

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

April 23, 2019

Elisabeth A. Shumaker  
Clerk of Court

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COREY E. DEGEARE,  
Petitioner - Appellant,

v.

CARL BEAR, Warden,  
Respondent - Appellee.

No. 18-6095  
(D.C. No. 5:17-CV-00244-D)  
(W.D. Okla.)

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**ORDER**

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Before **BACHARACH, PHILLIPS, and EID**, Circuit Judges.

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Mr. Corey E. Degear requests a certificate of appealability to appeal the district court's denial of habeas relief. We deny Mr. Degear's request and dismiss his appeal.

**1. Background**

Mr. Degear was convicted in Oklahoma state court on three counts of Rape in the First Degree, three counts of Forcible Sodomy, and one count of Lewd Acts with a Child Under Age Sixteen. After unsuccessfully appealing and seeking post-conviction relief in state court, Mr. Degear sought federal habeas relief, claiming that his appellate counsel in state court had been ineffective by filing a deficient appeal brief and failing to raise better arguments for reversal.

The district court concluded that

- some of these theories of ineffective assistance of counsel were procedurally barred from omission in Mr. Degeare’s initial application for post-conviction relief and
- the state appeals court had reasonably applied federal law in rejecting the other theories of ineffective assistance of appellate counsel.

Given these conclusions, the district court denied habeas relief.

## **2. The Standard for a Certificate of Appealability**

To appeal this ruling, Mr. Degeare needs a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A), (c)(3). To justify a certificate, Mr. Degeare “must make a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). When a district court rejects a claim on the merits, the petitioner must demonstrate “that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). But when a district court has denied relief on procedural grounds, the petitioner must show that reasonable jurists could debate both (1) the validity of the constitutional claim and (2) the correctness of the district court’s procedural ruling. *See id.*

### 3. Procedurally Barred Theories of Ineffective Assistance on Appeal

In district court, Mr. Degeare conceded that he had procedurally defaulted his theories of ineffective assistance on appeal based on the failure to assert ineffectiveness of trial counsel by declining:

1. to cross-examine one of the victims about her prior description of Mr. Degeare's genitals
2. to present evidence that Mr. Degeare's brother was a convicted sex offender and possibly the perpetrator

The district court agreed with this concession of procedural default on these theories, adding that Mr. Degeare had also procedurally defaulted his theories of ineffective assistance in the appeal based on the failure to assert ineffectiveness of trial counsel involving his missed opportunities to present

- evidence supporting the admissibility of Mr. Beckman's testimony,
- evidence of erectile dysfunction, and
- results of a polygraph test.

We start by considering whether the state appeals court decision on these claims had rested on adequate and independent state procedural grounds. *See, e.g., Wood v. Milyard*, 721 F.3d 1190, 1192 (10th Cir. 2013). If the state grounds are adequate and independent, Mr. Degeare would need to show "cause and prejudice" to avoid a procedural default. *Id.* In our

view, Mr. Degeare has not presented a reasonably debatable argument to avoid a procedural default on these theories.

On three of these theories, Mr. Degeare does not address the district court's ruling on procedural default. He instead criticizes the state appeals court for focusing on arguments raised in his pro se application for post-conviction relief rather than the arguments that his counsel had raised in the post-conviction appeal. But the state appeals court's focus was correct because the post-conviction appeal did not permit introduction of new theories. *See* Rule 5.2(A), Rules of the Okla. Court of Crim. Appeals. So the state appeals court declined to consider the merits of the new theories. This ruling was indisputably correct because the state procedural ground was adequate and independent of federal law. *See Duvall v. Reynolds*, 139 F.3d 768, 797 (10th Cir. 1998) (concluding that the state appeals court's application of Rule 5.2(C) was both adequate and independent). Given the state court's refusal to consider the merits based on an adequate and independent procedural bar, the federal district court concluded that the new theories were procedurally barred. This conclusion was not reasonably debatable.

In his appeal brief, Mr. Degeare does address procedural default with respect to two of his theories. The first theory is that his appellate counsel failed to assert ineffectiveness of trial counsel based on his missed opportunity to present evidence implicating Mr. Degeare's brother as the

culprit. Mr. Degeare's second theory is that his appellate counsel should have asserted ineffectiveness of trial counsel based on his missed opportunity to present evidence of erectile dysfunction.

