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FILED
United States Court of Appeals
Tenth Circuit

June 9, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAMUEL J. BARRETT,

Petitioner - Appellant,

v.

WYOMING DEPARTMENT OF CORRECTIONS STATE PENITENTIARY WARDEN, a/k/a Neicole Molden, in her official capacity; WYOMING DEPARTMENT OF CORRECTIONS DIRECTOR, a/k/a Daniel Shannon, in his official capacity; WYOMING ATTORNEY GENERAL,

Respondents - Appellees.

No. 24-8062
(D.C. No. 1:23-CV-00234-SWS)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MORITZ**, **EID**, and **FEDERICO**, Circuit Judges.

Samuel J. Barrett filed a pro se application for relief under 28 U.S.C. § 2254, challenging his 2020 conviction in Wyoming state court. The district court denied the application and denied a certificate of appealability (COA).

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Barrett now seeks a COA from this court so he can appeal the district court's judgment. *See* 28 U.S.C. § 2253(c)(1)(A) (requiring a COA to appeal the denial of a § 2254 application). We deny a COA and dismiss this matter.

I

The State of Wyoming charged Barrett with six counts of first-degree sexual assault, two counts of sexual exploitation of a child, and one count of blackmail. Barrett's jury trial began in October 2020, when the COVID-19 pandemic was in full swing. On the first day of trial, Barrett objected to "the entire format procedure of the trial," arguing that the court did not "seem to be in compliance with" pandemic guidelines issued by the (presumably Wyoming) "Department of Health," and that "the difficulties posed by abiding by these guidelines, with wearing of masks, not being able to approach witnesses, they're not able to see the faces of potential jurors, . . . this whole process is a violation of due process." R. III at 1263:11–20. The court concluded that it did not "see a violation of due process under the circumstances." *Id.* at 1267:1–2.

The trial proceeded to a jury verdict of guilty on all counts. The trial court sentenced Barrett to concurrent sentences of 33 to 50 years' imprisonment on each of the six sexual-assault counts, a consecutive 10-to-12-year sentence of imprisonment on one count of sexual exploitation of a child, and lesser concurrent sentences for the remaining count of sexual exploitation of a child and the blackmail count.

Barrett appealed his conviction to the Wyoming Supreme Court (WSC), arguing that the evidence was insufficient to convict him and that the trial court abused its discretion in admitting into evidence a prior conviction for sexual abuse. The WSC affirmed. *See Barrett v. State*, 509 P.3d 940, 943 (Wyo. 2022).

Barrett then filed a petition for postconviction relief (PCR) in state court. He asserted 67 grounds for relief, including allegations of error relating to the COVID-19 procedures and ineffective assistance of appellate counsel (appellate IAC). The postconviction court (PCR Court) dismissed the petition, determining, in relevant part, that Barrett's claims were procedurally barred because they could have been raised on direct appeal and that statutory exceptions to the procedural bar did not apply because he failed to show his appellate counsel was ineffective in failing to raise the claims. Barrett sought review in the WSC on some of the claims he raised in his PCR petition. The WSC denied review.

Barrett then filed his § 2254 application in federal district court. He advanced six substantive claims, one of which comprised multiple subclaims; one claim of appellate IAC comprising seven subclaims; and a claim of cumulative error. Many of his claims involved the trial court's COVID-19 protocols. Respondents moved to dismiss the application, arguing that Barrett's claims were either not cognizable in habeas, unexhausted and subject

to anticipatory procedural default, or procedurally defaulted. The district court granted respondents' motion, denied the application, and dismissed it with prejudice. The court also denied a COA. Barrett sought timely review with this court.

II

A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show the district court's resolution of the constitutional claim was either "debatable or wrong." *Id.* For claims a district court denied "on procedural grounds without reaching the prisoner's underlying claim," the applicant must also show "that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling." *Id.*

We afford Barrett's pro se filings a liberal construction, but we may not act as his advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

III

A

In claim 1 of his § 2254 application, Barrett argued that the trial court's COVID-19 plan violated his Sixth Amendment right to a public trial because it resulted in: (1) a fully closed courtroom for voir dire; (2) a partially closed courtroom for trial because only two members of the public were allowed to attend any one trial session; and (3) the repeated refusal to allow his friends and family to enter because there was not enough space. He also argued that in response to defense counsel's objection to the "entire trial format procedure," the trial court should have considered how to accommodate the public interest in attending the trial even though the parties had offered no suggestions. R. I at 61.

The district court denied relief on this claim based on Barrett's failure to overcome procedural default through a showing of appellate IAC. The court explained that the PCR Court had determined this claim was procedurally barred because it could have been raised on direct appeal.[1] The district court then concluded Barrett could not show cause to overcome the procedural default because the claim lacked merit, and therefore appellate counsel was

[1] The district court also ruled that (1) Barrett's claim that the PCR Court incorrectly applied Wyoming PCR law is not cognizable in habeas and (2) the state procedural bar is independent and adequate. Barrett does not question those rulings in his COA application. We therefore address them no further.

not ineffective in failing to raise it on direct appeal. The district court observed that the trial court's COVID-19 plan did not totally close the courtroom but instead allowed the public to attend "'as space permits due to social distancing.'" R. VI at 2800 (quoting R. I at 223). The district court also noted the PCR Court had found that "Barrett's brother attended several days of the trial." *Id.* The district court concluded that Barrett had not shown "he did not receive a public trial" or "that a total closure or partial closure would have been unreasonable under the circumstances." *Id.* The court therefore concluded that Barrett could not establish cause to overcome the procedural default of claim 1 through a showing of appellate IAC.

In his COA application, Barrett makes several arguments on the merits of claim 1. We construe these arguments as an attempt to overcome the procedural default of claim 1 by showing that appellate counsel omitted a meritorious claim from the direct appeal. *See Davis v. Sharp*, 943 F.3d 1290, 1299 (10th Cir. 2019) (explaining that when assessing whether appellate IAC constitutes cause to excuse the procedural default of a claim because it was omitted from a direct appeal, "this court typically examines the merits of the omitted issue," and "[i]f the omitted issue is meritless, its omission will not constitute deficient performance" (brackets and internal quotation marks omitted)).

Barrett first contends the trial court's social-distancing requirements denied him a public trial because "no space existed for public attendance during voir dire, and at most two members of the press or public could attend the trial proceedings after voir dire." COA Appl. at 8. He argues that the trial court should have conducted an analysis under *Waller v. Georgia*, 467 U.S. 39 (1984), "before either closing the courtroom or in its response to . . . defense counsel's objection to the entirety of the proceedings." COA Appl. at 8. He adds that "the State Court made no offer of enhancing public access through any solution whatsoever, such as [a] closed-circuit feed to another area of the courthouse," a "livestream," an "audio-only stream," or "[a]ny other technological solution" other courts used during the pandemic. *Id.* at 9.

This argument does not convince us that reasonable jurists would find the district court's denial of relief on this claim to be debatable. "A district court totally closes a courtroom when it excludes all persons besides 'witnesses, court personnel, the parties, and the lawyers.'" *United States v. Veneno*, 107 F.4th 1103, 1112 (10th Cir. 2024) (emphasis added) (quoting *Waller*, 467 U.S. at 42), *petition for cert. filed*, No. 24-5191 (U.S. July 31, 2024). But even assuming that the social-distancing requirements effected a complete closure of the courtroom to the public during voir dire, the trial court had no obligation to conduct a *Waller* analysis.

In *Waller*, the Supreme Court set out the relevant test for a total closure – there must be "an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." 467 U.S. at 48. However, "*Waller* mandates that the district court must [apply these standards] when the courtroom is closed '*over the objections of the accused.*'" *Veneno*, 107 F.4th at 1112 (emphasis added) (quoting *Waller*, 467 U.S. at 47). Here, although defense counsel vaguely objected to the "entire format procedure of the trial," R. III at 1263, the specific objections were limited to due process concerns regarding Barrett's right to confront the witnesses against him. *See id.* Because Barrett did not specifically object to the partial exclusion, the trial court was not required to conduct a *Waller* analysis.

Barrett's argument that only two members of the press or the public were permitted to attend the trial after voir dire appears to implicate the trial court's "as space permits" limitation on how many members of the public would be admitted. This amounted to a partial courtroom closure. *See United States v. Holder*, 135 F.4th 887, 896 (10th Cir. 2025) ("Even a few attendees other than the parties creates a closure that is only partial."). A test less onerous than the *Waller* test applies to partial closures: "[w]hen the closure is partial rather than total, the defendant's right to a public trial gives way if a substantial

reason for the partial closure exists." *Veneno*, 107 F.4th at 1112 (internal quotation marks omitted). Even overlooking that Barrett did not specifically base his trial objection on the space-permits limitation on public attendance, there was not only a substantial reason for the partial closure, but a compelling reason – the public-health risk the COVID-19 pandemic posed. *See Holder*, 135 F.4th at 896 ("COVID is a substantial reason that justifies [a] partial closure."); *Veneno*, 107 F.4th at 1113 n.2 ("'Stemming the spread of COVID-19 is unquestionably a compelling interest[.]'" (quoting *Roman Cath. Diocese of Brooklyn v. Cuomo*, 592 U.S. 14, 18 (2020))).

Barrett also claims he presented affidavits from members of his family and the community attesting that they were not allowed to enter the courtroom because there was "'no more space [ECF 1 Affidavits].'" COA Appl. at 9 (brackets in original). We have not uncovered any such affidavits in the record. But even if this were true, it shows only that the trial court limited the number of public attendees, not that it totally excluded the public. And as already stated, the trial court had a substantial reason for doing so.

Finally, Barrett contends the trial court's COVID-19 plan addressed public access only for voir dire. That isn't correct. The plan provided that the "[p]ublic will be allowed as space permits due to social distancing." R. I at 223. Although this provision is set out in the "Jury Summonses" section of the plan and not in the ensuing "Voir dire" or "Trial proceedings" sections, *id.* at 223–

25, it is readily apparent that the plan's sections are to be read in series, not in isolation from each other. Thus, the plan provided for public access at each later stage of the trial "as space permits." And in fact, members of the public were allowed to attend, as evidenced by Barrett's brother's attendance at the trial.[2]

In sum, Barrett has not shown that his appellate counsel omitted a meritorious Sixth Amendment public-trial claim from his direct appeal. He therefore has not shown that reasonable jurists would debate the district court's conclusion that he failed to overcome the procedural default of claim 1 through a showing of appellate IAC.

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[2] Barrett also advances several factual assertions he did not make in the district court:

> no media coverage during the trial exists in the public domain save for one online-only article from the first day of the evidence phase (and which included no testimony from any of the accuser witnesses – the most important witnesses in the state's case); no media coverage exists in the public domain of the content of the audio and video exhibits presented to the jury; the trial transcript contains no transcripts of the audio and video exhibits presented to the jury, so the content of these exhibits is forever unavailable to the public; no single member of the public was present at all for several sessions of the evidence stage of the trial; no member of the public was present for any part of the second day of the evidence phase of the trial.

COA Appl. at 8. Because he did not present these assertions before the district court, they are "waived on appeal." *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015).

B

In claim 2 of his § 2254 application, Barrett advanced nine subclaims alleging violations of his Sixth Amendment and due process rights stemming from specific aspects of the trial court's COVID-19 plan: social distancing in the courtroom; masking requirements; the trial court's alleged violation of the plan by calling too many jurors for each venire panel, which allegedly foreclosed public attendance at voir dire; the requirement that the jury funnel requests to view digital-format exhibits in the jury room through the bailiff; the internal conflict jurors must have felt in having to risk their lives to serve; inconsistent juror experience due to seating arrangements and different information presented to each voir dire grouping; and the removal of two members of Barrett's defense team during trial because they had been exposed to COVID-19.

The district court denied these subclaims because Barrett failed to either overcome a procedural default, cite any persuasive case law on the merits, or show the subclaim was cognizable in habeas.[3]

In his COA application, Barrett's attempt to demonstrate an entitlement to a COA on claim 2 is wholly conclusory. He merely states that all of his "claims are interrelated and in some instances interdependent," and that his trial "was a failed experiment in testing the ability to conduct a complex,

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[3] At some points in its ruling on claim 2's subclaims, and elsewhere in its decision, the district court denied relief on a claim or subclaim because Barrett had cited no clearly established federal law as determined by the United States Supreme Court. That is the standard set out in § 2254(d)(1), which prohibits granting a habeas application "with respect to any claim that was adjudicated on the merits in State court proceedings unless adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable interpretation of, clearly established Federal law, as determined by the Supreme Court of the United States."

In Barrett's case, the PCR Court did not rule on the merits of any of the substantive claims Barrett would later raise in his § 2254 application but instead determined they were procedurally barred. But the PCR Court seems to have considered the merits of the procedurally barred substantive claims, at least to some extent, when it analyzed Barrett's claims of appellate IAC as a "portal" through which he could obtain review of those claims. *See Schreibvogel v. State*, 269 P.3d 1098, 1104 (Wyo. 2012) (explaining that in Wyoming, an appellate IAC claim presented in a PCR petition is "a 'portal' through which otherwise waived claims of trial error may be raised"). Whether that constitutes an "adjudication on the merits" of a procedurally defaulted substantive claim within the meaning of § 2254(d)(1) appears to be an open question. *Cf. Cutbirth v. State*, 751 P.2d 1257, 1267 (Wyo. 1988) (indicating that "[t]he claim for relief attaching to [a claim of appellate IAC serving as a portal] *can be* resolved *without necessarily considering* the substantive merits of the issues raised" (emphasis added)). We need not address this issue today because Barrett has not complained that the district court erred by relying on his failure to meet the § 2254(d)(1) standard.

lengthy trial during an historic public health emergency; one that the [WSC] explicitly determined was faulty when it halted jury trials just days later." COA Appl. at 12 (boldface omitted). Because Barrett completely fails to meet the COA standard regarding claim 2, we deny a COA on claim 2.

