APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

APPENDIX TABLE OF CONTENTS (Continued)

REHEARING ORDERS

RELEVANT PROCEDURAL RULE

FILED
United States Court of Appeals
Tenth Circuit

October 23, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LARRY ALAN WHITELY,

Petitioner - Appellant,

v.

JIM FARRIS, Warden,

Respondent - Appellee.

No. 18-6085
(D.C. No. 5:16-CV-00514-HE)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HARTZ**, **MURPHY**, and **CARSON**, Circuit Judges.

Petitioner Larry Whitely is a state prisoner in Oklahoma. A jury convicted him of two counts of lewd molestation of a minor, and the judge sentenced him to concurrent twenty-year terms of imprisonment. The Oklahoma Court of Criminal Appeals upheld his conviction and sentence on direct appeal and ultimately affirmed a state district court's denial of his request for post-conviction relief. Petitioner then filed a habeas petition under 28 U.S.C. § 2254 in the United States District Court for the Western District of Oklahoma, which the federal district court denied. He now

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

appeals the federal district court's denial of his petition. Our jurisdiction arises under 28 U.S.C. §§ 1291 and 2253. We affirm.

I.

In 2006, Petitioner's step-daughter, K.B.—then in fifth grade—passed a note to her friends N.M. and L.W. at school stating that her dad had been raping her. L.W. told her mother about the note. Authorities removed K.B. and her younger sister from her home. Tracy Koelling, a forensic interviewer, subsequently interviewed K.B. Law enforcement officer Jeffrey Cox—a police officer with the Noble, Oklahoma police department—observed the interview. K.B. denied worrying about anything, said she missed her cat, and told Koelling that she felt safe in her home. Two days later, Officer Cox himself interviewed K.B. K.B. continued to say that she missed her mother, wanted to go home, and had nothing further to say. Officer Cox asked K.B. about the note. K.B. denied passing the note, said a friend had passed the note, and said the friend had falsely reported the content of the note. Cox told K.B. that he had talked to N.M. and L.W. and that K.B. needed to tell him what was wrong. K.B. then began to cry and alleged that Petitioner had, in fact, raped her.

Cox told Koelling that K.B. had made more disclosures. Koelling then interviewed K.B. a second time, two days after K.B.'s interview with Officer Cox. At that interview, K.B. told Koelling that Petitioner had anally raped her on numerous occasions. She said that she wrestled with Petitioner and the wrestling would sometimes lead to forced anal rape. K.B. said that she had fought back every time. She also said that Petitioner had not put anything on his penis, but the anal rapes had not hurt or made

her bleed. K.B. also described Petitioner's penis as "soft and gooey" and his ejaculate as "really cold."

Oklahoma charged Petitioner with two counts of lewd molestation of a minor. Before and after Petitioner's trial on those charges, K.B.'s mother, Kelly Whitely ("Mrs. Whitely"), sought the return of her children and agreed to take various steps to get her children back. On numerous occasions before trial, employees of the Oklahoma Department of Human Services indicated to Mrs. Whitely that it was important that she believe and support K.B. if she wanted her children back. At various times, Mrs. Whitely indicated to DHS employees that she did or did not believe K.B.'s allegations.

At trial, L.W. testified regarding the note K.B. had written. She also testified that people at school had called K.B. a liar.

K.B. testified regarding the abuse. She testified that Petitioner had forced his penis into her anus and that she had fought back. She also testified that she had been able to hit Petitioner with her shoes and kick him hard enough for him to flip over backwards, at which point she would run and hide from him in her closet or under her bed. In addition, K.B. testified that the abuse had not hurt and that she had not bled. She admitted that she had previously gotten in trouble for lying about other matters.

Dr. Mark McKinnon, M.D., testified that his examination had revealed no physical indications of sexual abuse. He also testified that in more than ninety percent of cases, no physical signs of sexual abuse exist and that the anal region of the body heals quickly because it is highly vascularized. He further testified that he would not be surprised if a victim lacked signs of abuse despite having been abused anally for a long period of time.

He explained that an abrasion could exist but not appear three weeks later on a physical exam.

Dr. McKinnon also conceded, though, that anal sex can cause injury and he opined that the likelihood of an anal injury occurring would depend on the size of the object introduced, the use or nonuse of force, the use or nonuse of lubricants, and the amount of victim cooperation. He acknowledged, too, that frequent, forceful anal penetration would lead to a greater risk of injury, conceded that an anal tear could leave a scar, and noted that he had not found any such scars.

Dr. Linda Ingraham, Ph.D., testified that Koelling had conducted a proper child forensic interview. She then discussed various factors that could have affected K.B.'s memory, such as bias, suggestibility, misattribution, memory recording, and positive versus negative reinforcement. She also criticized Officer Cox's interview; identified various inconsistences in K.B.'s allegations that she would generally not expect; and concluded that it was possible that the interview with Officer Cox had distorted K.B.'s memory.

Koelling testified about her interviews with K.B.[1] She also discussed proper techniques for interviewing child victims of sexual assault.

Mrs. Whitely also took the stand and briefly testified. During her testimony, she stated that she had not seen any blood on K.B.'s underwear or clothes when K.B. had been living with her. She also indicated that she had been looking for blood because she

[1] A video of her first interview and an edited video of her second interview were also played for the jury and entered into evidence.

had believed that K.B. would start menstruating soon. On cross-examination, she testified that she was not at the trial to support Petitioner and that their divorce was pending.

Petitioner's father, Larry Whitely, Sr., also took the stand. During his testimony, Petitioner submitted pictures his father took into evidence. Those pictures indicated that no space existed for K.B. to hide under the bed and that her closet was small.

In his closing argument, Petitioner's trial counsel highlighted these inconsistencies, but the jury nevertheless convicted Petitioner on both counts. Between the trial and sentencing, Mrs. Whitely sent a letter to the trial judge indicating that she did not believe the allegations against Petitioner and had seen no signs of abuse. She expressed her belief that Petitioner was innocent and asked the judge to release him or give him the minimum punishment. At sentencing, Mrs. Whitely stood by her statements after she was warned that her testimony could prevent her from getting her children back. The judge sentenced Petitioner to concurrent twenty-year terms of imprisonment.

Petitioner appealed his convictions to the Oklahoma Court of Criminal Appeals (the "OCCA").[2] The OCCA affirmed the judgment.

Petitioner then filed an application for post-conviction relief (the "APCR") in state district court. In the APCR, Petitioner asserted claims based on prosecutorial

[2] None of the claims Petitioner asserts in this petition relate to his arguments on direct appeal.

misconduct, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel. Petitioner also requested discovery and a full evidentiary hearing.

The state district court held that Petitioner waived his prosecutorial misconduct claims and ineffective assistance of trial counsel claims because he did not assert them on direct appeal. It denied Petitioner's discovery request for the most part, although it permitted Petitioner to depose his direct appeal appellate counsel. The court then held a two-day evidentiary hearing to address Petitioner's ineffective assistance of appellate counsel claims but limited the hearing to what appellate counsel did or did not do.[3] After the hearing, the court denied relief on the ineffective assistance of appellate counsel claims.

The OCCA reversed, holding the state district court failed to address a number of issues and applied the wrong legal standard.

On remand, the state district court determined that appellate counsel was ineffective because she had not engaged in any investigation outside the record before filing Petitioner's appeal. It then concluded that, even though it was unclear whether trial counsel had performed ineffectively, cause existed to grant Petitioner a new appeal to address Petitioner's ineffective assistance of trial counsel claims.

The state district court also noted that the OCCA had directed it to determine "whether witnesses were deterred by the prosecution, including DHS personnel, from

[3] The parties dispute whether we should address Petitioner's underlying claims as if an evidentiary hearing was held or whether the limits on the hearing rendered it equivalent to no hearing at all. We resolve this appeal without reaching that issue.

fully and truthfully testifying or whether the witnesses had changed their story after the fact because they no longer had anything to lose." Order dated Dec.19, 2014, Oklahoma v. Whitely, No. CF-2006-250, slip op. at 2. It determined that Petitioner had not produced sufficient evidence on that issue during the evidentiary hearing and thus did not grant any relief with respect to the prosecutorial misconduct claim.

Petitioner appealed and the OCCA again reversed the state district court because Oklahoma's statute governing post-conviction relief does not permit a court to grant a petitioner a second direct appeal. It then remanded the case to the state district court to resolve the remaining issues and make specific findings of facts and conclusions of law as to each issue. The OCCA concluded that the state district court could review the original record, allow depositions and affidavits for good cause, and/or conduct an evidentiary hearing.

On remand, the state district court determined that Petitioner's claims lacked merit without holding an evidentiary hearing. This time, the OCCA affirmed.

Petitioner then filed a petition in the United States District Court for the Western District of Oklahoma seeking habeas relief pursuant to 28 U.S.C. § 2254. The court denied that petition and denied Petitioner a certificate of appealability.

Petitioner appealed, and we granted a certificate of appealability allowing him to pursue his claims.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires that we apply a "difficult to meet" and "highly deferential standard" in

federal habeas proceedings under 28 U.S.C. § 2254; it "demands that state-court decisions be given the benefit of the doubt." Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (internal quotation marks omitted). When a petitioner includes in his habeas application a "claim that was adjudicated on the merits in State court proceedings," a federal court shall not grant relief on that claim unless the state-court decision:

> (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)(1)–(2).

Section 2254(d)(1)'s reference to "clearly established Federal law, as determined by the Supreme Court of the United States," "refers to the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). "Federal courts may not extract clearly established law from the general legal principles developed in factually distinct contexts, and Supreme Court holdings must be construed narrowly and consist only of something akin to on-point holdings." Fairchild v. Trammell (Fairchild I), 784 F.3d 702, 710 (10th Cir. 2015) (internal quotation marks and citation omitted).

Under § 2254(d)(1), a state-court decision is "contrary to" the Supreme Court's clearly established precedent if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts

that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [that] precedent." Williams, 529 U.S. at 405–06. A state court need not cite, or even be aware of, applicable Supreme Court decisions, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam).

A state-court decision is an "unreasonable application" of Supreme Court law if the decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." Williams, 529 U.S. at 407–08. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Conversely, "[i]f a legal rule is specific, the range may be narrow," and "[a]pplications of the rule may be plainly correct or incorrect." Id. And "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." Williams, 529 U.S. at 410 (emphases in original).

If we determine that a state-court decision is either contrary to clearly established Supreme Court law or an unreasonable application of that law, or that the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding, we then apply de novo review and may only grant habeas relief if the petitioner is entitled to relief under that standard. Milton v. Miller, 744 F.3d 660, 670–71 (10th Cir. 2014).

Claims not "adjudicated on the merits" in state court are entitled to no deference. Fairchild I, 784 F.3d at 711 (internal quotation marks omitted). But

"even in the setting where we lack a state court merits determination, '[a]ny state-court findings of fact that bear upon the claim are entitled to a presumption of correctness rebuttable only by "clear and convincing evidence."'" Grant v. Royal, 886 F.3d 874, 889 (10th Cir. 2018) (alteration in original) (quoting Victor Hooks v. Workman (Victor Hooks II), 689 F.3d 1148, 1164 (10th Cir. 2012)).

With these standards in mind, we turn to Petitioner's claims.

III.

Initially, Petitioner asserts that the OCCA did not determine that his underlying ineffective assistance of trial counsel claims and prosecutorial misconduct claims were procedurally barred and that he properly presents those claims to us (rather than arguing that his appellate counsel was constitutionally ineffective for failing to assert those claims on direct appeal). We do not necessarily agree, but we need not resolve that issue because an ineffective assistance of appellate counsel claim lacks merit if the petitioner argues that appellate counsel should have asserted meritless claims. Ryder ex rel. Ryder v. Warrior, 810 F.3d 724, 746–47 (10th Cir. 2016). And for the reasons discussed below, we are satisfied that none of the claims Petitioner advances here have merit.

A. Ineffective Assistance of Trial Counsel

Petitioner contends that trial counsel acted ineffectively by failing to: (1) investigate a medical defense; (2) investigate and present expert forensic interview testimony; and (3) present additional evidence that K.B. was dishonest, manipulative, and attention-seeking.

1. Legal Standard

We review claims of ineffective assistance of counsel under the framework set forth in Strickland v. Washington, 466 U.S. 668 (1984). Byrd v. Workman, 645 F.3d 1159, 1167 (10th Cir. 2011). Under Strickland, a petitioner "must show both that his counsel's performance 'fell below an objective standard of reasonableness' and that 'the deficient performance prejudiced the defense.'" Id. (emphasis omitted) (quoting Strickland, 466 U.S. at 687–88). "These two prongs may be addressed in any order, and failure to satisfy either is dispositive." Victor Hooks II, 689 F.3d at 1186.

"[O]ur review of counsel's performance under the first prong of Strickland is a 'highly deferential' one." Byrd, 645 F.3d at 1168 (quoting Danny Hooks v. Workman, 606 F.3d 715, 723 (10th Cir. 2010)). "Every effort must be made to evaluate the conduct from counsel's perspective at the time." Littlejohn v. Trammell (Littlejohn I), 704 F.3d 817, 859 (10th Cir. 2013) (quoting United States v. Challoner, 583 F.3d 745, 749 (10th Cir. 2009)). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Victor Hooks II, 689 F.3d at 1187 (quoting Byrd, 645 F.3d at 1168). And the "petitioner 'bears a heavy burden' when it comes to overcoming that presumption." Byrd, 645 F.3d at 1168 (quoting Fox v. Ward, 200 F.3d 1286, 1295 (10th Cir. 2000)). "To be deficient, the performance must be outside the wide range of professionally competent assistance. In other

words, it must have been completely unreasonable, not merely wrong." Danny Hooks, 606 F.3d at 723 (internal quotation marks and citation omitted).

"A state prisoner in the § 2254 context faces an even greater challenge." Victor Hooks II, 689 F.3d at 1187 (citing Byrd, 645 F.3d at 1168). "[W]hen assessing a state prisoner's ineffective-assistance-of-counsel claims on habeas review, '[w]e defer to the state court's determination that counsel's performance was not deficient and, further, defer to the attorney's decision in how to best represent a client.'" Id. (alterations in original) (quoting Byrd, 645 F.3d at 1168). "Thus, our review of ineffective-assistance claims in habeas applications under § 2254 is 'doubly deferential.'" Id. (quoting Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)).

"Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether *any* reasonable argument exists that counsel satisfied Strickland's deferential standard." Harrington v. Richter, 562 U.S. 86, 105 (2011) (emphasis added). And "because the Strickland standard is a general standard, a state court has . . . more latitude to reasonably determine that a defendant has *not* satisfied that standard." Byrd, 645 F.3d at 1168 (emphasis added) (ellipsis in original) (quoting Knowles, 556 U.S. at 123).