Mr. Degeare conceded in district court that his first theory was procedurally defaulted.<sup>1</sup> To avoid the procedural default, Mr. Degeare relies on *Martinez v. Ryan*, 566 U.S. 1 (2012).<sup>2</sup> *Martinez* addressed jurisdictions where defendants could use postconviction proceedings to initiate claims involving ineffective assistance of trial counsel. In these jurisdictions, the *Martinez* Court allowed defendants to raise ineffective-assistance claims for the first time in post-conviction proceedings. *See Martinez*, 566 U.S. at 9 (recognizing a narrow exception to the general rule refusing to recognize ineffective assistance in postconviction proceedings

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<sup>1</sup> In these objections, Mr. Degeare stated:

First, as Degeare pointed out in his reply brief filed in [district court] (Doc. 16), Degeare raised the evidentiary foundations in his post-conviction application filed *pro se* of his claims except for two: his sex-offender brother as an alternate perpetrator; and the physical characteristic of his genitals. Doc. 16 at 5. Thus, Degeare asserts that these are the only two claims that have been defaulted, and he objects to application of any procedural default to any claims other than these two.

Appellant's App'x at 31 (footnote omitted).

<sup>2</sup> Mr. Degeare acted *pro se* when filing his application in state court for post-conviction relief. To the extent he suggests that *counsel* may have provided ineffective assistance in those proceedings, we assume that he is referring to counsel who later entered the case and handled the evidentiary hearing in state district court.

as cause to excuse a procedural default, where “[i]nadequate assistance of counsel at initial-review collateral proceedings . . . establish cause for a prisoner’s procedural default of a claim of ineffective assistance [of trial counsel]”). But *Martinez* did not suggest that a defendant could wait until the second round of post-conviction proceedings to claim ineffective assistance by appellate counsel. See *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017) (declining to extend *Martinez* “to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when a prisoner’s state postconviction counsel provides ineffective assistance by failing to raise that claim”). We thus deny a certificate on this theory.

Mr. Degeare also alleges that his appellate counsel should have relied on trial counsel’s failure to present evidence of erectile dysfunction. For this allegation, Mr. Degeare asserts that the finding of a procedural bar was “patently incorrect because Degeare presented his own records and argument sufficient to raise this claim in his *pro se* post-conviction application” in state district court. COA App. at 38. But in state district court, Mr. Degeare presented these records as newly discovered evidence rather than develop an ineffective-assistance claim based on these records. We thus conclude that this theory is not reasonably debatable.

#### **4. Theories Properly Rejected on the Merits in the State Appeals Court**

Reaching the merits, the state appeals court rejected four of Mr.

Degeare's theories of ineffective assistance on appeal:

1. failure to assert error in excluding testimony that the girls had falsely accused Kameron Beckman of sexual molestation
2. failure to assert ineffective assistance of trial counsel based on a missed opportunity to call a physician's assistant to testify about the lack of physical evidence of rape
3. failure to assert error in rejecting a claim of prosecutorial misconduct for stating in closing that the victims had no reason to lie
4. failure to assert a denial of equal protection in excluding results of a polygraph test

The state appeals court reasoned that Mr. Degeare could not show that appellate counsel's failure to raise these arguments had amounted to deficient performance or prejudice.

##### **A. Applicability of the Antiterrorism and Effective Death Penalty Act**

To determine whether the district court's rulings on these theories were reasonably debatable, we consider the underlying standard for habeas relief that would govern in an appeal. *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004). When the state appeals court has adjudicated the merits of these theories, we apply the standard set out in the Antiterrorism and Effective Death Penalty Act. 28 U.S.C. § 2254(d)(1).

The state appeals court addressed the four theories, concluding that appellate counsel was not ineffective. These conclusions would typically constitute an adjudication on the merits of a claim involving ineffective assistance. But Mr. Degeare contends

- that the state appeals court failed to adequately discuss these theories and
- that this lack of discussion entailed a failure to adjudicate the merits.

This contention is facially invalid, for we have held that a state appeals court can adjudicate the merits even when the discussion is cursory. *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 740 (10th Cir. 2016).

Given the state appeals court’s adjudication on the merits, the district court could grant habeas relief only if Mr. Degree had shown that the state appellate decision was (1) “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

**B. Reasonableness of the State Appeals Court’s Application of Supreme Court Precedent**

If permitted to appeal, Mr. Degeare would contend that the state appeals court unreasonably applied Supreme Court precedent. The state appeals court focused on *Strickland v. Washington*, which had addressed



claims involving ineffective assistance of counsel. 466 U.S. 668, 687 (1984). Mr. Degeare argues that his appellate counsel’s brief was so poor that it should have triggered consideration under *United States v. Cronic*, 466 U.S. 648 (1984). *Cronic* provides that “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” 466 U.S. at 659.

