

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

June 20, 2017

Elisabeth A. Shumaker
Clerk of Court

CHRISTOPHER COUNTS,

Petitioner - Appellant,

v.

EDDIE WILSON, Warden, Wyoming
State Penitentiary; WYOMING
ATTORNEY GENERAL,

Respondents - Appellees.

No. 17-8003
(D.C. No. 2:16-CV-00070-NDF)
(D. Wyo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **KELLY, BALDOCK**, and **BRISCOE**, Circuit Judges.

Christopher Counts, proceeding *pro se*, seeks a certificate of appealability (COA) in order to appeal the district court's judgment in favor of respondents on his 28 U.S.C. § 2254 habeas petition. Because we conclude that Mr. Counts has failed to demonstrate his entitlement to a COA, we deny his request and dismiss this matter.

I.

Mr. Counts was charged in state court with three felonies: aggravated assault and battery; aggravated burglary; and kidnapping. A jury convicted him of aggravated burglary and kidnapping, but acquitted him of aggravated assault and

* This order is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel.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.

battery. The state court then held an additional trial to determine whether Wyoming's habitual-criminal statute applied to Mr. Counts. The jury determined he had three prior felony convictions and that the statute did apply. As a result, the state district court sentenced him to two concurrent life sentences. The Wyoming Supreme Court affirmed his conviction on direct appeal. *Counts v. State*, 277 P.3d 94, 111 (Wyo. 2012). His requests for post-conviction relief were denied in state district court and on appeal.

The evidence at trial, as described by the Wyoming Supreme Court, showed that Mr. Counts went to the house where the victim, his girlfriend, lived. He began pounding on one of the windows, calling loudly for her to let him in to get his cell phone charger. When she did not respond, he walked around the house, shouting and pounding on the windows and the back door.

The house's occupants heard a crash at the back door, and the sound of breaking glass and wood. Mr. Counts entered the back door. The victim ran out the front. There was evidence that Mr. Counts was carrying a knife, and that when he passed the two men from the house, he said, "I warned you once, bitch." *Id.* at 99 (internal quotation marks omitted).

The victim ran toward a neighbor's house and tried to hide under a parked pickup truck. Mr. Counts ran after her. He grabbed her by the neck and dragged her back into the house. She was screaming and begging for help.

Inside the house, Mr. Counts told the two men to leave. He slammed the front door after them as they departed. After they left, they heard thuds and loud screams coming from the house.

According to the victim, Mr. Counts forced her downstairs into her room, threw her on the bed, choked her, threw objects at her, and called her names. He locked the door to the room and stood in front of it to prevent her from leaving. Eventually, after about an hour, he calmed down.

By this time, the police had arrived. Mr. Counts initially refused to leave the house, but eventually surrendered to police. They found a knife in his pocket and a folding pocket knife under the mattress in the victim's bedroom. The police took a statement from the victim, who later recanted that statement or added significant information that she had not told the police on the day of the incident. The prosecution later learned that in spite of being ordered not to contact the victim, Mr. Counts had been communicating with her to persuade her to change her story.

II.

At the outset, we must determine whether Mr. Counts filed a timely notice of appeal. This threshold jurisdictional issue must be resolved before we consider his request for a COA. *See Watkins v. Leyba*, 543 F.3d 624, 625 (10th Cir. 2008) (dismissing appeal for lack of jurisdiction, without addressing application for COA, where petitioner's notice of appeal from order dismissing habeas petition was untimely).

The district court entered judgment in favor of the respondents on November 1, 2016. Mr. Counts had 30 days, until December 1, 2016, to file his notice of appeal. *See* Fed. R. App. P. 4(a)(1)(A). On November 21, he sought an extension of time to file the notice of appeal. The district court could grant him an extension, but only for “30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.” Fed. R. App. P. 4(a)(5)(C).

On November 23, the district court granted the request for extension of time until December 14. Mr. Counts claims that prior to this new deadline, on December 10, he timely placed his notice of appeal in the prison mailbox. *See* Fed. R. App. P. 4(c) (describing requirements of prison mailbox rule).

But the district court did not receive the notice of appeal until a month later, on January 9, 2017. This was not due to a simple delay in the mails. As Mr. Counts explained, the district court clerk rejected the envelope containing the notice of appeal he mailed on December 10 because the prison officials did not affix sufficient postage. As a result, the notice of appeal was returned to him. He then re-mailed the notice of appeal in a new envelope with adequate postage, accompanied by his motion for excusable neglect. As proof of all this, Mr. Counts included the original envelope, postmarked on December 13, which showed that the district court had returned his initial submission for insufficient postage.

The district court granted Mr. Counts’ motion for excusable neglect on January 10, 2017, and filed the notice of appeal as of that date. But there is a problem. The motion for excusable neglect, considered as a second request for extension of time to

file the notice of appeal, was untimely under Fed. R. App. P. 4(a)(5) and 4(c). Thus, notwithstanding the district court's attempt to rescue it, the notice of appeal was untimely and could not create appellate jurisdiction.

Nevertheless, we may construe Mr. Counts' November 21, 2016, motion for extension of time to file his notice of appeal as the functional equivalent of a notice of appeal. *See United States v. Smith*, 182 F.3d 733, 734-36 (10th Cir. 1999) (construing a motion for extension of time to file a notice of appeal as the functional equivalent of a notice of appeal). The motion satisfied the "functional equivalent" criteria because it was filed within the time limit for filing a notice of appeal, and it specified the party taking the appeal, designated the judgment appealed from, and named the court to which the appeal was to be taken. *See id.* at 735; Fed. R. App. P. 3(c)(1). This appeal is therefore timely, and we may proceed to determine whether Mr. Counts has shown his entitlement to a COA.

III.

In order to obtain a COA, Mr. Counts must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires "a demonstration that . . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the [application] should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). If the application was denied on procedural

grounds, the applicant must also show “that jurists of reason would find it debatable . . . whether the district court was correct in its procedural ruling.” *Id.*

When a claim has been adjudicated on the merits in a state court, a federal court can grant habeas relief only if the applicant establishes that the state-court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “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)(1), (2). This “deferential treatment of state court decisions must be incorporated into our consideration of [Mr. Counts’] request for [a] COA.” *Dockins v. Hines*, 374 F.3d 935, 938 (10th Cir. 2004).

Mr. Counts seeks a COA on the following issues: (1) he was improperly denied the right to cross-examine the victim; (2) the prosecutor committed misconduct that deprived him of a fair trial; (3) his trial counsel was constitutionally ineffective; (4) he should have been provided with the prosecution’s files; (5) the state failed to provide a bill of particulars; (6) the jury instructions given at his trial failed to define certain necessary terms; (7) there was insufficient evidence to convict him of kidnapping; and (8) the habitual-criminal sentence was improper because one of his prior convictions was for a crime he committed as a juvenile. We have reviewed Mr. Counts’ arguments in light of the entire record and the controlling legal principles. Having done so, we conclude he has failed to show that reasonable jurists

could find that the district court's denial of his claims was debatable or wrong. We therefore deny his request for a COA and dismiss this matter.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

July 17, 2017

Elisabeth A. Shumaker
Clerk of Court

CHRISTOPHER COUNTS,

Petitioner - Appellant,

v.

No. 17-8003

EDDIE WILSON, Warden, Wyoming
State Penitentiary, et al.,

Respondents - Appellees.

ORDER

Before **KELLY, BALDOCK**, and **BRISCOE**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
2016 NOV -1 PM 4:23
STEPHAN HARRIS, CLERK
CHEYENNE

CHRISTOPHER COUNTS,

Petitioner,

vs.

Case No: 16-CV-0070-F

EDDIE WILSON, Warden, Wyoming
State Penitentiary; and the WYOMING
ATTORNEY GENERAL,

Respondents.

**ORDER GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT
ON PETITION FOR WRIT OF HABEAS CORPUS**

This matter is before the Court on Petitioner Christopher Counts's ("Counts") Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody. (Doc. 1). The State responded on June 3, 2016, and on July 26, 2016, the Court entered a scheduling order. (Docs. 17, 26). On August 26, 2016, the State filed a motion for summary judgment. (Docs. 38). Thereafter, Counts filed a motion to dismiss and reply on September 19, 2016. (Doc. 48). The Court has considered the motions, responses, and replies, and is fully informed in the premises. For the following reasons Respondents' motion for summary judgment is GRANTED, Counts's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody is DENIED, and Counts's motion to dismiss and reply is DENIED.