C

In claim 3, Barrett argued the jury instructions were defective because the order of the charges in the instructions was different than the order on the verdict form, and the jury was not instructed that he had to knowingly possess child pornography to convict on count 9, sexual exploitation of a child. He also complained that during closing argument, the prosecutor told the jury that to convict on count 9, it only had to find Barrett possessed child pornography. And he contended that in his direct appeal, the WSC indicated it knew count 9 required that he knowingly possessed child pornography.

The district court determined this claim was unexhausted but decided it on the merits. *See* § 2254(b)(2) (permitting a court to deny a habeas application on the merits despite a failure to exhaust state-court remedies). The court concluded that the verdict form asked whether the jury found him guilty of count 9 as charged, and the relevant instruction identified the proper mens rea – knowingly – required for conviction. With respect to the prosecutor's closing argument, the court found that contrary to Barrett's misrepresentation of the record, the prosecutor had expressly told the jury that it had to find Barrett

knowingly possessed child pornography. Finally, the court concluded Barrett failed to show that on direct appeal the WSC unreasonably applied the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), when it concluded there was sufficient evidence to support his conviction on count 9.

In his COA application, Barrett does not address the district court's ruling at all. His sole preserved argument is that "the discrepancy in the ordering of the Counts between the jury instructions and the verdict form itself[] prevented [him] and Trial Counsel from correctly addressing the counts." COA Appl. at 13. The district court referred to this aspect of claim 3 but did not expressly address it. Nonetheless, a COA is not warranted because, as we understand it, Barrett's argument is based on mistaken references to count 3 as count 9 by (1) his own attorney during closing argument, *see* R. V at 2607:14–16 (asking for "not guilty verdicts on Counts Two and I believe it's Nine" that "depend[ed] solely upon [the] credibility" of a victim not involved in Count 9); and (2) the prosecutor's recommendation at the sentencing hearing that the court sentence Barrett to consecutive sentences on "Counts Two and Nine, . . . the counts with [that other victim]," R. III at 1130:11–14. Barrett has never explained how these misstatements prevented him from "correctly

addressing the counts," COA Appl. at 13, or prejudiced him. Thus, this argument does not support granting a COA on claim 3.[4]

D

In claim 4, Barrett asserted a due process violation based on his assertion that the trial transcript omitted a statement by one of his defense attorneys that the attorney was fearful of contracting COVID-19 because his wife was immunocompromised. The statement was allegedly made in response to the trial court's inquiry whether the defense team was comfortable proceeding without two of its members who had to leave due to COVID-19 exposure. The district court appears to have decided this claim on the merits, concluding that Barrett had provided no authority supporting his due process claim and that his vague reference to due process was not enough to make the claim cognizable in habeas.

In his COA application, Barrett argues that if his attorney's statement had been preserved in the transcript, he could have demonstrated that the attorney had a conflict between his wife's health and defending Barrett. Barrett contends this claim presents "an issue of first impression." COA Appl. at 16. But Barrett wholly overlooks that he was present when (or if) counsel

[4] Barrett also claims there was insufficient evidence to support a conviction on Count 5, which charged him with sexual assault of one of the victims. Barrett did not advance this claim in his § 2254 application, so it is also "waived on appeal." *Owens*, 792 F.3d at 1246.

made his statement about COVID-19 concerns to the trial court. *See* R. III at 1077 (letter from Barrett to one of his trial attorneys providing his "recollection" of what the attorney told the trial court). Thus, there is no merit to his contention that an alleged omission of the statement from the transcript violated his due process rights by preventing him from pursuing relief, either on direct appeal or, as he claimed in his § 2254 application, in his post-conviction proceedings, *see* R. I at 157. A COA is not warranted on claim 4.

E

In claim 5, Barrett argued that the proximity of jurors to the defense table violated his right to continuously confer with counsel. *See* R. I at 159. The district court determined that claim 5 was a duplicate of claim 2(a) and denied claim 5 for the same reasons it denied claim 2(a): the claim was procedurally defaulted, Barrett could not show cause and prejudice to excuse the default because the cases he relied on were distinguishable, and he did not identify anything he was unable to say to counsel due to the jury's proximity or explain why he could not use other methods of communication, such as written notes.

In his COA application, Barrett contends that under *Geders v. United States*, 425 U.S. 80 (1976), "deprivation of [a] substantial right to effective assistance of counsel assumes prejudice." COA Appl. at 16. That is true, at least where a court order prohibits a defendant from communicating with his attorney. *See Geders*, 425 U.S. at 92 ("[A]s the Court holds, a defendant who

claims that an order prohibiting communication with his lawyer impinges upon his Sixth Amendment right to counsel need not make a preliminary showing of prejudice." (Marshall, J., concurring)). But in Barrett's case there was no prohibitive court order, and Barrett offers nothing to call into question the district court's determination that he failed to show he was deprived of effective assistance of counsel. Barrett adds that because of the pandemic and the trial court's COVID-19 plan, this is "an issue of first impression." COA Appl. at 16. However, there is nothing novel in the legal issue involved in this claim, and a COA is not warranted on claim 5.

F

In his one-paragraph claim 6, Barrett argued that the trial court deprived him of due process when it overruled defense counsel's objection to the COVID-related trial format without "consider[ing] the impacts on Barrett's rights of a closed trial." R. I at 160. The district court concluded that Barrett failed to show cause to overcome the procedural default of this claim because he did not "demonstrate that the trial court's decision was a violation of clearly established law"; the claim's substance "seems to be incorporated into the various other arguments under claims one and two"; and, as the court had discussed in relation to those claims, "Barrett failed to demonstrate he was entitled to relief" on them. R. VI at 2829.

In his COA application, Barrett merely reproduces the one-paragraph argument from his § 2254 application. He adds that claim 6 presents "an issue of first impression." COA Appl. at 17. Barrett fails to demonstrate that reasonable jurists would debate the district court's resolution of this claim. A COA is not warranted on claim 6.

G

Barrett's claim 7 comprises seven subclaims of appellate IAC. The district court determined these subclaims failed on the merits for a variety of reasons. In his COA application, Barrett provides only conclusory arguments that his appellate attorney "failed to investigate the trial record, witnesses, and [Barrett's] claims"; "failed to pursue non-frivolous issues and constitutional issues such as [Barrett's] conviction on Count Five, for which no evidence was offered in support of the essential element of location: 'by Eastridge Mall'"; and "failed to timely provide the trial record to [Barrett] and to obtain [Barrett's] consent to file the Direct Appeal brief." COA Appl. at 17. These conclusory arguments are insufficient to demonstrate that reasonable jurists would find the district court's disposition of any of the appellate IAC subclaims debatable or wrong. We therefore decline to recite the district court's rulings on these subclaims, and we deny a COA on claim 7.

H

In claim 8, Barrett argued that cumulative error required relief. The district court determined there could be no cumulative error because the court had not identified any individual errors. In his COA application, Barrett "argues that the accumulated impact of the Coronavirus Pandemic on his trial rendered the trial so debased from the normal, statutory and constitutional procedures as to cause the outcome to be in doubt." COA Appl. at 18. He also claims "[t]his is an issue of first impression." *Id.* But because he has not shown entitlement to a COA on any issues, he also has not shown error in any of the individual claims. *See Cargle v. Mullin*, 317 F.3d 1196, 1206 (10th Cir. 2003) ("A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." (internal quotation marks omitted)).

IV

We DENY Barrett's COA application and DISMISS this matter.

Entered for the Court

Richard E.N. Federico
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

SAMUEL J. BARRETT,

Petitioner,

VS.

WYOMING DEPARTMENT OF CORRECTIONS STATE PENITENTIARY WARDEN, *in her official capacity,* also known as, Neicole Molden,

WYOMING DEPARTMENT OF CORRECTIONS DIRECTOR, *in his official capacity,* also known as, Daniel Shannon,

WYOMING ATTORNEY GENERAL,

Respondents,

Case No. 23-CV-00234-SWS

JUDGMENT

This action came before the Court on Petitioner's Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, Honorable Scott W. Skavdahl, District Judge, presiding. The Court entered an Order denying Petitioner's § 2254 Petition and dismissing it with prejudice. Accordingly, it is therefore **ORDERED, ADJUDGED, AND DECREED** that this matter is **DISMISSED WITH PREJUDICE**.

Dated this 14th day of August 2024.

Scott W. Skavdahl
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

SAMUEL J. BARRETT,

Petitioner,

VS.

WYOMING DEPARTMENT OF CORRECTIONS STATE PENITENTIARY WARDEN, *in her official capacity*, also known as, Neicole Molden,

WYOMING DEPARTMENT OF CORRECTIONS DIRECTOR, *in his official capacity*, also known as, Daniel Shannon,

WYOMING ATTORNEY GENERAL,

Respondents,

Case No. 23-CV-00234-SWS

ORDER GRANTING MOTION TO DISMISS [ECF 6]

THIS MATTER is before the Court on a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 filed by *pro se* petitioner, Samuel J. Barrett [ECF 1], and a Motion to Dismiss [ECF 6] filed by Respondents. Having considered the petition, the motion, the response, the reply and being otherwise fully advised, the Court finds Respondents motion should be granted.

BACKGROUND

A Wyoming jury convicted Mr. Barrett of six counts of first-degree sexual assault, two counts of sexual exploitation of a child, and one count of blackmail. *Barrett v. State*, 509 P.3d 940, 943 (Wyo. 2022). The underlying facts have little bearing on the issues raised by Mr. Barrett in this petition.[1] In short, three women who were sexually involved with Mr. Barrett over several years accused him of sexual assault and alleged he used threats and blackmail to keep them from reporting the incidents. *Id.* at 943-45.

The State of Wyoming charged Mr. Barrett in July of 2019. *Id.* at 945. Mr. Barrett's[2] trial was originally scheduled to begin in February of 2020, but defense counsel requested a continuance because of a large discovery disclosure. [ECF 1 p. 23] His trial was rescheduled for March 16, 2020, but was again delayed—this time because of the COVID-19 pandemic. [ECF 1 p. 23] Mr. Barrett went to trial on October 6, 2020. [ECF 1 p. 23] The trial proceeded according to the Seventh Judicial District Coronavirus Pandemic Jury Trial Operational Plan. [ECF 1 p. 23; ECF 1 ex. 1 pp. 28-31] Mr. Barrett's attorney objected to the entire format of the trial under the COVID-19 Protocol, arguing it violated Mr. Barrett's right to due process. [ECF 5 ex. 2] The trial court overruled Mr. Barrett's objection and the case proceeded to trial. [ECF 5 ex. 2] The jury found Mr.

[1] There are discrepancies between the facts and procedural history reported by Mr. Barrett, that described by Respondents, and the one included in the Wyoming Supreme Court's opinion. For example, Mr. Barrett states he was charged on June 28, 2019 [ECF 1 p. 22], Respondents say he was charged in August of 2019 [ECF 7 p. 3], and the Wyoming Supreme Court stated he was charged in July of 2019, *Barrett*, 509 P.3d at 945. These discrepancies make no difference to the Court's analysis of the issues raised in this petition. The Court references the Wyoming Supreme Court's findings where available.

[2] The Court cites to the ECF page number throughout this order.

Barrett guilty of all charges and the trial court "imposed a lengthy sentence." *Barrett*, 509 P.3d at 945.

Mr. Barrett appealed and raised two issues: 1) whether there was sufficient evidence to support Mr. Barrett's conviction for sexual exploitation of a child, and 2) whether the trial court abused its discretion by admitting evidence of his prior conviction under Wyoming Rule of Evidence 404(b). *Id.* at 943. The Wyoming Supreme Court concluded: "There was sufficient evidence at trial to support Mr. Barrett's convictions for sexual exploitation of a child under Wyo. Stat. Ann. § 6-4-303(b)(i) and (iv). The district court did not abuse its discretion by admitting evidence of Mr. Barrett's prior conviction under W.R.E. 404(b)." *Id.* at 952.

Mr. Barrett then filed a petition for post-conviction relief (PCR). [ECF 1 ex. 2 pp. 20-138] He raised eleven main claims—many with numerous subclaims. [ECF 1 ex. 2 p. 20-22] The PCR court issued a thorough decision denying Mr. Barrett's PCR petition. [ECF 1 ex. 4 pp. 50- 81] It determined three of Mr. Barrett's claims were not cognizable in a PCR petition because they did not relate to the proceedings that resulted in his conviction and sentence, one claim was barred because it was raised and decided on the merits, and the remaining claims were procedurally barred because they could have been raised on direct appeal but were not. [ECF 1 ex. 4 p. 55] The PCR court concluded Mr. Barrett did not rely on newly discovered evidence or demonstrate that he received ineffective assistance of appellate counsel and, therefore, the exceptions to the procedural bar did not apply. [ECF 1 ex. 4 p. 55] Mr. Barrett filed a petition for writ of review in the Wyoming Supreme Court which was summarily denied. [ECF 1 ex. 5 p. 1]

Mr. Barrett then filed this petition in which he raises numerous claims. Most of Mr. Barrett's claims are interrelated and assert that the trial court's operating plan during the COVID-19 pandemic violated his constitutional rights. [ECF 1 pp. 51-170] Specifically he argues:

1. denial of a public trial [ECF 1 pp. 51-90],
2. the accumulated impact of the coronavirus pandemic denied Mr. Barrett a constitutionally protected trial.
    a. The COVID-19 protocols denied him the ability to continuously confer with counsel [ECF 1 pp. 90-98],
    b. the masking requirements violated his rights because it made it difficult to assess reactions [ECF 1 pp. 98-101],
    c. the masking requirements deprived him of his right to confront witnesses [ECF 1 pp. 101-114],
    d. the seating requirements deprived him of due process because some of the jurors were disadvantaged at viewing exhibits [ECF 1 pp. 114-119],
    e. the trial court's failure to adhere to the COVID-19 operating procedures violated his right to due process [ECF 1 pp. 119-121],
    f. abnormal jury room accommodations denied him due process [ECF 1 p. 122],
    g. jury conflict because the jurors were placed in a position to risk their lives to serve on the jury [ECF 1 pp. 122-128],

h. the inconsistency in treatment between members of the jury means there can be no faith in the outcome [ECF 1 pp. 128-129],

i. the removal of two members of the defense counsel team during trial compromised his attorney's ability to effectively assist him [ECF 1 pp. 129-144],

3. the jury instructions were defective [ECF 1 pp. 124-150],

4. the trial transcript was defective [ECF 1 pp. 150-155],

5. the inability to confer with trial counsel [ECF 1 p. 155]

6. the trial court's overruling of the defense's objection to the COVID-19 Protocols was unreasonable [ECF 1 pp. 155-156],

7. Mr. Barrett's appellate attorney was constitutionally ineffective [ECF 1 pp. 156-174],

a. failure to investigate the trial record [ECF 1 pp. 159-60],

b. failure to investigate witnesses [ECF 1 pp. 160-162],

c. failure to pursue all non-frivolous issues [ECF 1 p. 162],

d. failure to pursue federal constitutional issues [ECF 1 pp. 162-69]

e. failure to investigate Appellant's claims [ECF 1 pp. 169-71]

f. failure to provide trial record to Appellant [ECF 1 pp. 171-72]

g. failure to obtain Appellant's consent to file brief [ECF 1 pp. 172-74]

8. cumulative error [ECF 1 pp. 174-175].

