Case No. 23-6176

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS ROYE WAHPEKECHE,
Petitioner-Appellant,

v.

LUKE PETTIGREW, Warden,
Respondent-Appellee.

OPENING BRIEF OF RESPONDENT/APPELLEE

On Appeal from the United States District Court
For the Western District of Oklahoma
(D.C. No. CIV-21-1106-PRW)
The Honorable Patrick R. Wyrick, United States District Judge

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JULY 3, 2025 **ORAL ARGUMENT IS NOT REQUESTED**
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THOMAS ROYE WAHPEKECHE, **Petitioner/Appellant,** **v.** **LUKE PETTIGREW, Warden,**[1] **Respondent/Appellee.**	**Case No. 23-6176**

OPENING BRIEF OF RESPONDENT/APPELLEE

Respondent, by and through the Oklahoma Attorney General, Gentner F. Drummond, hereby submits the following response to Thomas Roye Wahpekeche's ("Petitioner") appeal from the denial of federal habeas corpus relief by the United States District Court for the Western District of Oklahoma.

STATEMENT OF JURISDICTION

The United States Magistrate Judge for the Western District of Oklahoma, on June 28, 2022, issued a Report and Recommendation ("R&R") recommending that habeas relief be denied in Case No. CIV-21-1106-PRW (ROA Vol. IV, 221-47).[2]

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[1] Petitioner is housed at Joseph Harp Correctional Center where David Rogers is Warden. Warden Rogers is the appropriate respondent. Rule 2(a), *Rules Governing Section 2254 Cases in the United States District Courts*; Fed. R. App. P. 43(c)(2).

[2] Citations will refer to this Court's CM/ECF pagination. Citations to specific items will appear as follows: 1) record on appeal, "ROA. Vol. __, __"; 2) Petitioner's *pro se* Opening Brief, "Op. Br., __"; 3) Petitioner's counseled Supplemental Brief, "Supp. Br., __"; Respondent's Motion for Reconsideration of Order Granting COA,

The United States District Judge, on October 20, 2023, issued an Order and Judgment denying habeas relief[3] (ROA Vol. IV, 293-300). Petitioner filed a Notice of Appeal on October 27, 2023, the District Court denied a certificate of appealability ("COA") on November 1, 2023, Petitioner filed his Combined Opening Brief and Application for COA in this Court on March 4, 2024, and this Court granted a COA "on all issues" on November 20, 2024 (ROA Vol. IV, 301-02, 304-05). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1291, 2253, as well as Fed. R. App. P. 4(a) and Fed. R. App. P. 22(b)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the State of Oklahoma lacked jurisdiction over Petitioner pursuant to the Major Crimes Act, 18 U.S.C. § 1153 (Supp. Br., 19-38).

2. Whether Petitioner exhausted his *Miranda v. Arizona*, 384 U.S. 436 (1966), ineffective assistance of counsel, and Rape Shield Act claims to the Oklahoma Court of Criminal Appeals ("OCCA") *and* whether Petitioner can overcome any applicable anticipatory procedural bar (Supp. Br., 39-50).

STATEMENT OF THE CASE

A. Facts:

Between 2008 and 2012, Petitioner—a man then in his late thirties to early forties—repeatedly and regularly raped and otherwise sexually abused S.R.,

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"Mtn. for Recon., __"; Petitioner's Response to Motion for Reconsideration, "Resp. to Recon., __"; and this Court's COA Order, "COA Order, __."

[3] The District Court stated that it was "dismiss[ing]" Petitioner's Petition; however, Respondent assumes that it was, in effect, denying habeas relief (ROA Vol. IV, 299).

beginning when she was just ten years old and ending when she was about fourteen years old. During this period of abuse, S.R. would periodically stay weekends at Petitioner's home in Cleveland County, visiting her half-brother, O.R., Petitioner's son (ROA Vol. VI, Tr. II 37-46, 76, 172-73, 257-58; Tr. III 68-69).

In August of 2012, when S.R. was fourteen years old, S.R.'s father and stepmother became concerned about her (ROA Vol. VI, Tr. II 53-54, 57). They discovered anime drawings made by S.R. that contained sexually charged storylines (ROA Vol. VI, Tr. II 55-57). They also discovered S.R. had been going online and engaging in sexual role-playing (ROA Vol. VI, Tr. II 55-56, 115-17). S.R. initially shut down when her father and stepmother asked about the anime drawings and online behavior (ROA Vol. VI, Tr. II 58-59, 119). However, she eventually "broke down" and burst into tears and told them that Petitioner had been having sex with her (ROA Vol. VI, Tr. II 60-61, 120-21).

Through her disclosure, it came to light that Petitioner had—on *multiple* and *regular* occasions—sexually assaulted S.R. during her trips to his home over the course of the last four years (ROA Vol. VI, Tr. II 184). According to S.R., Petitioner would call her into his bedroom under some pretense and then have her wedge a chair up underneath the doorknob on the door to his room so that no one else could come in (ROA Vol. VI, Tr. II 184-93). Petitioner would then take off his clothes and lead S.R. into various sexual activities, including forcing S.R. to touch his penis until

he ejaculated; forcibly squeezing and sucking on S.R.'s breasts; forcing his penis into S.R.'s mouth until he ejaculated; vaginally penetrating S.R. with his fingers or licking S.R.'s vagina; and vaginally and anally penetrating S.R. with his penis until he ejaculated (ROA Vol. VI, Tr. II 186-215).

S.R. explained each of these sexual activities in horrific detail, detailing Petitioner's instructions to her regarding specific sexual acts and even detailing how she had to swallow Petitioner's ejaculate or spit it into the bathroom sink after he orally raped her (ROA Vol. VI, Tr. 195-207). In the event Petitioner's ejaculate got on S.R.'s body following vaginal penetration (S.R. explained that Petitioner usually pulled out before ejaculating), Petitioner would force S.R. to clean herself with a rag or shower in his bathroom (ROA Vol. VI, Tr. II 205-07). Petitioner never used a condom (ROA Vol. VI, Tr. II 212). Additional facts will be discussed as necessary.

B. Procedural History:

On January 30, 2015, Petitioner was convicted by a jury of four counts of First-Degree Rape (Victim Under the Age of 14) (Counts I, II, VII, and VIII), two counts of Forcible Sodomy (Counts III and IV), three counts of Lewd or Indecent Acts to a Child Under 16 (Counts V, VI, and X), one count of Rape by Instrumentation (Count IX), and one count of Performing Lewd Acts in the Presence of Minor (Count XI), in Cleveland County District Court Case CF-2013-236 (ROA Vol. II, 147). Petitioner's jury fixed punishment at life imprisonment on each of

Counts I, II, VII, VIII; twenty years of imprisonment on each of Counts III, IV, IX, X, XI; five years of imprisonment on Count VI; and three years of imprisonment on Count V (ROA Vol. II, 147). The state district court, on December 21, 2015, sentenced Petitioner in accordance with the jury's verdicts and ordered the sentences to be served concurrently (ROA Vol. II, 147).

Petitioner unsuccessfully challenged his convictions and sentences on direct appeal to the OCCA, raising six propositions of error:

> I. [Petitioner] received ineffective assistance of counsel.
>
> II. The trial court erred in excluding relevant evidence affecting the credibility of the alleged victim, and violated [Petitioner]'s right to due process and a fair trial.
>
> III. The trial court erred in allowing impermissible expert testimony to be heard by the jury.
>
> IV. The State's witnesses improperly bolstered the alleged victim.
>
> V. The trial court lacked jurisdiction over this matter.
>
> VI. There was insufficient evidence to support the jury's verdict.

(ROA Vol. II, 147-55). On April 27, 2017, the OCCA affirmed.

From 2018 to 2021, following direct appeal, Petitioner took a "convoluted" path through state court in search of collateral relief; however, he was ultimately unsuccessful (ROA Vol. IV, 222-24). On February 16, 2018, Petitioner filed his first Application for Post-Conviction Relief in state district court, raising four claims of error (ROA Vol. II, 351-74). On June 18, 2018, however, the district court entered

an order denying post-conviction relief (ROA Vol. II, 389-93). Petitioner then lodged an untimely post-conviction appeal to the OCCA in Case No. PC-2018-816, which the OCCA dismissed for lack of jurisdiction (ROA Vol. II, 429-57).

On October 3, 2018, Petitioner returned to state district court and filed an Application for an Appeal Out of Time in order to challenge the state district court's ruling on his first post-conviction application (ROA Vol. II, 458-68). Next, on June 11, 2019, he filed a Motion to Set Matter for Hearing and a Motion for Permission to Submit Supplemental Material (ROA Vol. II, 469-76). Then, on September 4, 2019, Petitioner filed a Motion to Dismiss for Lack of Jurisdiction, arguing the State lacked jurisdiction to prosecute him in Indian Country (ROA Vol. II, 481-500). On July 31, 2020, the state district court denied Petitioner's Motion to Dismiss for Lack of Jurisdiction (which it construed as a second post-conviction application) and granted/recommended that Petitioner be allowed an appeal out of time from the denial of his first post-conviction application (ROA Vol. II, 529-33).

At that point, rather than *separately* (and *properly*) appealing the state district court's denial of his first and second applications for post-conviction relief, Petitioner, on August 10, 2020, filed a Motion of Notice of Intent to Appeal in state district court (ROA Vol. II, 538-43). In that document, Petitioner indicated obliquely that he wished to appeal the state district court's denial of both his first *and* second post-conviction applications (ROA Vol. II, 538-43). Petitioner then lodged a post-

conviction appeal to the OCCA in Case No. PC-2020-541, specifying he wished to request an appeal out of time in order to appeal the state district court's *first* post-conviction ruling (ROA Vol. II, 544-81). Despite Petitioner's failure to comply with the OCCA's Rules and attach proper documentation to his appellate filings, *see* (ROA Vol. II, 582-764), the OCCA, on September 11, 2020, ultimately granted Petitioner permission to appeal the state district court's first post-conviction ruling out of time (ROA Vol. II, 765-67). The OCCA also included instructions for this appeal out of time (ROA Vol. II, 765-66).

Petitioner thereafter lodged a post-conviction appeal in the OCCA in Case No. PC-2020-717 (ROA Vol. II, 768-809). In his initial pleading, Petitioner specifically noted he was challenging the state district court's *first* post-conviction ruling, yet he made arguments that seemed to relate to the state district court's *second* post-conviction ruling (ROA Vol. II, 768). In his appeal, he raised eight claims, each of which pertained to his challenge to state court jurisdiction (ROA Vol. II, 793-801). On September 30, 2021, the OCCA affirmed, applying its decision in *State ex rel. Matloff v. Wallace*, 497 P.3d 686, 688 (Okla. Crim. App. 2021) (holding that *McGirt v. Oklahoma*, 591 U.S. 894 (2020), "announced a new rule of criminal procedure which [it] decline[d] to apply retroactively in a state post-conviction proceeding to void a final conviction") (ROA Vol. II, 823-24).

After his lack of success in state court, Petitioner proceeded to federal court. On November 18, 2021, Petitioner filed a Petition for Writ of Habeas Corpus and Brief in Support in federal district court, raising eleven claims of error (ROA Vol. I, 7-158). In Grounds I, II, III, IV, V, VI, VIII, and X, Petitioner made various challenges related, in some way, to the State of Oklahoma's alleged lack of jurisdiction. In Ground VII, Petitioner raised a *Miranda* claim. In Ground IX, Petitioner alleged that evidence seized from his home during a search was improperly stored. Finally, in Ground XI, Petitioner raised a challenge with respect to Rape Shield evidence (ROA Vol IV, 227-29; *see also* ROA Vol. I, 7-158).

Following a Response in Opposition from Respondent and a Reply by Petitioner, the Magistrate Judge issued an R&R on June 28, 2022 (ROA Vol. II, 3-146; ROA Vol. III, 2-58; ROA Vol. IV, 221-47). The Magistrate Judge addressed Grounds I, II, III, V, and VIII on the merits (under *de novo* review) and determined habeas relief was unwarranted (ROA Vol. IV, 229-36). The Magistrate Judge then addressed Grounds IV, VI, VII, IX, and XI and determined that these claims were unexhausted and anticipatorily procedurally barred (ROA Vol. IV, 236-46). Finally, with respect to Ground X, the Magistrate Judge determined that the claim was not cognizable on habeas review (ROA Vol. IV, 246). On July 14, 2022, Petitioner timely objected to the R&R (ROA Vol. IV, 248-90). On October 20, 2023, the

District Judge entered an Order adopting the R&R and dismissing Petitioner's Petition (ROA Vol. IV, 293-300). This appeal followed.

PRELIMINARY MATTERS

Before moving to the arguments raised by Petitioner, Respondent must address some preliminary matters for purposes of preservation. First, Respondent re-urges his contention that a blanket COA "on all issues" was improvidently granted in this case. On December 30, 2024, Respondent filed a Motion for Reconsideration of Order Granting COA, challenging this Court's COA Order considering it, *inter alia*, did not enumerate the particular claims, set out the COA standard, or note which claims, if any, met the COA standard within 28 U.S.C. § 2253(c) (Mtn. for Recon., 11-20). After Petitioner objected (Resp. to Recon., 13), this Court denied that Motion on February 7, 2025, without prejudice.

Respectfully, Respondent continues to assert that this Court should vacate its COA Order in this case. In his Combined Opening Brief and Application for COA, Petitioner raised a *litany* of claims (Op. Br., 2-6, 13-28). As is typical of many *pro se* filings, this Opening Brief was lengthy, partially handwritten, and not a model of clarity, and it purported to raise nine, fourteen, or twenty-three claims (depending on how it was read) (Op. Br., 2; Mtn. for Recon., 5-9). However, this Court issued a cursory Order granting a COA. Other than a brief discussion of due dates, the appointment of counsel for Petitioner, and counsel's entry of appearance, the

substance of this Court's COA Order spanned essentially two sentences:

> Thomas Roye Wahpekeche, an Oklahoma prisoner proceeding pro se, moves for a certificate of appealability (COA) to appeal from the district court 's denial of his 28 U.S.C. § 2254 petition. *We grant a COA on all issues*.

(COA Order, 1 (emphasis added)).

