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

CHARLES ALAN DYER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. CIV-16-941-C**
	)	
JIM FARRIS, Warden,	)	
	)	
Respondent.	)	

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

The Attorney General of the State of Oklahoma, E. Scott Pruitt, appearing on behalf of the above-named Respondent, in response to the Petition for Writ of Habeas Corpus on file herein shows the Court as follows:

1. Petitioner, Charles Alan Dyer, an inmate in the custody of the State of Oklahoma at the Lexington Correctional Center, *pro se*, has filed with this Court a petition seeking federal habeas corpus relief.

2. Petitioner is currently incarcerated pursuant to a judgment and sentence entered in the District Court of Stephens County, Case No. CF-2010-17. Petitioner was convicted at jury trial on one count of Child Sexual Abuse. The trial court sentenced Petitioner to 30 years imprisonment. Petitioner was represented by counsel. Petitioner appealed to the Oklahoma Court of Criminal Appeals (OCCA) which affirmed his conviction and sentence by Summary Opinion on June 20, 2013 (Briefs and Opinion attached as Exhibits 1-3).[1]

---

[1]Petitioner was tried originally on April 25-28, 2011, but that trial ended with a deadlocked jury which resulted in a mistrial. A second trial commenced on January 23, 2012, but also

(continued...)

3. Petitioner filed an application for post-conviction relief on April 24, 2014, which the trial court denied on October 22, 2014. Petitioner appealed to the OCCA which affirmed the denial of post-conviction relief on November 19, 2015 (Exhibits 5 & 6).

4. Petitioner's petition is timely filed pursuant to 28 U.S.C. § 2244(d)(1).

5. Petitioner has exhausted his remedies in state court through direct appeal and in his post-conviction appeal to the OCCA on all his claims except for his claim in his habeas brief Ground One, Proposition II(J) regarding not taking an alleged plea offer. As explained further below in Ground One, Proposition II(J), that part of his claim of ineffective assistance of trial counsel in Proposition II(J) regarding the plea offer was never fairly presented to the OCCA on direct appeal or in his post-conviction appeal. However, an "anticipatory procedural bar" applies because Petitioner would be procedurally barred under Oklahoma law if he returned to State court to exhaust the claim. *Hain v. Gibson*, 287 F.3d 1224, 1240 (10th Cir. 2002); *see also Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013) (claims that could have been raised on direct appeal are waived (citing Okla. Stat. tit. 22, § 1086)); *Berget v. State*, 907 P.2d 1078, 1081-82 (Okla. Crim. App. 1995) (claims that could have been raised in first post-conviction application are waived).[2] Petitioner has exhausted his remedies in state court on the remaining grounds raised in his habeas brief.

---

[1](...continued)
ended in a mistrial when it was discovered the State inadvertently mailed juror survey forms to several members of Petitioner's jury. Petitioner's Rule 3.11 Motion filed Jan. 17, 2013, is attached as Exhibit 4.

[2]If this Court disagrees with the procedural bar, the State does not affirmatively waive the issue of exhaustion. 28 U.S.C. § 2254(B(3).

6. No evidentiary hearing is required because Petitioner has failed to show that a factual basis for the claims was not made in state court **and** that the facts underlying the claims would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offenses. *See Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) (holding that evidence introduced in federal court has no bearing on § 2254(d)(1) review, and "[i]f a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court.").

7. The following transcripts are available and have been conventionally filed with the Court under separate cover: Tr. Preliminary Hearing, July 19, 2010; Tr. Hearing, Apr. 4 & 8, 2011; Tr. Bond Revocation hearing, Apr. 25, 2011; Tr. Testimony of Valerie Dyer, Apr. 25 & 26, 2011,[3] Tr. Testimony of H.D., Apr. 26, 2011, Tr. Testimony of Jessica Taylor, Apr. 26, 2011, Tr. Testimony of Marvin Dutton, Apr. 27, 2011, Tr. Testimony of Christopher Lemons, Apr. 27, 2011, Tr. Testimony of Sara Ferrero, Apr. 27, 2011, Tr. Testimony of Ashleigh Sosebee, Apr. 27, 2011, Tr. Testimony of Joshua Seely, Apr. 27, 2011, Tr. Testimony of Amy Dark, Apr. 27, 2011, Tr. Testimony of Janet Dyer, Apr. 27, 2011, Tr. Testimony of Dr. Waters, Apr. 27, 2011, Tr. Testimony of Amanda Monsalve, Apr. 27, 2011, Tr. Testimony of Justin McCowan, Apr. 28, 2011, Tr. Testimony of Charles Alan Dyer, Apr. 28, 2011; Tr. Motion Hearing, Aug. 1, 2011; Tr. Motion for Continuance hearing,

---

[3]For reasons not clear from the record, the transcript of Petitioner's first trial consists of the testimony of the individual witnesses broken into separate transcripts.

Aug. 12, 2011; Tr. Hearing on Change of Venue, Dec. 30, 2011; Trial transcripts (second trial), Days 1 & 2, Jan. 23-24, 2012; Trial transcripts (third trial), Days 1-4, Apr. 16-19, 2012; Sentencing Tr., June 5, 2012; Original Record, Stephens County Case No. CF-2010-17, Vols. I & II;[4] and, State's Exhibits 1-5.

The Respondent is not aware of any proceedings that were recorded but not transcribed.

STANDARD OF REVIEW

As this Court is aware, habeas 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.

---

[4]References to the Original Record and transcripts are indicated by page as follows:

Original Record	(O.R.__)
April 8, 2011 evidentiary hearing	(Tr. 4/8/2011__)
April 25-28, 2011 trial testimony	(Tr. 4/27/2011 [witness]___)
August 12, 2011 hearing	(Tr. 8/12/2011__)
Sept. 11, 2011 motions hearing	(Tr. 9/11/2011__)
December 30, 2011 motion hearing:	(Tr. 12/30/2011__)
January 24 & 25, 2012 trial:	(Tr. 1/24/2012__)
April 16-19, 2012 Trial Day 1, 2, 3 or 4:	(Tr. Day__ at__)
Sentencing hearing:	(Tr. S __).

28 U.S.C. § 2254(d). "It is the petitioner's burden to make this showing and it is a burden intentionally designed to be 'difficult to meet.'" *Owens v. Trammell*, 792 F.3d 1234, 1242 (10th Cir. 2015) (internal citation omitted). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal citations omitted). The United States Supreme Court interpreted the § 2254(d) standard in *Williams v. Taylor*, 529 U.S. 362, 413 (2000) and held that:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the State court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Moreover, application by the state court must be objectively unreasonable. *Id.* at 409. In other words, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

The Supreme Court has reiterated that before a state prisoner can obtain habeas corpus relief from a federal court he must show:

> [T]hat 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 of fair minded disagreement. The reasons for this approach are familiar. "Federal habeas review of state convictions frustrates both States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."

Richter, 562 U.S. at 103 (internal citations omitted).

State court decisions which are not "contrary to" clearly established Supreme Court law can be subjected to federal habeas relief only if they are not merely erroneous, but "an unreasonable application" of clearly established federal law, or based on "an unreasonable determination of the facts." *Early v. Packer*, 537 U.S. 3, 7-8 (2002). "AEDPA thus imposes a 'highly deferential standard for evaluating state-court rulings,' and 'demands that state-court decisions be given the benefit of the doubt.'" *Renico v. Lett*, 559 U.S. 766, 773 (2010) (citations omitted). The Supreme Court emphasized, "AEDPA prevents defendants - and federal courts - from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts." *Renico,* 559 U.S. at 779. The Supreme Court reenforced that emphasis on relying on state court review in *Pinholster*, where the High Court held:

> Section 2254(d) is part of the basic structure of federal habeas jurisdiction, designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions. [T]he state trial on the merits [should be] the main event, so to speak, rather than a tryout on the road for what will later be the determinative federal habeas hearing.

Id. 563 U.S. at 186 (internal citations and quotations omitted).

Finally, there has to be clearly established Supreme Court law with facts that are closely related to those in the case at issue before the federal habeas court need determine whether the state court's holding was "contrary to" or an "unreasonable application" of clearly established federal law. *House v. Hatch*, 527 F.3d 1010, 1016-1017 (10th Cir. 2008) (citing *Carey v. Musladin*, 549 U.S. 70 (2006)). "A legal principle is 'clearly established' within the meaning of this provision only when it is embodied in a holding of [the United States Supreme Court.]" *Thaler v. Haynes*, 559 U.S. 43, 47 (2010). Clearly established federal law "[i]ncludes only the holdings, as opposed to the dicta, of [the Supreme Court's] decisions." *White v. Woodall*, 572 U.S.___, 134 S. Ct. 1697, 1702 (2014) (internal citations omitted). The Supreme Court held in *Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (internal citations omitted), "[b]ecause our cases give no clear answer to the question presented, . . . , it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law,'" therefore making habeas relief "unauthorized" under 28 U.S.C. § 2254(d)(1). In addition, Petitioner must show that the factual findings of the OCCA were based on an "unreasonable determination of the facts" under § 2254(d)(2). *Richter*, 562 U.S. at 98. The habeas court's evaluation of the reasonableness of the State court's determination of the facts is based on the State court record. *Byrd v. Workman*, 645 F.3d 1159, 1172 (10th Cir. 2011) (internal citations and quotations omitted). With this standard of review in mind, Petitioner is not entitled to relief and the petition must be dismissed.

STATEMENT OF FACTS

As the State showed on direct appeal, Valerie Dyer and Petitioner were married in 2000, when Valerie was sixteen-years old and Petitioner was nineteen. After living with Petitioner's parents in Stephens County for about one month, the couple moved to California where Petitioner was stationed with the Marine Corps. In 2002, at the end of Petitioner's duty, the couple returned to Oklahoma. Valerie was six months pregnant at the time. H.D. was born in November of 2002. Petitioner did not want a child, and his marriage to Valerie deteriorated from the time he learned she was pregnant, eventually ending in divorce (Tr. Day 2 at 23, 27).

A month after H.D. was born, Petitioner told Valerie they were moving to Tennessee, where Petitioner's sister, Amy Dark, lived. They lived in Jonesboro, Tennessee, for two or two and one half years, living first with Petitioner's sister, then after six months, they got their own place. Petitioner worked, then quit to take classes, and Valerie got a job at a Wal-Mart store. After a year and a half, Valerie quit her job, then Petitioner quit college and reenlisted in the Marine Corps. The couple left Tennessee and returned to Oklahoma while Petitioner waited to go back to the Marines. They were in Oklahoma a year and a half, then, when H.D. was almost three, Petitioner was readmitted to the Marines, and they moved to Camp Pendleton, California (Tr. Day 2 at 40). According to Valerie, Petitioner was uninterested in H.D. and unsupportive of Valerie, and their relationship was terrible. They fought constantly.

When H.D. was about four, Petitioner started to show more interest in H.D. Valerie thought that had a positive effect on their marriage. They were not arguing as much, and their relationship was more relaxed and normal. However, in late September of 2008, when H.D. was almost six, Petitioner bought plane tickets to send Valerie and H.D. back to Oklahoma. Petitioner had one year remaining in the Marines, and told Valerie he was sending her and H.D. back to Oklahoma to save money for that year. Valerie and H.D. returned to Oklahoma, and lived with Petitioner's parents for a couple of months. According to Valerie, she and Petitioner spoke by phone only about once a week, and he never asked to speak with H.D. (Tr. Day 2 at 42-44).

Petitioner wanted Valerie to live with his parents, but Valerie decided to get her own home. She got a job and rented a house for herself and H.D. Petitioner did not send her any money to help. Their relationship was not good. Valerie was suspicious about Petitioner's motive for sending her and H.D. away. Valerie started to question Petitioner, and finally, about six months after he sent Valerie to Oklahoma, he told her he did not want her anymore, and H.D. was in the way. Valerie was angry but it did not come as a shock (Tr. Day 2 at 51). Petitioner accused Valerie of adultery, and Valerie admitted she dated other men, but only after Petitioner told her he was finished with her. Petitioner also accused her of smoking marijuana, and she admitted she did that (Tr. Day 2 at 55-56, 147).

In the summer of 2009, Petitioner left the Marine Corps and returned to Oklahoma. He lived with his parents, in a tent on their property (Tr. Day 3 at 180). Valerie testified that although Petitioner was hurt that she was dating someone, and filed for divorce, they were

civil toward each other, and Petitioner was seeing H.D. Per their agreement, Petitioner would pick up H.D. to spend every other weekend with him (Tr. Day 2 at 57-58, 61)

Also in the summer of 2009, Petitioner traveled to California and returned with Valerie's former friend, Amanda Monsalve, informing Valerie that Monsalve was going to live with him (Tr. Day 2 at 66-68). Monsalve had been Valerie's best friend when she was in California. Valerie was shocked and hurt. She had shared everything with Monsalve, and felt betrayed when Monsalve moved in with defendant. Petitioner and Monsalve rented a house near Petitioner's parents. He had been seeing H.D. frequently before going to California, and it was the same when he and Monsalve moved in together. From that time until Christmas of 2009, Valerie had a civil relationship with defendant and Monsalve. Petitioner was seeing H.D. frequently, which Valerie thought was great (Tr. Day 2 at 72).

In December of 2009, when H.D. was seven years old, H.D. stayed with Petitioner and Monsalve for most of the Christmas break. At the end of her visit, sometime between the end of December and the first week of January, Valerie picked up H.D. from Petitioner's home and noticed H.D. was crying and not acting like herself. Valerie asked what was wrong, and H.D. said, "nothing. I don't want to talk about it." Valerie took H.D. home and drew a bath for her. The tub was filling up and H.D. kept crying. H.D. repeated that she did not want to tell Valerie what was wrong. Valerie pressed her to tell, and H.D. said, "I'm afraid of what Dad might do." Valerie took off H.D.'s clothes, and H.D. was complaining of her "bo-bo," referring to her vagina. "It hurts, Mama." Valerie thought H.D. had a urinary tract infection, but H.D. kept saying, "I don't want him to find out." H.D. sat in the

tub and Valerie noticed her vagina was not normal. It was very red and swollen and open (Tr. Day 2 at 72-75).

Valerie kept asking H.D. what was wrong, and H.D. kept saying, "I don't want him to find out. I don't want – I don't want Daddy to find out," "Mommy, you pinky promise that you won't tell Daddy." Valerie said, "I pinky promise" and after a minute, H.D. said, "Mommy, he touches my bo-bo." She grabbed herself in the vaginal area and said, "Daddy touches it." Valerie left the room so H.D. would not see her cry. She did not know what to do (Tr. Day 2 at 79-80). Valerie's cousin, Laurie Crosby, and her family were at her house. Crosby saw Valerie crying and asked what was wrong. Valerie told Crosby what H.D. said to her. Valerie went back to the bathroom. H.D. was getting out of the tub. As Valerie helped H.D. dry off, H.D. kept repeating, "Mommy, you pinky promised. You pinky promised." Valerie agreed not to tell (Tr. Day 2 at 83).

