

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

LENNIE D. MATHIS,)
)
PETITIONER,)
)
v.)
)
ROBERT EZELL, WARDEN, Davis)
Correctional Facility,)
)
RESPONDENT.)

Case No.

Prison No. 381358
Place of Confinement: Davis Correctional Facility
6888 E. 133 Rd
Holdenville, OK 74848-9033

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, the Petitioner, by and through his attorney, M. Michael Arnett, and for his Petition for Writ of *Habeas Corpus*, pursuant to 28 U.S.C. 2254, hereby alleges and states.

STATEMENT OF THE CASE

This Writ is a petition from a denial of a Subsequent Post Conviction Relief Petition PC-2010-1035 and a denial of Direct Appeal in the Oklahoma Court of Criminal Appeals Case No. C-2008-776.

On May 29th, 2008, the Petitioner was tried and convicted of three (3) counts: (1) Murder in the First Degree (21 O.S. §701.7); (2) Assault with a Dangerous Weapon (21O.S. §645), and (3) Possession of a Firearm After Former Conviction of a Felony (21 O.S. §1283). The jury assessed penalty on Count 2 of twenty (20) years imprisonment and on Count 3 as

seven (7) years imprisonment.

A Bill of Particulars was filed on Count 1. It was scheduled for a stage two trial to determine if the Petitioner would receive the death penalty, life imprisonment, or life imprisonment without parole. Prior to that trial, the Court entered a minute as part of the original record which states:

“THE DEFENDANT THEN PLED GUILTY TO THE BILL OF PARTICULARS, AND, WITH A PLEA AGREEMENT FROM THE STATE OF OKLAHOMA, THE DEFENDANT ENTERED A VOLUNTARY PLEA AND ACCEPTED THE PUNISHMENT OF LIFE WITHOUT POSSIBILITY OF PAROLE IN EXCHANGE FOR THE STATE DISMISSING THE DEATH PENALTY OPTION AND WAIVED ALL APPEALS.”

Petitioner timely filed a *pro se* motion to withdraw his plea, and pursuant to 22 O.S. Chap. 18 Rule 4.2. The evidentiary hearing so required was not timely held through no fault of the Petitioner, because he was incarcerated. The Petitioner's appeal to this matter was taken to the Oklahoma Court of Criminal Appeals (OCCA). On June 22, 2009, the OCCA denied certiorari and dismissed the case, Case No. C-2008-776, finding that the Petitioner had validly waived his rights of appeal, and that Petitioner had not filed subsequent requests to withdraw his plea. On April 2, 2009, Petitioner filed a *pro se* Application for Post-Conviction Relief requesting an appeal out of time concerning his plea and other matters. On May 5, 2009, the application was denied by the Oklahoma County District Court. An appeal was taken and the OCCA affirmed the denial of relief in Case No. PC-2009-518.

Petitioner filed a *pro se* Application for Post-Conviction Relief on February 12, 2010. The State, in a Motion to Strike, alleged that Petitioner's Application was in the wrong form

and was single spaced. The Petitioner filed an objection on February 26, 2010, but before the filing, and a hearing thereon, the Court, by the Honorable Patricia Parrish, granted the State's Motion to Strike, on February 22, 2010. On March 3, 2010, the Petitioner filed a *pro se* Supplemental Application for Post Conviction Relief, to which the State filed a Response on March 18, 2010. The Petitioner filed a handwritten *pro se*, "Motion of Clarity on Petitioner's Supplemental Application for Post-Conviction Relief". He also filed an additional motion to amend his stricken application, and a motion to exceed the twenty (20) page briefing limitation.

On August 12, 2010, a brief was submitted by counsel below in support of the Petitioner's supplemental application. On September 23, 2010, Judge Watson denied the said application for supplemental relief. That said order was appealed to the OCCA on October 22, 2010, and an Order Affirming the denial of Subsequent Application For Post Conviction Relief in Case No. PC-2010-1035. The Court stated in the Order: "Petitioner has exhausted State Remedies regarding the issues raised in the applications for post-conviction relief. Subsequent application on these issues is barred."

STATEMENT OF THE FACTS

The salient facts for this Writ are as follows.

On May 29, 2008, the Petitioner was found guilty by a jury in a first stage trial, in Oklahoma County Case No. CF-2004-6038, on three (3) counts: Count 1: Murder in the First Degree; Count 2: Assault and Battery With A Dangerous Weapon; Count 3: Possession of

a Firearm After Former Conviction of a Felony. The jury sentenced the Petitioner on Count 2 to twenty (20) years imprisonment and Count 3 to seven (7) years imprisonment. The jury, Court and the parties were ready to begin the Second Stage of the trial to determine the punishment for Count 1.

The Petitioner was offered Life Without Parole (LWOP) in exchange for DISMISSING the Bill of Particulars. The Defendant was asked (for some unknown reason) by the Court to plead to the Bill of Particulars and to waive his rights to appeal. The Petitioner did so. The Court did not follow the requirements of *King v. State*, 553 P.2d 529, 535, *et seq.* Neither did the Court use required Court Form "Plea Of Guilty/Summary of facts" which is required by Rule 4.1 of the *Rules of the Oklahoma Court of Criminal Appeals* "Title 22, Ch. 18, App.(2001).

The Court did not inform the Petitioner of his constitutional rights, or the ramifications of his plea bargain to include, the length of time he had to serve or that he could not appeal. None of the procedural requirements of Oklahoma Law were followed.

Further, trial counsel did not inform Petitioner of the ramifications of his plea. In the hearing to Withdraw Plea, trial counsel admitted that he did not know if Petitioner was advised of the ramifications of his plea or not, and Petitioner testified that he believed he could be paroled and could appeal the elements of the trial. (See Exhibit A, attached hereto.)

PROPOSITION ONE

**THE PETITIONER WAS DENIED DUE PROCEDURAL PROCESS OF LAW
PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE**

CONSTITUTION OF THE UNITED STATES OF AMERICA

The Court did not follow the procedural requirements of *King*, supra or the requirement of the OCCA cited above when taking the Petitioner's "plea". The Petitioner was not advised of his Constitutional rights concerning stage two of the trial, his rights to appeal, or the ramifications of LWOP and whether or not he could seek parole. Petitioner stated in testimony that he wanted his appeal rights as it effected certain portions of his trial and that he had no idea he could not get parole or appeal.

The failure of the Court to follow procedural due process deprived the Petitioner of fundamental fairness in determining his fate. The trial court should have granted him his Motion to Withdraw a Plea of Guilty, and restored his appeal rights. The appeals court should have granted the Petitioner his right to appeal trial issues out of time.