STANDARD OF REVIEW

Mr. Barrett filed his petition *pro se*. The Court liberally construes the filings of *pro se* litigants and holds them to a less stringent standard than those drafted by attorneys. *United States v. Hald*, 8 F.4th 932, 949, n. 10 (10th Cir. 2021). However, "it is not . . . the 'proper function of the district court to assume the role of advocate for the pro se litigant.'" *Rigler v. Lampert*, 248 F.Supp.3d 1224, 1232 (D. Wyo. 2017) (quoting *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991)).

To obtain habeas relief, Mr. Barrett must affirmatively prove that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). He must demonstrate the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) & (2). Where a state court has adjudicated constitutional issues on the merits, this Court gives significant deference to that decision. *Johnson v. Martin*, 3 F.4th 1210, 1218 (10th Cir. 2021).

The "clearly established federal law" referred to by the habeas statute "is determined by the United States Supreme Court, and refers to the Court's holdings, as opposed to the dicta.'" *Hawes v. Pacheco*, 7 F.4th 1252, 1263 (10th Cir. 2021) (quoting *Lockett v. Trammell*, 711 F.3d 1218, 1231 (10th Cir. 2013)). "A state court decision is 'contrary to' clearly established federal law 'if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts.'" *Id.*

(alterations in original) (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)). "A 'decision is an "unreasonable application" of clearly established federal law if it identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of petitioner's case.'" *Id.* (quoting *Underwood v. Royal*, 894 F.3d 1154, 1162 (10th Cir. 2018)) (alteration in original). The Court can grant habeas relief only if the state court's decision was objectively unreasonable and "if 'there is *no possibility* fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents.'" *Id.* (emphasis in original) (quoting *Coddington v. Sharp*, 959 F.3d 947, 953 (10th Cir. 2020)).

Respondents moved to dismiss this petition under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[3] The Federal Rules of Civil Procedure apply to § 2254 cases to the extent that they "are not inconsistent with any statutory provisions or" the Rules Governing Section 2254 Cases. Rule 12, Rules Governing Section 2254 Cases in the United States District Courts. Under Rule 12(b)(6) the Court evaluates whether the petition "states a claim to relief that is plausible on its face.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face when it includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the alleged misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "[C]onclusory

[3] The Court notes that the Wyoming Attorney General's office recently has been moving for dismissal or summary judgment in § 2254 habeas cases under Federal Rules of Civil Procedure 12(b)(6) and 56. While those rules do not conflict with the habeas rules and are, therefore, available for use in habeas cases, it is unnecessary to frame a dispositive motion under those rules in § 2254 cases. *See* Brian R. Means, Federal Habeas Manual, § 8 (June update 2024)

allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." *Hall*, 935 F. 2d at 1110.

DISCUSSION

I. Motion to Dismiss, Response, Reply, and Sur-reply

A. Motion to Dismiss [ECF 6 & 7]

Respondents filed a motion to dismiss Mr. Barrett's petition. They argue Mr. Barrett's claims are either not cognizable in a federal habeas petition or are procedurally defaulted. [ECF 7 p. 2] Specifically, Respondents argue claims 2(d), 2(e), 2(f), 2(g), 2(h), and 2(i) are not cognizable in a § 2254 petition because they do not allege a constitutional violation. [ECF 7 p. 7] They contend that the non-cognizable claims are based on vague due process assertions, but that he cannot succeed on them because he does not show that he was denied a constitutionally protected liberty interest. [ECF 7 p. 7] Respondents assert Mr. Barrett provides no reference to controlling case law to support his contentions that the COVID-19 safety procedures violated his due process rights. [ECF 7 pp-7-8] They further argue that Mr. Barrett provides no reference to case law for claims 7(b), 7(e), 7(f), or 7(g) to show that his constitutional rights were violated during the appeal process. Respondents also argue that Mr. Barrett's contention that the PCR court erred by not considering his response or holding an evidentiary hearing is not cognizable in a habeas petition. [ECF 7 pp. 9-10]

Next, Respondents argue the remainder of Mr. Barrett's claims are either unexhausted but now procedurally defaulted, or procedurally defaulted because they were procedurally barred in the state courts. [ECF 7 p. 10] Respondents argue that, while Mr.

Barrett raised his federal claims to the PCR court, he only included three of the federal claims when he sought a writ of review from the Wyoming Supreme Court on his PCR dismissal. [ECF 7 p. 11] Thus, Respondents contend the claims not presented to the Wyoming Supreme Court—claims 2(b), 3, 4, 6, 7(a), 7(c), and 7(d)— are unexhausted. [ECF 7 p. 11] Respondents argue the unexhausted claims are now subject to an anticipatory procedural bar. [ECF 7 p. 12]

Respondents argue claims 1, 2(a), and 2(c) are procedurally defaulted because the PCR court found them barred pursuant to an independent and adequate state ground. [ECF 7 p.p. 12-13] They contend he cannot overcome the procedural default by showing "cause and prejudice." Respondents argue that, while ineffective assistance of appellate counsel can constitute "cause" to avoid a procedural default for a claim that was not raised on direct appeal, it cannot serve as "cause" here because most of Mr. Barrett's claims are procedurally defaulted because he did not raise them in his petition for writ of review and that error is solely attributable to him. [ECF 7 p. 14] Respondents state the PCR court considered the ineffective assistance of appellate counsel claim and determined Mr. Barrett could not meet the standard. [ECF 7 p. 15] Respondents stress their contention that because the ineffective assistance of appellate counsel claim was not raised in Mr. Barrett's petition for writ of review, the Court is barred from considering it. [ECF 7 p. 15]

Respondents further argue Mr. Barrett cannot show a miscarriage of justice because he does not assert he is actually innocent of the crimes of which he was

convicted. [ECF 7 p. 16] Finally, they argue Mr. Barrett is not entitled to an evidentiary hearing. [ECF 7 pp. 16-17]

B. Response [ECF 8]

In response, Mr. Barrett argues he has consistently raised the federal constitutional issues in his post-conviction efforts. [ECF 8 p. 6] He contends he did not abandon his ineffective assistance of appellate counsel claims in his petition for writ of review. [ECF 8 p. 7] He argues he referenced the claim and stated that the arguments in his PCR petition were incorporated by reference into his petition for a writ of review. [ECF 8 pp. 8-9] Mr. Barrett contends this Court must "read through" to the last reasoned decision on the matter because the Wyoming Supreme Court did not determine that he abandoned his ineffective assistance of appellate counsel claim. [ECF 8 p. 9] Mr. Barrett points to a letter he received from the Wyoming Public Defender's office after his habeas petition was filed indicating that his appellate attorney's work product and performance diminished at the end of his career. [ECF 8 p. 10] Mr. Barrett acknowledges the Court would not ordinarily be able to consider the letter in its decision, but argues "it is of such substance that it simply cannot be ignored." [ECF 8 p. 10]

Mr. Barrett next argues the claims the PCR court determined were procedurally barred because he did not raise them on direct appeal are not procedurally barred here. [ECF 8 p. 11] He argues his claims were not decided on the merits, Wyoming's PCR statute is not independent and adequate, and he can demonstrate "cause and prejudice." [ECF 8 p. 12] He contends he briefed the ineffective assistance of appellate counsel claim by adequately referencing the record and by thoroughly explaining how his appellate

attorney was constitutionally ineffective. [ECF 8 pp. 14-15] Mr. Barrett argues about the standard for the PCR petition and states that he identified controlling federal case law demonstrating that the trial court's COVID-19 Protocols violated his Sixth Amendment and due process rights. [ECF 8 pp. 16-22]

Mr. Barrett argues the PCR procedural bars are not independent of federal law because the PCR court must rule on the ineffective assistance of appellate counsel. [ECF 8 pp. 24-26] He argues the Wyoming test for ineffective assistance of appellate counsel mirrors the federal test and, therefore, is not independent of the federal question. [ECF 8 p. 24-25] He further argues that Wyoming courts have not consistently applied the procedural bar rules and they are therefore inadequate. [ECF 8 p. 26] Mr. Barrett points to *Keats v. State*, 115 P.3d 1110 (Wyo. 2005), as an example of the Wyoming Supreme Court allowing a claim that could have been raised on direct appeal but was not. [ECF 8. 26] He argues Respondents failed to demonstrate the state procedural bars are independent and adequate. [ECF 8 p. 27]

Mr. Barrett further argues that, even if his ineffective assistance of appellate counsel claims are deemed procedurally defaulted, he can demonstrate "cause and prejudice" to overcome the bar. [ECF 8 p. 28] Mr. Barrett argues he has a compelling claim for ineffective assistance of appellate counsel. [ECF 8 p. 28] Mr. Barrett contends his appellate attorney should have raised the ineffective assistance of trial counsel on direct appeal but he refused to do so. [ECF 8 pp. 29-30] He concludes that his petition is not procedurally barred and this Court should consider his claims on the merits. [ECF 8 p. 32]

C. Reply [ECF 9]

In reply, Respondents argue Mr. Barrett has not demonstrated that he fairly presented his ineffective assistance of appellate counsel claim to the Wyoming Supreme Court. [ECF 9 p. 1] They contend Mr. Barrett's bare mention of the ineffective assistance of appellate counsel in his brief to the Wyoming Supreme Court is not sufficient to place the issue fairly before the court. [ECF 9 p. 2] Respondents assert Mr. Barrett did not present any argument, case law, legal standards, or factual basis for his ineffective assistance of appellate counsel claim. Instead, he presented an ineffective assistance of trial counsel argument. [ECF 9 p. 2] They further argue Mr. Barrett did not support his ineffective assistance of trial counsel claim with reference to his post-conviction brief. [ECF 9 p. 2] Respondents contend Mr. Barrett's assertion that his ineffective assistance of appellate counsel claim is exhausted because the lower court addressed it and the Wyoming Supreme Court summarily denied his petition for writ of review is inaccurate. Instead, they argue the Wyoming Supreme Court could not have denied his ineffective assistance of appellate claim without comment because Mr. Barrett never presented the claim to the court. [ECF 9 pp. 2-3]

Next, Respondents contend that Wyoming Statute § 7-14-103 is an independent and adequate bar to his procedurally defaulted claims. [ECF 9 p. 3] Respondents assert the statute is clear and has remained unchanged since 1988. [ECF 9 p. 3] They argue the Tenth Circuit has previously found that Wyoming's requirement that non-jurisdictional claims be raised on direct appeal is an independent and adequate state procedural bar. [ECF 9 p. 3] They also contend that Mr. Barrett's reliance on *Keats* is misplaced because

it is limited to situations where the same attorney represented the defendant at trial and on direct appeal, which did not occur here. [ECF 9 p. 3]

Respondents argue the PCR court applied state law to determine whether Mr. Barrett could avoid the procedural bar. [ECF 9 p. 4] The state law combines the *Strickland v. Washington*, 466 U.S. 668 (1984), ineffective assistance standard with the state plain error standard. [ECF 9 p. 4] They assert the PCR court did not apply *Strickland* to Mr. Barrett's procedurally defaulted claims, but instead relied solely on the plain error analysis. [ECF 9 p. 4] Thus, they argue, the state's bar was independent of federal law because it was based on Mr. Barrett's failure to satisfy Wyoming's plain error standard. [ECF 9 p. 4]

Finally, Respondents argue Mr. Barrett does not make a credible showing of actual innocence to overcome the procedural bar in this case. [ECF 9 pp. 4-5] While Respondents admit Mr. Barrett has always asserted his innocence of the crimes, they contend he has not presented reliable new evidence to support his factual innocence. [ECF 9 p. 5] Thus, they conclude he is not eligible for the actual innocence gateway to overcome his procedural default. [ECF 9 p. 5]

D. Sur-reply [ECF 10]

The Court first notes that Mr. Barrett's "reply to petitioner's reply" is an unauthorized sur-reply. Neither the Federal Rules of Civil Procedure nor the Local Rules allow litigants to file a sur-reply brief. Fed. R. Civ. P. 7(a); Local Rule 7.1(b)(1) & (b)(2). While the Court liberally construes the filings of pro se litigants, the Tenth Circuit "has repeatedly insisted that pro se parties follow the same rules of procedure that govern

other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (quoting *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994).

"A non-moving party may be allowed, on rare occasions, and then only with prior leave of court, to file a sur-reply, if, and only if, the reply filed by the movant raises **both** new evidence and new legal arguments." *Yellowbear v. Hargett*, 2016 WL 10520959, *40 (D. Wyo. 2016) (citing *Green v. New Mexico*, 420 F.3d 1189. 1196 (10th Cir. 2005)) (emphasis in original). Mr. Barrett did not seek or receive leave from this Court to file a sur-reply. Respondents' reply brief does not include a new legal argument—it simply responds to the arguments raised in Mr. Barrett's response. Further, Respondents' reply did not raise new evidence. Mr. Barrett's sur-reply simply reargues the points he made in his initial response to the respondents' motion to dismiss. [ECF 10] The re-argument of points already made in a prior brief does not justify a sur-reply. *Yellowbear*, 2016 WL 10520959; *see also O'Connor v. Lafayette City Council*, 2020 WL 5203792, *3 (D. Colo. 2020); *Wilson v. United States*, 2008 WL 11516545 *3 (D. Colo. 2008). Nevertheless, Respondents did not move to strike the sur-reply and the Court will consider the arguments to the extent they are helpful.