The next day Valerie reported H.D.'s disclosure to law enforcement. First she went to the Department of Human Services, then to the Women's Haven, then to the Duncan police. The police said it was out of their jurisdiction, so she went to the sheriff's department and filed a report. The sheriff's department made an appointment for H.D. to be examined by a doctor, and also for a forensic interview (Tr. Day 2 at 84, 91-92).

While Valerie was at the sheriff's department, Petitioner phoned her about having H.D. stay with him the next weekend. Valerie did not tell Petitioner she was at the sheriff's department, and told Petitioner she wanted to keep H.D. with her that weekend. Petitioner

was asking questions and sounded nervous on the phone, as if he knew there was something going on (Tr. Day 2 at 85-86).

Forensic interviewer Jessica Taylor testified she interviewed H.D. on January 12, 2010 at the Mary Abbott Children's House in Norman. Ms. Taylor described her credentials and interviewing methodology, and testified as to H.D.'s disclosures of Petitioner's sexual abuse during the interview. Ms. Taylor testified that H.D.'s responses and details were consistent with an uncoached child (Tr. Day 3 at 46).

Following the direct and cross examination of Ms. Taylor, the jury viewed her videotaped interview with H.D. (Tr. Day 3 at 6, 89, State's Ex. 3).

A review of the videotape reflects that Ms. Taylor initially asked H.D. general questions, explained the configuration of the interview room, and pointed out the video recording equipment. Ms. Taylor asked H.D. a number of questions to establish rapport and that H.D. knew the difference between the truth and a lie. Ms. Taylor stressed the importance of telling only the truth during the interview, and that it was important that H.D. correct her if she said something incorrect (State's Ex. 3 at 7:10-7:55).

Ms. Taylor asked H.D. her age, birthday, and the names of everyone who lived in the same house with her. Ms. Taylor asked H.D. if she knew why she was there, and H.D. said, "no." Ms. Taylor told H.D. they were going to talk about body parts, and asked H.D. to identify body parts on a drawing of a girl and a boy. As she identified the body parts, H.D. told Ms. Taylor she called a vagina a "bo-bo," and a penis was a "weiner" (State's Ex. 3 at 15:00, 16:15).

Ms. Taylor asked H.D. if she got kisses, and H.D. responded that her mom kissed her lips and cheek, and that those kisses were okay. Asked if H.D. ever got any kisses that were not okay, H.D. responded, "[y]es." Ms. Taylor asked, "[t]ell me about that, and H.D. replied, "My Dad does it on my bo-bo" (State's Ex. 3 at 17:15). H.D. said Petitioner kissed her bo-bo, and that he took off her clothes and his clothes, and he put her clothes on the pillow (State's Ex. 3 at 21:30). H.D. showed with the paper figures how defendant would lie on top of her, with his head on her vaginal area and his hands holding her legs (State's Ex. 3 at 25:00-27:00). H.D. stated this happened more than one time.

H.D. said she could not explain what happened, and Ms. Taylor then gave H.D. anatomically correct dolls to help H.D. show her what defendant did (State's Ex. 3 at 27:33). Ms. Taylor asked H.D. to show her what happened with the dolls (State's Ex. 3 at 29:00). H.D. undressed both dolls. H.D. said she was lying on the pillow, and Petitioner lay on top of her. H.D. showed Ms. Taylor what Petitioner would do to her vagina. H.D. explained and demonstrated with the dolls. H.D. said Petitioner gets on top of her, and puts "this" into her, as she showed Ms. Taylor the doll's penis and inserted it into the female doll's vagina. When Ms. Taylor asked, "How does that feel?" H.D. responded, "it hurts. His body is pushing really hard, and it hurts. It is moving up and down, and hurts whenever it goes up" (State's Ex. 3 at 33:00). Ms. Taylor gave H.D. the paper drawings, and asked her to circle the body parts when Petitioner puts his "weiner" into her "bo-bo," and H.D. circled the penis and the vagina on the drawings (State's Ex. 3 at 33:50).

(Tr. Day 3 at 97). H.D. testified no one asked her to lie or make anything up about Petitioner, specifically, that her mother never asked her to lie about Petitioner.

H.D. testified she did not want to talk to Ms. Taylor, and in some parts of the interview, she was embarrassed to answer Ms. Taylor's questions, and some of the times she said "I don't know" and "I don't remember" to Ms. Taylor was because she was embarrassed. H.D. was unwilling to tell the jury the details of what Petitioner did to her, but testified the things she told Ms. Taylor really happened to her (Tr. Day 3 at 97-99). H.D. testified that in addition to the things she told Ms. Taylor, Petitioner did things to her in his tent that was beside the house.

Dr. Preston Waters, M.D., examined H.D. on January 13, 2010. Dr. Waters testified he performed physical examinations of children when there were suspicions of sexual abuse. Dr. Waters did not do a rape exam, because he had been told the alleged abuse was too long ago for there to be DNA evidence (Tr. Day 3 at 118, 122-24). Dr. Waters did a physical exam, then a genital examination. There was no exterior bruising or scarring. That did not surprise him because most exams are normal, even where abuse is confessed. The genital area receives a lot of circulation, and heals very quickly. The reported abuse was more than a week prior to the exam, so he did not expect to see any outward signs of abuse. Dr. Waters testified that the appearance of the hymen posteriorly is of particular importance for evidence of abuse. The posterior hymen is the lower part if the child is lying on her back; or the portion of the hymen toward the anus. An accidental injury, even by a bicycle or bed post, would injure the anterior, not posterior, hymen (Tr. Day 3 at 129-30). When Dr. Waters

examined H.D., he found a complete absence of posterior hymen. This was "highly suspicious for an abusive penetrating sort of injury" (Tr. Day 3 at 130). The only explanation was forceful penetration (Tr. Day 3 at 132). The only conclusion more certain than "highly suspicious" would be "definitive" such as pregnancy, or an STD, or the presence of semen, or bruising or bleeding from an acute injury (Tr. Day 3 at 131). Dr. Waters also testified that there could be redness, swelling and abnormal openness of the vaginal area within a day or two of the alleged abuse (Tr. Day 3 at 132).

The defense presented the testimony of Petitioner's sister Amy Dark, Petitioner's mother Janet Dyer, Petitioner's girlfriend Amanda Monsalve, and Petitioner took the stand in his own defense. Among the testimony presented in defense of Petitioner, both Petitioner and Dark testified they believed H.D. had been sexually abused by someone, but not by Petitioner (Tr. Day 3 at 157-59, 166, 172, Day 4 at 159).

Additional facts will be discussed as they become pertinent to the Respondent's argument.

Ground One

PROPOSITION

THE DECISION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS THAT PETITIONER'S APPELLATE COUNSEL WAS NOT INEFFECTIVE BY NOT RAISING THE ISSUES RAISED IN HIS HABEAS BRIEF GROUND ONE, PROPOSITIONS I-VII WAS NOT CONTRARY TO, OR AN UNREASONABLE APPLICATION OF, SUPREME COURT PRECEDENT.

Petitioner raises in Ground One of his habeas corpus brief seven separate claims of ineffective assistance of appellate counsel for failure to raise various claims on direct appeal that will be addressed individually below (Petitioner's brief, pp. 6-44). The OCCA found that appellate counsel was not ineffective by not raising these claims on direct appeal (Exhibit 6, pp. 2-6). Petitioner fails in his burden to refute that finding by the OCCA. Accordingly, the Petitioner fails to show a "substantial likelihood" of a different result in his direct appeal if appellate counsel had raised the claims he raises in Propositions I-VII of his habeas brief. *Pinholster*, 563 U.S. at 202.

In denying Petitioner's appeal on post-conviction relief, the OCCA found there was no merit to the underlying claims, and therefore he failed to show he was denied effective assistance by appellate counsel for failing to raise the claims on direct appeal. The OCCA specifically relied on the standard from *Strickland,* in denying Petitioner's claim of ineffective assistance of appellate counsel (Exhibit 6, p. 5). The OCCA held:

> Most of Petitioner's arguments in this matter contend that the evidence presented at his trial was insufficient to convict him, and was insufficient to affirm his Judgment and Sentence

on appeal. Petitioner particularly claims that the testimony of the prosecutrix was contradictory, unclear, uncertain, improbable, inconsistent and impossible. Petitioner also claims that the testimony of the mother of the prosecutrix contained numerous instances of perjury. Such arguments either were raised during his trial or in his direct appeal and are procedurally barred from further review under the doctrine of *res judicata*; or could have been previously raised but were not and are waived for further review. *Logan, supra*, 2013 OK CR 2 at ¶ 3, 293 P.3d at 972 (citing 22 O.S.2011, § 1086).

This Court finds that Petitioner has asserted only two arguments which could provide sufficient reason to allow grounds for relief to be the basis of his post-conviction application. *Id.* The first is Petitioner's claim that several of the exhibits he now presents in this matter constitute newly discovered evidence of material facts not previously presented and heard that require vacation of his conviction and sentence in the interest of justice. The second is his claim that his appellate counsel was ineffective for failing to find and utilize the other exhibits.

In order to establish that his exhibit pack contains newly discovered evidence, Petitioner must show that the evidence was undiscoverable for trial or direct appeal despite the exercise of due diligence. *Romano v. State*, 1996 OK CR 20, ¶ 12, 917 P.2d 12, 15. In order to establish his claim of ineffective appellate counsel, Petitioner must show both (1) deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for appellate counsel's unprofessional error, the result of his appeal would have been different. *Logan*, 2013 OK CR 2 at ¶ 5, 293 P.3d at 973.

We begin by noting that Petitioner has not argued or established that anything in the pack of exhibits he presents in this matter was undiscoverable for trial or direct appeal. *Romano*, 1996 OK CR 20 at ¶ 12, 917 P.2d at 15. Petitioner was able to obtain and present the exhibits, and we find no reason why due diligence on the part of the defense team would

not have likewise obtained the exhibits. *Id.* Therefore, we do not find that Petitioner's claims of newly discovered evidence provide sufficient reason to allow his current grounds for relief to be the basis of his post-conviction application. 22 O.S.2011, § 1086.

With regard to Petitioner's claim of ineffective assistance of appellate counsel, if it is easier to dispose of such a claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674 (1984). Petitioner cites authority from this Court to argue that it is the duty of the court to scrutinize the evidence on direct appeal and that a rape conviction should not be sustained on the uncorroborated testimony of the prosecutrix. *Johnson v. State*, 1947 OK CR 74, 182 P.2d 777, 781 (a rape charge arouses the passion and prejudice of the jurors and is difficult to defend). Petitioner fails to cite another principle espoused in *Johnson* that the weight and credibility of the witness is for the jury and their decision will not be reversed where there is substantial evidence supporting it. *Johnson*, 182 P.2d at 781. Petitioner's jury considered all of the evidence presented at his trial and found him guilty beyond a reasonable doubt of the crime of Child Sexual Abuse. Petitioner has not established that his jury's decision was not supported by substantial evidence. *Id.* During his appeal proceedings, the evidence used by Petitioner's jury to convict and sentence him was scrutinized and Petitioner's Judgment and Sentence was affirmed. *Id.*; *see Dyer, supra.*

The District Court found in this matter that Petitioner's pack of exhibits does not support his claims, and that as a whole the exhibits are not persuasive. Petitioner has not met his fundamental burden to sustain the allegations of his post-conviction application by showing that the District Court erred or abused its discretion. *Russell, supra*, 1968 OK CR 45 at ¶ 5, 438 P.2d at 294. Petitioner has not established either that the result of his appeal should have been different, *Logan*, 2013 OK CR 2 at ¶ 5, 293 P.3d at 973; or that he has been sufficiently prejudiced by his appellate counsel's performance. *Washington*, 466 U.S. at 697, 104 S. Ct. at 2069. Therefore, we do not find that Petitioner's claim of ineffective assistance of appellate

> counsel provides sufficient reason to allow his current grounds for relief to be the basis of his post-conviction application. 22 O.S.2011, § 1086. Accordingly, the orders of the District Court of Stephens County denying Petitioner's application for post-conviction relief in Case No. CF-2010-17 should be, and are hereby, **AFFIRMED**.

(Exhibit 6, pp. 3-6).

The ruling of the OCCA was not contrary to, or an unreasonable application of, *Strickland* and is owed "doubly deferential" review under *Strickland* and § 2254(d)(1). *Knowles v Mirzayance*, 556 U.S. 111, 123 (2009). Petitioner has failed to overcome that double deference on habeas review. Therefore, Petitioner is not entitled to relief.

As referenced by the OCCA, claims of ineffective assistance of counsel are analyzed under the standard set out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* standard applies to habeas claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). In the first instance, Petitioner must show by a preponderance of the evidence that (1) appellate counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms and (2) this deficient performance prejudiced his defense to the extent that the result of the appeal would have been different. A reasonable probability means a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct, i.e., appellant must overcome the presumption that, under the circumstances, counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S.

at 689. The OCCA has long followed *Strickland* as the standard for reviewing claims of ineffective assistance of counsel and did so in this case. *Jones v. State*, 128 P.3d 521, 545 (Okla. Crim. App. 2006).

Because the OCCA found Petitioner's claims in his habeas brief Ground One, Propositions I-VII, have no merit, he fails to show he was prejudiced by trial counsel not raising them at trial or appellate counsel not raising them on direct appeal. *Strickland*, 466 U.S. at 687-88. On habeas review, a finding by the State court applying *Strickland* that counsel was not ineffective is entitled to "double deference." *Knowles*, 556 U.S. at 123.

In every case raising an ineffective appellate counsel issue, whether the OCCA decision should be accorded AEDPA deference will depend upon a case-specific determination of whether the OCCA followed established *Strickland* standards, including the principle that ineffective appellate assistance can be established on the basis of the demonstrable merit of the issue omitted by appellate counsel on Appellant's direct appeal. If the issue has no merit, then its omission cannot constitute deficient performance. *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003).

In this case, the decision of the OCCA concerning ineffective assistance of appellate counsel should be afforded deference as the claim was reviewed on the merits in denying post-conviction relief. *Ellis v. Hargett*, 302 F.3d 1182, 1187 (10th Cir. 2002). The OCCA properly found that appellate counsel was not ineffective because the claims had no merit (Exhibit 6, pp. 3-6).

