Case No. 20-5014

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN WILLIAM CHILDERS,
Petitioner-Appellant,

v.

SCOTT CROW, Director of the Oklahoma Department of Corrections,
Respondent-Appellee.

RESPONDENT-APPELLEE'S ANSWER BRIEF

On Appeal from the United States District Court
For the Northern District of Oklahoma
(D.C. No. 17-CV-416-GKF-JFJ)
The Honorable Gregory K. Frizzell, United States District Judge

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December 18, 2020 **ORAL ARGUMENT IS NOT REQUESTED**

BRIEF HAS ATTACHMENT IN PDF FORMAT

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IN THE UNITED STATES COURT OF APPEALS
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Petitioner-Appellant,	)	
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	)	**(N.D. Okla.)**
	)	
	)	
Respondent-Appellee.	)	

BRIEF OF RESPONDENT/APPELLEE

Respondent, Scott Crow, Director of the Oklahoma Department of Corrections, by and through Joshua R. Fanelli, Assistant Attorney General, hereby offers the following response to Petitioner's appeal from the dismissal of his habeas corpus petition by the United States District Court for the Northern District of Oklahoma.

STATEMENT OF JURISDICTION

On January 6, 2020, the United States District Court for the Northern District of Oklahoma entered an Opinion and Order dismissing Petitioner's Petition for Writ of Habeas Corpus as time-barred by the statute of limitations under 28 U.S.C. § 2244(d), and denying a Certificate of Appealability (hereinafter "COA"). ROA, at

164-69.[1] On that same day, the District Court entered a Judgment of Dismissal, announcing that Petitioner's habeas petition was dismissed with prejudice. ROA, at 170. Petitioner timely filed a notice of appeal on February 3, 2020. ROA, at 171-73. Petitioner filed his Opening Brief seeking a COA from this Court on April 3, 2020. *See* Op. Br. On May 13, 2020, this Court issued a COA on whether Petitioner could overcome the untimeliness of his habeas petition based on a claim of actual innocence, specifically, his ex post facto claim: "[r]easonable jurists could debate whether Mr. Childers has advanced a colorable claim of actual innocence," and that, correlatively, "[r]easonable jurists could also debate whether Mr. Childers' ex post facto claim entitles him to relief." Order Granting COA, at 6-8. Petitioner, through appointed counsel, filed a Supplemental Opening Brief on September 21, 2020. *See* Supp. Op. Br. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2253(c)(1)(A).

[1] The one (1) volume Record on Appeal (hereinafter "ROA") filed in this Court on February 26, 2020, will be referred to as "ROA, at __." *See* 10th Cir. R. 28.1(A) (establishing proper citation method to references to record authority). Petitioner's Opening Brief, filed on April 10, 2020, will be referred to as "Op. Br., at __." This Court's Order Granting COA, filed on May 13, 2020, will be referred to as "Order Granting COA, at __." Petitioner's Supplemental Opening Brief, filed on September 21, 2020, will be referred to as "Supp. Op. Br., at __." Page numbers within the ROA, this Court's Order Granting COA, and Petitioner's briefs filed in this Court will be cited according to the pagination assigned by the green docket stamps at the top of each page.

ISSUES PRESENTED FOR REVIEW[2]

1. Whether Petitioner can overcome both the untimeliness of his habeas petition and the anticipatory procedural bar precluding review of his unexhausted claims based on a credible showing of actual innocence?

2. Whether Petitioner's ex post facto challenges to the lawfulness of his two convictions under the Oklahoma Sex Offenders Registration Act (hereinafter "SORA") entitle him to habeas relief?

STATEMENT OF THE CASE

On September 30, 1998, Petitioner was charged with two (2) counts of First-Degree Rape, in violation of Okla. Stat. tit. 21, § 1114 (1991), and one (1) count of Second-Degree Rape, in violation of Okla. Stat. tit. 21, § 1114 (1991), in Delaware

[2] Petitioner's Statement of the Issues, as well as the substance of his brief, treats the merits of his constitutional claims as somehow preceding the timeliness of his petition and whether he can overcome the time-bar. Petitioner has it backwards. The State raised the statute of limitations below, and the District Court dismissed the petition on that ground. For this Court to ignore the time-bar properly raised by the State and applied by the District Court, instead proceeding directly to the merits of Petitioner's claims, would be an abuse of discretion. *See Wood v. Milyard*, 566 U.S. 463, 473-74 (2012) (absent extraordinary circumstances, court of appeals should dispose of habeas petition in the same manner, procedurally or substantively, as did district court). While Petitioner is correct that this Court's COA order discussed the merits of his constitutional claims, this is because this Court could not grant Petitioner a COA on a procedural issue—*i.e.*, whether he has overcome the untimeliness of his habeas petition by virtue of actual innocence—without also finding that reasonable jurists could debate the merits of his constitutional claims. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000). This Court's compliance with *Slack* does not mean Petitioner gets to skip over the question of time-bar and obtain automatic merits review of his claims.

County Case No. CF-1998-272, stemming from acts Petitioner perpetrated against his minor niece in 1992.[3] ROA, at 59. Petitioner pled guilty to these charges on March 23, 1999, and received a ten (10) year term of imprisonment for each count. ROA, at 59. Petitioner was released from confinement in March of 2005.

Subsequently, on September 8, 2009, Petitioner entered blind pleas of guilty to the crimes of Sex Offender Living within 2000 Feet of a School, in violation of Okla. Stat. tit. 57, § 590 (2006), in Delaware County Case No. CF-2007-341, and Failure to Notify Address Change as a Sex Offender, in violation of Okla. Stat. tit. 57, § 584(D) (2006), in Delaware County Case No. CF-2007-359, each after former conviction of two (2) or more felonies. ROA, at 53. Petitioner was sentenced to life imprisonment on each count, with his sentences ordered to run consecutively. ROA, at 53. Petitioner moved to withdraw his guilty pleas, and on December 8, 2009, the District Court of Delaware County denied that request. ROA, at 53. Petitioner sought *certiorari* relief in the Oklahoma Court of Criminal Appeals (hereinafter "OCCA"),

[3]*See* https://www.oscn.net/dockets/GetCaseInformation.aspx?db=delaware&number=CF-1998-00272&cmid=17027 (last visited Dec. 14, 2020). The bulk of the state court records detailing Petitioner's underlying rape convictions—the offenses predicate to his SORA violations at issue in the instant appeal—as well as his correlative sex offender obligations at the time of those convictions, are largely outside the current record on appeal, as the District Court time-barred the petition below without addressing the merits of his claims. The inadequacy of the record on appeal, as discussed herein, creates a substantial challenge to this Court's ability to properly weigh the merits of Petitioner's claims, a key reason why his petition should be procedurally barred, or else remanded for the record to be properly expounded below. *See Wood*, 566 U.S. at 473-74.

raising three (3) total propositions of error on direct appeal in Case No. C-2010-243, including a claim that his counsel was ineffective, that his sentences were excessive, and that his pleas were not knowing and voluntary. ROA, at 53. On September 24, 2010, in an unpublished Summary Opinion, the OCCA rejected Petitioner's arguments and denied his request for *certiorari* relief. ROA, at 53-54.

Thereafter, on December 16, 2011, Petitioner sought post-conviction relief in the District Court of Delaware County, raising three (3) total propositions of error. ROA, at 56-110. Petitioner argued that his sentences were "void," inasmuch as his pleas allegedly lacked an adequate factual basis, ROA, at 59-70; that his due process rights were violated when his counsel allegedly labored under a conflict of interest, ROA, at 71-85; and that he received ineffective assistance of trial and appellate counsel, ROA, at 85-99. The District Court of Delaware County summarily denied Petitioner's application for post-conviction relief on June 17, 2013. ROA, at 113. Petitioner did not appeal this denial to the OCCA. ROA, at 154.

On July 29, 2013, Petitioner filed a second application for post-conviction relief in the District Court of Delaware County, requesting permission to file an unspecified document out-of-time as a result of an alleged mailing error. ROA, at 119-22. The District Court of Delaware County denied that request on March 20, 2014. ROA, at 134. Petitioner did not appeal this issue to the OCCA.

Petitioner filed his third application for post-conviction relief in the District Court of Delaware County on August 15, 2014, raising four (4) total propositions of error. ROA, at 135-50. Petitioner alleged that his sentences were improperly enhanced, ROA, at 136-39; that the length of his sentences stemmed from the ex post facto application of intervening amendments to the statutes he was convicted under, ROA, at 139-44; that his pleas were not knowingly and intelligently entered, ROA, at 144-46; and that he received ineffective assistance of trial and appellate counsel, ROA, at 146-49. On September 22, 2016, the District Court of Delaware County denied relief on Petitioner's third post-conviction application, finding that his sentence enhancement claim had already been previously raised in Petitioner's first request for post-conviction relief, but leaving unaddressed his other three claims. ROA, at 151.

Petitioner then appealed to the OCCA under Case No. PC-2016-919, again urging that his sentences were improperly enhanced, that the retroactive application of the statutes he was convicted under unlawfully inflated his sentences, that his pleas were not knowing and intelligent, and that counsel was ineffective. *See* Exhibit "1," at 1-3. On December 14, 2016, the OCCA denied relief on Petitioner's claims, finding that Petitioner had "not asserted any issue that either was not or could not have been raised at trial, in his direct appeal, or in his prior post-conviction application." ROA, at 154. Indeed, the OCCA's Order recognized that both

Petitioner's ineffective assistance claim and that his challenge to the knowing and voluntary nature of his pleas were arguments that were, in fact, raised on direct appeal. ROA, at 154. Further, the OCCA consolidated his ex post facto challenge with his sentence enhancement claim and reasoned that an attack on his sentences had already been raised in his initial post-conviction application. ROA, at 154. Accordingly, the OCCA found all of Petitioner's claims barred by the doctrine of *res judicata*, announced that the claims brought in that post-conviction application were exhausted, and denied relief. ROA, at 154-55.