"Under the prejudice prong [of Strickland], a petitioner must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different.'" Littlejohn v. Royal (Littlejohn II), 875 F.3d 548, 552 (10th Cir. 2017) (quoting Strickland, 466 U.S. at 694).

2. Claims

i. Medical Defense

Petitioner argues that trial counsel was ineffective because he failed to investigate a medical defense to the charges and that failure prejudiced him. In support of his contention, he directs us to the affidavit of Dr. John H. Stuemky. That affidavit opines that:

> [S]ome of the information disclosed by the girl indicating multiple episodes of anal rape and that it was forced and against her will, and in the absence of lubricant and not hurting is also rather difficult to believe. This includes feeling ejaculate and that it was cold. If all of the above occurred—forced anal rape, multiple times, without lubricant, against her will, [sic] would seem more likely that there should have been physical findings. All of the above would be of great concern.

Dr. Stumeky also notes that K.B.'s story of fighting back "simply does not fit with ongoing child molestation by fathers/stepfathers" and that her "denial of pain does not fit with her allegations of fighting back and that force was used."[4]

a. Prior Decisions

[4] Respondent contends Petitioner did not properly present this evidence to the federal district court. We assume Petitioner properly presented the evidence because that assumption does not alter the outcome of the appeal.

We also note, although it is not entirely clear, that Petitioner appears to argue under this claim that he was prejudiced because Dr. Stuemky could not testify that Officer Cox's interview with K.B. presented a major conflict of interest and a risk of intimidation. But Petitioner waived that argument with respect to this claim because, before the federal district court, he only argued that the evidence was relevant to his forensic expert claim. See Stouffer v. Trammell, 738 F.3d 1205, 1221 n.13 (10th Cir. 2013).

The state district court rejected this claim because Dr. Stuemky's

> review of this matter . . . did not include a review [of] the testimony of Dr. McKinnon and . . . did not offer an opinion of whether he would agree or disagree with that testimony. In fact, although not offered in his affidavit, the 90% statistic is a well known opinion of Dr. Stuemky and thus his testimony may have tended to support the testimony of Dr. McKinnon. In addition, while it is not directly stated by Dr. Stuemky, it is clear that he believes this may be one of the 10% cases due to the allegations. It is interesting to note that Dr. Stuemky does not say that there **would be** physical findings in this matter only that it would "seem more likely that there should have been physical findings." Dr. McKinnon was thoroughly cross-examined on this point and concedes in effect the same conclusion: that the number of episodes, with force, without lubrication may have left physical finding and that he found none. The information proffered by Defendant was clearly before the jury without the introduction of additional testimony.

Order dated Nov. 24, 2015, Whitely, No. CF-2006-250, slip op. at 7–8 (emphasis in original). On appeal, the OCCA affirmed because, among other reasons, Petitioner had not shown any prejudice from counsel's omissions.

The federal district court concluded the OCCA's determination was not unreasonable. It stated:

> Dr. Stuemky's affidavit fails to challenge Dr. McKinnon's testimony in any meaningful way and does not establish[] that K.B. would have absolutely had injury. Further, Dr. McKinnon testified that forced anal penetration without lubrication would likely: (1) be painful; (2) cause bleeding; and (3) create a greater chance of injury. See *supra* p. 9. In sum, assuming Dr. Stuemky would have testified as his affidavit is presented, the expert would not have provided any substantive information that the jury did not already hear. Accordingly, the OCCA reasonably applied Strickland's prejudicial prong in finding there was not a reasonable likelihood that the results of Petitioner's trial would have been different had trial counsel investigated so as to call Dr. Stuemky as a witness. See Hanson v. Sherrod, 797 F.3d 810, 832 (10th Cir. 2015) ("We cannot say it was unreasonable for the OCCA to hold that [the cumulative evidence] would not have changed the outcome of Hanson's trial."). And, because the claim would have therefore lacked merit on direct appeal, the OCCA further reasonably applied Strickland in finding no reasonable likelihood that the outcome of the direct appeal would have been

> different had appellate counsel challenged trial counsel's conduct. See Fairchild v. Trammell, 784 F.3d 702, 715 (10th Cir. 2015) ("To prevail on a claim of ineffective assistance of appellate counsel, a defendant must establish that . . . there is a reasonable probability that, but for this unreasonable failure, the claim would have resulted in relief on direct appeal.").

Whitely v. Farris, No. CIV-16-514-HE, 2018 WL 1733997, at *6 (W.D. Okla. Jan. 10, 2018), report and recommendation adopted, No. CIV-16-514-HE, 2018 WL 1732072 (W.D. Okla. Apr. 10, 2018).

b. Analysis

As a preliminary matter, Petitioner contends that we should review this claim de novo because the state courts unreasonably concluded that the evidence in Dr. Stuemky's affidavit did not prove prejudice. He characterizes his argument as an argument that Dr. Stuemky's affidavit rebuts by clear and convincing evidence the state courts' speculative factual findings that Petitioner's "'different or better experts' were the 'benefit of hindsight.'" He reasons that the affidavit—in light of its statement that the absence of physical evidence and other factors are "of great concern"—indicates that Dr. Stuemky believes the lack of physical evidence substantially undermines K.B.'s credibility.

It is not immediately evident to us that that the state courts made a factual finding, as opposed to a legal determination. But even if they did make a factual finding, Petitioner's argument lacks merit. Although Dr. Stuemky indicated that the absence of physical evidence—among other factors—is "of great concern," it is not clear that Dr. Stuemky believes the lack of physical evidence *alone* substantially

undermines K.B.'s credibility.[5] Resolving this issue in Petitioner's favor would itself require speculation.[6] Under these circumstances, Petitioner has not rebutted any factual determination by clear and convincing evidence. We thus decline to review this claim *de novo* on that basis.[7]

Further, we agree with the district court that the OCCA's resolution of this claim was not an unreasonable application of Strickland. Insofar as he indicated physical evidence of abuse would be more likely under the circumstances presented

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[5] We note that at trial, defense counsel extensively addressed the other factors Dr. Stuemky identified as difficult to believe and of great concern.

[6] Petitioner also contends that by denying him an evidentiary hearing, the state district court prevented him from resolving the court's "speculative concern." He does not initially argue for *de novo* review on this basis, nor does he cite any legal authority that would support such relief.

Relatedly, Petitioner also contends that the state district court's failure to hold an evidentiary hearing prevented Petitioner from producing Dr. McKinnon or obtaining his studies to prove the 90 percent statistic was not relevant. But he once again fails to argue for *de novo* review or cite any legal authority showing he is entitled to any relief.

In the last sentences of the section of his opening brief which addresses Dr. McKinnon's testimony and Dr. Stuemky's affidavit, Petitioner finally argues that "[t]he State court[']s finding of fact and application of established Supreme Court precedent are unreasonable. 28 U.S.C. § 2254(d)(1) and (2)[.] The Court owes no deference." But that conclusory assertion still identifies no Supreme Court precedent that the OCCA unreasonably applied.

[7] Petitioner faults the state courts for highlighting that Dr. Stuemky did not say that a doctor would have found physical signs of abuse. Based on that statement, he contends that the state court required him to make a greater showing of prejudice than Strickland requires. This argument is not persuasive. When the state district court made that statement, it was analyzing the content of Dr. McKinnon's testimony and Dr. Stuemky's affidavit to determine whether the evidence was cumulative. It did not impermissibly require Petitioner to satisfy a heightened burden on his ineffective assistance of counsel claim.

in this case, Dr. Stuemky's affidavit is essentially cumulative of Dr. McKinnon's trial testimony. "Generally, counsel's failure to call witnesses whose testimony would be corroborative or cumulative of evidence already presented at trial is not deemed constitutionally deficient." Snow v. Sirmons, 474 F.3d 693, 729 (10th Cir. 2007).

The other statements in Dr. Stuemky's affidavit also add little to Petitioner's case. Dr. Stuemky indicates that K.B.'s story of fighting back "simply does not fit with ongoing child molestation by fathers/stepfathers" and that her "denial of pain does not fit with her allegations of fighting back and that force was used." But at trial, no one contended that K.B.'s testimony about fighting Petitioner was, in fact, true.

Koelling testified that: (1) K.B. was likely describing her ability to fight back "from her perspective"; (2) there is a lot of shame in being a victim and, because of her helplessness, K.B. was "looking for things that she did or she could have done to change the situation"; and (3) "[s]ome of the things [K.B.] told me were difficult for me to comprehend." And in its rebuttal argument, the prosecution argued:

> First one I want to talk about that they want to make a big thing out of is the fighting back and the hiding. [K.B.] tells you that she fought back, and I don't doubt that she wanted to. Don't doubt for a minute that she wanted to fight back and she wanted to punch and she wanted to hit him and kick him, and in her mind, as she's closing her eyes, as she's being raped, she probably is fighting him and she probably is hitting him and she probably is hiding under her bed and she probably is hiding in her closet.
>
> But what's really going on is the defendant is raping her. She probably fought the first few times, but after that it wasn't worth it. It was gonna happen anyway. He's in her home. He's where she lives. She can't hide from him every day, all day. Maybe should get it over with for that time that day, maybe he won't do it to you that night.

> So I bet she did fight some. But a lot of what she says about the fighting is children not wanting to admit that they laid there and allowed that to happen to them over and over and over and over again. So she's hiding. So she's fighting.

In light of this testimony and argument, it is unlikely that the jury that convicted Petitioner did so because it believed that K.B. had routinely fought Petitioner when he attempted to sexually assault her. Thus, a court could reasonably conclude that no reasonable probability existed that this evidence from Dr. Stuemky—which was predicated on K.B.'s testimony about fighting back—would alter the outcome of the trial.

Under these circumstances, the OCCA did not unreasonably deny Petitioner's claim.

ii. Forensic Interview Expert

Petitioner also argues that trial counsel was ineffective when he presented Dr. Ingraham as his forensic interview expert because: (1) she was not a forensic interview expert; (2) counsel had not gone over Dr. Ingraham's testimony with her; (3) she had not reviewed the Officer Cox interview before trial; and (4) her testimony regarding memory distortion was irrelevant and reduced the significance of K.B.'s inconsistent statements, which weakened Petitioner's argument that K.B. was lying.

Petitioner supports his claims with an affidavit from Dr. Maggie Bruck, Ph.D.[8] In her affidavit, Dr. Bruck states that Officer Cox: (1) "should not have been allowed

[8] In addition, Petitioner directs us to an affidavit from his post-conviction investigator that he claims establishes that: (1) Koelling would not have re-

to interview K.B."; (2) "used a number of interrogatory techniques used by police to produce confessions from suspects"; and (3) could have caused K.B. to produce a false statement by using those techniques on a child removed from her home who could not contact her mother and missed her. Dr. Bruck also asserts that Dr. Ingraham's suggestibility/memory distortion testimony was irrelevant because K.B.

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interviewed K.B. if she had been aware of Officer Cox's interview; and (2) Koelling admits K.B. may have fabricated her accusations. But the only reference to this evidence in the federal district court is in Petitioner's Statement of the case. There, he asserts:

> On August 4, 2014, Mr. Whitely filed a motion in the trial court to supplement his post-conviction application with evidence from Tracy Koelling, the state's forensic interviewer who testified at trial. As an offer of proof, Mr. Whitely submitted an affidavit prepared by Private Investigator Frank Gaynor, who interviewed Koelling. (R. 1443-49)

Petition Under 28 U.S.C. 2254 for Writ of Habeas Corpus By a Person in State Custody at 4, Whitely v. Farris, No. CIV-16-514-HE, 2018 WL 1732072 (W.D. Okla. Apr. 10, 2018). He did not, however, identify the evidence in the affidavit or argue its significance. Because Petitioner did not adequately present that evidence to the federal district court, we do not consider it here.

Petitioner also directs the court to the affidavit of Dr. H. D. Kirkpatrick, Ph.D. But, with respect to that affidavit, he merely argues that:

> Post-conviction counsel also obtained an independent, unbiased forensic analysis of K.B.'s statements from Dr. [H. D.] Kirkpatrick. (R 534-63) Kirkpatrick applied a rule-out hypothesis approach and found that K.B.'s statements support conflicting conclusions. (R. 551-52)

He does not argue why it is significant that K.B.'s statements support conflicting conclusions or how he was prejudiced by the absence of the evidence contained therein. Thus, we do not consider it. See Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived.").

had admitted to the abuse in a note that pre-dated her interview with Officer Cox, and that an expert should have instead testified about lies in childhood.

Petitioner also submits the affidavit of Dr. Stuemky. In his affidavit, Dr. Stuemky criticizes Officer Cox's interview with K.B. He indicates that the interview presented a major conflict of interest and a risk of intimidation because Officer Cox had: (1) worked as a police officer in the same police department as K.B.'s parents; and (2) interviewed K.B. late at night without any observers or any videotape.

Lastly, Petitioner identifies portions of Dr. Ingraham's trial testimony where she stated that she was: (1) testifying that Officer Cox was "wrong"; and (2) not opining that K.B. was lying.

a. Prior Decisions

The state district court rejected this claim for several reasons. First:

> Of the nine (9) points offered by Dr. Stuemky, seven (7) deal with the disclosures made by and interviews of the child rather than the physical examination itself. All seven of those concerns were addressed by defense counsel in the cross-examination of Dr. McKinnon. In addition, defense counsel addressed many of those issues with Linda Ingraham, the expert forensic psychologist called by the defense. Dr. Stuemky also opines that the first interview of the child was appropriate and well done. This information, if testified to, would have further supported State's case and would have contradicted another proffered expert, Dr. Maggie Bruck. In fact, Defendant specifically alleges that bolstering the State's case is problematic when he argues that trial counsel was ineffective by presenting Dr. Ingraham, who also testified that the forensic interviews were appropriately done. Either Dr. Stuemky would be supporting, yet again, the opinion that the interview was appropriate or, if Dr. Bruck had testified, he would be contradicting another defense witness. This would have been detrimental to the defense.

Order dated Nov. 24, 2015, Whitely, No. CF-2006-250, slip op. at 8–9.