The Supreme Court has held appellate counsel "[n]eed not (and should not) raise every nonfrivolous claim. . ." *Smith*, 528 U.S. at 288. Petitioner fails to show that appellate counsel was deficient in his performance or how he was prejudiced by appellate counsel not raising the additional claims that he raised in post-conviction and now in his habeas petition, which the OCCA found to be without merit. The OCCA's decision shows Petitioner would not have prevailed on these claims even if appellate counsel had raised them on direct appeal.

This determination by the OCCA was not contrary to, or an unreasonable application of, *Strickland. Turrentine v. Mullin*, 390 F.3d 1181, 1202 (10th Cir. 2004). In assessing the adequacy of an attorney's performance, courts must avoid the hypercritical effects of hindsight. *Hickman v. Spears*, 160 F.3d 1269, 1273 (10th Cir. 1998) (citing *Strickland*, 466 U.S. at 689).

In *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002), the Supreme Court interpreted the standard for federal habeas review and concluded that a "federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly." Rather, the habeas petitioner has the burden of showing that the state court applied *Strickland* to the facts in an objectively unreasonable manner. *Woodford*, 537 U.S. at 24. No such error occurred in Petitioner's case, and he fails to show the OCCA applied *Strickland* in an objectively unreasonable manner in the present case in denying his claims of ineffective assistance of appellate counsel.

I. Insufficient evidence

Petitioner claims in his habeas brief Ground One, Proposition I, as he did in Proposition II of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim on direct appeal that the evidence at trial was insufficient to support his conviction for Child Sexual Abuse. He claims the statements of the victim, H.D., were "so contradictory, uncertain, and improbable as to be unbelieveable." (Brief of Petitioner, p. 7). The jury saw the video recording of the interview of H.D. and heard her testimony at trial. It was for the jury to determine her credibility. *See Warner v. State*, 144 P.3d 838, 863 (Okla. Crim. App. 2006) ("The jury is the exclusive judge of the weight and credibility of the evidence.").

The United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), established the standard for reviewing sufficiency of the evidence by requiring reviewing courts to decide "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." The OCCA applied that standard in *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203. In 2004, the OCCA extended that standard to cases involving totally circumstantial evidence. *Easlick v. State*, 2004 OK CR 21, ¶ 15, 90 P.3d 556, 559. There is sufficient evidence in this case for a rational trier of fact to find defendant guilty of Child Sexual Abuse beyond a reasonable doubt.

The jury in the present case was correctly instructed on the elements of Child Sexual Abuse as follows:

1. A parent;

2. Willfully;

3. Engaged in;

4. Sexual abuse by rape and other lewd and indecent acts;

Instruction No. 4-39, OUJI-CR(2nd) (2012) (O.R. 205).[5]

Petitioner claims that H.D. was not a credible witness. The jury disagreed. As shown in the Statement of Facts, *supra*, a review of the videotape interview of H.D. reflects that Ms. Taylor initially asked H.D. general questions, explained the configuration of the interview room, and pointed out the video recording equipment. Ms. Taylor asked H.D. a number of questions to establish rapport and that H.D. knew the difference between the truth and a lie. Ms. Taylor stressed the importance of telling only the truth during the interview, and that it was important that H.D. correct her if she said something incorrect (State's Ex. 3 at 7:10-7:55).

Ms. Taylor asked H.D. her age, birthday, and the names of everyone who lived in the same house with her. Ms. Taylor asked H.D. if she knew why she was there, and H.D. said, "no." Ms. Taylor told H.D. they were going to talk about body parts, and asked H.D. to identify body parts on a drawing of a girl and a boy. As she identified the body parts, H.D. told Ms. Taylor she called a vagina a "bo-bo," and a penis was a "weiner" (State's Ex. 3 at 15:00, 16:15).

---

[5]Petitioner was charged under Okla. Stat. tit. 10, § 7115, which was later renumbered as Okla. Stat. tit 21, § 843.5(E). Section 843.5 removed the first element of a parent.

Ms. Taylor asked H.D. if she got kisses, and H.D. responded that her mom kissed her lips and cheek, and that those kisses were okay. Asked if H.D. ever got any kisses that were not okay, H.D. responded, "[y]es." Ms. Taylor asked, "[t]ell me about that," and H.D. replied, "My Dad does it on my bo-bo" (State's Ex. 3 at 17:15). H.D. said Petitioner kissed her bo-bo, and that he took off her clothes and his clothes, and he put her clothes on the pillow (State's Ex. 3 at 21:30). H.D. showed with the paper figures how defendant would lie on top of her, with his head on her vaginal area and his hands holding her legs (State's Ex. 3 at 25:00-27:00). H.D. stated this happened more than one time.

H.D. said she could not explain what happened, and Ms. Taylor then gave H.D. anatomically correct dolls to help H.D. show her what defendant did (State's Ex. 3 at 27:33). Ms. Taylor asked H.D. to show her what happened with the dolls (State's Ex. 3 at 29:00). H.D. undressed both dolls. H.D. said she was lying on the pillow, and Petitioner lay on top of her. H.D. showed Ms. Taylor what Petitioner would do to her vagina. H.D. explained and demonstrated with the dolls. H.D. said Petitioner gets on top of her, and puts "this" into her, as she showed Ms. Taylor the doll's penis and inserted it into the female doll's vagina. When Ms. Taylor asked, "How does that feel?" H.D. responded, "it hurts. His body is pushing really hard, and it hurts. It is moving up and down, and hurts whenever it goes up" (State's Ex. 3 at 33:00). Ms. Taylor gave H.D. the paper drawings, and asked her to circle the body parts when Petitioner puts his "weiner" into her "bo-bo," and H.D. circled the penis and the vagina on the drawings (State's Ex. 3 at 33:50).

Ms. Taylor asked if Petitioner ever made H.D. kiss any part of his body, and H.D. said it was kind of embarrassing to her, but after hesitating, H.D. asked for the drawing of the boy (State's Ex. 3 at 35:50). Pointing to the drawing, H.D. said she put her mouth on Petitioner's "weiner." Petitioner would say he was almost done, and stuff would squirt in her mouth. It was "yucky stuff" and looks "yellow." H.D. said defendant's "weiner" was inside her mouth, and she would swirl her tongue on it (State's Ex. 3 at 37:00).

In response to Ms. Taylor's questions, H.D. said she kissed Petitioner's penis more than one time, Petitioner had kissed her vagina more than one time and defendant put his penis in her vagina more than one time. The first time the abuse occurred was when she was four. Also, all of these things happened both in Oklahoma and in California. All of those things happened both at Petitioner's house and at Petitioner's mother's house (State's Ex. 3 at 44:40).

At trial, H.D. testified she remembered her interview with Jessica Taylor, and she remembered everything she told Ms. Taylor.

[PROSECUTOR]: [t]he things that you told Jessica in that interview, did those things really happen to you?

[WITNESS]: Yes.

[PROSECUTOR]: Who did those things to you, [H.D.]?

[WITNESS]: [Petitioner].

[PROSECUTOR]: And who is [Petitioner]?

[WITNESS]: My dad.

(Tr. Day 3 at 97). H.D. testified no one asked her to lie or make anything up about Petitioner, specifically, that her mother never asked her to lie about Petitioner.

H.D. testified she did not want to talk to Ms. Taylor, and in some parts of the interview, she was embarrassed to answer Ms. Taylor's questions, and some of the times she said "I don't know" and "I don't remember" to Ms. Taylor was because she was embarrassed. H.D. was unwilling to tell the jury the details of what Petitioner did to her, but testified the things she told Ms. Taylor really happened to her (Tr. Day 3 at 97-99). H.D. testified that in addition to the things she told Ms. Taylor, Petitioner did things to her in his tent that was beside the house.

Dr. Preston Waters, M.D., examined H.D. on January 13, 2010. Dr. Waters testified he performed physical examinations of children when there were suspicions of sexual abuse. Dr. Waters did not do a rape exam, because he had been told the alleged abuse was too long ago for there to be DNA evidence (Tr. Day 3 at 118, 122-24). Dr. Waters did a physical exam, then a genital examination. There was no exterior bruising or scarring. That did not surprise him because most exams are normal, even where abuse is confessed. The genital area receives a lot of circulation, and heals very quickly. The reported abuse was more than a week prior to the exam, so he did not expect to see any outward signs of abuse. Dr. Waters testified that the appearance of the hymen posteriorly is of particular importance for evidence of abuse. The posterior hymen is the lower part if the child is lying on her back; or the portion of the hymen toward the anus. An accidental injury, even by a bicycle or bed post, would injure the anterior, not posterior, hymen (Tr. Day 3 at 129-30). When Dr. Waters

examined H.D., he found a complete absence of posterior hymen. This was "highly suspicious for an abusive penetrating sort of injury" (Tr. Day 3 at 130). The only explanation was forceful penetration (Tr. Day 3 at 132). The only conclusion more certain than "highly suspicious" would be "definitive" such as pregnancy, or an STD, or the presence of semen, or bruising or bleeding from an acute injury (Tr. Day 3 at 131). Dr. Waters also testified that there could be redness, swelling, abnormal openness of the vaginal area within a day or two of the alleged abuse (Tr. Day 3 at 132).

This was more than sufficient evidence to prove the elements of Child Sexual Abuse in this case. There was nothing incredible or contradictory in H.D.'s forensic interview. Her testimony at trial affirmed the contents of the interview. It is the exclusive province of the jury to determine the weight of the evidence and the credibility of the witnesses and to resolve any conflicts in the evidence. *Hawkins v. State*, 46 P.3d 139, 147 (Okla. Crim. App. 2002). The reviewing court must accept all reasonable inferences and credibility choices that tend to support the judgment. *Bernay v. State*, 989 P.2d 998, 1008 (Okla. Crim. App. 1999). "The jury may consider all competent evidence, along with the rules of law and basic common sense, in reaching a verdict." *Pavatt v. State*, 159 P.3d 272, 285 (Okla. Crim. App. 2007).

As the OCCA held in *Wood v. State*, 158 P.3d 467, 472 (Okla. Crim. App. 2007):

> This Court reviews the trial evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. We accept all reasonable inferences and credibility choices that support the jury's verdict and must

> affirm the conviction so long as from the inferences reasonably drawn from the record evidence the jury might fairly have concluded the defendant was guilty beyond a reasonable doubt. (internal citations omitted).

There was more than sufficient evidence in the present case to prove Petitioner guilty of Child Sexual Abuse beyond a reasonable doubt. As such, the result of his appeal would not have changed if appellate counsel had raised a sufficiency of the evidence claim on direct appeal. Accordingly, Petitioner fails to show the ruling of the OCCA — that appellate counsel was not ineffective by not raising this claim on direct appeal — was contrary to, or an unreasonable application of, Supreme Court precedent or an unreasonable determination of the facts. This proposition has no merit.

II. Ineffective Assistance of Trial Counsel

Petitioner claims in his habeas brief Ground One, Proposition II, as he did in Proposition V of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that trial counsel was ineffective for various acts and omissions during the trial. Petitioner raises ten subpropositions alleging ineffective assistance of trial counsel that Petitioner argues appellate counsel should have raised on direct appeal. The claim of ineffective assistance of trial counsel in Proposition II(C) was raised in Proposition II on direct appeal but Petitioner claims appellate counsel should have done more. That part of Petitioner's claim of ineffective assistance of trial counsel in Proposition II(J) regarding the plea offer was never fairly presented to the OCCA on direct appeal or in his post-conviction appeal. However, as explained in Proposition II(J), below,

an "anticipatory procedural bar" applies because Petitioner would be procedurally barred under Oklahoma law if he returned to State court to exhaust the claim The separate claims will be addressed individually below.

A. Failure to object to alleged hearsay and inflammatory testimony

Petitioner claims appellate counsel was ineffective by not raising a claim of ineffective assistance of trial counsel for not objecting to the alleged hearsay testimony of Valerie Dyer and Jessica Taylor regarding what H.D. told them about being abused by Petitioner and the videotape of the forensic interview of H.D. As shown in Proposition VI, below, however, the statements were properly admitted. Likewise, as shown in Proposition II(E), below, the alleged bad character evidence was properly admitted. Accordingly, appellate counsel was not ineffective by not raising a claim on direct appeal that trial counsel was ineffective by not objecting to the evidence at trial. Petitioner fails to show the OCCA applied *Strickland* in an objectively unreasonable manner. *Woodford*, 537 U.S. at 24. *See Mayberry v. Patton*, No. 14-5032, 579 Fed. Appx. 640, 647 (10th Cir. Sept. 5, 2014) (unpublished)[6] (trial counsel not ineffective for failing to object to admissible evidence).

B. Failure to object to alleged prosecutor error

Petitioner claims appellate counsel was ineffective by not raising a claim of ineffective assistance of trial counsel for not objecting to the alleged error by the prosecutor by allegedly vouching for the State's witnesses, attacking Petitioner and presenting allegedly

---

[6]Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. 32.1 and 10th Cir. R. 32.1(A).

perjured testimony. As shown in Proposition V, the conduct of the prosecutor was proper and there was no basis for trial counsel to object. Accordingly, appellate counsel was not ineffective by not raising a claim on direct appeal that trial counsel was ineffective by not objecting to the alleged errors by the prosecutor. Petitioner fails to show the OCCA applied *Strickland* in an objectively unreasonable manner. *Woodford*, 537 U.S. at 24.

C. Failure to call witnesses and present evidence

Petitioner claims appellate counsel was ineffective by not raising a claim of ineffective assistance of trial counsel for not presenting various witnesses for the defense, failing to impeach the testimony of Valerie and H.D. and failing to present a medical expert to counter the testimony of Dr. Waters.

Most of this claim was raised by appellate counsel on direct appeal in Proposition I. Petitioner fails to show how he was prejudiced by appellate counsel not presenting the claim in a different manner.

Petitioner claims trial counsel was ineffective because he did not present the testimony of sheriff's deputies Joshua Seely and Christopher Lemons, OSBI criminalists Sara Ferrero and Ashleigh Sosebee, computer expert Marvin Dutton, and OSBI agent Don Rains. With the exception of Agent Rains, these witnesses testified at Petitioner's first trial on April 27, 2011, as outlined below. Petitioner fails to show the result of his trial would have changed if these witnesses had testified again at his third trial.

The OCCA considered this claim on direct appeal and rejected it:

> [A]lthough Dyer does not have to show the omitted evidence would have disproved the State's case, he must show a reasonable probability that, without counsel's errors or omissions, the result of the proceeding would have been different. *Richter*, 131 S. Ct. at 788. Dyer fails to show prejudice from counsel's strategic decision not to call certain witnesses, and he cannot meet this standard.
>
> Dyer changed defense attorneys between the first and second mistrials, and the same attorney represented him in his second mistrial and this trial. Original counsel called several witnesses which current defense counsel chose not to call. The record shows that this was a strategic decision on counsel's part. Upon reviewing the prior testimony of those witnesses, we will not second-guess that decision. The record shows that (a) the majority of the evidence to which they testified was admitted through other witnesses in this trial; (b) some of the evidence had little or no relevance to the issues at trial; and (c) Dyer cannot show he was prejudiced by the omission of any of these witnesses. As he cannot show prejudice, we will not find counsel ineffective.