On July 14, 2017, Petitioner filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 in the United States District Court for the Northern District of Oklahoma, naming Joe Allbaugh,[4] Director, as Respondent, and raising four (4) grounds for relief. ROA, at 4-30. Petitioner claimed that his convictions violated the ex post facto clause of the Oklahoma Constitution, ROA, at 8-13; that his sentences were improperly enhanced, ROA, at 13-16; that his pleas were not knowingly and intelligently entered as a result of ineffective assistance of counsel, ROA, at 17-22; and that the state courts improperly denied his post-conviction applications without issuing adequate findings of fact, ROA, at 22-26. Petitioner insisted that his habeas petition was timely based on the fact that it was filed within one (1) year of the

[4] Mr. Allbaugh has since been replaced by Scott Crow, Director, as Respondent in the instant action, as reflected by the caption in this case.

OCCA's denial of his latest request for post-conviction relief. ROA, at 29. Respondent responded to Petitioner's habeas petition on August 28, 2017, urging the District Court to dismiss Petitioner's first three grounds as untimely, and deny Petitioner's fourth ground as meritless. ROA, at 42-52.

On January 6, 2020, the District Court issued a written Opinion and Order denying Petitioner's Section 2254 habeas petition. In that Order, the District Court first found that the Judgment on *certiorari* direct appeal became final no later than December 23, 2010, and that, accordingly, Petitioner filed his habeas petition "well after the AEDPA deadline," and thus was untimely. ROA, at 167. Next, the District Court rejected Petitioner's claim that the Oklahoma Supreme Court's decisions in *Starkey v. Okla. Dept. of Corr.*, 305 P.3d 1004 (Okla. 2013), and *Cerniglia v. Okla. Dept. of Corr.*, 349 P.3d 542 (Okla. 2013), triggered the commencement of a new one-year period under 28 U.S.C. § 2244(d)(1)(C), reasoning that because such cases were not United States Supreme Court rulings, they did not qualify under that statutory exception. ROA, at 167-68. Lastly, the District Court found Petitioner's attack on the state courts' failure to issue adequate written findings in denying post-conviction relief to be unavailing. ROA, at 168. Accordingly, the District Court dismissed Petitioner's habeas petition with prejudice and refused a COA. ROA, at 168-70.

Petitioner timely filed a Notice of Appeal on February 3, 2020. ROA, at 171-73. Subsequently, Petitioner sought a COA from this Court on April 3, 2020. *See* Op. Br. On May 13, 2020, this Court issued an Order Granting COA, announcing that "[r]easonable jurists could debate whether Mr. Childers has advanced a colorable claim of actual innocence," and that, relatedly, "[r]easonable jurists could also debate whether Mr. Childers' ex post facto claim entitles him to relief." Order Granting COA, at 6-8. After counsel was appointed him, Petitioner filed a Supplemental Opening Brief on September 21, 2020. *See* Supp. Op. Br.

SUMMARY OF THE ARGUMENT

Petitioner failed to bring his habeas petition within the one-year statute of limitations established by the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), and his petition is therefore untimely under the AEDPA. In order to warrant excusal of his petition's belatedness, Petitioner bears the burden of demonstrating why equitable tolling of his claims is warranted. In this respect, Petitioner has tailored his effort to offering a colorable claim of actual innocence, in order to present a gateway to the merits of his untimely and procedurally barred arguments. For multiple reasons, Petitioner's ex post facto claims fail to show actual innocence, as discussed in greater detail below.

First, Petitioner's ex post facto arguments, which attack the alleged retroactive application of the SORA to his conduct in this case, and which challenge

the lawfulness of his convictions under Oklahoma state law, present nothing more than legal defenses and pure questions of law, and are inadequate to demonstrate alleged factual innocence of his crimes. Petitioner has presented no new evidence substantiating his claim of innocence, and offers nothing more than argument supporting a claim of alleged legal innocence. As Petitioner's legal arguments fail to satisfy the demanding standard for the actual innocence gateway, this Court should refuse to consider Petitioner's tardy habeas claims and should affirm the District Court's dismissal of his petition.

Second, the ex post facto arguments Petitioner has reengineered on habeas have not first been fairly presented to the OCCA and are therefore procedurally barred as unexhausted claims. Petitioner admits that his claims have been refurbished since his efforts at securing relief in state court, and ordinarily, Petitioner should first bring those new claims in state post-conviction proceedings before subsequently presenting them in federal habeas. However, Petitioner's revamped ex post facto claims now undoubtedly face an anticipatory procedural bar, inasmuch as those challenges would be barred from consideration by the doctrine of waiver and Oklahoma's statutory ban on successive post-conviction applications, should Petitioner return to state court to attempt to fairly present those claims to the OCCA. Because Petitioner's new arguments are subject to an anticipatory procedural bar, Petitioner must demonstrate either cause and prejudice, or actual innocence, in order

to warrant excusal of that bar. Petitioner has made no showing of cause and prejudice, and as was the case with his inability to overcome the time-bar, Petitioner's presentation of pure legal innocence does not amount to actual innocence sufficient to overcome the anticipatory procedural bar. For this additional reason, the District Court's dismissal of Petitioner's petition should be affirmed.

STANDARD OF REVIEW

Because Petitioner's federal habeas petition was filed after the effective date of the AEDPA, the provisions of the AEDPA control in this context. *Mitchell v. Gibson*, 262 F.3d 1036, 1045 (10th Cir. 2001); *Wallace v. Ward*, 191 F.3d 1235, 1240 (10th Cir. 1999). As discussed below, a habeas petitioner's colorable showing of actual innocence can serve as a gateway to otherwise untimely and procedurally barred claims. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). On habeas review, this Court will assess the federal district court's conclusions of law *de novo*, and any factual findings are weighed for clear error. *McCracken v. Gibson*, 268 F.3d 970, 975 (10th Cir. 2001); *LaFevers v. Gibson*, 182 F.3d 705, 711 (10th Cir. 1999).

Further, since the ex post facto arguments Petitioner now presses were not raised in his original habeas petition before the District Court, as discussed below, Petitioner has forfeited the instant claims for appellate review. *See Grant v. Royal*, 886 F.3d 874, 909 (10th Cir. 2018); *Owens v. Trammell*, 792 F.3d 1234, 1246 (10th Cir. 2015). And while this Court ordinarily reviews unpreserved claims for plain

error, Petitioner's failure to invoke the plain error standard should warrant outright forfeiture of his new claims on appeal. *See Bush v. Carpenter*, 926 F.3d 644, 657 n.4 (10th Cir. 2019); *Hancock v. Trammell*, 798 F.3d 1002, 1011 (10th Cir. 2015).[5]

ARGUMENT AND AUTHORITY

GROUND I

PETITIONER'S HABEAS PETITION IS UNTIMELY, AND THE TARDINESS OF HIS PETITION IS NOT EXCUSED BY EQUITABLE TOLLING AS HIS EX POST FACTO CLAIMS DO NOT PRESENT A COLORABLE CLAIM OF ACTUAL INNOCENCE.

First and foremost, the grounds raised in Petitioner's habeas petition are barred by the one-year statute of limitations contained within the AEDPA under 28 U.S.C. § 2244(d)(1), and Petitioner has not established how equitable tolling of his claims is warranted. For the reasons given below, therefore, Petitioner's habeas

[5] Though Petitioner takes issue with the District Court's failure to adjudicate Petitioner's alleged actual innocence in the proceedings below, Petitioner raised no actual innocence claim in his original petition. Rather, Petitioner attacked the length of his sentences based on an application of the ex post facto clause, contending that his term of incarceration was impermissibly enhanced. ROA, at 8-16. Petitioner did not raise a claim of actual innocence until his Opening Brief (and even there, Petitioner did not explicitly raise the issue of innocence, although this Court liberally construed his argument in granting a COA). *See* Op. Br., at 4-7; Order Granting COA, at 6 n.3. Given Petitioner's failure to preserve this issue in the District Court, Petitioner's instant claim of actual innocence warrants only plain error review, if not total forfeiture. *See Hancock*, 798 F.3d at 1011.

petition is untimely, and this Court should uphold the decision of the District Court finding Petitioner's claims time-barred by the AEDPA statute of limitations.

A. The Untimeliness of Petitioner's Habeas Petition is Conceded and is Not within the Scope of the COA

As an initial matter, the District Court found that Petitioner's habeas petition was not filed within the one-year deadline provided by the AEDPA in 28 U.S.C. § 2244(d)(1). ROA, at 167-68. This Court previously concluded that reasonable jurists could not debate this determination. Order Granting COA, at 5-6 ("Reasonable jurists could not debate whether Mr. Childers' § 2254 was timely."). Thus, any challenge to statutory timeliness is outside the scope of this Court's COA order, and indeed, Petitioner makes no argument that his habeas petition was filed within the statute of limitations. The only claim raised by Petitioner, and included within the COA order, is whether he can overcome his untimeliness with a showing of actual innocence. As shown below, he cannot.

B. Petitioner is Not Entitled to Equitable Tolling

The one-year limitation period under 28 U.S.C. § 2244(d) is not jurisdictional and may be equitably tolled "in rare and exceptional circumstances," as in the case of actual innocence. *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000); *see also Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998) (recognizing that equitable tolling of an untimely habeas petition may be warranted in circumstances where "a

constitutional violation has resulted in the conviction of one who is actually innocent or incompetent"). Here, the timeliness of Petitioner's habeas petition hinges on whether he is able to demonstrate actual innocence of his crimes.