Second:

> Both [Dr. Maggy Bruck and Dr. H. D. Kirkpatrick] are as well qualified in their fields as Dr. Ingraham and espouse alternative theories to present to the jury. Dr. Bruck, primarily puts forth a position of attacking the credibility of the child as opposed to the memory distortion theory espoused by Dr. Ingraham and would present information regarding the invalidity, from her perspective, of the forensic interviews. Dr. Kirkpatrick would present information about confirmatory bias thus attacking the interview techniques. A portion of the opinions were covered in the cross-examinations of Dr. McKinnon, Tracy Koelling (forensic interviewer) and Officer Cox as well as in the direct examination of Dr. Ingraham. Some of the opinions proffered clearly contradict other expert evidence given. However, particularly as it relates to Dr. Bruck, there are valid strategic reasons to proceed with opinions such as that offered at trial. In particular, attacking the credibility of [a] child witness is perilous. A jury may feel more sympathy for the child after the repeated attempts to cast her as a liar. The defense offered two theories for not believing the statements of the child—that the child had fabricated the story and that she had a distorted memory of the events. These are valid defense theories which provided the jury with options. Because a valid strategic reason exists for the manner in which the underlying case proceeded, it cannot be found to be below an objectively reasonable standard. This seems to be exactly the trap that the Strickland court warns against—that hindsight often provides us with many different avenues to traverse. But this Court does not find, based upon the totality of the trial record, that trial counsel's strategic decision to offer the memory distortion theory was unreasonable or fell below the standard required.

Id. at 9–10.

On appeal, the OCCA affirmed. It reasoned that:

> [The state district court] thoroughly examined [Petitioner's] claims regarding what seems to be a battle of the experts. A review of trial counsel's affidavit reveals that, in hindsight, counsel feels that he could have handled [Petitioner's] trial differently, and that some of the strategic decisions he made did not work out as intended.

Order Granting Request to Associate Counsel and Affirming Denial of Post-Conviction Relief, Whitely v. Oklahoma, No. PC 2015-1120, slip op. at 8 (Okla. Crim. App. Apr. 22, 2016).

The federal district court also rejected this claim. It determined the OCCA's decision was not unreasonable because the evidence that Petitioner advanced was essentially cumulative. It reasoned that, at trial, Dr. Ingraham (1) had extensively criticized Officer Cox's interview techniques; (2) had testified about her concerns regarding the absence of details in K.B.'s allegations and various improbabilities presented therein; (3) had not testified that the anal rape had occurred; and (4) had not testified that K.B. was not lying and instead had taken no position on the truth or falsity of the allegations. It further reasoned that although Dr. Bruck and Dr. Ingraham had presented conflicting opinions regarding Koelling's second interview, the jurors watched the second interview and were able to determine for themselves whether Koelling appeared biased towards disclosure.

b. Analysis

We agree with the district court's analysis for several reasons. First, the evidence does not show Dr. Ingraham harmed Petitioner's case. Although Dr. Ingraham indicated she was not opining that K.B. was lying, she also never testified that K.B.'s allegations were true.

Further, when she testified that Officer Cox was not "wrong," Dr. Ingraham was opining that his conduct may have been proper from a community safety perspective. She did not testify that his conduct did not undermine the credibility of K.B.'s allegations—in fact, she specifically testified that he was untrained and that his interview was inconsistent with protocols for interviewing child victims of sexual

abuse, had "introduced a possible source distortion," and may have distorted K.B.'s memory.

In addition, the evidence of memory distortion is not clearly inapplicable to this case. Although K.B. wrote a note to her friends before her interview with Officer Cox, no expert indicated to the jury[9] that the note (even if a lie) would have prevented Officer Cox from distorting K.B.'s memory at his interview—and K.B.'s post-note allegations are expansive.

And even if Dr. Ingraham's memory distortion testimony was not entirely relevant, we are satisfied that testimony did not materially prejudice Petitioner. That testimony did not clearly undermine Petitioner's argument that K.B.'s inconsistencies showed she was lying. Dr. Ingraham testified that she would expect K.B. to remember pain and bleeding unless she "blocked" the experience. She further testified that K.B. did not, in her opinion, have that type of traumatic amnesia. By opining in that manner, Dr. Ingraham's testimony left ample room for counsel to argue that the inconsistencies in K.B.'s testimony showed she was lying.

Second, Petitioner was not prejudiced in the manner that Strickland requires by the absence of the evidence he now presents. As the district court recounted, both Dr. Ingraham and Koelling testified extensively about the proper techniques for

[9] Dr. Bruck's affidavit asserts that memory distortion testimony is appropriate only when questioners suspect wrongdoing and the child was initially silent (unlike here where K.B. wrote the note). But no such limitation was described to the jury.

interviewing child victims of sexual abuse, which Officer Cox clearly did not follow. Indeed, Dr. Ingraham specifically criticized Officer Cox's interview.

In addition, Officer Cox testified at trial that he interviewed K.B. at night (at approximately 9:15 p.m.),[10] that Mrs. Whitely and Petitioner worked at the Noble Police Department as dispatchers, and that K.B. had been present there on several occasions. Even in the absence of Dr. Stuemky's testimony on that issue, the jury was well-equipped to evaluate the risk of intimidation or conflict of interest from those circumstances.

The allegations regarding the second Koelling interview also do not establish the prejudice that Strickland requires. True, Dr. Bruck's affidavit indicates that during the second interview, Koelling was merely seeking to elicit as many abuse-consistent details as possible and did not test the hypothesis that K.B. had made up the allegations despite K.B.'s inconsistent allegations. The jury, however, watched a video of the second interview and the jurors were able to: (1) consider the inconsistencies; and (2) observe the extent to which Koelling did or did not challenge K.B. and did or did not explore the hypothesis that no sexual abuse had occurred. Thus, they were able to evaluate the interview themselves.

Lastly, we note that Dr. Bruck did not review K.B. or L.W.'s testimony. Their testimony was significant because K.B. and L.W. testified that K.B. was known to

[10] Petitioner posits that Officer Cox may also have been in uniform during the interview. But he directs us to no evidence that was the case. To the extent he asserts that it is a reasonable inference that Officer Cox was in uniform, a jury is just as capable of drawing that inference when considering any pressure on K.B.

lie. Because Dr. Bruck did not review this testimony, which is specific to K.B., her affidavit does not clearly indicate that additional expert testimony on childhood lying was necessary.

Thus, because the record supports a determination that Dr. Ingraham did not materially harm Petitioner's case and the evidence Petitioner advances now would not have materially benefitted his case, we are satisfied that the OCCA did not unreasonably apply Strickland.

iii. Evidence of K.B.'s Dishonesty, Manipulation, and Attention-Seeking

Petitioner next argues that his counsel acted ineffectively by failing to present additional evidence of K.B.'s prior dishonesty, manipulation, and attention-seeking behavior. Petitioner contends counsel should have called impeachment witnesses and witnesses who could testify about K.B.'s reputation, and that the state courts unreasonably concluded the absence of that evidence did not prejudice him.

a. Prior Decisions

The state district court analyzed this claim as part of a larger claim that "trial counsel was ineffective for failing to present certain witnesses that would possess relevant information that would tend to disprove" K.B.'s allegations. The state district court denied that claim because:

> [t]he Affidavits of Danny Moss, Jeanna Moss, Shirely Orsak, and Toni Snyder are observations of neighbors who had no extensive contact with the Whitelys or the child. The testimony proffered is that they never saw anything that would indicate to them that abuse was occurring. (For example: "I never noticed anything unusual about our neighbors", "They appeared to be a normal family" . . .). These statements have minimal relevance at best. The Affidavits of Renee Haley, Jack Tracy, and Jack

> Haley, all rely on hearsay as the basis for their opinions as to the child's character for untruthfulness. Frances Burnett could only testify as to the general character for untruthfulness but had no specific instances. These statements would not have been admissible and therefore it was not error on the part of trial counsel to not sponsor those witnesses. In addition, their observations as to not observing any behavior on the part of the child or the Defendant, like those of the witnesses above, would only have minimal relevance. This is particularly true in light of the fact that the same information was presented by Larry Whitely, Sr. Furthermore, Defense counsel was able to provide specific instances of untruthfulness to the jury through the testimony of [L.W.]. Defense counsel was also able to argue that the victim was a "troubled" and "untruthful" child in his closing argument. Counsel's conduct was not objectively unreasonable.

Order dated Nov. 24, 2015, Whitely, No. CF-2006-250, slip op. at 10–11. The OCCA affirmed without any additional analysis.

The federal district court held that Petitioner was not entitled to relief because:

> Petitioner's attorney elicited testimony from K.B.'s friend that people at school called K.B. a liar, see Tr. Vol. II at 381, and K.B. herself admitted that she had been in trouble for lying. Tr. Partial Proceedings (dated Jan. 24, 2007) at 97. And, while K.B. claimed not to remember the meeting, Petitioner's attorney was able to suggest through his questioning that K.B. had visited with Jack Tracy about her lying. Id. Additionally, trial counsel called Petitioner's father, Larry Whitely, who presented evidence that K.B. could not have hidden in the closet or under the bed as she had suggested. See Tr. Vol. IV at 791-92. Finally, in questioning Dr. Ingraham, Petitioner's attorney elicited evidence that K.B., after making her allegations, "was getting attention" "which is important to a child." Id. at 743. In closing argument, trial counsel used all this information to emphasize K.B.'s alleged dishonesty and the incredibility of her allegations. See Tr. Vol. V at 858, 860-61.
>
> In light of this evidence, and based in large part of the generalness of the proffered testimony, Petitioner simply cannot establish any reasonable probability that the outcome of his trial would have been any different if trial counsel had called these witnesses, or, in the case of Kelly Whitely, asked her different questions. Accordingly, the OCCA reasonably applied Strickland in finding no prejudice in trial counsel's failure to call these witnesses, and subsequently, in appellate counsel's failure to raise this claim on direct appeal.

Whitely, 2018 WL 1733997, at *11, report and recommendation adopted, 2018 WL 1732072.

b. Analysis

The district court did not err by denying relief on this claim. While Petitioner directs us to additional evidence of K.B.'s dishonesty, that evidence is largely cumulative of the testimony produced at trial and highlighted in trial counsel's closing argument. In addition, Dr. Ingraham testified that attention is important to children. Although the evidence that Petitioner now asserts is stronger and more specific to K.B., when we apply our deferential standard of review, the record does not compel a determination that a reasonable probability of a different outcome exists. Thus, having considered the evidence proffered and presented in this case, we are satisfied that the state courts did not unreasonably apply Strickland.

B. Prosecutorial Misconduct

Petitioner brings two prosecutorial misconduct claims. First, he contends that the prosecutor used false testimony to secure his conviction. Second, he argues that the government improperly coerced Mrs. Whitely. We address each claim in turn.

1.

Petitioner's first prosecutorial misconduct claim is that the Oklahoma state courts unreasonably applied Napue v. Illinois, 360 U.S. 264 (1959), when they resolved his claim that the prosecution relied on false testimony to secure his

conviction. Specifically, he contends that Mrs. Whitely testified falsely when she indicated she was not "here today in support of [Petitioner]."[11]

To establish a Napue violation, a petitioner must show that "(1) [a witness's] testimony was in fact false, (2) the prosecution knew it to be false, and (3) the testimony was material." United States v. Caballero, 277 F.3d 1235, 1243 (10th Cir. 2002).

Petitioner directs us to several items of evidence to support his claim. First, he directs us to his own affidavit, in which he asserts that:

> My wife was present each day at the trial to support me, she had supper with me and she stayed with me two or three nights at the motel I stayed at during the trial. She continuously believed that I was innocent. I know this because she communicated it to me.

Second, Petitioner submits certain records from the Oklahoma Department of Human Services. Those records indicate: (1) during an interview on February 5, 2006, Mrs. Whitely said, in reference to the allegations, "I just can't see it," later "seemed to be leaning toward believing [K.B.] and accepting the possibility that the allegations [were] true," and subsequently stated that her "gut was telling her" the events described in K.B.'s allegations did not occur; (2) on May 31, 2006, a DHS employee and K.B.'s attorney observed Petitioner and Mrs. Whitely hugging and

[11] Petitioner also argues that Mrs. Whitely testified falsely when she testified that a divorce action was pending. Significantly, Petitioner first raised the divorce testimony in federal court in his objections to the Magistrate Judge's report and recommendation. "Issues raised for the first time in objections to the magistrate judge's recommendation are deemed waived." Marshall v. Chater, 75 F.3d 1421, 1426 (10th Cir. 1996).

kissing each other for eight minutes after a court hearing; (3) on August 25, 2006, when the DHS employee confronted Mrs. Whitely about the May 31, 2006 events, Mrs. Whitely said she believed Petitioner "at that time but now has no doubts that [Petitioner] hurt [K.B.]"; and (4) during an assessment of Mrs. Whitely's home on August 28, 2006, Mrs. Whitely made a comment that led a DHS employee to believe that Mrs. Whitley did not believe Petitioner abused K.B. Those events occurred before the trial in this matter.

Third, Petitioner cites witness testimony at his sentencing, which indicates that Mrs. Whitely did not believe K.B.'s allegations against him.

Petitioner also directs us to the prosecution's closing argument. There, the prosecution argued that the jurors "didn't hear [K.B.'s] mom come in here and you didn't hear her mom say she was a liar. And she would be the one who would know more than anyone."

The Respondent argues, among other things, that the prosecutors did not violate Napue because the "alleged false testimony was about [Mrs. Whitely's] subjective state of mind during the trial" and, as such, "[t]he only person who could ever know whether Mrs. Whitely's answer was true or false [wa]s Mrs. Whitely."

We conclude that this claim lacks merit even if we review it *de novo*.[12] But before we explain why we conclude that the prosecution did not violate Napue, we must

[12] Petitioner argues that the state courts did not address this claim and that he is entitled to *de novo* review. We do not resolve that issue because, as we noted above, his claim also fails when we review it *de novo*.

emphasize the limited nature of our holding. In this opinion, we do not determine whether Napue may ever apply to subjective intentions or beliefs. We also do not decide whether the prosecution may violate Napue when a witness's statements regarding their subjective belief or intentions at trial conflict with prior unequivocal statements regarding the witness's beliefs or intentions prior to trial. Our holding here is more modest; we merely hold that where a witness: (1) makes equivocal or contradictory statements regarding her intentions or beliefs prior to trial; (2) then testifies regarding her current subjective intentions or beliefs *at the time of trial* in a manner inconsistent with some of those prior statements and consistent with others; and (3) no other evidence indicates that the prosecution knew the witness's testimony was false, the petitioner has not made a sufficient showing that the prosecution knew the trial testimony was false.

We reach this conclusion for several reasons. First, the subjective nature of this inquiry renders it difficult for the prosecution to determine whether a witness is lying, even if the witness's prior statements are inconsistent with the witness's statement regarding her current beliefs and intentions. And if the witness has made contradictory or equivocal statements in the past, it would be even more difficult for the prosecution to know the truth or falsity of the statement at trial.

