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United States Court of Appeals
Tenth Circuit

August 29, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CHARLES ALAN DYER,

Petitioner - Appellant,

v.

JIM FARRIS, Warden,

Respondent - Appellee.

No. 19-6013
(D.C. No. 5:16-CV-00941-C)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **BRISCOE**, **McHUGH**, and **MORITZ**, Circuit Judges.

Petitioner Charles Dyer was convicted of one count of child sexual abuse in Oklahoma state court and was sentenced to thirty years' imprisonment. After exhausting his state remedies, Mr. Dyer filed a habeas petition in federal district court pursuant to 28 U.S.C. § 2254. The district court denied Mr. Dyer's habeas petition and denied his motion for a certificate of appealability (COA). Mr. Dyer then filed a motion for a COA in this court. We grant in part and deny in part Mr.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Dyer's motion for a COA. We in turn, exercising jurisdiction pursuant to 28 U.S.C. § 2253, affirm the denial of Mr. Dyer's habeas petition.

I

In January 2010, H.D. told her mother, Valerie Dyer, that her father, Charles Dyer, had sexually abused her. Ms. Dyer reported H.D.'s allegations to the Sheriff's office. The Sheriff's office coordinated for Jessica Taylor to conduct a videotaped forensic interview of H.D. During her forensic interview, H.D. reiterated that Mr. Dyer had sexually abused her. Dr. Preston Waters conducted a medical examination of H.D. Dr. Waters opined that H.D.'s exam was consistent with sexual abuse. Oklahoma charged Mr. Dyer with one count of child sexual abuse, in violation of Okla. Stat. tit. 21, § 843.5(E).

II

Mr. Dyer's third trial began in 2012.[1] The jury heard testimony from, among others, H.D., Mr. Dyer, Ms. Dyer, Ms. Taylor, and Dr. Waters. The jury also viewed a videotape of H.D.'s forensic interview. The jury convicted Mr. Dyer of child sexual abuse and he was sentenced to thirty years' imprisonment. ROA, Vol. I at 251. His conviction was affirmed on direct appeal by the Oklahoma Court of Criminal Appeals (OCCA) on October 30, 2013. *Id.* at 251–57.

Mr. Dyer filed an application for post-conviction relief on April 24, 2014. *Id.* at 396. The state district court denied the application, *id.* at 322, but the OCCA

[1] Mr. Dyer's first trial ended in a mistrial when the jury could not agree on a verdict. The state trial judge declared a mistrial in Mr. Dyer's second trial because Oklahoma had mailed jury survey forms to members of the venire.

reversed on appeal because the state district court had not adequately addressed various exhibits that Mr. Dyer attempted to file with this application, OCCA Order Apr. 16, 2015. On remand, the state district court again denied Mr. Dyer's application. ROA, Vol. I at 324–31. Mr. Dyer appealed to the OCCA. The OCCA affirmed the denial of Mr. Dyer's application for post-conviction relief on November 19, 2015. *Id.* at 342–47.

Mr. Dyer filed a habeas petition in the United States District Court for the Western District of Oklahoma on August 17, 2016. *Id.* at 6. The district court denied Mr. Dyer's habeas petition on November 13, 2018, *id.* at 640–42, and denied him a COA on January 9, 2019, *id.* at 674–75.[2]

On January 30, 2019, Mr. Dyer filed a motion for a COA in this court, seeking review of eight issues. We have regrouped the issues for purposes of our analysis, but have retained Mr. Dyer's numbering for ease of reference to the motion for a COA. The eight issues are: (1) whether the district court employed the proper standard of review when analyzing the state court decisions; (2) whether the district court properly reviewed the state courts' factual findings pursuant to 28 U.S.C. § 2254(d)(2); (3) whether the district court misunderstood Mr. Dyer's claim that his direct appeal counsel was ineffective for failing to argue that the state trial court did

[2] The district court adopted the magistrate judge's report and recommendation, overruling Dyer's objections, in a short order. ROA, Vol. I at 640–41. Therefore, our citations to the district court's findings refer to the report and recommendation.

not require a unanimous verdict;[3] (4a) whether Mr. Dyer's direct appeal counsel was ineffective for not arguing that Mr. Dyer's trial counsel was ineffective when advising Mr. Dyer about whether to accept a plea agreement;[4] (4b & 4c) whether Mr. Dyer's direct appeal counsel was ineffective for not arguing that Mr. Dyer's trial counsel was ineffective when he failed to call various witnesses at trial;[5] (4c, 5 & 7) whether Mr. Dyer's direct appeal counsel was ineffective for not arguing that Mr. Dyer's conviction was premised on false testimony;[6] (6) whether Mr. Dyer's direct appeal counsel was ineffective for not arguing that there was insufficient evidence to sustain Mr. Dyer's conviction;[7] and (8) whether Mr. Dyer's direct appeal counsel was ineffective for not arguing that Oklahoma relied on inadmissible hearsay testimony to secure his conviction.[8] *See* Mot. for COA at 3–5.

"Unless a circuit . . . judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus

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[3] Issue 3 corresponds to Ground One, Sub-Claim Four of Mr. Dyer's habeas petition. ROA, Vol. I at 33–34.

[4] Issue 4a corresponds to Ground One, Sub-Claim Two, Fact Ten of Mr. Dyer's habeas petition. ROA, Vol. I at 31–32.

[5] Issues 4b and 4c correspond to Ground One, Sub-Claim Two, Fact Three of Mr. Dyer's habeas petition. ROA, Vol. I at 22–26.