PROPOSITION TWO

THE PETITIONER WAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF LAW PURSUANT TO THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Due process is best defined in one word--fairness. Throughout the U.S.'s history, its constitutions, statutes and case law have provided standards for fair treatment of citizens by federal, state and local governments. These standards are known as due process. When a person is treated unfairly by the government, including the courts, due process is violated.

Equal protection is the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the

substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness.

These concepts include the right to competent counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

In order to make out a claim of ineffective assistance of counsel, Petitioner must show counsel's performance was deficient and it prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient assistance of counsel is representation that "[falls] below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. 2052. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 104 S.Ct. 2052.

In this case, by the testimony of Petitioner's own counsel, and Petitioner, it is evident that counsel did not adequately discuss the ramifications of Petitioner's plea, including appeal opportunities and the length of incarceration. Because of this, Petitioner's plea was involuntary and unknowing. The representation of counsel fell below any objective standard of reasonableness.

In order to establish an involuntary plea a Petitioner must: "(1) show that the [intent] element was a critical element of [the charge]; (2) overcome the presumption that his attorney explained this element to him at some other time prior to his guilty plea; and (3) demonstrate that, prior to his guilty plea, he did not receive notice of this element from any other source."

Miller v. Champion, 161 F.3d 1249, 1255 (10th Cir.1998).

In this case, the elements of eligibility for parole, ability to appeal trial issues, and the full ramifications of Petitioner's rights and privileges pursuant to the said plea herein, were not explained by counsel and he did not receive knowledge of these elements from another source prior to plea.

Hence, Petitioner had ineffective assistance of counsel at the said plea, and he should have been allowed to withdraw his plea and have his appeal rights restored. Further, the appeals courts should have granted Petitioner an appeal out of time on trial issues.

WHEREFORE, the Petitioner prays the Court issue a Writ of Habeas Corpus, to present the body of the Petitioner so that cause may be shown why he should remain in custody, and to grant the Petitioner relief to which he may be entitled.

Respectfully submitted,

/S/ M. Michael Arnett

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

LENNIE D. MATHIS,)	
)	
Petitioner,)	
)	
)	CIV-11-694-C
v.)	
)	
ROBERT EZELL, Warden,)	
)	
Respondent.)	

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, has filed this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is challenging the convictions for Murder in the First Degree, Assault with a Dangerous Weapon After Former Conviction of a Felony, and Possession of a Firearm After Former Conviction of a Felony entered in the District Court of Oklahoma County, Case No. CF-2004-6038. Respondent has moved to dismiss the Petition on the ground that 28 U.S.C. § 2244(d)(1)(A) bars judicial review of the Petition, and Petitioner has responded to the Motion. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. §636(b)(1)(B). For the following reasons, it is recommended that Respondent's Motion to Dismiss the Petition be denied.

I. Background

On May 29, 2008, Petitioner was found guilty by a jury of the offenses described above.¹ Prior to the second stage of the trial to determine Petitioner's sentence for murder, which was charged as a capital offense, Petitioner entered into an agreement with the prosecution in which he would receive a sentence of life without the possibility of parole and waive his right to appeal and in exchange the prosecution would dismiss the death penalty option.² Consistent with the jury's sentencing recommendation, Petitioner was sentenced on May 30, 2008, to twenty years of imprisonment for the assault conviction and seven years of imprisonment for the felony firearm conviction. Consistent with the sentencing agreement and also on May 30, 2008, Petitioner was sentenced for the murder conviction to life imprisonment without the possibility of parole.

Although Petitioner appears with counsel, Petitioner has not filed copies of the relevant state court record, including stamp-filed copies of the judgment and sentence, plea-related documents, appellate and post-conviction pleadings, or decisions of the Oklahoma Court of Criminal Appeals concerning Petitioner's appeal and post-conviction filings. According to the docket sheet in Case No. CF-2004-6038, an amended judgment and sentence in the criminal proceeding was entered on June 17, 2008. Respondent's Brief in

¹According to the docket sheet for this criminal proceeding, a copy of which is attached to Respondent's Brief in Support of Motion to Dismiss, the jury entered verdicts of guilty on all three counts on May 29, 2008. Respondent's Brief in Support of Motion to Dismiss, Ex. 1, at 40-41.

²According to the docket sheet for the criminal proceeding, Petitioner's sentencing occurred in the trial court on May 30, 2008. Respondent's Brief in Support of Motion to Dismiss, Ex. 1, at 41.

Support of Motion to Dismiss, Ex. 1, at 45 (docket sheet in State of Oklahoma v. Lennie Dartez Mathis, District Court of Oklahoma County, Case No. CF-2004-6038). On June 6, 2008, Petitioner filed a motion to withdraw his “plea.” Id. at 44. A hearing was conducted on the motion on August 5, 2008, and the motion was denied. Id. at 46.

Despite Petitioner’s waiver of his right to appeal, the trial court appointed counsel for Petitioner for the purpose of pursuing a direct appeal. On October 20, 2008, Petitioner, through his court-appointed counsel, filed a petition for writ of certiorari in the Oklahoma Court of Criminal Appeals (“OCCA”). Respondent’s Brief in Support of Motion to Dismiss, Ex. 2, at 2 (docket sheet in Lennie Dartez Mathis v. State of Oklahoma, Oklahoma Court of Criminal Appeals, Case No. C-2008-776).

On June 22, 2009, the OCCA entered in the case an Opinion Denying Certiorari and Dismissing Appeal. Respondent’s Brief in Support of Motion to Dismiss, Ex. 3. In this Opinion, the OCCA entered factual findings concerning Petitioner’s state court criminal proceeding that are presumed correct.³ 28 U.S.C. § 2254(e)(1). The OCCA found, in relevant part, that

no guilty plea was entered in this case,[] and therefore a certiorari appeal is not available to address Petitioner’s claims. In fact, Petitioner had entered a plea of not guilty and requested a jury trial. A jury found Petitioner guilty of the three crimes charged. Thereafter, Petitioner’s counsel sought and obtained an agreement as to sentencing in order to prevent Petitioner from facing the possibility of a death sentence. While there are

³Petitioner has not overcome the presumption with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

some references in the record that Petitioner “stipulated to the Bill of Particulars,” we have no record of that, as the transcript of the proceedings during which such as [sic] stipulation, if any, was made does not appear before us. However, assuming, *arguendo*, that such a stipulation was indeed made, perhaps to satisfy the victim’s family, said stipulation would have no legal significance here, for the State, as part of the plea deal, agreed to dismiss the second stage proceedings and accept the sentence of life in prison without the possibility of parole, making the Bill of Particulars a moot point.

