FILED
United States Court of Appeal
Tenth Circuit

September 18, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT R. YERTON, JR.,

Petitioner - Appellant,

v.

JASON BRYANT, Warden,

Respondent - Appellee.

No. 18-5034
(D.C. No. 4:15-CV-00130-GKF-PJC)
(N.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **EID**, **KELLY**, and **O'BRIEN**, Circuit Judges.

Robert R. Yerton, Jr., a pro se Oklahoma inmate, wants to appeal from the denial of his 28 U.S.C. § 2254 habeas application. *See* 28 U.S.C. § 2253(c)(1)(A). We deny the certificate of appealability (COA) he seeks and dismiss this appeal.

A jury convicted Yerton of two counts of child sexual abuse (Counts II and III) and one count of lewd molestation (Count IV). He was sentenced consecutively to twelve years on Count II, twelve years with the last four suspended on Count III, and three years suspended on Count IV. The Oklahoma Court of Criminal Appeals (OCCA) affirmed his convictions on direct appeal and denied his petition for

* This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Appendix A

rehearing. The state district court denied his application for post-conviction relief, which the OCCA affirmed.

Yerton then filed this pro se § 2254 application. He asserted sixteen grounds for relief, which the district judge consolidated into fourteen grounds. The district judge denied relief on all grounds and denied him a COA, but allowed him to proceed on appeal without prepayment of filing and docketing fees.

A COA may issue only upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this burden, Yerton must show "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, he must not only show that jurists would debate "whether the petition states a valid claim of the denial of a constitutional right," but he must also show "that jurists of reason would find it debatable whether the district [judge] was correct in [his] procedural ruling." *Id.* If a claim was adjudicated on the merits in state court, that decision is entitled to deference: unless it "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).

We liberally construe Yerton's pro se materials. *See Hall v. Scott*, 292 F.3d 1264, 1266 (10th Cir. 2002). He seeks a COA on the following issues: (1) whether he received ineffective assistance of counsel; (2) whether he exhausted his due process claims in the Oklahoma courts; (3) whether inadmissible testimony was presented at trial, violating his right to due process; (4) whether his right to confront witnesses was violated; (5) whether the trial court permitted improper use of testimony from an excessive number of propensity witnesses; (6) whether he was convicted in the absence of sufficient evidence of every element of his crimes; (7) whether the trial court denied him due process by denying him permission to call an expert witness; and (8) whether the district judge relied on facts that were unsupported by the record. *See* Combined Opening Br. & App. for COA at 17-18.

We have reviewed the arguments in Yerton's COA application, his opening brief, the record on appeal, and the relevant legal authority. Reasonable jurists could not debate the propriety of the district judge's decision. We therefore deny his request for a COA and dismiss this appeal for substantially the reasons articulated in the district judge's cogent decision of March 23, 2018.

The relevant statute, 28 U.S.C. § 1915(a) permits an appeal to be taken without prepayment of fees, but does not waive the fees. Yerton is obligated to pay all filing and

docketing fees ($505). Payment is to be made to the Clerk of Court for the Northern District of Oklahoma.

Entered for the Court

Terrence L. O'Brien
Circuit Judge

Signed for on 3/30/18

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

ROBERT R. YERTON, JR.,

Petitioner,

v.

JASON BRYANT, Warden,

Respondent.

Case No. 15-CV-130-GKF-PJC

ORDER

Before the Court is the *Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody* [Doc. No. 5] of the Petitioner, Robert R. Yerton, Jr. For the reasons set forth below, the petition is denied.

I. Procedural Background

Yerton seeks *habeas* relief from his convictions in the District Court of Tulsa County, Case No. CF-2010-1707, for Child Sexual Abuse, 21 O.S. § 843.5 (Counts II and III), of B.H., and for Lewd Molestation, 21 O.S. § 1123 (Count IV), of A.P. Yerton was sentenced consecutively to twelve years on Count II, twelve years with the last four suspended on Count III, and three years suspended on Count IV. *See* [Doc. No. 15-15, pp. 7–8, 10, 18–25].

Yerton directly appealed his convictions to the Oklahoma Court of Criminal Appeals (OCCA), citing eleven propositions of error. *See* [Doc. No. 15-1]. On February 14, 2014, the OCCA affirmed Yerton's convictions. *See* [Doc. No. 15-4]. Yerton subsequently filed a petition for rehearing, wherein he raised an additional proposition of error not raised in his initial filing. *See* [Doc. No. 15-5]. On March 6, 2014, the OCCA denied Yerton's petition for rehearing. *See* [Doc. No. 15-6].

Appendix B

Acting *pro se*, Yerton subsequently filed an application for state post-conviction relief in the Tulsa County District Court, citing the additional proposition of error raised in his petition for rehearing to the OCCA as well as two new propositions of error based on ineffective assistance of counsel. *See* [Doc. No. 15-7]. On November 19, 2014, the district court denied post-conviction relief. *See* [Doc. No. 15-9]. Yerton subsequently appealed to the OCCA, which affirmed the district court's denial of his application for post-conviction relief on February 27, 2015. *See* [Doc. No. 15-13].

Again acting *pro se*, Yerton filed the instant federal *habeas* petition on March 20, 2015. Therein, Yerton reiterates the eleven propositions of error raised in his direct appeal, the one proposition of error first raised in his petition for rehearing, and the two propositions of error first raised in his application for state post-conviction relief. The state filed a response opposing Yerton's petition, and Yerton subsequently filed a reply. *See* [Doc. Nos. 15; 28].

II. Legal Standards

The Antiterrorism and Effective Death Penalty Act ("AEDPA") governs federal *habeas* review of constitutional claims brought by state prisoners. *See* 28 U.S.C. § 2254. Under AEDPA, the court may only grant *habeas* relief where the state court's adjudication of a petitioner's claims

> (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.

28 U.S.C. § 2254(d). This standard is "highly deferential," and requires that the state court be given the "benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002)).

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"[F]ederal habeas corpus relief does not lie for errors of state law." *Wilson v. Corcoran*, 562 U.S. 1, 16 (2010) (per curiam) (quoting *Estelle v. McGuire*, 502 U.S. 62, 67 (1991)); *see* 28 U.S.C. § 2254(a). Consequently, federal courts "may not provide habeas corpus relief on the basis of state court evidentiary rulings 'unless they rendered the trial so fundamentally unfair that a denial of constitutional rights results.'" *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002) (quoting *Mayes v. Gibson*, 210 F.3d 1284, 1293 (10th Cir. 2000)). In making this determination, federal courts must exercise "considerable self-restraint," *Jackson v. Shanks*, 143 F.3d 1313, 1322 (10th Cir. 1998), and consider "the entire proceeding[], including the strength of the evidence against the defendant," *Hanson v. Sherrod*, 797 F.3d 810, 843 (10th Cir. 2015).