[6] Issues 4c, 5, and 7 correspond to Ground One, Sub-Claim Three of Mr. Dyer's habeas petition. ROA, Vol. I at 32–33.

[7] Issue 6 corresponds to Ground One, Sub-Claim One of Mr. Dyer's habeas petition. ROA, Vol. I at 9–21.

[8] Issue 8 corresponds to Ground One, Sub-Claim Six of Mr. Dyer's habeas petition. ROA, Vol. I at 42–44.

proceeding in which the detention complained of arises out of process issued by a State court." 28 U.S.C. § 2253(c)(1). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.*§ 2253(c)(2). "[A] petitioner must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)) (brackets omitted).

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims.

Id.

"[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 338 (quoting *Slack*, 529 U.S. at 484). "A claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Buck v. Davis*, 137 S. Ct. 759, 774 (2017) (quoting *Miller–El*, 537 U.S. at 338) (brackets omitted).

We now address each of the issues raised in Mr. Dyer's motion for a COA.

Issue 1

The district court found that the claims raised in Mr. Dyer's habeas petition were decided on the merits by the OCCA. ROA, Vol. I at 548–50. Therefore, the district court afforded the OCCA's decision deference, as required by AEDPA. *Id.* Mr. Dyer argues that the district court erred because the OCCA actually found that his claims were procedurally barred. Mot. for COA at 5–6. "[W]e review the district court's legal analysis of the state-court decision de novo." *Vreeland v. Zupan*, 906 F.3d 866, 875 (10th Cir. 2018) (quoting *Fairchild v. Workman*, 579 F.3d 1134, 1139 (10th Cir. 2009)) (brackets omitted). When deciding whether the OCCA decided Mr. Dyer's claims on the merits, we examine "the last reasoned state-court decision to address" the claims. *Johnson v. Williams*, 568 U.S. 289, 297 n.1 (2013) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991)).

The OCCA's order affirming the denial of Mr. Dyer's application for post-conviction relief is the last reasoned state-court decision to address the claims asserted by Mr. Dyer in this federal habeas action. In that order, the OCCA found that Mr. Dyer "ha[d] asserted only two arguments which could provide sufficient reason to allow grounds for relief to be the basis of his post-conviction application."[9] ROA, Vol. I at 344–45. One of the claims that the OCCA considered properly

[9] The OCCA reasoned that "[m]ost of [Dyer's other] arguments . . . contend[ed] that the evidence presented at his trial was insufficient to convict him, and was insufficient to affirm his Judgment and Sentence on appeal." ROA, Vol. I at 344. The OCCA concluded that "[s]uch arguments either were raised during [Dyer's] trial or in his direct appeal and are procedurally barred from further review under the doctrine of *res judicata*; or could have been previously raised but were not and are waived for further review." *Id.*

preserved for review was Mr. Dyer's "claim that his appellate counsel was ineffective for failing to find and utilize [certain] . . . exhibits" that Mr. Dyer claimed were "newly discovered evidence of material facts."[10] *Id.* at 345. In his brief to the OCCA on post-conviction review, Mr. Dyer raised fourteen claims of ineffective assistance of appellate counsel (IAAC). *See id.* at 282–307. It is unclear which of Mr. Dyer's fourteen IAAC claims the OCCA refers to in its order. While no claim focuses entirely on appellate counsel's failure to discover new evidence, the exhibits offered by Mr. Dyer factor into various claims raised by Mr. Dyer.

The OCCA affirmed the denial of Mr. Dyer's application for post-conviction relief, concluding that Mr. Dyer's "claim of ineffective assistance of appellate counsel" was not grounds for post-conviction relief because Mr. Dyer "ha[d] not established either that the result of his appeal should have been different; or that he ha[d] been sufficiently prejudiced by his appellate counsel's performance." *Id.* at 347 (citation omitted). It explained that Mr. Dyer "ha[d] not met his fundamental burden to sustain the allegations of his post-conviction application by showing that the [state] District Court erred or abused its discretion" when finding that Mr. Dyer's new "exhibits do[] not support his claims, and that as a whole the exhibits are not persuasive." *Id.* at 346–47.

[10] The other claim the OCCA considered properly preserved was Dyer's "claim that several of the exhibits he . . . present[ed on post-conviction review] constitute[d] newly discovered evidence of material facts not previously presented and heard that require vacation of his conviction and sentence in the interest of justice." ROA, Vol. I at 345. Dyer does not pursue further review of this claim in his motion for a COA. *See* Mot. for. COA at 6.

Even though the OCCA did not address each of Mr. Dyer's fourteen IAAC claims individually, the OCCA's denial of post-conviction relief is a decision on the merits for purposes of AEDPA. "[W]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Johnson*, 568 U.S. at 298 (citing *Harrington v. Richter*, 562 U.S. 86, 99 (2011)). This holds true even when, as here, "a state-court opinion addresses some but not all of a defendant's claims." *Id.*

"Although this presumption is rebuttable, [Mr. Dyer] offers no [persuasive] argument why the presumption should not apply." *Williams v. Trammell*, 782 F.3d 1184, 1202 (10th Cir. 2015) (citation omitted). Contrary to Mr. Dyer's argument in his motion for a COA, there is no indication the OCCA found Mr. Dyer's fourteen IAAC claims to be procedurally barred. *See Logan v. State*, 293 P.3d 969, 973 (Okla. Crim. App. 2013) ("Claims of ineffective assistance of appellate counsel may be raised for the first time on post-conviction, because it is usually a petitioner's first opportunity to allege and argue the issue."). Because reasonable jurists would not debate whether the district court properly found that the OCCA decided Mr. Dyer's claims on the merits, Mr. Dyer is not entitled to a COA on Issue 1.