What we have here is simply a negotiated agreement as to sentencing following a jury trial. As such, a certiorari appeal is not a viable option under 22 O.S.2001, § 1051 or Rule 4. Furthermore, we decline the invitation to restore Petitioner’s appeal rights, as he clearly stated during the proceedings that he did not wish to appeal.

Accordingly, the order of the district court denying Petitioner’s motion is AFFIRMED and CERTIORARI IS DENIED.

Id. at 1-3 (footnote omitted).

Petitioner now seeks federal habeas review of his claims, which he attempted to assert in his certiorari appeal, that he is entitled to habeas relief with respect to his murder conviction because his “plea[] to the Bill of Particulars” was not knowingly or voluntarily entered and that he was denied effective assistance of counsel in connection with the “plea.”

Petitioner presents no evidentiary support for these claims other than a copy of the brief filed on Petitioner’s behalf by his court-appointed counsel in his certiorari appeal. Petition, Ex.

A.

II. Analysis

Respondent contends that the Petition should be dismissed as it was not timely filed within one year of the date on which his murder conviction became final, as proscribed by

28 U.S.C. § 2244(d)(1)(A). Relying on the date on which the amended judgment and sentence was entered in Petitioner's state court criminal proceeding, June 17, 2008, Respondent contends that the one-year limitation period began to run on that date because Petitioner waived his right to appeal. Respondent's Brief in Support of Motion to Dismiss, at 1. In response to Respondent's Motion to Dismiss, Petitioner contends that the date of the OCCA's decision, June 22, 2009, was the date on which his conviction became "final" for the purpose of 28 U.S.C. § 2244(d)(1)(A).

Title 28 U.S.C. § 2244(d)(1), enacted April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.No. 104-132, 110 Stat. 1214, imposes a one-year period of limitation upon the filing of a petition seeking a writ of habeas corpus by a person in custody pursuant to a state court judgment. Under 28 U.S.C. §2244(d)(1)(A), the one-year limitation period generally begins to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." AEDPA's statutory limitation period is tolled for "[t]he time during which a properly filed application for State post-conviction relief or other collateral review with respect to the pertinent judgment or claim is pending...." 28 U.S.C. § 2244(d)(2).

In support of Respondent's assertion that Petitioner's conviction became "final" for the purpose of § 2244(d)(1)(A) on the date on which the amended judgment and sentence was entered in the trial court, Respondent relies on an unpublished decision entered by United States District Judge Rosenblatt in the United States District Court for the District of Arizona. In this decision, Judge Rosenblatt found that "[b]ecause the petitioner's conviction

became final in 1994, which was prior to the enactment of the AEDPA on April 24, 1996, the petitioner had until April 24, 1997 in which to file his § 2254 petition, absent tolling.” Franklin v. Ryan, No. CV-09-1339-PHX-PGR (MHB), 2009 WL 4827061 (D. Ariz. Dec. 15, 2009). The court’s decision in Franklin has no relevance to the instant action in which Petitioner was convicted and sentenced AFTER the AEDPA became effective. Respondent mistakenly asserts that Judge Rosenblatt found that the § 2244(d)(1)(A) limitation period should run from the date on which the petitioner was sentenced. However, this statement is actually contained in the Report and Recommendation of a United States Magistrate Judge appended to Judge Rosenblatt’s decision and expressly disavowed by Judge Rosenblatt in his decision. Id. at * 1 n. 2. Accordingly, the decision in Franklin is unpersuasive.

As the Supreme Court has observed, “the finality of a state-court judgment is expressly defined by statute as ‘the conclusion of direct review or the expiration of the time for seeking such review.’” Jimenez v. Quarterman, 555 U.S. 113, 119 (2009)(quoting 28 U.S.C. § 2244(d)(1)(A)). When Petitioner attempted to appeal his conviction, the OCCA clearly found that, as a result of his waiver, Petitioner was not entitled to a certiorari appeal under state statute or the appellate court’s procedural rules, and the OCCA refused to reinstate Petitioner’s right to an appeal.

Giving Petitioner the benefit of the doubt, Petitioner’s conviction became “final” through “the conclusion of direct review or the expiration of the time for seeking such review” under § 2244(d)(1)(A) on September 22, 2009, or ninety days after the OCCA entered its decision denying certiorari and dismissing his attempted direct appeal. See Locke

v. Saffle, 237 F.3d 1269, 1272-1273 (10th Cir. 2001)(holding that under §2244(d)(1)(A) a habeas petitioner's state conviction is not final and the one-year limitation period for filing a federal habeas petition does not begin to run until after Supreme Court has denied review or, if no petition for certiorari is filed, after time for filing petition for certiorari has expired); Rhine v. Boone, 182 F.3d 1153, 1155 (10th Cir. 1999)(stating, in *dicta*, that § 2244(d)(1)(A) takes into account time during which petition for certiorari to Supreme Court can be filed).

Petitioner's state post-conviction filings in which he asked to have his appeal reinstated can, at best, toll the one-year statute of limitations. See 28 U.S.C. § 2244(d)(2). It is not disputed that Petitioner filed an application for post-conviction relief in the district court on February 12, 2010. At that time, 143 days of the one-year limitation period had passed. The post-conviction application was stricken by the district court on February 22, 2010, as improperly filed. Thus, the limitation period was tolled for ten days in connection with this post-conviction application.

Petitioner filed a subsequent post-conviction application in the district court on March 3, 2010. At that time, not considering the ten-day tolling period, 152 days of the one-year limitation period had passed. The subsequent post-conviction application was pending in the district court until September 23, 2010, when the district court denied the application. The limitation period was tolled during this time period, and the limitation period was again tolled until January 25, 2011, when the OCCA affirmed the district court's decision. Brief in Support of Motion to Dismiss, Ex. 5 (Order Affirming Denial of Subsequent Application for Post-Conviction Relief in Lennie D. Mathis v. State of Oklahoma, Case No. PC-2010-1035).

The limitation period began to run again on January 26, 2011. The instant Petition was filed on June 20, 2011, well within the one-year limitation period. Therefore, Respondent's Motion to Dismiss the Petition on the ground that it is untimely pursuant to the operation of 28 U.S.C. § 2244(d)(1)(A) should be denied.

RECOMMENDATION

Based on the foregoing findings, it is recommended that Respondent's Motion to Dismiss (Doc. # 9) be DENIED. The parties are advised of their respective right to file an objection to this Report and Recommendation with the Clerk of this Court by October 17th, 2011, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996) ("Issues raised for the first time in objections to the magistrate judge's recommendations are deemed waived.").