In granting a COA "on all issues," this Court disregarded the *mandatory* language within § 2253(c)(2) and (c)(3) when it failed to identify the issues raised, failed to identify which issues met the COA standard, and failed to recognize that multiple claims were procedurally barred or otherwise not raised to the District Court. *See* 28 U.S.C. § 2253(c)(2), (3) (a COA may issue "*only* if the applicant has made a substantial showing of the denial of a constitutional right" and a COA order "shall indicate which specific issue or issues satisfy the showing required"); *see also Gonzalez v. Thaler*, 565 U.S. 134, 146 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484-85 (2000) (for claims denied on procedural grounds in district court, a petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling," and § 2253 "mandates that both showings be made before the court of appeals may entertain the appeal"); *Childers v. Crow*, 1 F.4th 792, 797 (10th Cir. 2021).

Although the requirements of § 2253(c)(2) and (c)(3) are not jurisdictional, they are nonetheless vital requirements laid down by Congress in order to preserve judicial resources and limit review of frivolous claims. *See Miller-El*, 537 U.S. at 337; *Spencer v. United States*, 773 F.3d 1132, 1137 (11th Cir. 2014); *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir. 2003); *Beyer v. Litscher*, 306 F.3d 504, 505-06 (7th Cir. 2002). By granting a COA "on all issues," this Court's COA Order acted as a "blanket" order that this Court, and others, have previously condemned. *See, e.g.*, *Blackman v. Ercole*, 661 F.3d 161, 164 (2d Cir. 2011); *Porterfield v. Bell*, 258 F.3d 484, 487 (6th Cir. 2001) (blanket orders "undermine the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability"); *Thomas v. Gibson*, 218 F.3d 1213, 1219 n.1 (10th Cir. 2000) ("'blanket' COAs . . . are at odds with the statutory provision governing appeals in § 2254 petitions"); *see also Davis v. Allbaugh*, No. 18-6131, 794 F. App'x 683, 685 n.1 (10th Cir. Oct. 24, 2019) (unpublished).

Put simply, it is implausible that *every single one* of Petitioner's claims, including those that were procedurally barred or not raised to the District Court, are debatable among jurists of reason. 28 U.S.C. § 2253(c). As such, this Court should vacate all, or a part, of its COA Order as improvidently granted. *See, e.g.*, *Mars v. White*, No. 24-6038, 2025 WL 702813, at *2 n.1 (10th Cir. Mar. 5, 2025)

(unpublished) (noting that it granted respondent's motion to reconsider and vacated a portion of the COA); *Childers*, 1 F.4th at 799-801 ("we conclude that a COA should not have been granted" on an issue the petitioner did not raise to the district court); *Holcomb v. Whitten*, No. 19-5033, 836 F. App'x 682, 690 (10th Cir. Dec. 3, 2020) (unpublished) (noting that, "[o]n rare occasions we have concluded that we should vacate a COA, or part of it, as improvidently granted," and vacating portion of COA as it related to procedurally defaulted claim); *Bowen v. Kansas*, No. 08-3022, 295 F. App'x 260, 261 (10th Cir. Sept. 29, 2008) (unpublished) ("we now vacate the COA as improvidently granted and dismiss the appeal as to all claims"); *Hughes v. Beck*, Nos. 05-6183, 05-6215, 161 F. App'x 797, 799 (10th Cir. Jan. 9, 2006) (unpublished) (finding that a "COA should not have been granted" for a waived claim and thereafter vacating COA and dismissing appeal).

Second, even assuming this Court leaves its COA Order intact and reviews all of Petitioner's claims,[4] Petitioner has waived or forfeited several of his claims. In his *pro se* Opening Brief, Petitioner alleged a "Constitutional Violation of 'Access to the Courts'" due to his blindness and lack of "adequate legal assistance" from a law clerk at his facility (Op. Br., 2-3). However, this claim was inadequately briefed

[4] In responding to Petitioner's claims within this brief, Respondent will take counsel for Petitioner at his word that Petitioner intended to raise *only* "the same eleven issues [in] his habeas petition" and not waste this Court's time addressing nine, fourteen, or twenty-three claims (Resp. to Recon., 8).

by Petitioner in his *pro se* Opening Brief, and counsel for Petitioner did not address this claim in the Supplemental Brief. As such, this Court should find that Petitioner has abandoned or waived such claim. *See Allen v. Zavaras*, 568 F.3d 1197, 1199 (10th Cir. 2009) (where petitioner filed a *pro se* brief and request for COA, then counsel was appointed by the Court to file a supplemental brief, the Court did "not consider the issues raised by [petitioner] in his original filing"—"by not including those issues in his supplemental brief, [petitioner] has abandoned them"); *cf. also Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("we routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief").

In any event, this claim was also not adequately raised to the District Court below. Petitioner did not raise the claim in his habeas Petition; rather he raised a version of this claim *after* the issuance of the R&R and again *after* the entry of Judgment, both times via a request for counsel (ROA Vol. I, 7-60, 80-113; ROA Vol. IV, 306-43; ROA Vol. V, 2-13). He again requested counsel once he reached this Court. Considering Petitioner did not include a claim concerning alleged denial of access to the courts in his habeas Petition, this claim should be deemed forfeited. Moreover, Petitioner does not request plain-error review. As such, this claim is

totally waived and not subject to any sort of review.[5] *United States v. McBride*, 94 F.4th 1036, 1044 (10th Cir. 2024); *Menzies v. Powell*, 52 F.4th 1178, 1201 (10th Cir. 2022); *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019); *Harris v. Sharp*, 941 F.3d 962, 975 (10th Cir. 2019); *Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015); *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015).

Additionally, in his habeas Petition, Petitioner argued that the State violated the Indian Child Welfare Act when questioning his son (Ground IV), that the State failed to store and properly preserve evidence (Ground IX), and that the OCCA improperly applied its *Matloff v. Wallace* decision to his case (Ground X) (ROA Vol. I, 24-26, 46-53; ROA Vol IV, 227-29). Petitioner also raised these claims in his *pro se* Opening Brief to this Court (Op. Br., 16-17, 22-24). However, counsel for Petitioner did not reassert these claims in his Supplemental Brief despite having over 4,000 words left to spare (Supp. Br., 52). *See* Fed. R. App. P. 32(a)(7)(B)(i)

[5] Respondent wholly agrees with the Honorable Judge Jerome Holmes that the invocation of "plain-error jurisprudence is inappropriate in the context of habeas review" pursuant to 28 U.S.C. § 2254. *Harmon v. Sharp*, 936 F.3d 1044, 1085-91 (10th Cir. 2019) (Holmes, J., concurring). Rather, the waiver doctrine should be applied to any claims not raised below—in other words, such claims should "not be subject to review at all." *Id.* at 1085. However, Respondent includes this forfeiture/plain-error argument for preservation purposes. But, considering this Court's somewhat inconsistent case law on waiver and forfeiture, *id.* at 1085-87, Respondent will hereafter adopt Judge Holmes's reasoning and refer to any claims not raised in the federal district court as "waived." Even if such claims were first considered forfeited, however, Petitioner has not requested plain-error review with respect to any of his forfeited claims, rendering them waived in any event.

(principal brief must contain "no more than 13,000 words"). Considering this, these claims should be deemed as waived or abandoned. *See Allen*, 568 F.3d at 1199. Finally, there are certain arguments Petitioner raises in his Supplemental Brief that he did not raise to the state courts, to the District Court below, or in his *pro se* Opening Brief to this Court (ROA Vol. I, 17-60, 80-113; ROA Vol. IV, 248-90; Op. Br., 2-28). As such, these claims are unexhausted and waived, and Respondent will attempt to specifically identify those arguments when addressing the substance of Petitioner's claims below. *See Childers*, 1 F.4th at 798; *see also infra*.

SUMMARY OF THE ARGUMENT

Petitioner claims he is entitled to relief in two main ways. First, he claims that he is entitled to relief considering his crimes allegedly occurred in Indian Country (Supp. Br., 19-38). He specifically argues that his crimes occurred on an existing reservation or on an allotment, "the Indian title[] to which ha[s] not been extinguished." 18 U.S.C. §§ 1151(a), (c), 1153. Second, he claims that he is entitled to relief considering the District Court refused to review certain unexhausted claims that were subject to an anticipatory procedural bar—he asserts these claims are exhausted *or* that he can overcome any anticipatory bar by showing cause and prejudice or a fundamental miscarriage of justice (Supp. Br., 39-50).

However, as will be detailed below, Petitioner's claims lack any merit. Petitioner committed his heinous and horrific crimes against S.R. within the

jurisdiction of *Oklahoma*. The location of the crimes—Petitioner's home—rests upon a *disestablished* reservation and is not part of a restricted or trust allotment. While Petitioner wishes to escape responsibility for his crimes by claiming lack of jurisdiction, he is sorely out of luck. Moreover, notwithstanding his *pro se* status, Petitioner failed to properly exhaust multiple claims to the OCCA, and the District Court correctly applied the Antiterrorism and Effective Death Penalty Act's ("AEDPA") exhaustion requirement. Petitioner offers no actual evidence that the claims at issue were *fairly presented* to the OCCA. Relatedly, Petitioner's extremely belated attempts to overcome the anticipatory bar applicable to his unexhausted claims are entirely waived. Ultimately, habeas relief is unwarranted, and this Court should affirm the District Court's decision.

STANDARD OF REVIEW

On appeal from the denial of a habeas petition filed pursuant to 28 U.S.C. § 2254, this Court reviews "the district court's legal analysis de novo." *Johnson v. Martin*, 3 F.4th 1210, 1217 (10th Cir. 2021); *see also Smith v. Duckworth*, 824 F.3d 1233, 1241-42 (10th Cir. 2016). In so doing, however, this Court "remain[s] bound by the constraints" of the AEDPA. *Johnson*, 3 F.4th at 1218. Under the AEDPA, a federal court may grant habeas relief with respect to a claim adjudicated on the merits by a state court *if and only if* the state court's adjudication of the claim:

> (1) resulted in a decision that was *contrary to*, or involved *an unreasonable application* of, *clearly established Federal law*, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was *based on an unreasonable determination of the facts* in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added).

For a state court to adjudicate a claim on the merits and receive deference, it is not necessary that the court provide an opinion explaining its reasoning. *Harrington v. Richter*, 562 U.S. 86, 98 (2011). Rather, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99. Further, "a state court need not cite or even be aware of [the United States Supreme Court's] cases under § 2254(d)." *Id.* at 98. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id*. This same *Richter* presumption applies when a state court opinion explicitly addresses *some* but *not all* of a defendant's claims. *Johnson v. Williams*, 568 U.S. 289, 298 (2013).

Pursuant to § 2254(d)(1), a petitioner must point to the existence of clearly established federal law. *House v. Hatch*, 527 F.3d 1010, 1018 (10th Cir. 2008). If clearly established law is implicated, a petitioner must then demonstrate that a state

court's decision was contrary to, or an unreasonable application of, such law. A state court decision is "contrary to" when it applies a rule that contradicts the governing law set forth in the Supreme Court's cases or decides a case differently than the Supreme Court has on materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court decision is an "unreasonable application of" if the state court correctly identifies the governing legal principle but applies it to the facts of the particular case in an unreasonable manner. *See Valdez v. Bravo*, 373 F.3d 1093, 1096 (10th Cir. 2004). Pursuant to § 2254(d)(2), a petitioner must demonstrate that a state court "plainly misapprehend[ed] or misstate[d] the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim," *and* that the "misapprehension [] fatally undermine[d] the fact-finding process, rendering the resulting factual finding unreasonable." *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir. 2016) (quoting *Byrd v. Workman*, 645 F.3d 1159, 1171-72 (10th Cir. 2011)). Importantly, state court factual findings are also presumed correct unless overcome by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Johnson*, 3 F.4th at 1218.

Moreover, consistent with AEDPA's purposes of comity, finality, and federalism, a federal court's review under the AEDPA is *extremely* limited. Indeed, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood

and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. And, importantly, this "fairminded jurist" standard applies to all three AEDPA inquiries within § 2254(d)(1) and (d)(2). *See Dunn v. Madison*, 583 U.S. 10, 12 (2017) ("[T]he state court's determinations of law and fact were not 'so lacking in justification' as to give rise to error 'beyond any possibility for fairminded disagreement.'"). Further, even if § 2254(d)(1) or (d)(2) is satisfied, a federal court may only proceed to *de novo* review to determine if law and justice *require* relief. *Johnson*, 3 F.4th at 1225; *see Shinn v. Ramirez*, 596 U.S. 366, 377 (2022). Indeed, habeas relief is reserved only for "extreme malfunctions in the state criminal justice systems." *Richter*, 562 U.S. at 102 (citation omitted).

Also consistent with AEDPA's goals is the requirement that claims be exhausted, *i.e.*, presented to a state's highest court before they are entitled to any sort of relief on habeas review. *See* 28 U.S.C. § 2254(b); *see also Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006); *Bear v. Boone*, 173 F.3d 782, 785 (10th Cir. 1999); *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994). The exhaustion requirement "'is principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings.'" *Harris v. Champion*, 15 F.3d 1538, 1554 (10th Cir. 1994) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). And exhaustion occurs when the substance, or "substantial equivalent" of a claim has been "fairly presented" to the state court.

(Donald) Grant v. Royal, 886 F.3d 874, 891 (10th Cir. 2018); *Bland*, 459 F.3d at 1011; *see also Picard v. Connor*, 404 U.S. 270, 276-77 (1971). In other words, a petitioner must "provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (*per curiam*) (quoting *Picard*, 404 U.S. at 276-77).

Importantly, "[t]here are consequences for failing to properly present a claim" in state court. *(Donald) Grant*, 886 F.3d at 891. Consistent with these consequences, federal courts typically have three options when dealing with unexhausted claims. First, the unexhausted claim can be dismissed in order to allow for proper exhaustion in state court. *Bland*, 459 F.3d at 1012. Second, the unexhausted claim can be denied on the merits notwithstanding the lack of exhaustion. 28 U.S.C. § 2254(b)(2). *Moore v. Schoeman*, 288 F.3d 1231, 1232 (10th Cir. 2002). Third and finally, if the unexhausted claim would likely be deemed procedurally defaulted in state court, such claim can be anticipatorily procedurally barred in federal court. *(Donald) Grant*, 886 F.3d at 891-92; *Bland*, 459 F.3d at 1012.