Issue 2

In the second issue raised in his motion for a COA, Mr. Dyer argues that "[t]he district court . . . failed to do the required [§ 2254](d)(2) review" and, as a result, "presumed" "incorrect findings by the state court . . . to be correct." Mot. for COA at

6. Mr. Dyer further argues that this alleged error affected many of the IAAC claims in his habeas petition. *Id.* at 6–7 (listing claims). Rather than address this issue in a vacuum, we will discuss the district court's § 2254(d)(2) analyses, as appropriate, when they arise during our evaluation of the remaining issues raised in Mr. Dyer's motion for a COA.

Issues 3 through 8

The remainder of Mr. Dyer's motion for a COA pertains to his claims that his appellate counsel was ineffective.[11] As discussed previously, we afford deference to the OCCA's adjudication of Mr. Dyer's claims because the OCCA decided Mr. Dyer's claims on the merits. *See* 28 U.S.C. § 2254(d).

> Under AEDPA, when a state court adjudicated a petitioner's claim on the merits, we cannot grant relief unless that adjudication:
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Wood v. Carpenter, 907 F.3d 1279, 1289 (10th Cir. 2018) (quoting 28 U.S.C. § 2254(d)(1)–(2)).

> "Clearly established Federal Law" refers to the Supreme Court's holdings, not its dicta. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state-court decision is only contrary to clearly established federal law if it "arrives at a conclusion opposite to that reached by" the Supreme Court, or "decides a case differently" than the Court on a "set of materially

[11] Dyer does not seek a COA to further pursue the second ground raised in his habeas petition—that the admission of other acts evidence rendered his trial fundamentally unfair. ROA, Vol. I at 46–47, 587–88.

> indistinguishable facts." *Id.* at 412–13. But a state court need not cite the Court's cases or, for that matter, even be aware of them. So long as the state-court's reasoning and result are not contrary to the Court's specific holdings, § 2254(d)(1) prohibits us from granting relief. *See Early v. Packer*, 537 U.S. 3, 9 (2002) (per curiam).
>
> A state court's decision unreasonably applies federal law if it "identifies the correct governing legal principle" from the relevant Supreme Court decisions but applies those principles in an objectively unreasonable manner. *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). Critically, an "*unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. at 410. "[E]ven a clearly erroneous application of federal law is not objectively unreasonable." *Maynard v. Boone*, 468 F.3d 665, 670 (10th Cir. 2006). Rather, a state court's application of federal law is only unreasonable if "all fairminded jurists would agree the state court decision was incorrect." *Frost v. Pryor*, 749 F.3d 1212, 1225 (10th Cir. 2014).
>
> Finally, a state-court decision unreasonably determines the facts if the state court "plainly misapprehend[ed] or misstate[d] the record in making [its] findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim." *Byrd v. Workman*, 645 F.3d 1159, 1170–72 (10th Cir. 2011). But this "daunting standard" will be "satisfied in relatively few cases." *Id.* That is because the state court's decision must be "based on an unreasonable determination of the facts." *Id.*

Wood, 907 F.3d at 1289 (internal parallel citations omitted).

When, as here, a state court denies a defendant's federal claim on the merits without explanation, we must try to identify the state court's reasoning so we can apply the standards of review from § 2254(d). We presume that, "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Wilson v. Sellers*, 138 S. Ct. 1188, 1194 (2018) (quoting *Ylst*, 501 U.S. at 803). Here, the state district court addressed Mr. Dyer's various IAAC claims when it first denied his application for post-conviction relief. The state district court found, after "its

own examination and analysis of the merits of each of the claims [Mr. Dyer] complains appellate counsel omitted raising on [direct] appeal[,] . . . that had the[claims] been raised [on appeal] they would have had no impact on the result nor resulted in a different outcome of [Mr. Dyer's] appeal and that they are meritless." ROA, Vol. I at 321. Therefore, insofar as the OCCA's order is silent as to why it affirmed the denial of Mr. Dyer's IAAC claims, we will look to the rationale provided by the state district court. *Wilson*, 138 S. Ct. at 1194–95.

"[T]he clearly established federal law here is *Strickland v. Washington*[, 466 U.S. 668 (1984)]." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011). "To have been entitled to relief from the [OCCA on post-conviction review], [Mr. Dyer] had to show both that his [direct appeal] counsel provided deficient assistance and that there was prejudice as a result." *Harrington v. Richter*, 562 U.S. 86, 104 (2011). "Surmounting *Strickland*'s high bar is never an easy task." *Id.* at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

> To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." [*Strickland*,]466 U.S. at 688. A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. *Id.*[] at 689. The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*[] at 687.
>
> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*[] at 694. It is not enough "to show that the errors had some

> conceivable effect on the outcome of the proceeding." *Id.*[] at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*[] at 687.

Richter, 562 U.S. at 104 (internal parallel citations omitted).

"Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Id.* at 105.

> The standards created by *Strickland* and § 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 562 U.S. at 105 (citations and quotation marks omitted).

Issue 3

In his habeas petition, Mr. Dyer claims that his direct appeal counsel was ineffective because he did not argue that "[t]he [d]istrict [c]ourt [f]ailed to [r]equire the [e]lection of a [c]rime." ROA, Vol. I at 33. Mr. Dyer was charged with a single count of child sexual abuse for acts that occurred sometime "between July 2009 and January 3, 2010[,]" but Mr. Dyer argues that, under Oklahoma law, his "conviction [had to] be based on a single act" within that timeframe. *Id.* at 33–34. Mr. Dyer further maintains that the state district court erred when instructing the jury because "[t]he jury was charged to find [him] guilty if [the jury] believed [he] had committed sexual acts on H.D. [any time] between July 2009 and January 3, 2010." *Id.* at 33.