BACKGROUND

On July 15, 2010, BP, Jared Gilstrap, and Dustin Thomas, were in BP's residence when "they heard Mr. Counts . . . pounding on one of the windows, calling loudly for BP to let him in to get his cell phone charger." *Counts v. State*, 277 P.3d 94, 98 (Wyo. 2012). When BP did not respond, Counts "walked around the house, shouting and pounding on the windows and the back door." *Id.* Three neighbors called the police. At trial, Mr. Gilstrap and Mr. Thomas testified that during these events BP was "frantically scared" and "shut off the lights in the house and positioned herself where she could escape." *Id.* at 99.

When BP heard "a crash at the back door and the sound of breaking glass and wood," she ran out the front door. *Id.* Mr. Gilstrap and Mr. Thomas testified Counts—while carrying a knife—followed BP and said, "I warned you once, bitch." *Id.* Counts dragged BP back inside the residence by her hair and neck, and told Mr. Gilstrap and Mr. Thomas to leave. *Id.* He then forced BP "downstairs into her room, where he threw her on the bed and choked her while cursing and calling her names." *Id.* According to BP, Counts locked the door to prevent her from leaving, and hit, choked, and threw objects at her. *Id.* About an hour later, Counts "tied an electric cable around BP's waist to keep her from escaping, and the two went upstairs to see if the door could be fixed." *Id.* By that time, police had arrived and were trying to convince Counts to surrender. *See id.* Eventually, Counts complied. *See id.*

When officers arrested Counts, they found a knife on him and a folding knife under BP's mattress. *Id.* In addition, Mr. Gilstrap, Mr. Thomas, and BP provided

statements regarding the incident. *Id.* Although BP later recanted portions of her initial statement, her recantation was undermined by evidence that Counts had been communicating with BP after she gave her statement. *See id.* At trial, BP testified consistent with her initial statement. *Id.*

The district attorney charged Counts with aggravated assault and battery, aggravated burglary, kidnapping, and as a habitual offender subject to mandatory life imprisonment. *Id.* The jury found Counts not guilty of aggravated assault and battery, but guilty of aggravated burglary, kidnapping, and under the habitual criminal statute. *Id.* at 100. The district court ordered Counts to serve two concurrent life sentences. *Id.*

After trial, Counts sent the trial judge an *ex parte* request for a mistrial for ineffective assistance of counsel and prosecutorial misconduct. At sentencing, Counts again argued his trial counsel was ineffective and prosecutorial misconduct. On appeal to the Wyoming Supreme Court, Counts raised the following issues: (1) Did the court abuse its discretion by refusing to admit complete documents and recordings and by admitting altered documents?; (2) Did the court abuse its discretion by denying Mr. Counts the right to cross-examine and impeach the witness against him in violation of his constitutional rights?; (3) Did the court abuse its discretion in denying the motion for a bill of particulars?; (4) Did the court improperly instruct the jury?; (5) Was the verdict inconsistent?; and (6) Was there sufficient evidence to support the verdict? *Id.* at 98. On May 22, 2012, the Wyoming Supreme Court affirmed Counts's convictions and sentences. *Id.* at 111.

On February 4, 2013, Counts petitioned the trial court for post-conviction relief. Counts amended his petition on June 11, 2015 to include the following claims: (1) ineffective assistance of appellate counsel; (2) prosecutorial misconduct; (3) ineffective assistance of trial counsel; (4) Counts's sentence violates the Wyoming statute for habitual criminal status; (5) the errors found by the appeals court amount to a reversible error using the plain error standard of the cumulative effect; and (6) lack of judicial discretion. The trial court granted the State's consolidated motion to dismiss in part and for summary judgment as to the remainder. Thereafter, Counts petitioned the Wyoming Supreme Court for review, but the petition was denied.

While Counts's post-conviction relief proceedings were pending, he filed a motion to correct an illegal sentence, arguing his sentence was unconstitutional under *Miller v. Alabama*. See *Counts v. State*, 338 P.3d 902 (Wyo. 2014). The District Court of Natrona County denied the motion and the Wyoming Supreme Court affirmed. See *id.*

Counts filed the current petition on April 12, 2016 with this Court. (Doc. 1 [Pet.]). In his petition, he raises the following issues:

1. Did the district court abuse its discretion by denying Counts the right to cross-examine and impeach BP, in violation of his constitutional rights? (*Id.* at 5).
2. Did the district court abuse its discretion by refusing to admit complete documents and recordings and by admitting altered documents? (*Id.* at 8).
3. Did the district court improperly instruct the jury? (*Id.* at 10).
4. Was there sufficient evidence to support the jury verdict? (*Id.* at 12).

5. Did the district court abuse its discretion in denying the motion for a bill of particulars? (*Id.* at 14).
6. Was the jury verdict inconsistent? (*Id.* at 16).
7. Did the district court err in rejecting the motion to correct an illegal and unconstitutional sentence pursuant to Rule 35(a) of the Wyoming Rules of Criminal Procedure? (*Id.* at 17).
8. Should the Court grant Counts's motion to require Respondent to produce the prosecution files, law enforcement files, and DCI files? (*Id.* at 19).
9. Should the Court grant Counts's motion to appoint a lawyer and for investigative resources relating to his petition for post-conviction relief? (*Id.* at 21).
10. Was Counts's appellate counsel ineffective? (*Id.* at 23).
11. Did the prosecutor commit misconduct during closing arguments? (*Id.* at 25).
12. Was Counts's trial counsel ineffective? (*Id.* at 28).
13. Does Counts's sentence violate the Wyoming habitual criminal statute? (*Id.* at 30).
14. Do the errors found by the Wyoming Supreme Court amount to reversible error using the plain error standard of the cumulative effect? (*Id.* at 32).
15. Did the district court lack judicial discretion? (*Id.* at 34).
16. Did the district court err in allowing the State's untimely filed motions, granting summary judgment, and ruling before all motions were filed? (*Id.* at 36).

On August 26, 2016, Respondents filed a motion for summary judgment and argued fourteen (14) grounds in Counts's petition—Grounds One (1) through Five (5), Seven (7), and Ten (10) through Sixteen (16)—were previously decided by Wyoming

state courts and found to be meritless. Respondents asked the Court to dispose of Grounds Six (6) and Nine (9) as insufficient for habeas relief. (*See* Doc. 39 [Br. in Supp. Mot. Summ. J] at 15). On September 19, 2016, Counts filed a motion to dismiss and reply. (Doc. 48 [Mot. Dismiss]).

LEGAL STANDARD

The Court shall grant a motion for summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). This standard requires more than the “mere existence of *some* alleged factual dispute between the parties,” it requires “that there be no *genuine* issue of *material* fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A material fact is one that “might affect the outcome of the suit under the governing law.” *Id.* at 248. A material fact is genuine “where a reasonable jury could return a verdict for the party opposing summary judgment.” *Jensen v. Solvay Chem., Inc.*, 788 F. Supp. 2d 1278, 1280 (D. Wyo. 2011) (quoting *Seymore v. Shawver & Sons, Inc.*, 111 F. 3d 794, 797 (10th Cir. 1997)). When the Court is faced with a motion for summary judgment, the evidence and inferences derived therefrom are viewed “in the light most favorable to the non-moving party.” *Nelson v. Geringer*, 295 F. 3d 1082, 1086 (10th Cir. 2002).

Initially, the moving party carries the burden of proving the nonexistence of a genuine dispute of material fact. *Tolman v. Stryker Corp.*, 108 F. Supp. 3d 1160, 1162 (D. Wyo. 2015). The moving party can satisfy this burden by “either (1) offering affirmative evidence that negates an essential element of the nonmoving party’s claim, or

(2) demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." *Id.*; see FED. R. CIV. P. 56(c)(1)(A)–(B). Once the burden is satisfied, "the nonmoving party must support its contention that a genuine dispute of material facts exists either by (1) citing to particular materials in the record, or (2) showing that materials cited by the moving party do not establish the absence of a genuine dispute." *Tolman*, 108 F. Supp. 3d at 1162–63.

