December 20, 2011, [Petitioner] was interviewed by police. He admitted that he talked with Adams on December 9, but denied ever meeting her. Although [Petitioner] lived in Choctaw and had worked at Tinker, he told police he was unfamiliar with the various highway exits in Midwest City. The same day, he told Schultz that he'd talked to Adams on the phone but had not met her. Schultz was contacted that day by Detective Garrett and learned [Petitioner] was the last person known to have contact with Adams. After that call, Schultz checked [Petitioner's] truck and noticed that a rain suit was missing. When she asked [Petitioner] about it, he denied it was missing. Schultz knew [Petitioner] was familiar with the area where Adams's body was found, but he told her he would not be stupid enough to leave the body near Lake Stanley Draper. Around the first of the year in 2012, [Petitioner] and Schultz moved to Skiatook. In February 2012, [Petitioner] consented to a search of the truck he'd driven the night Adams disappeared. At that point, law enforcement was trying to clear [Petitioner] and did not conduct a detailed search. [Petitioner] eventually told Schultz that he'd met Adams at midnight, he'd taken her to "some road" and had intercourse on the tailgate of his truck, then dropped her off at her minivan. He never told this to police.

Justin Adams remained the primary suspect and was arrested on January 27, 2012. After further investigation, Justin Adams and recent clients were excluded as contributors to a DNA mixture found in Adams's vagina; the other contributor was Adams herself. Police took a DNA sample from [Petitioner] in June 2012. [Petitioner] could not be eliminated as the male contributor to the mixture. On July 27, 2012, police searched [Petitioner's] house in Skiatook. Afterwards, [Petitioner] showed Schultz the sweatshirt he'd worn and the cell phone he used on

December 9th and 10th, the night Adams disappeared. He told Schultz he planned to throw away the shirt and asked her to hide the phone. In early September 2012, [Petitioner's] truck was searched again. Before surrendering his truck the second time, [Petitioner] removed his belongings and the seat covers. Finally, [Petitioner] was arrested and charged in April 2013. After his arrest, Schultz gave police [Petitioner's] hidden cell phone and the stained truck seat covers, which she had found hidden on their property. Schultz also volunteered for an interview with police in which she discussed what [Petitioner] had told her since December 10, 2011 and what she had observed, explaining that she had been too afraid of [Petitioner] to be truthful earlier.

The stains on the seat covers tested presumptively positive for blood, as did the underside of a seat cushion, part of the headliner, and the passenger rear inside door, but further testing for blood was negative. Significant parts of the cell phone call and text history during the time Adams disappeared had been manually deleted.

Doc. 63, Ex. 4, at 1-6.

II. Petitioner's claims.

Petitioner raises ten grounds for relief:

Ground One: The state's evidence was insufficient to prove [] Petitioner's guilt beyond a reasonable doubt, making the evidence insufficient to support a conviction[.]

Ground Two: The trial court gave an improper non-OUI instruction that created an impermissible presumption thereby violating [] Petitioner's right to due process and fair trial under the federal and state constitutions and in violation of *Sandstrom v. Montana*[, 442 U.S. 510 (1979).]

Ground Three: The trial court committed error in allowing [the] jury to view [the site where the victim's body was found] under

Okla. Stat. Tit. 22 § 851, then not following the proper procedure under that provision, depriving [] Petitioner [of] a fair trial[.]

Ground Four: The improper admission of unduly gru[e]some photographs that did not reflect [Petitioner's] acts, and blood soaked exhibits, violated [] Petitioner's fundamental right to fair trial[.]

Ground Five: [] Petitioner's fundamental right to a fair trial was violated by the admission of evidence of other bad acts in violation of the [Sixth] and [Fourteenth] Amendments and the Oklahoma Constitution[.]

Ground Six: Trial errors, when considered in a cumulative fashion, warrant a new trial[.]

Ground Seven: [] Petitioner was deprived of effective assistance on his direct appeal, in violation of his Sixth Amendment right of effective assistance of counsel[.]

Ground Eight: Petitioner was deprived of effective assistance of appellate counsel on his direct appeal, in violation of his Sixth Amendment right of effective counsel, for failing to raise claims of prosecutorial misconduct[.]

Ground Nine: [] Petitioner was deprived of effective assistance of appellate counsel on direct appeal in violation of his Sixth Amendment right to effective counsel, for failing to raise claims of judicial abuse of discretion[.]

Ground Ten: Petitioner's Sixth Amendment right to effective counsel on direct appeal was violated when a conflict of interest arose, when appellate counsel only raised on direct appeal [claims] that trial counsel had referred to her, and failed to raise claims that her client asked her to raise[.]

Doc. 57, at 15-19.

Petitioner raised grounds I-VI in his direct appeal. Doc. 63, Ex. 1. Petitioner raised ground VII-X in his application for post-conviction relief. *Id.* Ex. 10. The OCCA affirmed the trial court's judgments and sentences, *id.* Ex. 4, and the denial of Petitioner's application for post-conviction relief, *id.* Ex. 17.

III. Standard of review for habeas relief.

"The standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA') guide [this Court's] review of 28 U.S.C. § 2254 applications." *Wellmon v. Colo. Dep't of Corr.*, 952 F.3d 1242, 1245 (10th Cir. 2020). A petitioner is entitled to federal habeas relief only if the state court's adjudication of the merits of petitioner's claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d). Petitioner bears the "burden to make this showing and it is a burden intentionally designed to be 'difficult to meet.'" *Owens v. Trammell*, 792 F.3d 234, 1242 (10th Cir. 2015) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011)). This standard "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 v. Richter*, 562

U.S. 86, 102-03 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

This Court first determines “whether the petitioner’s claim is based on clearly established federal law.” *Hanson v. Sherrod*, 797 F.3d 810, 824 (10th Cir. 2015). Clearly established federal law consists of Supreme Court holdings in cases with facts similar to those in the petitioner’s case. *See House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008). If clearly established federal law exists, this Court then considers whether the state court decision was contrary to or an unreasonable application of that 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.* (quoting *Dodd v. Trammell*, 753 F.3d 971, 982 (10th Cir. 2013)). “It 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.” *Bland*

v. Sirmons, 459 F.3d 999, 1009 (10th Cir. 2006) (quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

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.’” *Owens*, 792 F.3d at 1242 (alterations omitted) (quoting *Bland*, 459 F.3d at 1009). 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.* (internal quotation marks omitted). So to qualify for habeas relief on this prong, Petitioner must show “there was no reasonable basis for the state court’s determination.” *Id.* at 1243 (internal quotation marks omitted). “In other words, ‘so long as fairminded jurists could disagree on the correctness of the state court’s decision,’ habeas relief is unavailable.” *Id.* (quoting *Harrington*, 562 U.S. at 101); *see also Harrington*, 562 U.S. at 103 (“As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”).

Petitioner raises claims based on state-law errors. Doc. 63, *passim*. But errors of state law provide no basis for federal habeas relief. *See Davis v. Reynolds*, 890 F.2d 1105, 1109 n.3 (10th Cir. 1989) (“Alternative state claims, whether grounded in state statutes or the State Constitution, are not cognizable under 28 U.S.C. § 2254(a).”); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”). The undersigned thus recommends the Court deny any claim solely based on the violation of Oklahoma’s statutes or constitution.

If Petitioner argues that a state-court error is “so unduly prejudicial that it renders the trial fundamentally unfair,” the Court will consider that claim under “the Due Process Clause of the Fourteenth Amendment[, which] provides a mechanism for relief.” *Ochoa v. Workman*, 669 F.3d 1130, 1144 (10th Cir. 2012) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991), regarding state-law evidentiary errors).

And even if the OCCA did not explicitly address a fundamental fairness argument, that federal due process claim was before the court and AEDPA deference applies. *See Harrington*, 562 U.S. at 98 (“Where a state court’s decision is unaccompanied by an explanation, the habeas petitioner’s burden

[under § 2254(d)] still must be met by showing there was no reasonable basis for the state court to deny relief.”).

Finally, although this Court liberally construes the petition, it will not supply Petitioner with an argument. *See, e.g., United States v. Pinson*, 584 F.3d 972, 975 (10th Cir. 2009) (“[B]ecause [the petitioner] appears pro se, we must construe his arguments liberally; this rule of liberal construction stops, however, at the point at which we begin to serve as his advocate.”) (citing *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)).