Mr. Dyer first raised this IAAC claim in his application for post-conviction relief. *Id.* at 467–68. He maintained that his direct appeal counsel's performance

was deficient because counsel should have argued that the jury instruction "violate[d Mr. Dyer's] guarantee[s] of due process . . . in the Oklahoma Constitution Article 2 [S]ection 7" and in "the due process [clause] of the Fifth Amendment of the U.S. Constitution." *Id.* On post-conviction review, the state district court found that Mr. Dyer's direct appeal counsel's performance was not deficient because "the State properly charged [Mr. Dyer] and the court's instructions to the jury were proper for the crime charged and the evidence before the jury." *Id.* at 320.

Mr. Dyer appealed to the OCCA, arguing that his direct appeal counsel should have argued that the jury instruction "violat[ed his] . . . Constitutional right to a verdict in which all of the jurors concur upon the same criminal act or transaction pursuant to Article 2, § 19 of the O[klahoma] Const[itution]" and his "due process" right. *Id.* at 290. The OCCA affirmed the denial of Mr. Dyer's application for post-conviction relief, but did not specifically address Mr. Dyer's jury instruction argument. *Id.* at 347. Therefore, we look through to the reasoning provided by the state district court when it first denied Mr. Dyer's application for post-conviction relief. *Wilson*, 138 S. Ct. at 1194–95.

In his habeas petition, Mr. Dyer's arguments focused on the deficient performance prong of *Strickland*—did direct appeal counsel's failure to challenge the jury instructions fall below an objectively reasonable standard of performance. First, Mr. Dyer argued "[t]he state court's decision [that the jury instruction was permissible] was contrary to, or involved an unreasonable application of clearly established federal law in *Estelle*[*v. McGuire*, 502 U.S. 62 (1991), because] . . . the

jury instruction did not ensure a unanimous verdict." ROA, Vol. II at 52. Second, Mr. Dyer argued the state court's decision "was based on an unreasonable determination of the facts" because the evidence did not show that "H.D. w[as] in [Mr. Dyer's] sole custody and care . . . during the alleged crimes ([from]July 2009 – January 2010)."[12] *Id.*

The federal district court understood Mr. Dyer's argument to be that "the time frame in the Information was too broad." ROA, Vol. I at 578. The district court then found "that the OCCA reasonably rejected [Mr. Dyer's] allegation under *Strickland*, because the underlying argument lacks merit" under Oklahoma state law. *Id.* In his application for a COA, Mr. Dyer argues that "[t]he district court misunderstood his claim" to be about the sufficiency of the Information when it really "turn[ed] on whether [Mr.] Dyer received a unanimous jury verdict." Mot. for COA at 8. Mr. Dyer is correct that the district court failed to address the claim raised in his habeas petition, which focused on jury unanimity, not the specificity of the Information. *See* ROA, Vol. II at 50–53. Therefore, we grant a COA on the third issue raised in Mr. Dyer's motion, *Miller-El*, 537 U.S. at 338, which corresponds to Ground One, Sub-Claim Four in Mr. Dyer's habeas petition, ROA, Vol. I at 33–34. However, Mr. Dyer cannot prevail on either of his arguments challenging the state courts' disposition of Ground One, Sub-Claim Four of his habeas petition.

[12] Dyer raised a similar argument in Issue 2 of his motion for a COA. Mot. for COA at 7 (arguing that "the state court made no findings of fact concerning . . . whether Dyer's case factually falls under the *Huddleston* exception for the purpose of electing a crime"). As explained previously, we address this component of Issue 2 as part of our analysis of Issue 3.

First, Mr. Dyer has failed to show that the denial of his application for post-conviction relief "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In his application for post-conviction relief and his habeas petition, Dyer argues that the jury instructions did not require a unanimous jury, in violation of his due process rights under the Federal Constitution. *See* ROA, Vol. I at 466–67, Vol. II at 50–52. But the Supreme "Court has never held jury unanimity to be a requisite of due process of law." *Johnson v. Louisiana*, 406 U.S. 356, 359 (1972). And, as discussed in the following paragraphs, the jury instruction complied with Oklahoma state law. Therefore, Mr. Dyer's direct appeal counsel did not perform deficiently by failing to challenge the jury instructions. Accordingly, the OCCA reasonably applied *Strickland* when concluding that Mr. Dyer's IAAC claim, as it pertained to the jury unanimity issue, lacked merit.

Second, the state courts did not deny Mr. Dyer's application for post-conviction relief "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)(2). To succeed on this argument, Mr. Dyer would need to show the "state court 'plainly misapprehend[ed] or misstate[d] the record in making [its] findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim.'" *Wood*, 907 F.3d at 1289 (quoting *Byrd*, 645 F.3d at 1170–72). Mr. Dyer's argument pertains to the state district court's finding that his direct appeal counsel did not perform deficiently when he failed to challenge the jury instructions because

"the [state trial] court's instructions to the jury were proper for the crime charged and the evidence before the jury." ROA, Vol. I at 320.