II. Analysis

A. Exhaustion requirement

Respondents and Mr. Barrett fundamentally disagree about whether he waived many of his claims by failing to raise them in his petition for writ of review. There is no question that Mr. Barrett raised the claims in this petition in his state PCR. However, Respondents contend he did not raise claims 2(b), 3, 4, 5, 6, 7(a), 7(c), and 7(d) in his

petition for of review in the Wyoming Supreme Court and, therefore, they are unexhausted and procedurally barred in this Court. [ECF 7 p. 11] Mr. Barrett argues he did not abandon these claims. [ECF 8 p.7] Mr. Barrett notes that he referenced the ineffective assistance of appellate counsel in his petition for writ of review and directed the Court to refer to his PCR brief to thoroughly explain the issues. [ECF 8 pp. 7-8] Respondents contend Mr. Barrett's mere reference to the claims does not constitute fair presentation to the Wyoming Supreme Court. [ECF 9 p. 2]

Section 2254 requires petitioners to exhaust their state remedies before bringing those claims to federal court. *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982). "The exhaustion requirement is satisfied if the federal issue has been properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack." *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994). "To provide the State with the necessary 'opportunity,' the prisoner must 'fairly present' his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29 (2004).

In *Baldwin*, the petitioner raised several claims, including "ineffective assistance of both trial court and appellate court counsel." *Id.* at 29. The petitioner specifically asserted that his trial counsel's representation violated several provisions of the federal constitution but did not separately claim that his appellate counsel's representation violated federal law. *Id.* at 29-30. The Ninth Circuit Court of Appeals determined the appellate ineffectiveness claim was fairly presented because "the justices of the Oregon

Supreme Court had had 'the *opportunity*' to read . . . the lower [Oregon] court decision claimed to be in error before deciding whether to grant discretionary review.'" *Id.* at 30 (internal citation omitted). The Supreme Court reversed and held that "ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so." *Id.* at 32.

Mr. Barrett failed to directly raise claims three and four in his petition for writ of review. Likewise, while Mr. Barrett did argue that the masking requirement violated his Sixth Amendment right to confront the witnesses against him, he did not argue that the masking requirement prevented the jury from seeing his reactions or from accurately determining whether they knew him during voir dire. [ECF 1 ex. 4 pp. 103-105] Thus, claim 2(b) was not presented to the Wyoming Supreme Court. Claim six was arguably presented to Wyoming Supreme Court and therefore will be discussed below. [ECF 1 ex. 4 p. 95]

It is less clear whether Mr. Barrett raised the ineffective assistance of appellate counsel claims to the Wyoming Supreme Court. In his petition for writ of review, Mr. Barrett included the following paragraph regarding the ineffective assistance of appellate counsel: "the failures of appellate counsel to even strongly support the only two issues he decided to raise on Direct Appeal further infringed upon Petitioner's right to effective assistance of counsel on direct appeal." [ECF 1 ex. 4 p. 111] He also stated:

> Petitioner asserts that but for: his denial of a public trial; his inability to confront witnesses against him; his denial of effective assistance of counsel (Trial Counsel); his choice to testify in his own defense denied him; prosecutorial misconduct; *Brady* violations; improper witness testimony; ineffective assistance of counsel (appellate counsel); the State's infringement upon his Fifth Amendment (US Constitution) rights; and all other issues raised in this *Petition* and Petitioner's *Motion for post-Conviction Relief*, the outcome of the trial would have been different.

[ECF 1 ex. 4 p. 122] While Mr. Barrett argues that he stated in his petition for writ of review that he relied on his motion for post-conviction relief to expand on his arguments, that was specifically in reference to the broad Due Process claims he made regarding the COVID-19 protocols in the state trial court:

> Petitioner was denied due process of law multiple times throughout the case. From the COVID Plan to the structure of the trial itself to a defective Trial Record, Petitioner has faced myriad denials of due process. Petitioner relies upon his *Motion for Post-Conviction Relief*, attached, for the thorough elucidation of these issues.

[ECF 1 ex. 4 p. 109] These references are insufficient to place the ineffective assistance of appellate counsel claim before the Wyoming Supreme Court.

To exhaust his state court remedies, Mr. Barrett was required to present the substance of the federal claim to the Wyoming Supreme Court. *Grant v. Royal*, 886 F.3d 874, 890 (10th Cir. 2018). "[T]he crucial inquiry is whether the 'substance' of the petitioner's claim has been presented to the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim." *Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012) (citing *Picard v. Connor*, 404 U.S. 270, 278 (1971)). Fair presentation does not require the petitioner to "invoke 'talismanic language' or cite 'book

and verse on the federal constitution.'" *Id.* It does, however, require the petitioner to present more than the facts necessary to support the claim, or to simply cite to the legal principal without including the relevant facts. *Id.*

Here, Mr. Barrett listed thirteen grounds for relief in his petition for writ of review and none of them mentioned the ineffective assistance of appellate counsel. [ECF 1 ex. 4 pp. 95-98] Within the brief, Mr. Barrett made passing references to the ineffective assistance of appellate counsel, as described above, but did not expand on his arguments. Further, even if his referral to his PCR brief is sufficient under *Baldwin*, it is insufficient in this situation because he did not refer to his ineffective assistance of appellate counsel argument.

Finally, his brief to the Wyoming Supreme Court offers further proof that the ineffective assistance of appellate counsel claim was not fairly presented. The PCR court determined that most of Mr. Barrett's claims were procedurally barred and he failed to overcome the procedural bar by showing his appellate attorney was ineffective—as required by Wyoming's post-conviction relief statute. [ECF 1 ex 4 pp. 57-81] Mr. Barrett did not address the PCR court's thorough analysis in his petition for writ of review by arguing that he had demonstrated his appellate counsel was ineffective to overcome the procedural bar. Rather, he reargued the merits of his case—specifically the due process and open courts claims— and asserted the PCR court should have considered his response to the State's motion to dismiss. [ECF 1 ex. 4 pp. 86- 127] Mr. Barrett did not fairly present his ineffective assistance of appellate counsel claim to the Wyoming Supreme Court; therefore, it is unexhausted.

When a petitioner has failed to exhaust his state remedies, courts should generally dismiss the case without prejudice to allow the petitioner to exhaust his remedies in state court. *Grant*, 886 F.3d at 891-92. However, dismissal without prejudice is inappropriate if the state court would find the claims procedurally barred on an independent and adequate state ground. *Id.* at 892 (citing *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991)). Here, an anticipatory procedural bar applies because Mr. Barrett cannot now exhaust his unexhausted claims in state court. Thus, "there is a procedural default for the purposes of federal habeas review." *Id.* (internal quotation omitted). "A petitioner may overcome the procedural bar only if he can 'demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.'" *Id.* (quoting *Coleman*, 501 U.S. at 750)).

Mr. Barrett argues the ineffective assistance of appellate counsel constitutes "cause" to overcome the procedural bar and states he can demonstrate prejudice. [ECF 8] Respondents contend this Court cannot consider Mr. Barrett's ineffective assistance of appellate counsel claim because the error is attributable to Mr. Barrett since he is the one who failed to raise the claim in his petition for writ of review, and therefore it cannot constitute "cause" to excuse his procedural default. [ECF 7 p. 15]

"This claim implicates some thorny procedural issues." *Revilla v. Gibson*, 283 F.3d 1203, 1210 (10th Cir. 2002). Courts can "bypass complex issues of exhaustion[] and procedural bar, to reject the claim on the merits." *Id.* (citing U.S.C. § 2254(b) and *Romero v. Furlong*, 215 F.3d 1107, 1111 (10th Cir.), *cert. denied*, 531 U.S. 982, 121

S.Ct. 434, 148 L.Ed.2d 441 (2000)) (internal citations omitted). Thus, this Court will address Mr. Barrett's straightforward "cause and prejudice" argument on the merits rather than wade through the convoluted procedural bar analysis Respondents urge the Court to apply.

B. Claim one

In his first claim, Mr. Barrett argues he was denied a public trial. He contends the trial court's COVID-19 protocols—specifically the social distancing requirements—resulted in the denial of a public trial. He argues that the social distancing requirements meant that no member of the public could attend voir dire and only two members of the public could attend the trial itself. He asserts that his family and friends were turned away from the courtroom because there was "no more space." [ECF 1 p. 52] Mr. Barrett's attorney raised an objection to the entire format of the trial, which the court denied. [ECF 1 p. 52]

Respondents argue claim one is procedurally defaulted because Mr. Barrett raised this claim in his state PCR and the state court determined it was barred because he could have raised the issues on appeal but did not. [ECF 7 p. 12-13] Mr. Barrett raised this claim in his Writ of Review to the Wyoming Supreme Court and it summarily denied the writ. [ECF 7 p. 12] Respondents, therefore, argue this Court should consider the PCR court's reasoning as required by the "look-through" rule explained in *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Respondents conclude Mr. Barrett's first claim is procedurally defaulted on an independent and adequate state ground. [ECF 7 p. 13] They also argue Mr. Barrett cannot show "cause and prejudice" to overcome the procedural default. [ECF

7 p. 13] They contend the failure of Mr. Barrett's appellate counsel to raise this issue on direct appeal cannot constitute "cause" because the PCR court looked at the argument and found that Mr. Barrett would not have been successful on this claim on direct appeal—therefore his attorney was not ineffective for failing to raise it. [ECF 7 p. 15] They also argue this Court cannot consider his ineffective assistance of appellate counsel claim, even if it is raised to avoid the procedural bar, because he did not raise it in his petition for writ of review in the Wyoming Supreme Court. [ECF 7 p. 15]

In response, Mr. Barrett argues he did raise his ineffective assistance of appellate counsel claims to the Wyoming Supreme Court. Thus, he contends, this Court should consider it here. [ECF 8 pp. 7-10] Next, he argues the PCR court reached the wrong decision because the procedural bar should not have applied to his case. [ECF 8 pp. 11-25] He then argues the procedural bar applied by the PCR court is not independent and adequate because it relies on the *Strickland* test for ineffective assistance of counsel. [ECF 8 p. 24-27] Finally, he argues his ineffective assistance of appellate counsel claim should be considered because he can meet the cause and prejudice standard. [ECF 8 pp. 28-29]

Respondents replied and argue that the ineffective assistance of counsel claim was not fairly raised in the Wyoming Supreme Court. [ECF 9 p. 2] Next, they contend the procedural bar applied by the PCR court is independent and adequate. [ECF 9 pp. 3-5] They argue the bar has been consistently applied and therefore he was on notice of it. They further argue the PCR court applied the procedural default rule because it found that Mr. Barrett could have raised the claims on direct appeal but did not—the PCR court then

applied state law to see if Mr. Barrett could overcome the state procedural bar. [ECF 9 p. 3-4] Respondents argue the state test combines *Strickland*'s analysis with the plain error standard of review, but the PCR court rested its decision on the plain error portion of the analysis. [ECF 9 p. 4]

"[A] federal claimant's procedural default precludes federal habeas review . . . if the last state court rendering a judgment in the case rests its judgment on the procedural default." *Harris v. Reed*, 489 U.S. 255, 262 (1989); s*ee also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) ("The procedural default doctrine and its attendant 'cause and prejudice standard' . . . apply whether the default in question occurred at trial, on appeal, or on state collateral attack."). "Where . . . the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits." *Ylst*, 501 U.S. at 803.

The PCR court applied a procedural bar: "Barrett's claim[s] alleging denial of a public trial . . . could have been raised on direct appeal. . . Therefore these claims are procedurally barred under Wyo. Stat. Ann. 7-14-103(a)(i)." [ECF 1 ex. 4 p. 56] Mr. Barrett argues the PCR court applied the PCR law incorrectly. This claim is not cognizable in a habeas petition because "[f]ederal habeas review does not extend to the correction of purely state law procedural errors that do not rise to the level of a constitutional due process violation." *Shipley v. Oklahoma*, 313 F.3d 1249, 1251 (10th Cir. 2002) (internal citation and quotation omitted).

Next, Mr. Barrett identifies *Keats* as proof that the procedural bar applied in his case was not adequate. However, the holding in *Keats* only applies to cases where the

same attorney represents the defendant at trial and on appeal. 115 P.3d 1110. Further, the Tenth Circuit has held that "Wyoming's procedural bars to claims not raised on direct appeal . . . are independent and adequate." *Teniente v. Wyoming Atty. Gen.*, 412 F. App'x 96, 101 (10th Cir. 2011) (unreported) (compiling cases). Mr. Barrett argues the PCR court's decision was not independent and adequate because it included the *Strickland* test, however that misstates the record. The PCR court determined Mr. Barrett's public trial claim was procedurally barred because he could have raised it on direct appeal but did not—that is the procedural bar and it is independent of the federal claim.

In his state PCR case, the court looked at whether Mr. Barrett met the state's standard to excuse the state procedural default and applied the test from *Smizer v. State*, 835 P.3d 334, 337 (Wyo. 1991). [ECF 1 ex. 4 pp. 53-54] The *Smizer* test is a combination of Wyoming's plain error standard and *Strickland*. *Id.* However, the PCR court's application of *Smizer* to determine whether Mr. Barrett could overcome the state procedural default is a matter of state law and separate from the court's application of the procedural bar. Further, even if this Court considered the application of the *Smizer* test as part of the "independent and adequate" analysis, the PCR court did not reach the *Strickland* portion of the *Smizer* test, determining instead that Mr. Barrett could not satisfy the plain error standard. [ECF 1 ex. 4 pp. 58-81] Therefore, it would still be independent of federal law. Thus, Mr. Barrett must demonstrate "cause and prejudice" to overcome the procedural bar.