A credible showing of actual innocence offers a gateway to consideration of a belated claim of constitutional error, and serves as an equitable exception to the AEDPA limitations period. *See McQuiggin*, 569 U.S. at 386 (holding that actual innocence, if sufficiently demonstrated, "serves as a gateway through which a petitioner may pass" in order to overcome a procedural bar or the expiration of the statute of limitations under Section 2244(d)). Nonetheless, "tenable actual-innocence gateway pleas are rare." *Id.* In order for an actual innocence claim to be credible, a habeas petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *see also McQuiggin*, 569 U.S. at 400-01 (extending actual innocence test in *Schlup* to the one-year limitation period under Section 2244(d)); *House v. Bell*, 547 U.S. 518, 537 (2006) (reaffirming the rule in *Schlup* that a gateway claim of actual innocence requires *new reliable evidence*). Further, the petitioner must demonstrate "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327; *see also McQuiggin*, 569 U.S. at 385. "[T]he *Schlup* standard is

demanding. The gateway should only open when a petition presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *McQuiggin*, 569 U.S. at 401 (citation and internal quotation marks omitted); *see also Klein v. Neal*, 45 F.3d 1395, 1400 (10th Cir. 1995) (noting that the "very narrow" actual innocence exception is "intended for those rare situations where the State has convicted the wrong person of the crime . . . [Or where] it is evident that the law has made a mistake" (citation and internal quotation marks omitted)). In the instant case, for starters, Petitioner's claim of actual innocence should receive, at best, plain error review, if not outright forfeiture. *See, e.g.*, *Grant*, 886 F.3d at 909; *Hancock*, 798 F.3d at 1011.

In any event, Petitioner does not offer or identify any evidence, let alone new or reliable evidence, in support of his allegation of actual innocence. *See Schlup*, 513 U.S. at 324. Indeed, there is nothing "new" about Petitioner's claim of "innocence," which was available at the time of his convictions. Instead of evidence, Petitioner asserts that he is actually innocent of his crimes as a result of the allegedly unlawful ex post facto nature of his convictions. As shown below, however, Petitioner's complaint about the alleged ex post facto effect of his convictions does not amount to a showing of actual innocence, and should not serve as the gateway for this Court

to consider the merits of his untimely habeas petition. *See McQuiggin*, 569 U.S. at 386. Indeed, Petitioner's claim is fundamentally one of alleged legal innocence.

Article II, Section 15 of the Oklahoma Constitution provides that "[n]o . . . ex post facto law . . . shall ever be passed." Okla. Const. art. II, § 15. A similar provision exists under the United States Constitution. U.S. Const. art. I, § 10 (federal ban on ex post facto laws). An ex post facto law has been defined as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action, or that aggravates a crime, or makes it greater than it was, when committed." *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964) (citation and internal quotation marks omitted); *see also Starkey*, 305 P.3d at 1018 (announcing that an ex post facto law is "'[a] law passed after the occurrence of a fact or commission of an act, which retrospectively changes the legal consequences or relations of such fact or deed.'" (citation omitted)).

The ban on ex post facto laws forbids a legislature from establishing a statute "which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed . . . ." *Beazell v. Ohio*, 269 U.S. 167, 169 (1925) (discussing the ex post facto clause of the United States Constitution); *see also Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (reaffirming

the formulation in *Beazell*, recognizing that a legislature "may not retroactively alter the definition of crimes or increase the punishment for criminal acts"). "To fall within the ex post facto prohibition, a law must be retrospective—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it, by altering the definition of criminal conduct or increasing the punishment for the crime." *Sallahdin v. Gibson*, 275 F.3d 1211, 1228 (10th Cir. 2002) (citation omitted).

"Whether an ex post facto violation has occurred presents a question of law." *Sallahdin*, 275 F.3d at 1228 (addressing a habeas petitioner's ex post facto claim in the context of a Section 2245 petition). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Merely asserting a legal argument or defense does not constitute factual innocence, and thus cannot amount to equitable tolling of an untimely habeas petition. *See Gibson*, 232 F.3d at 808 (noting that equitable tolling under the AEDPA is warranted if the petitioner can demonstrate actual innocence); *Laurson v. Leyba*, 507 F.3d 1230, 1233 (10th Cir. 2007) (reasoning that actual innocence means factual innocence); *Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000) (holding that legal defenses bear on a claim of legal innocence, as opposed to factual innocence); *Brecheen v. Reynolds*, 41 F.3d 1343, 1357 (10th Cir. 1994) (reaffirming that an actual innocence inquiry centers on factual, not legal, innocence).

This Court confronted the intersection between a habeas petitioner's ex post facto challenge and his efforts to establish actual innocence in *Martin v. Ray*, No. 08-5083, 295 F. App'x 891, 896 (10th Cir. Oct. 2, 2008) (unpublished).[6] In seeking a COA from this Court, the petitioner alleged that his Oklahoma conviction for forcible sodomy amounted to an ex post facto violation, as his prosecution was not initiated within the statute of limitations under Oklahoma law, particularly because state law required a sodomy prosecution to be brought within seven (7) years of the offense's discovery. *Id.* at 894-95. This Court refused to issue a COA on the petitioner's claims, finding that the claim at issue was not only unexhausted, but also that "nothing in the record appears to be remotely sufficient to establish cause and prejudice, *or actual innocence*, so as to allow [the petitioner] to overcome the procedural bar." *Id.* at 896 (emphasis added).

More recently, and even more pointedly, the United States District Court for the District of Colorado rejected a habeas petitioner's claim that an alleged ex post facto violation gave rise to a colorable showing of actual innocence, in *Pease v. Raemisch*, No. 16-cv-00279-GPG, 2016 WL 8671071, at *3-4 (D. Colo. May 23, 2016) (unpublished). There, the petitioner was convicted under Colorado law of a variety of crimes stemming from his sexual assault of a child, and on habeas claimed

[6] All unpublished decisions are cited for persuasive value only, pursuant to Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

that he was charged and convicted under statutory law that was not in effect at the time of his crimes, and that his sentence as a habitual sex offender was unlawful, inasmuch as a predicate offense ran afoul of the ex post facto clause. *Id.* at *1. The petitioner conceded that his habeas petition was untimely, but sought to establish equitable tolling through the actual innocence gateway. *Id.* at *3. The District Court noted that the petitioner had put forth no new reliable evidence in support of his claim of actual innocence, and instead merely proffered his ex post facto argument as a pure legal defense, which, on balance, the District Court found insufficient to afford him the actual innocence gateway. *Id.* at *4. In rejecting the petitioner's efforts to secure equitable tolling, the Court announced the following:

> Applied to the instant matter, *success on the claim of an ex post facto violation, standing alone, would show only legal innocence*. Pursuant to the above legal authority, *allegations of an ex post facto violation do not give rise to a cognizable assertion of actual innocence*, particularly in the absence of any allegations regarding new reliable evidence as required by *Schlup*. Applicant fails to provide any allegations or argument of new reliable evidence and, therefore, does not meet his burden of establishing actual innocence. For these reasons, equitable tolling does not save the Application from being untimely.

Id. at *5 (emphasis added).

In another similar case, a habeas petitioner's ex post facto challenge to Oklahoma's SORA was insufficient to excuse the procedural hurdles barring consideration of his claim on the merits in *Davis v. Oklahoma Cty.*, No. CIV-09-217-M, 2009 WL 799279, at *2-3 (W.D. Okla. Mar. 24, 2009) (unpublished). There,

the petitioner pled guilty to the crime of Failure to Comply with the Sex Offender Registration Act under Oklahoma law, and while serving a term of probation following his release from confinement, the petitioner filed a habeas petition attacking the lawfulness of his conviction under the ex post facto clause of the Oklahoma Constitution. *Id.* at *1. The District Court refused to consider the merits of the petitioner's untimely petition, reasoning that the petitioner's ignorance of the timing requirements for a habeas petition did not constitute equitable tolling. *Id.* at *2-3 (concluding that it was "not necessary to address the merits of Petitioner's claims" as the petitioner had not overcome the untimeliness of his petition). Furthermore, citing *Schlup*, 513 U.S. at 324, the District Court announced that the petitioner's habeas arguments were insufficient to demonstrate actual innocence. *Davis*, 2009 WL 799279, at *3 ("Nor has Petitioner made any showing of his actual innocence."). Accordingly, the District Court found the petition time-barred and dismissed the petitioner's request for habeas relief. *Id.*

Here, Petitioner claims he is innocent of violating § 590, living too close to a school as a sex offender, and § 584(D), failing to notify address change—crimes he previously admitted to committing in September 2007. Specifically, Petitioner contends that he was originally subjected to a registration period under SORA that would have ended in March 2007, but that an intervening change in Oklahoma law extended his registration period to March 2015, in violation of ex post facto law.

Supp. Op. Br., at 47-48. As to § 590, he also argues that his conviction violates the ex post facto clause because this crime did not exist when he committed his original crimes, in 1992, and when he ultimately became subject to SORA, in 1998. Supp. Op. Br., at 25-31.

Even assuming *arguendo* Petitioner is correct as to the original end date of his registration period,[7] Petitioner's argument on the actual innocence gateway is flawed for multiple reasons. First, rather than attempting to demonstrate, as a threshold matter in each of his Grounds, how his claims should warrant equitable tolling *via* the actual innocence gateway, Petitioner jumps straight to the merits of each issue, and includes an actual innocence showing only at the conclusion of each argument, and only in the most cursory fashion. Petitioner's approach ignores the fact that his habeas petition is untimely, a finding made and discussed below by the District Court, and he has not adequately attempted to overcome that finding of untimeliness under the AEDPA. Second, and critically, Petitioner overlooks an entire body of federal law explaining the distinctions between factual and legal innocence. *See, e.g.*, *Laurson*, 507 F.3d at 1233; *Beavers*, 216 F.3d at 923; *Klein*, 45 F.3d at 1400;

[7] Petitioner's calculation is based on a number of shaky assumptions. For example, he admits the two-year period, instead of a longer period, applied only if he completed a sex offender treatment program in prison. Supp. Op. Br., at 31. But the only support he provides for allegedly having completed this program is a citation to his own bare, self-serving allegations in prior pleadings. Supp. Op. Br., at 13.