Mr. Dyer was charged with a single count of child sexual abuse for "raping and committing other lewd and indecent sexual acts upon his 7 year old daughter, HD, while she was in his care and custody between July of 2009 and the 4th day of January, 2010, in Stephens County, Oklahoma." Jury Instructions at 2. Normally, to protect a defendant's "state constitutional right to a unanimous verdict," a trial court must instruct "the jury to agree on the specific act supporting the verdict of guilt." *Gilson v. State*, 8 P.3d 883, 899 (Okla. Crim. App. 2000). But, "the general rule requiring the State to elect which offense it will prosecute is not in force when separate acts are treated as one transaction." *Id.* "[W]hen a child of tender years is under the exclusive domination of one parent for a definite and certain period of time and submits to sexual acts at that parent's demand, the separate acts of abuse become one transaction within the meaning of this rule." *Id.* (quoting *Huddleston v. State*, 695 P.2d 8, 10-11 (Okla. Crim. App. 1985)).

Mr. Dyer argues that the jury instructions, which did not require "the jury to agree on the specific act supporting the verdict of guilt," *Gilson*, 8 P.3d at 899, were only appropriate if the OCCA found that H.D. was continuously in Mr. Dyer's exclusive custody from July 2009 to January 2010. Mot. for COA at 9. Mr. Dyer is incorrect. The OCCA's finding that the jury instructions were proper does not show that the OCCA "plainly misapprehended . . . the record." *Wood*, 907 F.3d at 1289 (brackets omitted). Mr. Dyer does not dispute that he had exclusive control over

H.D. at various points in time between July 2009 and January 2010. Oklahoma charged that the abuse occurred during these periods of time "while [H.D.] was in [Mr. Dyer's] care and custody." Jury Instructions at 2.

We have previously rejected an almost identical IAAC claim in which a defendant "did not live with the victim and her mother, and claim[ed] that after [a certain point in time] he was never alone with the victim." *Ives v. Boone*, 101 F. App'x 274, 294 (10th Cir. 2004). We held that the defendant's direct appeal counsel was not ineffective for failing to challenge jury instructions similar to those used in Mr. Dyer's trial because, "there were sufficient facts to support treating the abuse as a continuing offense." *Id.* Therefore, Mr. Dyer has not carried his burden of showing that the OCCA denied his application for post-conviction relief based on an unreasonable determination of the facts. We affirm the district court's denial of Ground One, Sub-Claim Four, of Mr. Dyer's habeas application.

Issue 4a

In his habeas petition, Mr. Dyer argued that his direct appeal counsel was ineffective for not arguing that his trial counsel was ineffective when advising him about whether to accept a plea deal. ROA, Vol. I at 31–32, Vol. II at 45–46. Mr. Dyer maintains that he was "offered a 2 1/2 year plea agreement and reduction of charges on the day of the third trial," but that he rejected the plea because trial counsel misled him about the strength of the defense that counsel would present at trial. ROA, Vol. I at 31–32.

In the district court, Oklahoma argued that Mr. Dyer's claim about his decision not to accept a plea offer "was never fairly presented to the OCCA . . . in [Mr. Dyer's] post-conviction appeal." *Id.* at 72. Mr. Dyer disagreed, pointing the district court to a footnote in his post-conviction appellate brief where Dyer directs the OCCA to his "Original Post-conviction Brief." *Id.* at 356 n.8 (referring to *id.* at 293 n.29). The district court found that Dyer had raised his plea offer argument in the OCCA. *Id.* at 548 n.4. The district court erred; Mr. Dyer failed to raise the issue to the OCCA. The entirety of Mr. Dyer's argument on this claim in the OCCA was "that trial counsel . . . misled [him] about his defense." *Id.* at 293.

This passing reference, which does not even mention a plea offer, did not "fairly present" the claim to the OCCA. *Grant*, 886 F.3d at 891. Nor is Dyer's bare citation to his post-conviction brief in state district court sufficient to put the OCCA on notice of the substance of his plea offer claim. *Brooks v. Archuleta*, 621 F. App'x 921, 927 n.6 (10th Cir. 2015); *Wilkinson v. Timme*, 503 F. App'x 556, 560 (10th Cir. 2012). Mr. Dyer did not "provide the [OCCA] with a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." *Grant*, 886 F.3d at 891. Therefore, we grant a COA on Issue 4a and conclude that Ground One, Sub-Claim Two, Fact Ten, of Mr. Dyer's habeas petition is not exhausted.[13] *Id.*; *see also Romano v. Gibson*, 239 F.3d 1156, 1168 (10th Cir. 2001)

[13] Dyer raised a similar argument in Issue 2 of his motion for a COA. Mot. for COA at 7 (arguing that "the state court made no findings of fact concerning . . . whether a plea agreement was offered"). Because Dyer did not exhaust his argument

("[We] can address procedural default even though respondent did not separately appeal the district court's determination."). This claim is also subject to an anticipatory bar because Mr. Dyer could not raise it in a subsequent application for post-conviction relief. *Williams*, 782 F.3d at 1213–14; Okla. Stat. tit. 22, § 1086.

Issues 4b & 4c

In his habeas petition, Mr. Dyer claimed that his direct appeal counsel was ineffective for not arguing that his trial counsel was ineffective when he declined to call Deputy Steely, Deputy Lemons, Sarah Ferrero, Marvin Dutton, Donald Raines, Officer Fletcher, and Officer Corchoran as witnesses. ROA, Vol. I at 23–25, Vol. II at 35–36. Mr. Dyer raised this claim in his application for post-conviction relief, but the state district court found that "trial counsel provided effective assistance." *Id.*, Vol. I at 320. The state district court also noted that Mr. Dyer's "claim of ineffective assistance of trial counsel was [unsuccessfully] raised . . . on direct appeal." *Id.* at 316. When Mr. Dyer appealed the denial of his application for post-conviction relief, he argued that his direct appeal counsel should have argued that trial counsel "failed to present witnesses and evidence vital to prove [Mr. Dyer's] innocence." *Id.* at 293. The OCCA denied relief. *Id.* at 347.