Second, under these circumstances, the evidence available to the prosecutor regarding the witness's subjective intentions and beliefs is essentially ambiguous. When presented with ambiguous evidence, the prosecution is entitled to argue the view of that evidence most favorable to it. See United States v. Blueford, 312 F.3d 962, 968 (9th Cir. 2002) ("It is certainly within the bounds of fair advocacy for a prosecutor, like any

lawyer, to ask the jury to draw inferences from the evidence that the prosecutor believes in good faith might be true. But it is decidedly improper for the government to propound inferences that it knows to be false, or has very strong reason to doubt, particularly when it refuses to acknowledge the error afterwards to either the trial court or this court and instead offers far-fetched explanations of its actions."). If we were to hold that, in a case like this, the government must inform the jury that the less favorable view of ambiguous evidence was correct, we would infringe on the prosecution's right to present its case.

Here, Petitioner has not shown that the prosecution knew that Mrs. Whitely's testimony was false. As we previously discussed, Petitioner directs the court to certain evidence to support his claim. But it is clear that the prosecution did not know Mrs. Whitely's *sentencing* testimony during the trial. Petitioner also does not direct us to any evidence that the prosecution was aware of the facts Petitioner asserts in his affidavit. Thus, the only evidence pertinent to the prosecution's knowledge at trial is the evidence contained in the DHS records. That evidence is equivocal and reflects shifting positions by Mrs. Whitely. Based only on that evidence, no reasonable factfinder could conclude that the prosecution knew Mrs. Whitely's testimony was false.

2.

Petitioner also argues that the prosecution, in violation of his due process rights, prevented Mrs. Whitely from testifying that she did not believe K.B.'s allegations by repeatedly informing her that her children would not be returned to her if she supported Petitioner.

To establish a violation of his due process rights, Petitioner must "provide evidence that there was actual government misconduct in threatening or intimidating potential witnesses and that such witnesses otherwise would have given testimony both favorable to the defense and material." United States v. Allen, 603 F.3d 1202, 1211 (10th Cir. 2010).

a. Prior Decisions

The state district court rejected this claim for several reasons:

> In his affidavit, trial counsel states that he did not ask certain questions of [Mrs.] Whitely because he believed her fear of DHS might consume her. This was a valid strategic reason not to ask particular questions-counsel did not know whether [Mrs.] Whitely's testimony would assist his client. Furthermore, the affidavit of Kelly Whitely now proffered is inconsistent with other statements. In particular, that the child always lied and made bad grades. The affidavit offered by the child's teacher indicates that she was her "top student", was not dishonest and was a very moral child. See Affidavit of Julie Curry. This was also indicated by the Affidavit of [M.M.] (offered by the Defendant) when she stated that [K.B.] never lied about big stuff and only told little white lies. In addition, the Affidavit of Michael Baker (offered by the Defendant) calls into question the character and credibility of Kelly Whitely. All of this evidence, offered by the Defendant, tends to cast doubt on the credibility of the statement of Kelly Whitely offered long after she "had nothing left to lose".
>
> These issues also are relevant to the claim of Prosecutorial Misconduct raised by the Defendant. [Mrs.] Whitely states that she was pressured into not supporting her husband, the defendant, for fear of reprisals from DHS. However, nothing in the record indicates that the statements made by the prosecution or DHS were false nor that anyone indicated to [Mrs.] Whitely that she should make false statements in court. The Court in Roy v. State, 2006 OK CR 4 7, stated that "Relief will be granted on a prosecutorial misconduct claim only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon. In this matter, because the statements of [Mrs.] Whitely are highly susceptible to credibility attacks (as stated above) and that there is no evidence that a legal action on behalf of the

> State in removing her children caused her to testify falsely, the claim of prosecutorial misconduct must also fail.

Order dated Nov. 24, 2015, Whitely, No. CF-2006-250, slip op. at 11–12.

> The OCCA affirmed. In its opinion, it noted that:
>
> > The victim's mother, Kelly Whitely, claimed that she felt pressured into not supporting her husband, Whitely, based on DHS's threats of reprisal. [The state district court] noted there was no supporting evidence in the record for the claims that statements made by the prosecution or DHS were false, nor was there any evidence to support a finding that Kelly Whitely was encouraged to make false statements at trial. The court determined that Kelly Whitely's affidavit offered in support of Whitely's application for post-conviction relief contained statements which were inconsistent with statements made by other witnesses, and are "highly susceptible to credibility attacks". [The state district court] also found that there was no evidence that Kelly Whitely was coerced into giving false testimony at trial based on a threat of legal action to remove her children from her custody. The court found the claim of prosecutorial misconduct did not warrant relief.

Order Granting Request to Associate Counsel and Affirming Denial of Post-Conviction Relief, Whitely, No. PC 2015-1120, slip op. at 5. The OCCA then indicated that it agreed with the lower's court's resolution of the issue. Id. at 6. The OCCA later elaborated that:

> [Trial counsel] also confirms that [Petitioner] wanted to testify in his defense, but that he . . . ultimately convinced [Petitioner] not to take the stand. [Trial counsel's] statement regarding Kelly Whitely reads as follows:
>
> > 16. I realize also that the jury missed some critical information from my client's wife who is also [K.B.'s] . . . mother. Although I had some reasons, at the time, for what I did and did not ask Kelly Whitely, I think it would have had a major impact on the jury if the jury had known that Kelly Whitely did not believe the allegations against my client and that [K.B.] lied on many occasions.
>
> The affidavit clearly indicates, while not being specific, that [trial counsel] had reasons for not asking Kelly Whitely questions which she now indicates

> in her affidavit she would have been willing to answer. As noted in this Court's prior order, the question to be resolved is whether or not Kelly Whitely refused to answer these questions because she was truly intimidated by D.H.S. and the prosecution or whether at this point, having nothing to lose, she has changed her story. The real question is, had Kelly Whitely testified that she disbelieved the victim and believed her husband, would the results at [Petitioner's] trial have been different.
>
> Although he asserts that Kelly's testimony might have had an impact on the jury, defense counsel . . . states that he had an unspecified reason for limiting his questioning of Kelly Whitely. We cannot find this strategic behavior to be objectively unreasonable. Additionally, as noted by [the state district court], several of the affidavits offered by [Petitioner] in his post-conviction application call into question Kelly Whitely's credibility and her character for truthfulness. The post-conviction claim is that Kelly was faced with a difficult choice when appearing at [Petitioner's] trial. We do not disagree. However, after the trial and prior to knowing that D.H.S. would not be returning her children to her custody, Kelly wrote a letter to the district court prior to [Petitioner's] sentencing advising the court that she did not believe [Petitioner] committed the offenses and expressing her belief that [K.B.] was lying. It is difficult to reconcile Kelly Whitely's claim that she was too intimidated to testify at trial because she feared losing her children but she was not afraid of losing them when she chose to write a letter on [Petitioner's] behalf prior to sentencing.

Id. at 8–9.

The federal magistrate judge recommended that the district court deny relief on this claim. The magistrate judge's report and recommendation reasoned that:

> First, as noted above, Petitioner must initially show that the State actually and substantially interfered with Mrs. Whitely's decision to testify. See supra p. 26, 123 S. Ct. 357. But Mrs. Whitely did in fact testify, and as a defense witness. See Tr. Vol. IV at 819-26. According to Mrs. Whitely's testimony, she regularly checked K.B.'s undergarments for blood, believing K.B. would soon begin menstruating, and never found any. Id. at 820-21. Moreover, Petitioner claims that had trial counsel asked her at trial, Mrs. Whitely "would have testified" about K.B.'s lying. Pet. at 52-53. Finally, as the OCCA noted, Mrs. Whitely wrote a letter to the district court, approximately one-month after trial, claiming that she did not believe K.B. and asking the court to overturn the verdict. Or. at 158 (filed stamped Feb. 22, 2007). Then, in March 2007, Mrs. Whitely testified at Petitioner's

> sentencing and after *repeated* cautions from the district court that her statements could be used against her in the DHS case, Mrs. Whitely said she was "going to stand by my letter." Tr. of Partial Proceedings (dated March 29, 2007) at 4-6, 10-11, 13-17. The OCCA found, essentially, that this evidence showed a lack of substantial coercion and this Court presumes that factual finding to be correct. See, e.g., Johnson v. Zavaras, 141 F.3d 1184, 1998 WL 141968, at *1 (10th Cir. Mar. 30, 1998) (unpublished op.) (holding, in the context of a confession, "an underlying factual determination that the police did not engage in coercive conduct is presumed correct"). Petitioner has not provided clear and convincing evidence to overcome that presumption of correctness.
>
> Second, Petitioner must show that Mrs. Whitely's testimony would have been material and favorable to his defense, and not merely cumulative to other witnesses' testimony. See supra p. 26, 123 S. Ct. 357. As discussed above, trial counsel elicited testimony regarding K.B.'s alleged dishonesty, and while certainly her mother could have given "favorable testimony," this is insufficient to show prosecutorial misconduct through coercion of a witness. Id. Petitioner has failed to demonstrate that his specific right to put forth a defense was so prejudiced as to be a denial of that right, and therefore, the OCCA's rejection of Petitioner's prosecutorial misconduct claim on this issue was a reasonable application of federal law.

Whitely, 2018 WL 1733997, at *13–14, report and recommendation adopted, 2018 WL 1732072 (emphasis in original).

The district court adopted the report and recommendation. In its order, it stated:

> Of the various matters relied on by petitioner here, the evidence as to DHS's dealings with Mrs. Whitely is the most troubling to this court. However, the OCCA accurately noted that Mrs. Whitely testified in her husband's favor at the later sentencing hearing despite the same pressures being potentially present, and there is therefore a plausible basis for the OCCA's conclusion that that appellate counsel was not constitutionally ineffective for not raising that issue on appeal. While this court might not have reached that conclusion if making the determination in the first instance, that is not the nature of the court's determination here. Rather, the question is whether the OCCA's resolution of the issue was unreasonable under the deferential AEDPA standard, and it was not.

Whitely, 2018 WL 1732072, at *2 (footnotes omitted).

b. Analysis

Petitioner argues that the OCCA's determination is an unreasonable application of Webb v. Texas, 409 U.S. 95 (1972).[13] In that case, the Supreme Court determined that the government violated a defendant's due process rights when a defense witness refused to testify due to improper government interference. Id. at 95–98. By contrast, Mrs. Whitely never refused to testify. In fact, as we previously noted, she provided some exculpatory testimony when questioned by defense counsel.

Petitioner nevertheless asserts that Webb establishes that the government violated his due process rights when, allegedly due to government pressure on Mrs. Whitely, (1) defense counsel decided not to ask her certain questions because he was unsure whether Mrs. Whitely would answer truthfully, and (2) Mrs. Whitely did, in fact, answer certain questions untruthfully.

When determining whether a state court holding violates clearly established federal law, as determined by the Supreme Court, we narrowly construe the Supreme Court's holdings. See Fairchild I, 784 F.3d at 710. For that reason, the first issue—whether defense counsel's response to government pressure on Mrs. Whitely rendered the governmental pressure a violation of due process—is a legal principle that falls outside the reach of Webb. Nothing in Webb indicates that Petitioner may assert a due process

[13] Petitioner also contends that the OCCA's decision is incompatible with Lynumn v. Illinois, 372 U.S. 528 (1963). That case only addresses whether the government's conduct was coercive. Because we determine that Petitioner is not entitled to relief even if we determine the government's conduct was coercive, we need not determine if the OCCA's decision contravenes Lynumn.

claim because his trial counsel refrained from asking a witness certain questions rather than asking the questions and seeking relief, if necessary, based on the witness's responses. Because Webb does not authorize such a claim, Petitioner has not shown that the state courts unreasonably applied clearly established federal law with respect to the testimony that Mrs. Whitely claims she would have provided in response to questioning from counsel.

The second issue—whether clearly-established federal law provides that a defendant's due process rights are violated when government pressure results in false testimony—presents a more difficult question. But we need not resolve that question here because we conclude that any error was harmless.

In the § 2254 context, we generally may only grant habeas relief if, after applying de novo review, we determine that the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). That harmless error standard requires a greater showing of prejudice than the standard that state courts apply on direct appeal. See id.

We have not previously addressed whether Brecht applies to Webb claims. But a number of other circuits apply harmless error analysis to such claims. See, e.g., Earp v. Davis, 881 F.3d 1135, 1145 (9th Cir. 2018); United States v. Foster, 128 F.3d 949, 953 (6th Cir. 1997); United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991); United States v. Pinto, 850 F.2d 927, 932–33 (2d Cir. 1988); United States v. Weddell, 800 F.2d 1404, 1411 (5th Cir. 1986), opinion amended on denial of reh'g, 804 F.2d 1343 (5th Cir.

1986); Peeler v. Wyrick, 734 F.2d 378, 381–82 (8th Cir. 1984). Moreover, we apply Brecht to Napue claims. See Mitchell v. Gibson, 262 F.3d 1036, 1062 n.13 (10th Cir. 2001). And we see no meaningful basis for applying Brecht to Napue claims in the § 2254 context but not to Webb claims in that context. Thus, we apply Brecht to this claim.[14]

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[14] In Brecht, the Supreme Court noted that its decision did not

> foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury's verdict.

Brecht, 507 U.S. at 638 n.9. We consider the application of this exception *sua sponte* because we raise the Brecht standard *sua sponte*.

Significantly, we have never held that a habeas case presented such an error. Indeed, in Duckett v. Mullin, 306 F.3d 982 (10th Cir. 2002), we held this exception did not apply when: (1) a prosecutor "had made improper remarks such as, in arguing for the death sentence, asking the jury whether it would serve 'justice [to] send this man down to prison, let him have clean sheets to sleep on every night, three good meals a day, visits by his friends and family, while [the victim] lies cold in his grave?'"; (2) the prosecutor "'ha[d] been chastised for participating in the same type of improper argumentation in other cases'"; (3) "'our past experiences with this prosecutor le[ft] us convinced that his inappropriate commentary at trial was intentional and calculated'"; and (4) we noted both that "the prosecutor's 'persistent misconduct . . . has without doubt harmed the reputation of Oklahoma's criminal justice system and left the unenviable legacy of an indelibly tarnished legal career'" and that "[o]ur nation's confidence in the fair and just administration of the death penalty is disserved by prosecutors who cynically test the bounds of the harmless-error doctrine." Underwood v. Royal, 894 F.3d 1154, 1176–77 (10th Cir. 2018) (alterations and ellipsis in original) (quoting Duckett, 306 F.3d at 992–94). We nevertheless concluded that the prosecutorial misconduct did not so infect the integrity of the proceeding that the entire trial was unfair. Duckett, 306 F.3d at 995.

We are satisfied that this case also does not present such an error for two reasons. First, as we determined above, no reasonable factfinder could conclude the prosecution knew Mrs. Whitely's testimony was false. Second, although we do not decide whether the government's interaction with Mrs. Whitely constituted coercion,

The statement at issue here—that Mrs. Whitely was not at the trial to support her husband—was ambiguous. While that statement could lead a jury to conclude that she believed the allegations against Petitioner, the statement does not compel such a conclusion.[15] Further, K.B. testified at trial that: (1) she and her mother had talked about whether her mother believed the allegations and, when asked whether she thought her mother believed her, said "No, not really"; and (2) she did not want to live with her mother, and one of her main problems she had with her mother was that her mother did not believe her.