DISCUSSION

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) provides habeas relief to a prisoner in state custody if he demonstrates "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The authority to issue a writ is preserved "in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This authority is granted to federal courts to "guard against extreme malfunctions in the state criminal justice systems," and is not to serve as a "substitute for ordinary error correction through appeal." *Id.* at 102–03 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring)). To obtain relief "from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. However, the prisoner must exhaust all state remedies before seeking relief in federal court. *See* 28 U.S.C. § 2254(b)–(c).

A petitioner “shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.” *Id.* § 2254(c). For claims adjudicated on the merits in state court, relief will only be granted where the state court proceedings:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. § 2254(d)(1)–(2). A claim on the merits refers “to a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d).” *Gonzales v. Crosby*, 545 U.S. 524, 532 n.4 (2005).

When reviewing a state-court adjudication, the AEDPA “imposes a ‘highly deferential standard for evaluating state-court rulings[.]’” *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7 (1997)). However, the federal court “is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). When there has been no state-court adjudication on the merits, the deferential standards do not apply. *See Byrd v. Workman*, 645 F.3d 1159, 1166 (10th Cir. 2011). Additionally, an issue that has been procedurally “defaulted in state court on an independent and adequate state procedural ground” will not be addressed by a federal court “unless the petitioner can demonstrate cause and prejudice or a fundamental miscarriage of justice.” *Medlock v. Ward*, 200 F.3d 1314, 1323 (10th Cir. 2000) (citations omitted).

A. Respondents' Motion for Summary Judgment on Petition for Writ of Habeas Corpus

Respondents ask the Court to deny Counts relief because fourteen (14) of the issues in the petition were previously presented to Wyoming state courts and found to be meritless, and the remaining two (2) issues—Grounds Six (6) and Nine (9)—are insufficient for habeas relief. (Doc. 39 [Br. in Supp. Mot. Summ. J.] at 15). Because Counts concedes Ground Six (6), the Court will only address the remaining fifteen (15) issues. (*See* Doc. 45 [Resp. and Obj.] at 3, ¶ 15).

Ground One (1)—Denial of the Right to Cross-Examine Witnesses

In his first claim, Counts argues the district court abused its discretion by denying him the right to cross-examine and impeach the witnesses against him. (Doc. 1 [Pet.] at 5). Counts raised this issue on appeal from the judgment of conviction. (*See id.*). Counts asserts he was unable to present his defense to the jury because “BP was questioned about her involvement with [DCI] outside the presence of the jury; not allowing them to be the sole triers of fact and credibility, or to appropriately draw any inferences” therefrom. (*Id.* at 6). As a result, Counts claims the trial court committed reversible error. (*Id.*). Respondents argue that not only does Counts’s claim violate the dictates of AEDPA by asking the Court to sit in plenary review, but in the event the issue demands further analysis, summary judgment is nevertheless appropriate. (*See* Doc. 39 [Br. in Supp. Mot. Summ. J.] at 18–19). Respondents also argue Counts is unable to show by clear and convincing evidence “the Wyoming courts unreasonably determined the facts of his case.” (*Id.* at 19).

Because this issue was decided on the merits, the Court must decide if the state court disposition was “based on an unreasonable determination of the facts in light of the evidence presented” 28 U.S.C. § 2254(d)(2). On appeal, the Wyoming Supreme Court concluded the “evidence of BP’s employment with DCI was relevant, and that the district court erred in prohibiting cross-examination about that employment.” *Counts*, 277 P.3d at 105. However, the Wyoming Supreme Court found the error harmless. *Id.* at 106. To “demonstrate harmful error, the defendant must show prejudice under circumstances which manifest inherent unfairness and injustice or conduct which offends the public sense of fair play.” *Id.* at 105 (quoting *Dysthe v. State*, 63 P.3d 875, 881 (Wyo. 2003)). To decide if an error is harmless, several factors may be considered, including “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution’s case.” *Counts*, 277 P.3d at 105 (quoting *Dysthe*, 63 P.3d at 332–33).

On review, the Wyoming Supreme Court found BP’s testimony not critically important because Counts testified at trial and BP’s testimony was “corroborated by physical evidence and the testimony of other witnesses.” *Counts*, 277 P.3d at 105–06. The Wyoming Supreme Court also found defense counsel thoroughly cross-examined “BP on questions relating to her credibility, plus other evidence that allowed the jury to evaluate her potential bias.” *Id.* at 106. Cumulatively, these findings support the

Wyoming Supreme Court's conclusion that the district court's error was harmless.¹ For these reasons, the Wyoming Supreme Court's decision was not based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(2). As such, Ground One (1) is dismissed with prejudice.

Ground Two (2)—Admission of Redacted Documents

Next, Counts alleges the district court abused its discretion by admitting redacted documents. (Doc. 1 [Pet.] at 8). Counts's argument is premised on the district court's redaction of references to various statements in letters Counts wrote to BP. (*See id.* at 9). Counts argues that by redacting the letters, the jury was not allowed "to view the entire context of the letter[s]." (*Id.*). He also claims that by redacting certain portions of the letters, he was unable to adequately present a defense. (*Id.*).

Counts raised this issue in his direct appeal. The Wyoming Supreme Court found that if the district court erred, the error was harmless. *Counts*, 277 P.3d at 104. The Wyoming Supreme Court began the analysis by stating, "[d]espite a no-contact order, Mr. Counts used intermediaries or pseudonyms to send letters to BP while he was incarcerated prior to trial." *Id.* at 100. The Wyoming Supreme Court explained that "[p]rior to trial, the prosecution informed the district court that it intended to offer excerpts of the letters into evidence. Mr. Counts objected, claiming that the evidence was inadmissible." *Id.* Counts argued that if the letters were admitted, then the letters should

¹ The Wyoming Supreme Court referred to BP admitting that she provided inconsistent statements to law enforcement, her tendency to lie if she felt she was in trouble, and her tendency to dramatizing things. *Counts v. State*, 277 P.3d 94, 106 (Wyo. 2012).

not be redacted. *See id.* The district court ruled the following references were inadmissible and subject to redaction:

(1) the references to the fact that Mr. Counts could be sentenced to life in prison; (2) parts of the letters that the district court found to be ‘self-serving’ and ‘vouching’; and (3) the fact that some of BP’s statements were made directly to the District Attorney and the Public Defender, the attorneys involved in the case.

Id. at 101.

In rendering the decision, the Wyoming Supreme Court relied on the United States Court of Appeals for the Tenth Circuit’s analytical framework for the rule of completeness. *See id.* at 100–01. The Tenth Circuit explained that “only portions which are relevant to an issue in the case and necessary to clarify or explain the portion already received need to be admitted.” *Id.* at 100 (quoting *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010)). Furthermore, if a disputed statement must be admitted, “the trial court should consider whether (1) it explains the admitted evidence, (2) places the admitted evidence in context, (3) avoids misleading the jury, and (4) insures fair and impartial understanding of the evidence.” *Counts*, 277 P.3d at 100–01 (quoting *Lopez-Medina*, 596 F.3d at 735).

Regarding the references to Counts’s life sentence, the Wyoming Supreme Court concluded the district court’s decision was reasonable. *Counts*, 277 P.3d at 102. The district court explained that evidence of Counts’s life sentence could result in the jury basing its decision on improper grounds. *Id.* The district court also reasoned, “[t]he fact that bifurcated proceedings are required by statute in a habitual criminal case . . . indicates that the jury should not be informed that Mr. Counts faced a potential life

sentence as they considered the current charges against him during the first phase of the trial.” *Id.*

After reviewing the “self-serving” and “vouching” statements, the Wyoming Supreme Court concluded the district court did not abuse its discretion. *Id.* at 103. Instead, the Wyoming Supreme Court found the redacted information merely cumulative. *Id.* The Wyoming Supreme Court also found Counts failed to demonstrate prejudice.

Finally, the district court explained the third redaction—in reference to the district attorney and public defender—was warranted because the district court was “concerned that allowing this information into evidence might force the attorneys involved in the case to testify as witnesses” *Id.* To avoid this problem, “the district court substituted language indicating that statements made to the prosecutor had been made to ‘law enforcement,’ and statements made to the public defender had been made to ‘my investigator.’” *Id.* Although the Wyoming Supreme Court agreed with Counts that the substitution was unnecessary, the Wyoming Supreme Court upheld the district court’s decision because Counts suffered no prejudice. *Id.* at 104.