(Exhibit 3, pp. 3-4).

The State court's determination of the facts is entitled to a presumption of correctness under § 2254(e)(1) (Exhibit 3, p. 3); *Hooks v. Workman*, 689 F.3d 1148, 1164 (10th Cir. 2012). Petitioner has failed to present any evidence, much less clear and convincing evidence, to overcome that presumption of correctness. Based on the OCCA's findings that trial counsel was not ineffective by not calling the witnesses Petitioner claims should have been called, Petitioner fails to show how he was prejudiced by appellate counsel not raising the claim in a different manner. The OCCA's determination of this claim is not contrary to,

or an unreasonable application of, *Strickland*, nor an unreasonable determination of the facts under § 2254(d)(1) and (d)(2).

The ruling of the OCCA is supported by the record as shown by the earlier testimony of the omitted witnesses in Petitioner's first trial:

Deputy Joshua Seely

Deputy Seely testified he participated in the search of Petitioner's home on January 12, 2011. The purpose of the search was to collect clothing and bedding that might bear DNA evidence. Petitioner's girlfriend Amanda Monsalve was present and cooperated with them, retrieving H.D.'s pajamas and panties from a clothes hamper, and giving Seely bedding from Petitioner's bed in the master bedroom. The officers also took covers from a cushion from the living room couch, and two cushions from the love seat because there was an allegation that one of the incidents took place on a couch (Tr. Seely 4/27/2011 at 5, 8-10).

Deputy Seely testified that on January 8, 2011, Valerie came to the sheriff's office to file a report that H.D. disclosed Petitioner touched her inappropriately. Deputy Seely contacted the Mary Abbott House in Norman to set up a forensic interview. Seely also testified that on January 12, 2011, Petitioner came in to file a complaint against Valerie because she was preventing him from seeing H.D. Deputy Seely told Petitioner he was a suspect in an investigation, and read Petitioner his *Miranda* rights. Petitioner asked for a lawyer, so they did not ask him any questions (Tr. Seely 4/27/2011 at 12, 16).

Deputy Seely testified that Valerie Dyer brought a computer to the sheriff's department, and Seely took the computer to have Marvin Dutton of Applied World

Technology make a copy of the hard drive. Mr. Dutton cloned the hard drive and gave Seely the cloned copy (Tr. Seely 4/27/2011 at 17).

Deputy Christopher Lemons

Deputy Lemons testified he accompanied Deputy Seely to the Mary Abbott House and observed the forensic interview of H.D. Lemons also assisted in the search of the Dyer house. A few days later, Valerie Dyer brought them a computer she and Petitioner had in California. She said she had seen child pornography on it at one time (Tr. Lemons 4/27/2011 at 10). The computer sat in the sheriff's office for eight months. Deputy Lemons asked Lieutenant Guthrie what to do with the computer, and Guthrie instructed him to keep it until the DA's office directed what they wanted to do with it. A few days later, Lemons noticed the computer was gone. There were no break-ins and the office was kept locked (Tr. Lemons 4/27/2011 at 12).

In September of 2010, Petitioner was at the courthouse for a hearing relating to Monsalve's child, and someone came into the sheriff's office and reported an altercation. Deputy Lemons went outside and saw Valerie yelling at Petitioner. He separated them, and Lieutenant Guthrie directed him to arrest Petitioner for violating Valerie's protective order. Charges were not filed, and Petitioner was released (Tr. Lemons 4/27/2011 at 13-14).

Sara Ferrero and Ashleigh Sosebee

Sara Ferrero, a criminalist at the OSBI Lawton laboratory, testified that she analyzed H.D.'s pajamas and panties and the bedding seized from Petitioner's house. The items were analyzed for the presence of bodily fluids such as blood or semen. There were no fluids

found on the pajamas or panties, and there were two stains containing spermatozoa on a bed sheet, and one stain on the comforter. Ms. Ferrero did not test the cushion covers. She only looked for male reproductive fluid, not for female vaginal secretions. Ms. Ferrero testified *she would not expect a prepubescent child to have any secretions.* (Tr. Ferrero 4/27/2011 at 6-10, 13-14) (emphasis added).

OSBI criminalist Ashleigh Sosebee performed DNA analysis on the spermatozoa stains. Sosebee tested the stains against samples from Petitioner, Monsalve, H.D., and Monsalve's five year-old daughter, I.C. The DNA from the three stains on the sheets matched Petitioner. Monsalve's DNA could not be excluded as contributing to the epithelial, or skin cell fraction of one stain, and on the other stain, both Monsalve and I.C. could not be excluded as DNA contributors, but H.D. could be excluded (Tr. Sosebee 4/27/2011 at 7-8, 14).

Marvin Dutton

Marvin Dutton, owner of Applied World Technology, testified that on the Friday before the April 27, 2011 trial, Deputy Seely brought a computer owned by Valerie and Petitioner to his business to have the hard drive cloned. Dutton reviewed the clone, and on December 25, 2009, someone used the computer to search child welfare and law websites on the topics of reporting child abuse, and what is required to convict someone of crimes against children. There were about twenty other searches that day, all of which were on sexual abuse, misconduct of a child, and what is required to file a case. One of the searches under child welfare was a search for adoption (Tr. Dutton 4/27/2011 at 13-14). Someone

searched pornographic websites during that same time frame, and during four days in early January. *There is no way to tell who did the searches. The computer belonged to Petitioner as well as Valerie, and could have been accessed by Petitioner remotely.* There were two accounts on the computer, Valerie's and Petitioner's. The websites were accessed under Petitioner's account (Tr. Dutton 4/27/2011 at 15-17, 21-22) (emphasis added). On August 1, 2011, at a motions hearing, Dutton testified again, stating that some time after the computer left his possession, seventeen files were modified or created (Tr. Dutton 8/1/2011 at 11).

Discussion

Petitioner's proffered evidence is insufficient to show that trial counsel was ineffective. The testimony contained in the previous trial transcripts, even with the addition of the evidence Petitioner offered with his Rule 3.11 Motion, would not have changed the outcome. Even if all of these witnesses testified as promised, none of their testimony would disprove the evidence that convicted Petitioner; thus, trial counsel's decision not to call these witnesses did not prejudice Petitioner. *See Strickland*, 466 U.S. at 693–94 (holding that to establish prejudice sufficient to warrant finding of ineffective assistance, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). Appellate counsel did raise this issue on direct appeal (Exhibit 1, Proposition I). Petitioner fails to show how the result of his appeal would have been different if appellate counsel had raised the issue in a different manner.

Petitioner contends Seely's testimony would have revealed the actual date Valerie reported the abuse was January 8, 2010. Petitioner claims this would have damaged Valerie's credibility by showing either she did not report the abuse the day after H.D.'s revelation, or that H.D. actually disclosed the abuse to her a few days after returning from her visit with Petitioner.

Seely's expected testimony that Valerie reported the abuse on January 8, 2010, rather than a few days earlier, would not have changed the outcome of Petitioner's trial. Valerie candidly testified she was not sure what date H.D. told her of the abuse (Tr. Day 2 at 125), and defense counsel's thorough cross-examination of Valerie effectively demonstrated Valerie was possibly mistaken about the date she reported H.D.'s allegations (Tr. Day 2 at 120, 125). If defense counsel had further emphasized the date discrepancy, at most it would have supported Valerie's testimony that her initial reaction to H.D.'s outcry was that the child's external injury, her visibly irritated and swollen vaginal area, was caused by a urinary tract infection. The additional evidence Valerie may have been mistaken about when she reported the abuse, or whether the child was home for a few days before disclosing it to her, would not have affected the fact H.D. told Valerie that Petitioner was sexually abusing her, prompting her to go to the authorities.

Petitioner also suggests Seely would have testified that Valerie's report to the sheriff's department, as documented in his probable cause affidavit,[7] revealed H.D. twice previously

---

[7]Petitioner mistakenly claims Seely's April 27, 2011, testimony also established that H.D. made two earlier disclosures of defendant's abuse. However, at the April 27, 2011 trial Seely (continued...)

told Valerie Petitioner was abusing her. Petitioner claims this would undermine Valerie's testimony that she was taken by surprise by H.D.'s disclosure.

Contrary to Petitioner's claim, the fact that H.D. had twice before informed her mother of Petitioner's abuse did not discredit Valerie's testimony that when H.D. complained her vagina hurt, Valerie wondered if she had a urinary tract infection (Tr. Day 2 at 74). Valerie's initial confusion would be understandable, in light of the fact that the child had a history of urinary tract infections (Tr. Day 2 at 124). If defense counsel had presented Seely's testimony that Valerie confronted Petitioner four or five months earlier with H.D.'s disclosures, it would have only strengthened and corroborated the evidence that the abuse had been going on a long time. In addition, the fact that Valerie confronted Petitioner twice in the past about H.D.'s allegations undermines Petitioner's position that Valerie manufactured the allegation and coached H.D. in response to recent custody and jealousy issues arising late in 2009. Finally, if defense counsel elicited Seely's testimony from the probable cause affidavit, the State would likely have cross-examined Seely to present the details of those prior disclosures:

> In her written statement Dyer states that the first time H.D. disclosed was a couple of years ago in California. H.D. told Dyer that while they lived in California [Petitioner] would touch her "no-no" spot whenever Dyer would leave to go to the store. Dyer states she confronted Petitioner about it and he stated H.D. was lying and he would talk to her about it. Dyer

---

[7](...continued)
testified that H.D. disclosed Petitioner abused her in California, and in December of 2009 (the disclosure that resulted in this conviction), but did not mention a disclosure in the summer of 2009 (Tr. 4/27/2011 at 19).

> states that H.D. later told her it was all a dream because [Petitioner] had got mad at her and told her mommy was lying. In her statement Dyer states that the second time H.D. disclosed anything was about four or five months ago. Dyer states that [Petitioner] had just got back from California and was living with his parents. Dyer states that H.D. would stay with [Petitioner] over the weekends. Dyer states that H.D. told her again that [Petitioner] touched her in her "no-no spot." Dyer confronted [Petitioner] a second time and he told her that H.D. was just trying to get him in trouble and that he stumbled over his words.

(O.R. 2). It is probable that counsel would have chosen to avoid the State's cross-examination of Seely and the emphasis on the details of the probable cause affidavit, when there was nothing to gain for Petitioner.

Petitioner claims Officers Seely and Lemons would have testified they seized bedding from Petitioner's bed, and H.D.'s pajamas and panties from the dirty clothes hamper at Petitioner's home, and OSBI criminologists Sosebee and Ferrero would have testified that no DNA from H.D. was identified on any of the items. There would be no benefit to Petitioner from this testimony.

H.D. was clear in her forensic interview that Petitioner first removed her clothes. Therefore, the evidence there were no bodily fluids or DNA from Petitioner on H.D.'s clothing was entirely consistent with the child's statements, and would have been of no use to Petitioner's defense. On the other hand, Sosebee and Ferrero would have also testified that there was no DNA from H.D. on her own pajamas or panties. This would have called into question the testimony of Ms. Monsalve that these pajamas and panties were worn by the child for three days and had not been laundered, particularly considering Monsalve's

testimony on cross-examination that Petitioner was concerned his DNA might be on H.D.'s clothing:

> [PROSECUTOR]: Defendant was even concerned, wasn't he, that his DNA would be on those clothes?
>
> [WITNESS]: He was concerned that they would be in –
>
> [PROSECUTOR]: Ma'am, that's just a "yes" or "no" answer.
>
> [WITNESS]: Yes.
>
> [PROSECUTOR]: In fact, you had a jail – a phone conversation with him about that very issue, didn't you?
>
> [WITNESS]: Yes.
>
> [PROSECUTOR]: And he explained it away by saying, "After sex with you he wiped himself off on them and it might be there." Isn't that what he said?
>
> [WITNESS]: Yes.

(Tr. Day 4 at 67-68).

As for Dutton's testimony relating to the Dyers' computer, when the computer's hard drive was cloned and the clone was examined, it showed that in December/January of 2009/10, someone conducted internet searches on child abuse and child custody, and the computer had also been used to visit pornographic websites, although not child pornography.

Petitioner claims defense counsel should have presented this evidence to support his position that Valerie manufactured the allegation against him and showed pornography to H.D. to coach the child for her interview. However, Dutton testified the searches were

conducted on Petitioner's, not Valerie's account, and that the computer could have been accessed remotely (Tr. Dutton at 21-22). In addition, Valerie testified several people had access to and used the computer, including a friend who was going through her own custody battle at the time (Tr. Day 2 at 121-22). Moreover, testimony about the computer would open the door to the evidence that the reason the sheriff's department had the Dyers' computer was because Valerie brought it to them after the search of Petitioner's home, reporting she had seen child pornography on it (Tr. Lemons at 10).

Reasonably competent trial counsel might well have determined that the best prospect for acquittal lay in discrediting the state's witnesses on cross-examination, rather than asking the jury to focus on these additional witnesses, who would not have diminished the inculpatory testimony of the State's evidence, and could have raised further questions. Thus, there is no reason to believe that defense counsel's decision not to present additional witnesses was anything other than a tactical decision. *See Strickland*, 466 U.S. at 689 (requiring a petitioner to overcome the presumption that counsel's decision "might be considered sound trial strategy").

Evidence submitted with Rule 3.11 Motion

In an Application for Evidentiary Hearing, filed contemporaneously with his direct appeal, appellate counsel asked the OCCA for an evidentiary hearing to add evidence to the record to support his claim of ineffective assistance of trial counsel. When the OCCA reviews an Application for Evidentiary Hearing on Sixth Amendment claims:

> this Court reviews the application to see if it contains "sufficient evidence to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." Rule 3.11(B)(3)(b)(I). In order to meet the "clear and convincing" standard set forth above, Appellant must present this Court with evidence, not speculation, second guesses or innuendo.

Jones v. State, 201 P.3d 869, 890 (Okla. Crim. App. 2009). The OCCA has held, "to meet the 'clear and convincing' standard set forth above, Appellant must present this Court with evidence, not speculation, second guesses or innuendo." *Lott v. State*, 98 P.3d 318, 351 (Okla. Crim. App. 2004).