"To establish cause, the prisoner must 'show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule.'" *Shinn*

v. Ramirez, 596 U.S. 366, 379 (2022) (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Petitioners demonstrate prejudice by showing "that the constitutional violation 'worked to his actual and substantial disadvantage.'" *Id.* at 379-80 (quoting *Murray*, 477 U.S. at 494). Violations of the Sixth Amendment right to effective assistance of counsel can constitute "cause" to excuse the procedural default. *Coleman*, 501 U.S. at 754. The Court applies the well-known test from *Strickland* to ineffective assistance of counsel claims. *Frederick v. Quick*, 79 F.4th 1090, 1104 (10th Cir. 2023), *cert. denied*, No. 23-6888, 2024 WL 2883778 (U.S. June 10, 2024). "Under *Strickland*, a defendant must establish that (1) counsel's performance 'fell below an objective standard of reasonableness,' and (2) 'the deficient performance prejudiced the defense.'" *Id.* (quoting *Strickland*, 466 U.S. at 687-88) (internal citations omitted). Where, as here, the petitioner alleges his appellate counsel was ineffective for failing to raise an issue on appeal, the Court examines the merits of the omitted issue and "[i]f the omitted issue is meritless, its omission will not constitute deficient performance." *Davis v. Sharp*, 943 F.3d 1290, 1299 (10th Cir. 2019). "[T]he Sixth Amendment does not require [appellate counsel] to raise every nonfrivolous issue," and "appellate attorneys frequently winnow out weaker claims in order to focus effectively on those more likely to prevail." *Id.*

Mr. Barrett argues his appellate counsel was constitutionally ineffective for failing to argue that the COVID-19 protocols violated his right to a public trial. Specifically, he argues the required social distancing did not permit members of the public to attend voir dire, and limited the number of people who could attend the trial. While the Sixth

Amendment provides the right to a public trial, that right "is not absolute." *United States v. Veneno*, 94 F.4th 1196, 1204 (10th Cir. 2024) (quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984)). Courtroom closures can be either total, excluding "all persons besides 'witnesses, court personnel, the parties, and the lawyers,'" or partial. *Id.* (quoting *Waller*, 467 U.S. at 42). A "total closure requires an overriding public interest that is likely to be prejudiced if the court does not close the proceedings." *Id.* (citing *Waller*, 467 U.S. at 48). Whereas "[w]hen the closure is partial rather than total, the defendant's right to a public trial 'gives way' if a 'substantial' reason for the partial closure exists." *Id.* (citing *United States v. Addison* 708 F.3d 1181, 1187 (10th Cir. 2013)).

Mr. Barrett cites to *United States of America v. Allen* to support his claim. 34 F.4th 789 (9th Cir. 2022). There, the district court prohibited the public from attending a suppression hearing and trial and denied the defendant's request to permit video streaming of the proceedings. *Id.* at 792. The Ninth Circuit Court of Appeals concluded the district court's restrictions constituted a total closure and were not narrowly tailored because the court should have considered less restrictive options. *Id.* at 800.

The Ninth Circuit Court of Appeals does not constitute binding law for this Court. Contrary to the Ninth Circuit's *Allen* decision, the Tenth Circuit determined in *Veneno* that a total-closure was justified under *Waller*'s total-closure test:

> Holding a trial in September 2020 provided an unprecedented challenge to the district court. After objection to the closed courtroom, the district court properly analyzed the closure, correctly found an overriding interest justifying closure, appropriately determined the closure was no broader than necessary, and reasonably concluded no reasonable alternatives existed. We believe the district court made an

> eminently reasonable determination to seat the jurors in the gallery. And even if we assumed this were error, such error would not be clear or obvious. Although the district court could possibly have made room for a few members of the public, doing so was not necessarily reasonable at the height of the pandemic. Indeed, reorganizing the entire juror seating arrangement for a few people would be unreasonable given the context. The district court met Waller's standards.

Veneno, 94 F.4th at 1206. Unlike the *Veneno* trial, Mr. Barrett's trial was not totally closed to the public. On the contrary, the COVID-19 Protocols specifically allowed members of the public to attend all stages of the trial:

> E. Public will be allowed as space permits due to social distancing. The gallery of the courtroom has been marked to identify appropriate social distancing in the seating. Once the spots are filled, no other observers will be allowed to enter the courtroom. Security will monitor the courtroom to ensure compliance with social distancing.
>
> F. The public and jurors shall not be allowed to communicate.

[ECF 1 ex. 1 pp. 28-29] Mr. Barrett cites to nothing other than his own conclusory statements that his trial was closed to the public. The PCR court found that the trial was open to the public, provided they followed the department of health's guidelines, and that Mr. Barrett's brother attended several days of the trial. [ECF 1 ex. 4 p. 58]

Mr. Barrett can only demonstrate "cause" to excuse the procedural default if he can show his appellate counsel was constitutionally ineffective for failing to raise this issue. Mr. Barrett cannot meet this standard. As discussed above he has not shown his attorney was deficient for failing to raise this issue because Mr. Barrett cannot show he did not receive a public trial. Nor can he show that a total closure or partial closure would have been unreasonable under the circumstances. Thus, Mr. Barrett's ineffective

assistance of appellate counsel claim for failing to raise the alleged public trial violation fails and Mr. Barrett cannot demonstrate "cause" to overcome the procedural default. Mr. Barrett's first claim is, therefore, procedurally defaulted.

C. Claim two

In claim two, Mr. Barrett generally argues that the accumulated impact of the coronavirus pandemic denied him a constitutionally protected trial. Respondents contend claims 2(a) and 2(c) are procedurally defaulted because Mr. Barrett raised these claims in his state PCR and the state court determined they were barred because he could have raised the issues on appeal but did not. [ECF 7 pp. 12-13] They also contend he cannot demonstrate cause and prejudice or a fundamental miscarriage of justice. [ECF 7 pp. 14-16] Respondents argue 2(d), 2(e), 2(f), 2(g), 2(h), and 2(i) are not cognizable in a § 2254 petition. Finally, Respondents contend claim 2(b) is unexhausted. They argue he presented the claim in his PCR, but failed to raise it in his petition for writ of review in the Wyoming Supreme Court. [ECF 7 pp. 10-11]

First, the Court addresses the overarching support Mr. Barrett cites for all his Claim Two subclaims. The Court does not minimize the challenges presented by the COVID-19 pandemic to the criminal justice system. All courts, including this one, faced significant challenges in managing the competing interests of upholding the constitutional rights of criminal defendants and protecting lives during an unprecedented global health crisis. Some of the cases cited by Mr. Barrett eloquently illustrate this struggle. They do not, however, represent controlling law for the purposes of a § 2254 habeas petition.

As explained above, to succeed on his habeas petition, Mr. Barrett must demonstrate the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) & (2). The "clearly established federal law" referred to by the habeas statute "is determined by the United States Supreme Court, and refers to the Court's holdings, as opposed to the dicta.'" *Hawes*, 7 F.4th at 1263 (quoting *Lockett*, 711 F.3d at 1231. "A state court decision is 'contrary to' clearly established federal law 'if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts.'" *Id.* (alterations in original) (quoting *Bell v. Cone*, 535 U.S. 685, 694 (2002)).

The COVID-19 pandemic and the measures undertaken by states and the federal government to save lives were unique events unparalleled in the history of this country. As such, there is no clearly established law for courts to apply and follow for protecting criminal defendants' constitutional rights during a pandemic. Rather, petitioners and the courts must look to clearly established law for each of the alleged violations and explain how the COVID-19 trial protocols impacted those rights.

Second, the cases to which Mr. Barrett cites are distinguishable and non-binding. Two of the cases involved civil cases. *Ironburg Inventions Ltd. v. Valve Corp.*, was a patent infringement trial conducted fully remotely. 64 F.4th 1274 (Fed. Cir. 2023). The remote nature of the trial was not part of the case on appeal and the appellate court only

addressed it in discussing whether the jury had substantial evidence to conclude that one of the video game controllers violated the other's patent. *Id.* The parties had mailed each juror examples of the controllers and told the jurors to focus on the samples during closing. *Id.* at 1291-92. *Tucker v. Gaddis*, was a Religious Land Use and Institutionalized Persons Act (RLUIPA) case that focused on the doctrine of mootness. 40 F.4th 289 (5th Cir. 2022). Only Judge Ho's concurrence mentions COVID-19 and it does so in reference to mootness and whether other circuit courts correctly applied the doctrine in RLUIPA cases. *Id.* at 296. Finally, Mr. Barrett cited *County of Butler, et al, v. Wolf* which was a § 1983 case brought by a group of counties, citizens, elected representatives, and businesses against the governor of Pennsylvania challenging measures taken to reduce the spread of COVID-19. 486 F. Supp. 3d 883 (W.D. Penn. 2020). Mr. Barrett makes much of the court's decision, saying: "The Honorable Judge William S. Stickman IV of the District Court for the Western District of Pennsylvania authored the definitive opinion of the intersection of public health and defendants' rights during a global pandemic" and he quotes the case extensively. [ECF 1 pp. 85- 89] However, the *Wolf* case challenged stay-at-home orders, business closure orders, and orders setting congregation size—it did not discuss criminal defendants. *Id.* Further, the *Wolf* decision was vacated and the appeal dismissed as moot—thus it no longer represents good law. *County of Butler v. Governor of Pennsylvania*, 8 4th 226 (3rd Cir. 2021).

Mr. Barrett referenced a few criminal cases, but none discussed whether COVID-19 protocols violated constitutional rights. In *United States of America v. Huling*, the

District Court for the District of Rhode Island issued a pretrial order regarding its COVID-19 protocols and determined that no public spectators would be allowed in the courtroom but set up a separate room on the premises for the public to view on closed-circuit television. 542 F.Supp.3d 144 (D. R.I. 2021). The order Mr. Barrett cited to in *U.S. v. Wright*, was an order continuing the jury trial due to the then ongoing public health crisis. *United States v. Wright*, No. 1:20 CR 47 TC, 2021 WL 1063180, at *1 (D. Utah Mar. 19, 2021). There, the judge expressed frustration at the public and governments for their lack of concern for criminal defendants and inability or unwillingness to follow recommendations that would reduce the spread of COVID-19 and allow criminal trials to resume. *Id.* at *1-*2. She pointed out that several courtrooms in the district had been prepared to protect participants while still allowing the trials to proceed—with many of the same methods used by the trial court in Mr. Barrett's case. *Id.* at *2.

i. Claim 2(a): COVID-19 protocols denied Mr. Barrett the ability to continuously confer with counsel

Mr. Barrett claims the COVID-19 Protocols violated his due process rights because he could not continuously confer with his attorney. [ECF 1 p. 90] Mr. Barrett argues he could not continuously confer with counsel because the COVID-19 Protocols required jurors to be seated too closely to the defense table and they were, therefore, within hearing distance of any conversations he tried to have with counsel. [ECF 1 p. 96] He contends this constitutes structural error. [ECF 1 p. 93] Respondents and Mr. Barrett then made the same arguments regarding the application of the independent and adequate

state procedural bar, ineffective assistance of appellate counsel, the *Smizer* test and the and cause and prejudice that the Court explained under claim one. *Supra* II B.

The PCR court determined that Mr. Barrett's claim regarding his inability to continuously confer with counsel was procedurally barred under Wyo. Stat. Ann. 7-14-103(a)(i). [ECF 1 ex. 4 p. 56] For the reasons discussed in this Court's analysis of claim one, Mr. Barrett's claim is procedurally defaulted and he must, therefore, demonstrate "cause and prejudice" to overcome the procedural bar. As explained above, violations of the Sixth Amendment right to effective assistance of counsel can constitute "cause" to excuse the procedural default. *Coleman*, 501 U.S. at 754. To meet this, the Court applies the two-prong test from *Strickland* and looks to the merits of the omitted issue. *Davis*, 943 F.3d at 1299.

Mr. Barrett cites to several cases to support his claim that the proximity of the jury meant he could not continuously confer with counsel and therefore his due process rights were violated. However, on review, most of the cases cited by Mr. Barrett are not binding and all are clearly distinguishable or inapplicable to this situation. First, Mr. Barrett cited to a Supreme Court case, *Holloway v. Arkansas*, 435 U.S. 475 (1978), which is inapplicable to his case. In *Holloway*, the codefendants both moved for appointment of new counsel because their joint appointed counsel asserted that he could not represent them both due to a conflict of interest. 435 U.S. at 476-77. The lower court denied the motions and the Supreme Court determined: "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters." *Id.* at 490. *Holloway*

stands for the idea that simply sitting next to a lawyer does not satisfy the Sixth Amendment when the attorney is unable to act as a lawyer and represent the defendant. *Id.* Here, Mr. Barrett's attorneys were more than just present—they were active and zealous advocates throughout trial, unencumbered by a conflict of interest.

Mr. Barrett also cited to several circuit court decisions. In *Tippins v. Walker*, the defense attorney slept through large portions of the trial. 77 F.3d 682 (2nd Cir. 1996). Despite Mr. Barrett's assertions to the contrary, the situation in *Tippins* is not comparable to what occurred at Mr. Barrett's trial. In *Tippins*, the defense attorney slept through substantial portions of the trial, including during damaging evidence from one of the government's witnesses. *Id.* The *Tippins* attorney's unconsciousness meant he could not object during testimony or communicate with the defendant about a plan. *Id.* Here, Mr. Barrett's attorneys were awake and actively participated throughout the trial. [ECF 1 exs. 8-15] Mr. Barrett's citation to the more recent case involving a dozing attorney, *U.S. v. Ragin*, is similarly inapposite to his case. 820 F.3d 609 (4th Cir. 2016). *Riley v. Deeds*, 56 F.3d 1117 (9th Cir. 1995) addressed whether it was reversible error for the trial judge to miss part of the proceedings.