Having reviewed the Wyoming Supreme Court’s analysis, the Court finds the decision to affirm the district court was reasonable in light of the facts presented. The Court also agrees with the Wyoming Supreme Court’s finding that Counts failed to demonstrate prejudice, and rejects Counts’s contention that he was unable to present a defense. For these reasons, Ground Two (2) of the petition is dismissed with prejudice.

Ground Three (3)—Improper Jury Instructions

In Ground Three (3), Counts asks the Court to determine if the jury was improperly instructed. (Doc. 1 [Pet.] at 10). On appeal, the Wyoming Supreme Court affirmed the district court's decision. *See Counts*, 277 P.3d at 107–08. Counts argues the district court should have provided jury instructions that defined the words “removal,” “confine,” and “terrorize.” (Doc. 1 [Pet.] at 11). Primarily, Counts focuses on the word “terrorize,” and claims that because the intent to terrorize is a specific intent to commit kidnapping, it should have been defined. (*Id.*). He asserts that because he was charged with a specific intent crime, “there should be no confusion as to what that intent is” (*Id.*). In response, the respondents assert summary judgment is proper because Counts failed to demonstrate prejudice.

The Wyoming Supreme Court reviewed this issue for plain error because defense counsel failed to object to this issue at trial. *Counts*, 277 P.3d at 107. The Wyoming Supreme Court explained that “[w]ords in jury instructions ‘are to be given their plain and ordinary meaning unless otherwise indicated.’” *Id.* at 108 (quoting *Keene v. State*, 812 P.2d 147, 150 (Wyo. 1991)). The Wyoming Supreme Court also stated that “[w]hen terms in a jury instruction are to be given their plain and ordinary meaning, there is no need to supply a definition.” *Counts*, 277 P.3d at 108. By utilizing this standard, the Wyoming Supreme Court found the district court did not err in failing to instruct the jury on the definitions of “confine,” “removal,” or “terrorize.” *Id.* The Wyoming Supreme Court based this decision on the commonality of the words and the ordinary meanings. *See id.* Regarding the word “terrorize,” the Wyoming Supreme Court examined the

parties' proposed definitions and found both definitions consistent with each other. This determination led the Wyoming Supreme Court to conclude the district court did not commit plain error. *Id.*

Looking at the plain and ordinary meaning of the words "removal," "confine," and "terrorize," the Court finds the Wyoming Supreme Court's decision was not unreasonable nor contrary to federal law. Consequently, Counts's third ground of relief is dismissed with prejudice.

Ground Four (4)—Sufficiency of the Evidence

In Ground Four (4), Counts claims there was insufficient evidence to support the jury verdict. (*See* Doc. 1 [Pet.] at 12). Counts states, "I still don't get how I kept her isolated from the usual protections of society" (*Id.* at 13). Respondents argue Counts "cannot show that the Wyoming Supreme Court's conclusion that sufficient evidence supported his conviction was contrary to, or an unreasonable application of, clearly established federal law, or that clear and convincing evidence proves that the Wyoming Courts unreasonably determined the facts of his case." (Doc. 39 [Br. in Supp. Mot. Summ. J.] at 22).

The Wyoming Supreme Court considered this issue by deciding "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Counts*, 277 P.3d at 109 (quoting *Garner v. State*, 264 P.3d 811, 820 (Wyo. 2011) (citations omitted)). In doing so, the Wyoming Supreme Court viewed the "evidence with the assumption that the evidence of the prevailing party [was] true, disregard[ed] the evidence favoring the unsuccessful party, and [gave] the prevailing

party the benefit of every favorable inference” *Counts*, 277 P.3d at 109 (quoting *Garner*, 264 P.3d at 820 (citations omitted)).

Here, the jury convicted Counts of aggravated burglary and kidnapping. According to Wyoming Statute § 6-3-301, “[a] person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit theft or a felony therein.” WYO. STAT. ANN. § 6-3-301(a) (2016). However, a person is guilty of aggravated burglary if, in the course of committing the burglary, the person “[i]s or becomes armed with or uses a deadly weapon or a simulated deadly weapon.” *Id.* § 6-3-301(c). In contrast,

[A] person is guilty of kidnapping if he unlawfully removes another from his place of residence or business or from the vicinity where he was at the time of the removal, or if he unlawfully confines another person, with the intent to . . . [i]nflict bodily injury on or to terrorize the victim or another.

WYO. STAT. ANN. § 6-2-201(a) (2016).

Using the elements of aggravated burglary and kidnapping, the Wyoming Supreme Court concluded there was sufficient evidence to support Counts’s convictions. In rendering the decision, the Wyoming Supreme Court relied on BP’s testimony and the evidence presented through Mr. Thomas’s and Mr. Gilstrap’s testimony. *See Counts*, 277 P.3d at 109–11. This Court agrees with the Wyoming Supreme Court and finds the decision was based on a reasonable determination of the facts presented. Therefore, Ground Four (4) of the petition is dismissed with prejudice.

Ground Five (5)—Denial of a Motion for a Bill of Particulars

In Ground Five (5), Counts asks the Court to decide if the district court abused its discretion when it denied Counts's motion for a bill of particulars. (Doc. 1 [Pet.] at 14). Counts states, "I don't exactly understand this issue but I do feel that if some definition of the [p]rosecutor[']s view of 'terrorize' was made I would have been better able to [prepare] a defense." (*Id.* at 15). Respondents argue this issue is subject to summary judgment because Counts "cannot demonstrate that clear and convincing evidence proves that the Wyoming courts unreasonably determined the facts of his case." (Doc. 39 [Br. in Supp. Mot. Summ. J.] at 19).

As the Wyoming Supreme Court clarified on appeal, Counts's argument arises from the district court's denial of Counts's motion for a bill of particulars. *See Counts*, 277 P.3d at 106. The Wyoming Supreme Court explained that "[t]he function of a bill of particulars is 'to make more specific the general allegations in the information to enable the defendant to prepare his defense and avoid being surprised at the trial.'" *Id.* at 107 (quoting *Heywood v. State*, 208 P.3d 71, 72 (Wyo. 2009) (citations omitted)). Generally,

the State is not required to provide additional information in a bill of particulars if the charging documents or other disclosures by the State adequately identify "the nature of the offense, the place where it is alleged offenses were committed, the period of time covered thereby, as well as the specific statutes which it was claimed [Petitioner] violated."

Counts, 277 P.3d at 107 (citation omitted). The Wyoming Supreme Court also stated that "[w]hile we have recognized that a bill of particulars is designed to make the general allegations of the charging documents more specific, we have also explained that 'a bill of particulars is inappropriate for obtaining evidence, facts, theories, and strategies.'"

Counts, 277 P.3d at 107 (quoting *Jansen v. State*, 892 P.2d 1131, 1141 (Wyo. 1995)).

From this explanation, the Wyoming Supreme Court affirmed the district court's decision to deny Counts's request for additional information. The Court finds the Wyoming Supreme Court's decision was not based on an unreasonable determination of the facts presented nor contrary to federal law. As such, Counts's fifth claim is dismissed with prejudice.

Ground Seven (7)—Motion to Correct an Illegal or Unconstitutional Sentence

In Ground Seven (7), Counts asks the Court to re-examine his motion to correct an illegal and unconstitutional sentence pursuant to Rule 35(a) of the Wyoming Rules of Criminal Procedure. (See Doc. 1 [Pet.] at 17). Counts raised this issue in a post-conviction motion and later appealed to the Wyoming Supreme Court. (*Id.*) For the first time in this petition, Counts argues the state courts failed to use the "*Teague v. Lane*" analysis, and for that reason his sentence was illegal and unconstitutional. (See *id.* at 18). To the extent Counts asserts a new argument in his petition, the argument is procedurally barred for failing to exhaust state remedies. However, the Court will address Ground Seven (7) to the extent Counts argues the state court proceedings were unreasonable or contrary to federal law. See 28 U.S.C. § 2254(d)(1)–(2).

I brought this up in my post-conviction relief petition NOT for the first time in this petition

And I raised *Teague* to show that the Amendment to 6-10-201(b)(1) is retroactive.