"Before a federal court may grant habeas relief to a state prisoner, the prisoner must exhaust his remedies in state court." *Thacker v. Workman*, 678 F.3d 820, 838–39 (10th Cir. 2012) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 841 (1999)). To satisfy this exhaustion requirement, "state prisoners [must] give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Id.* at 839 (quoting *O'Sullivan*, 526 U.S. at 845). In the event a state prisoner would be procedurally barred from returning to state court to exhaust a claim, that claim will be anticipatorily barred[1] in federal court unless the prisoner can show either "cause and prejudice" or a "fundamental miscarriage of justice." *Id.* at 841–42 (quoting *Anderson*, 476 F.3d at 1140).

When a litigant is proceeding *pro se*, his "pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers." *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972)). As a result,

[1] "'Anticipatory procedural bar' occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally barred under state law if petitioners returned to state court to exhaust it." *Anderson v. Sirmons*, 476 F.3d 1131, 1140 n.7 (10th Cir. 2007).

"if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements." *Id.* Nonetheless, courts must not "assume the role of advocate for the pro se litigant." *Id.*

III. Analysis

Yerton asserts he is entitled to federal *habeas* relief on sixteen grounds. As set forth below, the Court has consolidated the sixteen grounds into fourteen by combining Yerton's prosecutorial misconduct grounds (Grounds Two, Eight, and Nine). He first reiterates eleven grounds raised on direct appeal to the OCCA:

1. Prosecutorial misconduct deprived Yerton of a fair trial [Yerton's Grounds Two, Eight, and Nine; State's Two];

2. The trial court erred when it allowed the prosecution to introduce evidence that Yerton had homosexual pornography on his computer, where there was no connection between the pornography and the acts charged [Yerton's Ground Three; State's Three];

3. The prejudicial effect of the large amount of impeachment evidence admitted by the trial court during Yerton's cross-examination greatly outweighed any probative value the evidence had, and the admission of this evidence was error which requires that the conviction be reversed [Yerton's Ground Four; State's Four];

4. The province of the jury was invaded by improper testimony regarding the outcome of related civil cases, which denied Yerton a fair trial [Yerton's Ground Five; State's Five];

5. The trial court erred in allowing the prosecutor to expose the jury to a letter a campus police officer had written which claimed Yerton was a predator [Yerton's Ground Six; State's Seven];

6. The trial court's decision to allow eight separate propensity witnesses to testify against Yerton, in addition to the testimony of the four alleged victims, resulted in prejudice which denied Yerton a fair trial [Yerton's Ground Seven; State's Seven];

7. The cumulative effect of the prejudice from the numerous errors in this case deprived Yerton of a fair trial [Yerton's Ground Ten; State's Eight];

8. The conviction for sexual abuse alleged in Count III must be reversed because lewdly looking at another is not one of the acts prohibited by the sexual abuse statute [Yerton's Ground Eleven; State's Nine];

9. Because the state presented no competent evidence at preliminary hearing to meet its burden of showing probable cause on Count IV, the trial court's denial of Yerton's motion to quash the information was an abuse of discretion, and Yerton's conviction on Count IV must be reversed [Yerton's Ground Twelve; State's Ten];

10. The trial court erred when it admitted the video statement of A.P. [Yerton's Ground Thirteen; State's Eleven]; and

11. The trial court erred in restricting the defense from fully cross-examining A.P. [Yerton's Ground Fourteen; State's Twelve].

Next, Yerton reiterates one ground first raised in his petition for rehearing to the OCCA:

12. Because the OCCA held that evidence that Yerton had homosexual pornography on his computer was admissible to prove motive, intent, mistake, or accident, Yerton was deprived of his right to present his defense when the trial court refused to allow him to call an expert to show that there was no link between homosexual pornography and the offenses charged [Yerton's Ground One; State's One].

Last, he reiterates two grounds raised for the first time in his application for state post-conviction relief:

13. Ineffective assistance of appellate counsel for failing to raise a claim that newly discovered evidence supports that Yerton may have been convicted on perjury and manufactured allegations [Yerton's Ground Fifteen; State's Thirteen]; and

14. Ineffective assistance of appellate counsel for failing to raise a claim that trial counsel did not sufficiently develop a material fact [Yerton's Ground Sixteen; State's Fourteen].

✓ Respondent concedes Yerton timely filed his *habeas* petition, *see* 28 U.S.C. § 2244(d), and fully exhausted his available state remedies as to eleven of the fourteen grounds, *see* 28 U.S.C. § 2254(b)(1)(A). [Doc. No. 15, pp. 2–3, ¶¶ 5–6]. However, Respondent argues Yerton

failed to fully exhaust Grounds Two, Three, and Four—specifically, the portions of each ground based on an alleged denial of federal due process.

Having reviewed the record, the Court agrees the federal due process portions of Grounds Two, Three, and Four are unexhausted, based on the OCCA's determination that Yerton did not sufficiently raise them on direct appeal under OKLA. CT. CRIM. APP. R. 3.5(A)(5).[2] Furthermore, the federal due process portions of Grounds Two, Three, and Four are subject to anticipatory procedural bar because—if Yerton were to return to state court to exhaust them—he would be barred by 22 O.S. § 1086's requirement that "[a]ll grounds for relief available to an applicant under this act must be raised in his original, supplemental, or amended application." *See Thacker*, 678 F.3d at 841 (anticipatorily barring plaintiff's claim based on 22 O.S. § 1086); *Ellis v. Hargett*, 302 F.3d 1182, 1186 (10th Cir. 2002) (holding 22 O.S. § 1086 "is an independent and adequate state ground for denying habeas relief"). Last, Yerton has not overcome this procedural bar by showing cause and prejudice or a fundamental miscarriage of justice.[3] Therefore, the

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[2] OKLA. CT. CRIM. APP. R. 3.5(A)(5) requires that

> [e]ach proposition of error shall be set out separately in the brief. Merely mentioning a possible issue in an argument or citation to authority does not constitute the raising of a proposition of error on appeal. Failure to list an issue pursuant to these requirements constitutes waiver of alleged error.