An anticipatory bar precludes review "unless the prisoner 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." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (emphasis added). Cause is shown when a petitioner demonstrates that some objective factor

external to the defense causes that petitioner to fail to comply with a state's procedural rules; prejudice means actual resulting prejudice. *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *United States v. Frady*, 456 U.S. 152, 168 (1982). A fundamental miscarriage of justice, rather, is demonstrated by a credible showing of actual, *factual* innocence via new, reliable evidence. *McQuiggin v. Perkins*, 569 U.S. 383, 386-87 (2013); *Schlup v. Delo*, 513 U.S. 298, 324 (1995). Such a showing is exceedingly rare.

ARGUMENT AND AUTHORITY

GROUND "A"

THE FEDERAL DISTRICT COURT CORRECTLY REJECTED PETITIONER'S JURISDICTIONAL CLAIMS.

In Ground "A," Petitioner essentially combines Grounds I, II, III, V, and VIII from his habeas Petition into an omnibus claim that the State of Oklahoma lacked jurisdiction over him (Supp. Br., 19-38). Petitioner asserts he is an Indian and that his many crimes occurred in Indian Country, *i.e.*, the Citizen Potawatomi Nation ("CPN") Reservation *or* restricted allotted land (Supp. Br., 19-38). Petitioner argues that the state trial court and the OCCA unreasonably applied federal law and made an unreasonable factual determination in rejecting his jurisdictional claims below (Supp. Br., 18-19, 33-38). However, as will be demonstrated, the land upon which Petitioner's crimes occurred was *not* on a reservation or a restricted or trust

allotment. As such, the state courts, as well as the District Court, correctly determined that the State had the authority to prosecute Petitioner. Accordingly, habeas relief is unwarranted, and the District Court's decision should be affirmed.

A. Background:

Petitioner's jurisdictional claim—which has greatly evolved over the years—originated during his trial in Cleveland County. There, on the fourth day of Petitioner's 2015 trial, the parties explored a "jurisdictional issue" stemming from the testimony (on the third day of trial) of Chief Jose Chavez of the Cleveland County Sheriff's Office that the home was allegedly on "tribal land" (ROA Vol. VI, Tr. III 151, 154-56; Tr. IV 5). In exploring this "jurisdictional issue," the State presented the testimony of Chief Brad Jackson of the Absentee Shawnee Tribal Police Department (ROA Vol. VI, Tr. IV 5-21). Chief Jackson testified that Petitioner's house (where the crimes occurred), located at 16803 Creek Valley Lane (Lot No. 178, Pecan Creek Northeast Addition), Newalla, was not within any of the tribal trust land in Cleveland County (ROA Vol. VI, Tr. III 151; Tr. IV 8). The State also offered a map showing certain trust lands within Cleveland County and a land title document from the Cleveland County District Court Clerk's Office showing a portion of the title history for the property (ROA Vol. VI, Tr. IV 21-22; Court's Exs. 1-2). Based upon this evidence, the state district court ultimately determined that the State properly exercised jurisdiction over Petitioner (ROA Vol. VI, Tr. IV 24-25).

Following Petitioner's trial and prior to his sentencing, he moved to dismiss the matter for lack of jurisdiction, essentially arguing that his home was within a dependent Indian community (ROA Vol. VI, O.R. II, 205-08, 210-12, 216-66). Within that motion, Petitioner offered the following pieces of evidence:

> A Special Warranty Deed and a Correction Special Warranty Deed from the Housing Authority of the Absentee Shawnee Tribe to Petitioner on October 3, 2013, and June 18, 2014 (ROA Vol. VI, O.R. II 221-22).
>
> A map of the Pecan Creek Northeast Addition showing that it was located within Section 35, Township 10 North, Range 1, East of the Indian Meridian, in Cleveland County (ROA Vol. VI, O.R. II 223-25).
>
> A letter from President Benjamin Harrison, dated February 6, 1892, indicating that Joan Sloan, a member of the Absentee Shawnee Tribe, had received an allotment that included the west half of Section 35, Township 10 North, Range 1, East of the Indian Meridian, in connection with the Dawes Act of 1887 (ROA Vol. VI, O.R. II 226).
>
> A Warranty Deed from July 22, 1911, transferring the land at issue from Joan Sloan's heirs (his wife and son) to John Wilson (ROA Vol. VI, O.R. II 227-33).
>
> A copy of the 1867 Treaty with the Potawatomi (ROA Vol. VI, O.R. II 234-41).
>
> A copy of the Congressional Act of March 3, 1891 (ROA Vol. VI, O.R. II 242-61).
>
> A map, created by the Oklahoma Department of Transportation, of the "Tribal Jurisdictions in Oklahoma" (ROA Vol. VI, O.R. II 262).
>
> A copy of the Congressional Act of August 15, 1894 (ROA Vol. VI, O.R. II 263-66).

At sentencing, and after hearing argument, the state district court denied the request to dismiss (ROA Vol. VI, Sent. 12).

On direct appeal, Petitioner again challenged the State's jurisdiction, specifically arguing that his home was within a dependent Indian community (ROA Vol. II, 152-53, 198-201, 275-81). The OCCA, however, rejected this claim on the merits and also noted the lack of evidence, or any argument, that Petitioner's home was on trust land or a restricted allotment (ROA Vol. II, 152-53). Petitioner's convictions became final on July 26, 2017.

In post-conviction proceedings, Petitioner changed course and specifically argued (through standalone jurisdictional claims or ineffective assistance of counsel claims) that his home was within the confines of the CPN Reservation (ROA Vol. II, 359-64, 382-84, 442-48, 472-74, 481-99, 506-15, 538-39, 564-73, 772-801). In denying his first post-conviction application, the state district court barred the jurisdictional challenge as *res judicata*; in denying his second post-conviction application, the state district court determined that Congress disestablished the CPN Reservation in 1891 (ROA Vol. II, 390, 393, 530-32). In denying Petitioner's only proper post-conviction appeal, the OCCA summarily applied its *Wallace* ruling to Petitioner's jurisdictional challenge and determined that *McGirt* could not be applied retroactively to void Petitioner's final convictions (ROA Vol. II, 823-24).

Finally, as laid out above, Petitioner raised numerous jurisdictional claims in federal district court, challenging his convictions and sentences via various treaties, statutes, and cases (ROA Vol. I, 17-23, 28-31, 42-45, 80-113). In essence, Petitioner continued to allege, as he did during post-conviction proceedings, that his crimes occurred within the confines of the CPN Reservation. The District Court determined these reservation-based claims (*i.e.*, Grounds I, II, III, V, and VIII) had been exhausted to the OCCA on post-conviction appeal but that the OCCA had not adjudicated the claims on the merits (ROA Vol. IV, 229-35, 294-96). As such, the District Court reviewed the claims *de novo* and determined that Congress disestablished the CPN Reservation in 1891 (ROA Vol. IV, 236, 296-97). Ultimately, the District Court correctly denied habeas.

B. Preliminary Arguments:

Before proceeding to address Petitioner's arguments with respect to his omnibus jurisdictional challenge, Respondent must first raise some preliminary arguments. First, Respondent continues to assert, as he did below, that Petitioner greatly expanded his reservation-based jurisdictional claims when he filed his habeas Petition, rendering his claims *unexhausted* (ROA Vol. II, 46-53). *See* 28 U.S.C. § 2254(b)(3); *see also (Donald) Grant*, 886 F.3d at 890-91 (if claim is in a significantly stronger posture, it is no longer the substantial equivalent of the claim raised in state court). However, considering the District Court determined the

reservation-based claims were exhausted and subject to review, *but not waiving exhaustion*, Respondent will address the claims as if they were properly exhausted.

Second, Respondent also continues to assert, as he did below, that the OCCA's application of *Wallace* on post-conviction appeal constituted an adjudication on the merits *or* the application of an independent and adequate procedural bar as to Petitioner's reservation-based jurisdiction claims (ROA Vol. II, 39-45, 56-112, 122-24, 132-34). As such, the District Court's *de novo* review was improper. Indeed, at least one federal district court has agreed with Respondent, finding that, "[t]o the extent the OCCA's *Wallace*-based ruling on Petitioner's *McGirt* claim is considered to be the application of a procedural bar, this Court finds it was independent and adequate," and "to the extent the OCCA's ruling is considered to be an adjudication on the merits, it is neither contrary to, or an unreasonable application of, any clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts." *Fitzer v. Hamilton*, No. CIV-18-283-RAW-GLJ, at 13-18 (E.D. Okla. Jan. 2, 2025) (unpublished) (Attach. 1).

Here, the District Court determined that the OCCA did not adjudicate the reservation-based claims on post-conviction appeal because it "lumped" all of Petitioner's arguments under a *McGirt* theory even though Petitioner initially raised his post-conviction jurisdictional challenges prior to *McGirt* and also because Petitioner insisted his jurisdictional theory was distinct from *McGirt*. Further, as laid

out by the R&R, the District Court believed the OCCA did not adjudicate the merits of the claims by virtue of the application of its non-retroactivity bar (ROA Vol. IV, 230-32, 295). As to the first finding, the District Court was splitting hairs. No matter the cases, statutes, or treaties Petitioner cited, Petitioner's jurisdictional claims ultimately came down to two questions—was Petitioner Indian as of the date of his crimes, and did he commit the crimes within a reservation? In *McGirt*, the Supreme Court dealt with the reservation question head on (albeit with respect to the Muscogee Nation). Considering this, it was understandable for the OCCA to view the claim through the lens of *McGirt*. As to the second finding, the District Court should have found that the OCCA's application of its *Wallace* bar was, in that instance, just that—a bar precluding habeas review absent cause and prejudice.

Moreover, Petitioner's arguments in favor of *de novo* review fare no better (Supp. Br., 16-17).[6] Petitioner argues that no adjudication on the merits occurred because the *state district court* held a "snap hearing" during trial and considered minimal evidence (Supp. Br., 16-17). However, Petitioner's reservation-based claims were raised to, and rejected by, the OCCA. 28 U.S.C. § 2254(d). As such, the state district court's actions do not matter. Besides, the question before the state

[6] Respondent is unsure whether Petitioner is arguing that there was no merits adjudication in state court, *i.e.*, *de novo* review is warranted, or whether he is arguing that AEDPA deference is unwarranted considering the allegedly unreasonable determinations below (Supp. Br., 16-17).

district court was the dependent Indian community question, *not* the reservation question presented on habeas. Next, Petitioner also argues that "subject matter jurisdiction is never waived and can be raised at any time"—as such, he claims, no deference is owed to state courts when it comes to jurisdictional claims (Supp. Br., 16-17). This claim simply defies logic, as Petitioner cannot point to anything demonstrating that Congress has somehow carved out a jurisdictional exception to AEDPA's stringent requirements. *See Yellowbear v. Wyoming Att'y Gen.*, No. 23-8055, 2024 WL 94274, at *2 (10th Cir. Jan. 9, 2024) (unpublished) ("At bottom, the argument seeks 'a second chance' to have a federal court review his jurisdictional claim *de novo* rather than under AEDPA's deferential standard.").

Ultimately, however, because the District Court applied *de novo* review to Petitioner's omnibus jurisdictional claim below, Respondent will—*without abandoning the position that deference remains owed to the OCCA pursuant to the AEDPA considering its application of Wallace*—discuss the claim in the same manner. *See Gardner v. Galetka*, 568 F.3d 862, 879 (10th Cir. 2009) ("We agree with our sibling circuits that the correct standard of review under AEDPA is not waivable. It is, unlike exhaustion, an unavoidable legal question we must ask, and answer, in every case."); *see also (Donald) Grant*, 886 F.3d at 932. Furthermore, Respondent continues to assert, and does not waive, his assertion that *McGirt* cannot be applied retroactively to cases on collateral review, including Petitioner's case,

even on *de novo* review (ROA Vol. II, 40-42). *See Edwards v. Vannoy*, 593 U.S. 255, 262 (2021); *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality).

Third and finally, the allotment and diminishment arguments Petitioner repeatedly makes throughout his Supplemental Brief are unexhausted and waived. As relevant here, there are three types of Indian Country for purposes of criminal jurisdiction, as will be discussed in more detail below: 1) reservations; 2) dependent Indian communities; and 3) allotments, the Indian titles to which have not been extinguished. *See* 18 U.S.C. § 1151. As the District Court noted below, "Petitioner has raised two lines of jurisdictional arguments throughout various filings and hearings"—a dependent Indian community line of arguments[7] (at trial and on direct appeal) and a reservation line of arguments (in post-conviction and federal habeas proceedings) (ROA Vol. II, 198-201, 771-801; ROA Vol. IV, 296). Moreover, Petitioner's reservation-based arguments were essentially that the State does not have prosecutorial authority over Indians in the entirety of the historical boundaries of the CPN (ROA Vol. I, 80-113; ROA Vol. II, 45-46).

In other words, Petitioner *did not raise* the present allotment or diminishment arguments to the OCCA on direct or post-conviction appeal *or* to the District Court in the habeas proceedings below. Considering this, such arguments are unexhausted,

[7] It appears Petitioner has abandoned the dependent Indian community argument; as such, Respondent will not discuss it.

anticipatorily procedurally barred, *and* waived. *See Hancock*, 798 F.3d at 1021-22; *Owens*, 792 F.3d at 1246; *Stouffer v. Trammell*, 738 F.3d 1205, 1222 n.13 (10th Cir. 2013); *Parker v. Scott*, 394 F.3d 1302, 1327 (10th Cir. 2005); *see also Bland*, 459 F.3d at 1011; *Bear*, 173 F.3d at 785; *Dever*, 36 F.3d at 1534. However, *without conceding waiver or exhaustion*, Respondent will briefly discuss the meritless nature of Petitioner's allotment and diminishment arguments below.