Ground Seven (7) originates from the district court's denial of Counts's motion to correct an illegal sentence. See *Counts*, 338 P.3d 902, 904 (Wyo. 2014). The district court concluded that *Miller v. Alabama*, 132 S. Ct. 2455 (2012), "does not affect sentencing enhancements applied to adults based on habitual behavior[,] even if one of the previous convictions relied upon in enhancing the sentence was committed when the defendant

was a juvenile.” *Id.* On appeal, the Wyoming Supreme Court affirmed the district court’s decision, and stated:

The sentencing scheme at issue here did not mandate a life sentence for a juvenile. Mr. Counts was not a juvenile at the time he was sentenced. The mitigating factors of youth were simply not an issue when he was sentenced. Because kidnapping and aggravated burglary are violent felonies and Mr. Counts had twice previously been convicted on felony charges, the jury appropriately found he was a habitual criminal. Because Mr. Counts had three or more previous convictions, the district court was required to sentence him on these offenses to life in prison. He was not sentenced to life in prison for his juvenile offense. He was sentenced to life in prison for committing a fourth felony, and this time a violent one. It was the violence associated with the current felony that placed him within the parameters of the habitual criminal statute.

Id. at 906–07. The Wyoming Supreme Court also rejected Counts’s argument to retroactively apply the 2013 amendment of Wyoming Statute § 6-10-201 to his life sentence.² The Wyoming Supreme Court reasoned that not only does the general rule disfavor retroactive application, but there was no showing of manifest injustice to warrant such application. *See id.* at 907–08. Both the district court and the Wyoming Supreme Court relied on the facts of the case and reasonably applied the facts to the law. Thus, Counts’s Ground Seven (7) is dismissed with prejudice.

Ground Eight (8)—Request for Prosecution and Law Enforcement Files

In Ground Eight (8), Counts seeks discovery of prosecution and law enforcement files. However, Counts merely asserts vague and unintelligible allegations. He states, “I am not 100% clear on this motion but I do know that my lawyer at the time wanted the

² Before the 2013 amendment, the statute provided for habitual criminals to be punished by imprisonment for “[l]ife, if he has three (3) or more previous convictions for offenses.” WYO. STAT. ANN. § 6-10-201 (2012). Currently, habitual criminals are to be punished by imprisonment for “[l]ife, if he has three (3) or more previous convictions for offenses committed after the person reached the age of eighteen (18) years of age.” WYO. STAT. ANN. § 6-10-201 (2013) (emphasis added).

[p]rosecution files to prove issues of [p]rosecutorial [m]isconduct and BP[’s] DCI [f]iles to prove that she was arrested and used her DCI [involvement] to be released.” (Doc. 1 [Pet.] at 20).

As previously stated, for Counts to obtain relief he “must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington*, 562 U.S. at 103. Counts is not entitled to habeas relief because he fails to assert a claim under 28 U.S.C. § 2254. Additionally, when a state prisoner seeks relief, the federal court is limited to the state court record. *See Cullen*, 563 U.S. at 182. Although the United States Supreme Court recognizes that “state prisoners may sometimes submit new evidence in federal court, AEDPA’s statutory scheme is designed to strongly discourage them from doing so.” *Id.* at 186. Therefore, to the extent Counts’s request is one for discovery, that request also fails. For these reasons Counts’s Ground Eight (8) is dismissed with prejudice.

Ground Nine (9)—Motion for Appointment of Counsel

In Ground Nine (9), Counts asserts he should have been appointed counsel for his state post-conviction proceedings. (Doc. 1 [Pet.] at 21). He states, “[t]his is a Due Process of the 5th and 14th Amendments to the United States Constitution and applicable Wyoming Constitutional Provisions.” (*Id.* at 22). Counts also states, it “doesn’t make sense that I am suppose[d] to have a fair chance at a defense. How can it be fair for someone like me who has been incarcerated pretty much my whole life with no formal education to defend myself against very well educated lawyers?” (*Id.* at 22). Respondents

argue this claim cannot be the basis for federal habeas corpus relief “to the extent Counts asserts for the first time that federal due process requires the appointment of counsel in a Wyoming state post-conviction relief proceeding.” (Doc. 39 [Br. in Supp. Mot. Summ. J.] at 15). Respondents also argue Ground Nine (9) is procedurally defaulted “to the extent that Counts failed to present his arguments to the Wyoming courts and is precluded from doing so now” (*Id.* at 16).

“[I]f a petitioner ‘failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred’ the claims are considered exhausted and procedurally defaulted for habeas relief.” *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000) (citations omitted). Thus, to the extent Counts presents this argument for the first time, his argument is procedurally barred and must be rejected. In addition, the law is clear that there is no right to appointment of counsel beyond the direct appeal of a criminal conviction. *See United States v. Brown*, 556 F.3d 1108, 1113 (10th Cir. 2009). Therefore, to the extent Counts argues he is entitled to appointment of counsel in post-conviction relief proceedings, his argument must also fail. Because the Court finds Counts’s Ground Nine (9) is both procedurally barred and lacks merit, it is dismissed with prejudice.

Ground Ten (10)—Ineffective Assistance of Counsel

Next, Counts alleges his appellate counsel was ineffective. (*See* Doc 1 [Pet.] at 23). Counts indicates that he raised this issue through a post-conviction petition and appealed the decision to the Wyoming Supreme Court. (*Id.*). The district court dismissed

Counts's claim with prejudice and found his issue procedurally barred. The Wyoming Supreme Court denied the petition on March 1, 2016. (*See id.* at 52).

Counts states that if his appellate counsel filed the issues he requested, "the cumulative effect of their plain error would have been found." (*Id.* at 24). Specifically, Counts asserts his appellate counsel was ineffective for not filing an ineffective assistance of trial counsel claim, prosecutorial misconduct claim, or lack of judicial discretion claim. (*Id.*). He also argues his appellate attorney "failed to state how the 'harmless' errors in [his] initial appeal effected the outcome of [his] trial and if he would have done this[,] those errors may have been deemed reversible errors." (*Id.*). Respondents assert summary judgment is proper because Counts failed to meet his burden. (Doc. 39 [Br. in Supp. Mot. Summ. J.] at 24).

Because the district court decided this issue on the merits, the Court must determine if Counts can show the disposition "was contrary to, or involved an unreasonable application of, clearly established Federal Law . . . or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). To assess an ineffective assistance of appellate counsel claim, the Court utilizes the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). This standard requires Counts to "show both (1) constitutionally deficient performance, by demonstrating that his appellate counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding—in this case the appeal—would have been different." *Cargle v.*

Mullin, 317 F.3d 1196, 1202 (10th Cir. 2003) (citation omitted). When analyzing “an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, ‘we look to the merits of the omitted issue,’ generally in relation to the other arguments counsel did pursue.” *Cargle*, 317 F.3d at 1202 (citations omitted). According to the Tenth Circuit:

If the omitted issue is so plainly meritorious that it would have been unreasonable to winnow it out even from an otherwise strong appeal, its omission may directly establish deficient performance; if the omitted issue has merit but is not so compelling, the case for deficient performance is more complicated, requiring an assessment of the issue relative to the rest of the appeal, and deferential consideration must be given to any professional judgment involved in its omission; of course, if the issue is meritless, its omission will not constitute deficient performance.

Id. (citations omitted).

First, Counts alleges his appellate counsel was ineffective for failing to file an ineffective assistance of counsel claim against Counts’s trial counsel. Counts claims “this was a direct result of the [a]ppellate counsel and [t]rial counsel both being from the Wyoming Public Defender’s office, and that this was a conflict of interest for both attorneys assigned to the Petitioner.” (Doc. 17-16 [Am. Post-Conviction Pet.] at 8). As discussed in Ground Twelve (12), the Court finds the district court did not err in finding Counts failed to show his trial counsel was ineffective.

Second, Counts alleges his appellate counsel was ineffective for failing to assert prosecutorial misconduct. He asserts his “right to a fair trial was compromised by the [p]rosecutor’s [m]isconduct predominantly during closing arguments.” (Doc. 17-16 [Am. Post-Conviction Pet.] at 10). Counts also claims “prejudice did occur under the

circumstances of the misstatement(s) by the prosecutor, and that they did manifest an inherent unfairness that may have led the jury to hand down a less-favorable verdict, and that the misconduct by the prosecutor did offend the public sense of fair-play.” (*Id.* (citing *Seymore v. State*, 152 P.3d 401 (Wyo. 2007))). This Court agrees with the district court and finds no support for Counts’s claim of prosecutorial misconduct. Counts’s allegation of prosecutorial misconduct is further discussed in Ground Eleven (11). Consequently, Counts’s appellate counsel was not ineffective for failing to raise a prosecutorial misconduct claim.