Brecheen, 41 F.3d at 1357. As discussed in greater detail above, a habeas petitioner's challenge to the lawfulness of his convictions based on an allegedly unconstitutional application of the ex post facto clause *does not* amount to factual innocence, as such a claim presents nothing more than a legal question. *See Bousley*, 523 U.S. at 623; *Martin*, 295 F. App'x at 896; *Pease*, 2016 WL 8671071, at *3-5; *Davis*, 2009 WL 799279, at *3. Petitioner's unpersuasive efforts to reframe pure questions of law as "factual innocence," as well as his complete failure to present any new or reliable evidence supporting a claim of actual innocence, should together leave him well short of the actual innocence gateway needed to excuse his untimely petition. *See McQuiggin*, 569 U.S. at 401; *Schlup*, 513 U.S. at 327.

Moreover, Petitioner's claims of actual innocence in the instant case are even less tenable than the petitioner's arguments made in *Pease*, 2016 WL 8671071, at *1. Indeed, the petitioner in *Pease* alleged, *inter alia*, that his culpable acts partially pre-dated the enactment of the criminal statute he was ultimately convicted under. *Id.* Unlike in *Pease*, however, Petitioner clearly committed his crimes in this case long after the statutes criminalizing his conduct were enacted. Specifically, Petitioner was charged in 2007 for acts that were alleged to have occurred in September of 2007. Petitioner's crime of Sex Offender Living within 2000 Feet of a School was made criminal in 2003 with the enactment of Okla. Stat. tit. 57, § 590, and he was convicted under the 2006 version of that statute. Likewise, Petitioner's

crime of Failure to Notify Address Change as a Sex Offender was made criminal in 1989 with the enactment of Okla. Stat. tit. 57, § 584(D), and he was convicted under the 2006 version of that statute. Accordingly, Petitioner's ex post facto argument attempting to distinguish the applicability of the statutes at *the time of his registration violations*, as opposed to *the time of his original sex offender registration*, is fundamentally a claim of legal, rather than factual, innocence, and cannot overcome the untimeliness of his petition. *See Martin*, 295 F. App'x at 896; *Pease*, 2016 WL 8671071, at *3-5. Put differently, Petitioner's actions in 2007 were indeed criminal when he committed them; what remains is the *legal* question of whether the law criminalizing those actions was properly applicable to him.

Petitioner's own attempt to shoehorn his claim of legal innocence into one of actual innocence belies its legal nature. He states: "Mr. Childers was free to live within two-thousand feet of a school, even if § 590 made it illegal for others to do so. His doing so thus was not a crime." Supp. Op. Br., at 26. But this statement essentially admits the conduct underlying the crime—living too close to a school as a registered sex offender.[8] This is the opposite of a colorable actual innocence claim,

[8] *See* Okla. Stat. tit. 57, § 590 (2006) ("It is unlawful for any person registered pursuant to the Oklahoma Sex Offenders Registration Act to reside within a two thousand-foot radius of any public or private school site or educational institution."); *see also* Okla. Stat. tit. 57, § 584(D) (2006) ("Any person subject to the provisions of the Sex Offenders Registration Act who changes an address shall give written notification to the Department of Corrections and the local law enforcement authority of the change of address and the new

which requires denying having committed the conduct underlying the crime. *See Sawyer v. Whitley*, 505 U.S. 333, 340 (1992) ("A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime."); *Beavers*, 216 F.3d at 923 (indicating that a claim of actual innocence must be a claim that one is "innocent" of the conduct underlying the conviction); *Mukes v. Warden of Joseph Harp Corr. Ctr.*, No. 08-6182, 301 F. App'x 760, 763 (10th Cir. 2008) (unpublished) ("The court also did not abuse its discretion in rejecting Mukes' claim of actual innocence. Mukes does not dispute that he intentionally killed the two victims during an argument . . . ."). Moreover, as to Petitioner's claim that his acts were not criminal when committed by him, but were criminal if committed by others, consider an analogous claim. A habeas petitioner admits he killed someone—conduct that is ordinarily criminal—but claims he acted in self-defense, such that his particular actions were not criminal. This Court has repeatedly found such a self-defense claim to be a claim of legal, not actual,

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address no later than three (3) business days prior to the abandonment of or move from the current address."). Petitioner repeatedly suggests he was factually innocent of these crimes because he had no duty to register. *See* Supp. Op. Br., at 23-24, 32-33, 40-44, 57, 62-63. But he cites to no law showing that "duty to register" is an element of these crimes, and indeed, the plain statutory text does not require this—§ 590 speaks only to being a registered sex offender, which Petitioner indisputably was, and § 584(D) speaks only to being subject to the provisions of SORA, which again Petitioner was under the extended registration period. ROA, at 54, 59. Whether Petitioner was *legally* subject to that extended registration period—*i.e.*, whether he actually had a *duty* to register given his ex post facto claim—may have provided a legal defense to those crimes, but it did not negate an element.

innocence. *See, e.g.*, *Ellis v. Hargett*, 302 F.3d 1182, 1186 n.1 (10th Cir. 2002); *Beavers*, 216 F.3d at 923; *Mukes*, 301 F. App'x at 763. This Court should hold the same as to Petitioner's claim.[9]

Additionally, the fact that Petitioner knowingly and voluntarily pled guilty to each of the charges at issue in this case further undermines any allegation of actual innocence. *Cf. United States v. Broce*, 488 U.S. 563, 570 (1989) (discussing how a defendant's guilty plea is more than merely "stating that he did the discrete acts described in the indictment," but rather is the act of "admitting guilt of a substantive crime"). Indeed, on *certiorari* direct appeal, the OCCA found Petitioner had freely and voluntarily pled guilty to the charges against him, reasoning as follows:

> Finally, given the whole of the record including the summary of facts form, testimony presented at the plea hearing and the hearing on the

[9] Furthermore, Petitioner draws authority from both *Bousley*, 523 U.S. at 624, and *Davis v. United States*, 417 U.S. 333, 346 (1974), in support of his factual innocence claim and his assertion that "new evidence is not needed where an offense or one of its elements does not apply to a defendant." Supp. Op. Br., at 26 n.4. Petitioner's reliance on these cases is misplaced. In *Bousley*, the defendant pled guilty to using a firearm, and central to the actual innocence analysis was the defendant's claim that his conduct fell short of showing an element of the crime, namely, his "use" of the firearm, under federal law. *Bousley*, 523 U.S. at 624. In the instant case, unlike in *Bousley*, Petitioner's actual innocence argument is nothing more than a legal challenge to the applicability of the SORA statutes, which ignores the fact that his conduct fully satisfied the elements of those crimes at the time he committed them. Moreover, the reasoning Petitioner cites in *Davis* is taken out of context, as the Supreme Court did not discuss the actual innocence gateway there, but rather discussed whether a federal prisoner's non-constitutional claim was cognizable in a Section 2255 petition. *Davis*, 417 U.S. at 346. In any event, Petitioner points to no on-point authority suggesting that his claims amount to a showing of actual, rather than legal, innocence. Respondent has, on the other hand, shown that Petitioner's claims raise questions of pure law, and are insufficient to establish the innocence gateway.

> motion to withdraw, this Court can find that the trial court did not abuse its discretion in finding that Petitioner entered his guilty plea freely and voluntarily with a full understanding of his rights and the nature and consequences of entering the plea.

ROA, at 54. Moreover, Petitioner himself admitted, in his first post-conviction application, the propriety and lawfulness of his SORA registration at the time of his release from confinement in March of 2005, announcing the following: "It was about twenty (20) days later [following release from confinement] when a Delaware County District Attorney's Investigator, Dan Price, arrived at 21677 East 510 Road and explained the Sex Offender's Registration Act to Childers, therein properly registering Childers pursuant to 57 O.S. § 583(A)(1)(2)." ROA, at 59.

Accordingly, any claim of factual innocence Petitioner now urges is belied by the circumstances supporting each of his pleas, particularly given the fact that Petitioner voluntary entered his guilty pleas, admitted that he was fully aware of his sex offender obligations and restrictions upon release from confinement, and nonetheless consciously violated them. *Cf. Johnson v. Medina*, No. 13-1324, 547 F. App'x 880, 885 (10th Cir. Dec. 4, 2013) (unpublished) (finding that "[w]hile he claims that his guilty plea was involuntary and coerced, the state courts rejected that argument, and his plea of guilty simply undermines" a claim of factual innocence); *Chestang v. Sisto*, No. 09-17621, 522 F. App'x 389, 390 (9th Cir. June 11, 2013) (unpublished) (particular facts of the case, and the fact that the petitioner pled guilty,

"seriously undermine[d] the notion" that he was actually innocent); *Goosby v. Trammell*, No. 13-6074, 515 F. App'x 776, 777 (10th Cir. May 30, 2013) (unpublished) ("Given [the petitioner]'s guilty plea and his failure to address other evidence that contributed to his plea, he fails to carry the heavy burden of" demonstrating actual innocence).

C. Conclusion

Petitioner's claims are barred by the statute of limitations under the AEDPA. *See* 28 U.S.C. § 2244(d)(1). In order to warrant excusal of his untimely petition, Petitioner must make a colorable showing of actual innocence. *See McQuiggin*, 569 U.S. at 386. Nonetheless, in light of the voluntariness of Petitioner's guilty pleas, his inability to come forward with new evidence of factual innocence, and his complete failure to allege anything beyond *legal* innocence, Petitioner cannot carry his heavy burden of demonstrating a miscarriage of justice here. *See Schlup*, 513 U.S. at 324. Therefore, Petitioner's claims fall short of meeting the actual innocence gateway to his untimely petition. Petitioner has not shown error in the dismissal of his habeas petition as time-barred, let alone plain error. His belated request for habeas relief must be rejected. *See McQuiggin*, 569 U.S. at 386.