In his direct appeal to the OCCA on Grounds Two, Three, and Four, Yerton raised his federal due process claims summarily in single sentences at the end of multi-page arguments regarding state law. *See* [Doc. No. 15-1, pp. 24, 27, 30]. The OCCA specifically held this was insufficient as to Grounds Two and Four. [Doc. No. 15-4, pp. 4, 6]; *see Cole v. Trammell*, 755 F.3d 1142, 1176 (10th Cir. 2014) (holding an issue was insufficiently raised under Rule 3.5(A)(5) where the issue was mentioned in one sentence in a footnote). As to Ground Three, "the OCCA did not acknowledge, let alone address, the issue in disposing of [Yerton's] direct appeal, and it thus appears, consistent with [Rule] 3.5(A)(5), to have treated the issue as not properly raised." *Cole*, 755 F.3d at 1176; *see* [Doc. No. 15-4, p. 5].

[3] Yerton does not argue cause and prejudice, but does claim he is actually innocent. In support, Yerton notes he has consistently maintained his innocence, and reiterates

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Court denies *habeas* relief as to the federal due process portions of Grounds Two, Three, and Four because they are unexhausted and subject to anticipatory procedural bar.

As to Yerton's exhausted claims, the Court denies *habeas* relief on all fourteen grounds.

1. *Ground One—Prosecutorial Misconduct [Yerton's Grounds Two, Eight, and Nine; State's Two].*

Yerton seeks *habeas* relief based on three instances of alleged prosecutorial misconduct. First, Yerton claims the prosecutor asked questions on cross-examination without a good-faith basis which implied Yerton had been terminated from Garnett Church of Christ ("GCC") for sexual misconduct and from Tulsa Public Schools ("TPS") for having pornography on a school computer. *See* [Doc. No. 19-9, pp. 75–87, 166–77]. Second, Yerton claims the prosecutor improperly defined reasonable doubt in closing argument by telling the jury: "It is not your job to search for some doubt, rather it's your job to look at the evidence in this case, combined with your common sense, and the instructions of law, and determine what is reasonable doubt." [Doc. No. 19-10, p. 34]. Third, Yerton claims the prosecutor improperly appealed to the jury's sympathy during closing argument by stating: "I need to tell you that I've been the victim of sexual abuse." [Doc. No. 19-10, p. 127].

On direct appeal to the OCCA, Yerton argued these instances deprived him of the right to a fair trial. *See* [Doc. No. 15-1, pp. 37–41]. The OCCA disagreed, stating the following:

> [H]aving thoroughly reviewed some of [Yerton's] claims of prosecutorial misconduct for plain error and other comments met with objections, none of the comments, either singly or individually were such as to deprive [Yerton] of a fair trial. Mitchell v. State, 2011 OK CR 26, ¶ 138, 270 P.3d 160, 190.

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testimony and evidence presented at trial. *See* [Doc. No. 28, pp. 9–10, 19, 21]. Based on the court's review, Yerton has not made a "credible showing of actual innocence," *Frost v. Pryor*, 749 F.3d 1212, 1232 (10th Cir. 2014) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013)), or presented the court with a sufficient basis to conclude "it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt," *id.* (quoting *House v. Bell*, 547 U.S. 518, 536–37 (2006)).

[Doc. No. 15-4, p. 7].

The Supreme Court set the governing standard for review of claims of prosecutorial misconduct in *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Under *Donnelly*, *habeas* relief is appropriate where prosecutorial misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 643; *see Littlejohn v. Trammell*, 704 F.3d 817, 837 (10th Cir. 2013) (discussing *Donnelly*). This inquiry "requires an examination of the entire proceeding[], including the strength of the evidence against the defendant." *Hanson*, 797 F.3d at 843.

Here, the record does not indicate the prosecutor's conduct was improper; and even if it was, it did not render the trial fundamentally unfair. First, given Yerton's prior explanations, it was proper impeachment for the prosecutor to cross-examine Yerton about why he was terminated from GCC and TPS. In addition, the record shows the prosecutor had a good-faith basis for this line of questioning. With respect to the church, the prosecutor had information Yerton was asked to stay away from the children's ministry and had been placed on probation for making inappropriate sexual statements. [Doc. Nos. 16-4, pp. 16, 108; 17-8, p. 16]. As to TPS, even defense counsel acknowledged Yerton "was terminated because they found homosexual pornography on the laptop." [Doc. No. 19-9, p. 76]. Second, although Yerton is correct that it would have been improper for the prosecutor to attempt to define reasonable doubt in closing argument, that is not what the prosecutor did here. Rather, the context shows the prosecutor simply contrasted the different levels of doubt. [Doc. No. 19-10, p. 34]. Third, the prosecutor's statement about sexual abuse was not improper either; when read in context, it is obvious the prosecutor was not commenting on her own history of sexual abuse, but was rather paraphrasing the conversation Yerton's victims would one day need to have with their significant others.

[Doc. No. 19-10, p. 127]. Furthermore, even if it were to be concluded that the prosecutor acted improperly in one or more of these instances, the court concludes based on the entire record and the strength of the evidence that Yerton's trial was not fundamentally unfair.

Therefore, because Yerton has not shown the OCCA's adjudication of this claim was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court, the Court denies *habeas* relief on Ground One. 28 U.S.C. § 2254(d).

2. *Ground Two—Admission of Testimony about Homosexual Pornography on Yerton's Computer [Yerton's Ground Three; State's Three].*[4]

Yerton seeks *habeas* relief based on the admission of testimony he had homosexual pornography on his computer. The trial judge allowed this testimony to come in through: (1) direct examination of B.H. [Doc. No. 19-1, pp. 85–89]; (2) direct examination of Tulsa Police Department Detective Scott Gibson [Doc. No. 19-1, pp. 227–244]; and (3) cross-examination of Yerton [Doc. No. 19-9, pp. 78–97].[5]

On direct appeal to the OCCA, Yerton argued admission of this testimony violated state law and his federal due process rights. [Doc. No. 15-1, pp. 19–25]. The OCCA held otherwise, concluding the trial court did not abuse its discretion under state law by admitting the evidence, and concluding Yerton did not sufficiently raise his federal due process claim under OKLA. CT. CRIM. APP. R. 3.5(A)(5). [Doc. No. 15-5, pp. 3–4].