This Report and Recommendation does not dispose of the issues referred to the undersigned Magistrate Judge in the captioned matter.

ENTERED this 26th day of September, 2011.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

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

LENNIE D. MATHIS,)
)
Petitioner,)
)
) CIV-11-694-C
v.)
)
JUSTIN JONES, Director,)
)
Respondent.)

SUPPLEMENTAL REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, has filed this Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Petitioner is challenging the sentence of life imprisonment without possibility of parole imposed for his conviction for Murder in the First Degree and waiver of his right to appeal this conviction¹ entered in the District Court of Oklahoma County, Case No. CF-2004-6038. Respondent has responded to the Petition and filed the relevant state court records, including the transcript of the sentencing proceeding conducted on May 30, 2008² (hereinafter "Sentencing TR__"), the transcript of the hearing conducted August 5, 2008, on Petitioner's motion to withdraw his sentencing agreement

¹Petitioner was also convicted in Case No. CF-2004-6038 of the offenses of Assault and Battery with a Dangerous Weapon After Former Conviction of a Felony and Possession of a Firearm After Former Conviction of a Felony. Petitioner does not present a challenge to these convictions or the sentences imposed for these convictions.

²The sentencing transcript contains a typographical error indicating the sentencing proceeding was conducted on March 30, 2008. However, documents in the original record clearly show that the sentencing proceeding was conducted on May 30, 2008.

(hereinafter "Motion TR ___"), and a portion of the original record (hereinafter "OR___"). Petitioner has filed an Amended Reply. The matter has been referred to the undersigned Magistrate Judge for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B). For the following reasons, it is recommended that the Petition be denied.

I. Background

On November 9, 2004, Petitioner was charged in Oklahoma County District Court with three offenses, including Murder in the First Degree.³ On March 23, 2005, the prosecution filed a Bill of Particulars indicating its intent to seek the death penalty as to the murder charge.⁴ Two defense attorneys were appointed by the district court to represent Petitioner.⁵ On May 19-29, 2008, a trial concerning these charges was conducted before a jury.⁶

On May 29, 2008, the jury was instructed on the offenses as charged and on the lesser-included offense of heat-of-passion first degree manslaughter. (OR 2-46). On that same day, the jury found Petitioner guilty of the offenses of Murder in the First Degree (malice aforethought)(count one), Assault and Battery with a Dangerous Weapon After Former Conviction of a Felony (count two), and Possession of a Firearm After Former Conviction of a Felony (count three). OR 1, 47, 48. The jury recommended sentences of 20 years of

³These facts are gleaned from Petitioner's appellate brief. Response (Doc. # 18), Ex. 1 (Brief of Petitioner).

⁴Ibid.

⁵Ibid.

⁶Ibid.

imprisonment for the assault and battery conviction and 7 years of imprisonment for the felony firearms offense. OR 47, 48.

The second stage of the trial to determine Petitioner's sentence for the murder conviction was scheduled to begin the following day, May 30, 2008. However, before the second stage of the trial began Petitioner entered into an agreement with the prosecution. The agreement provided that he would receive a sentence of life imprisonment without the possibility of parole and waive his right to appeal. In exchange, the prosecution agreed to dismiss the "Bill of Particulars" seeking the death penalty and to allow Petitioner to be confined in another state. Petitioner was sentenced on May 30, 2008, to twenty years of imprisonment for the assault and battery conviction and seven years of imprisonment for the felony firearm conviction. OR 50-52. Consistent with the sentencing agreement, Petitioner was sentenced on May 30, 2008, for the murder conviction to life imprisonment without the possibility of parole, with all three sentences to be served consecutively. OR 50-52; Sentencing TR 1-13.⁷ Petitioner stated in open court and on sentencing documents filed in the case that he did not wish to appeal the judgment and sentence. OR 52, 53; Sentencing TR 4-5. The victim's mother provided victim impact testimony at the sentencing proceeding. Sentencing TR 7-11. Although the transcript of the jury trial is not in the record, the victim's mother stated during the sentencing proceeding that Petitioner shot the victim in the head. Sentencing TR 9.

⁷An amended judgment and sentence was entered in the criminal proceeding on June 17, 2008. OR 74-75.

On June 6, 2008, Petitioner changed his mind and filed a *pro se* motion to withdraw his “plea/sentence agreement.” OR 54-57. In his motion, Petitioner asserted that the “threat of possible death penalty” and his “stress” and “duress” resulted in a coerced and involuntary sentencing agreement. *Id.* A new attorney was appointed by the district court to represent Petitioner, and a hearing was conducted on the motion on August 5, 2008. OR 87; Motion TR 1-89. Petitioner testified at the hearing that his lawyers had advised him and he understood that “[I]f life without parole” meant “you ain’t going to be on parole to go home, I guess.” Motion TR 42. Petitioner also testified at the hearing that he “remember[ed] waiving appeal, and [he] said yes” when questioned by the presiding judge as to whether he was waiving his right to appeal. Motion TR 44-45. Petitioner further admitted at the hearing that he had discussed his jury trial rights with his lawyers on multiple occasions. Motion TR 48.

Mr. Bridge, one of Petitioner’s defense attorneys at the time of the trial and sentencing proceedings, also testified at the hearing. Mr. Bridge testified that he had “lots of conversations” with Petitioner about his appeal rights and that Petitioner understood what a sentence of life without possibility of parole meant. Motion TR 62. Mr. Bridge also testified that he, Petitioner’s second defense attorney, and Petitioner discussed the sentencing agreement and the sentencing documents that were completed in connection with the sentencing proceeding and that Petitioner understood his appeal rights and agreed to give up those appeal rights. Motion TR 63-64. Mr. Bridge further testified that he specifically asked Petitioner if he wished to appeal the judgment and sentence and that Petitioner responded, “No.” Motion TR 70-71. Mr. Bridge testified that he advised Petitioner prior to the sentencing

that “if you take this deal you can’t appeal, that’s part of the deal.” Motion TR 72. At the conclusion of the hearing, the district court denied the motion. OR 88-90; Motion TR 81-82.