C. The State Properly Exercised Jurisdiction:

Pursuant to the Major Crimes Act ("MCA"), the federal government has jurisdiction to prosecute major crimes (including those committed by Petitioner) committed by Indians in Indian Country. 18 U.S.C. § 1153. For purposes of the MCA, Indian Country is defined as

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. *See also Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022 (8th Cir. 1999). Moreover, also for purposes of the MCA, a person is Indian if he or she has some Indian blood and was recognized as Indian by a federally recognized tribe or the federal government at the time of the crime. *United States v. Diaz*, 679 F.3d

1183, 1187 (10th Cir. 2012); *see also United States v. Zepeda*, 792 F.3d 1103, 1113 (9th Cir. 2015) (*en banc*).

As relevant here, Petitioner claims he has ½ degree of Indian blood from the Kickapoo Tribe of Oklahoma, that he has ¼ degree of Indian blood from the Absentee Shawnee Tribe, and that he has been a member of the Kickapoo Tribe since 1973 (ROA Vol. II, 372-73, 578-81; Supp. Br., 21). While Respondent does not concede the authenticity of these claims, it is not necessary to determine whether Petitioner is Indian for purposes of the MCA. Even assuming he is, and despite Petitioner's claims otherwise, his crimes did not occur within a reservation or on a restricted or trust allotment. *See* 18 U.S.C. § 1151(a), (c).

Petitioner's crimes occurred at 16803 Creek Valley Lane (Lot No. 178, Pecan Creek Northeast Addition) in Newalla. The Pecan Creek Northeast Addition rests within Section 35, Township 10 North, Range 1, East of the Indian Meridian, in Cleveland County (ROA Vol. VI, O.R. II 221-25). In 1867, the United States entered a treaty with the CPN that created a reservation within modern-day Oklahoma, and that reservation included the land at issue here. *See* Treaty with the Potawatomi, 15 Stat. 531 (Feb. 27, 1867) ("1867 Treaty"). However, in 1867, Congress passed the General Allotment Act or Dawes Act. *See* General Allotment Act, 24 Stat. 388 (Feb. 8, 1887) ("Dawes Act"). The Dawes Act "empowered the President to allot most tribal lands nationwide without the consent of the Indian nations involved," and it

"restricted immediate alienation or encumbrance by providing that each allotted parcel would be held by the United States in trust for a period of 25 years or longer; only then would a fee patent issue to the Indian allottee." *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992).

Then, in 1891, Congress passed another Act specifically impacting the CPN. *See* Act of March 3, 1891, 26 Stat. 989 (Mar. 3, 1891) ("1891 Act"). The 1891 Act contained the following language:

> The Citizen Band of Pottawatomie Indians of the Indian Territory, in consideration of the fulfillment of the promises hereinafter made, *hereby cede, relinquish, and forever and absolutely surrender to the United States all their claim, title and interest of every kind and character in and to the following described tract of country . . .* [including] *Townships ten and eleven north, range one east*.
>
> . . .
>
> It is further agreed, as a further and only additional consideration for *such relinquishment of all title, claim, and interest of every kind and character in an to said lands*, that the United States will pay to said Citizen Band of Pottawatomie Indians, in said tract of country, within four months after this agreement shall have been ratified by Congress, the sum of one hundred and sixty thousand dollars for making homes and other improvements on the said allotments.

1891 Act, 26 Stat. 989, 1016, 1018 (emphasis added). The 1891 Act also, consistent with the Dawes Act, noted that certain allotments were to be created for tribal members. 1891 Act, 26 Stat. 989, 1017.

This allotment apparently occurred, as a letter from President Harrison demonstrates that John Sloan, a member of the Absentee Shawnee Tribe, was

allotted the "West half of section thirty five in Township Ten North of Range One East of the Indian Meridian, Oklahoma, Territory, containing three hundred and twenty acres" in 1892 (ROA Vol. VI, O.R. II 226). However, in 1911, Mr. Sloan's heirs sold the land, with the approval of the Secretary of Interior, to John Wilson for $2,700.00 (ROA Vol. VI, O.R. II 227-33). The paperwork concerning this sale noted that "[t]here are no reservations or withdrawals covering the land" (ROA Vol. VI, O.R. II 230). Following that sale, the only other evidence submitted in state court below indicates that the land then passed hands several times in the 1980s and 1990s, and that Cleveland County sold Lot No. 178 of Pecan Creek Northeast in 1991 to the Secretary of Housing and Urban Development, which then sold Lot No. 178 to the Housing Authority of the Absentee Shawnee Tribe in 1992 (ROA Vol. VI, Court's Ex. 2). Thereafter, the Housing Authority of the Absentee Shawnee Tribe, a state agency, *see* OKLA. STAT. tit. 63, § 1057 (2011), sold the land to Petitioner in 2013/2014 (ROA Vol. VI, Court's Ex. 2).

Considering the above evidence, Petitioner's crimes did not occur in Indian Country. Most importantly, it is clear Congress, through its 1891 Act, *disestablished* the CPN Reservation. This is made clear by the cession language ("hereby cede, relinquish, and forever and absolutely surrender"), as well as the promise of payment ($160,000.00) by the United States. *Solem v. Bartlett*, 465 U.S. 463, 470-71 (1984) ("When such language of cession is buttressed by an unconditional commitment

from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished."); *see also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 357 (1998) ("The 1894 Act contains the most certain statutory language, evincing Congress' intent to diminish the Yankton Sioux Reservation by providing for total cession and fixed compensation."); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 592 (1977); *DeCoteau v. Dist. Cnty. Ct. for Tenth Jud. Dist.*, 420 U.S. 425, 445 (1975). As the Supreme Court has explained,

> History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession" or an "unconditional commitment . . . to compensate the Indian tribe for its opened land." Other times, Congress has directed that tribal lands shall be "'restored to the public domain.'" Likewise, Congress might speak of a reservation as being "'discontinued,'" "'abolished,'" or "'vacated.'" Disestablishment has "never required any particular form of words" . . . But it does require that Congress clearly express its intent to do so, "[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.'"

McGirt, 591 U.S. at 904 (citations omitted).

Moreover, the fact that the 1891 Act allowed for allotments pursuant to the Dawes Act *does not* mean the CPN *Reservation* survived by virtue of these allotments. As pointed out by the Supreme Court in *McGirt*, questions concerning allotments and reservations are distinct ones. In other words, allotments alone do not end entire reservations, nor do allotments alone sustain entire reservations. *McGirt*,

591 U.S. at 906. As an example, in *McGirt*, the Supreme Court noted that the Muscogee Nation ceded a portion of its Reservation within Indian Territory to the United States in 1866. *Id.* However, during the subsequent Dawes Act and allotment era, the remainder of the Muscogee Reservation "survived allotment" because there was no similar law "terminating what remained." *Id.* Here, on the other hand, Congress allowed for allotments in the 1891 Act but also *expressly disestablished* the CPN Reservation through unambiguous statutory language. *See* 1891 Act, 26 Stat. 989, 1016, 1018; *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Collier*, 142 F.3d 1325, 1333 (10th Cir. 1998) (recognizing the tribes "ceded their interest in the land comprising the Potawatomi reservation" and repeatedly referring to "former" CPN Reservation). Considering this, § 1151(a) and § 1153 did not divest Oklahoma of jurisdiction here.[8]

In his Supplemental Brief, predicting Respondent's disestablishment argument, Petitioner vacillates between arguing that the CPN Reservation remains intact, that the CPN Reservation was only diminished and the Sloan allotment was "exempt from the cession language," or that his home rests upon the restricted Sloan

[8] For preservation purposes, Respondent asserts that he is aware of no clearly established federal law that Oklahoma would be divested of jurisdiction in this case even if the former CPN Reservation remains intact. Indeed, the exclusivity of the federal government's jurisdiction is not clearly established considering the Supreme Court's recent decision in *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 640-55 nn.2-3, 6, 9 (2022), specifically reserving such question. However, it is not necessary for this Court to reach that issue here.

allotment rather than a reservation (Supp. Br., 10-11, 13-15, 19-33). With respect to his latter two arguments, Petitioner did not make—or did not sufficiently raise—such arguments in his habeas Petition. Rather, the gist of his claim(s) assumed the existence of a CPN Reservation (ROA Vol. I, 17-23, 28-31, 42-45, 80-113; ROA Vol. II, 45-46 n.17). As such, these arguments should be considered waived. *See Childers*, 1 F.4th at 798 (new claims may not be considered on appeal, and this Court may not rewrite *pro se* petitions in an attempt to consider such new claims). In any event, Petitioner's preserved *and* waived arguments are meritless.

First, in cherry-picking select quotes and phrases from case law, Petitioner twists himself into a knot attempting to disprove disestablishment. For instance, Petitioner cites to two Supreme Court decisions he claims demonstrate the continued existence of a CPN Reservation (Supp. Br., 26-27 (citing *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 415 (2001); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991))). However, these cases are inapposite. In *C & L Enterprises*, while the Supreme Court did, in passing, note that the challenged contract at issue concerned a building "not on the Tribe's reservation or on land held by the Federal Government in trust for the Tribe," that passing remark cannot undo the *clear language of disestablishment* in the 1891 Act. *C & L Enters.*, 532 U.S. at 415. *Cf. McGirt*, 591 U.S. at 923 n.14 (references to a "hodge-podge of other" material,

including references to "former" reservations, was no substitute for clear Congressional intent through statutory language). This is particularly so when the reservation question was not before the Supreme Court at the time.

Moreover, in *Oklahoma Tax Commission*, the land at issue was not a reservation under the plain meaning of the word—rather, the land was *trust land*. And there, the Oklahoma Tax Commission was attempting to claim sovereign immunity for purposes of taxation did not apply to tribal trust land. The Supreme Court rejected this contention and explained that, for purposes of immunity, "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.'" *Oklahoma Tax Comm'n*, 498 U.S. at 511. In other words, nothing in that decision indicated a finding that the CPN Reservation had not been disestablished.

Aside from the above Supreme Court cases, Petitioner also attempts to use this Court's decision in *Collier* to his benefit (Supp. Br., 27-29). However, he misunderstands the greater context of *Collier*. In *Collier*, the Bureau of Indian Affairs ("BIA") attempted to place into trust, for the benefit of the Absentee Shawnee Tribe, land that rested within the *former* CPN Reservation. *Collier*, 142 F.3d at 1326-27. In attempting to do so, the BIA expressed its belief that it did not need to obtain consent from the CPN. Learning of this, the CPN initiated a lawsuit.

Id. Significantly, this Court's review in *Collier* was governed by 25 U.S.C. § 465 (renumbered as 25 U.S.C. § 5108), which stated:

> The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

Id. (quoting 25 U.S.C. § 465). Moreover, the relevant regulations for such acquisition were contained within 25 C.F.R. §§ 151.2(f), 151.8, which stated:

> Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma . . ., *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary.
>
> . . .
>
> An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

Id. (quoting 25 C.F.R. §§ 151.2(f), 151.8).

Thus, based upon the *applicable statute and regulations*, this Court had to determine whether the Absentee Shawnee had any pre-existing rights in the *former* CPN Reservation (as *former* reservations within Oklahoma qualified under that statute). *Id.* This Court ultimately answered that question in the negative. This Court

reasoned that the 1867 Treaty creating the *former* CPN Reservation was between the *United States and the CPN* and specifically set that land aside "for the exclusive use and occupancy" of the CPN—the Absentee Shawnee Tribe was only on the Reservation with the CPN's permission. *Id.* at 1328-32. This Court then determined that nothing contained within the 1891 Act abrogated the pre-existing ownership rights of the CPN from the 1867 Treaty—while Congress did allow for allotments to members of the Absentee Shawnee Tribe, nothing in the 1891 Act revealed that Congress viewed "the Absentee Shawnees as having rights in the [CPN Reservation]." *Id.* at 1332-34. As such, pursuant to statute, the BIA had to receive the "consent of the Potawatomi Tribe before acquiring such land [in the *former* CPN Reservation] in trust for the Absentee Shawnee Tribe." *Id.* at 1334. Petitioner's reliance on *C & L Enterprises*, *Oklahoma Tax Commission*, and *Collier* simply does not entitle him to any relief—the CPN Reservation has been disestablished.

Second, attempting to liken this case to *McGirt*, Petitioner claims the CPN Reservation was only *diminished* by the 1891 Act, that certain lands were allotted (including the Sloan allotment) and remained within the Reservation (pursuant to Article II), and that "575,870.42 acres of **excess lands** of the Reservation (*i.e.*, non-allotted) were ceded to the government" (pursuant to Article I) (Supp. Br., 23). Notably, as already stated, Petitioner did not make such an argument in his habeas Petition (ROA Vol. II, 45-46); as such, this argument is waived. *Owens*, 792 F.3d at

1246. However, in any event, this claim is easily disproved. This Court, in *Collier*, quoted legislative history concerning the 1891 Act:

> Our view is confirmed by the legislative history of the Act, which states that "[t]he said Citizen Band of Pottawatomie Indians are now, and for more than twenty years have been, occupying a reservation in the Indian Territory . . . *about 30 miles square, and containing an area of 575,870.42 acres. This tract was selected by said Indians under the provisions of the treaty of 1867*...." H.R.Rep. No. 51-3481, at 1 (1891).

Collier, 142 F.3d at 1333 (emphasis added). In other words, the 575,870.42 acres referred to in Article I of the 1891 Act was not merely "excess lands," it was the *entire CPN Reservation* as evidenced by Congressional records. Clearly, the CPN Reservation was not merely "diminished."

Persisting however, Petitioner strays from the unambiguous language of the 1891 Act and references contemporary sources, such as a Proclamation by President Harrison to prove that the CPN Reservation is still intact, albeit diminished (Supp. Br., 24-25, 29). However, in doing so, he ignores the clear dictates from the Supreme Court in *McGirt*:

> *To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress*. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation.
>
> . . .

> To avoid further confusion, we restate the point. *There is no need to consult extratextual sources when the meaning of a statute's terms is clear*. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up . . . not create" ambiguity about a statute's original meaning.

McGirt, 591 U.S. at 903, 916 (emphasis added) (citations omitted). Unlike in *McGirt*, the statutory language here is clear, and resorting to contemporary sources is in violation of the Supreme Court's directives.