Here, Yerton again argues admission of this testimony violated state law—specifically, *Burks v. State*, 594 P.2d 771, 772 (Okla. 1979) (holding "proof that one is guilty of other

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4 As discussed previously, the Court will not address the federal due process portion of Ground Two because it is unexhausted and subject to anticipatory procedural bar.

5 The judge did not admit the pornographic images themselves, and he instructed the jury not to consider evidence of other crimes or bad acts as proof of guilt. [Doc. No. 15-4, p. 4].

offenses not connected with that for which one is on trial must be excluded"), *overruled on other grounds in Jones v. State*, 772 P.2d 922 (Okla. 1989). However, this argument fails because "federal habeas corpus relief does not lie for errors of state law." *Wilson*, 562 U.S. at 16 (quoting *Estelle*, 502 U.S. at 67); *see* 28 U.S.C. § 2254(a). The Court therefore denies *habeas* relief on Ground Two.

3. *Ground Three—Improper Cross-examination About the Reasons for Yerton's Terminations [Yerton's Ground Four; State's Four]*[6]

Yerton seeks *habeas* relief based on the judge's allowance of cross-examination into the reasons for his termination from GCC and TPS. During trial, Yerton testified he was fired from GCC for a disagreement about baptism, [Doc. No. 19-9, p. 169], and voluntarily resigned from TPS, [Doc. No. 19-9, p. 75]. The prosecutor impeached Yerton on cross-examination, asking whether he had in fact been terminated from GCC for ~~sexual misconduct~~ biggest and from TPS for having pornography on a school computer. *See* [Doc. No. 19-9, pp. 75–87, 166–77].

Yerton argued on direct appeal to the OCCA that his cross-examination violated state rules of evidence and his federal due process rights. [Doc. No. 15-1, pp. 25–27]. The OCCA held the trial court did not abuse its discretion under state law, and did not address Yerton's federal due process claim. [Doc. No. 15-4, pp. 4–5].

Here, Yerton continues to argue his cross-examination violated Oklahoma's rules of evidence. [Doc. No. 5, pp. 19–21]. However, that argument is foreclosed because *habeas* relief "does not lie for errors of state law." *Wilson*, 562 U.S. at 16 (quoting *Estelle*, 502 U.S. at 67); *see* 28 U.S.C. § 2254(a). The Court therefore denies *habeas* relief on Ground Three.

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6 As discussed previously, the Court will not address the federal due process portion of Ground Three because it is unexhausted and subject to anticipatory procedural bar.

4. Ground Four—Admission of Testimony about the Outcome in Related Civil Lawsuit [Yerton's Ground Five; State's Five].[7]

Yerton seeks *habeas* relief based on the admission of testimony about the outcome of a related civil lawsuit between TPS and parents of two of the victims. The parents testified against Yerton in the criminal trial, and defense counsel insisted on using the civil lawsuit to impeach them. [Doc. Nos. 18-8, pp. 130–36; 19-3, pp. 148–56; 19-4, pp. 59–61]. In response, the judge permitted the prosecutor to elicit testimony that the lawsuit had settled. [Doc. Nos. 18-8, pp. 130–36; 19-3, pp. 115–18; 19-4, pp. 39–41]. The judge also permitted the prosecutor to cross-examine Yerton on the fact that he had filed a counterclaim against one of the victims, which the civil court had dismissed. [Doc. No. 19-9, pp. 67–68].

On direct appeal to the OCCA, Yerton argued the admission of this testimony violated state law and his federal due process rights. [Doc. No. 15-1, pp. 27–30]. The OCCA disagreed, holding the trial court did not abuse its discretion by admitting testimony about the outcome of the civil lawsuit and Yerton's counterclaim. As to Yerton's federal due process claim, the OCCA determined it had been insufficiently raised and was thus waived on appeal. [Doc. No. 15-4, p. 6].

In his *habeas* petition, Yerton once again argues that this testimony was inadmissible under Oklahoma law. As noted, *habeas* relief "does not lie for errors of state law." *Wilson*, 562 U.S. at 16 (quoting *Estelle*, 502 U.S. at 67); *see* 28 U.S.C. § 2254(a). *Habeas* relief is therefore denied on Ground Four.

[7] As discussed previously, the Court will not address the federal due process portion of Ground Four because it is unexhausted and subject to anticipatory procedural bar.

5. *Ground Five—Admission as Impeachment of the Contents of a TPS Police Officer's Letter [Yerton's Ground Six; State's Six].*

Yerton seeks *habeas* relief based on the admission of the contents of a TPS Police Officer's letter. Yerton testified about TPS's investigation and the circumstances surrounding his termination. In response, the trial judge permitted the prosecutor to impeach Yerton with some of the findings from that investigation. Specifically, the prosecutor cross-examined Yerton on the contents of a letter written by a TPS Police Officer which included findings that Yerton "needed to be job targeted on all of the issues related to touching, hugging, lap sitting, et cetera," and that Yerton's "actions could certainly be a pattern for possible exploitation or assault acts by a person who is exhibiting some disturbing tendencies, that it looked like predatory behavior." [Doc. No. 19-9, p. 161–66]. At Yerton's request, the trial judge admonished the jury that the officer's findings were not being introduced for their truth, but only as impeachment. [Doc. No. 19-9, p. 164].

On direct appeal, Yerton argued the admission of the contents of the letter as impeachment violated state law and the Confrontation Clause. The OCCA denied the claim, stating

> the trial court did not abuse its discretion in admitting testimony regarding the contents of a letter from a police officer with the Tulsa Public School System regarding [Yerton's] conduct. *See Goode*, 2010 OK CR 10, ¶ 44, 236 P.3d at 680. The inquiry was within the scope of proper cross-examination as [Yerton] "opened the door" to the issue by volunteering information on the Tulsa Public School's investigation. *Dodd*, 2004 OK CR 31, ¶ 73, 100 P.3d at 1039–1040. The officer's conclusions in the letter were not hearsay as they were not offered for the truth of the matter asserted. 12 O.S. 2011, § 2801(A)(3). The inquiry was permitted for impeachment purposes. At [Yerton's] request, the trial court admonished the jury that it was impeachment evidence, not offered for the truth of the matter, but only to impeach the witness's credibility. Under these circumstances, the probative value was not substantially outweighed by any undue prejudice.

[Doc. No. 15-4, p. 6–7].