IV. Analysis of Petitioner’s claims.

A. Ground One—Counts I & II: The OCCA reasonably determined there was sufficient evidence to convict Petitioner for the murder of Adams and her fetus.

1. The OCCA reasonably applied clearly established federal law as to Count I.

Petitioner claims the prosecution’s “evidence was insufficient to prove the Petitioner’s guilt beyond a reasonable doubt, making the evidence insufficient to support a conviction.” Doc. 58, at 10.

a. The OCCA’s decision.

The OCCA held:

[Petitioner] claims there was insufficient evidence to convict him on each count. To support a conviction for first degree murder the State must show an unlawful death caused by the defendant

with malice aforethought. [Petitioner] argues that no physical evidence connected him to Adams's murder, charged in Count I, and the State failed to show a motive.

The jury is the finder of fact, determining the weight and credibility of each witness, and weighing conflicting evidence. We will not disturb a verdict supported by competent evidence even if the evidence conflicts, and will accept all reasonable inferences tending to support the jury's verdict. Even where the evidence sharply conflicts, we will affirm a jury verdict supported by the evidence.

The case against [Petitioner] was entirely circumstantial. The DNA evidence, which [Petitioner] did not contest, confirmed that he and Adams had intercourse. [Petitioner] consistently lied about this to police, and insisted that he'd never met Adams. The record showed [Petitioner] was familiar with the area where Adams's minivan and body were found, and he consistently lied to authorities about that as well. Although [Petitioner] agreed to an in-person interview with police, he was evasive during the interview and refused to provide a DNA sample, which was later obtained by court order. This was true even though officers believed, at that time, that Justin was guilty, and explicitly told [Petitioner] they were trying to clear him of suspicion. Immediately after the crime [Petitioner] cleaned his truck inside and out and bought four new tires. [Petitioner] agreed to a search of his truck but first removed the seat covers, suggesting that he feared they might contain evidence that Adams had been in the truck. [Petitioner] tried to enlist Schulz's [sic] aid in establishing his innocence, and admitted to her that he'd had intercourse with Adams in his truck bed; however, he also tried to convince her that her memory of events was wrong and threatened that she would be arrested as an accomplice if she talked to police. He deleted the calls and texts with Adams from his cell phone, concealed that phone from police, and asked Schulz [sic] to hide it. The State provided a possible motive, discussed below. Maggot activity showed that Adams's body could have been left in the field no earlier than December 3rd and no later than December 15th,

fitting into the timeline developed by phone calls and texts between [Petitioner] and Adams, which strongly supported the State's assertion that she had been killed the night she disappeared.

[Petitioner] argued at trial that although Justin had been cleared he was in fact guilty of the crimes. During the trial, the State presented its entire case against Justin, followed by the evidence that eventually led investigators to believe that Justin had not killed Adams. This involved detailed explanations and comparisons of computer and cell phone records for Justin, Adams, and [Petitioner], as well as DNA evidence and other testimony. *The jury heard all this evidence, as well as the evidence supporting [Petitioner's] guilt. Taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that [Petitioner] killed Adams. Sufficient evidence supported his conviction for Count I.*

Doc. 63, Ex. 4, at 6-9 (internal citations omitted and emphasis added).

b. Clearly established federal law.

A petitioner "is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 324. *Jackson* requires that a habeas court review the evidence "in the light most favorable to the prosecution." *Id.* at 319. "Expressed more fully, this means a reviewing court 'faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the

prosecution, and must defer to that resolution.” *McDaniel v. Brown*, 558 U.S. 120, 133 (2010) (quoting *Jackson*, 443 U.S. at 326). Finally, “[s]tate law determines the parameters of the offense and its elements and a federal court may not reinterpret state law.” *Tillman v. Cook*, 215 F.3d 1116, 1131-32 (10th Cir. 2000) (alteration in original).

c. The OCCA reasonably applied *Jackson* in finding there was sufficient evidence to support a conviction on Count I.

The OCCA reasonably applied *Jackson* to conclude that “[t]aking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that [Petitioner] killed Adams.” Doc. 63, Ex. 4, at 9 (citing *Easlick v. State*, 90 P.3d 556, 559 (Okla. Crim. App. 2004), which adopted the *Jackson* test). In holding the evidence sufficient to secure a conviction on Count I, the OCCA emphasized three categories of evidence: cell phone records indicating Petitioner was the last person to see Adams alive; DNA evidence that Petitioner could not be excluded as a contributor to the genetic material found in Adams’s vagina; and Petitioner’s non-responsiveness and efforts to hide evidence during the police investigation.

Based on this evidence, the Court cannot say that “no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” See

Jackson, 443 U.S. at 324. The OCCA reasonably applied *Jackson* to find sufficient evidence supported Petitioner's conviction. This claim should therefore be denied.

2. The OCCA reasonably applied clearly established federal law as to Count II.

a. The trial court's erroneous instruction.

Petitioner argues there was insufficient evidence to support a conviction on Count II (first-degree murder of Adams's fetus) because under the incorrect instructions given to the jury, the prosecution was relieved of its burden to prove that he acted with malice aforethought with respect to Adams's fetus, as he did not know she was pregnant.³ See Doc. 63, Ex. 1, at 17-18 (argument on direct appeal incorporated by reference into brief in support of federal habeas relief, Doc. 58, at 10-12). The OCCA concluded the trial court erred when it

³ Petitioner also argues the jury instruction relieved the prosecution of its statutory burden to prove the fetus's viability. But Oklahoma law does not require viability as a prerequisite for criminal liability. Doc. 63, Ex. 4, at 10 ("In this instance, the Legislature's intent is clear: a defendant may be prosecuted for the homicide of an unborn child, whether or not that child is viable.").

instructed the jury that it need not find Petitioner was aware Adams was pregnant to convict him on Count II, first-degree murder of Adams's fetus.⁴

b. The OCCA's decision.

The OCCA addressed Petitioner's claim related to the sufficiency of the evidence and the challenged instruction as follows:

[Petitioner's] primary argument is that he cannot be convicted of malice murder in Count II. "Malice" is defined as a deliberate intention to take a human being's life. [Petitioner] argues that there is no evidence he knew Adams was pregnant, so he could not have had the intent to kill her child. *On the contrary, the malice element is satisfied by transferred intent. Transferred intent, an alternative factual theory of first degree murder, provides that if the defendant intends to cause the death of a human being, and actually causes the death of another human being, he is responsible for that death as well. The circumstances here are unusual in that [Petitioner's] intended actions killed two separate people: [Petitioner] intended to kill Adams and, in doing so, killed another person.*

[Petitioner] argues that he was unaware Adams was with child, precluding him from having intent to kill the child. However, the issue is not whether [Petitioner] actually saw the third party

⁴ In 2006, the Oklahoma legislature passed OKLA. STAT. tit. 21, § 691(B), redefining homicide to include killing a fetus. Doc. 63, Ex. 4, at 13. At the same time, it repealed OKLA. STAT. tit. 21, § 713, which had until that point made killing a fetus first-degree manslaughter. The legislature failed to remove the reference to that now-repealed fetal manslaughter statute from OKLA. STAT. tit. 21, § 723, which provides that "[a]ny offense committed pursuant to the provisions of Section[] . . . 713 of Title 21 of the Oklahoma Statutes does not require proof that the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant." *Id.* at 12-13.

victim, i.e. the unborn child, but whether he ought to have known a third person might be present. For instance, when a defendant shoots into a building intending to kill a specific person, he is responsible if he kills someone else who is also in the building, even though he cannot see inside—because common sense tells us that buildings may contain people, and his intent to kill is transferred to whomever is actually shot. Adams was a woman of childbearing age. Under Oklahoma law, unborn children are human beings. *We find that, under the narrow and unusual circumstances of this case, [Petitioner's] intent to kill Adams was transferred to her unborn child. Taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that [Petitioner] intended to kill the unborn child victim in Count II. Sufficient evidence supported Count II.* This proposition is denied.

[. . .]

[W]hether or not [Petitioner] knew [the victim] was pregnant has no bearing on whether his intent to kill [the victim] could be transferred to the unborn child. *Practically speaking, the modification neither misinformed the jurors nor removed the element of intent as to Count II. The instructions, taken as a whole, accurately stated the applicable law.*

Id. Ex. 4, at 11-12, 15 (internal citations omitted and emphasis added).

c. Clearly established law.