When Mr. Dyer raised the claim in his habeas petition, the district court agreed with the state courts. The district court rejected Mr. Dyer's claim because direct "appe[al] counsel *did* challenge trial counsel's decision not to call Deputy Steely,

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concerning trial counsel's advice about whether to accept a plea agreement, we deny a COA on this component of Issue 2.

Deputy Lemons, Sarah Ferrero, Marvin Dutton, [and] Donald Raines . . . for the same reasons [Mr. Dyer] now presents." *Id.* at 565. While direct appeal counsel did not challenge trial counsel's decision not to call Officers Fletcher and Corchoran, the district court found that direct appeal counsel made a permissible strategic decision not to do so; the witnesses' testimony could only have been used to impeach Ms. Dyer's testimony about an event tangential to the focus of Mr. Dyer's trial. *Id.* at 566–67. "Accordingly, the [district c]ourt f[ound] that the OCCA reasonably applied *Strickland* in finding no ineffective assistance from . . . appellate counsel." *Id.* at 567.

Mr. Dyer seeks a COA because "[t]he testimony and evidence" that would have been admitted through these witnesses was "extremely relevant" and "damning to the state's case." Mot. for COA at 12, 14–15. Mr. Dyer also faults the state courts for failing to make "findings of fact concerning the . . . testimony that would be elicited from witnesses [who] were not called."[14] *Id.* at 6–7. These arguments do not raise doubt about the district court's resolution of Mr. Dyer's claim, so we deny Mr. Dyer's motion for a COA on Issues 4b and 4c.

First, as the district court explained, direct appeal counsel argued that trial counsel rendered ineffective assistance because he "left the presentation of [Mr. Dyer's] theory of defense dismally incomplete" by deciding not to call Deputy Steely, Deputy Lemons, Sarah Ferrero, Marvin Dutton, and Donald Raines. ROA,

[14] Dyer raised this argument as part of Issue 2, but, as discussed previously, we address the argument here, as part of Issues 4b and 4c.

Vol. I at 172. This is the very argument that Mr. Dyer now asserts should have been made by direct appeal counsel. Accordingly, it was not unreasonable for the OCCA to conclude that the performance of direct appeal counsel did not fall below *Strickland* standards.

Second, "[t]rial counsel does not act unreasonably in failing to call every conceivable witness that might testify on a defendant's behalf." *Hooks v. Workman*, 689 F.3d 1148, 1190 (10th Cir. 2012). And counsel certainly has no obligation to "produce cumulative evidence tangential to the parties' actual dispute." *Matthews v. Workman*, 577 F.3d 1175, 1192 (10th Cir. 2009). Moreover, "appellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

Assuming Mr. Dyer is correct when he characterizes the substance of their testimony, Officers Fletcher and Corchoran would only have impeached Ms. Dyer's testimony concerning instances when the police had to mediate disputes between herself and Mr. Dyer. Mot. for COA at 13–14; ROA, Vol. II at 35–36. In contrast to the cumulative impeachment testimony that would have been offered by Officers Fletcher and Corchoran, the other witnesses not called at trial would have offered potentially exculpatory evidence. It is understandable that direct appeal counsel attempted to focus the OCCA's attention on the witnesses whose potential testimony would be most helpful to Mr. Dyer. Therefore, reasonable jurists would not disagree with the district court that the OCCA reasonably applied *Strickland* in finding that

direct appeal counsel was not ineffective when choosing which omitted witnesses would be the focus of his briefing before the OCCA.

Issues 4c, 5 & 7

Issues 4c, 5, and 7 concern Mr. Dyer's claim that his conviction was based on false testimony, primarily offered by Ms. Dyer. Mot. for COA at 12, 15–16, 19. In his habeas petition, Mr. Dyer argued that his "trial was infected by false testimony as to render the verdict completely unreliable" in violation of *Napue v. Illinois*, 360 U.S. 264 (1959). ROA, Vol. II at 48–50; *see also id.*, Vol. I at 32–33. Mr. Dyer also argued that "[t]he state court's determination of the facts that there was no perjury committed by Valerie Dyer is objectively unreasonable in light of the evidence presented in the trial and post-conviction relief courts." *Id.*, Vol. I at 33.

When Mr. Dyer raised this argument in his application for post-conviction relief, he argued that his direct appeal counsel was ineffective for not arguing that Mr. Dyer's conviction should be set aside because Oklahoma elicited false testimony from Ms. Dyer and Ms. Taylor. *Id.* at 512–14. Mr. Dyer argued that his appellate counsel should have raised this argument on appeal because Oklahoma's reliance on false testimony "denied [him] the due process guarantees of the Fifth and Fourteenth Amendments of the U.S. Constitution." *Id.* at 513. The state district court, on post-conviction review, denied this claim because "competent and relevant evidence was admitted and presented at trial." *Id.* at 320.

The OCCA found that Mr. Dyer could not show prejudice because, "[d]uring his appeal proceedings, the evidence used by [Mr. Dyer]'s jury to convict and

sentence him was scrutinized and [Mr. Dyer]'s Judgment and Sentence w[ere] affirmed." *Id.* at 346. The district court denied Mr. Dyer's habeas application because it found that Mr. Dyer had not offered evidence that the challenged testimony was actually perjured, as opposed to merely internally inconsistent, or that the prosecution knew it had elicited perjured testimony. *Id.* at 575–76.