GROUND II

PETITIONER'S CHALLENGES TO THE ALLEGED EX POST FACTO APPLICATION OF THE SORA ARE UNEXHAUSTED BUT SUBJECT TO AN ANTICIPATORY PROCEDURAL BAR, WHICH PETITIONER HAS FAILED TO OVERCOME AS HE HAS NOT DEMONSTRATED ACTUAL INNOCENCE OF HIS CRIMES.

As an additional matter, Petitioner's ex post facto challenges to the lawfulness of his convictions are subject to an anticipatory procedural bar on habeas review, as Petitioner has failed to bring any such claims to the OCCA on either *certiorari* direct appeal or in post-conviction, and those claims would now be procedurally barred if Petitioner returned to state court to exhaust those claims. As discussed below, the same actual innocence standard applies to overcome a procedural bar as applies to an attempt to bypass a time-bar. Thus, Petitioner's legal challenges to the applicability of the SORA cannot overcome the anticipatory procedural bar any more than the time-bar. As such, even assuming this Court is inclined to bypass the time-bar,[10] this Court is still precluded from granting relief on the merits of Petitioner's claims.

[10] As previously indicated, Respondent interprets this Court's COA order as discussing the merits of Petitioner's claims only in compliance with *Slack*. Moreover, Respondent contends that this Court would abuse its discretion if it bypassed the time-bar to consider the merits of Petitioner's claims. *See Wood*, 566 U.S. at 473-74. In any event, before this Court reaches the merits, if it does so, exhaustion must be addressed.

A. Petitioner's Ex Post Facto Claims are Unexhausted

"A threshold question that must be addressed in every case is that of exhaustion." *Harris v. Champion*, 15 F.3d 1538, 1554 (10th Cir. 1994). "Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Petitioner bears the burden of demonstrating that state court remedies have been exhausted as required by 28 U.S.C. § 2254(b), or that exhaustion would otherwise have been futile. *Selsor v. Workman*, 644 F.3d 984, 1026 (10th Cir. 2011); *see also McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009) (reaffirming that the burden rests on a habeas petitioner to show exhaustion).

A claim has been exhausted when it has been "fairly presented" to the state courts. *Picard v. Connor*, 404 U.S. 270, 275 (1971); *see also Brown v. Shanks*, 185 F.3d 1122, 1124 (10th Cir. 1999) ("The exhaustion requirement is satisfied if the issues have been properly presented to the highest state court, either by direct review of the conviction or in a post-conviction attack." (internal quotation marks omitted)). "Fair presentation" requires more than setting forth "all the facts necessary to support the federal claim" before the state court or articulating a "somewhat similar state-law claim." *Bland v. Sirmons*, 459 F.3d 999, 1011 (10th Cir. 2006) (citation omitted).

A petitioner need not "invoke 'talismanic language' or cite 'book and verse on the federal constitution.'" *Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012) (citation omitted). But he may not assert entirely different arguments from those raised in state court. *Bland*, 459 F.3d at 1011. "[T]he crucial inquiry is whether the 'substance' of the petitioner's claim has been presented to the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim." *Prendergast*, 699 F.3d at 1184 (citation omitted). "[O]rdinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief" filed in that court to be made aware of the federal claim." *Baldwin v. Reese*, 541 U.S. 27, 32 (2004).

As the Supreme Court reasoned in *Harrington v. Richter*, 562 U.S. 86, 103 (2011), "[u]nder the exhaustion requirement, a habeas petitioner challenging a state conviction must first attempt to present his claim in state court." *Richter*, 562 U.S. at 103 (citing 28 U.S.C. § 2254(b)). In this respect, the deference provision of 28 U.S.C. § 2254(d), "complements the exhaustion requirement and the doctrine of procedural bar to ensure that *state proceedings are the central process*, not just a preliminary step for a later federal habeas corpus proceeding." *Richter*, 562 U.S. at 103 (emphasis added). "The exhaustion requirement is designed to avoid the 'unseemly' result of a federal court 'upset[ting] a state court conviction without' first according the state courts an 'opportunity to . . . correct a constitutional violation."

Davila v. Davis, 137 S. Ct. 2058, 2064 (2017) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)). Indeed, for purposes of exhaustion, it is not adequate that a petitioner has merely been through the state courts; rather, the petitioner must "present the state courts with the same claim he urges upon the federal courts." *Picard*, 404 U.S. at 275-76; *see also Dever v. Kan. State Pen.*, 36 F.3d 1531, 1534 (10th Cir. 1994) (reasoning that fair presentation requires the federal issue to be "properly presented to the highest state court, either by direct review or in a postconviction attack").

Here, Petitioner's ex post facto challenges to his convictions were not first fairly presented to the OCCA, and are therefore unexhausted. As discussed above, Petitioner's three (3) claims on *certiorari* direct appeal in OCCA Case No. C-2010-243 included arguments that his counsel was ineffective, that his sentences were excessive, and that his pleas were not knowing and voluntary. ROA, at 53. Nowhere in his *certiorari* direct appeal did Petitioner raise an attack on the allegedly unlawful ex post facto application of the SORA to his convictions in this case. Following the OCCA's Summary Opinion, Petitioner filed his first post-conviction application in the District Court of Delaware County on December 16, 2011, alleging that his sentences were "void," as his pleas allegedly lacked a factual basis, ROA, at 59-70; that his counsel's alleged conflict of interest deprived him of due process, ROA, at 71-85; and that he received ineffective assistance of trial and appellate counsel, ROA, at 85-99. The District Court of Delaware County summarily denied

Petitioner's application for post-conviction relief on June 17, 2013. ROA, at 113. Petitioner did not appeal that denial to the OCCA. ROA, at 154. Petitioner's second post-conviction application involved a procedural request to correct a mailing error, which the District Court of Delaware County also denied, and which is unrelated to the instant analysis. ROA, at 119-22, 134.

In his third post-conviction application, filed in the District Court of Delaware County on August 15, 2014, Petitioner raised four (4) propositions, including a claim that his sentences ran afoul of the ex post facto clause. ROA, at 139-44. Specifically, on that issue, Petitioner argued that the life sentences imposed on each of his convictions were improperly inflated, as a result of the allegedly unlawful retroactive application of the sentencing ranges for each crime. ROA, at 139-44. In that argument, Petitioner focused his attack on the lawfulness of his life sentences, rather than the legitimacy of his convictions, under the ex post facto clause. The District Court of Delaware County rejected relief in an Order filed on September 22, 2016, reasoning that Petitioner's third application "raises one of the same issues he raised in his previous" application—his attack on his sentence enhancement—and summarily denied Petitioner's entire post-conviction application "as it brings an issue already ruled on by this Court and which was or should have been known" by Petitioner at the time of his initial application. ROA, at 151.

On October 7, 2016, Petitioner appealed the denial of his third post-conviction application to the OCCA under Case No. PC-2016-919. Petitioner attempted to re-raise the issues already rejected by the District Court of Delaware County, asserting that his sentences were improperly enhanced, that the retroactive application of the statutes he was convicted under unlawfully inflated his sentences, that his pleas were not knowing and intelligent, and that counsel was ineffective. Ex. 1, at 3. With respect to the ex post facto issue, Petitioner articulated only the following argument, without any additional discussion or adornment:

> His second proposition argues the fact that the State wrongfully applied law implemented after his predicate offense to his case. This issue was clarified in **Starkey v. Okla. Dept. of Corr.**, and **State v. Salathiel**, landmark cases directly applicable to Petitioners [sic], each of which was decided after Petitioner filed his initial post conviction.

Ex. 1, at 3 (bold in original). In an unpublished Order filed on December 14, 2016, the OCCA denied relief on Petitioner's claims, finding that Petitioner had "not asserted any issue that either was not or could not have been raised at trial, in his direct appeal, or in his prior post-conviction application." ROA, at 154. In so doing, the OCCA's Order reasoned that both Petitioner's ineffective assistance claim and that his challenge to the knowing and voluntary nature of his pleas were already raised and rejected on direct appeal. ROA, at 154. Additionally, the OCCA consolidated Petitioner's ex post facto challenge with his sentence enhancement argument, and concluded that an attack on his sentence enhancement had already

been denied in his initial post-conviction application. ROA, at 154. Accordingly, the OCCA found all of Petitioner's claims barred by the doctrine of *res judicata*, held that those claims brought in Petitioner's post-conviction application were exhausted, and denied relief. ROA, at 154-55.

Petitioner then urged the same hybrid ex post facto/sentence enhancement arguments in his habeas petition brought before the United States District Court for the Northern District of Oklahoma. ROA, at 8-12. The District Court, in rejecting Petitioner's request for habeas relief, found that Petitioner had not overcome the statute of limitations under the AEDPA, and that his reliance on the intervening decisions in *Starkey*, 305 P.3d 1004, and *Cerniglia*, 349 P.3d 542, did not reset his one-year period under 28 U.S.C. § 2244(d)(1)(C). ROA, at 167-68. On balance, Petitioner's habeas petition was dismissed as untimely. ROA, at 168-69.

Subsequently, in Petitioner's *pro se* Opening Brief and Application for Certificate of Appealability, Petitioner re-urged his ex post facto argument, claiming that the State had "improperly retroactively appl[ied] laws that should not have been applied retroactively," and that, as a result, he was wrongfully incarcerated for his crimes. Op. Br., at 6-7. This Court liberally construed Petitioner's argument as an effort at raising an actual innocence claim, notwithstanding his failure to explicitly raise that argument in his Opening Brief, and issued a COA on the question of

whether, as a result of the alleged ex post facto violations in Petitioner's cases, Petitioner had shown actual innocence. Order Granting COA, at 6 n.3, 7.