Despite Petitioner’s waiver of his right to appeal, the district court appointed counsel for Petitioner for the purpose of pursuing an appeal. On October 20, 2008, Petitioner, through his new court-appointed counsel, filed a petition for writ of certiorari in the Oklahoma Court of Criminal Appeals (“OCCA”). Response (Doc. # 18), Ex. 1 (Brief of Petitioner). In his appellate brief, Petitioner asserted that his “guilty plea was entered as a result of ignorance, misunderstanding and misinformation about the nature and consequences of his plea and, as a result, the plea was not voluntarily or knowingly made.” Id. at 3. Petitioner also asserted that the district court erred by failing to comply with the procedures set forth in King v. State, 553 P.2d 529, 532 (Okla. Crim. App. 1976), that Petitioner’s “conflict counsel was constitutionally ineffective [in connection with the hearing on the motion to withdraw the sentencing agreement] for failing to file a supplemental application to withdraw plea,” and that Petitioner’s appeal rights were denied through no fault of his own. Id.

On June 22, 2009, the OCCA entered an opinion denying certiorari and dismissing appeal. Response, Ex. 2. In this opinion, the OCCA made the following presumptively-correct factual findings⁸:

[N]o guilty plea was entered in this case,[] and therefore a certiorari appeal is not available to address Petitioner’s claims. In fact, Petitioner had entered a plea of not guilty and requested

⁸These factual findings are presumed to be correct as Petitioner has not overcome the presumption of correctness with clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

a jury trial. A jury found Petitioner guilty of the three crimes charged. Thereafter, Petitioner's counsel sought and obtained an agreement as to sentencing in order to prevent Petitioner from facing the possibility of a death sentence. While there are some references in the record that Petitioner "stipulated to the Bill of Particulars," we have no record of that, as the transcript of the proceedings during which such as [sic] stipulation, if any, was made does not appear before us. However, assuming, *arguendo*, that such a stipulation was indeed made, perhaps to satisfy the victim's family, said stipulation would have no legal significance here, for the State, as part of the plea deal, agreed to dismiss the second stage proceedings and accept the sentence of life in prison without the possibility of parole, making the Bill of Particulars a moot point.

What we have here is simply a negotiated agreement as to sentencing following a jury trial. As such, a certiorari appeal is not a viable option under 22 O.S.2001, § 1051 or Rule 4. Furthermore, we decline the invitation to restore Petitioner's appeal rights, as he clearly stated during the proceedings that he did not wish to appeal.

Accordingly, the order of the district court denying Petitioner's motion is AFFIRMED and CERTIORARI IS DENIED.

Id. at 1-3 (footnote omitted).

On April 2, 2009, Petitioner filed a *pro se* post-conviction application in the trial court in which he requested to file an appeal out-of-time from his convictions in Case No. CF-2004-6038. On May 7, 2009, the district court entered an order denying the application. Response, Ex. 3. Petitioner appealed this decision, and on August 7, 2009, the OCCA entered an order affirming the district court's denial of Petitioner's post-conviction application and request for an out-of-time appeal. Response, Ex. 4. In this order, the appellate court found that it had previously "concluded that Petitioner had validly waived his rights of appeal and that he was not entitled to be restored those rights" and therefore he "cannot show he was denied any right

of appeal through no fault of his own, which is the standard for granting an out-of-time appeal.” Id. (footnote omitted).

In another post-conviction application filed by Petitioner in the district court on March 3, 2010, Petitioner alleged that the prosecutor “improperly joined the charge in Count 2 with the remaining counts in a single information.” Response, Ex. 5, at 3. On September 23, 2010, the district court denied the application due to Petitioner’s procedural default. Id. at 4. The OCCA entered an order on January 25, 2011, affirming the district court’s denial of post-conviction relief on the basis of Petitioner’s waiver of his appeal rights. Response, Ex. 6.

Petitioner now seeks federal habeas review of his claim, which he attempted to assert in his certiorari appeal, that his “plea[] to the Bill of Particulars” was not knowingly or voluntarily entered. Petition, at 4. Petitioner also asserts that he was denied effective assistance of counsel in connection with the “plea,” a claim that he did not present in the state courts. He has technically exhausted this claim, however, because the Oklahoma courts would now find the claim procedurally barred as a result of Petitioner’s failure to raise the claim in his previous post-conviction applications.

II. State Law Error

Petitioner first asserts that he was denied procedural due process guarantees because the state court did not comply with state procedures regarding the acceptance of a guilty plea⁹

⁹Rule 4.1 of the Rules of the Oklahoma Court of Criminal Appeals requires that a guilty plea in Oklahoma be accompanied by a form detailing the particulars of the plea. The OCCA has also adopted certain procedures to be followed when a guilty plea is accepted in state courts. See King v. State, supra.

during his sentencing proceeding. Such a claim is not cognizable in this § 2254 habeas proceeding because it involves only an alleged error of state law. See Wilson v. Corcoran, ___ U.S. ___, 131 S.Ct. 13, 16 (2010) (“[F]ederal habeas corpus relief does not lie for errors of state law.”) (citing e.g., Lewis v. Jeffers, 497 U.S. 764, 780 (1990)); 28 U.S.C. §2254(a) (habeas relief may be afforded to a state prisoner “only on the ground” that his or her custody violates federal law).

III. Invalid Sentencing Agreement and Waiver of Right to Appeal

Petitioner next contends that he did not knowingly and voluntarily enter into a sentencing agreement and waive his rights to jury sentencing and appeal. Respondent concedes that Petitioner exhausted this claim in his motion to withdraw and attempted certiorari appeal. Oklahoma statutes direct that a separate sentencing proceeding be conducted when a defendant is convicted of murder in the first degree, and also provide that “[i]f the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court.” Okla. Stat. tit. 21, §§ 701.10(A), (B). In this case, the district court conducted a separate sentencing proceeding after Petitioner was found guilty.

With respect to the sentencing agreement and waiver of appeal rights entered in Petitioner’s sentencing proceeding, the OCCA found that “Petitioner’s counsel sought and obtained an agreement as to sentencing in order to prevent Petitioner from facing the possibility of a death sentence,” Petitioner “conferred with his counsel” and then “entered into an agreement with the State, accepting the sentence of life imprisonment without the

possibility of parole in exchange for the State's dismissal of second stage capital proceedings and Petitioner's waiver of the right to appeal." Response, Ex. 2, at 1-3. Finally, the OCCA found that Petitioner "clearly stated during the [sentencing] proceedings that he did not wish to appeal." Response, Ex. 2, at 3. Based on these findings, the appellate court found the waiver was valid. Id. Because Petitioner had simply entered into a "negotiated agreement as to sentencing following a jury trial" and as part of that agreement waived his right to appeal the conviction and sentence, he was not entitled to an appeal under state law or the court's appellate rules.¹⁰ Id. In affirming the district court's denial of Petitioner's first post-conviction application, the OCCA stated that it had previously concluded "Petitioner had validly waived his rights of appeal and that he was not entitled to be restored those rights," and therefore he was not entitled to an out-of-time appeal. Response, Ex. 4, at 2-3.