Jury instructions are a matter of state law. *See Nguyen v. Reynolds*, 131 F.3d 1340, 1357 (10th Cir. 1997). “On habeas review [], ‘the fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief.’” *Parker v. Scott*, 394 F.3d 1302, 1319 (10th Cir. 2005) (quoting *Estelle*, 502 U.S. at 71-72). “The question . . . is not whether the [challenged]

instruction is ‘undesirable, erroneous, or even universally condemned,’ but whether the instruction so infected the trial that the resulting conviction violates due process.” *Maes v. Thomas*, 46 F.3d 979, 984 (10th Cir. 1995) (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (further internal quotations omitted)).

A jury instruction violates a defendant’s due process rights when it relieves the prosecution of its burden to prove every element of the crime beyond a reasonable doubt, that is, “every fact necessary to constitute the crime . . . charged.” *Sandstrom*, 442 U.S. at 523 (quoting *In re Winship*, 397 U.S. 358, 364 (1970)). This includes instructions related to the mens rea element of intent. See *Patton v. Mullin*, 425 F.3d 788, 807 (10th Cir. 2005) (applying *Sandstrom*); *Wiley v. Rayl*, 767 F.2d 679, 680 (10th Cir. 1985) (explaining that the court “must decide whether the intent instruction violated the fundamental principle that the state must prove every element of a criminal offense beyond a reasonable doubt as defined in *Sandstrom*” and vacating the defendant’s kidnapping conviction because “the state’s instruction unconstitutionally shifted to the defendant the burden of proving a lack of intent to kidnap”).

d. The OCCA's determination that there was sufficient evidence to convict Petitioner for malice murder of Adams's fetus was not contrary to clearly established federal law.

The OCCA concluded that, given the application of the transferred intent doctrine, any rational trier of fact could find beyond a reasonable doubt that Petitioner intended to kill the unborn child victim. Doc. 63, Ex. 4, at 12. The court reasoned that “[p]ractically speaking, the [instruction] neither misinformed jurors nor removed the element of intent as to Count II.” *Id.* Ex. 4, at 15. The only question for this Court is whether the OCCA's conclusion is contrary to *Sandstrom*, that is, whether the OCCA reasonably concluded that the prosecution was not relieved of its burden to prove every element of first-degree murder as defined by Oklahoma law. *See Tillman*, 215 F.3d at 1131-32 (10th Cir. 2000) (“[S]tate law determines the parameters of the offense and its elements and a federal court may not reinterpret state law.”). The Court finds the OCCA's conclusion to be consistent with *Sandstrom*.

Under Oklahoma law, a first-degree murder charge requires the state to show an unlawful death caused by the defendant with malice aforethought. OKLA. STAT. tit. 21, § 701.7. Petitioner argues the “OCCA conflicted with federal law by accepting and recognizing the proposed transferred intent theory,” which “the trier of fact was never made aware of or given to consider

in determining their verdict.” Doc. 58, at 11-12 (citing *Bradford v. United States*, 651 F.2d 700, 704-05 (10th Cir. 1981)). But the jury instructions included the substance of the transferred intent doctrine, even if not identified by name.

The doctrine of transferred intent entails:

[W]hen one person acts with intent to harm another person, but because of a bad aim he instead harms a third person who he did not intend to harm, the law considers him just as guilty as if he had actually harmed the intended victim.

Short v. State, 980 P.2d 1081, 1098 (Okla. Crim. App. 1999) (citing W. LaFave & A. Scott, *Criminal Law*, § 3.12(d) (2d ed. 1986)). The doctrine “directly relates to the *mens rea* element of the charged offense.” *Jackson v. State*, 371 P.3d 120, 1122 (Okla. Crim. App. 2016). It is “not an alternative legal theory of guilt,” but rather “an alternative factual theory with the same legal basis.” *Id.*

The trial court properly instructed the jury that to find Petitioner guilty of first-degree murder as to Count I, it must find that he acted with malice aforethought to kill Adams. OR 595-96, 613. And the jury was instructed, albeit erroneously, as to Count II: “The Oklahoma Statute does not require proof that the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant.” Doc. 63,

Ex. 18, at 24; *see also id.* Ex. 4, at 14. The OCCA concluded, “The instructions, taken as a whole, accurately stated the applicable law.” *Id.* Ex. 4, at 15. Specifically, “The modified language instructed jurors that, as to an unborn child, there was no requirement that [Petitioner] either knew Adams was pregnant, or intended to injure or kill her unborn child.” *Id.* Ex. 4, at 14-15. Taken together, the mens rea instructions for Counts I & II conveyed the transferred intent doctrine—that, should the jury find Petitioner acted with the requisite intent to kill Adams, that intent could also be transferred to her fetus.

So, consistent with *Sandstrom*, the prosecution was not relieved of its burden of proving malice aforethought as to Count II. The jury found that Petitioner acted with malice aforethought in killing Adams, and that conclusion was sufficient to satisfy the intent element for Count II by way of the transferred intent doctrine, which the jury was, practically speaking, properly instructed on.

Petitioner’s claim should be denied.

B. Ground Two: The OCCA reasonably held that the trial court's erroneous jury instruction did not relieve the state of its burden to prove the intent element of malice murder as to Count II.

Petitioner contends the erroneous instruction relieved the state of its burden to prove he had the malice aforethought to justify a first-degree murder conviction for killing Adams's fetus, in violation of *Sandstrom*. Doc. 58, at 12-18. As explained *supra* § IV.A.2.b., the OCCA concluded that the "modification neither misinformed the jurors nor removed the element of intent as to Count II." Doc. 63, Ex. 4, at 15. This Court is bound by the OCCA's determination that the jury instruction accurately represented state law. See *Williams v. Trammell*, 782 F.3d 1184, 1195 (10th Cir. 2015) ("[A] state court's interpretation of state law, *including one announced on direct appeal of the challenged conviction*, binds a federal court sitting in habeas corpus." (quoting *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005))). The OCCA's conclusion that "the intent necessary for malice murder is provided through transferred intent" is not an unreasonable application of, or contrary to, clearly established federal law. Doc. 63, Ex. 4, at 13-14. Petitioner's claim, as above, should be denied.

C. Ground Three: The OCCA reasonably concluded Petitioner suffered no prejudice from the jury's visit to the crime scene.

Petitioner claims the OCCA erred by holding the trial court had not deprived him of a fair trial by allowing the jury to visit the site where Adams's body was found and for failing to follow proper procedures at the site. Doc. 58, at 18-20. Petitioner argues the site visit was unnecessary and prejudicial, given the accuracy of photos and diagrams also available to the jury and because the site had significantly changed in the intervening years. *Id.*

1. The OCCA's decision.

The OCCA concluded:

Before the visit, the trial court admonished jurors that, during the visit, they would be in the bailiff's custody, and should neither talk about the case nor ask questions. The record reflects that, while in the bailiff's custody, jurors followed this admonition. The trial court denied [Petitioner's] requests for a court reporter at the scene and another admonition to jurors at the scene. The trial judge, jurors, and sheriff's office escorts arrived at the scene together, and the prosecution and defense teams travelled on their own; jurors were already viewing the scene when defense counsel arrived. They were instructed not to talk about the case or ask questions. The record shows that the jurors stayed briefly at each scene. At the end of the visit, the bailiff discharged the jurors and told them not to discuss the case or watch news reports.

The State asked that jurors be allowed to view the scene to show that, although it was near a main road and town, the scene itself was very isolated. The State sought to show jurors that it was possible Adams's body could have remained in the field for a month

undiscovered. Defense counsel objected, noting that in the interval since Adams was reported missing (the crime was in December 2011, and the site visit was in October 2016) the landscape and property use had substantially changed. The area was no longer an off-road recreation site; the vegetation had grown, the dirt trails were less visible, and the area had been fenced with locked gates. Neither party spent any time discussing the parking lot visit.

[Petitioner] fails to show how he was prejudiced by the site visit. *On appeal, he repeats the claims that the crime scene had changed since Adams's body was discovered, and he notes that photographs, maps and diagrams showed jurors the isolated character of the site. He also argues, without authority, that viewing the site where the body was discovered is "akin to taking the jury to a gravesite." It is not. The record fails to show that either party gained any particular benefit, or suffered any particular prejudice, from this excursion. [Petitioner] was not harmed by the site visit, and this proposition is denied.*

Doc. 63, Ex. 4, at 16-18 (internal citations omitted and emphasis added).