In his motion for a COA, Mr. Dyer backs away from the assertion that the testimony was perjured. Mot. for COA at 12. "Rather, he claims that the testimony is 'false' and that [his trial] counsel had readily available evidence to rebut it." *Id.* Moreover, Mr. Dyer concedes that "[t]he prosecutor [at his trial] would have [had] no way of knowing [that] most of [the challenged] testimony was false." *Id.* at 15. Nevertheless, Mr. Dyer argues that he is entitled to a COA because, under § 2254(d)(2), the district court should have examined the information that Mr. Dyer has collected since being convicted and decided for itself whether the prosecutor knowingly admitted perjured testimony.[15] *Id.* at 15, 19.

"A *Napue* violation occurs when (1) a government witness committed perjury, (2) the prosecution knew the testimony to be false, and (3) the testimony was material." *United States v. Garcia*, 793 F.3d 1194, 1207 (10th Cir. 2015). Because, in his motion for a COA, Mr. Dyer "does not necessarily claim 'perjury'" and concedes that "[t]he prosecutor would have no way of knowing most of [the

[15] Dyer raised a similar argument in Issue 2 of his motion for a COA. Mot. for COA at 6–7 (arguing that "the state court made no findings of fact concerning . . . whether the numerous claims of false testimony were, in fact, false . . . [and] whether the prosecution knew of false testimony"). As explained previously, we address this component of Issue 2 as part of our analysis of Issues 4c, 5, and 7.

testimony] was false," any *Napue* claim raised on appeal would have been unsuccessful. Therefore, Mr. Dyer's direct appeal counsel did not perform deficiently when he decided not to raise a *Napue* claim. *Lay v. Royal*, 860 F.3d 1307, 1317 (10th Cir. 2017). Reasonable jurists would not dispute the district court's finding that the OCCA reasonably applied *Strickland* in concluding that Mr. Dyer's direct appeal counsel's performance was not deficient. Accordingly, we deny Mr. Dyer's motion for a COA on Issues 4c, 5, and 7.

Issue 6

In his habeas petition, Mr. Dyer argued that his direct appeal counsel was ineffective for not arguing that there was insufficient evidence to sustain his conviction. ROA, Vol. I at 9–21, Vol. II at 25–31 (citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). As is relevant to Mr. Dyer's motion for a COA, Mr. Dyer argued that (1) H.D.'s testimony was too inconsistent to support the jury's verdict and (2) Oklahoma failed to corroborate H.D.'s testimony. *Id.*, Vol. I at 9–10, 12–13, Vol. II at 26. When Mr. Dyer raised this argument on post-conviction review, the state district court "undert[ook] a review of the record" and found "the record supports the conclusions that the verdict is supported by the evidence." *Id.*, Vol. I at 320. The court also found "that the evidence was sufficient to support . . . the . . . trial resulting in [Mr. Dyer's] conviction." *Id.*

The OCCA similarly denied relief. *Id.* at 346. The OCCA explained:

> [T]he weight and credibility of [a] witness is for the jury [to evaluate] and their decision will not be reversed where there is substantial evidence supporting it. [Mr. Dyer's] jury considered all of the evidence presented at

> his trial and found him guilty beyond a reasonable doubt of the crime of Child Sexual Abuse. [Mr. Dyer] has not established that his jury's decision was not supported by substantial evidence. During his [direct] appeal proceedings, the evidence used by [Mr. Dyer's] jury to convict and sentence him was scrutinized and [Mr. Dyer]'s Judgment and Sentence was affirmed.

Id. (citations omitted).

The district court denied Mr. Dyer's habeas petition because "the OCCA reasonably found that [Mr. Dyer]'s sufficiency of the evidence claim lacked merit under *Jackson*, and appellate counsel's failure to raise the issue did not constitute ineffective assistance of counsel under *Strickland*." *Id.* at 561.

Mr. Dyer seeks a COA on two grounds. First, he argues that the jury could not accurately weigh the testimony at trial because it was unaware of "numerous inconsistencies" and "false statements" in the testimony. Mot. for COA at 16-17. But, as the district court explained in denying Mr. Dyer's habeas petition, "[t]he question before the OCCA and us under *Jackson* concerns the sufficiency of the evidence at the trial that resulted in the defendant's conviction, not the availability of other evidence that wasn't used as the basis to deprive [Mr. Dyer] of his liberty." *Matthews*, 577 F.3d at 1185. "[I]t makes no sense for us, in reviewing whether a jury's verdict was based on sufficient evidence, to consider facts the jury never heard." *Id.* Mr. Dyer's direct appeal counsel had to work with the record developed at trial and therefore did not perform deficiently by declining to pursue a *Jackson* claim based on evidence outside the record.

Second, Mr. Dyer argues that there was insufficient evidence to convict him because "Oklahoma law states that corroboration is necessary in a case such as this one when testimony is contradictory."[16] Mot. for COA at 17 (quotation marks omitted). In Oklahoma, "[a] conviction may be sustained upon the uncorroborated testimony of the prosecuting witness, unless such testimony appears incredible and so unsubstantial as to make it unworthy of belief." *Roldan v. State*, 762 P.2d 285, 286 (Okla. Crim. App. 1988). Under such circumstances, "[c]orroboration is necessary for admission of a rape victim's testimony." *Gilmore v. State*, 855 P.2d 143, 145 (Okla. Crim. App. 1993). "[T]he improbability of the . . . testimony must arise from something other than just the question of [its] believability. The testimony must be of such contradictory and unsatisfactory nature, or the witness must be so thoroughly impeached, that the reviewing court must say that such testimony is clearly unworthy of belief and insufficient as a matter of law to sustain a conviction." *Gamble v. State*, 576 P.2d 1184, 1186 (Okla. Crim. App. 1978).