Third, Counts alleges his appellate counsel was ineffective for not filing a lack of judicial discretion claim. He asserts,

not only did the trial judge refuse to allow the jury to hear about the facts of [BP’s] involvement with D.C.I., and the fact that since her involvement, her statements were no longer exculpatory to Mr. Counts; but he also barred any cross-examination about her involvement with D.C.I., why they approached her, and why her statements changed in favor of the prosecution; and how this coincide with her recent workings with D.C.I.

(Doc. 17-16 [Am. Post-Conviction Pet.] at 36). Thus, Counts’s lack of judicial discretion claim is essentially the same claim as Ground One (1). The Court previously denied Counts’s lack of judicial discretion claim in Ground One (1), and therefore, the Court will not revisit the analysis under this claim.³

Finally, Counts alleges his appellate counsel was ineffective because he “failed to state how the ‘harmless’ errors in [his] initial appeal effected the outcome of [his] trial and if he would have done [that] those errors may have been deemed [reversible] errors.”

³ In Ground One (1), the Court agreed with the Wyoming Supreme Court’s conclusion that the error was harmless beyond a reasonable doubt, and as a result, Ground One (1) was dismissed with prejudice.

(Doc. 1 [Pet.] at 24). He claims that if his appellate counsel asserted ineffective assistance of trial counsel, prosecutorial misconduct, and lack of judicial discretion, the cumulative effect of the potential errors would amount to reversible error. (See Doc. 17-16 [Am. Post-Conviction Pet.] at 7). However, as discussed in Ground Fourteen (14), the Court finds the errors, if any, do not warrant reversal. The Court also finds the omitted issues were not meritorious, and as a result, cannot serve as a basis for Ground Ten (10). See *Cargle*, 317 F.3d at 1202 (citations omitted) (stating “if the issue is meritless, its omission will not constitute deficient performance”). Moreover, the Court agrees with the district court that Counts failed to show his appellate counsel’s performance was deficient and prejudice resulted. See *Strickland*, 466 U.S. 668. Therefore, Ground Ten (10) of the petition is dismissed with prejudice.

Ground Eleven (11)—Prosecutorial Misconduct

In Ground Eleven (11), Counts raises the issue of prosecutorial misconduct. (Doc. 1 [Pet.] at 25). This claim arises predominantly from the prosecutor’s closing argument. (Doc. 17-16 [Am. Post-Conviction Pet.] at 10). Counts asserts “[t]he [p]rosecutor misstated the evidence over and over so much so that even the [Wyoming Supreme Court] . . . based their facts off of misstating the evidence and not off the testimony of the witnesses as Mr. Thomas testified” (Doc. 1 [Pet.] at 26). He also alleges “[t]he [p]rosecutor . . . testified to the jury, presented evidence not brought up at trial, misstated testimony, testified to [Count’s] guilt, and misstated . . . the law to the jury.” (*Id.*). Counts concludes that “without the [p]rosecutor’s unprofessional conduct a reasonable probability exists that [he] may have enjoyed a more favorable verdict.” (*Id.* at 27).

Respondents argue summary judgment is appropriate because Counts failed to assert the facts necessary to support his claim and failed to demonstrate how the state courts reached an incorrect decision. (Doc. 39 [Br. in Supp. Mot. Summ. J.] at 25).

Prosecutorial misconduct will typically “require reversal of a state court conviction only where the remark sufficiently infected the trial so as to make it fundamentally unfair, and, therefore, a denial of due process.” *Duckett v. Mullin*, 306 F.3d 982, 988 (10th Cir. 2002) (citation omitted). To determine the “fundamental fairness of a trial” the Court must “examine the effect of any misconduct within the context of the entire proceedings.” *Id.* (citation omitted). This analysis requires the Court to “look first at the strength of the evidence against the defendant and decide whether the prosecutor’s statements plausibly could have tipped the scales in favor of the prosecution.” *Id.* at 988–89 (quoting *Fero v. Kerby*, 39 F.3d 1462, 1474 (10th Cir. 1994)). Then, the Court “must consider the probable effect the prosecutor’s [statements] would have on the jury’s ability to judge the evidence fairly.” *Id.* at 989 (alteration in original) (citation omitted).

When the Court reviews “a claim of prosecutorial misconduct in closing argument, the court looks at the entire record to determine whether the defendant’s case was so prejudiced by the improper comments as to result in the denial of a fair trial.” *Burton v. State*, 46 P.3d 309, 313 (Wyo. 2002) (citations omitted). However, when the defense fails to object to improper statements during closing argument, the Court must review those statements for plain error. *See id.* at 313–14. Here, defense counsel did not object to the alleged improper statements. Thus, Counts must demonstrate “that the record clearly shows an error that transgressed a clear and unequivocal rule of law which adversely

affected a substantial right.” *Id.* at 314 (quoting *Taylor v. State*, 17 P.3d 715, 721 (Wyo. 2001)). Additionally, because the issue of prosecutorial misconduct was decided on the merits, the Court must determine if the district court’s decision was reasonable in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(2).

Although Counts refers to several statements made by the prosecutor in his petition, the Court will only review the statements presented to the state district court. Any additional arguments raised for the first time are procedurally barred. In his motion before the district court, Counts focused on the following allegations:

1. The prosecutor invaded the province of the jury by misstating the evidence and making arguments that were not supported by the record;
2. The prosecutor misinformed the jury that false imprisonment was not a lesser-included offense of kidnapping and that Counts could not be found to have committed that lesser-included offense;
3. The prosecutor invaded the province of the jury by arguing that testimonies and other evidence corroborated each other and that Counts’s testimony contained contradictions;
4. The prosecutor made emotional appeals by stating that the jurors could use their “common sense,” by using the phrase “domestic violence,” by calling Counts “the man who thinks he’s smarter than us,” and by stating that Counts was “guilty” during his arguments; and
5. The prosecutor made so many improper comments that his argument must be seen as cumulative error.

This is incorrect, this Court only reviewed the issues that were disputed by the state. Every issue raised in my §2254 was raised in the state district court and should not be procedurally barred.

(Doc. 17-18 [Order] at 10, ¶ 23).

In Counts’s first argument—the prosecutor misstated the evidence—he appears to assert the prosecutor: (1) told the jury that he broke the lock on BP’s front door; (2) claimed Counts told officers that BP pried her door open; (3) argued Counts admitted to

throwing compact discs in BP's bedroom; and (4) told the jury Counts claimed he had the right to be present during BP's interview with law enforcement. (*Id.* at 11, ¶ 26). The district court explained that "[e]ven if one were to argue that both of the prosecutor's closing arguments regarding the lock were not supported, wholly or in part, by the evidence introduced," prejudice was not shown. (*Id.* at 13, ¶ 31). The district court concluded that Counts "failed to prove that he was materially prejudiced by any misstatement the prosecutor may have made concerning the door and its lock and, therefore, failed to show plain error." (*Id.* at 14, ¶ 31). Regarding the second claim, the district court rejected Counts's argument that the prosecutor "improperly informed the jury that Counts had testified that BP 'used a pry bar' to open the back door to her home." (*Id.* ¶ 32). The court reasoned that "BP testified that while she and Counts were in her home that night, they concocted a 'cover story' to explain the broken back door." (*Id.* ¶ 33). Part of that story involved "BP telling others, specifically the investigator working for Counts's trial counsel, that BP 'had to pry the door back open' after BP had locked herself out of the home." (*Id.*). Counts's third claim, regarding the CDs, was also discredited by the district court because Counts stated he thought he broke the CD case when he threw it. (*See id.* at 15, ¶ 34). Specifically, the district court referenced Counts's testimony: "I'm right over here at the end of the bed, probably right here. This and this is the CD case. And I think I broke one, threw it in this side of the room and one I threw in this side of the room, one or two." (*Id.*). Finally, Counts's fourth claim "alleges the prosecutor incorrectly told the jury that Counts tried to assert that he had the right to be present during any police interview with BP." (*Id.* ¶ 35). After examining the

prosecutor's and the testifying officer's remarks, the district court concluded that "[w]hile Counts may argue that Officer Jenkins did not testify truthfully, he cannot claim that the prosecutor misstated that testimony in his arguments to the jury." (*Id.* at 16, ¶ 36). The Court agrees with the district court and finds Counts failed to demonstrate the prosecutor misstated the evidence or that prejudice resulted. Thus, Counts's first contention is insufficient for the Court to find prosecutorial misconduct.