2. The OCCA's conclusion that Petitioner suffered no prejudice is not an unreasonable application of clearly established federal law.

The OCCA held that the trial court had not abused its discretion or violated any statute by allowing the site visit, concluding that Petitioner "fail[ed] to show how he was prejudiced by the site visit." *Id.* Ex. 4, at 15-18. This conclusion was not an unreasonable application of clearly established federal law. *Hooks v. Workman*, 689 F.3d 1148, 1180 (10th Cir. 2012) ("[Petitioner] is entitled to relief only if an alleged state-law error [] 'was so grossly prejudicial that it fatally infected the trial and denied the fundamental

fairness that is the essence of due process.” (quoting *Revilla v. Gibson*, 283 F.3d 1203, 1212 (10th Cir. 2002)).

Petitioner’s due process claim based on the site visit should therefore be denied.

D. Ground Four: The OCCA reasonably concluded Petitioner was not deprived of a fair trial by the admission of “unduly gru[e]some photographs” and “blood soaked exhibits.”

Petitioner contends the trial court deprived him of a fair trial by admitting into evidence “unduly gru[e]some photographs” and “blood soaked exhibits.” Doc. 57, at 15. Petitioner claims “the nature and volume of the photographs introduced had a tremendous impact on the jury.” Doc. 58, at 20.

1. The OCCA’s decision.

The OCCA held as follows:

[Petitioner] argues the trial court should not have admitted photographs and Adams’s cut and bloody coat. We review the decision to admit this evidence for abuse of discretion.

Photographs may show the nature and location of wounds, corroborate the medical examiner’s testimony, and show the crime scene. Several of the photographs do, as [Petitioner] states, reflect the fact that Adams’s body lay on the open ground, uncovered, for a significant period of time, and attracted both insect and animal attention before its discovery. *While these pictures are unpleasant, they are a direct result of [Petitioner’s] actions and decision to abandon the body where he did, and reflect his handiwork.* The extent of insect activity was relevant to, and illustrated, expert testimony dating Adams’s death in part through evidence of

exposure and the insects found with the body and at the scene. While several photographs were taken after the body was at the Medical Examiner's office they do not, as [Petitioner] argues, show the work of the Medical Examiner or impermissibly show autopsy results. Pictures of Adams's shaved scalp and separated jaw show numerous cuts and stab wounds to her head, and that her jaw was broken. All this was [Petitioner's] work, and relevant to issues of guilt and punishment. [Petitioner] claims the photographs were unnecessary because neither the cause nor manner of death were disputed. However, one important issue was the time of Adams's death and the amount of time her body lay undiscovered at that location. *The photographs were probative on this issue. The cut and blood-soaked coat, in which Adams's body was found, was relevant as tending to establish a material fact.*

[Petitioner] argues that the photograph of the unborn child, as it was preserved by the Medical Examiner, was not relevant and reflected only that official's actions. On the contrary, [Petitioner] was charged in Count II with the murder of that unborn child. The fact that it died as a result of Adams's death, and not directly at [Petitioner's] hands, does not make its death any less [Petitioner's] own doing. *The State was required to prove the existence of that victim, and entitled to do so through available evidence including photographs. The picture is not so gruesome that jurors could not view it impartially.*

The trial court did not abuse its discretion in admitting the disputed photographs and evidence.

Doc. 63, Ex. 4, at 18-20 (internal citations omitted and emphasis added).

2. **The OCCA's conclusion that these exhibits did not render Petitioner's trial fundamentally unfair is not an unreasonable application of clearly established federal law.**

“The essence of our inquiry under the Fifth, Sixth, and Eighth Amendments, as applied to the states under the Fourteenth Amendment, is whether the admission of the photographs rendered the proceedings fundamentally unfair.” *Smallwood v. Gibson*, 191 F.3d 1257, 1275 (10th Cir. 1999); *see also Jackson v. Shanks*, 143 F.3d 1313, 1322 (10th Cir. 1998) (“[D]ue process arguments relating to the admissibility of the victims’ clothing and autopsy photos similarly will not support habeas relief absent fundamental unfairness so as to constitute a denial of due process of law.” (quoting *Martin v. Kaiser*, 907 F.2d 931, 934 (10th Cir. 1990))).

The OCCA concluded the pictures reflecting “insect and animal attention” before the body was discovered were relevant because “one important issue was the time of Adams’s death and the amount of time her body lay undiscovered at that location.” Doc. 63, Ex. 4, at 18-19. And the OCCA further held the photograph of Adams’s fetus was relevant to prove the existence of the victim of the charged crime in Count II. Given the probative nature of these photographs, the OCCA reasonably concluded that the trial court did not err by admitting these photographs. *See Jackson*, 143 F.3d at 1322 (“Though admittedly unpleasant, the photographs illuminated and clarified the forensic pathologist’s testimony.”); *Smallwood*, 191 F.3d at 1275

(“Given the . . . the gruesome character of the crime itself, and the wealth of additional evidence supporting defendant’s convictions, the admission of the photographs was not so unduly prejudicial as to render the proceedings against petitioner fundamentally unfair.”).

Petitioner’s claim should be denied.

E. Ground Five: The OCCA reasonably concluded Petitioner was not deprived of a fair trial by the admission of character evidence of prior bad acts.

Petitioner argues the admission of evidence of his prior bad acts rendered his trial fundamentally unfair. Doc. 58, at 21-23. Petitioner challenges testimony that he assaulted prior sexual partners by ejaculating inside them after assuring them he would not, then pressuring them to obtain abortions, and testimony that he forwarded a graphic video of a cow being slaughtered to a friend. *See id.*

1. The OCCA’s decision

The OCCA held as follows:

The State argued the disputed evidence went to [Petitioner’s] motive to kill Adams. Evidence showed that Adams required customers to use a condom, insisted on being the person to make that decision, provided condoms if necessary, and did not allow customers to ejaculate inside her. Adams had a volatile temper and was known to fly off the handle quickly if she didn’t get her say. She had a strong-willed, aggressive personality and would fight back, both verbally and physically, if someone did

something with which she did not agree. The State alleged that [Petitioner] not only habitually refused to use a condom, but insisted on ejaculating inside partners during intercourse, even when they explicitly asked him not to do so. The State argued that [Petitioner's] habits and Adams's rules surrounding sexual activity clashed, with the result that [Petitioner] broke Adams's jaw and stabbed her multiple times.

To prove the allegations regarding [Petitioner's] habitual sexual behavior, the State offered the testimony of A.S. and C.F. Each woman testified that, during sexual intercourse, [Petitioner] didn't like condoms and would ejaculate inside his partner, although he had earlier agreed not to do that. Each woman became pregnant as a result, and [Petitioner] demanded that each get an abortion. *The evidence of [Petitioner's] habit of ejaculation inside his partner during sexual intercourse was probative as to motive. It was relevant and there was a visible connection between the women's testimony and the charged crimes.* The bad acts evidence was proved by clear and convincing evidence, and it was more probative than prejudicial. The trial court did not abuse its discretion in admitting this evidence. *However, the State concedes the evidence that [Petitioner] asked C.F. and A.S. to have abortions was irrelevant to the issue of motive. While this certainly cast [Petitioner] in an unpleasant light, he fails to show that it prejudiced him to the extent that it affected the outcome of his trial. Admission of this testimony was harmless.*

[Petitioner's] girlfriend, Schultz, also testified that [Petitioner] did the same thing to her and that she, too, became pregnant as a result, but she did not testify that she specifically asked him not to ejaculate or that she objected when he did. [Petitioner] did not object to Schultz's testimony at trial and has waived all but plain error as to this claim. Plain error is an actual error, that is plain or obvious, and that affects a defendant's substantial rights, affecting the outcome of the trial. *Schultz's testimony was relevant to the issue of motive. There is no error, and thus no plain error.*

[Petitioner] also complains about Detective Holland's testimony that, as part of a series of text messages, [Petitioner] sent his friend Brittany Davis a link to a graphic video of a cow slaughter. Holland testified Davis responded by telling [Petitioner] not to send her more links like that. Petitioner responded essentially that Davis was too sensitive. At the prosecutor's request, Holland described the video's contents in some detail. The State argued the evidence was relevant because afterwards, the tone of their conversations changed. Davis said that considering [Petitioner] was in trouble for a gruesome murder, he should rethink the humor of slaughter, that it might make him look guilty, and that she could be that unfortunate voice in his trial. The trial court denied [Petitioner's] objection that the evidence of the video was irrelevant and prejudicial. *On the contrary, the record shows that, whatever relevance Davis's threats might have had, the information about and description of the slaughter video was irrelevant to any issue at trial. While the State correctly notes that this exchange describes neither a crime nor a bad act of [Petitioner's], jurors might well feel that [Petitioner] was a bad person for finding humor in the video. However, the record does not support [Petitioner's] claim that he was prejudiced by its admission.*

Doc. 63, Ex. 4, at 21-24 (internal citations omitted and emphasis added).