Oklahoma statutes provide a right of appeal from a conviction to the OCCA. Okla. Stat. tit. 22, § 1051(a). In Oklahoma, the statutory right to appeal a conviction, including a conviction for murder and sentence of death, may be waived. Grasso v. State, 857 P.2d 802, 805 (Okla. Crim. App. 1993). In Grasso, the appellate court conducted a review to determine whether the defendant was competent to waive his right to appeal the judgment and death-penalty sentence entered in that case and whether the waiver was knowingly and intelligently entered. The appellate court then concluded that the defendant had "the capacity to understand the difference between life and death and to knowingly and intelligently waive his statutory

¹⁰The OCCA permits appellate review of motions to withdraw guilty pleas through a writ of certiorari. See Rules 4.1-4.4 of the Rules of the Oklahoma Court of Criminal Appeals.

right to a direct appeal of his judgment” in the capital case. Id. at 808.

In an appellate decision recently entered by the OCCA, Mitchell v. State, __ P.3d __, 2011 WL 5042059 (Okla. Crim. App. 2011), the defendant appealed his murder conviction and death sentence on grounds, *inter alia*, the district court erred by refusing, due to his claim of innocence, to accept a sentencing agreement that would have provided for a sentence of life imprisonment without parole and a waiver of the defendant’s right to appeal his conviction and life-without-parole sentence. Id. at * 22. As did Petitioner in his attempted certiorari appeal, the defendant in Mitchell asked the OCCA to adopt procedures and forms similar to those set forth in King v. State, *supra*, and the OCCA’s appellate rules, which are used when a defendant enters a guilty plea. Id. at * 23. Just as in Petitioner’s case, the OCCA found that the defendant in Mitchell had not entered a guilty plea, because the jury had already found him guilty of the murder offense. Id. Rather, the defendant had entered into a sentencing agreement in which the defendant would waive his right to jury sentencing and his right to appeal in exchange for the State dismissing the Bill of Particulars and thus removing the death penalty as a sentencing option. Id.

In Mitchell, the OCCA restated its conclusion, citing Grasso, *supra*, that “[w]aivers of the rights to jury sentencing and to appeal must be knowing and voluntary” and that when such a waiver is proposed the district court must ascertain “whether [the defendant] had been fully informed of his right to jury sentencing and the right to appeal, whether he understood those rights, whether he understood he could waive one or both of those rights and the effects of such a waiver on those rights, and whether he was voluntarily waiving any of those rights.” Id.

at * 23, * 24. Because the defendant in Mitchell had been subjected to the sentencing phase of the trial as a result of “the trial judge’s erroneous assumptions about the proceedings before him,” the OCCA modified the defendant’s death sentence to a sentence of life in prison without the possibility of parole. Id at * 24.

Just as a guilty plea constitutes a waiver of the right, *inter alia*, to a jury trial, Parke v. Raley, 506 U.S. 20, 29 (1992), Petitioner’s negotiated sentencing agreement constituted a waiver of his right to a jury trial on the issue of his sentencing. Thus, the sentencing agreement, like a guilty plea, “must be both knowing and voluntary.” Id. at 28. Although Petitioner contends that he did not knowingly and voluntarily enter into the sentencing agreement and waiver of his right to appeal, he provides no evidentiary support for this conclusory assertion. In his motion to withdraw the sentencing agreement, Petitioner asserted that his “stress” and “duress” at the time he entered into the agreement, his fear of the death penalty, and his defense counsels’ advice urging him to enter into the sentencing agreement rendered the agreement not knowingly and voluntarily entered. However, Petitioner’s defense attorneys’ attempts to persuade him that it would be in his best interest to enter into the sentencing agreement, including the waiver of his appeal rights, does not reflect that the agreement was involuntary. See Miles v. Dorsey, 61 F.3d 1459, 1470 (10th Cir. 1995)(“Merely because [defense counsel] attempted to persuade Petitioner that it was in his best interest to plea does not lead to the conclusion that his no contest plea was involuntary.”), cert. denied, 516 U.S. 1062 (1996). Additionally, his “stress” and “duress” and fear of the penalty that could be imposed if he did not enter into the sentencing agreement do no render the agreement

involuntary. See id. (“Although deadlines, mental anguish, depression, and stress are inevitable hallmarks of pretrial plea discussions, such factors considered individually or in aggregate do not establish that Petitioner’s plea was involuntary.”).

The transcript of the sentencing proceeding reflects Petitioner’s testimony that he had agreed to a sentence of life without the possibility of parole. Sentencing TR 3-4. Petitioner expressly stated he did not wish to appeal the judgment and sentence and that he was waiving “all his appeal rights related to the trial of this case.” Sentencing TR 4. Petitioner further acknowledged that he had discussed the sentencing agreement and waiver with his attorney. Id. The prosecutor and Petitioner’s defense attorney stated that the sentencing agreement included an agreement allowing Petitioner to be moved to another state, and the presiding judge stated that the transfer would be allowed “by the agreements of the parties.” Sentencing TR 5-6.

Petitioner further acknowledged in open court that he had signed a written waiver of his right to appeal. Sentencing TR 6-7. This written waiver entitled “Certification of Appeal Rights By Trial Counsel” states that “I have served as trial counsel for the above named defendant and hereby certify that I have advised the defendant of his/her appeal rights and that he/she fully understands the rights of appeal and that the defendant affirmatively states he/she does not want to appeal the conviction. I further certify by my signature and the defendant’s signature here before, that I have delivered a copy of this affidavit to the defendant in open court and before the above signed judge.” OR 53. The certificate bears the signatures of Petitioner and his defense attorney, Mr. Bridge. OR 53.

During the hearing conducted in the district court on Petitioner's motion to withdraw the sentencing agreement, Petitioner testified that at the time of the sentencing proceeding he remembered he wanted "to waive my appeals" but he did not understand he was giving up his right to appeal. Motion TR 48. Petitioner admitted during this hearing that at the time he entered into the agreement with the prosecution he knew the "three potential sentences were life, life without parole and death" and that the prosecution was seeking the death penalty in the trial. Motion TR 38. He testified he also knew that a jury was waiting outside the courtroom for the initiation of the second stage of his trial on the death penalty issue scheduled to begin on that date. Motion TR 51-52.