Petitioner submitted with his Rule 3.11 Motion the affidavit and school records of a Duncan public school official as proof that H.D. went back to school on January 4, 2010, after winter break, to discredit Valerie's testimony regarding the date of the child's disclosure. As discussed above, evidence calling into question Valerie's recollection of the date of H.D.'s disclosure or Valerie's subsequent report to law enforcement would not have affected the fact of the disclosure or the evidence of abuse.

Petitioner also proffered with his Rule 3.11 Motion an affidavit from his previous defense attorney, David Hammond, sponsoring the report of OSBI Special Agent Don Rains, of the contents of the Dyers' computer hard drive. The Rains report reflects that Valerie originally brought the computer to law enforcement to be examined because she alleged Petitioner was viewing child pornography on it. After Petitioner's first trial, the District Attorney's Office requested him to search the Dyers' computer, already cloned and examined by Dutton, and which was still in the state's possession. As Dutton had testified, a search of

the hard drive revealed the computer had been used to create and store pornographic images between December 25 and 31, 2009, and between January 5 and 12, 2010.[8] The computer was also used during the same time frame to search for information on parental rights and custody. Rains found no evidence the computer was used to possess child pornography.

The Rains report appears to be cumulative of the Dutton testimony, and it is unclear how its additional information would support an ineffective assistance of counsel claim. Furthermore, like Lemons' testimony, the Rains report also reveals the *res gestae* evidence that Valerie Dyer asked law enforcement to examine the computer because she alleged Petitioner was accessing child pornography. For this reason, defense counsel would have reasonably chosen to omit the evidence of the computer search, which would have produced no exculpatory evidence for him and could have interjected the child pornography allegation into his trial.

The OCCA denied this claim on direct appeal, including Petitioner's Rule 3.11 Motion (Exhibit 3, pp. 2-4). The OCCA's denial of the claim under Rule 3.11 is a denial on the merits. The OCCA held in *Simpson v. State*, 230 P.3d 888, 905-906 (Okla. Crim. App. 2010), that when it denies a request for evidentiary hearing on a claim of ineffective assistance of counsel under Rule 3.11, "we necessarily make the adjudication that Appellant has not shown defense counsel to be ineffective under the more rigorous federal standard set forth in *Strickland.*"

---

[8]Presumably, the "2011" dates on page 3 of the Rains report are typographical errors, and should be "2010."

The Tenth Circuit recognized in *Lott v. Trammell*, 705 F.3d 1167, 1213 (10th Cir. 2013), that based on the OCCA's interpretation of Rule 3.11 in *Simpson*, the OCCA's ruling on a Rule 3.11 motion is a ruling on the merits of an ineffective assistance claim and complies with the *Strickland* standard of review. *See also Wilson v. Trammell*, 706 F.3d 1286, 1305 (10th Cir. 2013) (same). As such, a denial by the OCCA of the Petitioner's ineffective assistance of counsel claim, including his Rule 3.11 Motion and attachments, is a ruling on the merits applying the *Strickland* standard. Petitioner has cited no on point Supreme Court precedent, other than *Strickland*, to show trial counsel was ineffective to support his claim. As such, this Court must apply the more general standard of *Strickland*. *Blake v. Janecka*, No. 14-2053, 624 Fed. Appx. 640, 646 (10th Cir. Aug. 25, 2015) (unpublished)[9] (holding if the only clearly established federal law Petitioner cites is *Strickland* itself, then *Strickland's* more general standard is used). Petitioner fails to show the ruling of the OCCA was contrary to, or an unreasonable application of, *Strickland*. As such, Petitioner fails to show appellate counsel was ineffective by not raising this claim in a different manner on direct appeal. *See Strickland*, 466 U.S. at 693–94 (holding that to establish prejudice sufficient to warrant finding of ineffective assistance, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

---

[9]Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. 32.1 and 10th Cir. R. 32.1(A).

Likewise, Petitioner fails to show the alleged inconsistencies in the testimony of H.D. and Valerie would have changed the result of his trial. Such evidence, even if it existed, could only be used to impeach the credibility of H.D. and Valerie. The Supreme Court has held that impeachment evidence that goes to the credibility of a witness generally will not change the result of a trial. "This sort of latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness's] account of petitioner's actions." *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992).

Finally, Petitioner claims trial counsel was ineffective for not calling an expert witness to counter the medical testimony of Dr. Waters. However, Petitioner shows nothing to establish that a defense expert would have changed the result of the trial. *See Cannon v. Mullin*, 383 F.3d 1152, 1165 (10th Cir. 2004) (petitioner failed to show ineffective assistance of counsel where he failed to show what helpful testimony would have been elicited from expert witnesses); *Grisby v. Blodgett*, 130 F.3d 365, 373 (9th Cir. 1997) ("Speculation about what an expert could have said is not enough to establish prejudice."); *Stemple v. State*, 994 P.2d 61, 73 (Okla. Crim. App. 2000) (defendant failed to show what testimony expert would have provided if he testified).

The Supreme Court reiterated in *Richter* that there are "[c]ountless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Richter*, 562 U.S. at 106 (quoting *Strickland*, 466 U.S. at 689). "Rare are the situations in which the 'wide latitude counsel must have in

making tactical decisions' will be limited to any one technique or approach." *Id.* at 106 (internal citations omitted). Petitioner's claim on appeal, and in his habeas petition — that an expert could have countered the testimony of Dr. Waters — is the very kind of after the fact strategy shopping the Supreme Court condemned in *Richter*.

In *Richter*, the Supreme Court found that trial counsel was not ineffective for failing to consult with forensic blood experts or introducing expert testimony to counter the State's evidence. "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Richter*, 562 U.S. at 107 (internal citations omitted). "Reliance on the 'harsh light of hindsight' to cast doubt on a trial that took place more than 15 years ago is precisely what *Strickland* and AEDPA seek to prevent." *Id.* at 107 (internal citations omitted). The Supreme Court rejected a claim by Richter, almost identical to Petitioner's claim in the present case, that his trial counsel was ineffective by not hiring an expert to rebut the State's evidence. "But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Richter*, 562 U.S. at 111.

So too in the present case "Newton's third law for the presentation of evidence" was not in effect. The Supreme Court has made it abundantly clear that hindsight is not the standard by which to measure ineffective assistance of counsel claims. *Richter*, 562 U.S. at 107. Because trial counsel elected to go with a different strategy in this trial — by relying on the testimony of Petitioner and other witnesses that the injuries to H.D. described by Dr. Waters were not caused by Petitioner — Petitioner fails to show trial counsel was ineffective

by not calling an expert witness. Furthermore, Petitioner fails to show any viable line of cross-examination for Dr. Waters, backed by an affidavit from his own expert, that would have impeached Dr. Waters' medical conclusions that H.D.'s injuries were "highly suspicious for an abusive penetrating sort of injury" (Tr. Day 3, 130). Accordingly, Petitioner fails to show appellate counsel was ineffective by not raising this as a claim of ineffective assistance of trial counsel on direct appeal. *See Strickland*, 466 U.S. at 693–94 (holding that to establish prejudice sufficient to warrant finding of ineffective assistance, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

D. Failure to file a motion to use the testimony of Dr. Hand

Petitioner claims in his habeas brief Ground One, Proposition II(D), as he did in Proposition V of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that trial counsel was ineffective by not filing a motion to use the testimony of Dr. Ray Hand to allegedly impeach the interview tactics of Jessica Taylor when she conducted the forensic interview of H.D. Petitioner fails to show he was prejudiced by trial counsel's action where the trial court found the testimony of Dr. Hand was not relevant after a hearing on the matter. The trial court held a hearing on April 8, 2011, to determine the admissibility of Dr. Hand's testimony (Tr. 4/8/2011). After hearing the testimony of Dr. Hand, the trial court sustained the State's motion in limine to exclude his testimony. The court considered the fact that Dr. Hand did not interview H.D. or know her

circumstances, and he had no specifics regarding H.D. The trial court sustained the State's motion in limine, addressing trial counsel:

> Mr. Hammond, I just don't think you carried the burden here. I'm concerned by Dr. Hand's testimony that he – concerning the issue of his familiarity with his forensic interviewing techniques. He's self-taught. He relies upon various authors and persons that he relies, but he says it's based on – he can't really tell and show this Court what is his specific protocol other than he's developed it. He hasn't been able to articulate to the Court what he found to be questionable about leading questions. Nor has he interviewed this child. I just don't think under these circumstances that you've carried your burden. I'll sustain the State's motion and objection.

(Tr. 4/8/2011 at 226).

The judge's rationale and conclusion was proper and entirely within his discretion. In *Gilson v. State*, 8 P.3d 883, 907-08 (Okla. Crim. App. 2000), the defendant wanted to call an expert witness, Dr. Wanda Draper, to testify regarding the credibility of child victims' statements. Dr. Draper would have testified about factors that determined whether a child was a competent witness, and that improper interview techniques could "taint" a child's ability to accurately relate an incident.

The OCCA noted in *Gilson* that Dr. Draper could not show that her theory of the effect of trauma on a child's ability to testify could be tested, or whether it was generally accepted in the field of child development. Dr. Draper had stated only that there was a "great possibility" that improper interviewing techniques could impact a child's ability to relate an event. Dr. Draper had interviewed the child victims only once, asking each child five or six uniform questions. *Id.*, 8 P.3d at 908.

The OCCA held in *Gilson* that the trial court did not abuse its discretion in excluding Dr. Draper's expert testimony. Of particular relevance to this case, the OCCA addressed the inadmissibility of evidence that was confusing and speculative:

> Once the trial court determined that the children were competent witnesses, Dr. Draper's testimony [about failing to properly interview a child] would have been confusing and its speculative nature would not have been relevant to the jury's determination of the credibility of the children's testimony.

Id., 8 P.3d at 908. The OCCA stated, "Dr. Draper's testimony did not meet the *Daubert*[10] requirements of 'scientific knowledge' and the testimony would not have assisted the trier of fact." *Id.*

Similarly, in this case, the trial court did not abuse its discretion in excluding the testimony of Dr. Hand. The judge examined the prospective expert witness and determined his testimony was not substantiated. Dr. Hand was unclear in his testimony, stating both that use of anatomically correct dolls can prompt false responses (Tr. 4/8/2011 at 194), and also that use of anatomically correct dolls may be appropriate, once the interviewee has made an allegation (Tr. 4/8/2011 at 195-96).

Dr. Hand's testimony, if admitted, would have amounted to a generalized critique of the technique used to interview H.D. Dr. Hand conceded that interviewing children who are allegedly victims of sexual abuse was not his area of expertise, and he had conducted "not a lot" of such interviews (Tr. 4/8/2011 at 187-88, 213). Defense counsel and Dr. Hand conceded Dr. Hand was not familiar with the particulars of H.D.'s circumstances (Tr.

---

[10] *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

4/8/2011 at 218, 224). He could not identify any specific questions which were leading (Tr. 4/8/2011 at 216-17).

Dr. Hand's expertise in the relevant area was limited, and the trial court's ruling that Dr. Hand was not qualified to offer expert testimony on the interview techniques employed by Ms. Taylor is supported by the record. In addition, Dr. Hand testified the best way to get "accurate" information is to elicit a narrative from the child, and that some researchers believe that use of anatomical dolls "affects their accuracy" and prompts children to offer "fantastic details" (Tr. 4/8/2011 at 192, 194). Though the defense and the proposed expert claimed his testimony would not comment on H.D.'s credibility, it is difficult to imagine how testimony that is intended to point out how a child's responses are not "accurate" and how she might have offered "fantastic details" cannot be viewed by the trial judge as going to the credibility of that child. Under these circumstances, the trial judge did not abuse his discretion under Oklahoma law by excluding the proposed expert testimony.

Furthermore, Petitioner cannot show that he was prejudiced by the absence of Dr. Hand's testimony. Petitioner was permitted to cross-examine the interviewer and H.D. Any lay person with common sense would be aware that suggestive or leading questioning can affect an interviewee's responses. There was no need for an expert to teach this to the jury. If Dr. Hand had presented his evidence to the jury, the prosecutor would have thoroughly impeached it by revealing the same weaknesses shown at the hearing, that Dr. Hand had not conducted any research himself, and that he was not experienced in conducting or evaluating interviews on child sexual abuse victims. The jury also viewed the interview in question, and

would undoubtedly consider the interview free of leading questions, and the child's responses and demeanor to be remarkably credible.

Because the trial court found the testimony of Dr. Hand to be irrelevant, Petitioner fails to show trial counsel was ineffective by not filing another motion with the court to allow his testimony. As such, Petitioner fails to show appellate counsel was ineffective by not raising this as a claim of ineffective assistance of trial counsel on direct appeal. *See Smith v. Workman*, 550 F.3d 1258, 1268 (10th Cir. 2008) (appellate counsel need not raise meritless issues).

E. Failure to object to Bad Acts evidence

Petitioner claims in his habeas brief Ground One, Proposition II(E), as he did in Proposition V of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that trial counsel was ineffective for not objecting to the alleged bad acts evidence about Petitioner. However, appellate counsel did raise a claim on direct appeal that the alleged bad acts evidence should not have been admitted (Exhibit 1, Proposition II). As explained in Ground II below, the OCCA rejected that claim on direct appeal finding the testimony was properly admitted (Exhibit 3, pp. 4-6). Because the evidence was properly admitted, Petitioner fails to show how he was prejudiced by trial counsel not objecting to it at trial. As such, appellate counsel was not ineffective for not raising it as a claim of ineffective trial counsel on direct appeal. *See Smith*, 550 F.3d at 1268 (appellate counsel need not raise meritless issues).

F. Failure to impeach Valerie Dyer and H.D.

Petitioner claims in his habeas brief Ground One, Proposition II(F), as he did in Proposition V of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that trial counsel was ineffective by not impeaching the testimony of Valerie and H.D. with alleged prior inconsistent statements and alleged perjury. Petitioner offers nothing to support his claim that their testimony was perjured other than he disagrees with their testimony. Likewise, Petitioner fails to show the alleged inconsistencies in the testimony of H.D. and Valerie would have changed the result of his trial. Such evidence, even if it existed, could only be used to impeach the credibility of H.D. and Valerie. As previously referenced, the Supreme Court has held that impeachment evidence that goes to the credibility of a witness, "will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness's] account of [the defendant's] actions." *Sawyer*, 505 U.S. at 349. As such, Petitioner fails to show he was prejudiced by appellate counsel not raising a claim of trial counsel ineffectiveness on this issue on direct appeal. *See Robbins*, 528 U.S. at 285-286 (Petitioner has the burden to show but for appellate counsel's failure to raise an issue on the merits he would have prevailed on appeal).