2. **The OCCA's conclusion that Petitioner was not prejudiced by this character evidence is not an unreasonable application of clearly established federal law.**

Under Oklahoma law, evidence of prior bad acts is admissible only if "probative of a disputed issue of the crime charged," with the probative value outweighing any prejudice to the defendant. *Marshall v. State*, 232 P.3d 467, 477 (Okla. Crim. App. 2010). The OCCA concluded that the

admission of the abortion and cow-slaughter-video evidence, though error, was nevertheless harmless. Doc. 63, Ex. 4, at 22, 24.

On habeas review, the Court asks whether the prior bad acts evidence resulted in a fundamentally unfair trial. *See Knighton v. Mullin*, 293 F.3d 1165, 1171 (10th Cir. 2002) (considering, on federal habeas review, whether the admission of the character evidence “resulted in a fundamentally unfair trial”). The Court agrees that, given the properly admitted evidence of Petitioner’s guilt, the record did not support a conclusion that Petitioner was prejudiced by their omission. *See Bass v. Burt*, 850 F. App’x 962, 966 (6th Cir. 2021) (denying habeas relief because prior act evidence was erroneously admitted and concluding that the petitioner “seriously underestimates the evidence of his guilt and exaggerates the prominence of the rape evidence at trial,” echoing the state court’s holding that “that the admission of this evidence was harmless in light of the ‘overwhelming’ circumstantial proof of [the petitioner’s] guilt”); *cf. Millsap v. Allbaugh*, 2019 WL 1302548, at *15 (E.D. Okla. Mar. 21, 2019) (“The admission of the other crimes and bad acts evidence did not render Petitioner’s trial fundamentally unfair There was strong evidence supporting the guilty verdicts and sentences in the case at hand, regardless of the admission of the other crimes and bad acts evidence.”).

Because the OCCA reasonably concluded that the erroneously admitted character evidence did not render Petitioner's trial fundamentally unfair, this claim should be denied.

F. Ground Six: The OCCA reasonably concluded that the purported errors in Grounds I-V did not cumulatively warrant a new trial.

Petitioner claims that the above errors, *supra* §§ IV.A.-E., when considered cumulatively, warrant a new trial. Doc. 58, at 23.

1. The OCCA's decision.

The OCCA held as follows:

[Petitioner] claims in Proposition VI that accumulated error denied him a fair trial. We found no error in Propositions I-IV. We found in Proposition V that [Petitioner] was not prejudiced by error in admission of evidence of some bad acts, and admission of irrelevant evidence. There is no cumulative error where errors considered together do not affect the outcome of the proceedings.

Doc. 63, Ex. 4, at 24.

2. The OCCA's conclusion is not an unreasonable application of clearly established federal law.

Although "the Supreme Court has never recognized the concept of cumulative error," meaning there is arguably no clearly established federal law on the subject, *Bush v. Carpenter*, 926 F.3d 644, 686 n.16 (10th Cir. 2019), when a habeas petitioner asserts cumulative error under due process principles the

claim is reviewable because “Supreme Court authority clearly establishes the right to a fair trial and due process,” *Hanson*, 797 F.3d at 852 n.16 (quoting *Darks v. Mullin*, 327 F.3d 1001, 1017 (10th Cir. 2003)). “A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless.” *Workman v. Mullin*, 342 F.3d 1100, 1116 (10th Cir. 2003) (quoting *Duckett v. Mullin*, 306 F.3d 982, 992 (10th Cir. 2002)).

That is, “we must find that the cumulative effect of the errors determined to be harmless had a ‘substantial and injurious effect or influence in determining the jury’s verdict.’” *Hanson*, 797 F.3d at 852 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

The OCCA found the trial court erred by admitting some of the character evidence that the OCCA determined to be irrelevant, *supra* § IV.E.1. Petitioner has not explained how those errors had a substantial or injurious effect on the jury’s verdict when considered together. The Court therefore finds this claim should be denied, as Petitioner has not shown the OCCA’s decision was

contrary to or an unreasonable application of the Supreme Court's clearly established due process law.

G. Ground Seven: The OCCA reasonably concluded Petitioner did not receive ineffective assistance of appellate counsel.

1. Clearly established law.

Under clearly established law, Petitioner must show his attorney's performance was deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 691-92 (1984). A court will only consider an attorney's performance "deficient" if it falls "outside the wide range of professionally competent assistance," and such review "must be highly deferential." *Id.* at 689-90. "[P]rejudice" involves "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

"[A]ppellate counsel's omission of an issue may constitute ineffective assistance under *Strickland*. In analyzing such claims, the court must consider the merits of the omitted issue." *Malicoat v. Mullin*, 426 F.3d 1241, 1249 (10th Cir. 2005). "A sufficiently meritorious omitted claim certainly can, by itself (or in relation to other issues that counsel did pursue), establish constitutionally deficient performance by appellate counsel." *Cargle v. Mullin*, 317 F.3d 1196, 1205 (10th Cir. 2003). But "if the issue is meritless, its omission will

not constitute deficient performance.” *Id.* at 1202. “The omitted issue’s merits determine both deficient performance and prejudice.” *Wood v. Carpenter*, 907 F.3d 1279, 1304 (10th Cir. 2018). Thus, to rule on a claim that appellate counsel was ineffective for failing to argue that trial counsel was ineffective, a court “must assess the merits of the ineffective assistance of trial counsel claim [the petitioner’s] counsel failed to raise.” *Id.*

The OCCA’s determination of Petitioner’s ineffective assistance of counsel claims is entitled to “doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). “When § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Harrington*, 562 U.S. at 105.

2. Petitioner’s claims.

Petitioner alleges appellate counsel was ineffective for failing to raise fourteen claims on direct appeal that Petitioner’s trial counsel was ineffective.

Doc. 58, at 23-43. Petitioner alleges trial counsel was ineffective for:

- (1) failing to request a *Franks* [*v. Delaware*, 438 U.S. 154 (1978)] hearing and move for suppression of unspecified evidence obtained pursuant to search warrants;

- (2) failing to challenge the veracity of the affidavit for Petitioner's arrest warrant;
- (3) failing to move for suppression of unspecified evidence obtained pursuant to a search warrant for a cellphone;
- (4) failing to move for suppression of evidence seized from his home pursuant to a search warrant;
- (5) failing to move for suppression of evidence allegedly seized from Petitioner's trucks prior to issuance of search warrants;
- (6) failing to move for dismissal of Count 2 on Section 11[, OKLA. STAT. tit. 21, § 11,] grounds;
- (7) failing to move for suppression of evidence retrieved from Petitioner's cellphone during an allegedly warrantless search;
- (8) failing to seek independent DNA testing of the victim's vaginal swab;
- (9) failing to object to Dr. Heather Ket[c]hum's report as hearsay;
- (10) failing to call an allegedly exculpatory witness, Marvell Kraft;
- (11) failing to adequately cross-examine the medical examiner regarding whether sperm was present on the victim's vaginal swabs;
- (12) failing to object to Detective Holland's testimony regarding text messages between Petitioner and Brittany Davis as hearsay and violative of the Confrontation Clause;
- (13) failing to consult with Petitioner and waiving his presence for a bench conference regarding a question from the jury during deliberations; and
- (14) failing to object to twenty-four alleged instances of prosecutorial misconduct.

Doc. 63, Ex. 14, at 4 n.2; *see also* Doc. 58, at 23-43.