Mrs. Whitely also provided exculpatory evidence for Petitioner. For example, she testified that she had never seen "any blood or anything like that in [K.B.'s] underwear or on her clothes," and that she was looking for blood because she had expected K.B. to start menstruating. Mrs. Whitely did not testify that she was aware of any facts that indicated the allegations were true.

The prosecution argued that the jurors "didn't hear [K.B.'s] mom come in here and you didn't hear her mom say she was a liar. And she would be the one who would know more than anyone else." That argument was arguably inappropriate because neither the defense nor the prosecution had asked Mrs. Whitely whether K.B. was a liar. But, at the same time, we are not convinced that any prejudice from that

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even if it did, that conduct was not especially egregious in light of the parallel child placement proceedings.

[15] Indeed, the same is true of Mrs. Whitely's testimony that a divorce was pending between her and the Petitioner.

argument resulted from Mrs. Whitely's testimony that she was not at the trial to support Petitioner.

Under these circumstances, we conclude that Mrs. Whitely's testimony that she was not at the trial to support Petitioner—even if that testimony was false—had no substantial or injurious effect or influence on the jury's verdict. That testimony was therefore harmless.

IV.

For the reasons stated above, we AFFIRM the district court's denial of federal habeas relief under 28 U.S.C. § 2254.

Entered for the Court

Joel M. Carson III
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

December 4, 2018

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LARRY ALAN WHITELY,

Petitioner - Appellant,

v.

JIM FARRIS,

Respondent - Appellee.

No. 18-6085
(D.C. No. 5:16-CV-00514-HE)
(W.D. Okla.)

ORDER GRANTING CERTIFICATE OF APPEALABILITY

CARSON, Circuit Judge.

A state district court jury in Cleveland County, Oklahoma, convicted Petitioner Larry Alan Whitely of two counts of lewd molestation of a minor. The state district court then sentenced Petitioner to concurrent terms of twenty years' imprisonment on each count. After the Oklahoma Court of Criminal Appeals affirmed his conviction, Petitioner engaged in lengthy post-conviction relief proceedings in Oklahoma state court. The state district court initially concluded Petitioner had established ineffective assistance of appellate counsel. The Oklahoma Court of Criminal Appeals reversed and remanded. The district court then determined Petitioner's counsel's failure to raise certain issues on appeal did not prejudice him. The Oklahoma Court of Criminal Appeals affirmed and denied post-conviction relief.

Petitioner then sought to vacate his sentence pursuant to 28 U.S.C. § 2254. The federal district court denied the motion and a request for a certificate of appealability. Petitioner asks us for the certificate, and we grant it.

I.

In 2006, Petitioner's step daughter, K.B., then in fifth grade, passed a note to her friends N.M. and L.W. at school stating that her dad rapes her. L.W. told her mother about the note. Authorities removed K.B. from her home. Tracy Koelling, a forensic interviewer, subsequently interviewed K.B. Law enforcement officer Jeffrey Cox observed the interview. K.B. denied worrying about anything, said she missed her cat, and told Koelling she felt safe in her home. Two days later, Cox interviewed K.B. K.B. continued to say she missed her mother, wanted to go home, and had nothing further to say. Cox asked K.B. about the note. K.B. denied passing the note, said a friend had passed the note, and said the friend had falsely reported the content of the note. Cox told K.B. that he had talked to N.M. and L.W. and she needed to tell him what was wrong. K.B. then began to cry and made rape allegations against Petitioner.

Koelling again interviewed K.B. two days later. Cox told Koelling that K.B. had made more disclosures. K.B. told Koelling that Petitioner anally raped her 60 to 100 times over the past year. She said that she enjoyed wrestling with Petitioner but that the wrestling would lead to forced anal rape. K.B. said she fought every time. She said Petitioner did not use lubrication but also stated that the anal rapes did not

hurt or make her bleed. K.B. described Petitioner's penis as "soft and gooey" during the attacks and his ejaculate as "really cold."

Dr. Mark McKinnon examined K.B. for evidence of sexual abuse. He did not find any such evidence.

Following trial and sentencing, Petitioner raised ineffective assistance claims against both his trial and appellate counsel because of his counsels' alleged failure to investigate and present what he believes are "obvious medical, forensic interview and lay witness defenses." Petitioner included supporting expert affidavits from doctors and supporting lay witness affidavits regarding what he terms "K.B.'s lifelong history of dishonest, manipulative, false-accusing, attention-seeking conduct." Additionally, Petitioner alleged the State engaged in prosecutorial misconduct. Specifically, he asserted that prosecutors threatened his then-wife with permanent loss of her children if she did not believe and support K.B.'s claims and the State's presentation of his then-wife's allegedly false testimony that she did not support Petitioner. Petitioner requested a full evidentiary hearing and discovery. The state trial court granted an evidentiary hearing on his ineffective assistance of counsel claims but limited the hearing to what appellate counsel did or did not do. It denied Petitioner's discovery request, although it allowed for appellate counsel's deposition.

The federal district court denied Petitioner's request for habeas relief pursuant to 28 U.S.C. § 2254 and denied his request for a certificate of appealability. Petitioner now requests a certificate of appealability from us on three issues: (1) whether the district court unreasonably denied relief based on prosecutorial coercion

of defense witnesses, where state actors coerced the accusant's mother with repetitive threats that her children would not be returned if she did not believe and support her daughter; (2) whether the district court unreasonably denied relief based on the State's presentation of false evidence from the accusant's mother that informed the jury she did not support her then-husband when the State knew that she did; and (3) whether the district court unreasonably denied relief on Petitioner's claims of ineffective assistance. As to the ineffective assistance of counsel claim, Petitioner posits that: (1) counsel failed to investigate and present medical and forensic expert testimony to contradict the State's medical expert, who advised the jury that physical evidence would not be found in approximately 90% of child sexual abuse cases, as well as the State's investigators, who both vouched for the reliability of their investigation and violated protocols necessary to guard against false allegations; and (2) counsel failed to investigate and present family members and friends to impeach the accusant's credibility with her history of dishonest, manipulative, attention-seeking, false-accusing behavior. We grant Petitioner a certificate of appealability on all of these claims of error.

II.

Petitioner must make "a substantial showing of the denial of a constitutional right" to obtain a certificate of appealability. 28 U.S.C. § 2253(c). This showing is made only if "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v.

McDaniel, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). This threshold inquiry "does not require full consideration of the factual or legal bases adduced in support of the claims." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

III.

Petitioner argues the prosecution engaged in misconduct by: (1) threatening his then-wife with the loss of her children if she did not believe K.B.'s accusations, and (2) knowing that his then-wife did not believe Petitioner was guilty, but knowingly presenting false evidence to the jury that his then-wife was not at trial to support her husband. This allegedly prevented Petitioner from putting forth a defense through his wife. Additionally, Petitioner raises ineffective assistance of counsel. We address each issue in turn.

A.

A reasonable jurist could find merit in Petitioner's appeal as to whether prosecutors engaged in misconduct by threatening his then-wife with the loss of her children if she did not believe K.B.'s accusations. Intimidation or threats that discourage a potential witness from testifying may infringe a defendant's due process rights. Webb v. Texas, 409 U.S. 95, 98 (1972) (concluding that the judge's treatment of defendant's sole witness drove the witness from the stand). "The circumstances will warrant reversal only if the government's conduct interfered substantially with a witness's 'free and unhampered choice' to testify." United States v. Pinto, 850 F.2d 927, 932 (2d Cir. 1988) (citing United States v. Goodwin, 625 F.2d 693, 703 (5th Cir. 1980)).

That may have happened here. Petitioner believes the record indicates that the Oklahoma Department of Human Services ("DHS") refused to return legal and physical custody of two minor children to Petitioner's then-wife because she did not believe that her husband had raped her daughter and because she had vocally stated that belief to DHS. DHS told her that she had to not only believe her daughter's rape claim but also not support her husband in any way at his trial. According to his then-wife, she would have testified for her husband and against K.B. if she could have without losing custody of her children. Prior to sentencing, she sent a letter to the trial court stating that DHS and the district attorney told her that she must believe her daughter in order to ever obtain custody of her children.

If Petitioner is able to prove that the prosecution threatened Petitioner's then-wife with the loss of her children if she testified favorably for Petitioner, a reasonable jurist could find a violation of Petitioner's due process rights.

B.

A reasonable jurist could also find merit in Petitioner's appeal on his second prosecutorial misconduct argument—that the prosecutor elicited false testimony from Petitioner's then-wife. "[I]t is established that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Napue v. Illinois, 360 U.S. 264, 269 (1959). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id.

Again, that *may* have happened here. Petitioner asserts record evidence supports his contention that prosecutors knew his then-wife testified falsely to maintain custody of her children. Petitioner contends the false evidence directly impacted the question of who was credible and that the State's elicitation of false testimony, in conjunction with its coercion against her, simultaneously prevented truthful exculpatory evidence from going to the jury.

If Petitioner is able to prove the prosecution knowingly elicited false testimony from Petitioner's then-wife, a reasonable jurist could find a violation of Petitioner's due process rights.

C.

Petitioner next argues his trial and appellate counsel were deficient. Specifically, Petitioner alleges his counsel were ineffective for failing to: (1) investigate medical expert testimony; (2) investigate a medical defense; (3) investigate available expert testimony to refute the State's investigation and Koelling and Cox's testimony; and (4) investigate and present witness testimony to discredit K.B. We analyze his claim under a two-part test. Strickland v. Washington, 466 U.S. 668, 687 (1984). Under this test, Petitioner must show: (1) deficiency in counsel's performance, and (2) resulting prejudice. Id. The deficiency prong requires Petitioner to show that the legal representation "fell below an objective standard of reasonableness." Id. at 687–88. The prejudice prong requires Petitioner to show that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Id. at 694.

A reasonable jurist could find merit in Petitioner's appeal on the deficiency prong. First, as to Petitioner's challenge to the adequacy of his counsels' investigations into medical expert testimony and a medical defense, the Supreme Court has stated that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 690–91.

Under the circumstances of this case, a reasonable jurist could find deficiency in Petitioner's counsels' decisions not to conduct any investigation into the lack of medical evidence of sexual abuse. Although K.B. accused Petitioner of anally raping her repeatedly over a one-year period, no medical evidence corroborated this. Despite this apparent inconsistency, however, counsel conducted no investigation into the availability of medical expert testimony to support Petitioner's defense. Counsel did not make an effort to support Petitioner's claim of innocence with disinterested medical testimony or other medical evidence suggesting that K.B.'s allegations were not credible. Petitioner provided a Declaration from Dr. John Stuemky, head of Oklahoma University's Child Protection Team, to demonstrate prejudice from his counsels' failure to investigate medical expert testimony.

If Petitioner is able to prove this, a reasonable jurist could find deficiency in Petitioner's legal representation by failing to conduct any investigation into the

significance of the lack of medical evidence that K.B. had been sexually abused. Holsomback v. White, 133 F.3d 1382, 1388 (11th Cir. 1998).

Next, Petitioner argues that his counsel was deficient by failing to investigate available expert testimony to refute the State's investigation and Koelling and Cox's unfavorable testimony regarding K.B.'s allegations. At trial, all testifying experts affirmed the State's series of interviews and results of their investigations. Contrary to her trial testimony, Petitioner asserts Koelling now admits K.B. may have fabricated her accusations. Trial counsel failed to communicate with his defense expert and mistakenly believed she was a forensic interview expert. Trial counsel admits not preparing for her testimony. Petitioner contends this expert's conclusion negated trial counsel's defense and negated Petitioner's forensic interview defense with his own expert, which he believes was unqualified. Petitioner asserts his trial counsel was factually unaware that the chosen expert was not a qualified forensic interview expert.

A reasonable jurist could find deficiency in the legal representation by counsel's failure to communicate with the witness and learn about the content of her planned testimony. Stevens v. McBride, 489 F.3d 883, 896 (7th Cir. 2007) (presenting expert testimony about which lawyers were "utterly in the dark" was a "complete failure of the duty to investigate with no professional justification").

Finally, a reasonable jurist could find deficiency in the legal representation by counsel's failure to investigate and present witness testimony regarding K.B.'s character. Petitioner argues that the trial contained no physical evidence, no

confession, and no eyewitnesses. Petitioner asserts that the only evidence was the "testimony of a young accusant who contradicted herself and was a notorious liar." Again, Petitioner contends that his counsel did not investigate his defenses. The decision not to call particular witnesses is often a strategic decision related to trial strategy. The decision, however, could also be "not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated 'strategic' and been especially reluctant to disturb." Pavel v. Hollins, 261 F.3d 210, 218 (2d Cir. 2001).

For Petitioner to prevail, Petitioner must show that but for his counsel's deficiency, the result of the proceeding would have been different. Reasonable jurists may ultimately reject the ineffective assistance claim based on failure to satisfy this element. But at this point, Petitioner has shown that a reasonable jurist *could* find merit in his appeal. That is all we require for a certificate of appealability.

IV.

We grant Petitioner's request for a certificate of appealability on all issues in his opening brief. Respondent shall file a response brief within 30 days of the date of this order. Petitioner may file a reply brief 21 days thereafter.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

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

LARRY ALAN WHITELY,	)	
	)	
Petitioner,	)	
vs.	)	NO. CIV-16-0514-HE
	)	
JIM FARRIS, Warden,	)	
	)	
Defendant.	)	

JUDGMENT

In accordance with the order entered on this date, petitioner's application for writ of habeas corpus is denied. A certificate of appealability is also denied.

IT IS SO ORDERED.

Dated this 10th day of April, 2018.

JOE HEATON
CHIEF U.S. DISTRICT JUDGE

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

LARRY ALAN WHITELY,	)	
	)	
Petitioner,	)	
vs.	)	NO. CIV-16-0514-HE
	)	
JIM FARRIS, Warden,	)	
	)	
Defendant.	)	

ORDER

Petitioner Larry Alan Whitely is a state prisoner who seeks habeas relief pursuant to 28 U.S.C. § 2254. He was convicted in the District Court of Cleveland County, State of Oklahoma, of two counts of lewd molestation of a minor. He was sentenced to concurrent terms of twenty years imprisonment on each count.