In his *habeas* petition, Yerton reiterates that admission of this evidence violated state law and the Confrontation Clause. [Doc. No. 5, p. 24]. With respect to state law, Yerton claims the evidence was inadmissible because its probative value was substantially outweighed by the danger of unfair prejudice, *see* 12 O.S. § 2403, because it was improper opinion evidence, *see* 12 O.S. § 2701–03, and because it was hearsay, *see* 12 O.S. § 2803. However, federal *habeas* review does not lie for errors of state law "unless they rendered the trial so fundamentally unfair that a denial of constitutional rights results."[8] *Duckett v. Mullin*, 306 F.3d 982, 999 (10th Cir. 2002) (quoting *Mayes v. Gibson*, 210 F.3d 1284, 1293 (10th Cir. 2000)).

Having thoroughly reviewed the record, the Court concludes the use of the TPS Police Officer's findings to impeach Yerton did not render the trial fundamentally unfair. First, Yerton opened the door by testifying on cross-examination that he chose to resign from TPS [Doc. No. 19-9, p. 75]; that TPS's only issue with his employment was the fact that he had two prior arrests [Doc. No. 19-9, p. 76-77]; that he was an "exemplary teacher" [Doc. No. 19-9, p. 77]; and that the "primary reason" he was in court was because of his son's lies [Doc. No. 19-9, p. 103]. *See* [Doc. No. 19-9, 161–62]. Second, the evidence was not hearsay, and the trial judge admonished the jury that it was being introduced "not for the truth, but simply for impeachment purposes." [Doc. No. 19-9, p. 164]. Third, the relevance of this evidence to the credibility of Yerton's characterization of the investigation was not substantially outweighed by the danger of unfair prejudice. For those reasons, and considering the record as a whole and the strength of the

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[8] In Grounds Two, Three, and Four, the Court did not address whether the alleged errors of state law rendered Yerton's trial fundamentally unfair, because the federal due process portions of those grounds were unexhausted and subject to anticipatory procedural bar. Even if the Court had, it would not have concluded Yerton's trial was rendered fundamentally unfair.

evidence against Yerton, the court concludes the alleged errors of state law did not render the trial fundamentally unfair.

Turning to the Confrontation Clause, although Yerton fairly raised this issue on direct appeal, the OCCA rejected Yerton's claim without explicitly discussing the Confrontation Clause. *See* [Doc. No. 15-4, p. 6–7]. The OCCA did, however, determine that the contents of the TPS Police Officer's letter had not been introduced for their truth. This determination was implicitly dispositive, because the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Williams v. Illinois*, 567 U.S. 50, 104 (2012) (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)). Furthermore, the OCCA's failure to explicitly discuss the Confrontation Clause or this rule from *Crawford* does not undermine the presumption that the OCCA adjudicated Yerton's *Crawford* claim on the merits. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011) ("When 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."); *Mitchell v. Esparza*, 540 U.S. 12, 16 (2008) (noting that a "state court need not even be aware of [Supreme Court] precedents, 'so long as neither the reasoning nor the result of the state-court decision contradicts them'" (quoting *Early v. Packer*, 537 U.S. 3, 8 (2002)). Therefore, the Court concludes Yerton has not shown the OCCA's adjudication was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d). *Habeas* relief is denied on Ground Five.

6. *Ground Six—Admission of Testimony From Four Victims and Eight Propensity Witnesses [Yerton's Ground Seven; State's Seven].*

Yerton seeks *habeas* relief based on the trial judge's decision to allow testimony from the four victims as well as eight propensity witnesses. *See* [Doc. No. 5, p. 25]. At trial, these eight witnesses testified Yerton had acted inappropriately around male students. *See* [Doc. Nos. 19-1, pp. 247–48, 251–57, 263–69; 19-2, pp. 29–35, 42–49, 52–55, 84–87, 98–103, 114–20, 154–59]. As to each witness except one, the trial judge admonished the jury during the trial—pursuant to OUJI-CR 9-9—that the testimony should be received "solely on the issue of [Yerton's] alleged motive, intent, and absence of mistake." [Doc. No. 19-1, pp. 250–51, 264; 19-2, pp. 35–36, 84–85, 98, 111–12; 19-7, pp. 150–51]. The trial judge also instructed the jury using OUJI-CR 9-9 at the close of trial. *See* [Doc. No. 15-15, p. 15].

On direct appeal to the OCCA, Yerton argued the admission of testimony from the four victims and eight propensity witnesses violated state law and his federal due process rights. *See* [Doc. No. 15-1, pp. 33–37]. The OCCA decided otherwise:

> [T]he trial court did not abuse its discretion in admitting the sexual propensity evidence. *See Horn v. State*, 2009 OK CR 7 ¶ 41, 204 P.3d 777, 786. The evidence met the criteria set forth in *Horn* for admission of evidence under 12 O.S. 2011 § 2413. *Id.*, 2009 OK CR 7 ¶ 40, 204 P.3d at 786.

[Doc. No. 15-4, p. 7].

As discussed previously, federal courts "may not provide habeas corpus relief on the basis of state court evidentiary rulings 'unless they rendered the trial so fundamentally unfair that a denial of constitutional rights results.'" *Duckett*, 306 F.3d at 999 (quoting *Mayes*, 210 F.3d at 1293); *see also Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (noting due process is violated "[o]nly when evidence is so extremely unfair that its admission violates fundamental conceptions of justice"). Here, the trial judge's admission of testimony from the four victims and eight witnesses did not render Yerton's trial fundamentally unfair. First, having thoroughly

reviewed the record, the court concludes the testimony was relevant and not unfairly prejudicial. Second, as to the eight propensity witnesses, the trial judge instructed the jury multiple times that their testimony should not be considered as proof of Yerton's guilt.

The Court denies *habeas* relief on Ground Six, because Yerton has not shown the OCCA's adjudication was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d).

7. Ground Seven—Cumulative Error [Yerton's Ground Ten; State's Eight].

Yerton seeks *habeas* relief based on the cumulative effect of trial errors. *See* [Doc. No. 5, pp. 30–31]. However, cumulative error is only applicable where the Court has found two or more harmless errors. *Littlejohn v. Royal*, 875 F.3d 548, 567 (10th Cir. 2017). Here, the OCCA did not find harmless error, and—as set forth herein—this Court does not find harmless error. The cumulative error analysis is thus inapplicable, and *habeas* relief is denied on Ground Seven.