3. The OCCA's decision.

Petitioner raised his ineffective assistance of appellate counsel claims in his application for post-conviction relief. Doc. 63, Ex. 10. The Oklahoma County District Court denied his application, *id.* Ex. 14, and the OCCA affirmed, *id.* Ex. 17. The OCCA agreed with the state district court that appellate counsel was not ineffective for failing to raise claims about trial counsel's alleged errors. *Id.* Ex. 17, at 2-5. The OCCA noted that the district court "denied Petitioner's claims of ineffective assistance of appellate counsel on their merits" and agreed with the determination "that appellate counsel's performance was not objectively unreasonable and that Petitioner failed to demonstrate a reasonable probability that due to the alleged errors the outcome of the appeal would have been different." *Id.* Ex. 17, at 2. The OCCA correctly described the federal standard for ineffective assistance of appellate counsel claims, explaining that to review such a claim under *Strickland*, "a court must look to the merits of the issues that appellate counsel failed to raise." *Id.* Ex. 17, at 4.

Strickland's deferential standard for evaluating whether counsel provided constitutionally adequate representation extends to a criminal defendant's claim that appellate counsel was ineffective. *Smith v. Robbins*, 528

U.S. 259, 285 (2000). In this context, the petitioner must show (1) “that a reasonably competent attorney” would have determined that the omitted “nonfrivolous issue was clearly stronger than issues that counsel did present,” and (2) “a reasonable probability that, but for his counsel’s unreasonable failure” to raise the omitted issue or issues, the petitioner “would have prevailed on his appeal.” *Id.* at 285-89. When applying *Strickland* to consider whether appellate counsel performed deficiently by omitting certain issues, reviewing courts necessarily must “look to the merits of” the omitted issue or issues. *Miller v. Mullin*, 354 F.3d 1288, 1298 (10th Cir. 2004) (quoting *Cargle*, 317 F.3d at 1202). This is so because “ineffective appellate assistance can be established on the basis of the demonstrable merit of the issue omitted by counsel on the petitioner’s direct appeal.” *Cargle*, 317 F.3d at 1205.

4. The OCCA’s conclusion that Petitioner did not receive ineffective assistance of appellate counsel is not contrary to *Strickland*.

The OCCA adopted the state district court’s reasoning to determine that appellate counsel was not ineffective for failing to raise a number of claims.⁵

⁵ Petitioner claims the OCCA did not sufficiently analyze the state district court’s disposition of his claims. Doc. 58, at 23-25. He argues the OCCA did not provide this Court with sufficient material to review and that the state court’s ruling does not merit AEDPA deference. *Id.* But even summary disposition by

See Malicoat, 426 F.3d at 1249. The state district court assessed the merits of the omitted claims—that trial counsel had provided ineffective assistance by committing the alleged errors. *See Wood*, 907 F.3d at 1304. In each instance, the state district court reasonably applied *Strickland* to find the omitted ineffective assistance of trial counsel claims were meritless. The state district court therefore concluded appellate counsel was not ineffective for declining to raise those claims. The Court will assess Petitioner’s underlying claims in turn.

a. *Franks* hearing and search warrant claims.

The Court turns first to trial counsel’s failure to request a *Franks* hearing to determine the veracity of the affidavits supporting the search warrants for his cellphone, home, and truck and failure to move for suppression of evidence obtained pursuant to those warrants. The district court found that Petitioner had failed “to demonstrate that any evidence admitted at trial would

the state courts is sufficient for habeas review. In reviewing such a summary disposition, “the federal court should ‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale” and “presume that the unexplained decision adopted the same reasoning.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). And the “AEDPA’s deferential standard [would] appl[y] even where [t]he state court’s disposition is by summary opinion.” *Carson v. Ward*, No. CIV-05-1049-C, 2006 WL 1744815, at *2 n.1 (W.D. Okla. June 22, 2006). This Court “defer[s] to the OCCA’s decision unless we conclude that its result—not its rationale—is ‘legally or factually unreasonable.’” *Gipson v. Jordan*, 376 F.3d 1193, 1197 (10th Cir. 2004) (quoting *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999)).

have been properly excluded had counsel sought suppression.” Doc. 63, Ex. 14, at 5. That is, the state district court concluded Petitioner had not proven prejudice under *Strickland*.

Petitioner alleges that the warrants for his home, truck, and cellphone were supported by affidavits containing false and misleading statements, so trial counsel should have requested a *Franks* hearing to challenge the warrants’ validity. *Id.* Ex. 10, at 3-5, 7-11. A warrant lacks validity “if there is substantial evidence to support deliberate falsehood or reckless disregard for the truth, and the exclusion of false statements would undermine the existence of probable cause.” *Harte v. Bd. of Comm’rs of Johnson Cnty.*, 864 F.3d 1154, 1162 (10th Cir. 2017) (applying *Franks*).

In his challenges to each search warrant, Petitioner asserts only personal knowledge that the affidavits supporting probable cause for the search contained deliberate falsehoods, offered with reckless disregard for the truth. He has not pointed to any evidence counsel could have put forth, had they moved for a *Franks* hearing, to successfully render these warrants invalid and obtain suppression of the resulting evidence.

The state district court reasonably found Petitioner had not demonstrated that a *Franks* hearing would have resulted in suppression of the

evidence obtained pursuant to the allegedly invalid warrants. Therefore, the court reasonably concluded Petitioner's *Franks* claim was meritless and appellate counsel was not ineffective for omitting it.

b. Arrest warrant claim.

Turning next to trial counsel's failure to challenge the veracity of the affidavit for Petitioner's arrest warrant, Respondent contends the state district court "impliedly rejected Petitioner's claim when it rejected all of Petitioner's claims concerning the veracity of the information contained in the [search] warrant affidavits in this case." Doc. 63, at 82. This Court agrees and finds the district court's conclusion was a reasonable application of *Strickland*.

c. Count 2 dismissal claim.

Turning next to trial counsel's failure to move for dismissal of Count 2 on the grounds that it violated the Section 11 prohibition against multiple punishments, the state district court concluded Petitioner had "fail[ed] to demonstrate that he would not have been convicted and sentenced for the murder charged in Count 2 had counsel argued that his convictions for both Ms. Adams'[s] and her unborn child's deaths violated the statutory prohibition against multiple punishments." *Id.* Ex. 14, at 5. That is, the state district court

concluded Petitioner had not proven he was prejudiced under *Strickland* by trial counsel's failure to object on multiple-punishment grounds.⁶

d. Cellphone search warrant claim.

Turning next to trial counsel's failure to move for suppression of the evidence retrieved from Petitioner's cellphone during an allegedly warrantless search, the state district court found that Petitioner had "fail[ed] to demonstrate that any evidence admitted at trial would have been properly excluded had counsel sought suppression based on the alleged Fourth Amendment violations asserted here." *Id.* Ex. 14, at 5. The OCCA affirmed in a reasonable application of *Strickland*. *Id.* Ex. 17, at 3-4.

e. DNA testing claim.

Turning next to trial counsel's failure to seek independent DNA testing of Adams's vaginal swab, Petitioner argues trial counsel should have sought

⁶ Indeed, under Oklahoma law, there is no violation of the Section 11 prohibition on "double punishment" "[i]f the offenses at issue are separate and distinct, requiring dissimilar proof." *Sanders v. State*, 358 P.3d 280, 283 (Okla. Crim. App. 2015). "Crimes against the person are separate and distinct if they are directed at separate victims." *Burleson v. Saffle*, 46 P.3d 150, 152 (Okla. Crim. App. 2002). As explained *supra* § IV.A.2.d., Oklahoma law provides that a fetus, regardless of viability, is a person for purposes of the state's homicide statutes. OKLA. STAT. tit. 21, § 691(B). Given this state law, the district court reasonably concluded that Petitioner's ineffective assistance claim based on trial counsel's failure to object on double-punishment grounds was meritless, so appellate counsel was not ineffective for omitting that claim.

“expert forensic testing” to resolve the alleged conflict between the medical examiner findings and the forensic chemist’s later findings. Doc. 58, at 34-35. The medical examiner testified that “[n]o definite sperm is seen in the oral, vaginal or rectal swabs.” Doc. 63, Ex. 12, at 13. Later DNA testing by the forensic chemist revealed Petitioner could not be eliminated as a contributor to the DNA on the vaginal swab. *Id.* Ex. 4, at 5. The state district court found Petitioner had not “established that independent testing of the vaginal swab collected by the medical examiner would have yielded different results than that presented at trial had counsel pursued that course.” *Id.* Ex. 14, at 5. That is, Petitioner’s ineffective assistance of trial counsel claim was meritless, as Petitioner did not prove prejudice under *Strickland*. The state district court reasonably applied *Strickland* to conclude appellate counsel was not ineffective for omitting that claim.

f. Ketchum report claim.