The district court concluded that the state appeals court had not acted unreasonably by applying *Strickland* rather than *Cronic*. This conclusion was not reasonably debatable. Although Mr. Degeare’s appellate brief in the direct appeal was lacking in many respects, it did not entirely fail to subject the prosecution’s case to meaningful adversarial testing. *See Lockett v. Trammell*, 711 F.3d 1218, 1247–48 (10th Cir. 2013) (concluding that the state appeals court had reasonably applied *Strickland*, rather than *Cronic*, to the petitioner’s claim of ineffective assistance). We thus consider the potential merit of Mr. Degeare’s theories based on the standard set out in *Strickland* rather than *Cronic*.

Under the *Strickland* standard, Mr. Degeare must show that counsel’s performance was both deficient and prejudicial. *McGee v. Higgins*, 568 F.3d 832, 838 (10th Cir. 2009). To apply this standard, we start with the merits of the issue omitted in the direct appeal. *Hammon v. Ward*, 466 F.3d 919, 927 (10th Cir. 2006). If that issue is so strong that it would have been

unreasonable to omit it, the omission may suggest deficient performance. *Malicoat v. Mullin*, 426 F.3d 1241, 1249 (10th Cir. 2005). Unless the omitted issue is compelling, however, we must consider it in the context of the other arguments that counsel did present. *Id.* “[O]f course, if the issue is meritless, its omission will not constitute deficient performance.” *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003). And even a deficient performance would support habeas relief only if adding the appeal point would have created a reasonable probability of a better result. *Malicoat*, 426 F.3d at 1249.

The state appeals court concluded that appellate counsel’s omissions did not constitute deficient performance and were not reasonably likely to affect the outcome. We thus consider whether the district court’s rulings were reasonably debatable.

### **C. Falsity of Accusations Under the Rape-Shield Statute**

We start with Mr. Degeare’s theory of ineffective assistance involving the girls’ allegedly false accusations of sexual abuse by their stepbrother, Mr. Beckman. The district court rejected this theory, and this ruling was not reasonably debatable.

Oklahoma’s rape-shield statute limits the admission of evidence concerning a victim’s sexual behavior, providing that when the defendant is accused of a sexual offense, evidence is inadmissible when it involves reputation or opinion of the victim’s other sexual behavior. Okla. Stat. tit.

12, § 2412(A).<sup>3</sup> An exception permits evidence that a victim made “[f]alse allegations of sexual offenses.” Okla. Stat. tit. 12, § 2412(B)(2). Mr. Degeare argues that the girls’ accusations against Mr. Beckman fell within this exception.

In the habeas petition, Mr. Degeare asserted ineffectiveness of appellate counsel for failure to raise this evidentiary issue. The district court found no basis for habeas relief, concluding that Mr. Degeare had failed to show prejudice. Had counsel raised the evidentiary issue on direct appeal, he would have had to show either (1) that the trial court had ruled incorrectly under Oklahoma law or (2) that excluding Mr. Beckman’s testimony was unconstitutional.

Reliance on Oklahoma law appeared ill-fated because the trial court had determined that Mr. Beckman’s denial was insufficient to prove falsity of the girls’ prior allegations. The only evidence of falsity was that the prosecutor had not brought charges against Mr. Beckman. Despite this evidence, the state appeals court could reasonably conclude that the failure to challenge the ruling under state law was not prejudicial.

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<sup>3</sup> The rape-shield statute also generally requires exclusion of evidence regarding the victim’s other sexual behavior to show consent. Okla. Stat. tit. 12, § 2412(A)(2). But this provision did not apply because the two girls were underage and lacked capacity to consent.

The same was also true of Mr. Degeare’s constitutional challenge to the ruling. An unsupportable evidentiary ruling could conceivably deprive a defendant of a complete defense. *See Dodd v. Trammell*, 753 F.3d 971, 987 (10th Cir. 2013) (stating that application of a state evidentiary rule may deprive a defendant of his right to present a complete defense when “the state court . . . provided no rationale for the exclusion, could not defend an absurd rule, or had failed to examine the reliability of the specific evidence in that case”). But the trial court provided a reasonable ground to exclude the evidence, and Mr. Degeare was able to testify about the girls’ motives to fabricate allegations. Appellant’s App’x at 59. Given this explanation and the testimony, the state appeals court reasonably applied *Strickland* when rejecting Mr. Degeare’s theory of ineffective assistance.