Mr. Whitely appealed his conviction to the Oklahoma Court of Criminal Appeals ("OCCA"), which affirmed the conviction. He then sought post-conviction relief and a somewhat unusual series of post-conviction proceedings followed. The state district court conducted an evidentiary hearing as to certain of his claims, but denied post-conviction relief. On appeal, the OCCA reversed and remanded for further proceedings. The district court then determined that Mr. Whitely had established ineffective assistance of appellate counsel and granted him a new direct appeal. Petitioner appealed that determination, contending the appropriate remedy was a new trial. The OCCA reversed again and remanded, with instructions to the district court to determine whether the ineffective assistance was ultimately prejudicial to petitioner. In further proceedings in the district court, the court then examined in detail whether petitioner had received ineffective

assistance of trial counsel. It concluded he had not and that, as a result, there was no prejudice to petitioner from his appellate counsel's failure to raise on appeal the various IAC issues as to trial counsel. Mr. Whitely appealed that determination to the OCCA, which affirmed the district court's order.

Petitioner then sought habeas relief in this court. The matter was referred to U. S. Magistrate Judge Bernard Jones for initial proceedings. Judge Jones has issued a Report and Recommendation (the "Report") recommending that habeas relief be denied. Petitioner has filed an extensive and detailed objection to the Report, triggering *de novo* review by the court of the matters to which objection had been made.

The factual background is described in the Report and need not be recounted here. Further, the Report accurately sets out the standard for review in this habeas proceeding. That standard is deferential—indeed, doubly deferential as to certain issues—to the OCCA's resolution of the issues raised here, all of which were first considered in the state court proceedings.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), this court may grant habeas relief only if the state court' adjudication of the issues "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 "was based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) and (2).

Factual findings are not "unreasonable" just because this or some other reviewing court might have found the facts differently in the first instance. Brumfield v. Cain, 135

S. Ct. 2269, 2277 (2015). Rather, this court must defer to the state court determination of the issue so long as "reasonable minds reviewing the record might disagree about the finding in question." *Id.*

A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree on the correctness of the state court's decision." Woods v. Etherton, 136 S. Ct. 1149, 1151 (2016). In other words, this court's review is highly deferential to the determination of the OCCA. Further, as noted above, the review is doubly deferential as to issues involving claims of ineffective assistance of counsel. The Strickland v. Washington, 466 U.S. 688, 690-1 (1984), standard for such claims, like the § 2254(d) standard, is "highly deferential and when the two apply in tandem, review is doubly so." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Applying these standards, the court concludes Mr. Whitely's petition for habeas relief must be denied. His objections to the Report are developed in considerable detail and skillfully argued, but they do not state a basis for relief when tested against the deferential standard applicable here.

It is unnecessary to discuss the various issues in detail, as the court concludes the Report's treatment of them is substantially correct. With respect to the issue of whether trial counsel's performance was deficient for having failed to call certain expert witnesses or to have elicited certain types of testimony from them, the question here is whether the OCCA's determination of the issue was unreasonable under the above standard, and it plainly was not. There was a basis in the record for concluding, based on the experts who did testify and the evidence offered from various sources, that any deficiencies in the use

of experts was not prejudicial. It is no doubt true that, with hindsight, different or better experts might have been identified and used, or the evidence developed more effectively, but that does not necessarily translate into ineffective assistance of counsel. And it certainly does not establish that the OCCA's resolution of the issue was unreasonable or contrary to Supreme Court authority.

Similarly, counsel's failure to call more or different witnesses to testify as to KB's history of dishonesty does not show a basis for relief here. It is clear evidence as to that issue was presented to the jury and the OCCA's conclusion that, in light of that evidence, the absence of further testimony was not prejudicial is not obviously unreasonable.

Finally, petitioner's claim of prosecutorial misconduct based on the treatment of petitioner's wife does not translate into a basis for relief here. Of the various matters relied on by petitioner here, the evidence as to DHS's dealings with Mrs. Whitely is the most troubling to this court.[1] However, the OCCA accurately noted that Mrs. Whitely testified in her husband's favor at the later sentencing hearing despite the same pressures being potentially present,[2] and there is therefore a plausible basis for the OCCA's conclusion that that appellate counsel was not constitutionally ineffective for not raising that issue on appeal. While this court might not have reached that conclusion if making the

[1] *Petitioner's submissions identify instances of DHS personnel effectively assuming, in advance of trial, that petitioner was guilty of the charged crimes and suggesting that any different view by Mrs. Whitely would be viewed as a basis for removing her children from her custody.*

[2] *The chronology of events affords a sufficient basis for the state court's conclusion that Mrs. Whitely would still have been worried about the risk of losing her children at the time of the sentencing hearing.*

determination in the first instance, that is not the nature of the court's determination here. Rather, the question is whether the OCCA's resolution of the issue was unreasonable under the deferential AEDPA standard, and it was not.

The same is true of that court's determination of the "false evidence" claim. There is a factual basis for viewing Mrs. Whitely answer to the "why are you here" question as being literally true, and the OCCA's determination as to lack of prejudice is not obviously unreasonable.

In sum, the court concludes Mr. Whitely's request for habeas relief must be denied for substantially the reasons stated in the Report.[3] The Report is therefore **ADOPTED**. Petitioner's petition for writ of habeas corpus [Doc. #1] is **DENIED.**

IT IS SO ORDERED.

Dated this 10th day of April, 2018.

JOE HEATON
CHIEF U.S. DISTRICT JUDGE

[3] *In his objections, petitioner challenges some of what he characterizes as factual "findings" by the magistrate judge. Of course, the magistrate judge was not making factual findings in the ordinary sense, but was simply determining the presence or absence of evidence to support the conclusions reached by the state courts.*

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

LARRY ALAN WHITELY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CIV-16-514-HE
	)	
JIM FARRIS, Warden, Lexington Assessment and Reception Center,	)	
	)	
Respondent.	)	

REPORT AND RECOMMENDATION

Petitioner, Larry Alan Whitely, appearing through counsel, filed a Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [Doc. No. 1] challenging his state court conviction in Case No. CF-2006-250, District Court of Cleveland County, State of Oklahoma. Chief United States District Judge Joe Heaton has referred the matter for proposed findings and recommendations consistent with 28 U.S.C. § 636(b)(1)(B) and (C). Respondent has filed a Response [Doc. No. 14] and the State Court Records [Doc. Nos. 16, 19],[1] and Petitioner has filed a Reply [Doc. No. 17]. For the reasons set forth below it is recommended that the Court DENY the Petition.

I. Relevant Procedural History

The State tried Petitioner on two counts of lewd molestation of a minor. *See* Or. at 54-55.[2] The jury convicted Petitioner on both counts, and per the jury's recommendation, the trial court

[1] The state court records include the Transcript of Jury Trial Proceedings held on January 24-29, 2007, hereinafter "Tr.___," and the Original Record, hereinafter "Or.___." The records also include the State's trial exhibits, hereinafter "State's Ex. ___."

[2] Citations to the jury trial transcripts and original records refer to the original pagination in those documents. Citations for all other documents will refer to this Court's CM/ECF pagination.

sentenced Petitioner to twenty year's imprisonment on both counts, to be served concurrently. *See id.* at 148, 176-77.

Thereafter, Petitioner filed a direct appeal to the Oklahoma Court of Criminal Appeals (OCCA). *See* Brief of Appellant [Doc. No. 14-Ex. 1]. The state appellate court affirmed the conviction. *See* OCCA Summary Opinion [Doc. No. 14-Ex. 3]. Then, Petitioner filed an application for post-conviction relief, raising in relevant part claims involving prosecutorial misconduct and ineffective assistance of trial and appellate counsel. *See* Petitioner's Application for Post-Conviction Relief [Doc. No. 14-Ex. 4]. The state district court found that Petitioner had waived his prosecutorial misconduct and trial counsel claims and then ordered an evidentiary hearing on Petitioner's ineffective assistance of appellate counsel claim. *See* Order [Doc. No. 14-Ex. 5]. After the evidentiary hearing, the state court denied relief. *See* Order [Doc. No. 14-Ex. 6]. Petitioner appealed, and the OCCA reversed and remanded for further proceedings. *See* OCCA Order Reversing District Court Order Denying Application for Post-Conviction Relief and Remanding for Further Proceedings [Doc. No. 14-Ex. 7]. On remand, the state district court held that Petitioner had successfully shown that appellate counsel's conduct was deficient, and granted Petitioner a new direct appeal. *See* Order [Doc. No. 14-Ex. 8]. Petitioner appealed on grounds that his remedy should have been a new trial. *See* Petition in Error [Doc. No. 14-Ex. 9]. The OCCA reversed and remanded on two grounds, holding the state district court had failed to consider whether appellate counsel's performance was also prejudicial and that a new appeal was not an available remedy. *See* OCCA Denying Application for Post-Conviction Relief and Remanding Matter to District Court for Further Proceedings [Doc. No. 14-Ex. 10]. On remand, the state district court crafted a detailed order, examining the merits of Petitioner's underlying prosecutorial misconduct and ineffective assistance of trial counsel claims and finding no grounds

for relief, and thus ultimately concluded that while appellate counsel's performance was deficient, it was not prejudicial. *See* Order (Dist. Ct. Order dated Nov. 24, 2015) [Doc. No. 14-Ex. 11]. The OCCA affirmed the district court's order in Petitioner's subsequent appeal. *See* Order Granting Request to Associate Counsel and Affirming Denial of Post-Conviction Relief (OCCA Order) [Doc. No. 14-Ex. 12].

The present action timely followed.

II. Grounds for Federal Habeas Corpus Relief

Petitioner alleges in Ground One that his trial counsel was ineffective for failing to: (1) investigate a medical defense; (2) investigate and present expert forensic interview testimony; and (3) investigate and present witness testimony to discredit the minor child. *See* Pet. at 17-55. Appellate counsel was allegedly ineffective in failing to investigate so as to raise these claims on direct appeal. *See id.* In Ground Two, Petitioner claims that the State committed prosecutorial misconduct when it threatened a key witness with loss of her children, preventing Petitioner from presenting a defense and allowing false evidence to be admitted at trial. *See id.* at 55-60.[3]

There is no dispute that Petitioner raised his trial counsel and prosecutorial misconduct claims for the first time in post-conviction proceedings. However, Petitioner alleges that ineffective assistance of appellate counsel was "[t]he primary reason for this failure," Pet. at 13, and, if meritorious, such an argument could overcome any procedural bar. *See Ryder ex rel. Ryder*

[3] In his conclusion, Petitioner requests, without any discussion or authority citation, "that the Court consider his claims both singularly and cumulatively." Pet. at 61. While a petitioner may bring an independent claim for habeas relief based on accumulation of error, Petitioner's single, undeveloped reference to the issue is insufficient to raise a proper claim for relief. *See, e.g., United States v. Douglas*, 605 F. App'x 702, 704 n.2 (10th Cir. 2015) (referring to a petitioner's "single description" of an event and noting "[Petitioner] never mentions the concept again in his brief, and as we have said, 'we will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim.'" (citation and internal brackets omitted)). So, the Court should decline Petitioner's conclusory request to consider his claims cumulatively.

v. Warrior, 810 F.3d 724, 747 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 498 (2016) ("A claim of ineffective assistance of appellate counsel can serve as cause and prejudice to overcome a procedural bar, if it has merit."). Recognizing that the Court would have to look to the merits of the underlying claims to determine if appellate counsel was ineffective for purposes of overcoming the procedural bar, and further recognizing that the OCCA ultimately denied the underlying claims on the merits, Respondent concedes that it would be "easier to address the merits of the barred claims." Resp. at 11-14. The Court agrees. *See Brown v. Sirmons*, 515 F.3d 1072, 1092-93 (10th Cir. 2008) ("[I]n the interest of efficiency, we have held that we can avoid deciding procedural bar questions where claims can readily be dismissed on the merits." (citation, internal brackets, and internal quotation marks omitted)).

III. Brief Factual Background

K.B., then in fifth grade, wrote a letter to her friends saying that her stepfather (Petitioner) had raped her, and after one of the friends reported it, K.B. was removed from the home. Tr. of Partial Proceedings (dated Jan. 24, 2007) at 24-27. Thereafter, Tracy Koelling conducted a forensic interview with K.B., and K.B. denied anyone was hurting her at home. Tr. Vol. III at 554, 560 & State's Ex. 11. Then, while she was at a shelter, Moore police officer Jeff Cox came and questioned K.B. *Id.* at 458 & State's Ex. 2. Although K.B. initially denied the allegations, she later said that what she had written to her friends was true and she had not wanted to tell anyone because she did not want to be taken from her parents. *Id.*, State's Ex. 2, 9:41-10:55. K.B. eventually said Petitioner had been putting his "penis in her butthole." *Id.* at State's Ex. 2, 17:39-17:60. Based on this disclosure, Officer Cox took K.B. back to Ms. Koelling, who performed a second forensic interview with K.B. *Id.* at 463-65, 570. During that second interview, K.B. discussed the disclosure in more detail, again saying Petitioner had, on multiple occasions, put his

penis in her bottom. *Id.*, State's Ex. 11. K.B. said she fought back but denied that she had ever bled afterwards. *Id.*, State's Ex. 11, 17:05:30-55.

At trial, K.B. testified that Petitioner had repeatedly placed his penis in her anus, without lubrication, and that she "fought back." Tr. of Partial Proceedings (dated Jan. 24, 2007) at 32, 36-43, 71-73. She stated that "it wouldn't like physically hurt, but it would – it would just feel weird because I know it's not meant to go right there, because he would like have to force it in there." *Id.* at 40. K.B. said during the act, Petitioner's body "would go up and down" and "oozy stuff would come out [of his penis] a few times." *Id.* at 39-40. K.B. told Ms. Koelling that the "gooey stuff" was cold. State's Ex. 11, 17:04:08-35.

IV. Standard of Review

Because the OCCA adjudicated Petitioner's claims on their merits,[4] they are governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Pursuant to the AEDPA, this Court may grant habeas relief only if the state court's adjudication "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 "was based

[4] Because the OCCA had to consider the merits of the underlying prosecutorial misconduct and ineffective assistance of trial counsel claims while analyzing the appellate counsel claim, this Court gives deference to the OCCA's ruling on the underlying claims. *See Smith v. Duckworth*, 824 F.3d 1233, 1242 & n.6 (10th Cir. 2016) ("[B]ecause the OCCA considered the merits of [plaintiff's underlying claim] in considering whether ineffective assistance excused his procedural default, we must apply AEDPA deference to the OCCA's evaluation of that [underlying] claim.").

on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1) and (2).[5]

A state-court decision is contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1) if it "applies a rule that contradicts the governing law set forth in Supreme Court cases or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent." *Ryder ex rel. Ryder*, 810 F.3d at 739 (internal quotation marks omitted). "A state-court decision is an 'unreasonable application' of Supreme Court precedent if the decision 'correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case.'" *Fairchild v. Trammell*, 784 F.3d 702, 711 (10th Cir. 2015) (*quoting Williams v. Taylor*, 529 U.S. 362, 407-08 (2000)).