Nothing in the record or Petitioner's arguments rebuts the Petitioner's express acknowledgments that he had read the sentencing agreement and appeal waiver, discussed it, understood it, and voluntarily agreed to it. Accordingly, Petitioner has not demonstrated that the OCCA's finding of a valid waiver and sentencing agreement is not "contrary to" or an "unreasonable application of" clearly established Supreme court precedent. 28 U.S.C. §2254(d)(1), (2). He is therefore not entitled to habeas relief concerning this claim.

IV. Ineffective Assistance of Counsel

Petitioner asserts that his defense attorneys provided constitutionally ineffective assistance of counsel in connection with the negotiation of the waiver and sentencing agreement. Respondent contends that Petitioner failed to exhaust this claim by raising it in the state courts. To satisfy the exhaustion requirement, a federal claim must have been presented previously to the OCCA, "includ[ing] reference to a specific federal constitutional guarantee,

as well as a statement of the facts that entitle the petitioner to relief.” Gray v. Netherland, 518 U.S. 152, 162-163 (1996). “[E]xhaustion of state remedies requires that petitioners fairly present federal claims to the state courts in order to give the State an opportunity to pass upon and correct alleged violations of its prisoners’ federal rights.” Duncan v. Henry, 513 U.S. 364, 365 (1995)(*per curiam*).

Petitioner did not exhaust his claim of ineffective assistance of counsel. He asserted in his attempted certiorari appeal that if the OCCA found Petitioner had failed to adequately assert his claim of an invalid sentencing agreement then he was denied effective assistance of counsel in connection with the hearing on his motion to withdraw the sentencing agreement. This is not the same claim that Petitioner asserts herein. In his Petition, Petitioner is asserting that his defense attorneys provided constitutionally ineffective assistance in connection with his sentencing agreement. Thus, Petitioner has not exhausted his ineffective assistance of counsel claim by fairly presenting it in the state courts.

In any event, his claim is without merit. Petitioner can show no prejudice with regard to his defense attorneys’ advice because the record shows Petitioner was plainly made aware at the sentencing proceeding of his appeal rights and the consequences of his negotiated sentencing agreement before he agreed to waive his appeal rights and accept the life-without-parole sentence. See Strickland v. Washington, 466 U.S. 668, 688, 694 (1984). Accordingly, Petitioner is not entitled to habeas relief concerning this claim.

RECOMMENDATION

Based on the foregoing findings, it is recommended that the Petition for a Writ of

Habeas Corpus pursuant to 28 U.S.C. § 2254 be DENIED. The parties are advised of their respective right to file an objection to this Supplemental Report and Recommendation with the Clerk of this Court by January 30th, 2012, in accordance with 28 U.S.C. § 636 and Fed. R. Civ. P. 72. The failure to timely object to this Supplemental Report and Recommendation would waive appellate review of the recommended ruling. Moore v. United States of America, 950 F.2d 656 (10th Cir. 1991); cf. Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996) (“Issues raised for the first time in objections to the magistrate judge’s recommendations are deemed waived.”).

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

ENTERED this 10th day of January, 2012.


GARY M. PURCELL
UNITED STATES MAGISTRATE JUDGE

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

LENNIE D. MATHIS,)	
)	
Petitioner,)	
)	
vs.)	No. CIV-11-694-C
)	
JUSTIN JONES, Director,)	
)	
Respondent.)	

ORDER ADOPTING REPORT AND RECOMMENDATION


Petitioner, a state prisoner, appearing through counsel, filed a Petition for Habeas Corpus relief pursuant to 28 U.S.C. § 2254 challenging his state court sentence on various grounds. Consistent with the provisions of 28 U.S.C. § 636(b)(1)(B), the case was referred to United States Magistrate Judge Gary M. Purcell. Judge Purcell entered a Supplemental Report and Recommendation (“R&R”) on January 10, 2012, recommending denial of the Petition.

In his R&R, Judge Purcell found that Petitioner had failed to raise any claim entitling him to relief. The substantive facts and law are accurately set out in Judge Purcell’s R&R and there is no purpose to be served in repeating them yet again. In his Objection, Petitioner ignores the deferential standard and fails to demonstrate that the matters he challenges in this habeas action were decided in a manner that was contrary to or an unreasonable application of Supreme Court law. Rather, Petitioner merely argues in a conclusory fashion that the reasoning of the Oklahoma Court of Criminal Appeals (“OCCA”) violates the Constitution. After consideration, the Court disagrees. The OCCA’s rationale and reasoning accurately

accounts for any and all constitutional issues surrounding a plea agreement to obtain a specific sentence.

As set forth more fully herein, the Court adopts, in full, the Report and Recommendation of the Magistrate Judge (Dkt. No. 24), and the Petition for Writ of Habeas Corpus is denied. Petitioner did not make a request for an evidentiary hearing in his Objection and the Court finds one is not warranted. A separate judgment will issue.

IT IS SO ORDERED this 28th day of February, 2012.



ROBIN J. CAUTHRON
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

July 23, 2012

Elisabeth A. Shamaker
Clerk of Court

LENNIE D. MATHIS,

Petitioner - Appellant,

v.

JUSTIN JONES, Director,

Respondent - Appellee.

No. 12-6082
(D.C. No. 5:11-CV-00694-C)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY
AND DISMISSING APPEAL*

Before LUCERO, O'BRIEN, and MATHESON, Circuit Judges.

Lennie D. Mathis seeks to appeal from the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. We deny his request for a Certificate of Appealability (COA) and dismiss.

* The parties have waived oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). This case is submitted for decision on the briefs.

This order and judgment is an unpublished decision, not binding precedent. 10th Cir. R. 32.1(A). Citation to unpublished decisions is not prohibited. Fed. R. App. 32.1. It is appropriate as it relates to law of the case, issue preclusion and claim preclusion. Unpublished decisions may also be cited for their persuasive value. 10th Cir. R. 32.1(A). Citation to an order and judgment must be accompanied by an appropriate parenthetical notation - (unpublished). *Id.*

BACKGROUND AND PROCEDURAL HISTORY

After a jury trial in Oklahoma state court, Mathis was convicted of first-degree murder, assault with a dangerous weapon, and being a felon in possession of a firearm.

Prior to trial, the prosecution decided to seek the death penalty on the murder charge and filed a bill of particulars to enable it to do so. Following his conviction, however, Mathis reached an agreement with the prosecution under which he would receive a life sentence without the possibility of parole in exchange for an appeal waiver. In accord with this agreement, Mathis was sentenced to consecutive terms of life imprisonment without parole on the murder count, twenty years of imprisonment on the assault charge, and seven years on the felon-in-possession charge.