The cited case, *Young v. Duckworth*, is likewise inapplicable to Mr. Barrett's situation. 733 F.2d 482 (7th Cir. 1984). Mr. Barrett cites to the line: "[t]he assistance of counsel, to be fully effective, must be continuous from the time when the prosecution begins" to support his argument that he was denied due process because he could not continuously confer with his attorney because of the proximity of the jury. *Id.* at 483. However, the "continuous" assistance referred to by the *Young* court is the continuous

representation by counsel through all stages of the criminal prosecution. *Id.* In *Young*, the defendant was denied appointed counsel for the three months between his initial appearance and arraignment. *Id.* It did not refer to the ability to continuously communicate with counsel.

Finally, Mr. Barrett cited to several lower court opinions that are of little relevance to his argument. *Lakin v. Stine* is a case from the Eastern District of Michigan where a criminal defendant's appointed counsel refused to meet with him outside the presence of guards, thereby making privileged communication impossible, and the court, rather than appointing the defendant a new attorney, required the defendant to proceed *pro se.* 44 F.Supp.2d 897 (E.D. Mich. 1999). Despite being distinguishable because there is no allegation that he could not speak to his attorney privately before trial and he was represented by his attorney during trial, the case to which Mr. Barrett refers is not good law because it was reversed on appeal by the Sixth Circuit. *Lakin v. Stine*, 229 F.3d 1152 (6th Cir. 2000). *Moritz v. Woods*, dealt with a Confrontation Clause issue and the trial court's decision to replace the defendant's retained counsel with standby counsel who was not prepared for the proceedings. 844 F.Supp.2d 831 (E.D. Mich. 2012). Like, *Laken*, the lower *Moritz* decision was reversed on appeal by the Sixth Circuit. *Moritz v. Lafler*, 525 Fed. Appx. 277 (6th Cir. 2013) (unreported).

The only case Mr. Barrett cited that is similar to his situation is *United States v. Schwartz*, 2021 WL 5283948, Opinion and Order Overruling Defendant's Objection to Proceeding with Jury Trial During COVID-19 Pandemic, (E.D. Mich. 2021) (unreported). Like Mr. Barrett, the defendant in that case entered a late objection to the

COVID-19 protocols arguing that they abridged his Sixth Amendment rights. *Id.* The defendant did not raise, and therefore the court did not address, the ability to converse with counsel without the jury hearing. However, like the trial court in Mr. Barrett's case, it rejected all the defendant's challenges and proceeded to trial.

Thus, Mr. Barrett has not identified, nor has this Court found, any support for his argument that his due process rights were violated because the jury was seated too close to the defense table. Further, Mr. Barrett did not identify anything that he was unable to convey to his attorney due to the proximity of the jury, or why other methods of communication—such as written notes which are common during trials—would not suffice. Additionally, the PCR court likewise found the record did not support Mr. Barrett's conclusory assertion that he was unable to communicate with his attorney. Under these circumstances, Mr. Barrett cannot show that his appellate attorney was ineffective for failing to raise this meritless issue. *Davis*, 943 F.3d at 1299. Mr. Barrett, therefore, cannot demonstrate "cause" to overcome the procedural default.

ii. Claim 2(b): masking requirements

In claim 2(b), Mr. Barrett argues the masking requirements prevented the jury from seeing his reactions to testimony and exhibits as well as obscured his identity so the potential jurors were unable to identify whether they knew him during voir dire. [ECF 1 pp. 98-99] Respondents contend this issue is unexhausted because he failed to raise it in his petition for writ of review to the Wyoming Supreme Court. [ECF 7 p. 11] As discussed above, claim 2(b) is unexhausted and subject to an anticipatory procedural bar. Therefore, Mr. Barrett must show cause and prejudice to overcome the procedural

default. Violations of the Sixth Amendment right to effective assistance of appellate counsel can constitute "cause" to excuse the procedural default. *Coleman*, 501 U.S. at 754. To meet this, the Court applies the two-prong test from *Strickland* and looks to the merits of the omitted issue. *Davis*, 943 F.3d at 1299.

Here, Mr. Barrett did not argue his appellate attorney was ineffective for failing to raise this issue. He has cited to no case law to demonstrate that his required mask violated clearly established federal law. Further, his argument regarding voir dire is purely speculative and hypothetical. He identified no juror that he *might* have known—despite knowing their names. There is nothing in his argument or the record presented to this Court to indicate that one of the jurors might have recognized Mr. Barrett and identified a potential conflict if he had not been wearing a mask. Mr. Barrett cannot demonstrate cause and prejudice.

iii. Claim 2(c): masked testimony delivered by witnesses deprived Mr. Barrett of the right to confront witnesses.

In claim 2(c), Mr. Barrett argues the masking requirement violated his Sixth Amendment right to confront the witnesses against him. [ECF 1 p. 101] Respondents argue this claim is procedurally defaulted because the PCR court applied a procedural bar and the Wyoming Supreme Court summarily denied Mr. Barrett's petition for writ of review. [ECF 7 p.12] Respondents and Mr. Barrett made the same arguments regarding the application of the independent and adequate state ground procedural bar, ineffective assistance of appellate counsel, the *Smizer* test, and the and cause and prejudice that the Court discussed under claim one. *Supra* II B.

The PCR court determined that Mr. Barrett's claim regarding the masking requirement was procedurally barred under Wyo. Stat. Ann. 7-14-103(a)(i). [ECF 1 ex. 4 p. 56] For the reasons discussed in this Court's analysis of claim one, Mr. Barrett's claim is procedurally defaulted and he must, therefore, demonstrate "cause and prejudice" to overcome the procedural bar. As explained above, violations of the Sixth Amendment right to effective assistance of appellate counsel can constitute "cause" to excuse the procedural default. *Coleman*, 501 U.S. at 754. The Court applies the two-prong test from *Strickland* and looks to the merits of the omitted issue. *Davis*, 943 F.3d at 1299.

Mr. Barrett argues twelve of the twenty-four witnesses who testified at trial did so while masked. [ECF 1 p. 101] He contends the COVID-19 Protocols did not require witnesses to remove masks while testifying. [ECF 1 p. 103] Mr. Barrett argues the masked witnesses violated his constitutional right to confront the witnesses against him because the jurors could not adequately judge their credibility. [ECF 1 p. 103] Mr. Barrett asserts the trial transcript demonstrates that the trial court did not instruct twenty-one of the twenty-four witnesses to remove their masks because it used the permissive phrase "you can remove the mask" rather than directing the witness to remove their mask. [ECF 1 pp. 107-109]

While the Sixth Amendment's Confrontation Clause generally guarantees criminal defendants the right to confront the witnesses against them face-to-face, this right is not absolute. *Maryland v. Craig*, 497 U.S. 836, 849 (1990). "[O]ur precedents establish that the Confrontation Clause reflects a preference for face-to-face confrontation at trial, a preference that must occasionally give way to considerations of public policy and the

necessities of the case." *Id.* (internal citations and quotations omitted). "Thus, though we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Id.* at 849-50.

Mr. Barrett only provided the Court with a single case to support his position that masks worn by testifying witnesses during the COVID-19 pandemic violated the Confrontation Clause. That case, however, does not mention or analyze the Confrontation Clause; rather the Western District of Washington granted an uncontested motion in limine asking the Court to prohibit witnesses from wearing face masks. *United States v. Alston*, No. 22-CR-00066, 2022 WL 2305382, at *3 (W.D. Wash. June 27, 2022). Further, a survey of courts addressing the question demonstrates most determined that requiring witnesses to wear masks during the COVID-19 pandemic was "necessary to further an important public policy." *United States v. Holder*, No. 18CR00381CMAGPG01, 2021 WL 4427254, at *9 (D. Colo. Sept. 27, 2021); *see also, e.g., United States v. Maynard,* No. 2:21-CR-00065, 2021 WL 5139514, at *2 (S.D.W. Va. Nov. 3, 2021), aff'd, 90 F.4th 706 (4th Cir. 2024); *United States v. Crittenden,* No. 4:20-CR-7 (CDL), 2020 WL 4917733, at *6 (M.D. Ga. Aug. 21, 2020); *United States v. James*, No. CR1908019001PCTDLR, 2020 WL 6081501, at *2 (D. Ariz. Oct. 15, 2020). Like the defendants in the above cases, Mr. Barrett was able to see the witnesses when they testified and cross-examine them, he could see their eyes, and reactions—their mouths and noses were simply covered by a thin piece of fabric. Thus, Mr. Barrett

cannot and does not demonstrate that it violated his Sixth Amendment right to have the witnesses testify while masked.

Finally, Mr. Barrett's argument and citation to the record do not demonstrate that the witnesses wore masks to testify. While he asserts the word "can" shows that witnesses were not required to remove their masks because "can" is permissive, his argument is specious. For example, the following exchange occurred when the State of Wyoming called Dr. Lindberg:

> [THE COURT:] Next witness?
>
> [PROSECUTOR]: It will be Dr. Lindberg, Fred Lindberg.
>
> THE COURT: Have you put some gloves on there, please. You're going to end up somewhere else. The clerk will give you an oath.
>
> THE CLERK: Please raise your right hand.
> Do you solemnly swear that the testimony that you will give in the case before the Court will be the truth, the whole truth, and nothing but the truth, so help you God?
>
> THE WITNESS: I do.
>
> THE CLERK: Thank you.
>
> THE COURT: And then there's a chair with a W there. That's where you're going to head.
>
> THE WITNESS: Over there?
>
> THE COURT: Yes.
> And once you're seated there, you can remove the mask. Thank you.

[ECF 1 ex. 12 p. 84: 4-24]. Read in context, the use of the word "can" is a direction to the witness to remove his mask once he reaches his seat. Further, the PCR court determined:

"The trial record clearly shows that Barrett was able to confront the witnesses and the jury was able to judge their credibility because the witnesses removed their masks while testifying." [ECF 1 ex. 4 p. 58]

For the reasons discussed above, Mr. Barrett does not demonstrate that his appellate attorney was ineffective for failing to raise this issue because he does not demonstrate a likelihood of success on the merits. Thus, Mr. Barrett cannot show "cause" to overcome his procedural default and claim 2(c) is procedurally defaulted.

iv. Claim 2(d): seating requirements deprived Mr. Barrett of Due Process

Mr. Barrett argues the seating requirements under the COVID-19 protocols denied him Due Process. [ECF 1 p. 114] Specifically, he contends jurors 1, 2, and 3 were substantially disadvantaged when viewing exhibits because the monitors were located above and behind their heads. [ECF 1 p. 114-15] He contends the judge and prosecutor acknowledged this was an issue at trial. [ECF 1 p. 115] He also argues none of the jurors were given vision tests so it is possible the jurors sitting more than forty feet away from the screens could not see what was being published for them to view. [ECF 1 pp. 114-15] He also argues the judge's view of jurors 5 and 11 was obstructed by the podium and thus was not aware juror 5 fell asleep during closing arguments. [ECF 1 p. 115] He argues the fact that the trial court ordered some of the witnesses to put their masks back on but not others demonstrates that some witnesses never removed their masks to testify. [ECF 1 pp. 109-112]

Mr. Barrett attempts to make this claim cognizable in a habeas petition by asserting the seating requirements violated his due process rights. He points to vague

references by the prosecutor that the jury might not be able to read some of the exhibits. [ECF 1 pp. 115-16] He also points to a statement made by the judge that "some jurors can see that TV."

First, the prosecutor references a typed report describing the name and length of a video file downloaded from Mr. Barrett's various hard drives and devices. He told the witness he could put the report on the screen for reference, and then walked the witness through each part of the report tracking how the video was moved from device to device and the timeline. [ECF 1 ex. 14 pp. 39:1-48:17] The state then moved for its introduction into evidence, the court received it, and then the prosecutor said: "I don't know that you need to publish it. They won't be able to read it from here." [ECF 1 ex. 14 p. 43:12-14] While the state did not publish the report, it did walk the investigator through the contents. Further, The COVID-19 Protocols permitted the jury to view exhibits during deliberation through a designated procedure:

> If the jury wishes to view exhibits, they will either be brought back into the courtroom with the parties and the Court will show the exhibits on the screen. Any physical exhibits will be placed on the table in the jury room and they can view the exhibit but will be instructed not to touch any exhibits without proper protection.

[ECF 1 ex. 1 p. 31] Directly before the jury went to the jury room to deliberate, the court told the jury they could send a request to the court to play any of the exhibits the court received in electronic format. [ECF 1 ex.15 p. 53: 21-24] Thus, Mr. Barrett has not demonstrated that the jury was unable to view the evidence.

Second, he takes the above referenced statement by the judge out of context. In that part of the trial the prosecutor was attempting to introduce into evidence a proposed exhibit. She asked for permission to allow the witness to review it—the review process would take place on a screen in front of the witness. The judge expressed some concern that some members of the jury would be able to view the screen on which the officer was reviewing the document before it was admitted to evidence:

> [PROSECUTOR]: Your Honor, may I show just the witness State's Exhibit 159 for him to review?
>
> THE COURT: Let me see. I'm not sure I have the ability to do that without—I mean, if you do, it's going to be on that TV.
>
> [PROSECUTOR]: Yes, Your Honor. That's what we stipulated before. I can ask the officer a few questions—I know he has reviewed the document—before I admit it, if you would like?
>
> THE COURT: [Defense attorney]?
>
> [DEFENSE ATTORNEY]: I—I don't have an objection to them showing it—
>
> THE COURT: I'm sorry?
>
> [DEFENSE ATTORNEY]: I said I don't have an objection to them showing it to him. I might have an objection to whether it would be admissible.
>
> THE COURT: Let's see if we can work through it. My concern is, is there are some jurors who can see that TV.

[ECF 1 ex. 10 pp. 110: 13-111:7] The State then decided not to move for admission of the document into evidence and instead asked the court to blank the screens (plural) and talked to the witness through the contents of the document. [ECF 1 ex. 10 pp. 111:9-

112:23 Thus, rather than proving that the trial court acknowledged some jurors could not view the screens, the exchange shows the court was concerned and cognizant that, because of the placement of the screens and jurors in the courtroom, some jurors may see evidence before it was admitted. Finally, he points to nothing beyond his own statement that one of the jurors was sleeping during closing arguments.