#### **D. Physician’s Assistant’s Testimony**

Mr. Degeare also argues that (1) the girls’ bodies had no physical evidence of molestation or rape and (2) his appellate counsel should have raised an issue involving trial counsel’s failure to present testimony from a physician’s assistant. The state appeals court held that Mr. Degeare had failed to show prejudice. This holding is supported by the state district court’s findings that (1) the girls testified that they had no bleeding or physical injuries and (2) the physician’s assistant would not have helped the defense, for she had said that the clinical evaluation and physical

examination were consistent with sexual abuse. Given these findings, the state appeals court's conclusion was based on a reasonable application of Supreme Court precedent. In our view, the district court's rejection of this theory was not reasonably debatable.

#### **E. Prosecutorial Misconduct**

In closing argument, the prosecutor commented that the victims had no motive to lie. Mr. Degeare argues that

- these comments were improper because the prosecutor knew that the girls had falsely accused Mr. Beckman and
- appellate counsel should have claimed ineffective assistance by trial counsel for failing to object to this prosecutorial misconduct.

The district court rejected this theory for two reasons:

1. Mr. Degeare had failed to show error in the trial court's exclusion of Mr. Beckman's testimony.
2. The prosecution had simply been responding to Mr. Degeare's argument that the girls were lying because they did not want him to adopt them, they wanted their parents to reunite, and the girls wanted to live with their biological father rather than Mr. Degeare.

Appellant's App'x at 63–64. Mr. Degeare does not challenge these rationales, and the district court's rejection of this theory was not reasonably debatable.

## **F. Polygraph Results**

Mr. Degeare also faults his appellate attorney for failing to challenge Oklahoma's exclusion of favorable polygraph results. This theory is not reasonably debatable.

Polygraph results are inadmissible in Oklahoma. *See, e.g., Collier v. Reese*, 223 P.3d 966, 973–74 (Okla. 2009) (“[W]e reaffirm that polygraph evidence is inadmissible in criminal and civil proceedings.”). Despite the inadmissibility of polygraph evidence, Mr. Degeare makes three arguments:

1. Exclusion constitutes a denial of equal protection.
2. Oklahoma courts might relax its limitations on the use of polygraph evidence.
3. Oklahoma's cases excluding polygraph evidence are old.

First, Mr. Degeare argues that exclusion of the evidence violated his right to equal protection because polygraph testing is used in Oklahoma's treatment programs for sex offenders. *See* Okla. Stat. tit. 22, § 991a(A)(1)(ee). The district court rejected this argument, reasoning that Mr. Degeare lacked support for his equal-protection theory. This conclusion was not reasonably debatable, for Mr. Degeare has not provided

any reason to treat criminal defendants as similarly situated to offenders undergoing therapy as a condition of probation.

Second, Mr. Degeare claims that (1) the Oklahoma courts might change their minds about polygraph evidence and (2) his appellate counsel had a good-faith basis to urge for a change in the law. On this claim, Mr. Degeare insists that the Tenth Circuit has changed its approach and now treats polygraph evidence like any other scientific evidence under the *Daubert* test. It is true that we applied *Daubert* to polygraph evidence in *United States v. Call*, 129 F.3d 1402, 1404–05 (10th Cir. 1997). But in *Call*, we explained that polygraph evidence must satisfy Federal Rule of Evidence 403 and can do so only rarely because “[t]he credibility of witnesses is generally not an appropriate subject for expert testimony” and there is a “danger that the jury may overvalue polygraph results as an indicator of truthfulness because of the polygraph’s scientific nature.” *Id.* at 1405–06.

Third, Mr. Degeare argues that the state appeals court’s opinions excluding polygraph results are 40 years old. But Oklahoma courts have stated more recently that polygraph test results are inadmissible. *See, e.g., Collier v. Reese*, 223 P.3d 966, 973–74 (Okla. 2009) (“Today, we reaffirm that polygraph evidence is inadmissible in criminal and civil proceedings.”); *Folks v. State*, 207 P.3d 379, 383 (Okla. Crim. App. 2008) (“Appellant’s testimony regarding his offer to take a polygraph and ‘pass

it' was property excluded because any polygraph test would not have been admissible.”). Given these more recent opinions, the district court's rejection of this theory was not reasonably debatable.

**5. Conclusion**

Because the district court's rulings were not reasonably debatable, we (1) deny the request for a certificate of appealability and (2) dismiss the appeal.

Entered for the Court

Robert E. Bacharach  
Circuit Judge