Counts's second contention—misinforming the jury—alleges "the prosecutor misstated the law during his closing arguments by stating that false imprisonment is not a lesser-included offense of kidnapping." (*Id.* ¶ 38). The district court correctly found "[d]uring his closing, the prosecutor did not misstate the law or improperly instruct the jury. After first reiterating what the testimonies of several eyewitnesses and the physical evidence showed, the prosecutor distinctly stated that '[Counts's] conduct is not a lesser crime.'" (*Id.* at 17, ¶ 41 (alteration in original)). During closing arguments, the prosecutor said:

Maybe the 911 dispatcher was right. You have a lively neighborhood tonight. Yeah, nothing that they did. What'd they hear? What'd [BP] tell you happened? It's not a lesser-included crime, the false imprisonment. False imprisonment, you restrain your liberties. He didn't let her go until the hostage negotiator showed up. He drug her from a car. His conduct is not a lesser crime.

(*Id.* at 16, ¶ 39 (alteration in original)). Based on the prosecutor's closing argument and the district court's reasoning, the Court finds the district court did not err in rejecting Counts's second argument.

In Counts's third contention, he argues "the prosecutor invaded the province of the jury as the finder of fact by arguing that the testimonies of the State's witnesses generally corroborated each other." (*Id.* at 17, ¶ 42). However, according to the Wyoming Supreme Court,

the purpose of closing arguments is to afford counsel the opportunity to explain the significance of the evidence and how it should be viewed by the jury. During closing arguments, counsel may assist the jury by reflecting upon the evidence and drawing reasonable inferences that logically flow from the evidence. When the jury is presented with contradictory testimony, counsel is allowed to communicate the reasonable inference that one of the witnesses is lying.

Dike v. State, 990 P.2d 1012, 1026 (Wyo. 1999) (citations omitted). The district court concluded "Counts cannot show that the prosecutor in any way violated the law by misleading the jury regarding such corroboration and contradiction, much less that he was unfairly prejudiced" (Doc. 17-18 [Order] at 19, ¶ 46). The Court agrees with the district court and finds the decision reasonable in light of the evidence presented.

In his fourth contention, Counts alleges the prosecutor made statements that tended to appeal to the jury's emotions. (*See* Doc. 17-16 [Am. Post-Conviction Pet.] at 10-25). Specifically, he asserts the prosecutor improperly asked the jury to use their "common sense," used the phrase "domestic violence," called Counts "the man who thinks he's smarter than us," and stated Counts was "guilty." (*Id.*). The district court found the prosecutor's statements proper and not unfairly prejudicial. This Court agrees and concludes Counts's fourth contention is insufficient to find prosecutorial misconduct.

Counts's fifth argument asserts "the prosecutor's alleged misconduct during closing arguments, combined with other alleged errors that occurred during the trial

constitute cumulative error requiring reversal of his conviction.” (Doc. 17-18 [Order] at 24, ¶ 59). The Court agrees with the district court that the prosecutor did not engage in misconduct and, therefore, rejects Counts’s claim of cumulative error and finds the district court did not err. Thus, Ground Eleven (11) is dismissed with prejudice.

Ground Twelve (12)—Ineffective Assistance of Trial Counsel

In Ground Twelve (12), Counts raises an ineffective assistance of trial counsel claim. (Doc. 1 [Pet.] at 28). This issue was not raised in his appeal from the judgment of conviction, but was raised in his post-conviction petition. (*See id.*). Counts alleges “[t]here are several things that [he] requested of [his] attorney that were not done” (*Id.* at 29). Specifically, he asserts the following arguments against his trial counsel.

1. “My trial attorney never investigated a mental health issue, I never signed any releases for her, I was never spoken to by any psychologist or psychiatrist prior to trial.” (*Id.*).
2. “She failed to object to the [prosecutor’s] misstatements and inflaming arguments or request a mistrial for such, failing to object to highly objectionable situations.” (*Id.*).
3. “She failed to file motions to suppress evidence in which I requested and failed to object to their use at trial, violating my [Fourth] Amendment rights where I did not and still have not received a full and fair litigation on these issues.” (*Id.*).
4. “She failed to request a jury instruction for BP who was working as a CI for DCI.” (*Id.*).

5. “She failed to raise a [Sixth] Amendment claim of the confrontation clause during the professed cross-examination outside the jury[’s] presence.” (*Id.*).

In response, Respondents ask the Court to grant summary judgment because Counts failed to “carry his substantive evidentiary burden of demonstrating either that the Wyoming courts unreasonably applied clearly established federal law in his case or that clear and convincing evidence proves that the Wyoming courts unreasonably determined the facts of his case.” (Doc. 39 [Br. in Supp. Mot. Summ. J.] at 24).

To prevail on an ineffective assistance of counsel claim, Counts must show two (2) elements. *See Strickland*, 466 U.S. at 687.

First, [Counts] must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed [Counts] by the Sixth Amendment. Second, [Counts] must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. If Counts cannot “make both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.” *Id.*

When the Court examines counsel’s performance, the proper measure is “reasonableness under prevailing professional norms.” *Id.* at 688. This analysis requires Counts to “show that counsel’s representations fell below an objective standard of reasonableness.” *Id.* Thus, the Court must look to see if counsel’s performance was reasonable under all of the circumstances. *See id.* However, because of the “distorting effects of hindsight,” a fair assessment requires the Court “to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from

counsel's perspective at the time.” *Id.* at 689. Moreover, “[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance” *Id.* Meaning, Counts “must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* (citation omitted). Additionally, because Ground Twelve (12) was decided on the merits by the district court, Counts must show the district court’s disposition was “contrary to, or involved an unreasonable application of, clearly established Federal Law . . . or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1)–(2).

First, Counts alleges his trial counsel failed to inquire into his mental health issues. (See Doc. 17-16 [Am. Post-Conviction Pet.] at 26). He asserts that “[d]espite the fact that the case was clearly a mental health case and [he] may well have been severely impaired, neither [his trial or appellate] lawyer had an independent psychological evaluation, or a psychiatrist review the records or examine [him].” (*Id.* at 26–27). The district court rejected this argument because Counts failed to provide records or offer other proof showing his trial counsel’s performance was defective. (Doc. 17-18 [Order] at 27, ¶ 68). Rather, the district court found Counts’s claim rested on mere speculation. (*See id.*).

Although Counts alleges his trial counsel was ineffective for failing to investigate his mental health issues, he fails to show what a mental health examination would have revealed. The Tenth Circuit stated, “[a]bsent some demonstration about what an appropriately thorough examination of his mental state would have revealed,” Counts’s

argument that his counsel “ought to have been put on notice by his checkered psychiatric history, is beside the point.” *Leslie v. Abbott*, 117 F. App’x 72, 77 (10th Cir. 2004) (the defendant argued “his appellate counsel was ineffective for obtaining his consent to withdraw his direct appeal without investigating whether [he] was sufficiently mentally competent . . .”). Here, Counts argues “[i]t should have been clear that [he] may well have had substantive medical and psychological issues . . . simply from the transcript of the proceedings in District Court.” (Doc. 17-16 [Am. Post-Conviction Pet.] at 26). However, Counts does not provide any facts suggesting he suffered from mental health issues or that his trial counsel’s failure to inquire into his mental health resulted in prejudice. Because the Court finds Counts’s claim unsupported and the district court did not err, Counts’s first allegation is rejected.

Next, Counts asserts his trial counsel was ineffective for failing to object to the prosecutor’s closing argument. (Doc. 17-16 [Am. Post-Conviction Pet.] at 27). In Counts’s second claim, he makes the same arguments previously discussed in Ground Eleven (11). Therefore, because the Court has already deemed this issue meritless and dismissed Ground Eleven (11) with prejudice, the Court rejects Counts’s argument.

Counts’s third allegation is “his trial counsel failed to object to the admission of, or otherwise move to suppress, evidence that Counts believes was obtained illegally.” (Doc. 17-18 [Order] at 28, ¶ 70). Counts argues his trial counsel should have moved to suppress the fruits of Counts’s initial search and the various letters seized by the Natrona County Detention Center. (Doc. 17-16 [Am. Post-Conviction Pet.] at 28–29). He also

argues his trial counsel's performance was deficient for failing to object to the admission of the letters at trial. (*See id.* at 29).