Third, Petitioner argues, even assuming disestablishment or diminishment, that his home rests upon a restricted, retained, or trust allotment tracing back to Mr. Sloan, the original Indian allottee (Supp. Br., 29-33). *See* 18 U.S.C. § 1151(c). He argues that disestablishment did not divest the Sloan allotment of its status as Indian Country, and he argues that nothing in the title history of the allotment demonstrates that Indian title has been extinguished or that any restrictions were removed.[9] *However, as already noted, this argument should not be considered, as it is unexhausted, anticipatorily procedurally barred, and waived for Petitioner's failure to raise it to the OCCA or the District Court*. In any event, Respondent respectfully disagrees that Petitioner's home rests on a qualifying allotment. Notably, it is

[9] Petitioner references an Act of Congress from May 8, 1906, to prove that the trust period was extended and that any future sale would not extinguish any restrictions on the Sloan allotment (Supp. Br., 31-32). *See* Act of May 8, 1906, 34 Stat. 182 (May 8, 1906) ("Burke Act"). However, the Burke Act does not apply here, as the Act specifically states "[t]hat the provisions of this Act shall not extend to any Indians in the Indian Territory." Burke Act, 34 Stat. 182, 183.

important to define what types of allotments qualify as Indian Country, as "allotment" is a term of art:

> An Indian allotment may be either a parcel held in trust by the federal government for the benefit of an Indian (a trust allotment) or a parcel owned by an Indian subject to a restriction on alienation in favor of the United States (a restricted allotment). Under § 1151(c) both types of allotments are Indian country regardless of whether they are on or off an Indian reservation. In contrast, lands that are owned in fee without such restrictions on alienation do not qualify as Indian country under § 1151(c); but they may be classified as Indian country under § 1151(a) if they are within the boundaries of an Indian reservation.

Gaffey, 188 F.3d at 1022 (citations omitted).

Here, the letter from President Harrison noted that Mr. Sloan's *trust allotment* (the patent on which issued on February 6, 1892) would be subject to restrictions for twenty-five years. However, Mr. Sloan died in 1897, and the Department of the Interior specifically approved of a sale from Mr. Sloan's heirs to Mr. Wilson in 1911, *i.e.*, prior to the expiration of the twenty-five years (ROA Vol. VI, O.R. II 226-33). In other words, there is no evidence that Mr. Sloan (or his heirs) ever had a fee simple patent or *restricted* fee patent (*i.e.*, *restricted allotment*). *See Magnan v. Trammell*, 719 F.3d 1159, 1165-68, 1176-77 (10th Cir. 2013) (interests inherited from allottee were restricted pursuant to Acts of Congress regarding the Five Tribes, and restrictions were not met when land was later conveyed).

More importantly, at the time of the sale, it appears the land at issue ceased being a *trust allotment* conveyed pursuant to the Dawes Act and the 1891 Act,[10] as the land was no longer being held in trust for the benefit of Mr. Sloan and his heirs. *Gaffey*, 188 F.3d at 1022. Further, it does not appear Mr. Wilson was an Indian for purposes of federal law such that he was entitled to a trust or restricted allotment, and it does not appear that the land was transferred to Mr. Wilson with any sort of restrictions. Indeed, the documentation from the Department of the Interior specifically noted (twice) that there were "no reservations or withdrawals covering" the land at issue[11] (ROA Vol. VI, O.R. II 230-31).

Despite this, Petitioner attempts to place the onus on Respondent to prove that restrictions were removed from the land at issue between 1891/1892 (the original allotment) and 2013/2014 (when it was conveyed to him) (Supp. Br., 32). However, Petitioner carries the burden in this appeal, and it is his responsibility to show that any *restrictions even existed* when the land at issue was sold to Mr. Wilson. Based

[10] Respondent believes the land at issue remained a trust allotment (held by the United States) up until its sale in 1911 considering the proceeds from the sale were to be dispensed to Mr. Sloan's heirs for *specific* purposes, in certain amounts, and subject to approval by the Superintendent of the Shawnee Indian School or, in certain circumstances, the Commissioner of Indian Affairs (ROA Vol. VI, O.R. II 229-31).

[11] Petitioner insists that this language only related to a geological survey (Supp. Br., 37-38). However, this language is mentioned twice in the documentation from the Department of the Interior, and in one of those instances, is nowhere near the mention of the geological survey (ROA Vol. VI, O.R. II 230-31).

on the evidence above, it does not appear the land at issue was either a trust allotment or a restricted allotment following its sale in 1911. Furthermore, since that time, the land has changed hands multiple times, even being purchased by Cleveland County itself, and Petitioner offers no evidence those conveyances were in violation of any restrictions. As such, § 1151(c) and § 1153 did not divest Oklahoma of jurisdiction.

D. Conclusion:

As shown, Congress explicitly disestablished the CPN Reservation in 1891. As such, § 1153 and § 1151(a) did not bar Petitioner's prosecution in state court. Moreover, Petitioner has failed to demonstrate that his home rested within a surviving trust allotment or a restricted allotment at the time of his crimes. Thus, § 1153 and § 1151(c) likewise did not bar Petitioner's prosecution in state court. The District Court correctly denied habeas relief, and this Court should affirm.

GROUNDS "B," "C," and "D"

THE FEDERAL DISTRICT COURT CORRECTLY DETERMINED THAT PETITIONER'S *MIRANDA*, INEFFECTIVE ASSISTANCE OF COUNSEL, AND RAPE SHIELD CLAIMS WERE UNEXHAUSTED.

In Grounds "B" and "C," Petitioner argues that Grounds VI, VII, and XI from his habeas Petition are exhausted (Supp. Br., 39-48). He claims that he attempted to raise the *Miranda* (Ground VII) and ineffective assistance (Ground VI) claims in his untimely appeal of the state district court's first post-conviction decision; however, that appeal was untimely filed due to an error by the Cleveland County District Court

Clerk (Supp. Br., 39-40). He claims that he reasonably believed the OCCA would consider all the claims raised in his *previously dismissed* post-conviction appeal when it adjudicated his subsequent post-conviction appeal on the merits (Supp. Br., 40). He also argues that the OCCA never indicated what claims it was rejecting (Supp. Br., 41). As for the Rape Shield Act (Ground XI) claim, Petitioner argues he raised this claim on direct appeal. In any event, he argues he can overcome any anticipatory procedural bar applicable to these claims by showing cause and prejudice or, in Ground "D," a fundamental miscarriage of justice (Supp. Br., 41-50). However, as will be shown below, the District Court correctly determined Grounds VI, VII, and XI were unexhausted and barred. Moreover, Petitioner's attempts to overcome the exhaustion requirement are waived.

A. Background:

As relevant here, on direct appeal, Petitioner challenged the *state district court's actions* with respect to exclusion of evidence regarding S.R. in light of Oklahoma's Rape Shield Act, OKLA. STAT. tit. 12, § 2412 (2011), and he also challenged his *attorney's performance* as to this evidence (ROA Vol. II, 183-86, 191-94). Petitioner did not raise any sort of Rape Shield claim in his post-conviction proceedings. In his habeas Petition in federal district court, Petitioner raised a Rape Shield claim in Ground XI; however, there, he specifically focused on the *actions of the prosecutor* rather than the state district court or his counsel (ROA Vol. I, 55-57).

In his first post-conviction application to the state district court, Petitioner raised a claim regarding appellate counsel's failure to raise an ineffective assistance of trial counsel claim on direct appeal specifically in reference to *Miranda*—in other words, appellate counsel should have raised a claim that trial counsel erred in neglecting to raise the *Miranda* issue to the state district court (ROA Vol. II, 369). In his failed post-conviction appeal to the OCCA in Case No. PC-2018-816, Petitioner raised the same claim (ROA Vol. II, 453-54). However, Petitioner did not raise this claim in his subsequent substantive appeal to the OCCA in Case No. PC-2020-717. In his habeas Petition, Petitioner raised a similar claim in Ground VII, although that claim shifted the focus away from counsel (ROA Vol. I, 38-40).

In his first post-conviction application to the state district court, Petitioner alleged ineffective assistance of *appellate* counsel for failing to adequately raise a jurisdictional claim on direct appeal (ROA Vol. II, 358-64). Petitioner raised the same claim in his failed post-conviction appeal to the OCCA in Case No. PC-2018-816 (ROA Vol. II, 442-47). Petitioner then, again, raised this claim in his subsequent substantive appeal to the OCCA in Case No. PC-2020-717 (ROA Vol. II, 797-98). Then, in Ground VI of his habeas Petition to the federal district court, Petitioner raised a claim of ineffective assistance of *trial* counsel for failure to adequately challenge jurisdiction, apparently abandoning any challenge to appellate counsel's performance (ROA Vol. I, 33-36).

In light of this procedural history, the District Court determined that all the above claims were unexhausted. With respect to Ground VI, Petitioner never raised a claim of ineffective assistance of *trial* counsel in relation to jurisdiction to the OCCA; rather, he raised an ineffective assistance of *appellate* counsel claim. With respect to Ground VII, Petitioner simply did not ever properly raise this claim to the OCCA. Finally, with respect to Ground XI, Petitioner did not raise the substantial equivalent of the Rape Shield Act claim that he raised on direct appeal; instead, he shifted the entire focus of his claim (ROA Vol. IV, 236-46, 297-99). Moreover, the District Court determined that an independent and adequate anticipatory procedural bar was applicable to these claims (considering the OCCA would bar them should Petitioner attempt to return to state court), and Petitioner totally failed to overcome the bar by showing cause and prejudice or a fundamental miscarriage of justice (ROA Vol. IV, 236-46, 297-99).

B. The District Court Correctly Determined Petitioner's Claims are Unexhausted:

Here, the District Court's determination that Grounds VI, VII, and XI were unexhausted was correct. Petitioner has never properly raised a *Miranda* claim to the OCCA, nor has he raised a claim that *trial counsel* failed to effectively challenge jurisdiction. In other words, Petitioner has never *fairly presented* Grounds VI and VII to the OCCA. *Woodford v. Ngo*, 548 U.S. 81, 92 (2006); *Dever*, 36 F.3d at 1534. Additionally, as for Ground XI, Petitioner did not fairly present the substance of the

habeas version of the Rape Shield Act claim to the OCCA. While his habeas challenge to the *prosecutor's* actions is "somewhat similar" to his direct appeal challenge to the *state district court's* and *trial counsel's* actions, *similarity* alone is insufficient to satisfy the exhaustion requirement. *See Gray v. Netherland*, 518 U.S. 152, 163 (1996); *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *(Donald) Grant*, 886 F.3d at 891; *Bland*, 459 F.3d at 1011-12.

Despite this correct finding by the District Court, Petitioner claims Grounds VI, VII, and XI are exhausted. However, he offers no convincing argument. Petitioner essentially argues that the claims should be considered exhausted because he *tried* to exhaust them and was stymied by errors committed by the State and the OCCA which caused his first post-conviction appeal to be dismissed (Supp. Br., 39-41). He claims it was "absurd" to require him to raise his claims anew once he was granted a post-conviction appeal out of time, and he further argues he was not put on notice of any requirement to raise his claims anew (Supp. Br., 40). In other words, he essentially argues that he believed the OCCA was *considering every claim he ever raised*.[12] However, Respondent is not aware of any court that has ever held that merely *trying* (and doing so improperly) to exhaust is enough to satisfy AEDPA's

[12] He also argues that the OCCA's failure to delineate the claims it considered prevented him from seeking a rehearing petition to ensure all his claims were considered. However, Petitioner ignores the fact that rehearing petitions are not allowed in post-conviction proceedings pursuant to the OCCA's Rules. *See* Rule 5.5, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020).

exhaustion requirement, and Petitioner's argument seems to relate to cause more than it does to exhaustion.

In any event, admittedly, while Petitioner's first post-conviction appeal was dismissed due to an apparent error made by the Cleveland County District Court Clerk, the OCCA corrected that error by granting Petitioner an appeal out of time. Moreover, there is *nothing* to indicate Petitioner was unaware of the requirement that he raise all applicable claims in his subsequent appeal out of time (ROA Vol. II, 455-68, 530, 765-66). Indeed, in granting Petitioner an appeal out of time, the OCCA specifically directed Petitioner to file a petition in error and *supporting brief* pursuant to its Rules (ROA Vol. II, 765-66). *See* Rule 5.2, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2020). If Petitioner truly believed all his claims had been adequately raised via the first post-conviction appeal, surely he would have questioned the OCCA's directive to file a *new* brief. Moreover, Petitioner's allegations are belied by the fact that he filed a lengthy brief in Case No. PC-2020-717 and decided to again raise his ineffective assistance of appellate counsel claim despite raising it in the first post-conviction appeal in Case No. PC-2018-816. In other words, if he truly believed he did not need to re-raise his claims, it seems odd that he wasted precious space to do so. Ultimately, Petitioner has not demonstrated that the District Court was incorrect in finding his claims unexhausted.

C. Petitioner Waived Any Cause/Prejudice or Fundamental Miscarriage of Justice Arguments:

Considering Grounds VI, VII, and XI are unexhausted these claims are, as the District Court determined, subject to an anticipatory procedural bar. *Grant*, 886 F.3d at 891-92; *Bland*, 459 F.3d at 1012. This is so because the OCCA would find Petitioner's claims waived should he return to state court to exhaust them. *Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013). *See* OKLA. STAT. tit. 22, § 1086 (2022). Importantly, this Court has repeatedly found Oklahoma's waiver bar independent and adequate. *See, e.g.*, *Fontenot v. Crow*, 4 F.4th 982, 1024 (10th Cir. 2021); *Hale v. Gibson*, 227 F.3d 1298, 1331 n.15 (10th Cir. 2000); *Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008). Moreover, Petitioner does not allege dependence or inadequacy.

As such, and as the District Court also found, these claims are barred from habeas review unless overcome by cause and prejudice or a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750. Petitioner claims he can make such a showing (Supp. Br., 41-50). However, significantly, during the federal district court proceedings, Petitioner adamantly asserted that all his claims were exhausted to the OCCA—as such, *he never raised cause and prejudice or actual innocence arguments to the District Court* (ROA Vol. IV, 240-46, 297-99). Petitioner has thus waived any cause and prejudice or actual innocence arguments, and this Court should decline to review those arguments within the Supplemental Brief.