"Review of a state court's factual findings under § 2254(d)(2) is similarly narrow." *Smith*, 824 F.3d at 1241. Factual findings are not unreasonable merely because on habeas review the court "would have reached a different conclusion in the first instance." *Brumfield v. Cain*, -- U.S. -- 135 S. Ct. 2269, 2277 (2015) (citation omitted). Instead, the court must defer to the state court's factual determinations so long as "reasonable minds reviewing the record might disagree about the finding in question." *Id*. "Accordingly, a state court's factual findings are presumed correct, and the petitioner bears the burden of rebutting that presumption by 'clear and convincing evidence.'" *Smith*, 824 F.3d at 1241 (*citing* 28 U.S.C. § 2254(e)(1)).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Woods*

[5] Without citing any supporting authority, Petitioner argues that "the Court should grant no deference to the Court of Criminal Appeals opinion because it is flawed as to both the law and the facts." Pet. at 61. If Petitioner is correct, he would be entitled to relief *under* the AEDPA standard. *See* 28 U.S.C. § 2254(d)(1), (2).

v. Etherton, -- U.S. --, 136 S. Ct. 1149, 1151 (2016) (internal quotation marks and citation omitted). "The state court decision must be so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id*. (internal quotation marks and citation omitted).

V. Analysis

A. Petitioner's Ground One – Claims Involving Ineffective Assistance of Counsel

In Ground One, Petitioner alleges that his trial attorney was ineffective for failing to: (1) investigate a medical defense; (2) investigate and present expert forensic interview testimony; and (3) investigate and present witness testimony to discredit the minor child. *See* Pet. at 17-55. Appellate counsel was then ineffective for failing to investigate and raise these issues on direct appeal. *See id.* In relevant part, the state district court found no prejudice in trial or appellate counsel's conduct and the OCCA affirmed on those grounds. *See* Dist. Ct. Order dated November 24, 2015 at 7-12; OCCA Order at 5-10. The Court should find the OCCA's decision to be a reasonable application of federal law.

1. Clearly Established Law

To succeed on his claims, Petitioner must demonstrate that his trial and appellate counsel's performances were deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 688, 690-91 (1984). A court will only consider a performance "deficient" if it falls "outside the wide range of professionally competent assistance." *Id.* at 690. "[P]rejudice" involves "a reasonable probability that, but for counsel's unprofessional errors, the result of the [trial or direct appeal] would have been different." *Id.* at 694. Notably, a court reviews an ineffective assistance of counsel claim from the perspective of counsel at the time he or she rendered the legal services, not in hindsight. *See id.* at 680.

"Surmounting *Strickland's* high bar is never an easy task." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks and citation omitted). "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult [as] [t]he standards created by *Strickland* and § 2254(d) are both highly deferential and when the two apply in tandem, review is doubly so." *Id.* (internal quotations marks and citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.*

2. Petitioner's Claim Involving Failure to Investigate a Medical Defense

Petitioner first claims that his trial attorney failed to investigate a medical defense which "would have yielded powerful evidence of [Petitioner's] innocence." Pet. at 19, 22. The Court should deny habeas relief on this allegation.

a. Background

K.B. testified that Petitioner had to "force" his penis into her anus, without lubrication, and that she "fought back." Tr. of Partial Proceedings (dated Jan. 24, 2007) at 32, 36-43, 71-73. She also claimed that it did not hurt, *id.* at 40, 73-75, and she told Ms. Koelling that she did not bleed. State's Ex. 11, 17:05:30-35. After K.B. was removed from her home, Dr. Mark McKinnon, M.D. performed a sexual assault examination on the child. Tr. Vol. III at 414. He admitted that while he had been trained to take sexual assault histories, he personally did not do so for fear they could cause bias in the findings, and stated that he did not take K.B.'s history. *Id.* at 412-14. Regarding K.B.'s physical exam, Dr. McKinnon testified "there was no physical indication of abuse." *Id.* at 414-16. When asked whether that was uncommon, Dr. McKinnon testified that "in 90 percent of the cases or more of confirmed sexual abuse, there are no physical findings." *Id.* at 416. Dr.

McKinnon explained "the anal genital, the genitourinary or anal region of a human body is highly vascularized; in other words, it has good blood flow, so it heals quickly. Whether it's vaginal or anal penetration . . . you can put an instrument or a penis in there, and it will – it's very elastic, and it just – it will not show anything." *Id.* at 417. When asked "[i]f there was evidence . . . that [K.B.] had been abused – has been sexually abused anally for a long period of time, would that surprise you that you did not have any findings[]" the physician answered: "It would not surprise me." *Id.* Dr. McKinnon explained again: "Anal penetration could occur. There could be an abrasion . . . and then three weeks later you could see absolutely nothing on a physical exam." *Id.* at 418.

On cross examination, Petitioner's attorney asked Dr. McKinnon about a 1986 study which allegedly found that "40 to 50 percent of boys and girls with a history of anal penetration have abnormalities identified on the examination." *Id.* at 420-21. Dr. McKinnon stated that he was not familiar with that study. *Id.* at 421. However, upon further questioning, Dr. McKinnon admitted that even when performed consensually, "anal sex sometimes causes injury" and he agreed that the absence of lubrication would "increase the likelihood of injury." *Id.* at 423-24. The physician also agreed that unlubricated anal sex would likely be painful. *See id.* According to Dr. McKinnon, whether anal injury occurs would likely depend on: (1) the size of the object introduced; (2) the presence or absence of force; (3) the use or nonuse of lubricants; and (4) the amount of cooperation. *See id.* at 424-25. The physician also agreed that it "stands to reason" that frequent, forceful, anal penetration would create "a greater chance of injury." *Id.* at 426. Dr. McKinnon testified that anal injuries are more likely to bleed because the area is highly vascularized. *See id.* at 427. Finally, Dr. McKinnon agreed that an anal tear could "leave a scar" and that he had not found any scars on K.B. *Id.* at 428. At the conclusion of cross-examination,

Dr. McKinnon again agreed that he "did a thorough sexual assault exam, and . . . found no trace of sexual abuse." *Id.* at 434.

On re-direct, Dr. McKinnon reiterated that "no trace of abuse doesn't mean abuse didn't happen." *Id.* at 435.

After trial, at Petitioner's request, Dr. John H. Stuemky, M.D. reviewed K.B.'s testimony, Dr. McKinnon's medical exam, and K.B.'s various interviews. Or. at 479-80. Dr. Stuemky expressed concern about K.B.'s interviews and opined that K.B.'s medical assessment was "incomplete" because Dr. McKinnon had failed to conduct a "medical history." *Id.* at 480. Dr. Stuemky further explained:

> [S]ome of the information disclosed by the girl indicating multiple episodes of anal rape and that it was forced and against her will, and in the absence of lubricant and not hurting is also rather difficult to believe. This includes feeling ejaculate and that it was cold. If all the above occurred – forced anal rape, multiple times, without lubricant, against her will, would seem more likely that there should have been physical findings. All of the above would be of great concern.
>
> Furthermore, denial of pain does not fit with her allegations of fighting back and that force was used.
>
> The child's detailed description of fighting back along with the allegations of violent forced attacks simply does not fit with ongoing child molestation by fathers/stepfathers.

Id. (paragraph numbering omitted).

Petitioner blames his trial attorney for failing to investigate and presumably call Dr. Stuemky (or a like-minded expert) as a witness. *See* Pet. at 19-20.

b. The OCCA's Decision

Reviewing this claim on post-conviction, the state district court found no prejudice under *Strickland*. That is, the district court acknowledged that Dr. Stuemky is "a well respected physician" with "credentials . . . above reproach." Dist. Ct. Order dated Nov. 24, 2015 at 7.

However, the court noted that Dr. Stuemky had not reviewed Dr. McKinnon's testimony and had not offered an opinion on whether he agreed or disagreed with it. *See id.* at 8. Perhaps more importantly, the district court found "Dr. Stuemky does not say that there **would be** physical findings in this matter only that it would 'seem more likely that there should have been physical findings.'" *Id.* (emphasis in original). The district court held: "Dr. McKinnon was thoroughly cross-examined on this point and concedes in effect the same conclusion: that the number of episodes, with force, without lubrication may have left physical findings and that he found none. The information proffered by [Petitioner] was clearly before the jury without the introduction of additional testimony." *Id.* Finally, the district court held that Dr. McKinnon was questioned, on both direct and cross-examination, regarding the majority of Dr. Stuemky's concerns, including his failure to take a medical history. *See id.* at 8-9. In sum, the district court held: "this Court does not find that the affidavit offered by Dr. Stuemky creates a reasonable probability that the result of the trial would have been different if defense counsel had called him to testify because the information to be provided was properly before the jury from other sources." *Id.* at 9. With this, the district court likewise found no prejudice in appellate counsel's failure to raise the issue on direct appeal. *See id.* at 13.

Citing *Strickland*, the OCCA affirmed the decision. *See* OCCA Order at 5-10. That the OCCA did not specifically restate all the district court's findings on this topic is irrelevant; "'[w]here there has been one reasoned state judgment rejecting a federal claim,' . . . federal habeas courts should presume that 'later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground.'" *Hittson v. Chatman*, 135 S. Ct. 2126, 2127 (2015) (citation omitted). In doing so, the Court "'looks through unexplained orders to the last reasoned decision . . . .'" *Id.* (citation and internal quotation marks omitted). Moreover, this Court evaluates "the

reasonableness of the OCCA's application of [federal law], considering the reasonableness of the theories that 'could have supported' the OCCA's decision." *Williams v. Trammell*, 782 F.3d 1184, 1200 (10th Cir. 2015) (*citing Harrington*, 562 U.S. at 88), *cert. denied*, *Williams v. Warrior*, 136 S. Ct. 806 (2016).

c. Analysis

The Court should find that the OCCA's decision was neither contrary to, nor an unreasonable application of, the clearly established law in *Strickland*.

Petitioner first claims that the decision is "contrary" to *Strickland* because the OCCA frequently stated Petitioner "did not prove the result would have been different," but the *Strickland* standard requires him only to "demonstrate a 'reasonable probability' that the result would have been different." Pet. at 21 (*citing Strickland*, 466 U.S. at 694). But the OCCA clearly and properly set forth *Strickland*'s standard, including that a petitioner must "demonstrate[] a reasonable probability that, but for counsel's unprofessional error, the result of the proceedings would have been different." OCCA Order at 7. The fact that the OCCA used a "shorthand reference" when discussing the *Strickland* standard is inconsequential. *See, e.g., Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002) (finding that the state court had not held petitioner to a higher standard when it said he had not shown a "probable" chance his trial would have been different but for counsel's errors and stating: "The California Supreme Court's opinion painstakingly describes the *Strickland* standard. Its occasional shorthand reference to that standard by use of the term 'probable' without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision."); *Frost v. Pryor*, 749 F.3d 1212, 1226-27 (10th Cir. 2014) (rejecting petitioner's argument that the state appellate court's decision was "contrary" to *Strickland* because the court

used the phrase "'we are not persuaded that the jury *would have reached a different result*'" where, "when viewed in its entirety," the opinion demonstrated "proper articulation of the prejudice standard" (emphasis in original; citation omitted)).

Petitioner next argues that the OCCA's *Strickland* application was unreasonable. *See* Pet. at 21-31. But as noted above, Dr. Stuemky's affidavit fails to challenge Dr. McKinnon's testimony in any meaningful way and does not established that K.B. would have absolutely had injury. Further, Dr. McKinnon testified that forced anal penetration without lubrication would likely: (1) be painful; (2) cause bleeding; and (3) create a greater chance of injury. *See supra* p. 9. In sum, assuming Dr. Stuemky would have testified as his affidavit is presented, the expert would not have provided any substantive information that the jury did not already hear. Accordingly, the OCCA reasonably applied *Strickland's* prejudicial prong in finding there was not a reasonable likelihood that the results of Petitioner's trial would have been different had trial counsel investigated so as to call Dr. Stuemky as a witness. *See Hanson v. Sherrod*, 797 F.3d 810, 832 (10th Cir. 2015) ("We cannot say it was unreasonable for the OCCA to hold that [the cumulative evidence] would not have changed the outcome of Hanson's trial."). And, because the claim would have therefore lacked merit on direct appeal, the OCCA further reasonably applied *Strickland* in finding no reasonable likelihood that the outcome of the direct appeal would have been different had appellate counsel challenged trial counsel's conduct. *See Fairchild v. Trammell*, 784 F.3d 702, 715 (10th Cir. 2015) ("To prevail on a claim of ineffective assistance of appellate counsel, a defendant must establish that . . . there is a reasonable probability that, but for this unreasonable failure, the claim would have resulted in relief on direct appeal.").

In the absence of any prejudice, the Court should deny habeas relief on Petitioner's claim that trial and appellate counsel were ineffective for failing to investigate a medical defense.[6]

3. Petitioner's Claim Involving Failure to Investigate and Present Expert Forensic Interview Testimony

Petitioner next claims his attorney failed to investigate and present experts on forensic interviewing to challenge the integrity of the interviews conducted with K.B., and that appellate counsel was ineffective for failing to investigate and raise this claim on direct appeal. *See* Pet. at 32-46. The Court should also deny habeas relief on this ground.

a. Background

As described above, Officer Cox questioned K.B. at the shelter and she eventually said Petitioner had put his "penis in [her] butthole." State's Ex. 2, 17:39-60. Ms. Koelling then performed a second forensic interview with K.B., during which K.B. discussed the disclosure in more detail. *Id.* at 566 & State's Ex. 11. In particular, K.B. talked about Petitioner putting his penis into her anus on multiple occasions. According to K.B., she usually fought back, and described several instances where Petitioner pinned her down, but she was able to either hit him with her shoes or kick him hard enough for him to flip over backwards and she would get away, hiding in her closet or under her bed. *Id.*, State's Ex. 11, 17:16:30-17:17:13; 17:25:35-17:26:50; 17:29:30-40; 17:41:24-36.

[6] Petitioner also claims that the OCCA unreasonably determined several facts; however he refers to facts that relate to whether trial counsel's conduct was deficient (for example, whether it was sound trial strategy). *See* Pet. at 31-32. Because the Court should find that the OCCA reasonable applied *Strickland*'s prejudicial prong, it need not address issues related to deficiency. *See Smith*, 824 F.3d at 1252 ("Mr. Smith has failed to demonstrate the OCCA unreasonably concluded he was not prejudiced by trial counsel's failure to present the . . . evidence in mitigation. Because the OCCA reasonably concluded that Mr. Smith suffered no prejudice, we do not consider whether trial counsel rendered deficient performance by failing to present this evidence.").