In his Supplemental Opening Brief, however, Petitioner reengineered his ex post facto argument, reorienting the focus away from the lawfulness of his sentences in each conviction (as he argued both in state court and in the federal District Court below), instead articulating an attack on the constitutionality of his convictions as a whole. Indeed, in Petitioner's Ground One, he asserts that because Okla. Stat. tit. 57, § 590 (2006) was not in existence at either the time of his initial sex offenses in 1992, or at the time of his convictions for those sex offenses in 1998, the provisions of Section 590 did not apply to him, even in 2007, and thus, he is factually innocent of the crime of Sex Offender Living within 2000 Feet of a School. *See* Supp. Op. Br., at 25-38. Further, in Petitioner's Ground Two, he argues that the two-year registration period following his release from confinement in 2005 had already expired by the time of his 2007 offenses, and thus, he could not have been convicted of either crime in this case. *See* Supp. Op. Br., at 39-69. In each ground he now raises, Petitioner recognizes the fact that his instant ex post facto arguments urge different issues than the ones raised by Petitioner in state court. Supp. Op. Br., at 36-37 ("The claim pressed here is close to, but not exactly the same as, the one Mr. Childers made in the state court."); Supp. Op. Br., at 64-69 ("The claim here differs somewhat from the one Mr. Childers pressed in the Oklahoma courts."). Petitioner

further admits that, to the extent his ex post facto arguments had not been fairly presented to the OCCA below, those claims would now be anticipatorily procedurally barred from review if Petitioner were to bring those claims to the OCCA. Supp. Op. Br., at 37, 65.

On the issue of exhaustion, the AEDPA specifically provides that "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3). "To be express, a waiver of exhaustion must be clear, explicit, and unambiguous." *Sharrieff v. Cathel*, 574 F.3d 225, 229 (3rd Cir. 2009). For purposes of waiver, "the touchstone for determining whether a waiver is express is the clarity of the intent to waive." *D'Ambrosio v. Bagley*, 527 F.3d 489, 497 (6th Cir. 2008). In the District Court, Respondent undoubtedly waived exhaustion with respect to the issues Petitioner fairly presented in state court proceedings. ROA, at 43 ("Petitioner has exhausted his state court remedies as he raised the issues in his direct appeal or post-conviction application to the Court of Criminal Appeals."); *see also McCormick v. Parker*, No. 13-7016, 571 F. App'x 683, 686-87 (10th Cir. July 9, 2014) (unpublished) (finding the State had explicitly waived the issue of exhaustion when, in the District Court, the State admitted that the petitioner's federal court claims had been raised in state court and were exhausted). Nonetheless, as shown above, Petitioner's new ex post facto claims

differ substantially from the arguments he raised in state court, inasmuch as his instant challenges attack the lawfulness of his convictions as a whole, rather than the propriety of his alleged sentence enhancement, a claim which he repeatedly urged in post-conviction. *Compare* Supp. Op. Br., at 25-38, 39-69 (Petitioner's new challenges to the lawfulness of his SORA convictions based on an application of the ex post facto clause), *with* Ex. 1, at 3 (Petitioner's ex post facto sentence enhancement issues presented in his latest post-conviction appeal to the OCCA).

Thus, with respect to Petitioner's new claims, raised for the first time before this Court, Respondent does not waive the issue of exhaustion (and in fact, Petitioner's lack of exhaustion is a key reason why his petition is procedurally barred). *Contra McCormick*, 571 F. App'x at 687. Indeed, in his Supplemental Opening Brief, Petitioner readily admits that his new claims are distinguishable from the ones raised in state court and are subject to an anticipatory procedural bar. *See* Supp. Op. Br., at 33-34, 64-69. Not only does Petitioner correctly recognize that his claims are anticipatorily barred, but as discussed below, Petitioner's pure legal arguments are insufficient to excuse that bar, and this Court should decline to address his unexhausted claims on the merits. Moreover, Petitioner's failure to present his current challenges to the lawfulness of his convictions in his original habeas petition should warrant forfeiture, or at least plain error review, of the new claims he now presses. *See Grant*, 886 F.3d at 909; *Hancock*, 798 F.3d at 1011.

1. Petitioner's claims are subject to an anticipatory procedural bar.

"An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Nonetheless, this Court has recognized that a habeas petitioner can satisfy the exhaustion requirement if, at the time of the filing of his habeas petition, there are no available state avenues for redress available to the petitioner. *Miranda v. Cooper*, 967 F.2d 392, 398 (10th Cir. 1992). According to the Supreme Court, a habeas petitioner's claims are procedurally defaulted in federal court if the petitioner "failed to exhaust state remedies and the court to which the petition would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

"'Anticipatory procedural bar' occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if the petitioner returned to state court to exhaust it." *Anderson v. Sirmons*, 476 F.3d 1131, 1139 n.7 (10th Cir. 2007) (citation omitted); *see also Thacker v. Workman*, 678 F.3d 820, 839-41 (10th Cir. 2012) (reiterating the well-established principle of anticipatory procedural bar). In determining whether to apply an

anticipatory procedural bar to a technically unexhausted claim, this Court will weigh whether "the likelihood of default in the petitioner's case is beyond debate or dispute." *Williams v. Trammell*, 782 F.3d 1184, 1213 (10th Cir. 2015); *see also Cummings v. Sirmons*, 506 F.3d 1211, 1222-23 (10th Cir. 2007).

The Oklahoma Post-Conviction Procedure Act (hereinafter "PCPA") sets forth a series of legal grounds upon which a criminal defendant can institute a proceeding seeking state post-conviction relief. Okla. Stat. tit. 22, § 1080, *et seq.* Nonetheless, the OCCA has consistently reaffirmed that the PCPA is not intended to provide a second or subsequent direct appeal. *See, e.g.*, *Mayes v. State*, 921 P.2d 367, 370 (Okla. Crim. App. 1996); *Fox v. State*, 880 P.2d 383, 384 (Okla. Crim. App. 1994). Accordingly, issues raised on direct appeal are barred from further review by the doctrine *res judicata*, and issues which could have been raised on direct appeal but were not are barred by the doctrine of waiver; claims in a post-conviction application subject to either procedural bar will not be considered by the state court on the merits. *See, e.g.*, *Sporn v. State*, 139 P.3d 953, 953-54 (Okla. Crim. App. 2006) (finding claims available but not presented on direct appeal to be waived on post-conviction); *Berget v. State*, 907 P.2d 1078, 1080-81 (Okla. Crim. App. 1995) ("Issues which were raised on direct appeal are barred from further consideration by *res judicata*, and issues which were not raised on direct appeal, but could have been, are waived"); *Thomas v. State*, 888 P.2d 522, 525 (Okla. Crim.

App. 1994) ("We find that these propositions have been satisfactorily answered on direct appeal and are therefore barred from post-conviction review."); *Smith v. State*, 826 P.2d 615, 616 (Okla. Crim. App. 1992) ("Petitioner may not obtain review of an issue by presenting it in a slightly different manner on post-conviction."). This Court has found the OCCA's procedural doctrine of waiver to be an independent and adequate ground barring habeas review. *See Thacker*, 678 F.3d at 835; *see also Tripp v. Whitten*, No. CIV-20-246-SLP, 2020 WL 4043987, at *2 (W.D. Okla. June 18, 2020) (unpublished) (reaffirming this Court's recognition of Oklahoma's waiver doctrine as an independent and adequate state procedural ground on habeas review).

Here, though Petitioner has not fairly presented his current ex post facto arguments to the OCCA, those arguments were available at the time of his direct appeal, and would therefore be barred from post-conviction review by the doctrine of waiver if Petitioner returned to state court to attempt to exhaust these claims in post-conviction. *See Sporn*, 139 P.3d at 953-54; *Thomas*, 888 P.2d at 525. Moreover, Petitioner has already filed three (3) prior post-conviction applications in state court. *See* ROA, at 165. Thus, any future request for post-conviction relief Petitioner attempts to file in state court would be barred by Oklahoma's prohibition on successive post-conviction applications. *See* Okla. Stat. tit. 22, § 1086 (2011) (generally banning subsequent post-conviction applications and requiring "[a]ll grounds for relief available to an applicant under this act [to be] raised in his original,

supplemental or amended application"). Much like the doctrine of waiver under Oklahoma law, this Court has recognized that the OCCA's ban on successive post-conviction applications is firmly established and consistently followed. *See Williams*, 782 F.3d at 1212; *Thacker*, 678 F.3d at 835-36 (recognizing "Oklahoma's regular and consistent application of [its] procedural-bar rule in the vast majority of cases" (citation and internal quotation marks omitted)).

Petitioner admits, in his Supplemental Opening Brief, that any subsequent effort to bring his ex post facto claims before the OCCA would now be procedurally barred, and that, accordingly, his new arguments are subject to an anticipatory procedural default. *See* Supp. Op. Br., at 37, 65. Thus, given the combination of the doctrine of waiver and Oklahoma's ban on successive post-conviction filings, as discussed above, it is "beyond dispute" that Petitioner's ex post facto challenges before this Court are subject to an anticipatory procedural bar.[11] *See Williams*, 782 F.3d at 1212; *Thacker*, 678 F.3d at 835-36; *Cummings*, 506 F.3d at 1222-23 ("We readily conclude that this claim is procedurally barred. Although the claim is technically unexhausted, it is beyond dispute that, were [the petitioner] to attempt to

[11] The OCCA has undoubtedly recognized that a petitioner can raise a claim of factual innocence at any stage of appeal or post-conviction. *See Slaughter v. State*, 108 P.3d 1052, 1054 (Okla. Crim. App. 2005) (noting that "innocence claims are the Post-Conviction Procedure Act's foundation"). Nonetheless, as discussed herein, because Petitioner's unexhausted ex post facto challenges *do not* present a credible showing of factual innocence, Petitioner's claims are subject to an anticipatory bar.

now present the claim to the Oklahoma state courts in a second application for post-conviction relief, it would be deemed procedurally barred.").