Mathis later filed a pro se motion in the state district court requesting to withdraw the "plea/sentence agreement." (Appellant's App'x 44.) His motion cited the "stress" and "duress" of the threat of the death penalty in claiming the agreement was coerced and involuntary. (Appellant's App'x 44.) The court held an evidentiary hearing on the motion. One of Mathis's defense counsel testified to having discussed the appeal waiver with Mathis, who seemed to understand what was involved and agreed to the waiver. The court denied the motion.

Nevertheless, the court appointed counsel to aid Mathis in pursuing an appeal. In his appeal briefs, he argued his "guilty plea" was not knowing and voluntary. In an unpublished order, the Oklahoma Court of Criminal Appeals rejected the argument and dismissed the appeal. It concluded the agreement was not a plea agreement; Mathis had pled not guilty and was tried by a jury on the issue of guilt. Rather, the court reasoned,

“[w]hat we have here is simply a negotiated agreement as to sentencing following a jury trial.” (Appellant’s App’x 46.)

The state district court later denied Mathis’s *pro se* application for post-conviction relief, and the Oklahoma Court of Criminal Appeals affirmed.

Mathis then brought this federal habeas petition. Calling his agreement with the prosecution a “guilty plea” to the bill of particulars, he claims the plea was constitutionally invalid because it was not made (1) voluntarily and intelligently and (2) in a manner consistent with state-law procedures for accepting guilty pleas. He also claims he was denied effective assistance of counsel in connection with the proceedings to withdraw his “guilty plea.” The district court referred the case to a magistrate judge, *see* 28 U.S.C. § 636(b)(1)(B), who recommended denying the petition. Although the magistrate refused to characterize the sentencing agreement as a plea, he concluded the agreement was constitutionally valid only if Mathis knowingly and voluntarily agreed to it. Following a detailed recitation of the record evidence, the magistrate concluded “[n]othing in the record . . . rebuts the Petitioner’s express acknowledgements that he had read the sentencing agreement and appeal waiver, discussed it, understood it, and voluntarily agreed to it.” (Appellant’s App’x 53.) With respect to the effectiveness of Mathis’s counsel, the magistrate concluded Mathis had failed to exhaust the claim in the Oklahoma courts.

Although Mathis objected to the magistrate’s report and recommendation, the objection focused entirely on the magistrate’s resistance to characterizing the agreement

as a plea agreement. It did not explain why either of the magistrate's conclusions was incorrect. The district court adopted the magistrate's report and recommendations in full.

DISCUSSION

A certificate of appealability (COA) is a jurisdictional prerequisite to our review of a petition for a writ of habeas corpus. 28 U.S.C. § 2253(a), (c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Although Mathis did not request a COA in either the district court or this court, we construe his notice of appeal and opening brief as a request for a COA. Fed. R. App. P. 22(b)(2).

We issue a COA “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This means the applicant must demonstrate that an issue is debatable among reasonable jurists or “deserve[s] encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted). In evaluating whether Mathis has satisfied this burden, we undertake “a preliminary, though not definitive, consideration of the [legal] framework” applicable to each of his claims. *Miller-El*, 537 U.S. at 338.

A. Validity of Agreement

Because, in Mathis's view, his agreement with the prosecutor was a plea agreement, he believes it was valid only if his agreement was voluntary and intelligent. Since, as the Oklahoma Court of Criminal Appeals pointed out, the agreement followed Mathis's not-guilty plea and a jury trial culminating in a verdict of guilt, we are not

confident the plea agreement cases Mathis cites are fully applicable here.¹ Nevertheless, we are confident the Constitution requires an appeal waiver to be made voluntarily and intelligently. *See United States v. Ruiz*, 536 U.S. 622, 629 (2002) (“[T]he Constitution insists, among other things, that the defendant enter a guilty plea that is ‘voluntary’ and that the defendant must make related waivers ‘knowingly, intelligently, and with sufficient awareness of the relevant circumstances and likely consequence’”) (citation and quotation marks omitted); *cf. United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (requiring an appellate waiver in the *federal* criminal system to be made knowingly and voluntarily).

Yet Mathis’s waiver *was* voluntary and knowing. Strong evidence in the record shows he knew the circumstances and likely consequences of the agreement and voluntarily entered into it. The magistrate thoroughly discussed this evidence in his report. Based on this record, the magistrate concluded the OCCA’s finding that the waiver was valid was not an “unreasonable application of clearly established Supreme [C]ourt precedent.” (Appellant’s App’x 53.) *See* 28 U.S.C. § 2254(d). Mathis makes no effort, as is his burden, to demonstrate why the magistrate’s analysis of the record evidence was incorrect. *See Hernandez v. Starbuck*, 69 F.3d 1089, 1093 (10th Cir. 1995) (noting appellant “bears the burden of demonstrating the alleged error”). On this record there could be no debate among reasonable jurists that the magistrate correctly concluded the sentencing agreement met constitutional standards. *See Slack*, 529 U.S. at 484.

¹ Mathis supports his view by explaining that the trial judge characterized the agreement as a plea of guilty to the bill of particulars.

Moreover, even if Oklahoma failed to follow its own procedures for ensuring appellate waivers are voluntary and intelligent,² the magistrate correctly concluded the federal courts cannot remedy these defects on habeas review. *See Wilson v. Corcoran*, 131 S. Ct. 13, 16 (2010) (“[F]ederal habeas corpus relief does not lie for errors of state law.”).

B. Ineffective Assistance of Counsel

Mathis also argues he was denied the effective assistance of counsel because counsel (1) “fail[ed] to follow statutory law for pleading a defendant guilty”; (Appellant Br. 15) and (2) should have prepared a motion to withdraw his plea. However, because Mathis failed to raise any of these arguments in his objection to the magistrate’s report and recommendation, he has waived them. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991) (adopting waiver rule); *see Hall v. Jordan*, 143 F. App’x 74, 75-76 (10th Cir. 2005) (noting waiver rule forecloses consideration of arguments not presented in the objection to a magistrate’s report and recommendation).³

No jurist could reasonably debate the correctness of the district court’s decision with respect to the issue presented—the voluntariness of his appeal waiver. We DENY

² Oklahoma’s procedures seek to ensure a defendant’s guilty plea is “voluntarily and intelligently entered” as required under *King v. State*, 553 P.2d 529 (Okla. Crim. App. 1976).

³ Unpublished opinions are not binding precedent. 10th Cir. R.App. P. 32.1(A). We cite unpublished opinions as we would an opinion from another circuit, persuasive because of its reasoned analysis.

his request for a COA and DISMISS this matter.

Entered by the Court:

Terrence L. O'Brien
United States Circuit Judge

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