8. Ground Eight—Conviction on Count III (Child Sexual Abuse of B.H.) for Lewdly Looking [Yerton's Ground Eleven, State's Nine].

Yerton seeks *habeas* relief from his conviction on Count III of Child Sexual Abuse for lewdly looking at B.H. while B.H. showered. In support, Yerton argues lewdly looking is not one of the acts prohibited by the child sexual abuse statute, 21 O.S. § 843.5. *See* [Doc. No. 5, p. 32]. 21 O.S. § 843.5 defines child sexual abuse by incorporation as "includ[ing] but . . . not limited to rape, incest, lewd or indecent acts or proposals made to a child, as defined by law, by a person responsible for the health, safety, or welfare of the child." *See* 10A O.S. § 1-1-105(2)(b).

On direct appeal to the OCCA, Yerton argued "lewdly looking" did not fall within § 843.5's incorporated definition of child sexual abuse. *See* [Doc. No. 15-1, pp. 43–44]. The OCCA disagreed, stating the following:

> [W]e find [Yerton's] act of lewdly looking upon the naked body of B.H. in a lewd and lascivious manner fell within the acts prohibited under the child sexual abuse

> statute, 21 O.S. 2011 § 843.5. While the same conduct may also be prohibited under the lewd molestation statute, 21 O.S. 2011, § 1123, the State acted well within its discretion in bringing charges against [Yerton] under § 843.5(E). *See Childress v. State*, 2000 OK CR 10, ¶ 18, 1 P.3d 1006, 1011 ("the decision regarding which criminal charge to bring lies within the wide parameters of prosecutorial discretion"). Therefore, we find no reason to reverse [Yerton's] conviction in Count III.

[Doc. No. 15-4, p. 8].

In his *habeas* petition, Yerton once again contends "lewdly looking" is not one of the acts prohibited by the child sexual abuse statute. However, the interpretation of 12 O.S. § 843.5 is a question of state law, which falls outside the scope of federal *habeas* relief. *See Wilson*, 562 U.S. at 16 (quoting *Estelle*, 502 U.S. at 67); 28 U.S.C. § 2254(a). Furthermore, the Court finds the state court's interpretation of 12 O.S. § 843.5 was reasonable, and certainly not so erroneous as to constitute a violation of due process. Therefore, the Court denies *habeas* relief on Ground Eight.

9. *Ground Nine—Insufficient Evidence to Establish Probable Cause on Count IV (Lewd Molestation of A.P.) [Yerton's Ground Twelve; State's Ten].*

Yerton seeks *habeas* relief based on insufficiency of the evidence used to bind him over for trial on Count IV of Lewd Molestation of A.P. However, the Tenth Circuit has noted that if a defendant is ultimately convicted, "his claim regarding the sufficiency of the evidence at his preliminary hearing cannot be grounds for habeas relief." *Powers v. Dinwiddie*, 324 F. App'x 702, at *2 (10th Cir. 2009) (unpublished) (citing *Montoya v Scott*, 65 F.3d 405, 422 (5th Cir. 1995)).[9] This is so because "[a] § 2254 petition challenges the validity of a state prisoner's conviction and sentence, . . . and the Supreme Court has long held that an 'illegal arrest or

[9] The Court cites this decision, and any other unpublished decisions herein, as persuasive authority. *See* FED. R. APP. P. 32.1(a); 10th Cir. R. 32.1(A).

detention does not void a subsequent conviction.'" *Id.* (quoting *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)). On this basis, *habeas* relief is denied to Yerton on Ground Nine.

10. Ground Ten—Admission of a Video Statement by A.P. [Yerton's Ground Thirteen; State's Eleven].

Yerton seeks *habeas* relief based on the admission of video statement by A.P. The video was admitted pursuant to 12 O.S. § 2803.1, which allows the statement of a child under thirteen years of age describing sexual contact to be admitted if, among other things, the trial judge holds a reliability hearing and determines the video is reliable. The video here depicted an approximately twenty-minute long forensic interview of A.P., in which A.P. described Yerton grabbing A.P.'s penis through his shorts. *See* [Doc. No. 20]. Prior to admitting the video, the trial judge held a reliability hearing, at which A.P.'s mother testified. *See* [Doc. No. 19-3, p. 2–42]. At the conclusion of the hearing, the judge held the video had sufficient indicia of reliability based on its consistency and spontaneity, and the lack of a motivation for fabrication. [Doc. No. 19-3, p. 41–42]. On that basis, the judge admitted the video, conditioned on A.P. testifying at trial, which he subsequently did. *See* [Doc. No. 19-3, pp. 55–89]. Yerton's counsel cross-examined A.P. about the allegations made in the video.

In his direct appeal to the OCCA, Yerton argued admission of A.P.'s video statement violated state evidentiary rules and the Confrontation Clause. The OCCA held

> [t]he trial court did not abuse its discretion in admitting A.P.'s video statement under 12 O.S. 2011, § 2308.1. *See Folks v. State*, 2008 OK CR 29, ¶ 15, 207 P.3d 379, 383. The record clearly supports the trial court's conclusion that A.P. was not coerced or led in any manner to testify a certain way and that he had no reason to fabricate. A.P. testified at trial and was subject to cross-examination; therefore, admission of his statement did not violate [Yerton's] Confrontation Clause Rights. *Id.*

[Doc. No. 15-4, p. 10].

In his *habeas* petition, Yerton once again argues admission of A.P.'s video statement violated state evidentiary rules and the Confrontation Clause. *See* [Doc. No. 5, p. 36–38]. In support, Yerton claims the video statement was unreliable because A.P.'s story had changed over time and because the civil lawsuit gave A.P. a motivation to lie. *See* [Doc. No. 5, pp. 36–38].

Because "federal habeas corpus relief does not lie for errors of state law," *Wilson*, 562 U.S. at 16 (quoting *Estelle*, 502 U.S. at 67), Yerton must show the video was "so extremely unfair that its admission violates fundamental conceptions of justice." *Perry*, 565 U.S. at 237 (quoting *Dowling*, 493 U.S. at 352). However, having watched the video and having thoroughly reviewed the record, the Court concludes admission of the video did not render Yerton's trial fundamentally unfair, especially given that Yerton was allowed to cross-examine A.P. regarding inconsistencies in his story and his motivation to lie. *See* [Doc. No. 19-3, pp. 85–86]. On that basis, the Court concludes Yerton has not shown the OCCA's denial of his claim was incorrect, much less that admission of the video warrants *habeas* relief.