2. Petitioner cannot overcome the anticipatory procedural bar as he has failed to show actual innocence of his crimes.

As Petitioner's unexhausted claims are subject to an anticipatory procedural bar, Petitioner can only overcome that procedural bar by showing either "cause" and "prejudice" for his failure to properly raise these claims below, or by otherwise demonstrating a "fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750 (citations and internal quotation marks omitted); *see also Thacker*, 678 F.3d at 841-42. The latter exception is met when a habeas petitioner "has made a 'credible' showing of actual innocence." *Frost v. Pryor*, 749 F.3d 1212, 1231 (10th Cir. 2014) (citing *Coleman*, 501 U.S. at 750). Petitioner has made no effort to demonstrate the first of these alternatives, as he has not even mentioned, much less argued, the cause and prejudice exception to his procedural hurdles. Thus, the instant analysis depends on Petitioner's ability to demonstrate actual innocence of his crimes. *See Frost*, 749 F.3d at 1231 ("Because Mr. Frost only asserts his actual innocence and does not contend he has adequate cause for failing to raise these claims in this case, we do not address the first exception.").

The actual innocence gateway to Petitioner's procedurally barred claims follows the same framework as the innocence gateway discussed above, in the

context of Petitioner's inability to overcome his petition's untimeliness. *See supra* Ground One; *see also McQuiggin*, 569 U.S. at 386 (reasoning that a sufficient showing of actual innocence may provide a gateway to overcome procedural bars or a petition's untimeliness); *Frost*, 749 F.3d at 1231-32 (analyzing the "fundamental miscarriage of justice" exception for procedural bars using the framework for actual innocence established in *Schlup*, 513 U.S. at 324); *Cummings*, 506 F.3d at 1223.

"[T]he fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup*, 513 U.S. at 324. In order to invoke the fundamental miscarriage of justice exception, a habeas petitioner must "*supplement*[] his constitutional claim with a colorable showing of factual innocence." *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (emphasis in original) (citation and internal quotation marks omitted). As shown in Ground One, for a habeas petitioner to avail himself of the actual innocence gateway and proceed to the merits of a procedurally barred claim, that petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.*; *see also McQuiggin*, 569 U.S. at 386; *House*, 547 U.S. at 537. Such new evidence must be sufficient to demonstrate that it is "more likely than not that no reasonable juror would have

convicted him in light of the new evidence." *Schlup*, 513 U.S. at 327; *see also McQuiggin*, 569 U.S. at 385. The Supreme Court has maintained that "the *Schlup* standard is demanding," and that, accordingly, "[t]he gateway should only open when a petition presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error." *McQuiggin*, 569 U.S. at 401 (citation and internal quotation marks omitted). Indeed, "tenable actual-innocence gateway pleas are rare." *Id.* at 386.

As recognized in Ground One, Petitioner points to no new reliable evidence in support of his allegation of actual innocence. *See Schlup*, 513 U.S. at 324. Instead, Petitioner offers this Court nothing more than arguments supporting alleged legal innocence, based on the allegedly improper ex post facto application of the SORA to his conduct in this case. As was the case above, Petitioner's ex post facto arguments constitute legal, rather than factual, innocence, and cannot meet the gateway standard for factual innocence to bypass his unexhaustion and correlative anticipatory procedural default. *See McQuiggin*, 569 U.S. at 386.

The Supreme Court has recognized that "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. Thus, a petitioner's mere legal argument or assertion of a legal defense does not amount to factual innocence for purposes of the actual innocence gateway. *Laurson*, 507 F.3d

at 1233 (upholding dismissal of habeas petition when the petitioner's legal arguments were insufficient to establish actual innocence); *Beavers*, 216 F.3d at 923 (rejecting habeas petitioner's claims of innocence predicated on legal defenses, reasoning that such arguments "go to legal innocence, as opposed to factual innocence," and thus could not excuse the petitioner's procedural default on habeas). And specifically, with respect to ex post facto arguments raised in the context of a habeas petition, such arguments present nothing more than "a question of law." *Sallahdin*, 275 F.3d at 1228.

Both this Court and various lower federal courts have consistently found ex post facto challenges brought by habeas petitioners to be inadequate grounds for establishing the actual innocence gateway to excuse the procedural hurdles barring merits consideration of such claims. Indeed, as discussed above, in *Martin*, 295 F. App'x at 896, this Court refused to issue a COA on an ex post facto claim brought by an Oklahoma petitioner, as that claim was unexhausted and no evidence in the record was even "remotely sufficient to establish . . . actual innocence, so as to allow [the petitioner] to overcome the procedural bar." *Martin*, 295 F. App'x at 896. At least two federal district courts have reached similar conclusions in pointedly rejecting ex post facto arguments as adequate grounds to bypass procedural bars. *See, e.g.*, *Pease*, 2016 WL 8671071, at *3-5 (reasoning that, *inter alia*, "success on the claim of an ex post facto violation, standing alone, would show only legal

innocence," and holding that, accordingly, "allegations of an ex post facto violation do not give rise to a cognizable assertion of actual innocence"); *Davis*, 2009 WL 799279, at *2-3 (rejecting a habeas petitioner's arguments challenging his Oklahoma SORA conviction under the ex post facto clause, finding that his ex post facto challenge on habeas did not amount to a showing of actual innocence and therefore did not warrant excusal of procedural hurdles).

Thus, Petitioner's claims in the instant case are inadequate to demonstrate actual innocence, as his arguments bear on nothing more than "legal insufficiency," and do not amount to a credible showing of factual innocence. *Bousley*, 523 U.S. at 623; *see also Laurson*, 507 F.3d at 1233; *Beavers*, 216 F.3d at 923. Moreover, as Petitioner has come forth with no "new reliable evidence" supporting his assertion of actual innocence, *see Schlup*, 513 U.S. at 324, and as "tenable actual-innocence gateway pleas are rare," *see McQuiggin*, 569 U.S. at 386, this Court should decline Petitioner's invitation to bypass the anticipatory procedural bar presented by his unexhausted claims, and refuse to consider his ex post facto arguments on the merits. *See Martin*, 295 F. App'x at 896; *Pease*, 2016 WL 8671071, at *3-5; *Davis*, 2009 WL 799279, at *3.

Likewise, the voluntariness of Petitioner's guilty pleas demonstrates that Petitioner fully understood and readily accepted culpability of his SORA violations, and freely admitted that he knew that his conduct was unlawful at the time he

committed his crimes. ROA, at 54. By his own written admission in his first post-conviction application, Petitioner conceded that law enforcement, in apprising him of the SORA restrictions following his release from confinement in 2005, "properly register[ed] Childers pursuant to 57 O.S. § 583(A)(1)(2)." ROA, at 59. Petitioner's pleas of guilt and correlative state court admissions gravely undercut any insistence of actual innocence now presented. *Cf. Johnson*, 547 F. App'x at 885 (rejecting habeas petitioner's claim of actual innocence, recognizing that, *inter alia*, the petitioner's guilty plea "simply undermines" his insistence that another individual committed the crime at issue); *Chestang*, 522 F. App'x at 390 (reasoning that habeas petitioner's claim of actual innocence was "seriously undermin[ed]" by the facts of the case and his guilty plea); *Goosby*, 515 F. App'x at 777 (finding the petitioner had "fail[ed] to carry the heavy burden" in establishing the actual innocence threshold, given his guilty plea and failure to confront the other evidence contributing to that plea).

B. Alternatively, this Court Should Remand to the District Court for Consideration of Petitioner's Claims on the Merits

Assuming this Court agrees that Petitioner's claims amount to actual, rather than legal, innocence, this Court should remand to the District Court to consider the merits of his claims in the first instance on a fully developed record. As shown previously, because Petitioner did not adequately raise his arguments until his COA

application before this Court (and has greatly expanded on these arguments since), the record is woefully underdeveloped on his claims. Indeed, the District Court dismissed Petitioner's petition as time-barred without explicitly addressing actual innocence. Thus, a number of unanswered questions remain as to Petitioner's claims, including the exact dates of Petitioner's re-incarceration during the pendency of his registration period and what effect this had on his registration period; whether part of Petitioner's re-incarceration was in another state, as it appears to be,[12] and whether

[12] Following Petitioner's release in March of 2005, Petitioner found himself frequently in and out of state custody for violations and new offenses. The docket sheet from Petitioner's 1998 Oklahoma case, for example, shows the State moved to revoke his suspended sentence in April of 2006, and in June of 2006, Petitioner stipulated to the violations of his rules and conditions and was re-sentenced to a new two-year term of incarceration. *See* https://www.oscn.net/dockets/GetCaseInformation.aspx?db=delaware&number=CF-1998-00272&cmid=17027 (last visited Dec. 14, 2020). Evidently, Petitioner did not serve that full sentence, as he was released again in 2007, and was subsequently charged with his Oklahoma SORA violations in September of 2007.