In rejecting this claim, the district court found that H.D.'s testimony did not need to be corroborated. The district court explained that "H.D. certainly testified in a manner one would expect of a young child, occasionally contradicting herself and failing to give precise dates and descriptions." ROA, Vol. I at 559. "However, [the district court found that H.D.] clearly described sexual acts, including the giving and receiving of oral sex, and she used anatomical dolls in a manner clearly mirroring

[16] In Issue 2, Dyer argues that "the state court[s] made no findings of fact concerning the evidence at trial with regards to corroboration." Mot. for COA at 6. We address this argument as part of our analysis of Issue 6.

sexual activity." *Id.* This is consistent with the state district court's pre-trial finding, after reviewing a video of H.D.'s forensic interview and conducting a hearing at which Ms. Taylor testified, that there was "sufficient indicia of reliability" concerning H.D.'s statements "so as to render them inherently trustworthy." Felony Mot. at 166. Given that corroborating evidence is only required when a victim's testimony is "incredible and so unsubstantial as to make it unworthy of belief," *Roldan*, 762 P.2d at 286, reasonable jurists would not debate the district court's finding that the OCCA did not unreasonably apply *Strickland* in concluding that Mr. Dyer's direct appeal counsel was not ineffective when he decided not to raise a *Jackson* claim. Accordingly, we deny Mr. Dyer a COA on Issue 6.

Issue 8

In his habeas petition, Mr. Dyer argued that his direct appeal counsel was ineffective for not arguing that the state trial court improperly admitted H.D.'s hearsay statements through the testimony of Ms. Dyer and Ms. Taylor, as well as a videotape of H.D.'s forensic interview. ROA, Vol. I at 42–44, Vol. II at 58–62. As is relevant for Mr. Dyer's application for a COA, Mr. Dyer argued that the state district court did not properly determine the reliability of H.D.'s out of court statements and failed to ensure that H.D.'s statements were disclosed to the defense in a timely manner. *Id.*

When the state district court denied Mr. Dyer's application for post-conviction relief, it found that, "having followed established statutory procedural safeguards, the [state trial c]ourt pre-trial and outside the presence of the jury properly determined

[the] reliability of hearsay evidence offered at trial which was probative and relevant." *Id.*, Vol. I at 320. The court also found that "the trial court after an *in camera* determination of the reliability of the evidence properly allowed out of court statements of the minor child as well as that of the forensic interviewer." *Id.* at 321. The OCCA affirmed the state district court's denial of Mr. Dyer's post-conviction application. *Id.* at 347.

The district court denied Mr. Dyer's habeas petition because, "the [state] trial court held . . . a hearing" to determine the reliability of H.D.'s out of court statements "and found H.D.'s statements to be inherently trustworthy." *Id.* at 585. "And, because H.D. testified at trial, there was no need for independent corroboration under" Oklahoma law. *Id.* (citing Okla. Stat. tit. 12, § 2803.1(A)(2)(b)). Finally, the district court noted that, according to the state trial record, Mr. Dyer "was given a copy of H.D.'s forensic interview before the . . . hearing." *Id.* Therefore, the district court found "that the OCCA reasonably rejected [Mr. Dyer's] claims" about the admission of H.D.'s hearsay statements. *Id.*

In his application for a COA, Mr. Dyer argues that the district court erred because the state district court did not make the required finding that H.D.'s out of court statements were reliable before allowing the hearsay to be admitted at trial.[17] Mot. for COA at 20. Mr. Dyer also argues that the district court erred in finding that

[17] Dyer raised a similar argument in Issue 2 of his motion for a COA. Mot. for COA at 6–7 (arguing that "the state court made no findings of fact concerning . . . whether there was a proper finding of sufficient indicia of reliability of H.D.'s hearsay statements"). As explained previously, we address this component of Issue 2 as part of our analysis of Issue 8.

H.D.'s hearsay testimony was properly disclosed. *Id.* at 20–21. Mr. Dyer's arguments are contradicted by the record. After holding a pre-trial hearing outside the presence of the jury, the state district court found that H.D.'s out of court statements had "sufficient indicia of reliability so as to render them inherently trustworthy." Felony Mot. at 166. Moreover, Mr. Dyer's counsel demonstrated detailed familiarity with the content of H.D.'s statements at the pre-trial hearing, undermining Mr. Dyer's assertion that the video of H.D.'s interview was not timely disclosed. *See id.* at 95. Therefore, reasonable jurists would not debate the district court's finding that the OCCA reasonably applied *Strickland* when concluding that Mr. Dyer's direct appeal counsel was not ineffective for failing to challenge the admission of H.D.'s hearsay statements on these grounds. Accordingly, we deny Mr. Dyer a COA on Issue 8.

III

We GRANT Mr. Dyer's motion for a COA on Issues 3 and 4a, but DENY the motion as to all other Issues. Exercising jurisdiction pursuant to 28 U.S.C. § 2253 over Ground One, Sub-Claim Four, and Ground One, Sub-Claim Two, Fact Ten, of Mr. Dyer's habeas petition, we AFFIRM the district court's denial of those claims for relief. We also GRANT Mr. Dyer's motion to proceed in forma pauperis.

Entered for the Court

Mary Beck Briscoe
Circuit Judge