G. Failure to challenge alleged sleeping jurors

Petitioner claims in his habeas brief Ground One, Proposition II(G), as he did in Proposition V of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that trial counsel was ineffective by not addressing the issue

of allegedly sleeping jurors. There is nothing in the record to support such a claim, and Petitioner offers nothing to support his claim that jurors were sleeping at trial. Therefore, appellate counsel was not ineffective for not raising it as a claim of ineffective trial counsel on direct appeal. *See Smith*, 550 F.3d at 1268 (appellate counsel need not raise meritless issues).

H. Failure to request jury instruction on corroboration

Petitioner claims in his habeas brief Ground One, Proposition II(H), as he did in Proposition V of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that trial counsel was ineffective by not requesting a jury instruction on corroboration of H.D.'s testimony. Under Oklahoma law, in cases of rape or lewd or indecent acts with a child, a conviction may be sustained upon the uncorroborated testimony of the victim unless the testimony appears incredible or so unsubstantial as to make it unworthy of belief. *Jones v. State*, 765 P.2d 800, 802 (Okla. Crim. App. 1988). Corroboration is only necessary when a victim's testimony is too inherently improbable to support the conviction. *Gamble v. State*, 576 P.2d 1184, 1185-86 (Okla. Crim. App. 1978). The improbability must arise from something other than the question of her believability. *Id.* The testimony must be so contradictory and unsatisfactory, or the witness must be so thoroughly impeached as to be insufficient as a matter of law to sustain a conviction. *Id.*

As shown in the Statement of Facts, *supra*, H.D.'s testimony, including her forensic interview, was not inherently improbable or contradictory so as to require corroboration. As such there was no basis for trial counsel to request a jury instruction on corroboration.

Moreover, H.D.'s testimony was corroborated by the testimony of Dr. Waters that the injuries to H.D.'s hymen were "highly suspicious for an abusive penetrating sort of injury" (Tr. Day 3, 130).

Because there was no basis under Oklahoma law for trial counsel to request a jury instruction on corroboration, Petitioner was not prejudiced by trial counsel not requesting it. Therefore, appellate counsel was not ineffective for not raising it as a claim of ineffective trial counsel on direct appeal. *See Robbins*, 528 U.S. at 285-286 (Petitioner has the burden to show but for appellate counsel's failure to raise an issue on the merits he would have prevailed on appeal).

I. Failure to present evidence

Petitioner claims in his habeas brief Ground One, Proposition II(I), as he did in Proposition V of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that trial counsel was ineffective by not presenting alleged evidence that H.D.'s uncle was a registered sex offender and that somehow made him a suspect for sexually abusing H.D. Petitioner fails to present anything to support his claim that H.D.'s uncle had the opportunity to molest H.D., much less that he sexually abused her. There is nothing to indicate that H.D. mistook her uncle for Petitioner when she was sexually assaulted by Petitioner or that there was any indication in H.D.'s forensic interview that anyone other than Petitioner sexually abused her. As such, appellate counsel was not ineffective for not raising this as a claim of ineffective trial counsel on direct appeal. *See Smith*, 550 F.3d at 1268 (appellate counsel need not raise meritless issues).

J. Advice of trial counsel regarding alleged plea offer

Petitioner claims in his habeas brief Ground One, Proposition II(J) that appellate counsel was ineffective by not raising a claim that but for trial counsel's alleged deficient performance at trial, Petitioner would have accepted a plea offer from the State. Petitioner did not raise this claim in his direct appeal or in his post-conviction appeal to the OCCA. As such, the claim would be procedurally barred if Petitioner attempted to raise it in a second post-conviction application. *See Watson v. State*, 343 P.3d 1282, 1283 (Okla. Crim. App. 2015) (any ground not raised in first application for post-conviction relief may not be raised in subsequent application).

There is nothing in the record to support Petitioner's claim that he was offered a plea bargain by the State. However, even if he was, he did not raise this claim in his direct appeal or in his post-conviction appeal to the OCCA. The claim would be procedurally barred if Petitioner attempted to raise it in a subsequent post-conviction application. Under the Oklahoma Post-Conviction Procedure Act, Okla. Stat. tit. 22, § 1086, all issues that a post-conviction applicant could have raised in his direct appeal, or "in any other proceeding the applicant has taken to secure relief," will be procedurally barred from being raised in a subsequent application, unless there "is a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application." § 1086. Claims that could have been raised in a prior post-conviction application are waived. *Berget*, 907 P.2d at 1081-82. Petitioner was obviously aware of the alleged plea offer when he filed his

post-conviction application. He fails to show cause for not raising it in his post-conviction application.

Because of his procedural default, this Court may not consider Petitioner's claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim regarding the alleged plea offer is not considered. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). *See Smallwood v. Gibson*, 191 F.3d 1257, 1268 (10th Cir. 1999) (Oklahoma's procedural bar on claims brought in second post-conviction application, which could have been brought in first post-conviction application, is adequate to bar federal habeas review of the claims).

To the extent Petitioner argues that ineffective appellate counsel was the cause for his failure to raise this claim regarding the alleged plea offer on direct appeal or in his first post-conviction application, this argument is unavailing. Petitioner defaulted his ineffective assistance of appellate counsel claim whether reviewed substantively or as cause. Petitioner failed to present this claim regarding the alleged plea offer to the OCCA in his first post-conviction appeal, and accordingly the claim is barred, and Petitioner cannot use ineffective assistance of appellate counsel as his excuse for his procedural default of the claim. *Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). As the Supreme Court stated in *Carpenter*:

> [I]neffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim. And we held in *Carrier* that the principles of comity and federalism that underlie our longstanding exhaustion doctrine—then as now codified in the federal habeas statute, see 28 U.S.C. §§ 2254(b), (c)—require that constitutional claim, like others, to be first raised in state court. "[A] claim of ineffective assistance," we said, generally must "be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default."

Carpenter, 529 U.S. at 451-452 (internal citation omitted); *See Walton v. Franklin*, No. 09-5119, 358 Fed. Appx. 38, 40-41 (10th Cir. Dec. 22, 2009) (unpublished)[11] (Petitioner procedurally defaulted claim of ineffective assistance of trial counsel when he failed to raise it as a claim of ineffective assistance of appellate counsel in his post-conviction proceedings); *Screws v. Jones*, No. CIV-06-429-T, 2006 WL 2645135, *1 (W.D. Okla. Sept. 14, 2006) (unpublished)[12] (where there is no basis for the petitioner to allege he adequately presented an independent claim of ineffective assistance of appellate counsel to the state court, he cannot rely on the allegation of ineffective assistance of appellate counsel to excuse his procedural default); *See* Okla. Stat. tit. 22, § 1086 ("All grounds for relief available to an applicant . . . must be raised in his original, supplemental or amended application. Any ground . . . waived in the proceeding that resulted in the conviction . . . or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent

---

[11]Unpublished decision cited herein for persuasive value only, pursuant to Fed. R. App. P. 31.1 and 10th Cir. R. 32.1(A).

[12]Unpublished decision cited herein for persuasive value only, pursuant to Fed. R. App. P. 31.1 and 10th Cir. R. 32.1(A).

application[.]"). Since Petitioner has failed to show "cause," the issue of prejudice need not be addressed. *Steele v. Young*, 11 F.3d 1518, 1522 n.7 (10th Cir. 1993).

Furthermore, a fundamental miscarriage of justice will not result if the issues raised are not considered by this Court. As previously referenced, in *Coleman*, the Supreme Court held that, "a fundamental miscarriage of justice requires proof of actual innocence." *Coleman*, 501 U.S. at 748. The claim that Petitioner would have accepted the alleged plea offer if he had known trial counsel was going to be deficient in his performance at trial is not an issue which advances actual innocence and in fact is the very opposite of innocence. The claim merely challenges trial counsel's performance without any specific claim of deficient performance or prejudice. *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995) (Petitioner must show "actual innocence" to meet fundamental miscarriage of justice standard). Petitioner fails to make a showing of actual innocence on this claim.

As such, the Petitioner does not meet the actual innocence requirement to show a fundamental miscarriage of justice. To invoke the "fundamental miscarriage of justice" exception, the Petitioner must identify evidence that affirmatively demonstrates his innocence. *Phillips v. Ferguson*, 182 F.3d 769, 774 (10th Cir. 1999). The Supreme Court has held the threshold for showing actual innocence is "extraordinarily high." *Herrera v. Collins*, 506 U.S. 390, 417 (1993). Actual innocence "means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623-24 (1998).

Thus, Petitioner in the present case failed to establish that the application of the procedural bar would result in a fundamental miscarriage of justice. As such, his claim that

he would have accepted the alleged plea offer but for the alleged deficient performance of trial counsel at trial is barred.

III. Alleged false testimony

Petitioner claims in his habeas brief Ground One, Proposition III, as he did in Proposition VI of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that his "trial was infected by false testimony." Petitioner presented nothing with his post-conviction application to show the testimony of the witnesses against him was false other than his disagreement with what they said. As previously referenced in Proposition II(F), *supra*, at most he shows potential impeachment evidence that would not have changed the result of his trial. The Supreme Court has held that impeachment evidence that goes to the credibility of a witness, "will seldom, if ever, make a clear and convincing showing that no reasonable juror would have believed the heart of [the witness's] account of [the defendant's] actions." *Sawyer*, 505 U.S. at 349.

The Supreme Court held in *United States v. Agurs*, 427 U.S. 97, 103 (1976):

> [a] conviction obtained by knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.

The relevant standard from *Agurs* is whether: (1) "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony"; (2) "the prosecution knew or should have known, of the perjury"; and (3) "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103-104. The

Petitioner bears the burden of presenting evidence to establish such a violation. *Foster v. Ward*, 182 F. 3d 1177, 1191 (10th Cir. 1999). Petitioner has presented nothing to support his claim that perjured testimony was used against him, much less that the prosecutors knew of any alleged perjury. Therefore, appellate counsel was not ineffective for not raising this as a claim on direct appeal. *See Smith*, 550 F.3d at 1268 (appellate counsel need not raise meritless issues).

IV. Failure to elect a crime

Petitioner claims in his habeas brief Ground One, Proposition IV, as he did in Proposition III of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that the State failed elect which act of rape it was relying on for his conviction. Petitioner was not charged with rape. He was charged with Child Sexual Abuse while H.D. was in his custody at various times between June of 2009 and January 4, 2010 (Tr. Day 2, at 5). Under Oklahoma law, "It is well settled that the State is not required to prove an offense took place on the exact date charged." *Robedeaux v. State*, 908 P.2d 804, 806 (Okla. Crim. App. 1995) (internal quotations omitted).

The sufficiency of the Information is primarily a question of State law. *Tapia v. Tansy*, 926 F. 3d 1554, 1560 (10th Cir. 1991). "An indictment [or information] need only meet minimal constitutional standards, and we determine the sufficiency of an [information] by practical rather than technical considerations." *United States v. Dashney,* 117 F.3d 1197, 1205 (10th Cir.1997).

Valerie Dyer testified that in the summer of 2009 she had an agreement with Petitioner where he would pick up H.D. to spend every other weekend with him (Tr. Day 2 at 57-58, 61). She also testified that in late December 2009 to early January 2010, H.D. spent the Christmas break with Petitioner (Tr. Day 2 at 72-75). It was during these visits that H.D. was under the exclusive parental care of Petitioner.

Petitioner claims that the separate rapes and acts of sexual abuse were not part of one transaction because the victim was not under the exclusive parental care of Petitioner, and therefore he claims the State should have been required to make an election of which crime it was proving. In *Huddleston v. State*, 695 P.2d 8 (Okla. Crim. App. 1985), as in this case, the victim was in the care of the defendant for a specific period of time over the Christmas holidays when the crimes occurred. He was charged with one count of rape and two counts of oral sodomy. The evidence showed the nine-year-old victim was raped each night of her six night visit although the defendant was only charged with one count of rape. The defendant alleged the State had failed to elect which rape it would rely upon for conviction. This Court held that when a young child "is under the exclusive domination of one parent for a definite and certain period of time" then separate acts of abuse occurring during that period of time become one transaction for the rule of election. *Id.*, 695 P.2d at 10-11.

In the present case Petitioner was charged with one count of Child Sexual Abuse. In addition to the Christmas break, H.D. was under the exclusive parental care of Petitioner on various weekends in the summer and fall of 2009 and during the Christmas break in late

2009. As such, the separate acts of sexual abuse became one transaction and the State was not required to make an election.

The charges were proven by the testimony of the victim who described the acts in detail, and who said they occurred on more than one occasion on separate visits to Petitioner's house and at his mother's house while H.D. was in the custody and control of Petitioner (State's Exhibit 3 at 37:00, 44:40). As such, the State was not required to make an election under Oklahoma law. Even if Petitioner could show that the State should have elected a date for the crime, Petitioner fails to show he was prejudiced where the State could have charged him with multiple counts of Child Sexual Abuse based on the forensic interview of H.D. *See Gilson*, 8 P.3d at 900 (under Oklahoma law, the State had the option to charge and prove separate acts of child abuse). Therefore, appellate counsel was not ineffective for not raising this as a claim on direct appeal. *See Smith*, 550 F.3d at 1268 (appellate counsel need not raise meritless issues).

V. Failure to raise a claim of prosecutorial error

Petitioner claims in his habeas brief Ground One, Proposition V, as he did in Proposition IV of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim of prosecutorial error in that the prosecutor allegedly: (A) misstated material facts; (B) improperly expressed personal beliefs about the veracity of the witnesses; and, (C) knowingly used perjured testimony. None of these claims are supported by the record. As such, Petitioner fails to show appellate counsel was ineffective by not raising this claim on direct appeal.

Trial counsel did not object to most of the now complained of acts of the prosecutor at trial, thereby waiving all but plain error under Oklahoma law. *Grissom v. State*, 253 P.3d 969, 992 (Okla. Crim. App. 2011). In *Simpson v. State*, 876 P.2d 690, 698 (Okla. Crim. App. 1994), the OCCA held:

> If defense counsel does not object, this Court has repeatedly held the error is waived for all but fundamental error, now properly known as plain error, which has been defined as an error which goes to the foundation of the case, or which takes from a defendant a right essential to his defense.

There is no practical distinction between the OCCA's plain error review and the federal due process test of fundamental error review. *Thornburg v. Mullin*, 422 F.3d 1113, 1124-25 (10th Cir. 2005). Because the now complained of questions and arguments by the prosecutor were proper, there was no misconduct by the prosecutor, much less plain error. As such, Petitioner fails to show he was prejudiced by appellate counsel not raising this claim on direct appeal.

In *Donnelly v. DeChristoforo*, 416 U.S. 637, 645 (1974), the Supreme Court held that the standard for establishing the appropriateness of a prosecutor's comments during trial is whether the prosecutor's remarks made the defendant's trial so fundamentally unfair as to deny him due process. The OCCA holds that in order for a prosecutor's statements at trial to warrant relief, "Appellant must show not only that error occurred but that the resulting prejudice from the error was such that reversal is warranted." *Bland v. State*, 4 P.3d 702, 726 (Okla. Crim. App. 2000).