Turning next to trial counsel’s failure to object to Dr. Heather Ketchum’s report as inadmissible hearsay, that forensic entomology report used insect activity on Adams’s body to determine the length of time between her death and the discovery of her body. *Id.* Ex. 12, at 14. The state district court found Petitioner’s ineffective assistance of trial counsel claim meritless, explaining

regarding the single statement in her report indicating that she had observed no sperm on the vaginal swab, especially given the uncontroverted DNA evidence.” Doc. 63, Ex. 14, at 5. The Court agrees that Petitioner’s ineffective assistance of trial counsel claim is meritless and appellate counsel was not ineffective for omitting it.

i. Hearsay claim.

Turning next to trial counsel’s failure to object to Detective Holland’s testimony about text messages between Petitioner and Brittany Davis, Petitioner argues this evidence was inadmissible hearsay and a violation of the Confrontation Clause because Detective Holland read Davis’s side of the conversation for the jury but Davis herself did not testify. Doc. 58, at 39. The state district court concluded Petitioner had not proven he was prejudiced by trial counsel’s failure to object to this testimony. Doc. 63, Ex. 14, at 5. As explained *supra* § IV.E.1., the OCCA found that this conversation—including graphic testimony about a video of an inhumane cow slaughter—should not have been admitted, as it was irrelevant to any issue at trial. The OCCA nonetheless concluded Petitioner was not prejudiced by this graphic testimony. Because the OCCA reasonably found a lack of prejudice from this error, it also reasonably found (by way of adopting the district court’s reasoning) that

Petitioner's claim of ineffective assistance of trial counsel was meritless. The Court concludes the state district court reasonably found appellate counsel was not ineffective for omitting this claim.

j. Jury deliberation claim.

Turning next to trial counsel's failure to consult with Petitioner and waiving his presence for a bench conference about a question from the jury during deliberations, the state district court found "Petitioner has shown no prejudice from counsel's waiver of his presence at a bench conference during jury deliberations." Doc. 63, Ex. 14, at 5. During deliberations, the jury sent a note to the trial court asking, "Does Instruction Number 8 supersede Instrument [sic] Number 11 regarding count two[?] Need to know if malice aforethought applies to the fetus." *Id.* Ex. 12, at 16. The trial court told counsel that it intended to tell the jury, "You have all the rules of law and evidence you need to reach your verdicts." *Id.* Counsel waived Petitioner's presence at the conference and had no objection to the court's response. *Id.* The state district court reasonably found lack of prejudice—Petitioner had not shown that the trial court would have responded differently to the jury's question had he been present at the bench conference. Adopting the district court's reasoning, the

OCCA reasonably applied *Strickland* to find this claim meritless and to find that counsel was not ineffective for omitting it.

k. Prosecutorial misconduct claim.

Finally, turning to trial counsel's failure to object to twenty-four alleged instances of prosecutorial misconduct, the state district court found Petitioner "establishes no prejudice from counsels' failure to raise any of the twenty-four objections Petitioner now raises to comments or questions by the prosecution." *Id.* Ex. 14, at 5; *see also id.* Ex. 10, at 15-20 (listing instances of alleged prosecutorial misconduct). Adopting the district court's reasoning, the OCCA reasonably applied *Strickland* to find these ineffective assistance of trial counsel claims meritless and to conclude appellate counsel was not ineffective for failing to raise them.

l. Conclusion.

The state court reasonably applied *Strickland* in denying the above claims of ineffective assistance of appellate counsel. Because he has not proven prejudice from trial court's alleged deficiencies, appellate counsel was not ineffective for failing to raise the ineffective assistance of counsel claims detailed here. Petitioner's claims should be denied.

H. Ground Eight: The OCCA reasonably concluded Petitioner's appellate counsel was not ineffective for failing to raise a prosecutorial misconduct claim.

Petitioner also claims appellate counsel was ineffective for failing to raise a claim on direct appeal that the prosecution had committed thirteen instances of prosecutorial misconduct.⁷ *Id.* Ex. 10, at 21-25 (argument in state post-conviction application, incorporated by reference into brief in support of federal habeas relief, Doc. 58, at 43). Petitioner alleged the prosecution improperly:

- (1) appealed to jurors' sympathy during opening statement;
- (2) misstated a fact about Ashley Shepard's impending testimony about her abortion appointments, later contradicted by Shepard's testimony;
- (3) injected its own opinion and called into question the defense's credibility by predicting the defense's concession;
- (4) misstated a fact about Rebecca Schultz-Leonard's impending testimony—that Petitioner “said he had been at the bar . . . a smokey bar”;

⁷ Above, *supra* § IV.G., Petitioner alleges that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for “failing to object to twenty-four alleged instances of prosecutorial misconduct.” Here, Petitioner argues that appellate counsel was ineffective for failing to raise thirteen instances of prosecutorial misconduct on direct appeal.

- (5) made misleading comments during opening statement about Sergeant Baxter's impending testimony—inaccurately describing Petitioner's seat covers as "blood stained";
- (6) commented during the direct examination of Investigator Curtis Ferguson indicating semen had been found inside the victim's body;
- (7) knowingly elicited false testimony about which officer obtained and executed the search warrant for Petitioner's DNA;
- (8) vouched for Justin Adams's credibility during an objection after calling him a "big fat liar" in opening statement;
- (9) bolstered Justin Adams's testimony through the impermissible expert testimony of Detective Holland;
- (10) elicited testimony about Justin Adams's plea agreement and failed to "correct the record as to the details of the plea agreement and information in that agreement";
- (11) elicited testimony from the forensic chemist that was outside the bounds of reliable science;
- (12) failed to disclose that there was a finding of no sperm on the victim's vaginal swab, which contradicted the forensic chemist's testimony, in violation of the duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963);
- (13) made misleading comments in closing argument suggesting the defense had the burden to prove Petitioner's innocence.

Id. Ex. 14, at 5 n.3 & Ex. 10, at 21-25.

1. The OCCA's decision.

Petitioner raised these ineffective assistance of appellate counsel claims in his application for post-conviction relief. Doc. 63, Ex. 10. The Oklahoma County District Court denied his application, *id.* Ex. 14, and the OCCA affirmed, *id.* Ex. 17. As above, *supra* § IV.G., the OCCA adopted the state district court's reasoning. And that court correctly described the federal standard for ineffective assistance of appellate counsel claims, explaining that to review such a claim under *Strickland*, "a court must look to the merits of the issues that appellate counsel failed to raise." Doc. 63, Ex. 17, at 4.

2. The Oklahoma County District Court reasonably applied *Strickland* in rejecting Petitioner's ineffective assistance claims related to prosecutorial misconduct.

The state district court reasonably applied *Strickland* to determine that appellate counsel was not ineffective for failing to raise the above prosecutorial misconduct claims. *See Malicoat*, 426 F.3d at 1249. In doing so, the district court assessed the merits of the omitted claims. *See Wood*, 907 F.3d at 1304.

Allegations of prosecutorial misconduct are evaluated "within the context of the entire trial, considering not only the propriety of the prosecutor's actions, but also the strength of the evidence against the defendant and the corresponding arguments of defense counsel." *Hanson v. State*, 206

P.3d 1020, 1028 (Okla. Crim. App. 2009). “Relief will be granted only where the prosecutor committed misconduct that so infected the defendant’s trial that it was rendered fundamentally unfair, such that the jury’s verdicts should not be relied upon.” *Sanders*, 358 P.3d at 286.

The state district court concluded that “Petitioner’s trial was not rendered fundamentally unfair by prosecutorial misconduct,” explaining that “[b]y and large, the comments at issue here were within the wide range of latitude afforded both parties and were appropriately based on the evidence presented and reasonable inferences that could be drawn from it.” Doc. 63, Ex. 14, at 6. Specific to Petitioner’s *Brady* claim, the state district court found he had “not shown that prosecutors withheld any evidence, much less material evidence.” *Id.*

The state district court reasonably applied *Strickland* to conclude Petitioner was not prejudiced by the omission of these prosecutorial misconduct claims because they were meritless under Oklahoma law. In agreeing with the state district court, the OCCA reasonably applied *Strickland* to deny Petitioner’s ineffective assistance of appellate counsel claim related to prosecutorial misconduct.