Notably, this Court has recently held that even gateway claims of actual innocence can be waived if not raised below. *See Childers*, 1 F.4th at 798. And "[a]lthough [a petitioner]'s pro se petition before the district court is entitled to a liberal construction, [this Court] 'may not rewrite a petition to include claims that were never presented.'" *Id.* (quoting *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999)); *see also id.* at 796 ("The district court did not address any allegations of cause, prejudice, or actual innocence to overcome the time-bar because [petitioner] did not raise any such claims."). Considering actual innocence arguments can be waived, cause and prejudice arguments can certainly be waived as well. *Cf. Harmon v. Sharp*, 936 F.3d 1044, 1066 (10th Cir. 2019) ("Petitioner did not raise this argument before the district court. By failing to do so, he has waived it."). Here, Petitioner cannot attempt to rewrite the past by raising cause and prejudice and actual innocence arguments. Ultimately, this Court's decision in *Childers* forecloses Petitioner's belated attempts to overcome the anticipatory bar here.

D. Conclusion:

As shown, the District Court correctly determined that Grounds VI, VII, and XI are unexhausted and subject to an independent and adequate anticipatory procedural bar. Furthermore, Petitioner's last-minute attempts to overcome the anticipatory procedural bar are waived considering he did not raise them to the District Court. Habeas relief is unwarranted.

CONCLUSION

Based on the above, federal habeas corpus relief is unwarranted. Therefore, Respondent respectfully requests this Court uphold the District Court's decision denying Petitioner's Petition for Writ of Habeas Corpus in its entirety.

STATEMENT OF ORAL ARGUMENT

Respectfully, Respondent believes oral argument is not necessary here, as "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument." *See* Fed. R. App. P. 34(a)(2)(C).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 12,998 words.

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CERTIFICATE OF SERVICE

X I hereby certify that on July 3, 2025, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrant(s):

Mr. Jason Wesoky
Jason.Wesoky@omtrial.com

s/TESSA L. HENRY

CERTIFICATE OF DIGITAL SUBMISSION

This is to certify that:

1. All required redactions have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the document filed with the Clerk;

2. The digital submissions have been scanned for viruses with Symantec Endpoint Protection, Updated 7/3/2025, and according to said program, are free of viruses.

s/TESSA L. HENRY

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

JOE DEWAYNE FITZER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV 18-283-RAW-GLJ**
	)	
CASEY HAMILTON, Warden,	)	
	)	
Respondent.	)	

OPINION AND ORDER

This matter is before the Court on Petitioner Joe Dewayne Fitzer's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. (Dkt. 1). Petitioner is a pro se state prisoner in the custody of the Oklahoma Department of Corrections who currently is incarcerated at Great Plains Correctional Center in Hinton, Oklahoma. He is attacking his conviction and 55-year sentence in Okmulgee County District Court Case No. CF-2015-25 for Domestic Assault and Battery, Third Offense, After Conviction of Two Felonies. *See Fitzer v. State*, No. F-2016-230 (Okla. Crim. App. Jan. 4, 2017) (Dkt. 44-1 at 1). He sets forth the following grounds for habeas relief:

I. [Petitioner's] 55-year sentence should be modified to remedy errors that occurred in the trial's sentencing stage.

II. The State of Oklahoma lacked jurisdiction to prosecute because the Major Crimes Act gives the federal government exclusive jurisdiction to prosecute crimes against persons committed by Indians in Indian Country.

III. Petitioner was deprived of the effective assistance of counsel on appeal.

(Dkt. 1 at 5-7).[1]

Respondent alleges Petitioner has not exhausted his state court remedies with respect to any

[1] The Court's citations refer to the CM/ECF header pagination.

of the raised grounds for the purpose of federal habeas corpus review, and Respondent expressly does not waive exhaustion. (Dkt. 44 at 31) (citing 28 U.S.C. § 2254(a)(3)). Respondent has submitted the state district court and appellate court records and transcripts for consideration.

Background

A review of the trial transcripts shows the following testimony was presented at trial:

On January 30, 2015, Barbara Ehrman was moving from her apartment on the ground floor of a fourplex apartment building in Okmulgee, Oklahoma. (Dkt. 45-4). She already had taken down the curtains and drapes, so she had a clear view out the front window. *Id.* at 33-34. When she stepped to the window to take a coffee break, her attention was drawn to voices she heard outside, and she saw Petitioner dragging Benita Buckley by her neck, hair, and arms. *Id.* at 35-37. Petitioner was cursing, and Ms. Buckley was screaming. *Id.* at 57. It appeared that Ms. Buckley was trying to get off the porch to run away from Petitioner. *Id.* at 37. Petitioner grabbed Ms. Buckley's hair and neck and started beating her head against the cement stairs. *Id.* The weather was freezing, however, Ms. Buckley was barefoot and wearing only a T-shirt and cut-off pants similar to shorts. *Id.* at 38. Ms. Buckley could take "one or two steps," but he would grab her back tightly and never let her go, beating her head "against the sidewalk or whatever was near." *Id.*

Ms. Ehrman called 911 and reported what she was seeing to the police. *Id*. at 40. The recording of the phone call, State's Exhibit No. 1, was played to the jury without objection. *Id.* at 42. Okmulgee County Police Officer William Scott responded to the call and arrived at the scene at approximately 11:53 a.m. *Id.* at 59-62. He observed a White male and an Indian female standing

by the road. *Id.* at 63. He later learned it was Petitioner and Benita Buckley, a married couple.[2] *Id.* at 70.

As he was driving up, Officer Scott saw Petitioner grab Ms. Buckley, turn her around, and shove her back with sufficient force to almost make her fall. *Id.* at 65. After she stumbled, the officer jumped out of his patrol car and approached them. *Id.* at 66. When Officer Scott told them to stop, Petitioner and Ms. Buckley walked away from him. *Id.* at 72-73.

Officer Scott confronted them and observed that Ms. Buckley had several lacerations or cuts on both sides of her face. *Id.* at 67. There was blood coming from her nostrils and red marks around her neck, which indicated to him that Ms. Buckley recently had been choked. *Id.*

Ms. Ehrman gave Ms. Buckley some clothing to protect her from the freezing weather. *Id.* at 43-44. Ms. Buckley then was able to observe Ms. Buckley's injuries and confirm what the officer saw, including bleeding from her lips and face and visible marks on her neck. *Id.* at 44-51.

Officer Scott saw no injuries on Petitioner, and Petitioner did not indicate that he had been injured in any way. *Id.* at 69. When the officer put wrist restraints on him, Petitioner blurted out, "[W]e fight. We make up. We do this all the time. We're going through counseling for it right now." *Id.* at 71-72.

During the second stage of trial, Petitioner stipulated to two misdemeanor convictions of Domestic Abuse-Assault and Battery, in Supplemental Information A. He also stipulated to two felony convictions for Domestic Abuse-Assault and Battery and for Unlawful Possession of a Controlled Drug with Intent to Distribute in Supplemental Information B. *Id.* at 108-112, 118, 121-

[2] In his first application for post-conviction relief, Petitioner described Ms. Buckley as his common-law wife. (Dkt. 44-6 at 4).

22.

Standard of Review

Under the Anti-Terrorism and Effective Death Penalty Act, federal habeas corpus relief is proper only when the state court adjudication of a claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Ground I: Petitioner's 55-Year Sentence

Petitioner alleges his 55-year sentence should be modified because of the introduction during the sentencing phase of Judgment and Sentence documents indicating he previously received suspended sentences for his prior convictions that were used to enhance his present sentence. (Dkt. 1 at 5; Dkt. 1-1 at 10-13).[3] Respondent alleges this ground for relief must be rejected, because Petitioner fails to allege a federal basis for this purely state-law claim. In addition, Petitioner failed to exhaust this issue as a federal claim and the claim lacks any clearly established Supreme Court law.

During the second stage of trial, the State introduced Petitioner's prior Judgments and Sentences as State's Exhibits Nos. 6-9, which were used to enhance his sentence. (Dkt. 45-7 at 11-14, 16-18, 21-23, 27-29). Petitioner did not object to the admission of the four Judgments and

[3] The Court construes Petitioner's pro se pleadings liberally but does not act as his advocate. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

Sentences, and in fact, as stated above, he stipulated to all of them. (Dkt. 44-38 at 35-40; Dkt. 45-4 at 108-112, 118, 122). He had three prior convictions for domestic assault and battery. (Dkt. 45-4 at 121). The third domestic abuse conviction in February 2009 was a felony, and in March 2013, he was convicted of possession of a dangerous drug with intent to distribute. *Id.* at 121-22.

Petitioner received the following sentences for these convictions:

(1) for the February 2007 domestic abuse, assault and battery, misdemeanor conviction in Case No. CM-2006-436, "6 months suspended, 90 days to serve," with a fine of $1,130 (State's Exhibit 6; Dkt. 45-7 at 10-14);

(2) for the February 2007 domestic abuse misdemeanor conviction in Case No. CM-2006-536, a fine of $1,704 (State's Exhibit 7; Dkt. 45-7 at 15-18);

(3) for the February 2009 domestic abuse felony conviction in Case No. CF-2008-219, "a term of 2 years with all but the first 6 months suspended" plus a fine of $1,000 (State's Exhibit 8; Dkt. 45-7 at 20-23); and

(4) for the 2013 drug possession felony conviction in Case No. CF-2012-420A, "a term of 10 years with the first 1 year to be served in [the Okmulgee County Criminal Justice Authority] and the balance suspended," with a fine of $1,000. (State's Exhibit 9; Dkt. 45-7 at 26-29).

Notably, the prosecutor never made any mention of the fact that portions of Petitioner's prior sentences had been suspended. Indeed, after admitting the exhibits, the prosecutor made no comments except to announce that the State rested its case. (Dkt. 45-4 at 115). The only argument the prosecutor made based on the exhibits was that they indicated the State had yet to get Petitioner's attention about domestic abuse. (Dkt. 45-4 at 121). Asserting that Petitioner had committed "[v]ery serious crimes," the prosecutor further stated:

> [W]hat that tells us is Mr. Fitzer is a chronic abuser, and has a documented history of abusing others that are close to him. These were not one-time things. Oops, I was stupid, I lost my temper, and I did something I shouldn't have done. This is a documented history before you.
>
> And nothing yet has worked.
>
> By his own admission, he said, we're in counseling for it. That didn't work. The State has charged him before.
>
> That didn't work.
>
> What's to keep him from harming another loved one?
> . . .
>
> Because you love someone doesn't mean they sign up to be a punching bag. And we know for a fact that people in his life have been just that.

(Dkt. 45-4 at 176-77).

On direct appeal, Petitioner raised Ground I as he raises it to this Court. (Dkt. 44-2 at 7-9). His claim before the state court was based exclusively on state law--in particular, the Oklahoma Court of Criminal Appeal's (OCCA) then-binding line of cases limiting the State's use in the sentencing stage of evidence of prior suspended sentences or of probation or parole. *Id*. at 8-9. In addition to the total lack of citation to any federal case or the Constitution, Petitioner provided absolutely no indication he was attempting to federalize the claim, without so much as a reference to "due process." The only reference to a constitutional right was a repeat of the OCCA's plain-error standard of review that did not even specify if the federal or state constitution was implicated: "Under plain error review, this Court will provide relief if it concludes that the errors were not harmless or that the errors constitute a miscarriage of justice or a substantial violation of a constitutional or statutory right." *Id.* at 7 (citing *McIntosh v. State*, 237 P.3d 800, 803 (Okla. Crim. App. 2010)). The OCCA rejected Petitioner's state-law claim as follows:

> PROPOSITION. APPELLANT'S 55-YEAR SENTENCE SHOULD BE MODIFIED TO REMEDY ERRORS THAT OCCURRED IN THE TRIAL'S SENTENCING STAGE.
>
> After thorough consideration of this proposition, and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we affirm. While the Judgment and Sentence documents offered in the punishment stage of trial did make reference to partially suspended sentences, Appellant did not ask to have this information redacted, so our review is only for plain error. *Mitchell v. State*, 2016 OK CR 21, ¶¶ 29-30, [387 P.3d 934, 945]. The prosecutor never drew attention to the possibility of probation or parole in general, or to the fact that Appellant had received some leniency in the past. "A judgment and sentence which indicates that the defendant received a suspended sentence, *standing alone*, does not constitute plain error." *Stewart v. State*, 2016 OK CR 9, ¶ 17, 372 P.3d 508, 512 (emphasis added). Appellant's sole proposition of error is therefore denied.

Fitzer v. State, No. F-2016-230 (Okla. Crim. App. Jan. 4, 2017) (Dkt. 44-1 at 1-2) (emphasis in original).

Respondent alleges Ground I fails as a threshold matter for several reasons. First, habeas review is available only where a petitioner alleges he is imprisoned "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Petitioner, however, makes no such allegation. His habeas petition simply states that his sentence should be "modified" because of sentencing-stage "errors" (Dkt. 1 at 5-6), with no citation to the federal Constitution or even a mention of "due process." He incorporates his direct appeal briefing on this issue, filed with the petition, however as summarized above, that briefing also did not provide any federal basis for this claim. *Id*. at 5 (citing Dkt. 1-1 at 4-13).

"Although [a] pro se petition before the district court is entitled to a liberal construction, we may not rewrite a petition to include claims that were never presented." *Childers v. Crow*, 1 F.4th 792, 798 (10th Cir. 2021) (citation omitted), *cert. denied*, 142 S. Ct. 2718 (2022). Even with a liberal construction, Petitioner cannot be construed as having raised a federal claim in Ground I.

Further, even if Petitioner's pro se habeas petition could be liberally construed as raising a federal claim to this Court, it is questionable whether his identical arguments in a counseled brief before the OCCA fairly presented a federal claim. A habeas petitioner who challenges an evidentiary ruling in state court is not automatically entitled to then claim in habeas proceedings that his due process right to a fair trial was violated by the admitted evidence:

> If state courts are to be given the opportunity to correct alleged violations of prisoners' federal rights, they must surely be alerted to the fact that the prisoners are asserting claims under the United States Constitution. If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.

Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (per curiam).