In *Bland*, the defendant argued on appeal that the prosecutor stated in his closing argument that it was the jury's civic and moral duty to find the defendant guilty and sentence

him to death. The OCCA held that the prosecutor's closing argument focused on the jury's duty to serve and render a verdict based upon the evidence and denied the defendant relief. *Id.*, 4 P.3d at 727-28. In order for a prosecutor's remarks to amount to reversible error, the OCCA has long held that they must be "[f]lagrant and of such a nature as to be prejudicial to the defendant. . ." *Kite v. State,* 506 P.2d 946, 950 (Okla. Crim. App. 1973). Moreover, prosecutors have wide latitude in closing argument to discuss the evidence and reasonable inferences therefrom. *Hanson v. State*, 72 P.3d 40, 49 (Okla. Crim. App. 2003). It is well settled under Oklahoma law that the prosecutor is entitled to make fair comments on the evidence. *Pavatt v. State*, 159 P.3d 272, 291 (Okla. Crim. App. 2007). The prosecutor's comments and actions in this case did not deny Petitioner a fundamentally fair trial. Thus, appellate counsel was not ineffective in failing to raise this claim.

A. Allegedly misstating the evidence and vouching for witnesses

Petitioner argues in Proposition V(A) that the prosecutor misrepresented the evidence by allegedly:

> [p]ersuading the jury that there were no issues of custody or visitation in question, insinuating that the defense theory of false charges is an air defense; that Valerie was truthful, did not commit adultery, and did not use drugs; that H.D. was given the opportunity by Jessica Taylor to point out an alternate perpetrator of abuse; and that the Petitioner was an uncaring father that felt no responsibility to his family.

(Brief of Petitioner, pp. 35-36).

He argues in his Proposition V(B) that the prosecutor vouched for the witnesses. The argument by the prosecutor did not misstate the evidence or vouch for the witnesses. Instead

it was based on fair inferences from the evidence. *Hanson*, 72 P.3d at 49. The prosecutor's closing argument that there were not issues of custody or visitation prior to H.D. reporting the sexual assaults was properly based on the evidence at trial (Tr. Day 4 at 183). The evidence was that from the summer of 2009 until Christmas 2009, Valerie had a civil relationship with Petitioner (Tr. Day 2 at 72). In the summer of 2009 H.D. was spending every other weekend with Petitioner (Tr. Day 2 at 57-58, 61). The prosecutor's argument did not misstate the evidence.

The prosecutor did not vouch for Valerie or H.D. "Vouching occurs when a prosecutor expresses a personal belief in a witness's credibility, either through explicit assurances or by implying that other evidence, not presented to the jury, supports the witness's testimony." *Taylor v. State*, 248 P.3d 362, 379 (Okla. Crim. App. 2011) (internal citations omitted). Nowhere in the prosecutor's closing argument did the prosecutor vouch for Valerie or H.D. The prosecutor did not call the defense "an air defense" (Tr. Day 2 at 180-190, 212-219). Contrary to Petitioner's claim, the prosecutor did not say Valerie did not commit adultery or use drugs. In fact, the prosecutor's closing argument specifically acknowledged that Valerie admitted she became involved with a boyfriend after Petitioner sent her and H.D. back to Oklahoma from California because Petitioner said he did not want her around anymore (Tr. Day 4 at 182). The prosecutor also specifically acknowledged that Valerie admitted that she used marijuana and told Petitioner that (Tr. Day 4 at 186).

The prosecutor did not misstate the evidence when the prosecutor argued Ms. Taylor gave H.D. the opportunity during her forensic interview to name someone else as the person who sexually assaulted her. The prosecutor correctly pointed out that Ms. Taylor asked H.D., "Did somebody else do this?" (Tr. Day 4 at 207). Finally, there was nothing improper in the prosecutor's argument that Petitioner sent Valerie and H.D. back to Oklahoma and then later brought Amanda Monsalve with him to Oklahoma to live with him (Tr. Day 4 at 182-183). This was based on the evidence at trial as shown in the Statement of Facts, *supra*.

The prosecutor's argument that the evidence was uncontroverted that H.D. was sexually abused was based on the testimony of Dr. Waters (Tr. Day 3 at 129-130). Petitioner did not dispute that evidence, and in fact Petitioner and his sister both testified that they thought H.D. had been sexually abused by someone (Tr. Day 3 at 157-159, 166, 172, Day 4 at 159). Again there was no improper vouching for the State's witnesses. It was trial counsel who repeatedly called Valerie a liar (Tr. Day 4 at 191-192, 194). To the extent this Court finds any misstatement of the facts by the prosecutor, such are minor misstatements which in no way affected the outcome of the trial. *Bear v. State*, 762 P.2d 950, 957 (Okla. Crim. App. 1988). The prosecutor's comments did not render Petitioner's trial fundamentally unfair. *Donnelly*, 416 U.S. at 645. Accordingly, Petitioner fails to show he was prejudiced by appellate counsel not raising this issue on direct appeal where it would have been denied by the OCCA. *See Smith*, 550 F.3d at 1268 (appellate counsel need not raise meritless issues).

B. Alleged knowing use of perjured testimony

Petitioner repeats his claim that the prosecutor presented perjured testimony. As previously shown in Proposition III, *supra*, the relevant standard from *Agurs* is whether: (1) "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony"; (2) "the prosecution knew or should have known, of the perjury"; and (3) "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103-104. Petitioner bears the burden of presenting evidence to establish such a violation. *Foster*, 182 F.3d at 1191. Petitioner has presented nothing, other than his obvious disagreement with the testimony of the State's witnesses, to support his claim that perjured testimony was used against him, much less that the prosecutors knew of any alleged perjury. Therefore, appellate counsel was not ineffective for not raising this as a claim on direct appeal. *See Smith*, 550 F.3d at 1268 (appellate counsel need not raise meritless issues).

VI. Failure to raise a claim of alleged hearsay

Petitioner claims in his habeas brief Ground One, Proposition V, as he did in Proposition VIII of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not raising a claim that improper hearsay evidence was admitted against him in the form of disclosures of child sexual abuse made by seven-year-old H.D. to her mother, Valerie, and in her forensic interview with Ms. Taylor. Petitioner claims the testimony about the disclosures and the forensic interview was admitted without a hearing on reliability and was not corroborated. That is simply incorrect.

Petitioner acknowledged that Okla. Stat. tit.12, § 2803.1(A) provides in pertinent part:

> A statement made by a child who has not attained thirteen (13) years of age . . . . which describes any act of physical abuse against the child or incapacitated person or any act of sexual contact performed with or on the child or incapacitated person by another, is admissible in criminal and juvenile proceedings in the courts in this state . . . .

See Folks v. State, 207 P.3d 379, 382 (Okla. Crim. App. 2008) (§ 2803.1 is a specific exemption to the hearsay rule that allows the statement of a child under 13 describing acts of sexual conduct performed with the child). Section 2803.1(A)(1) goes on to require the trial court to conduct a hearing to determine if the statement is trustworthy. The trial court in this case conducted such a hearing and determined the statements of H.D. regarding the sexual abuse by Petitioner had sufficient indicia of reliability:

> [t]he Court finds that there is sufficient indicia of reliability so as to render the statements contained not only in the video that [H.D.] has – that is attributed to [H.D.] that's depicted in that video, as well as the declaration that she made to her mother the day after she retrieved [H.D.] – the day that she retrieve [H.D.] from her father, the Court finds that considering all those factors there is sufficient indicia of reliability so as to render them inherently trustworthy.

(Tr. Apr. 4 & 8, 2011 at 166).

As such, the trial court held the required hearing and found the statements by H.D. were inherently trustworthy. Therefore, the testimony of Valerie and Ms. Taylor regarding the statements along with the video recording of the forensic interview of H.D. were properly admitted.

Petitioner further claims H.D. was unavailable at trial, the statement was not corroborated and therefore it was inadmissible under § 2803.1(A)(2)(b). However, contrary to Petitioner's assertion, H.D. did testify at trial.

H.D. testified she remembered her interview with Jessica Taylor, and she remembered everything she told Ms. Taylor.

[PROSECUTOR]: [t]he things that you told Jessica in that interview, did those things really happen to you?

[WITNESS]: Yes.

[PROSECUTOR]: Who did those things to you, [H.D.]?

[WITNESS]: [Petitioner].

[PROSECUTOR]: And who is [Petitioner]?

[WITNESS]: My dad.

(Tr. Day 3 at 97). H.D. testified no one asked her to lie or make anything up about Petitioner, specifically, that her mother never asked her to lie about Petitioner.

H.D. testified she did not want to talk to Ms. Taylor, and in some parts of the interview, she was embarrassed to answer Ms. Taylor's questions, and some of the times she said "I don't know" and "I don't remember" to Ms. Taylor was because she was embarrassed. H.D. was unwilling to tell the jury the details of what Petitioner did to her, but testified the things she told Ms. Taylor really happened to her (Tr. Day 3 at 97-99). H.D. testified that in addition to the things she told Ms. Taylor, Petitioner did things to her in his tent that was beside the house.

As such, there was no requirement to corroborate H.D.'s account. But, as previously shown in Proposition II(H) *supra*, H.D.'s testimony was corroborated by the testimony of Dr. Waters that the injuries to H.D.'s hymen were "highly suspicious for an abusive penetrating sort of injury" (Tr. Day 3, 130). Accordingly, the statements of H.D. were properly admitted, and Petitioner fails to show he was prejudiced by appellate counsel not raising this issue on direct appeal. *See Strickland*, 466 U.S. at 693–94 (holding that to establish prejudice sufficient to warrant finding of ineffective assistance, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

VII. Failure to challenge the denial of the demurrer

Petitioner claims in his habeas brief Ground One, Proposition VII, as he did in Proposition XI of his post-conviction appeal to the OCCA, that appellate counsel was ineffective by not claiming on direct appeal that the trial court erred by overruling the defendant's demurrer to the evidence at his third trial held in April 2012. There was more than sufficient evidence presented to support the trial court's denial of Petitioner's demurrer to the evidence.

> The test of a demurrer to the plaintiff's evidence requires both the trial court and the reviewing court to accept as true all of the plaintiff's evidence and its reasonable inferences, and to disregard conflicting evidence favorable to the defendant. A demurrer to the plaintiff's evidence should be sustained only when there is an entire absence of proof.

State v. Price, 280 P.3d 943, 953 (Okla. Crim. App. 2012) (internal citations omitted).

As the State showed in Proposition I, *supra*, there was more than sufficient evidence presented to prove Petitioner's guilt beyond a reasonable doubt. In addition to the forensic interview, where H.D. described Petitioner's numerous sexual assaults of her, Ms. Taylor testified about H.D.'s disclosures to her in the interview. As previously shown, Dr. Waters examined H.D. and testified to the complete absence of H.D.'s posterior hymen that was indicative of abuse. This was more than enough evidence to support the trial court's denial of Petitioner's demurrer. As such, Petitioner fails to show he was prejudiced by appellate counsel not raising this issue on direct appeal. *See Smith*, 550 F.3d at 1268 (appellate counsel need not raise meritless issues).

Conclusion

The OCCA rejected Petitioner's claims of ineffective assistance of appellate counsel in his appeal of the trial court's denial of his application for post-conviction relief. The OCCA found there was no reasonable probability that raising the omitted issues at trial or on appeal would have resulted in a different outcome in Petitioner's trial or appeal (Exhibit 6, pp. 3-6). The Supreme Court held in *Richter*, 562 U.S. at 98, that a State court does not have to show which part of a multipart claim it found insufficient because § 2254(d) deference applies when a "claim," not a component of one, is adjudicated. The OCCA rejected Petitioner's claim of ineffective assistance of appellate counsel (Exhibit 6, pp. 3-6).

Petitioner fails to show this ruling by the OCCA was contrary to, or an unreasonable application of, Supreme Court law. As previously referenced, *supra*, the Supreme Court has

reiterated that before a state prisoner can obtain habeas corpus relief from a federal court he must show:

> [t]hat 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 of fair minded disagreement. The reasons for this approach are familiar. Federal habeas review of state convictions frustrates both States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.

Richter, 562 U.S. at 103 (internal quotations and citations omitted).

Accordingly, Petitioner's claims have no merit, and he fails to show prejudice by appellate counsel not raising them. Therefore, Petitioner has failed to show that the OCCA's opinion finding appellate counsel was not ineffective was contrary to, or an unreasonable application of, *Strickland,* or an unreasonable determination of the facts. He has to show more than the OCCA's opinion was wrong but that it was "objectively unreasonable." The OCCA's opinion was certainly not an "objectively unreasonable" application of *Strickland*, especially when viewed through the prism of "double deference." *Williams,* 529 U.S. at 409; *Richter*, 562 U.S. at 105; *Knowles*, 556 U.S. at 123. As such, he is not entitled to habeas relief.

Ground Two

PROPOSITION

THE OPINION OF THE OKLAHOMA COURT OF CRIMINAL APPEALS DECIDING THAT ADMISSION OF ALLEGED BAD ACTS EVIDENCE WAS NOT ERROR WAS A MATTER OF STATE LAW AND NOT SUBJECT TO FEDERAL HABEAS CORPUS REVIEW.

The Petitioner claims in Ground Two of his habeas corpus brief a single proposition that the trial court improperly allowed evidence of other crimes or bad acts to be introduced regarding his contentious marriage and divorce with Valerie Dyer and his relationship with his daughter H.D. Petitioner raised this claim in Proposition II of his direct appeal (Exhibit 1). He argues appellate counsel did not fully develop the claim. Petitioner claims this evidence denied him a fair trial. In a detailed opinion, the OCCA found that the evidence about Petitioner's relationship with Valerie and H.D. was properly admitted under Oklahoma law (Exhibit 3, pp. 4-6). The OCCA found that much of the testimony "[i]nvolved neither other crimes, bad acts, nor acts carrying a prejudicial stigma" (Exhibit 3, p. 5). The OCCA found the history of Petitioner's contentious relationship with Valerie and H.D. supported Petitioner's defense that Valerie was angry at Petitioner and coached H.D. to falsely accuse him (Exhibit 3, p.5). This was a ruling by the highest State court on a state law issue that is not subject to challenge in federal habeas corpus proceedings. *Anderson-Bey v. Zavaras*, 641 F.3d 445, 453 (10th Cir. 2011).