Likewise, shortly after his SORA-related charges were filed, Petitioner was charged with first degree rape in Oklahoma. At that point, Petitioner was apparently in Arkansas state custody, as the docket sheet indicates that Petitioner was transported back from Arkansas to appear in an Oklahoma trial court on his new rape charge. *See* https://www.oscn.net/dockets/GetCaseInformation.aspx?db=delaware&number=CF-2008-00050&cmid=8476 (last visited Dec. 14, 2020). Ultimately, however, that case was dismissed after Petitioner pled to his SORA violations. The Arkansas docket sheet reflects Petitioner pled guilty in 2008 to failure to register as a sex offender in that state and received a six-year sentence with credit for 177 days served. *See* https://caseinfo.arcourts.gov/cconnect/PROD/public/ck_public_qry_doct.cp_dktrpt_frames?backto=P&case_id=04CR-07-1801&begin_date=&end_date= (last visited Dec. 14, 2020). Petitioner acknowledges his re-incarceration during the pendency of his registration period, admits it is a "possible wrinkle" in this case, but fails to explain the effect it had on his registration, nor does he mention his collateral case in Arkansas. Supp. Op. Br., at 34. In this respect, Petitioner certainly has not shown that his registration period in Oklahoma

this impacted the running of his registration period in Oklahoma.[13] These merits issues make it impossible to determine, on the present record, whether Petitioner's ex post facto claim is meritorious, either as an actual innocence claim or as a constitutional claim on the merits. In this respect, Petitioner has not carried his burden of preserving an adequate record for appellate review. *See Beem v. McKune*, No. 01-3326, 48 F. App'x 281, 282 (10th Cir. Sept. 5, 2002) (unpublished) (reasoning that a counseled habeas petitioner bears the burden to provide an adequate record to decide the appellate issues presented, and noting that, in absence of a proper record, this Court cannot meaningfully evaluate a petitioner's claims on appeal). Accordingly, if this Court concludes that Petitioner has alleged a claim of actual, factual innocence, Respondent respectfully requests that this Court remand to the District Court so that Petitioner may more fully develop the record and the District Court can consider the merits in the first instance.

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would have continued to run while revoked and incarcerated, or else during the time he was detained elsewhere.

[13] In the COA order, this Court hinted at the possible inadequacy of the current record, recognizing the following in a footnote: "To the extent the record on appeal is unclear as to the date that Mr. Childers became subject to SORA under the version of the law then in effect, the district court may seek supplemental briefing from the parties to provide additional clarity on that question." Order Granting COA, at 7 n.4.

C. Conclusion

Petitioner's ex post facto challenges to the lawfulness of his convictions are unexhausted claims, as he has failed to fairly present them to the OCCA before bringing them in federal habeas review. *See* 28 U.S.C. § 2254(b)(1)(A); *Richter*, 562 U.S. at 103; *Dever*, 36 F.3d at 1534. Petitioner readily admits that his arguments here differ from the ones presented in state court, and for the reasons discussed above, Petitioner's claims are subject to an anticipatory procedural bar. *See Coleman*, 501 U.S. at 735 n.1; *Thacker*, 678 F.3d at 839-41; *Anderson*, 476 F.3d at 1139 n.7. Petitioner's only avenue to overcoming that bar is his attempt at showing actual innocence, *see McQuiggin*, 569 U.S. at 386, which he has failed to adequately demonstrate, given that his claims present nothing more than alleged legal, rather than factual, innocence of his crimes. *See Bousley*, 523 U.S. at 623; *Laurson*, 507 F.3d at 1233; *Beavers*, 216 F.3d at 923. As Petitioner has failed to carry his burden of putting forth sufficient evidence of actual innocence, this Court should decline to address the merits of Petitioner's unexhausted and procedurally barred claims. *See Martin*, 295 F. App'x at 896; *Pease*, 2016 WL 8671071, at *3-5; *Davis*, 2009 WL 799279, at *3.

CONCLUSION

In sum, Petitioner's request for habeas relief should be rejected by this Court for multiple reasons, as shown above. Petitioner has not overcome the various procedural hurdles barring review of his ex post facto claims on the merits. Accordingly, this Court should uphold the judgment of the District Court and deny Petitioner's request for a writ of habeas corpus.

STATEMENT OF ORAL ARGUMENT

Oral argument would not materially assist the disposition of this appeal. The underlying facts and legal arguments have been presented adequately in the briefs and record, and this Court's decision will not be significantly aided by oral argument from the parties. *See* Fed. R. App. P. 34(a)(2)(C). Accordingly, this case should be submitted without the necessity for oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(B)(i), I certify that this brief is proportionally spaced and contains 12,926 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

[X] I relied on my word processor to obtain the count and it is Microsoft Word Version 16.44.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ JOSHUA R. FANELLI

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed with the Clerk of this Court on December 18, 2020, and for electronic transmission to:

Howard A. Pincus
Assistant Federal Public Defender
633 17th Street, Suite 1000
Denver, Colorado 80202

s/ JOSHUA R. FANELLI

CERTIFICATE OF DIGITAL SUBMISSION

This is to certify that:

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

2. The digital submissions have been scanned for viruses with Symantec Endpoint Protection, Updated 12/18/20, and according to said program, are free from viruses.

s/ JOSHUA R. FANELLI

IN THE COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

John W. Childers, Petitioner,
v.
State of Oklahoma, Respondent.

Case No: CF-07-341 CF-07-359

PETITION IN ERROR

Comes now, the Petitioner, John W. Childers, pursuant to Rule 5.2 of the Rules of the Court of Criminal Appeals and 22 O.S. § 1087, and appeals the denial of Petitioner's application for Post-Conviction Relief. In support of said appeal Petitioner would show the following:

1. That Petitioner was convicted of:

CHARGE:	STATUTE:	CASE NO:
Sex offender within 2000 School	(AFC) 57, § 590	CF-2007-341
Failure to Notify Address Change	(AFC) 57, § 584	CF-2007-359

in the District Court of Delaware County.

2. That Petitioner was sentenced to:

CHARGE:	SENTENCE:	CC or CS:
SO within 2000 ft School (AFC)	Life	CS
SO failure to Notify Address Change	(AFC) Life	CS

3. That Petitioner ~~(did)~~ (did not) file a direct appeal of said convictions to this court. If Petitioner filed a direct appeal said convictions were (affirmed) (affirmed but sentence modified) by (published opinion, Give citation: _____ v. State, ____ P._d _____ (Okl. Cr. 20__)), (unpublished opinion, see Court of Criminal Appeals Case No. C-2010-243).

EXHIBIT 1

4. That Petitioner filed his application for post-conviction relief with the District Court of Deleware County in Case No.s CF-2007-341 CF-2007-359 which application was denied Sept. 22, 2016. A certified copy of said denial is attached hereto and made part hereof.

5. Petitioner has attached his Brief in Support to this Petition In Error, with his attachments in support thereof.

WHEREFORE, Petitioner respectfully requests this Court review the Trial Court's Denial of his Application for Post-Conviction Relief and reverse the same for reasons more specifically set out in the attached brief in support.

Respectfully Submitted,

John W. Childers

Print name and DOC# John W. Childers # 222461

Davis Correctional Facility
6888 E. 133rd Rd.
Holdenville, OK 74848

IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

STATE OF OKLAHOMA

John William Childers,
Petitioner,

v.

State of Oklahoma,
Respondent.

Case: CF-07-341,
CF-07-359

Brief In Support

Comes now John William Childers, Petitioner pro se with his Brief In Support on appeal of the District Court of Delaware County denial and Order of his application for post-conviction filed August 15, 2014.

Petitioner filed his application, as stated, on August 15, 2014. After no response from both the State or the Court, Petitioner filed a Motion to Dismiss Cause Confessed on September 19, 2016.

In the Court's Order there is statement of "specific findings of fact", or expressly stated "conclusion of law, relating to each issue presented". 22 § 1084; and, **Boggs v. State, 551 P.2d 1166, 1167 (1976).**

Petitioner raised four (4) propositions of relief in his application, and not a single one was addressed by the court. Stating only that one of the issues presented had been raised in his previous post conviction relief application. However, the issue presented, or reasserted in the current post conviction is presented under provision of law not previously asserted, and given relevance by rulings of this Court in cases decided after Petitioners initial post-conviction.

It should be noted by the Court that the original post conviction appli-

cation filed December 16, 2011 and denied June 17, 2013 also afforded Petitioner no finding of facts or conclusions of law as to the issues raised. (See attached order of 2011) Therefore, the issue complained of being raised in his first application was not properly resolved by the district court at the time, and now that the issue has been strengthened with update rulings of this Court it continues to be improperly resolved and addressed by the Court.

The district court seems to believe a single application for post conviction bars any further applications even in light of intervening changes or interpretations of law directly applicable to his case. The district court would deny Petitioner's right to appeal and the application of the holdings of this Court and the Oklahoma Supreme Court to his situation.

The fact of which would cause his release from prison immediately, and rightfully so. Under the holdings of the very high courts of Oklahoma, Petitioner has satisfied the maximum sentence for his crimes.

The district court's refusal to address the issues, or make a ruling consistant with the findings of the high courts is a denial of Petitioner's due process.

Petitioner presented the fact that his sentences were wrongfully enhanced. Not that they could not be enhanced. One violation carries its own enhancer within the statute making for specific enhancement from within statutory provisions, 21 § 11, and Art II § 7 of Oklahoma Const. this is 57 § 590, and the law in effect at the time of his conviction. The provisions under 57 § 584 at 587 declare the punishment to be no more than 5 years which causes the enhancer to be limited under 51.1(3) to be for a term "not exceeding ten (10) years". One violation being enhanced under specific provision, the other under general. Yet, neither by law can exceed 10 years.

His only other previous conviction was satisfied over 10 years prior, exempting it from being used as an AFC.

His second proposition argues the fact the State wrongfully applied law implemented after his predicate offense to his case. This issue was clarified in **Starkey v Okla. Dept. of Corr.**, and **State v Salathiel**, landmark cases directly applicable to Petitioners, each of which was decided after Petitioner filed his initial post conviction.

Proposition three argues the fact that the improper application of law, even before the holdings of this Court in **Starkey v Salathiel** deprived him of his right to make a knowing or intelligent plea based on fact and proper application of laws.

Naturally, Ineffective Assistance of Counsel must arise in this situation in a clear violation of **Strickland v Washington and Logan v State 293 P.3d (2013).**

The District Court of Delaware County, taking a convoluted amount of time to rule has allowed Petitioner to fully satisfy the fullness of what he could have been sentenced to under the law, and more.

He requests this Court Reverse with an Order to Dismiss his case as time served for cause stated within his application for post conviction relief. And, or such other relief as this Honorable Court may hold applicable to his cause.

Repectfully,

John William Childers #222461