Moreover, if a petitioner wishes to exhaust a federal due process claim, the claim must "be fairly presented to the state court, which means that the petitioner has raised the substance of the federal claim in state court." *Grant v. Royal*, 886 F.3d 874, 890 (10th Cir. 2018) (internal quotation marks and citations omitted), *cert. denied*, 139 S.Ct. 925 (2019). [I]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." *Gray v. Netherland*, 518 U.S. 152, 163 (1996); *see also Duncan*, 513 U.S. at 364-366 & n.1 (holding petitioner, who argued in state court that prior-crime evidence was erroneously admitted under state law and asked state court to find error was not harmless under state law, "did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment," and instructing that petitioner's argument that evidence was "irrelevant and inflammatory" and its admission resulted in a "miscarriage of justice" was not sufficient to

signal federal claim); *cf. also Rivera v. Illinois*, 556 U.S. 148, 158, 160 (2009). ("[E]rrors of state law do not automatically become violations of due process" because "[t]he Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial" (quotation marks omitted)).

Put more generally, "[t]o satisfy exhaustion, . . . the habeas petition's focus--as well as the alleged error that it identifies--cannot depart significantly from what the petitioner had presented to the state court." *Grant*, 886 F.3d at 891; *cf. Duncan*, 513 U.S. at 366 ("[M]ere similarity of claims is insufficient to exhaust.").

Here, even if Petitioner's claim is liberally construed to raise a federal claim to this court, no such claim was raised to the OCCA. Instead, Petitioner based his OCCA claim entirely on state law. (Dkt. 44-2 at 8-9). He did not cite to any federal case or the Constitution or otherwise indicate he was attempting to federalize the case. Because he did not fairly apprise the OCCA that he was raising a federal claim or give the OCCA a fair opportunity to pass on the claim, any federal claim he now is construed to raise is unexhausted.

Further, any federal version of the unexhausted claim is subject to an anticipatory bar. Petitioner would face an independent and adequate state procedural bar if he were to return to state court and assert a federalized version of Ground I in a subsequent application for post-conviction relief. Specifically, if Petitioner were to return to state court and present the claim in another post-conviction application and appeal to the OCCA, the OCCA would bar the claim as successive, because Petitioner could have raised it on direct appeal or in any of his prior post-conviction applications and appeals. *See* Okla. Stat., tit. 22, § 1086 (2021). The Tenth Circuit has held § 1086 to be independent and adequate. *Smith v. Workman*, 550 F.3d 1258, 1274 (10th Cir. 2008).

A federal court may not grant relief on a claim defaulted in state court based on an independent and adequate rule "unless the prisoner 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." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Here, Petitioner does not acknowledge that any federalized version of his claim is unexhausted, let alone show cause and prejudice or a fundamental miscarriage of justice to overcome his default.

Petitioner makes no arguments that his sentence was not properly enhanced by his prior convictions, that a sentencing jury cannot consider a defendant's prior convictions in arriving at the appropriate sentence and that judgment and sentence documents would have been inadmissible even with the sentencing information redacted, or that the prosecutor made any comment on the suspended sentences. Instead, Petitioner's claim is that the unredacted admission of his judgment and sentence documents in the sentencing stage, standing alone, violated his constitutional rights. Respondent maintains that absolutely no Supreme Court authority supports such a claim. *Cf. Holland v. Allbaugh*, 824 F.3d 1222, 1229 n.2 (10th Cir. 2016) ("We also note that the Ninth Circuit has gone so far as to hold no clearly established Supreme Court law exists with respect to evidentiary claims at all" (citing *Holley v. Yarborough*, 568 F.3d 1091 (9th Cir. 2009)); *Id*., 568 F.3d at 1101 ("[The Supreme Court] has not yet made a clear ruling that admission of irrelevant or overtly prejudicial evidence constitutes a due process violation sufficient to warrant issuance of the writ.")

Petitioner bases his claim only on a particular line of OCCA cases that once limited the use of information regarding a defendant's prior sentences in sentencing. OCCA case law, however, is not the relevant "measuring stick . . . Supreme Court law is." *Grant v. Royal*, 886 F.3d 874, 944

(10th Cir. 2018). Further, the OCCA has since overruled the main case relied upon by Petitioner, *Hunter v. State*, 208 P.3d 931 (Okla. Crim. App. 2009). Specifically, in *Terrell v. State*, 425 P.3d 399, 401 (Okla. Crim. App. 2018), the OCCA held as follows:

> Appellant claims that the references to suspended sentences in the exhibit and the prosecutor's argument violated the holding in *Hunter v. State*, 2009 OK CR 17, 208 P.3d 931. Prior to *Hunter*, this Court had recognized that jurors were not to speculate on pardon or parole, thus, the parties were prohibited from making an unmistakable comment on pardon or parole. *See Martin v. State*, 1983 OK CR 168, ¶ 22, 674 P.2d 37, 41-42; *Starr v. State*, 1979 OK CR 126, ¶¶ 12-13, 602 P.2d 1046, 1049; *Satterlee v. State*, 1976 OK CR 88, ¶ 26, 549 P.2d 104, 111; *Bell v. State*, 1962 OK CR 160, ¶ 18, 381 P.2d 167, 173. Without discussion or analysis, *Hunter* expanded this rule to prohibit both the introduction of judgment and sentence documents reflecting receipt of a suspended sentence and explicit references to probation in opening or closing argument. *Hunter*, 2009 OK CR 17, ¶ 10, 208 P.3d at 933-34. However, the introduction of the judgment and sentence is a proper part of the proof of a former felony conviction. *Camp v. State*, 1983 OK CR 74, ¶¶ 2-3, 664 P.2d 1052, 1053-54. Thus, we were forced in *Stewart v. State*, 2016 OK CR 9, ¶ 17, 372 P.3d 508, 512, to draw a distinction between unmistakable comments upon probation or parole and the instance where the judgment and sentence documents simply reflect receipt of a deferred or suspended sentence.
>
> Today, we recognize that the rule announced in *Hunter* is simply unworkable. Jurors are free to consider the relevant proof of a prior conviction including any evidence that a defendant previously received probation, suspension, or deferral of a sentence and any acceleration or revocation of such a sentence. *See Honeycutt v. State*, 1967 OK CR 154, ¶¶ 18-20, 432 P.2d 124, 128 (finding proof of suspension of sentence by trial court proper proof of former felony conviction). The receipt of a probationary term may be viewed as supporting both greater and lesser punishment depending on the facts of the case. The jury as a whole can make this determination.
>
> Similarly, counsel should be permitted to discuss the relevant proof of prior conviction in closing argument. This Court has long recognized that both parties are afforded wide latitude to discuss the evidence, including reasonable inferences therefrom, and make recommendation as to punishment in the second stage of a trial. *See Hooks v. State*, 2001 OK CR 1, ¶ 40, 19 P.3d 294, 314 (recognizing parties' wide latitude to discuss evidence and reasonable inferences from evidence in second stage closing argument); *Jones v. State*, 1988 OK CR 267, ¶ 9, 764 P.2d 914, 917 (prosecutor's recommendation of life imprisonment found proper where no unmistakable reference to possibility of parole); *Van White v. State*, 1999 OK CR 10, ¶ 69, 990 P.2d 253, 272 ("[P]rosecution may recommend the punishment to be

> given."); *Mahorney v. State*, 1983 OK CR 71, ¶ 17, 664 P.2d 1042, 1047 ("On numerous occasions this Court has upheld cases where the prosecutor has recommended sentences to the jury."). Since the jury is free to consider the relevant proof of a prior conviction, both parties are afforded wide latitude to discuss this evidence and make recommendation as to punishment in the second stage of a trial. As *Hunter* is inconsistent with both of these lines of cases, it must be and is overruled.

Terrell, 425 P.3d at 401 (paragraph numbering omitted).

Not only has the OCCA overruled *Hunter*, it found that Petitioner's case was distinguishable from *Hunter*, because the prosecutor never drew attention to the suspended sentences. (Dkt. 44-1 at 1-2).

Respondent asserts that while *Terrell* was decided after the OCCA's 2017 opinion in the present case, *Terrell* held that "[j]urors are free to consider the relevant proof of a prior conviction including any evidence that a defendant previously received probation, suspension, or deferral of a sentence and any acceleration or revocation of such a sentence." *Id.* When *Terrell* reached the United States District Court for the Western District of Oklahoma in a § 2254 habeas action, the Magistrate Judge reasoned that *Terrell*'s "reversal of previous case law was, of course, simply a matter of state law unreviewable on federal habeas," and, as to the prosecutor's statements in that case regarding Terrell's prior convictions and sentences, "Mr. Terrell has cited no Supreme Court cases supporting his contention that the prosecutor's statements violated the Due Process Clause." *Terrell v. McCoy*, No. CIV-19-908-F, 2020 WL 8268564, at *5 (W.D. Okla. Dec. 30, 2020) (unpublished) (citation omitted), *report and recommendation adopted*, No. CIV-19-908-F, 2021 WL 261698 (W.D. Okla. Jan. 26, 2021) (unpublished) (agreeing with the report and recommendation's analysis on de novo review). Neither the Western District Magistrate Judge nor the District Judge expressed any reservations about the OCCA's new rule.

Here, the Court finds Petitioner has presented to the OCCA and to this Court a claim based entirely on a state-law rule that is grounded in a line of OCCA cases that has been partially overruled. In addition, Petitioner has cited no Supreme Court case suggesting constitutional error occurred, and the only relevant authority in fact suggests the opposite. Therefore, this claim is not reviewable in habeas proceedings, and Ground I of the petition is denied.

Ground II: Subject-Matter Jurisdiction

Petitioner alleges in Ground II of the petition that the State of Oklahoma lacked subject-matter jurisdiction to prosecute him, because the Major Crimes Act, 18 U.S.C. § 1153(a), gave the federal government exclusive jurisdiction to prosecute crimes against persons committed by Indians in Indian Country. Petitioner first raised this claim on December 14, 2017, in a post-conviction application in the state district court, alleging he is a registered member of the Choctaw Indian Nation, and his crime occurred within the Creek Indian Nation. (Dkt. 44-6 at 5). The application was denied on May 15, 2018:

> . . . Defendant fails to allege or provide evidence of tribal affiliation, membership or citizenship. Defendant also fails to allege whether or in which provision the crimes for which he was prosecuted, tried and convicted are enumerated in the Major Crimes Act. The Court further declines to find the ruling in *Murphy v. Royal* [875 F.3d 896 (10th Cir. 2017)] "is not the law in Oklahoma . . ." as all matters in *Murphy* address federal law, federal jurisdiction, and do not involve interpretation of Oklahoma State law. Further, the State fails to cite any authority to advance the proposition that *Murphy* is inapplicable to Oklahoma Post Conviction procedures.
>
> Accordingly, Defendant's Application for Post Conviction Relief and for Evidentiary Hearing is hereby denied.

Fitzer, No. CF-2015-15-13 (May 15, 2018) (Dkt. 44-9) (emphasis omitted).

Petitioner appealed the denial to the OCCA in Case No. PC-2018-695 (Dkts. 44-10, 44-11), which declined jurisdiction, rejected tendered motions to supplement the appeal record, and

dismissed the attempted post-conviction appeal on January 8, 2019, for failure to file a timely notice. (Dkt. 44-12 at 3).

On January 31, 2019, Petitioner filed in the Okmulgee County District Court a motion for an out-of-time post-conviction appeal. (Dkt. 44-13). The motion included copies of his Choctaw Nation of Oklahoma Tribal Membership Card and his Bureau of Indian Affairs Certificate of Degree of Indian Blood, both dated August 8, 2018. *Id.* at 15.

On December 27, 2019, the state district court recommended that Petitioner be allowed to file his appeal out of time (Dkt. 44-15), and on April 9, 2020, the OCCA granted Petition's request for an out-of-time post-conviction appeal in Case No. PC-2020-75. (Dkt. 44-18). Petitioner filed a petition in error and a brief in support on May 7, 2020, in Case No. PC-2020-310. (Dkts. 44-19, 44-20). On May 29, 2020, the OCCA affirmed the denial of post-conviction relief, finding that Petitioner's post-conviction application based on *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017), was premature, because a petition for writ of certiorari for *Murphy* was pending in the United States Supreme Court. (Dkt. 44-21).[4]

On July 20, 2020, Petitioner filed in the state district court a pro se second application for post-conviction relief, raising the jurisdiction claim pursuant to *Murphy* and *McGirt v. Oklahoma*,

[4] *Murphy* held that Congress had not disestablished the Creek Reservation, therefore the crime at issue occurred in Indian Country as defined in 18 U.S.C. § 1151(a). "Because Mr. Murphy is an Indian and because the crime occurred in Indian country, the federal court has exclusive jurisdiction, [and] Oklahoma lacked jurisdiction. *Murphy*, 866 F.3d at 1233 (citing 18 U.S.C. § 1153(a), *amended and superceded on denial of rehearing en banc by* 875 F.3d 896 (10th Cir. 2017).

591 U.S. 894 (2020) (Dkt. 44-22 at 3),[5] and the State filed a response on October 28, 2020 (Dkt. 44-23). On April 22, 2021, Petitioner's counsel filed an amended post-conviction application, again presenting the *McGirt* Indian Country claim. (Dkt. 44-24). On April 23, 2021, the district court entered an agreed order granting Petitioner's post-conviction application based on lack of jurisdiction and dismissing the convictions in Case Nos. CF-2015-25 and CF-2015-287 (Bail Jumping Conviction).[6] (Dkt. 44-25). A handwritten notation at the bottom of the order states, "Stay ordered 30 days 5/26/21 @ 1:30 pm." *Id.* at 2. On May 26, 2021, the state district court extended the stay pursuant to *McGirt* until July 28, 2021. (Dkt. 44-5 at 15). The state district court docket sheet for this case indicates that on the next day, May 27, 2021, a "motion to stay execution judgment (order)" was filed, however, the docket does not indicate which party made the filing. (Dkt. 44-5 at 16).

On September 24, 2021, the State of Oklahoma filed a motion to vacate agreed order for post-conviction relief, alleging that pursuant to *State ex rel. Matloff v. Wallace*, 497 P.3d 686, *cert. denied*, __ U.S. __, 142 S.Ct. 757 (2022), *McGirt* could not be applied retroactively to Mr. Fitzer. (Dkt. 44-26 at 2-3). On October 27, 2021, the state district court entered an order vacating the April 23, 2021, agreed order and denying post-conviction relief in Case Nos. CF-2015-25 and CF-2015-287. (Dkt. 44-27). (Dkt. 44-27). On January 11, 2022, the state district court docketed a second order vacating agreed order for post-conviction relief and denying application for post-conviction

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[5] *McGirt* held that the Creek Reservation in Oklahoma had not been disestablished by Congress and that Mr. McGirt should have been prosecuted in federal court under the Major Crimes Act.