Regarding Counts's initial search, the district court concluded Counts did not prove that he was subjected to an unreasonable search or seizure, and found Counts's trial counsel properly and thoroughly cross-examined the witnesses. (Doc. 17-18 [Order] at 28, ¶ 71). The district court reasoned that "[r]egardless of whether they had probable cause to arrest Counts when they removed the knife from his pocket, they did not need probable cause in order to conduct an investigative detention, particularly when they had reasonable suspicion that he was armed and possibly dangerous." (*Id.* at 29, ¶ 72).

It is well-settled that "[a]n investigatory or *Terry* stop represents a seizure which implicates the Fourth Amendment, requiring the presence of specific, articulable facts and rational inferences giving rise to a reasonable suspicion that a person has committed or may be committing a crime." *Putnam v. State*, 995 P.2d 632, 637 (Wyo. 2000) (citations omitted). When a "pat-down" is conducted during an investigatory detention, the "officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 27 (1968)). Based on the circumstances of this case, the Court finds the district court's decision was reasonable.

With regard to the letters, Counts argues his trial counsel's performance was deficient because his attorney failed to file motions to suppress and object to their use at trial. (Doc. 17-16 [Am. Post-Conviction Pet.] at 29). The district court concluded that

“[w]hile Counts laments that his attorney failed to object to the introduction of these letters on Fourth Amendment grounds, he offers nothing to prove that the letters were, in fact, illegally obtained or that making his proposed objections or motions would have had any effect upon the proceedings.” (Doc. 17-18 [Order] at 30, ¶ 76). The district court further stated that although Counts’s “trial counsel may not have offered the objections and motions concerning these letters that Counts in hindsight may want, counsel did offer specific, legally supported objections.” (*Id.* ¶ 77). The Court finds the district court’s decision was reasonable in light of the evidence presented and, therefore, rejects Counts’s argument.

Counts’s fourth allegation is that his trial counsel was ineffective “for not requesting a jury instruction on the fact that [the] [state’s] key witness was working for DCI as a confidential informant (CI) and the jury needed to know this as the witness may have had a reason to lie.” (Doc. 17-16 [Am. Post-Conviction Pet.] at 30). The district court rejected Counts’s argument and stated that “[e]ven if trial counsel had requested an instruction on the issue, this Court would have rejected it in light of its previous ruling.” (Doc. 17-18 [Order] at 31, ¶ 79). The district court was referring to the ruling that “unless Counts could show that BP had pending charges or some other specific bias to testify in favor of the prosecution . . . the Court would not allow the defense to inquire into her work with [DCI] because the Court did not believe that work was relevant.” (*Id.*). As the district court explained, “[c]ounsel’s failure to pursue a jury instruction that, most likely, would have been refused by the district court does not constitute ineffective assistance.” *Jones v. State*, 228 P.3d 867, 874 (Wyo. 2010); (Doc. 17-18 [Order] at 31, ¶ 79). Not

only does the Court find the district court's decision reasonable in light of the facts presented, but substantively, this allegation is the same as Ground One (1) and, therefore, Counts's argument is rejected.

Counts's final allegation is his counsel's performance was deficient for failing to raise a Sixth Amendment violation claim regarding defense counsel's cross-examination of BP outside the presence of the jury. (Doc. 1 [Pet.] at 29). The district court concluded that "[n]either requesting a jury instruction nor mentioning the Sixth Amendment would have bolstered what his trial counsel did to attack BP's credibility and to preserve the issue of this Court's limitation for an appeal." (Doc. 17-18 [Order] at 32, ¶ 81). The Court agrees with the district court and—as explained in Ground One (1)—the Wyoming Supreme Court's finding that any error was harmless. Thus, Counts's final allegation is also rejected.

Because Counts failed to allege sufficient facts demonstrating his trial counsel's performance was deficient or how any of the alleged deficiencies caused prejudice, Counts's ineffective assistance of trial counsel claim is rejected. As a result, Ground Twelve (12) is dismissed with prejudice.

Ground Thirteen (13)—Sentencing Issues

In Ground Thirteen (13), Counts raises issues related to his sentence under Wyoming's habitual criminal statute. (Doc. 1 [Pet.] at 30). As in Ground Seven (7), Counts asserts he "filed this issue because [his] attorney at the time of [his] illegal sentence [m]otion failed to use the Teague Analysis as [he] requested." (*Id.* at 31). Thus,

this issue is substantively the same as Ground Seven (7), which the Court has previously rejected. As such, Ground Thirteen (13) is dismissed with prejudice.

Ground Fourteen (14)—Errors Found by the Wyoming Supreme Court

In Ground Fourteen (14), Counts alleges the errors found by the Wyoming Supreme Court amount to reversible error using the plain error standard of the cumulative effect. (Doc. 1 [Pet.] at 32). Counts fails to support this claim with any legal authority, but merely states:

I found cases that say the [cumulative] effect needs to be exhausted in the state courts before the [f]ederal [c]ourt will even look at it. Well[,] I have exhausted it, something that should have been done by my appellate attorney and if he would have filed the issues I requested I wouldn't have had to do it [myself].

(*Id.* at 33). Counts's allegation is insufficient and fails to demonstrate the district court's disposition was "contrary to, or involved an unreasonable application of, clearly established Federal Law . . . or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). Moreover, although the Wyoming Supreme Court found the district court erred, the Wyoming Supreme Court found any errors were harmless. Therefore, Ground Fourteen (14) of the petition is dismissed with prejudice.

Ground Fifteen (15)—Lack of Judicial Discretion

In Ground Fifteen (15), Counts asserts a lack of judicial discretion claim. (Doc. 1 [Pet.] at 34). Although Counts raised this issue in his direct appeal, in his petition he claims he has included different sub-issues. (*See id.*). The Court disagrees. In his petition, Counts wrote, "[t]his is not only an issue of my right to confront for my lawyer being

denied to cross-examine any of BP's testimony about being a CI for DCI[,] but she was questioned outside the presence of the jury." (*Id.* at 35). Substantively, the Court finds Ground Fifteen (15) is the same claim as Ground One (1). As a result, Ground Fifteen (15) is dismissed with prejudice.

Ground Sixteen (16)—Post-Conviction Relief Procedural Claims

In Ground Sixteen (16), Counts claims the district court erred when it allowed untimely filed motions, granted summary judgment for Respondents, and made a ruling before all motions were filed. (Doc. 1 [Pet.] at 36). Essentially, Counts argues he is entitled to habeas relief because the district court failed to follow filing deadlines. (*Id.* at 37–38). However, this argument is not proper for federal habeas relief because Counts's claim is purely procedural and fails to "demonstrate cause and prejudice or a fundamental miscarriage of justice." *Medlock*, 200 F.3d at 1323 (citations omitted). For these reasons, Ground Sixteen (16) is dismissed with prejudice.

B. Counts's Motion to Dismiss Respondents' Response in Opposition to Dispositive Motion and Reply

On September 19, 2016, Counts filed a motion to dismiss and reply. (Doc. 48). It appears Counts's motion is merely a response to Respondents' Reply to Petitioner's Response and Objection to Respondents' Motion for Summary Judgment. (Doc. 47). Consequently, because Counts's motion is not a dispositive motion, but a response, the motion to dismiss and reply is DENIED.

C. Certificate of Appealability

A certificate of appealability ("COA") may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court finds Counts failed to state a valid claim and has failed to make a substantial showing of a denial of a constitutional right. Therefore, a COA should not issue in this case.

CONCLUSION

For all of the above stated reasons, the Court finds no genuine issue of material fact exists, Respondents are entitled to summary judgment as a matter of law, and Counts's Petition for Writ of Habeas Corpus is DENIED. Additionally, the Court finds a COA shall not issue.


IT IS ORDERED Respondents' Motion for Summary Judgment (Doc. 39) is GRANTED.

IT IS FURTHER ORDERED Counts's Motion to Dismiss Respondents' Response in Opposition to Dispositive Motion and Reply (Doc. 48) is DENIED.

IT IS FURTHER ORDERED Counts's Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody (Doc. 1) is DENIED.

IT IS FINALLY ORDERED a certificate of appealability shall not issue.

Dated this 1 day of November, 2016.


NANCY D. FREUDENTHAL
CHIEF UNITED STATES DISTRICT JUDGE

**Additional material
from this filing is
available in the
Clerk's Office.**