As a general matter, federal habeas corpus relief does not lie to review state law questions about the admissibility of evidence. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

It is well established that an issue regarding admissibility of evidence is a matter of State law, and as such is not a proper issue for habeas corpus review. *Bullock v. Carver*, 297 F.3d 1036, 1055 (10th Cir. 2002); *Moore v. Marr*, 254 F.3d 1235, 1246 (10th Cir. 2001). As the Tenth Circuit held in *Moore*:

> As a general matter, federal habeas corpus relief does not lie to review state law questions of admissibility of evidence, and federal courts may not interfere with state evidentiary rulings unless the rulings in question rendered 'the trial fundamentally unfair as to constitute a denial of federal constitutional rights.'

Id. at 1246 (internal citations omitted).

The Tenth Circuit Court of Appeals held in *Boyd v. Ward*, 179 F.3d 904, 916 (10th Cir. 1999), to the extent that Petitioner argues that the state court erroneously interpreted and applied state law, this issue does not warrant habeas relief. The Tenth Circuit has held the law does not allow issuance of the writ of habeas corpus on the basis of a perceived error of State law "absent a determination that the state law violation rendered the trial fundamentally unfair." *Spears v. Mullin*, 343 F.3d 1215, 1245 (10th Cir. 2003)(citing *James v. Gibson*, 211 F.3d 543, 545 (10th Cir. 2000)(internal citations omitted)). "[B]ecause a fundamental-fairness analysis is not subject to clearly definable legal elements, when engaged in such an endeavor a federal court must tread gingerly and exercise considerable self-restraint." *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002).

The bad acts evidence in this trial did not render the trial fundamentally unfair as determined by the OCCA in its review of this case on direct appeal (Exhibit 3, pp. 4-6). *See Knighton v. Mullin*, 293 F.3d 1165, 1171 (10th Cir. 2002)(other crimes evidence did not deny

defendant a fundamentally fair trial); *O'Neal v. Province*, No. 06-CV-610, 2010 WL 2231928, *6 (slip copy) (N.D. Okla. June 1, 2010)(unpublished)[13] (same).

The OCCA carefully reviewed this claim on direct appeal and found the evidence was correctly admitted under Oklahoma law:

> We find in Proposition II that the trial court did not abuse its discretion in allowing Valerie Dyer's testimony about their marriage and details of Dyer's relationship with the child victim, H.D. *Neloms v. State*, 2012 OK CR 7, ¶ 12, 274 P.3d 161, 164. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the issue; a clearly erroneous conclusion and judgment, clearly against the logic and effect of the facts. *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. Valerie testified along similar lines in Dyer's two previous trials. In each, he objected; both times the objections were overruled. Dyer argues that these previous objections, in different trials, preserved this issue for review. He is mistaken. As he did not object to the testimony in this trial, he has waived all but plain error. He must show an actual error, that was plain or obvious, and that the error affected his substantial rights, affecting the outcome of the trial. *Barnard v. State*, 2012 OK CR 15, ¶ 13, 290 P.3d 759, 764.
>
> A person should be convicted only by testimony of the charged crime, but evidence of other crimes or bad acts may be admissible to show absence of mistake or accident, common scheme or plan, motive, opportunity, intent, preparation, knowledge and identity. *Marshall v. State*, 2010 OK CR 8, ¶ 38, 232 P.3d 467, 477; 12 O.S. § 2404(B) (2011). Evidence of an act which carries a prejudicial stigma with jurors is subject to § 2404(B). *Rutan v. State*, 2009 OK CR 3, ¶ 74, 202 P.3d 839, 854. The State must give notice of its intent to use other crimes evidence, and the trial court must give a limiting instruction regarding its use. *Burks v. State*, 1979 OK CR 10, ¶¶ 12, 17, 594

[13]Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. 32.1 and 10th Cir. R. 32.1(A).

P.2d 771, 774-75. Regarding the lack of a *Burks* notice, Dyer does not argue he was surprised by the evidence. *Rutan*, 2009 OK CR 3, ¶ 75, 202 P.3d at 854-55. Dyer argues that any marginal relevancy was substantially outweighed by the danger of unfair prejudice. He relies on *Coates v. State*, 1989 OK CR 16, 773 P.2d 1281. In *Coates* the Court concluded the admission of an abundance of highly inflammatory evidence of other crimes or bad acts required reversal. The analogy is not apt. While the evidence of bad acts in *Coates* had no relevance to the charges, Valerie's testimony had some relevance to the issues at trial. Defense counsel elicited some of this evidence through cross-examination of Valerie, and through his own witnesses, including Dyer himself. The entirety of Valerie's testimony about her history with Dyer, and Dyer's history with H.D., seems to support Dyer's defense. Dyer claimed he did not commit the crimes, and that Valerie coached H.D. to accuse Dyer because she was angry with him. Dyer argues that the prejudicial effect was exacerbated because jurors were not given a limiting instruction on the use of the evidence. We review the trial court's decisions regarding instructions for abuse of discretion. *Soriano v. State*, 2011 OK CR 9, ¶ 10, 248 P.3d 381, 387. Dyer failed to request this instruction and we review for plain error. *Postelle v. State*, 2011 OK CR 30, ¶ 86, 267 P.3d 114, 145.

Much of this evidence involved neither other crimes, bad acts, nor acts carrying a prejudicial stigma. The trial court was not obliged to give a limiting instruction as to that evidence. The testimony that Dyer hit Valerie's stomach while she was pregnant may have carried a stigma which could prejudice Dyer.

However, he fails to show any prejudice from the absence of a contemporaneous limiting instruction as to this evidence. The jury received a general limiting instruction on the use of other crimes evidence. [O.R. 396] As there was no prejudice, there is no plain error. *Rutan*, 2009 OK CR 3, ¶ 78, 202 P.3d at 855.

(Exhibit 3, pp. 4-6).

The carefully detailed opinion of the OCCA is supported by the record. Petitioner complains the trial court erred by admitting evidence of his contentious relationship with Valerie including that he was hostile toward Valerie during her pregnancy and that he isolated Valerie from her family. Petitioner's complaint is disingenuous because, as the OCCA pointed out, Valerie's description of her perceptions of Petitioner's shortcomings was precisely the basis of his defense that she was angry at him and coached H.D. to falsely accuse him. As Petitioner stated in his Proposition I on direct appeal, Petitioner's defense was that Valerie was an angry and scorned wife, and she invented the accusations against him, and coached H.D. to accuse him of sexually abusing her. Indeed, the defense's witness lists consistently notified the State that Petitioner intended to present Valerie and other witnesses for the purpose of showing Valerie's animosity toward Petitioner, as follows:

- Valerie Dyer . . .will testify about issues relative to her animosity and hatred against the Defendant;
- Amanda Monsalve . . will testify about Valerie Dyer's hatred toward the defendant;
- Amy Dark . . . will testify about the Defendant's relationship with H.D. and the Defendant's family relationship with H.D. Will testify about Valerie Dyer's hatred toward the Defendant;

and

- [Petitioner] will . . . testify regarding his relationship with Valerie Dyer.

(O.R. 172-73, 224-28). Thus, Petitioner cannot complain that the same testimony he intended to offer was in fact offered by the State.

The evidence shows that Petitioner was uncomfortable having Valerie's family around the baby because he thought her family was doing drugs around the baby. A month after H.D. was born, Petitioner informed Valerie they were moving to Tennessee to live with his sister. Valerie testified:

> [WITNESS]: He didn't want my family to be around [H.D.]. That was his main concern, and he just wanted, I guess, that control. . . . as soon as that baby was – [H.D.] was born he just wanted that control of who got to see her and he said, "well, I think it's best that we go to Tennessee."

(Tr. Day 2 at 30). On cross-examination, defense counsel elicited testimony to explain that Petitioner was concerned that members of Valerie's family used drugs when H.D. was present, and that was why he did not want her family around the baby (Tr. Day 2 at 111-12). Valerie's comment, that Petitioner "couldn't stand" her family, read in context, was part of the evidence that Petitioner was concerned about her family doing drugs around the baby:

> [PROSECUTOR]: What was [Petitioner's] attitude toward your family at that time?
>
> [WITNESS]: Oh, he couldn't stand my family. Again, that's that control. He didn't want me to be around my family and he didn't want [H.D.] to be around them, but it was okay for – [H.D.] could go around his family and it was just – he just didn't like my family.

(Tr. Day 2 at 44-45).

Petitioner complains of Valerie's testimony he acted angry and nasty when she became pregnant, poked her and called her names, and was uninterested in H.D. The testimony was evidence that Petitioner did not want a child, lost interest in his wife, and was

rude to his wife and disinterested and inattentive to his child. None of the evidence revealed that Petitioner committed a crime or "bad act," but rather was simply morally questionable behavior. *Carter v. State,* 177 P.3d 572, 576 (Okla. Crim. App. 2008) (acts do not automatically fall under the category of other crimes or bad acts simply because they are morally questionable). If the testimony suggested other crimes or bad acts, it was at most an implication. As such, it is not evidence of other crimes, and it does not warrant relief. *See also Bernay v. State*, 989 P.2d 998, 1008 (Okla. Crim. App. 1999) ("[T]he mere suggestion of another crime, without more, will not trigger the general rules regarding the admission of other crimes evidence."). *See Knighton*, 293 F.3d at 1171 (other crimes evidence did not deny defendant a fundamentally fair trial)

In *Carter*, the OCCA reviewed a complaint that the trial court erroneously admitted the contents of certain telephone calls, claiming that it was inadmissible evidence of bad acts. The OCCA stated:

> While we . . . agree with the defense that portions of the intercepted discussions were not relevant and could have been redacted, we find the vast majority of the "incidents" are not evidence of other crimes or even necessarily bad acts, but simply discussions that frame Appellant's "sexually active" character. As such, we find no plain error in their admission[.] . . . Acts do not automatically fall under the category of other crimes or bad acts simply because they are morally questionable.

Carter, 177 P.3d at 576. As in *Carter*, the complained-of testimony here was not inadmissible evidence of other crimes or bad acts. The statements described features of Petitioner's troubled marriage and conflict in his family, and explained the couple's

separation, and H.D.'s visits with Petitioner without Valerie present while H.D. was in Petitioner's exclusive care and custody.

In any event, Petitioner was not unduly prejudiced by the complained of testimony. To the extent the evidence was unflattering, the jury instruction limiting its consideration of evidence of other crimes or bad acts properly channeled the jury's consideration of the evidence:

> Evidence has been received that the defendant has allegedly committed offenses other than that charged in the information. You may not consider this evidence as proof of the guilt or innocence of the defendant of the specific offense charged in the information. This evidence has been received solely on the issues of the defendant's alleged motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity or absence of mistake or accident. This evidence is to be considered by you only for the limited purpose for which it was received.

(O.R. 396, OUJI-CR 9-9). In *Marshall v. State*, 232 P.3d 467, 477 (Okla. Crim. App. 2010), such an instruction was held to effectively limit the jury's use of other crimes evidence. The testimony was dwarfed by the evidence of Petitioner's crimes against H.D. Considering H.D.'s interview, her testimony confirming it, and the corroborating physical evidence that H.D. had no posterior hymen which indicated abuse, it is unlikely that the complained-of statements prejudiced Petitioner or contributed to the jury's verdict. *Stouffer v. State*, 147 P.3d 245, 264 (Okla. Crim. App. 2006). In *Lambert v. State*, 984 P.2d 221, 236 (Okla. Crim. App. 1999), the OCCA found certain other crimes evidence irrelevant and improperly admitted, but also found its admission harmless in light of the evidence of the defendant's

guilt. *See Sattayarak v. State*, 887 P.2d 1326, 1332 (Okla. Crim. App. 1994) ("[G]iven the other evidence, this [improperly admitted other crimes evidence] probably did not affect the outcome of the trial and is not reversible error.").

There was no evidence of prior bad acts or crimes under Oklahoma law, and Petitioner cannot show the testimony harmed him. *Carter*, 177 P.3d at 576 (not every questionable act falls under the category of other crimes or bad acts). *See also Lott*, 705 F.3d at 1193-94 (10th Cir. 2013) (petitioner's trial not rendered fundamentally unfair by admission of other crimes evidence in light of overwhelming evidence of guilt (internal citations omitted)). As such, the admission of the alleged bad acts evidence in this case did not deny Petitioner a fundamentally fair trial.

The evidentiary issues Petitioner raises are not cognizable on habeas review. *See Estelle*, 502 U.S. at 67-68 (stating that a federal court is limited on habeas review to deciding whether a conviction violated the Constitution, laws, or treaties of the United States, and not to re-examining state-court determinations on state-law questions). "[E]rrors in the admissibility of evidence are not grounds for habeas corpus relief absent fundamental unfairness so as to constitute a denial of due process of law." *Martin v. Kaiser*, 907 F.2d 931, 934 (10th Cir. 1990)(citations omitted). The admissibility of "other crimes evidence" is a state law issue. *Glover v. Newton-Embry*, No. CIV-07-282, 2009 WL 2413925, *12 (slip copy)(W.D. Okla. August 5, 2009)(unpublished).[14] Petitioner is only entitled to habeas relief

[14]Unpublished decision cited for persuasive value only, pursuant to Fed. R. App. 32.1 and 10th Cir. R. 32.1(A).

for an improper state evidentiary ruling "if the alleged error was so grossly prejudicial [that it] fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Revilla v. Gibson*, 283 F.3d 1203, 1212 (10th Cir. 2002)(internal citations omitted). *See Holland v. Allbaugh*, 824 F.3d 1222, 1230 (10th Cir. 2016) (holding that OCCA finding that other crimes or bad acts evidence was properly admitted as *res gestae* and did not deny Petitioner due process was not an unreasonable application of Supreme Court precedent). Petitioner in the present case experienced no "fundamental unfairness" because of the alleged bad acts evidence which was properly admitted in this case. State law governed this issue, and Petitioner is not entitled to habeas relief.

CONCLUSION

Petitioner's contentions have been answered by both argument and citations of authority. The Respondent contends that no error occurred which would require reversal or modification, and, therefore, respectfully requests that Petitioner's request for federal habeas relief be denied.

Respectfully submitted,

E. SCOTT PRUITT
ATTORNEY GENERAL

s/ DONALD D. SELF
DONALD D. SELF, OBA # 8062
ASSISTANT ATTORNEY GENERAL

313 N.E. 21st Street
Oklahoma City, Oklahoma 73105
(405) 521-3921
(405) 522-4534 (FAX)
Service email: fhc.docket@oag.ok.gov
ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

X I hereby certify that on November 22, 2016, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing.

X I hereby certify that on November 22, 2016, I served the attached document by mail on the following, who is not a registered participant of the ECF System:

Charles Alan Dyer, #659682
LCC Unit 5 H-2-H
P.O. Box 260
Lexington, OK 73051

/s/Donald D. Self
DONALD D. SELF