Mr. Barrett cites to no case law to support his claim that the juror's seating arrangement violated his due process rights. To succeed on a claim in a § 2254 habeas petition, the petitioner must demonstrate a violation of clearly established federal law as determined by the United States Supreme Court. *Hawes*, 7 F.4th at 1263. Mr. Barrett's vague due process assertions, supported by nothing beyond his own theory that some jurors may not have been able to view the monitors, falls far short of this standard.

v. Claim 2(e): The trial court's failure to adhere to the COVID-19 operating procedures violated his right to Due Process.

Mr. Barrett argues that the trial court's COVID-19 Protocols, though they failed to guarantee a constitutionally protected trial, at least tried to respond to the COVID-19 pandemic. [ECF 1 p. 119] He contends the trial court broke from the protocol and called too many prospective jurors for each venire which meant there was not enough room in the courtroom for the public at the jury selection stage. [ECF 1 pp. 119-121] The Seventh Judicial District's COVID-19 Operating Plan clearly allowed the public to view and access each stage of the proceedings:

> E. Public will be allowed as space permits due to social distancing. The gallery of the courtroom has been marked to identify appropriate social distancing in the seating. Once the

> spots are filled, no other observers will be allowed to enter the courtroom. Security will monitor the courtroom to ensure compliance with social distancing.
>
> F. The public and jurors shall not be allowed to communicate.

[ECF 1 ex. 1 p. 29] Neither Mr. Barrett's petition, nor his response to the motion to dismiss identify any members of the public who wanted to attend voir dire but were unable because the trial court called too many prospective jurors in each panel. Rather, he indicates some members of the public could attend, albeit a limited number. [ECF 8 p. 14]

To succeed on a claim in a § 2254 habeas petition, the petitioner must demonstrate a violation of clearly established federal law as determined by the United States Supreme Court. *Hawes*, 7 F.4th at 1263. Mr. Barrett has not identified any clearly established federal law to support this claim. Mr. Barrett's vague assertion that the public could not attend voir dire because there were too many potential jurors in the courtroom is not supported by any evidence or case law and therefore falls far short of § 2254 standard.

vi. Claim 2(f): The abnormal jury room accommodations deprived Mr. Barrett of Due Process.

Mr. Barrett argues that the COVID-19 operating procedures deprived the jury of the ability to review exhibits in the jury room. [ECF 1 p. 122] He argues the departure from normal practice demonstrates that he was denied due process of law and should cause this Court to doubt the validity of the entire process and outcome of the trial. [ECF 1 p. 122] As discussed above, the Seventh Judicial District specifically described how the jurors could review evidence in the jury room in its COVID-19 Operating Procedures.

Supra Section II (B)(iv). Mr. Barrett has not identified any clearly established federal law to support this claim and his vague reference to due process is insufficient to make this cognizable in a habeas petition.

vii. Claim 2(g): jury conflict

Mr. Barrett argues the jurors should not have been put in the position to worry about potentially contracting COVID-19 while performing their civic duty. [ECF 1 pp. 122-23] He contends that the jurors had a reasonable fear of becoming infected with COVID-19 due to the pandemic. He points to the rapid verdict return as evidence of the violation. He contends the jury returned within one hundred minutes with a completed verdict form which is too fast for his nine claims after an eight-day jury trial. [ECF 1 pp. 124-25]

Jury service is a civic duty. Mr. Barrett has pointed to no law that demonstrates this duty is suspended during a pandemic. Further, he cites to nothing to support his position that the relatively quick jury return violated his due process rights. Mr. Barrett has not identified any clearly established federal law to support this claim and his vague reference to due process is insufficient to make this cognizable in a habeas petition.

viii. Claim 2(h): Jurors experienced the trial inconsistently.

Mr. Barrett argues the jurors experienced the trial inconsistently which raises doubt as to the outcome of the trial. [ECF 1 p. 128] He contends some jurors' views of the monitors were obstructed, other jurors sat on uncomfortable seats, and finally the jury venire panels heard different information and therefore had different impressions about the crimes involved in the trial. [ECF 1 p. 128-29] Mr. Barrett raises this claim under a

vague due process umbrella, but he points to no clearly established law on point. His vague reference to due process is insufficient to make this cognizable in a habeas petition.

viv. Claim 2(i): Loss of two members of the defense counsel team.

Mr. Barrett argues the removal, during trial, of two members of the defense counsel team because they were exposed to COVID-19 resulted in the ineffective assistance of counsel. [ECF 1 p. 129] Mr. Barrett argues it confused the jury to have two members of the team leave suddenly. He also argues his attorney was not able to use the courtroom technology and needed the assistance of his team—without them he had to rely on the State's attorneys to help him with exhibits. [ECF 1 pp. 129-44] He contends the failure to follow the COVID-19 Protocols placed the jury and trial participants in danger. [ECF 1 p. 133-34] He further argues his attorney was not able to operate the courtroom technology properly and therefore gave up on certain questions. [ECF 1 p. 137] Respondents argue this issue is not cognizable in a habeas petition. [ECF 7 p. 7]

Mr. Barrett cites to a single case that is similar to the situation in his case, *United States v. Dennison*, 626 F. Supp. 3d 189, 195 (D. Me. 2022), aff'd, 73 F.4th 70 (1st Cir. 2023). In *Dennison*, the government's main witness tested positive for COVID-19 halfway through his testimony. *Id.* at 195. The court determined it was unsafe to continue and declared a mistrial over defense counsel's objections. *Id.* at 195-97. Mr. Dennison then moved to dismiss the case on double jeopardy grounds and his motion was denied—that decision was affirmed on appeal. *United States v. Dennison*, 73 F.4th 70 (1st Cir. 2023).

Mr. Barrett's situation is different from that in *Dennison* where the court determined it was necessary to declare a mistrial. First, in *Dennison* the government's main witness—the FBI agent assigned to the case—tested positive for COVID-19 midway through his testimony. *Dennison*, 626 F.Supp.3d at 195. In Mr. Barrett's case, the third-chair defense attorney and paralegal were exposed to someone who was exposed to someone who tested positive. [ECF 1 ex. 12 p. 188:3-20] One of Mr. Barrett's remaining attorneys stated he was comfortable moving forward and they successfully completed the trial. [ECF 1 ex. 12 p. 189:22-23] Earlier in Mr. Barrett's trial, a juror had a similar exposure to COVID-19 and the court consulted with the Natrona County Department of Health who determined they were safe to proceed with trial. [ECF 1 ex. 11 pp. 30:10-5] The court's concerns in *Dennison* that the government's main witness could not complete his testimony and there was a danger to the people in the courtroom from a direct COVID-19 exposure were not present in Mr. Barrett's case.

Additionally, while Mr. Barrett asserts that the jury was confused by the defense team members' sudden departure, nothing in the record supports this assertion. To the contrary, the court informed the jury that there was another potential exposure by "someone associated with the trial" and that it was the same type of situation as the prior potential exposure. [ECF 1 ex. 12 pp. 195:15-197:7]

Further, *Dennison* was a double jeopardy question after the trial court declared a mistrial. *Id.* Here, Mr. Barrett raises this claim under a vague due process umbrella, but he points to no clearly established law on point. His reference to due process is insufficient to make this cognizable in a habeas petition.

D. Claim 3: defective jury instructions

In claim three, Mr. Barrett argued the jury instructions violated due process because the order of the charges in the instructions was different than the order on the verdict form. [ECF 1 p. 144] Mr. Barrett believes the jury was not instructed that he had to "knowingly" possess child pornography for count nine and therefore this error is a "dead-bang winner." [ECF 1 p. 145] Respondents contend this claim is unexhausted and therefore procedurally barred. "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C § 2254(b)(2).

"[T]he appropriate question on habeas review is 'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.'" *Turrentine v. Mullin*, 390 F.3d 1181, 1191 (10th Cir. 2004) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)). Mr. Barrett's argument is not clear. He seems to be arguing that the verdict form did not include the word "knowingly" and was therefore incorrect. [ECF 1 p. 146] However, he also states that the jury instruction listing the elements for count 9—sexual exploitation of a child—included "knowingly" as an element. [ECF 1 p. 147] Thus, it is not clear why he believes the jury instructions were misleading. The verdict form asked whether the jury found him guilty of sexual exploitation of a child as charged, and the instruction on sexual exploitation of a child required the jury to find that Mr. Barrett committed the crime "knowingly." [ECF 1 p. 148]

Mr. Barrett also misrepresents the record. He states that the prosecutor told the jury he only had to have child pornography to possess it, however the State also clearly said:

> Which brings us to sexual exploitation of a child. And the title was sexual exploitation of a child, but this is commonly referred to as possession of child pornography. And keep in mind, none of these elements say unless the sheriff's (sic) didn't charge it. But it's on or about November 5, 2014, though on or about July 9, 2015. Okay. In the interview with Investigator Courtney, he admitted that. In Natrona County, State of Wyoming—the defendant was in Natrona County, State of Wyoming, throughout this time. The defendant, Samuel Barrett—he admitted he was the one that had it on his phone. For any purpose—he admitted—he said he's keeping it for—to use it because he caught her having sex with his son. It doesn't matter why he's keeping it. It says for any purpose under number 4. *Knowingly—he knew it was on there*, and he turned out to be right—possessed child pornography.

[ECF 1 ex. 14 pp. 198:10-199:2] (emphasis added). Thus, the prosecution did, in closing, tell the jury that Mr. Barrett had to "knowingly" possess child pornography.

"Moreover, "[a]lthough the sufficiency of the evidence does not alone eliminate the possibility of a due[-]process violation, [if] the strength of the evidence supports the conclusion that the actual verdict entered in this case was not the result of an" erroneous jury instruction, then it becomes harder to show a due-process violation. *Kriesel v. Bowen*, No. 19-CV-0992 KG/SMV, 2020 WL 4050376, at *7 (D.N.M. July 20, 2020), report and recommendation adopted, No. 19-CV-0992 KG/SMV, 2021 WL 1720903 (D.N.M. Apr. 30, 2021) (unreported) (quoting *Valdez v. Bravo*, 244 F.App'x 864, 868 (10th Cir. 2007); *see also Turrentine*, 390 F.3d at 1191. Federal courts evaluating the

sufficiency of the evidence in habeas petitions "must look to state law for the substantive elements of the criminal offense, but the minimum amount of evidence that the Due Process Clause requires to prove the offense is purely a matter of federal law." *Coleman v. Johnson*, 566 U.S. 650, 655 (2012) (internal citations and quotations omitted). Where a state court decided a sufficiency of the evidence claim on the merits, the "AEDPA adds an additional degree of deference." *Hooks v. Workman*, 689 F.3d 1148, 1166 (10th Cir. 2012) (citing *Coleman*, 566 U.S. at 651. Federal courts apply the *Jackson* standard to sufficiency of the evidence claims. *Coleman*, 566 U.S. at 651. "Under *Jackson*, evidence is sufficient to support a conviction 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.'" *Id.* at 654 (quoting *Jackson v. Virginia*, 433 U.S. 650, 319 (1979)) (emphasis is original). To meet the twice-deferential standard, Mr. Barrett would have to show that the Wyoming Supreme Court's conclusion that the evidence was sufficient to support its conclusion that he knowingly possessed child pornography was an unreasonable application of the *Jackson* standard. *Hooks*, 689 F.3d at 1166. Mr. Barrett has not attempted to meet this standard, nor could he.

Here, Mr. Barrett challenged the sufficiency of the evidence to prove he "knowingly" possessed child pornography on direct appeal. *Barrett*, 509 P.3d at 943. The Wyoming Supreme Court found:

> Moreover, the jury could reasonably infer from AG's testimony about the circumstances under which Mr. Barrett filmed the video, along with evidence that he stored the video on multiple electronic devices, that he "knowingly" possessed child pornography. Such evidence supported that he

> possessed child pornography with "awareness, deliberateness, or intention." *See id.* Consequently, there was also sufficient evidence at trial to support Mr. Barrett's conviction for sexual exploitation of a child under Wyo. Stat. Ann. § 6-4-303(b)(iv).

Id. at 948. This conclusion was rational and supported by the record. Thus, Mr. Barrett's jury instruction challenge fails and he cannot meet the § 2254 standard.

E. Claim 4: the trial transcript was defective

Mr. Barrett's fourth claim alleges that the trial transcript was defective. Specifically, he contends the transcript does not reflect the statement one of his attorneys made during the judge's inquiry about what to do after two members of the defense team had to leave because of a COVID-19 exposure. [ECF 1 pp. 151-152] He further contends a response is missing from a line of questioning. [ECF 1 p. 153] Mr. Barrett argues these absences demonstrate the trial record is defective and therefore his due process was violated. [ECF 1 p. 153] He argues the missing statements from his attorney, in the context of the COVID-19 pandemic, show that the trial should not have occurred because people were worried about catching the virus and therefore had a conflict of interest. [ECF 1 p. 154] He contends he can satisfy "cause and prejudice" because the court reporter unilaterally decided to leave his attorney's remarks out of the record and he was prejudiced because he cannot overcome the defective trial record to demonstrate the way his substantial rights were violated during trial. [ECF 1 p. 155] Respondents argue this claim is unexhausted.

First, Mr. Barrett misrepresents (again) the record regarding the "missing" answer from one of the witnesses. The transcript reveals the entire context of the exchange:

> [DEFENSE ATTORNEY]: Have you ever—did the DA ever play any of those text messages for you to refresh your recollection?
>
> A. No.
>
> Q. Did the DA ever show you any of these text messages on paper?
>
> A. No, other than the one that I read.
>
> Q. Okay. Just that one that was favorable to you, I guess; right?
>
> [PROSECUTOR]: That's not really a question.
>
> Q. (BY [DEFENSE ATTORNEY]) So that one that you read –
>
> THE COURT: Just a second. What is the objection?
>
> [PROSECUTOR]: It's just an argumentative question, Your Honor.
>
> THE COURT: Sustained as to the second part. The first part of the answer stands.