As to Yerton's right to confront his accusers, the OCCA correctly recognized that the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford*, 541 U.S. at 59 n.9 (2004). Given that A.P. did testify at trial and was subjected to cross-examination regarding the video statement, Yerton's rights under the Confrontation Clause were not violated.

Therefore, Yerton has not shown the OCCA's adjudication of this claim was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d). *Habeas* relief is denied on Ground Ten.

11. Ground Eleven—Limitation of Yerton's Cross-examination of A.P. [Yerton's Ground Fourteen; State's Twelve]

Yerton seeks *habeas* relief based on the trial court's decision to limit Yerton from cross-examining A.P. about a Department of Human Services ("DHS") referral containing a statement by A.P. that his mother pushed his head into a pillow in April of 2008. *See* [Doc. No. 5, pp. 39–40]. Yerton sought to cross-examine A.P. using this referral on the basis that it was "a false accusation against a person in authority." [Doc. No. 19-3, p. 43]. Upon review, the judge determined that the referral concluded A.P. had not made a false report, and thus held that it contained "nothing to impeach [A.P.]." [Doc. No. 19-3, p. 51]. The judge did, however, allow Yerton to use the referral to cross-examine A.P.'s mother, who had denied that the incident happened. *See* [Doc. No. 19-3, p. 52].

On direct appeal to the OCCA, Yerton argued the trial court's limitation of A.P.'s cross-examination violated the Confrontation Clause. *See* [Doc. No. 15-1, p. 54]. The OCCA held otherwise:

> [T]he trial court did not abuse its discretion in limiting the cross-examination of A.P. *Thrasher v. State*, 2006 OK CR 15, ¶ 7, 134 P.3d 846, 849 *citing Delaware v. Van Arsdall*, 475 U.S. 673, 678–79, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 675 (1986). The referral to the Department of Human Services containing a statement made by A.P. regarding his mother's conduct, made two years previous to his accusations against [Yerton], was collateral to the issue of A.P.'s truthfulness. Therefore, it was not relevant for purposes of impeaching A.P.

[Doc No. 15-4, p. 10].

In his *habeas* petition, Yerton once again argues the trial court's limitation of his cross-examination of A.P. violated his right to confrontation. *See* [Doc. No. 5, pp. 39–40]. However, "[t]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on . . . cross-examination . . . that is only marginally relevant." *See Hooks v. Workman*, 689 F.3d 1148, 1177 (10th Cir. 2012) (quoting *Van Arsdall*, 475 U.S. at 679 (internal

quotation marks omitted)). Here, as the trial judge noted, the DHS report contained "nothing to impeach [A.P.]," because it concluded he had not made a false report. [Doc. No. 19-3, p. 51]. For that reason, Yerton has failed to show the OCCA's adjudication of this claim was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. 28 U.S.C. § 2254(d). The court denies *habeas* relief on Ground Eleven.

12. Ground Twelve—Refusal to Allow Yerton to Call an Expert Regarding Homosexual Pornography [Yerton's Ground One; State's One].

Yerton seeks *habeas* relief based on the trial court's denial of his request to call an expert witness to testify there was no link between homosexual pornography and child sexual abuse or molestation. *See* [Doc. No. 5, pp. 9–13]. The trial judge denied Yerton's request on the basis that "there ha[d] been no suggestion that homosexuality equates to pedophilia" because the evidence that Yerton had homosexual pornography on his computer had only been admitted as *res gestae* to Yerton's improper touching of Brandon. [Doc. No. 19-6, pp. 4–5].

Yerton first raised this issue in his petition for rehearing, after the OCCA found that the trial court did not abuse its discretion in admitting the evidence. The OCCA found the evidence admissible—not as *res gestae* as the trial court had concluded—but rather as evidence of Yerton's "motive and intent to sexually abuse and molest B.H. and to rebut [Yerton's] claim of mistake or accident in his touching of the victim." [Doc. No. 15-4, p. 4]. In response, Yerton filed a petition for rehearing, arguing that—in light of this new rationale for the admission of the evidence—the trial judge's denial of Yerton's request to call an expert witness to testify that there was no link between homosexual pornography and child sexual abuse or molestation deprived Yerton of due process. The OCCA denied relief, concluding Yerton had not offered a sufficient basis for a rehearing. [Doc. No. 15-6]. On collateral review, both the district court and

the OCCA held the claim was waived and thus procedurally barred, pursuant to 22 O.S. § 1086.[10] *See* [Doc. Nos. 15-9, p. 5; 15-13, p. 3].

Here, Yerton once again argues the trial court's denial of his request to call an expert witness deprived him of due process. *See* [Doc. Np. 5, pp. 9–13]. However, when

> a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). Yerton defaulted his claim in state court pursuant to 22 O.S. § 1086, which is an independent and adequate state procedural bar. *See Ellis*, 302 F.3d at 1186. Furthermore—as discussed above, *see supra* Part III, p. 6 n.3—Yerton has not overcome this procedural bar by showing cause and prejudice or a resulting fundamental miscarriage of justice.[11] As a result, the court concludes Ground Twelve is procedurally barred and denies relief.

13. Ground Thirteen—Appellate Counsel's Failure to Raise a Claim of Newly Discovered Evidence [Yerton's Ground Fifteen; State's Thirteen]

Yerton seeks *habeas* relief based on his appellate counsel's failure to raise a claim on direct appeal regarding newly discovered evidence purportedly showing B.H. lied on the stand about participating in Union High School's and Abilene Christian University's athletic programs. *See* [Doc. No. 5, pp. 41]. Yerton asserts that "[q]uestioning of the Union High School Athletic

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10 22 O.S. § 1086 requires that "[a]ll grounds for relief available to an applicant . . . must be raised in his original, supplemental or amended application."

11 Even if the Court were to construe Yerton as sufficiently arguing both cause and prejudice, *see* [Doc. No. 28, p. 8], the Court would still conclude any underlying error did not render his trial fundamentally unfair.

Department and the Administrative Staff of ACU does not support these statements." [Doc. No. 15-7, p. 2]. However, Yerton did not supply the OCCA with evidence supporting this assertion.