Petitioner’s claim should therefore be denied.

I. Ground Nine: The OCCA reasonably applied *Strickland* in rejecting Petitioner's ineffective assistance claims related to "judicial abuse of discretion."

Petitioner claims appellate counsel was ineffective for failing to raise eight claims of "[j]udicial abuse of discretion" on direct appeal. Doc. 58, at 52. Those alleged instances of abuse of discretion, all based on the trial court's evidentiary rulings, were:

- (1) overruling trial counsel's objection to a question posed to Investigator Ferguson on direct examination indicating semen had been found in Adams's body;
- (2) sustaining the prosecution's objections to questions posed to Detective Garrett on cross-examination regarding statements in emails sent from Tina Clarke to Charles Holt;
- (3) sustaining the State's objection to trial counsel's comment that the prosecution described Justin Adams as a "big fat liar";
- (4) permitting Detective Holland to provide improper opinion testimony that Justin Adams was the person using Adams's computer on the night of her murder;
- (5) sustaining the state's objections to questions posed by defense counsel to Sergeant Baxter on re-cross-examination about the techniques used to gather evidence from Petitioner's truck;
- (6) admitting without objection a copy of Dr. Ketchum's report into evidence, even after sua sponte expressing doubts as to its admissibility;

- (7) overruling trial counsel's objection to the forensic chemist's testimony regarding an allele that was present but fell below the lab's threshold evidence for statistical analysis; and
- (8) overruling trial counsel's objection to the prosecutor's comment during closing argument about Petitioner's innocence, that "[t]o believe Joseph Cyr innocent we have to find a few things; primarily . . . we have to believe that Joseph Cyr is unreasonably unlucky";

Doc. 63, Ex. 14, at 6 & Ex. 10, at 25-29.

1. The OCCA's decision.

Petitioner raised these ineffective assistance of appellate counsel claims in his application for post-conviction relief. *Id.* Ex. 10. The Oklahoma County District Court denied his application, *id.* Ex. 14, and the OCCA affirmed, *id.* Ex. 17. As above, *supra* § IV.H., the OCCA adopted the state district court's reasoning. And the OCCA correctly described the federal standard for ineffective assistance of appellate counsel claims, explaining that to review such a claim under *Strickland*, "a court must look to the merits of the issues that appellate counsel failed to raise." Doc. 63, Ex. 17, at 4.

2. The OCCA reasonably applied *Strickland* in rejecting Petitioner's ineffective assistance claims related to the trial court's evidentiary rulings.

The state district court reasonably applied *Strickland* to determine that appellate counsel was not ineffective for failing to raise the above judicial abuse

of discretion claims. *See Malicoat*, 426 F.3d at 1249. In doing so, the court assessed the merits of the omitted claims. *See Wood*, 907 F.3d at 1304. The court explained two standards of review for alleged trial court errors: abuse of discretion when counsel timely objects, *see Wall v. State*, 465 P.3d 227, 231-32 (Okla. Crim. App. 2020); and plain error when counsel does not object, *see Williams v. State*, 188 P.3d 208, 217 (Okla. Crim. App. 2008). The court found Petitioner had “not established error” for most of the challenged rulings. As for Dr. Ketchum’s report, the court found that even if it “was admitted in error, its admission did not have a substantial influence on the outcome of the trial.” Doc. 63, Ex. 14, at 7.

Since these claims were meritless, the state district court reasonably determined that Petitioner had not proven either error or prejudice, in the case of Dr. Ketchum’s report, under *Strickland*. *See Wood*, 907 F.3d at 1304 (“The omitted issue’s merits determine both deficient performance and prejudice.”). Relying on the district court’s reasoning, the OCCA’s denial of Petitioner’s ineffective assistance claim was not an unreasonable application of clearly established federal law.

Petitioner’s ineffective assistance of appellate counsel claim related to judicial abuse of discretion should therefore be denied.

J. Ground Ten: The OCCA reasonably concluded Petitioner's appellate counsel was not ineffective for declining to raise claims Petitioner requested, instead raising only the claims referred to her by trial counsel because of an alleged conflict of interest.

Petitioner claims that appellate counsel had a conflict of interest because both appellate and trial counsel were employed by the Oklahoma County Public Defender's office. Doc. 58, at 56-58. Petitioner argues he received ineffective assistance of counsel because of this alleged conflict because appellate counsel raised only claims referred to her by trial counsel.

1. The OCCA's decision.

Petitioner raised this ineffective assistance of appellate counsel claim in his application for post-conviction relief. Doc. 63, Ex. 10. The Oklahoma County District Court denied his application, *id.* Ex. 14, and the OCCA affirmed, *id.* Ex. 17. As above, *supra* § IV.I., the OCCA adopted the state district court's reasoning. And the OCCA correctly described the federal standard for ineffective assistance of appellate counsel claims, explaining that to review such a claim under *Strickland*, "a court must look to the merits of the issues that appellate counsel failed to raise." Doc. 63, Ex. 17, at 4.

2. The OCCA reasonably applied *Strickland* in rejecting Petitioner's claim of ineffective assistance attributable to an alleged conflict of interest.

The state district court found that "Petitioner fails to demonstrate that counsel's representation amounted to an actual conflict of interest which adversely affected her performance." *Id.* Ex. 14, at 7.

To establish an ineffective assistance of counsel claim, a petitioner "must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 350. This means more than "a mere theoretical division of loyalties." *United States v. Williamson*, 859 F.3d 843, 852 (10th Cir. 2017). Indeed, "appellate public defenders from the Oklahoma County Public Defender's Office have repeatedly raised ineffective assistance of trial counsel arguments based on the conduct of attorneys from that office," which the Tenth Circuit Court of Appeals has taken to be "strong evidence" that appellate and trial attorneys from that office should be treated as separate counsel. *Harmon v. Sharp*, 936 F.3d 1044, 1062 (10th Cir. 2019).

Petitioner argues a “conflict arose when appellate counsel failed to assert valid claims of ineffective assistance of trial counsel on direct appeal that would have warranted REVERSAL on direct appeal even after Petitioner made it clear to her that he wished to pursue [those] claims.” Doc. 58, at 56. Petitioner does not detail those omitted claims in his habeas petition. Assuming they are the same ones asserted above, *supra* § IV.G.2., the OCCA reasonably concluded that appellate counsel was not ineffective for failing to raise those claims. It is not clear that appellate counsel rejected plainly meritorious claims. *Cf. Jones v. Barnes*, 463 U.S. 745, 752 (1983) (emphasizing “the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review”).

Given Petitioner’s bare assertions of a conflict based solely on trial and appellate counsel’s common employer, the state district court’s conclusion that Petitioner did not allege an actual conflict is a reasonable application of federal law. Petitioner’s claim should be denied.

V. Recommendation and notice of right to object.

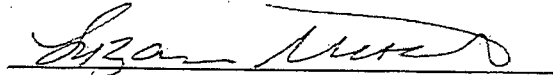
For the reasons set forth above, the undersigned recommends the Court deny the petition for habeas relief, Doc. 57.⁸

The undersigned advises Plaintiff of his right to file an objection to this report and recommendation with the Clerk of this Court on or before December 7, 2022, in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b)(2). The undersigned further advises Plaintiff that failure to make a timely objection to this report and recommendation waives the right to appellate review of both factual and legal questions contained herein. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

This report and recommendation disposes of all issues referred to the undersigned Magistrate Judge in this matter.

⁸ Petitioner has filed three letters: one notifying the Court of his new address and asking for a copy of the docket sheet, as well as stamped and filed copies of his reply brief and several other motions, Doc. 75; a second reiterating that request, Doc. 76; and a third asking for a status update on his pending habeas petition after the Court dismissed Petitioner's motion for an evidentiary hearing and motion for appointment of counsel, Doc. 78. This Court typically does not consider letters as pleadings. Fed. R. Civ. P. 7, 10; LCvR7.1. Although the Court construes a pro se litigant's pleadings liberally, Petitioner "nevertheless must follow the same rules of procedure that govern other litigants." *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992). Petitioner's letters are therefore stricken from the record.

ENTERED this 16th day of November, 2022.


SUZANNE MITCHELL
UNITED STATES MAGISTRATE JUDGE