[ECF 1 ex. 12 p. 153: 23-154:18]. Mr. Barrett argues the "first part of the answer" referred to in the court's ruling is missing—however it is clearly present—the DA did not show the witnesses the text messages ahead of time.

Second, Mr. Barrett claims that the court reporter omitted one of his attorney's responses when the judge inquired about whether they were comfortable continuing trial when two members of the defense team had to leave because of exposure to COVID-19. According to his recollection, his attorney said something along the lines of: "Frankly, Your Honor, I haven't left the house since this all started in March. My wife is immune-

system compromised, and we've been scared to go out at all." [ECF 1 p. 151] Mr. Barrett's attorney agreed he said something along those lines in a letter to Mr. Barrett—however there is nothing in the record to demonstrate this exchange occurred. [ECF 1 ex. 7 p. 66] As discussed above, he has not provided any clearly established law that the loss of two members of the trial team violated his due process, or that it violates due process for a jury trial to occur during a pandemic when people are concerned about contracting the virus. *Supra* II(C)(viv) & II(C)(vii). Mr. Barrett has not identified any clearly established federal law to support this claim and his vague reference to due process is insufficient to make this cognizable in a habeas petition. Mr. Barrett's claim falls far short of the § 2254 requirements.

F. Claim 5: inability to continuously confer with counsel

In claim five, Mr. Barrett argues he was unable to continuously confer with counsel. [ECF 1 p. 155] Mr. Barrett raised this issue as part of claim 2(a). As discussed above, he has not demonstrated "cause and prejudice." *Supra* 2(C)(i). Because Mr. Barrett cannot demonstrate "cause and prejudice," claim five is procedurally defaulted.

G. Claim 6: trial court's overruling of defense attorney's objection to trial format was unreasonable

In claim six, Mr. Barrett argues that the state trial court's overruling of his attorney's objection to the trial format was unreasonable. [ECF 1 [pp. 155-56] The following exchange occurred at trial:

> [DEFENSE COUNSEL]: Yes, Your Honor. Is that we would like to pose an objection just to the entire format procedure of the trial. We know that, you know, the Department of Health

has come up with guidelines. But the difficulties posed by abiding by these guidelines, with wearing of masks, not being able to approach witnesses, they're not able to see the faces of potential jurors, we – we would just like the record to reflect that we believe that this whole process is a violation of due process for Mr. Barrett.

THE COURT: [Prosecutor]?

[PROSECUTOR]: Your Honor, I would just put on the record that he's still entitled to his right to confront witnesses against him. He's been entitled to his right to a jury of his peers. They are just sitting in a different place, Your Honor. I don't think that's a valid motion, and I would ask that it be denied.

I would also note that the procedures are in place are due to a public health crises that the Supreme Court has acknowledged; and the procedures the Court has put into place, it's my understanding, were approved by the Natrona County Department of Health, I believe. So I think that the trial can go forward.

[DEFENSE COUNSEL]: Nothing further, Your Honor.

THE COURT: All right. I guess I should make a record on that, as well.

[Defense counsel] indicated to me this morning that that was an issue he wanted to put on the record. I don't know that I had advance notice of that. To the extent it matters, he did indicate that was going to be an issue before we started selecting a jury. I asked whether we could address it at a break—so I'm sure if we had a time and opportunity, [defense counsel] would have said that before we started jury selection. I didn't want to –

[DEFENSE COUNSEL]: Absolutely, Your Honor. I—I recognize the untimeliness of bringing it to the Court.

THE COURT: But, also, I don't want there to appear that there was some waiver by proceeding with the first panel.

[DEFENSE COUNSEL]: I appreciate that.

THE COURT: You would have made an objection if we had time this morning before we started that process.

Again, it's not an issue that I necessarily was aware of before today. I don't know how much of a record I need to make on it.

We did go through a process, lengthy process, of looking into these procedures amongst the judges here. We consulted with lawyers along the way, from both sides, as it relates to criminal cases. We developed a plan. I believe that plan is in writing and in the possession of the Supreme Court. There has more detail in it. I would incorporate that by reference.

I would note that we tried to achieve a balance in a lot of regards, including that potential jurors would be allowed to pull their mask down if they wish while responding to questions from counsel.

Beyond that, obviously, we have a health issue that we're trying to address in a way that it's been recommended that we address it. The plan that we developed was reviewed by local health officials. They did not have any concern with it based on the way we laid it out. We have also gone to great pains to distance people within the courtroom. Thankfully, we have a large courtroom to work with here.

The witness will be allowed to remove their mask when they testify, when they are in the witness chair and testifying. I don't see how that would affect their ability to testify and the jury's ability to consider their credibility, including their body language, facial expressions, and whatnot. For the record, the witness is well distanced from everyone, including—well, just within the courtroom format.

We have also held multiple trials. We've attempted more than that, and we scheduled even more than that. And I –anecdotally, I've completed one, started another. I don't see how we weren't able to accomplish a fair trial for both parties even under these circumstances.

That's the best I can come up with off the top of my head between jury panels at this time. I'm going to deny the motion. I don't see a violation of due process under the circumstances.

[ECF 1 ex. 8 pp. 89:9- 93:2] While it is true Mr. Barrett's attorney objected to the format of the trial on "due process" grounds—he did not identify any specific due process

concerns. Further, Mr. Barrett does not identify anything in his Petition, or briefing to demonstrate that the trial court's decision was a violation of clearly established law. Finally, Mr. Barrett's claim six is a single paragraph long. The substance of this claim seems to be incorporated into the various arguments under claims one and two—thus claim six is duplicitous. As the Court discussed above, Mr. Barrett failed to demonstrate he was entitled to relief under claims one and two; therefore, claim six similarly fails. Mr. Barrett cannot demonstrate "cause" to overcome his procedural default.

H. Claim seven

In his seventh claim, Mr. Barrett argues his appellate attorney was constitutionally ineffective. He lays out his theories of ineffectiveness in each of the subclaims. Respondents argue claim 7(a), 7(c), and 7(d) are unexhausted. They contend claims 7(b), 7(e), 7(f), and 7(g) are non-cognizable. Respondents further argue the Court cannot consider whether appellate counsel was ineffective as "cause" to excuse the default. [ECF 7 pp. 14-15]

i. Claim 7(a): failure to investigate the trial record

Mr. Barrett contends his appellate counsel was ineffective for failing to investigate the trial record. He argues his appellate attorney's failure was evident because he did not raise all the issues he could have on appeal—in particular, he did not raise a due process argument based on his trial counsel's objection to the entire format of the trial. [ECF 1 pp. 159-60]

Mr. Barrett cites to a single case to support this claim, *Matire v. Wainright*, 811 F.2d 1430 (11th Cir. 1987). First, *Matire* is an Eleventh Circuit case and not binding on

this Court, nor does it constitute clearly established law for habeas purposes. Second, it is distinguishable from Mr. Barrett's case. In *Matire*, the prosecutor made three comments about the defendant's exercise of his Fifth Amendment right to remain silent—at least one of which the defense counsel objected to. *Id.* On appeal, appellate counsel raised only one issue regarding jury instructions. *Id.* at 1433. The Eleventh Circuit determined the appellate attorney was ineffective and the conduct prejudicial. *Id.* at 1438-39.

Here, Mr. Barrett's attorney made a vague due process objection at the beginning of trial. He did not expand on any of the issues that Mr. Barrett raised in this petition. Nor did trial counsel brief the issue to the trial court. Thus, the scope of the due process claim was not clear, unlike in *Matire*. Further, this Court determined that Mr. Barrett's due process claims would not have succeeded on appeal, thus his attorney was not ineffective for failing to raise them on appeal. *Davis*, 943 F.3d at 1299.

ii. Claim 7(b): failure to investigate witnesses

Mr. Barrett argues his trial counsel was ineffective for failing to investigate certain witnesses, specifically his neighbor, Mr. Ash, who would have testified about his relationship with one of the victims as well as a conversation Mr. Barrett had with him about inappropriate acts one of the victims allegedly perpetrated on Mr. Barrett's son. [ECF 1 pp. 160-61] He claims his appellate attorney should have further investigated several other witnesses who would have elaborated on the due process violations and how they impacted Mr. Barrett's trial.

To obtain habeas relief, Mr. Barrett must affirmatively prove that he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §

2254(a). He must demonstrate the state court proceedings "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) & (2). Here, Mr. Barrett has not identified any law in support of his argument that his attorneys were ineffective for failing to investigate witnesses. Thus, he cannot meet the § 2254 standard.

iii. Claim 7(c): failure to pursue all non-frivolous issues

Mr. Barrett argues his appellate attorney was ineffective for failing to pursue all non-frivolous issues. However, "the Sixth Amendment does not require an attorney to raise every nonfrivolous issue on appeal." *Banks v. Reynolds*, 54 F.3d 1508, 1515 (10th Cir. 1995); *see also*, *Davis*, 943 F.3d at 1299. Thus, the failure to pursue all non-frivolous issues does not violate clearly established federal law and Mr. Barrett cannot meet the § 2254 standard.

iv. Claim 7(d): failure to pursue federal constitutional issues

Mr. Barrett argues his appellate attorney was ineffective for failing to raise federal constitutional issues. This Court has analyzed this claim throughout this order and determined in every instance that Mr. Barrett's appellate attorney was not ineffective for failing to raise the federal constitutional issues because they would not have succeeded on the merits. Thus, Mr. Barrett cannot demonstrate his attorney was ineffective for failing to raise these issues and he cannot meet the § 2254 standard.

v. Claim 7(e): failure to investigate appellant's claims

Mr. Barrett contends his appellate attorney was ineffective for failing to investigate his claims. [ECF 1 p. 169] He discusses his appellate attorney's dismissive attitude towards his suggestions and his frustration following the oral argument. [ECF 1 pp. 169-171] Here, Mr. Barrett has not identified any law in support of his argument that his appellate attorney failed to investigate his claims. Thus, he cannot meet the § 2254 standard. 28 U.S.C. § 2254(d)(1) & (2).

vi. Claim 7(f): failure to provide trial record to appellant

Mr. Barrett argues his attorney was ineffective for not providing him access to the record until after the opening appellate brief was due to the Wyoming Supreme Court. [ECF 1 pp. 171-72] As with most of the other claims in this section, Mr. Barrett did not identify any law to support his position. Therefore, he cannot meet the § 2254 standard. 28 U.S.C. § 2254(d)(1) & (2).

vii. Claim 7(g): failure to obtain appellant's consent to file brief

Mr. Barrett argues his appellate attorney was ineffective for not allowing him to help with the appeal. [ECF 1 p. 172] He argues he sent his attorney twenty pages of notes and his attorney refused to look at them, telling Mr. Barrett he was only going off what was in the record. [ECF 1 p. 172] Respondents argue *Anders* does not support Mr. Barrett's claim and that his claim is not cognizable in a habeas petition. [ECF 7 p. 9]

Mr. Barrett cites to *Anders v. California* to support his position that his attorney was ineffective for failing to allow him to participate in the appeal. 386 U.S. 738 (1967). Contrary to Mr. Barrett's assessment, *Anders* does not require appellate attorneys to seek

the assistance of their clients in completing and filing the appellate brief. Rather, it lays out the steps an appellate attorney must take if they determine, after examining the record, that the appeal is "wholly frivolous." *Id.* at 744.

Mr. Barrett also cites *Ludwig v. U.S.* to support his argument. 162 F.3d 456 (6th Cir. 1998). Apart from being non-binding, *Ludwig* does not support Mr. Barrett's position. In *Ludwig*, the criminal defendant asked his attorney to file a notice of appeal and his attorney failed to do so. The *Ludwig* court noted: "with respect to counsel's failure to file a notice of appeal, every Court of Appeals that has addressed the issue has held that a lawyer's failure to appeal a judgment, in disregard of the defendant's request, is ineffective assistance of counsel regardless of whether the appeal would have been successful or not." *Id.* at 459. Here, Mr. Barrett's attorney not only filed a notice of appeal, he briefed and argued several issues to the Wyoming Supreme Court.

Mr. Barrett did not identify any clearly established law violated by his appellate attorney's failure to involve Mr. Barrett is his appellate brief. Therefore, he cannot meet the § 2254 standard. 28 U.S.C. § 2254(d)(1) & (2).

I. Cumulative error

Mr. Barrett argues cumulative error requires this Court to grant his petition for writ of habeas corpus. [ECF 1 pp. 174-75] "A cumulative-error analysis aggregates all errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *United States v. Toles*, 297 F.3d 959, 972 (10th Cir.2002); *see also Cargle v. Mullin*, 317

F.3d 1196, 1206 (10th Cir. 2003). Here, the Court has not identified any errors. Therefore, there can be no cumulative error analysis.

CONCLUSION

28 U.S.C. § 2253(c) and rule eleven of the Rules Governing Section 2254 Cases require this Court to "issue or a deny a certificate of appealability when the Court enters a final order adverse to the applicant." Rule Governing Section 2254 Cases in the United States District Courts, Rule 11. When a court rejects a constitutional claim on the merits, it should issue a COA when "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). Mr. Barrett cannot make such and showing and the Court will not issue a certificate of appealability. The state court record in this matter demonstrates a thorough and thoughtful approach was taken in conducting Mr. Barrett's trial. Faced with balancing Mr. Barrett's constitutional rights and the public health concerns created by a worldwide pandemic the state trial court admirably navigated these unchartered waters.

NOW, THEREFORE, for the reasons discussed above, it is **ORDERED** Respondents' Motion to Dismiss [ECF 6] is **GRANTED. IT IS FURTHER ORDERED**, Mr. Barrett's Petition for Writ of Habeas Corpus is **DENIED AND DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED, a certificate of appealability **SHALL NOT ISSUE.**

IT IS FURTHER ORDERED, Mr. Barrett's motion to proceed *in forma pauperis* and to appoint counsel [ECF 15] is **DENIED AS MOOT.**

Dated this 14th day of August 2024.

Scott W. Skavdahl
United States District Judge

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