Yerton first raised this claim of ineffective assistance in his application for post-conviction relief. *See* [Doc. No. 7]. After reviewing the trial transcripts, the district court found "that the proffered evidence [was] cumulative and additionally that there is not a reasonable probability that, if such evidence had been produced at trial, it would have changed the result." [Doc. No. 15-9, p. 6]. As a result, the district court concluded "appellate counsel's performance was not objectively unreasonable and that [Yerton] failed to demonstrate a reasonable probability that due to the alleged error the outcome of the appeal would have been different." [Doc. No. 15-13, pp. 2–3]. On appeal, the OCCA affirmed the district court's denial of Yerton's ineffective assistance claim, pursuant to *Strickland v. Washington*, 466 U.S. 668, 687–89 (1984). *See* [Doc. No. 15-13, p. 3].

To obtain habeas relief, Yerton must show the OCCA's application of *Strickland* was unreasonable. Under *Strickland*, a defendant must show: (1) his counsel's performance was deficient because it fell below an objective standard of reasonableness; and (2) but for his counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. 466 U.S. at 687. Standing alone, the *Strickland* standard is "highly deferential." *Knowles v. Mirzayance*, 556 U.S. 111, 124 (2009). Under § 2254(d)(1), this Court's review of whether the OCCA unreasonably applied *Strickland* is "doubly deferential." *Id.* at 123.

Under this standard, and having carefully considered the trial and appellate records, the court finds nothing unreasonable about the OCCA's application of *Strickland*. The OCCA reasonably concluded the alleged new evidence was cumulative and would not have resulted in a

different outcome, and thus that appellate counsel's conduct was not deficient. Therefore—because Yerton has not shown the OCCA's adjudication was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court—the Court denies *habeas* relief on Ground Thirteen. *See* 28 U.S.C. § 2254(d).

14. Ground Fourteen—Appellate Counsel's Failure to Raise a Claim of Ineffective Assistance of Trial Counsel [Yerton's Ground Sixteen; State's Fourteen]

Yerton seeks *habeas* relief based on his appellate counsel's failure to raise a claim of ineffective assistance of trial counsel. At trial, B.H. testified to having seen homosexual pornography on Yerton's personal computer and on a laptop Yerton purchased in 2007. *See* [Doc. No. 19-1, pp. 80, 85–87]. However, Yerton asserts that B.H. moved out in 2009 and that Yerton did not purchase the laptop until 2010. Yerton claims his lawyer was ineffective for failing to develop this timeline at trial. *See* [Doc. No. 5, p. 42]. Aside from Yerton's assertion, the state record does not contain evidence that the laptop was purchased in 2010.[12]

Yerton raised this argument for the first time in his application for state post-conviction relief. *See* [Doc. No. 15-7, p. 3]. The OCCA denied his claim, holding that

> [a] review of the trial transcript makes it clear that this claim is without merit. Pursuant to the *Logan* and *Strickland* standards . . . we find [Yerton] has failed to establish that appellate counsel's performance was deficient or objectively unreasonable and [Yerton] has failed to establish any resulting prejudice. *Logan*, 2013 OK CR 2, at ¶ 7, 293 P.3d at 974; *Strickland*, 466 U.S. at 687–89, 104 S.Ct. at 2064–66. [Yerton's] ineffective assistance of appellate counsel claim is without merit.

[Doc. No. 15-13, p. 5].

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12 Yerton directs the court to a letter filed in this Court by his father on June 15, 2015, in which his father provides information purportedly corroborating Yerton's claim that the laptop was purchased in 2010. *See* [Doc. No. 23]. However, the court's review is limited to the record before the OCCA. *See Pinholster*, 563 U.S. at 181–82. Regardless, the information provided does not show the laptop on which B.H. saw pornography was purchased in 2010.

Yerton now reiterates the argument that his appellate counsel was ineffective for not raising a claim of ineffective assistance of trial counsel, based on trial counsel's failure to develop the laptop's timeline of ownership. As discussed above, to overcome this Court's double deference to the OCCA's decision, Yerton must show the OCCA's application of *Strickland* was unreasonable. *Knowles*, 556 U.S. at 123. However, the Court concludes Yerton has not made such a showing. It was reasonable for the OCCA to conclude Yerton had not established deficiency or prejudice in appellate counsel's performance. As a result, Yerton has not shown the OCCA's adjudication was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. *See* 28 U.S.C. § 2254(d). *Habeas* relief is denied on Ground Fourteen.

IV. Conclusion and Certificate of Appealability

For the reasons set forth above, the Court denies *habeas* relief on all fourteen grounds. Yerton's *Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody* [Doc. No. 5] is therefore denied.

Regarding Yerton's certificate of appealability, Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts instructs that "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." A district court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies a habeas petition by rejecting the merits of petitioner's constitutional claims, the petitioner must make this showing by "demonstrat[ing] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). However, if the district court denies a habeas petition on procedural

grounds, the petitioner must make this showing by demonstrating both "[1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Because reasonable jurists would not debate the correctness of the Court's ruling that Ground Twelve and the federal due process portions of Grounds Two, Three, and Four are procedurally barred, or the Court's assessment of the constitutional claims raised in Grounds One, Five through Eleven, and Thirteen through Fourteen, the Court denies a certificate of appealability.

WHEREFORE, Yerton's *Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody* [Doc. No. 5] and certificate of appealability are denied.

ORDERED this 23rd day of March, 2018

Gregory K. Frizzell

GREGORY K. FRIZZELL, CHIEF JUDGE

Signed for on 3/30/18

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

ROBERT R. YERTON, JR.,

Petitioner,

v.

JASON BRYANT, Warden,

Respondent.

Case No. 15-CV-130-GKF-PJC

JUDGMENT

Pursuant to the Court's order dated March 23, 2018, denying Petitioner Robert R. Yerton, Jr.'s *Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody* [Doc. No. 5], the Court hereby enters judgment in favor of Respondent and against Petitioner.

ENTERED this 23rd day of March, 2018.

Gregory K. Frizzell

GREGORY K. FRIZZELL, CHIEF JUDGE

B-27

B-27

FILED
United States Court of Appeals
Tenth Circuit

November 6, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROBERT R. YERTON, JR.,

Petitioner - Appellant,

v.

JASON BRYANT, Warden,

Respondent - Appellee.

No. 18-5034

ORDER

Before **EID**, **KELLY**, and **O'BRIEN**, Circuit Judges.

This matter is before the court on *Appellant's Motion for an En Banc Review*. The motion is construed as a petition for rehearing en banc and, as construed, the 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

ELISABETH A. SHUMAKER, Clerk

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