[6] According to the Oklahoma Department of Corrections Offender website at https://okoffender.doc.ok.gov, Petitioner discharged the Bail Jumping sentence on February 9, 2021. The Court takes judicial notice of the offender website pursuant to Fed. R. Civ. P. 201. *See Triplet v. Franklin*, 365 F. App'x 86, 92, 2010 WL 409333, at *6 n.8 (10th Cir. Feb. 5, 2010).

relief, although the order stated it was entered on October 27, 2021. (Dkt. 44-28). The second order included Findings of Fact and Conclusions of Law. *Id.*

The record shows that Petitioner's direct appeal, which challenged his 55-year sentence, was affirmed on January 4, 2017, in OCCA Case No. F-2016-230. (Dkt. 33-1). His conviction became final on April 4, 2017, upon expiration of the 90-day period for a certiorari appeal to the United States Supreme Court. *McGirt* was decided more than three years later on July 9, 2020.

Respondent maintains that Ground II does not warrant habeas relief, and the OCCA's refusal to grant relief on Petitioner's *McGirt* claim must not be disturbed. When the Supreme Court decided *McGirt*, it recognized that many state inmates who attempt to seek release under its decision would nonetheless remain in state custody "thanks to well-known state and federal limitations on postconviction review in criminal proceedings." *McGirt*, 140 S. Ct. at 2479. In *Wallace*, the OCCA declined to apply retroactively *McGirt*'s new rule of criminal procedure "in a state post-conviction action to void a final conviction." *Id.* at 497 P.3d at 688.

After examining its own precedent and having sought guidance from federal case law, the OCCA decided in *Wallace* that "[f]or purposes of [its] state law retroactivity analysis, *McGirt*'s holding" was not "substantive." *Id*. at 691. *McGirt*, the OCCA explained, "did not determine whether specific conduct is criminal, or whether a punishment for a class of persons is forbidden by their status," but instead was "procedural" in that it "effectively decided which sovereign must prosecute major crimes committed by or against Indians within" historic Muscogee (Creek) lands. *Id*. The OCCA also held that *McGirt* was "new" in that it "imposed new and different obligations on the state and federal governments" and "it was not dictated by, and indeed, arguably involved controversial innovations upon, Supreme Court precedent," pointing to the reasoned disagreement

between the Justices of the Supreme Court. *Id*. at 691-92.

> New rules of criminal procedure generally apply to cases pending on direct appeal when the rule is announced, with no exception for cases where the rule is a clear break with past law. But new rules generally do *not* apply retroactively to convictions that are final, with a few narrow exceptions.

Id. at 689 (citations omitted) (emphasis in original).

> *McGirt* was never intended to annul decades of final convictions for crimes that might never be prosecuted in federal court; to free scores of convicted prisoners before their sentences were served; or to allow major crimes committed by, or against, Indians to go unpunished.

Id. at 693.

To the extent the OCCA's *Wallace*-based ruling on Petitioner's *McGirt* claim is considered to be the application of a procedural bar, this Court finds it was independent and adequate, and Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner 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." *Coleman*, 501 U.S. at 750. To be independent, a state procedural rule must rely on state law, rather than federal law, as the basis for the decision. *Id*. at 1145. To be adequate, "a state procedural rule must be 'strictly or regularly followed' and applied 'evenhandedly to all similar claims.'" *Id*. (quoting *Duvall v. Reynolds*, 139 F.3d 768, 796-97 (10th Cir. 1998)).

This Court finds that to the extent the OCCA's ruling is considered to be an adjudication on the merits, it is neither contrary to, or an unreasonable application of, any clearly established Supreme Court law, nor was it based on an unreasonable determination of the facts. *See* 28 U.S.C.

§ 2254(d). Petitioner's conviction was final before *McGirt* was decided, and the OCCA has determined that "*McGirt* and our post-*McGirt* decisions recognizing [the Cherokee, Choctaw, and Chickasaw Reservations] shall not apply retroactively to void a conviction that was final when *McGirt* was decided." *Wallace*, 497 P.3d at 689. The Court, therefore, concludes that Ground II of the petition must be denied.

Ground III: Ineffective Assistance of Appellate Counsel

Petitioner claims in Ground III of the petition that his appellate counsel was ineffective in failing to argue on direct appeal that the State lacked subject-matter jurisdiction. Respondent alleges this claim is unexhausted, or in the alternative, that it fails on the merits. Petitioner does not present any argument concerning this claim in his reply to Respondent's response to the petition. (Dkt. 48).

Petitioner originally raised this claim on December 14, 2017, in his first post-conviction application. (Dkt. 44-6 at 14-16). When the first post-conviction proceeding ultimately reached the OCCA on appeal, on May 29, 2020, the OCCA ruled that both of Petitioner's *Murphy*-based claims--his freestanding jurisdictional claim and the ineffective assistance of appellate counsel claim for failing to raise the jurisdictional claim--were premature:

> On post-conviction appeal Petitioner argues that as an American Indian and enrolled member of the Choctaw Nation, he cannot be prosecuted for domestic abuse by the State of Oklahoma due to a lack of jurisdiction. He also claims appellate counsel was ineffective for failing to raise this issue on appeal. Petitioner cites to *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017).
>
> In an order filed May 15, 2018, the District Court denied Petitioner's post-conviction application finding the ruling in *Murphy* is not the law in Oklahoma.
>
> The Tenth Circuit order issued November 16, 2017, in *Murphy* granted the unopposed motion to stay the mandate pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court. As a petition for a writ of certiorari was filed in the United States Supreme Court on February 6, 2018, and the matter is,

> therefore, stayed until the Supreme Court's final disposition, Petitioner's post-conviction application based on the Tenth Circuit's holding in *Murphy* is premature.
>
> Accordingly, the denial of Petitioner's application for post-conviction relief is **AFFIRMED**.

(Dkt. 44-21 at 2) (emphasis in original).

As discussed above, the Supreme Court's *McGirt* decision was issued shortly afterward on July 9, 2020, and the State moved to stay these federal habeas proceedings, arguing Petitioner should be required to return to the state court to give the OCCA a full and fair opportunity to consider Petitioner's jurisdictional claims--plural--post-*McGirt*. ("In this case, due to the supervening change in federal law announced in *McGirt* on July 9, 2020, by the United State [sic] Supreme Court, Petitioner should be required to return to state court to exhaust his *Murphy/McGirt claims* as the OCCA was not given a full and fair opportunity to resolve the *claims*.") (Dkt. 25 at 8) (emphasis on "claims" added).

Upon his return to state court, however, Petitioner raised only his freestanding jurisdiction claim, never giving the OCCA an opportunity to rule on his ineffective assistance of appellate counsel claim post-*McGirt*[7] (*see generally* Dkts. 44-22, 44-34, 44-37). Therefore, Petitioner's ineffective assistance of appellate counsel claim is unexhausted, and Respondent asserts he expressly does not waive exhaustion. *See* 28 U.S.C. § 2254(a)(3). Further, Petitioner has not shown cause and prejudice or a fundamental miscarriage of justice to overcome his default. *See Coleman*, 501 U.S.

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[7] Respondent concedes that this Court's minute order directing Petitioner to return to state court referred only to a single claim: "Granting Respondent's motion to stay federal habeas proceedings for Petitioner to exhaust his *Murphy* claim in state court in light of the U.S. Supreme Courts [sic] decision in *McGirt v. Oklahoma*. Petitioner is directed to notify the Court within fourteen (14) days after his claim has been exhausted in the Oklahoma Court of Criminal Appeals." (Dkt. 29).

at 750. As such, because Ground III is unexhausted, it cannot provide Petitioner with habeas relief or serve as a cause to excuse the default of Ground II. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (holding that an ineffective-assistance claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted, and unless the petitioner can satisfy the cause and prejudice standard for the procedurally defaulted ineffective assistance of counsel claim, that claim cannot serve as cause for another procedurally defaulted claim).

Respondent also asserts that Ground III is without merit. To establish constitutionally ineffective counsel, Petitioner must show: (1) that his attorney's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Petitioner bears the burden of proving that counsel's performance was unreasonable, and this Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 687, 689. With respect to prejudice, Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

Regarding the prejudice standard, the "likelihood of a different result must be substantial, not just conceivable." *Richter*, 562 U.S. at 112. "Counsel's errors must be so serious as to deprive Petitioner of a fair trial, a trial whose result is reliable." *Id*. at 104 (citation). Petitioner need not show that counsel's actions more likely than not altered the outcome, "but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case." *Id*. at 111-112 (internal quotation marks omitted).

The same standard applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Therefore, Petitioner must show that appellate counsel's

performance was unreasonable and that he suffered prejudice, that is, that there is a reasonable probability that, had the errors now complained of been raised, the result of his appeal would have been different. *Id*. To determine whether appellate counsel's decision not to raise a particular issue amounts to deficient performance, the Court must evaluate the merits of the omitted claim. *Id*. If the issue was so plainly meritorious that it would have been unreasonable to exclude it, even if the appeal was otherwise strong, then counsel's performance may have been unreasonable. *Id*. If the issue has some merit, but is not so compelling that its exclusion would have been unreasonable, then its merit should be weighed against the rest of the appeal, taking into account the deference that a court must give to any professional judgment on the part of counsel. *Id*. Finally, if the issue is meritless, counsel was not deficient for failing to raise it. *Id*.

"[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim." *Miller v. Mullin*, 354 F.3d 1288, 1298 (10th Cir. 2002) (citation omitted). Instead, an appellate attorney must select out those claims he believes, in light of his professional judgment, have the best chances of success. *See Jones v. Barnes*, 463 U.S. 745, 751-753 (1983). Although the Supreme Court has suggested that "it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim," it has also acknowledged that "it is difficult to demonstrate that counsel was incompetent" in selecting the issues he or she did raise. *Robbins*, 528 U.S. at 288. Only when ignored claims are clearly stronger than those raised will a petitioner be able to prevail. *Id.*

Here, Petitioner has not shown that appellate counsel was ineffective in failing to challenge the States's subject-matter jurisdiction on direct appeal. Petitioner does not allege, let alone show, that he informed counsel of his Indian status. Direct appeal counsel filed his opening brief in June

2016, more than a year before the Tenth Circuit's November 2017 *Murphy* decision and years before the Supreme Court's July 2020 *McGirt* decision. Although Petitioner's jurisdictional claim was available long before his direct appeal, the decisions in *Murphy* and *McGirt* were unexpected. *See McGirt*, 140 S. Ct. at 2499 (Roberts, C.J., dissenting) ("[F]or 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently . . . ."). *See also Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir. 2002) ("When reviewing an ineffective assistance of counsel claim, we must make every effort 'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time.' . . . Consequently, we have rejected ineffective assistance of counsel claims where a defendant 'faults his former counsel not for failing to find existing law, but for failing to predict future law' and have warned 'that clairvoyance is not a required attribute of effective representation.'" (citations omitted)).

Precedent at the time of Petitioner's direct appeal actually foreclosed a jurisdictional claim. The OCCA had declined to hold that the Muscogee Nation Reservation was intact. *Murphy*, 124 P.3d at 1207-08. Prior to that ruling, this Court had found that there was "no doubt the historic territory of the Creek Nation was disestablished as part of the allotment process." *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1290 (E.D. Okla. 2007). Appellate counsel was not ineffective for failing to raise a claim that found no support in then-existing precedent and was in fact foreclosed by precedent. *See Toledo v. United States*, 581 F.3d 678, 681 (8th Cir. 2009) (holding that sentencing counsel reasonably declined to pursue objections that had no support in the law at the time of sentencing, and although the Supreme Court issued an intervening decision that changed the

law, "sentencing counsel's performance was not constitutionally deficient for failure to anticipate future changes in the law").

Here, appellate counsel reasonably declined to raise a claim not supported by precedent, and counsel did not prejudice Petitioner in not raising a claim that would have been denied. The *McGirt* ruling was issued in 2020, long after Petitioner's conviction became final in 2017. Counsel cannot have been ineffective for failing to raise an unsupported claim. *See also Bentley v. Harvonek*, No. CIV-22-160-C, 2022 WL 1400285, at *4-5 (W.D. Okla. Mar. 30, 2022) (unpublished) (report and recommendation finding claim of ineffective assistance of appellate counsel to be meritless for failing to raise a Major Crimes Act claim when the petitioner's appeal pre-dated *McGirt*), *report and recommendation adopted by* 2022 WL 1321552 (W.D. Okla. May 3, 2022).

Further, in *Wallace*, the OCCA held that *McGirt*'s holding, and its impact on state criminal jurisdiction in a vastly expanded Indian Country, was a procedural change of law that does not apply retroactively to void convictions already final when the Supreme Court decided *McGirt*. *Wallace*, 497 P.3d at 688, 694. *See also Sanders v. Pettigrew*, No. CIV 20-350-RAW-KEW, 2021 WL 3291792, at *5 (E.D. Okla. Aug. 2, 2021) (concluding that *McGirt* "did not break any new ground" or "recognize a new constitutional right, much less a retroactive one"). In the present case, Petitioner's convictions were final well before the Supreme Court issued its *McGirt* ruling in 2020. Based on this, this Court concludes there was not a reasonable probability that raising this issue on appeal would have resulted in Petitioner's ultimately obtaining appellate relief. Accordingly, Petitioner's third ground for relief based on appellate counsel's failure to challenge the state court's jurisdiction must be denied.

Certificate of Appealability

The Court further finds Petitioner has failed to make a "substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2). In addition, he has not shown "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether [this] court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Therefore, a certificate of appealability cannot be issued.

ACCORDINGLY, Petitioner's petition for a writ of habeas corpus (Dkt. 1) is denied, and he is denied a certificate of appealability.

IT IS SO ORDERED this 2nd day of January 2025.

Ronald A. White

RONALD A. WHITE
UNITED STATES DISTRICT JUDGE