When asked, Ms. Koelling expressed her opinion that K.B. was likely describing her ability to fight back "from her perspective" and said some children will exaggerate their resistance to a sexual assault because "there's a lot of shame [and helplessness] involved." *Id.* at 579-81. On cross-examination, Ms. Koelling admitted that "[s]ome of the things [K.B.] told me were difficult for me to comprehend." Tr. Vol. IV at 598. Petitioner's attorney spent significant time cross-examining Ms. Koelling about interview techniques and the potential for bias, specifically asking questions that suggested Officer Cox's questioning had been improper. *Id.* at 598-657.

Then, in his case-in-chief, Petitioner's attorney called Dr. Linda Ingraham, Ph.D. as an expert witness. Dr. Ingraham believed that Ms. Koelling had conducted a proper child forensic interview. *Id.* at 680, 717. Conversely, she testified that Officer Cox had conducted an interrogation rather than a forensic interview and had "introduced a possible source distortion." *Id.* at 680. She explained that Officer Cox had been an authority figure and K.B. was isolated, and then Officer Cox aligned with her, asked leading questions, and praised her when she made disclosure statements. *Id.* at 680-81. Dr. Ingraham then discussed ways that bias, suggestibility, misattribution, memory recoding, and positive versus negative reinforcements could have affected K.B.'s memory. *Id.* at 679, 681-86, 688-90, 692-96, 701-706. Dr. Ingraham also expressed concern that K.B.'s details were vague and inconsistent, specifically stating: "But there were some inconsistences about the core event, which we would expect to remain more intact." *Id.* at 698. In particular, Dr. Ingraham said that it "doesn't make sense" that K.B. "doesn't have any memory of pain" and she would "expect a child – anyone – to remember some of that detail[.]" *Id.* Finally, Dr. Ingraham noted that, after K.B. was removed from the home, she was kept away from any family member "who had some doubts about what happened." *Id.* at 702. She explained that "in the extreme, it's brainwashing when you're isolated from disconforming sources of information."

Id. at 703. In sum, while Dr. Ingraham acknowledged that the "hypothesis put forth by the State [was] certainly possible[,]" she also believed it was also possible that the "intervening interview by Officer Cox could have either distorted [K.B.'s] memory . . . ." *Id.* at 704.

After trial, Petitioner collected affidavits from Dr. Stuemky, Dr. Maggie Bruck, Ph.D., and Dr. H. D. Kirkpatrick, Ph.D. According to Dr. Stuemky, Officer Cox had a "major conflict of interest" and had "the potential of a certain amount of intimidation to [K.B.]." Or. at 480. Dr. Stuemky did not specifically criticize Ms. Koelling's interview techniques, but wondered why the interviewer did not ask about K.B.'s initial disclosure (in the note passed to her friends) during the first interview and stated that a second interview "is unusual and strains credibility." *Id.*

In her affidavit, Dr. Bruck explained, in relevant part, that children can generate false reports of sexual abuse through "deliberately" lying, "normal processes of memory distortion," or because interviewers use suggestive techniques. *Id.* at 501. According to Dr. Bruck, because K.B. made the initial disclosure in a written note, suggestibility was not an issue and "memory distortion" testimony only "confuses the major issues . . . ." *Id.* at 502. Dr. Bruck believed the trial attorney should have had an expert testify about "lies in childhood" and should have "presented the jury with evidence that [K.B.] was a known liar." *Id.* at 503. She also opined that "the expert," presumably Dr. Ingraham, should have presented "scientific evidence to show the damaging effects of interviewer bias . . . ." *Id.* In particular, Dr. Bruck criticized Officer Cox's interview with K.B., noting he "had no training in interviewing children about sexual abuse" and "used a number of interrogatory techniques used by police to produce confessions from suspects[.]" *Id.* Finally, Dr. Bruck thought "the expert," again, presumably Dr. Ingraham, should have "dissected the second interview [by] Koelling, showing how problematic it was due to

interview bias" and challenging Ms. Koelling's failure to "test the hypothesis that the child had made-up the written allegation." *Id.*

Dr. Kirkpatrick also provided an affidavit wherein he expressed concern about: (1) Officer Cox's "unintentionally coercive" interview with K.B.; (2) inconsistencies in K.B.'s narrative; (3) the absence of detail in K.B.'s description of the abuse; (4) the alleged lack of painfulness of the alleged abuse; (5) K.B.'s history of dishonesty; and (6) implausibility's in K.B.'s description of events. *Id.* at 540.

Petitioner blames his trial attorney for failing to investigate and utilize testimony similar to that in Dr. Stuemky, Dr. Bruck and Dr. Kirkpatrick's reports. *See* Pet. at 32-46. Petitioner also appears to challenge his attorney's decision to call Dr. Ingraham as an expert witness. *See id.* at 34-35, 41-42.

b. The OCCA's Decision

The state district court found no prejudice under *Strickland*. Referring to Dr. Stuemky's affidavit, the district court found that trial counsel had addressed his concerns (relating to Officer Cox's interview and the propriety of a second forensic interview) during Dr. Ingraham's testimony and thus the information was already before the jury. *See* Dist. Ct. Order dated Nov. 24, 2015 at 8-9. Then, turning to Dr. Bruck and Dr. Kirkpatrick's affidavits, the district court found, in relevant part, that trial counsel had "presented two theories for not believing the statements of the child . . ." and had, based on the same reasoning Dr. Bruck and Dr. Kirkpatrick presented, challenged Officer Cox's interview through Dr. Ingraham and had challenged both Officer Cox and Ms. Koelling's interviews on cross-examination. *Id.* at 9-10.

Citing *Strickland*, the OCCA affirmed the decision. *See* OCCA Order at 5-10. Noting the OCCA's lack of specific findings, Petitioner argues "the State court of appeals' silence on this

issue presumably means they do not affirm the trial court's findings because they expressly affirmed other findings made by the trial court and failed to do the same on this issue." Pet. at 40. But the presumption is actually that the OCCA *did* affirm on the merits. *See Hittson*, 135 S. Ct. at 2127 (holding that the reason courts may "look through" unexplained orders to the last reasoned order to ascertain a state court's reasoning is because "federal habeas courts should presume that 'later unexplained orders upholding that judgment . . . rest upon the same ground.'" (citation omitted)). And, this Court evaluates "the reasonableness of the OCCA's application of [federal law], considering the reasonableness of the theories that 'could have supported' the OCCA's decision." *Williams*, 782 F.3d at 1200.

c. Analysis

The Court should again find that the OCCA's decision was neither contrary to, nor an unreasonable application of, the clearly established law in *Strickland*.[7]

All three experts provided affidavits criticizing Officer Cox's interview techniques; however, Dr. Ingraham testified extensively in this area. That is, the expert repeatedly described Officer Cox's interview as an interrogation and explained how Officer Cox's interview could have distorted K.B.'s memory. *See* Tr. Vol. IV at 678-82, 684-86, 692-93, 704-706. Petitioner's attorney elicited similar testimony from Ms. Koelling. *See id.* at 598-608. So, even if Petitioner's attorney had utilized testimony similar to that suggested in Dr. Stuemky, Dr. Bruck, or Dr. Kirkpatrick' affidavits on this subject matter, he would not have provided any substantive

[7] Although Petitioner begins his argument under the heading "Contrary to Strickland standard," for this claim he does not actually articulate how the OCCA's decision is contrary to the Supreme Court standard. Instead, he launches directly into his complaint that the state appellate court unreasonably applied *Strickland*. *See* Pet. at 39-45. As noted above, the OCCA clearly and properly set forth *Strickland*'s standard and the Court should find no merit in Petitioner's vague assertion that the OCCA's decision was "contrary" to clearly established law.

information that the jury did not already hear. Accordingly, the OCCA reasonably applied *Strickland's* prejudicial prong in finding there was not a reasonable likelihood that the results of Petitioner's trial would have been different had trial counsel investigated so as to challenge Officer Cox's interview.

Likewise, Dr. Ingraham testified about her concerns relating to the absence of details in K.B.'s descriptions and improbabilities in K.B.'s testimony, particularly relating to the alleged lack of pain and ability to forcefully defend against a grown adult. *See id.* at 697-98. And, as discussed in further detail below, *see infra* pp. 23-24, Petitioner's attorney clearly challenged K.B.'s honesty throughout the trial, Tr. Vol. II at 381; Vol. III at 97, and Dr. Ingraham agreed that "[s]ome kids are pretty accomplished fibbers." *Id.*, Vol. IV at 708. So, these concerns were also fairly presented to the jury and the OCCA reasonably applied *Strickland* when it found there was not a reasonable probability that the outcome of Petitioner's trial would have been different if the attorney had presented cumulative evidence on these issues.

Admittedly, Dr. Bruck and Dr. Ingraham present conflicting opinions regarding Ms. Koelling's second forensic interview. However, both Ms. Koelling and Dr. Ingraham testified about how interviewer bias can corrupt an interview or distort memory, Tr. Vol. III at 539-54; Vol. IV at 598-600, 602-605, 606-610, 619-20, 695-97, and the jury was able to watch Ms. Koelling's interview and determine for itself if she showed bias towards disclosure. Further, the jury heard Ms. Koelling admit that second interviews are not common, Tr. Vol. III at 566, and she did in fact ask K.B., in the first interview, about the note she wrote her friends. Tr. Vol. IV at 643. In sum, Petitioner simply cannot establish that the OCCA *unreasonably* applied *Strickland* when it found that there was not a reasonable likelihood that the outcome of Petitioner's trial would have been different had trial counsel brought in another expert to challenge Ms. Koelling's second interview.

Finally, habeas relief is not warranted on Petitioner's suggestion that his attorney's calling Dr. Ingraham as an expert witnessed prejudiced the outcome of the trial. As discussed, the expert testified extensively about why K.B.'s memories might be the effect of suggestibility and misattribution, explained why K.B. might change her story from liking Petitioner to having never liked him, and expressed concern about K.B.'s lack of details, etc. *See* Tr. Vol. IV 664-711. And contrary to Petitioner's assertion, the expert did not testify that the "core event" – i.e,. "anal rape" – was "certain" nor did she testify that K.B. was not lying. Pet. at 35. That is, on direct questioning, Dr. Ingraham was asked: "Well, did you hear or see a lot of details about the abuse itself?" Tr. Vol. IV at 697. She answered: "That would be what I would consider the core events. There were some inaccuracies about the core event. There were some improbabilities about the core event. And those would be the kind of thing – remember I said details deteriorate over time. But there were some inconsistencies about the core event, which we would expect to remain more intact." *Id.* at 697-98. Later, on cross-examination, Dr. Ingraham was asked again about K.B.'s lack of details and stated: "She gave the actual core detail. Not detail. The core event that – what rape meant to her and what she said her daddy did." *Id.* at 738. Then, while explaining why some memories can become distorted over time, Dr. Ingraham said "a person is likely to remember the core event of a meaningful thing" but misremember details. *Id.* at 724. When asked if the "core event remains the same[,]" the expert answered: "No, the core event, as I explained, I think, in my direct testimony, was that the core event also can be – is subject to distortion . . . ." *Id.* at 725. Finally, Dr. Ingraham, in explaining how memory recoding works, said: "But every time we tell about something, we may distort it a little bit. The fish gets bigger. The – you know, that kind of thing. We're not lying. It's just that our memories change over time." *Id.* at 724. This was clearly

not, as Petitioner suggests, a statement that K.B. was not lying, and in fact, Dr. Ingraham cautioned that "I'm not saying whether or not [K.B.] was molested. I have no opinion on that[.]" *Id.* at 694.

In sum, the information provided in Dr. Stuemky, Dr. Bruck and Dr. Kirkpatrick's affidavits was provided to the jury, either through direct testimony or on cross-examination, and trial counsel utilized that evidence in closing arguments, specifically challenging Officer Cox's interview, Ms. Koelling's alleged bias, K.B.'s alleged dishonesty, and inconsistencies in K.B.'s story. *See* Tr. Vol. V at 858, 860-61, 881-83, 888. Therefore, Petitioner cannot show that the OCCA unreasonably applied *Strickland* when it found, in essence, that the outcome of the trial would not have been different with additional evidence on these subjects. *See Hanson*, 797 F.3d at 832. And, because the underlying trial counsel claim would have therefore lacked merit on direct appeal, the OCCA also reasonably applied *Strickland* in finding no reasonable likelihood that the outcome of the direct appeal would have been different had appellate counsel challenged trial counsel's conduct. *See Fairchild*, 784 F.3d at 715.

For these reasons, the Court should deny habeas relief on Petitioner's claim that trial and appellate counsel were ineffective for failing to investigate and utilize different evidence involving the forensic interviews.[8]

4. Petitioner's Claim Involving Failure to Investigate and Call Witnesses to Prove K.B.'s Dishonesty

Petitioner finally claims that his trial attorney failed to investigate and call witnesses who would have testified as to K.B.'s "long-standing reputation for dishonesty, manipulation and

[8] Again, Petitioner also claims the OCCA unreasonably determined several facts; however he refers to facts that are either irrelevant to the analysis above or relate to whether trial counsel's conduct was deficient. *See* Pet. at 41-44. Because the Court should find that the OCCA reasonably applied *Strickland*'s prejudicial prong, it need not address issues related to deficiency. *See supra* n. 6.

attention-seeking behavior." Pet. at 46 (capitalization omitted). Again, Petitioner also blames his appellate attorney for failing to investigate and raise this claim on direct appeal. *See id.* The Court should deny habeas relief on this allegation.

a. Background

According to Petitioner, trial counsel should have called as witnesses: Kelli Miller, Nicole McMahan, Monica Brokaw, Kent Burnett, Shelly Sappington, Kaila Burton-Sappington, Michael Baker, Petitioner's neighbor, Jack Haley, Renee Haley, Jack Tracy, and Donnie Miller. *See* Pet. at 46-50.[9] Kelli Miller would have disputed K.B.'s testimony that, when they were five years old, K.B. told her that Petitioner had molested her, and Nicole McMahan, K.B.'s friend from school, would have testified that K.B. "would lie about her friends to each other." *Id.* at 46-48. Monica Brokaw, married to Petitioner's brother, would have testified that she had "personally observed [that K.B.] had a serious lying problem" and when K.B. was four years old, she "'had to be a part of whatever was going on' and '[e]verything had to revolve around her.'" *Id.* at 47 (citation omitted). Monica Brokaw's brother, Kent Burnett, would have testified that he had "observed [K.B.] lie often" and K.B. had once broken his daughter's doll. *Id.* at 48. Shelly Sappington and Kaila Burton-Sappington, Petitioner's ex-girlfriend and her daughter, would have testified that Petitioner had never molested Kaila when he and Shelly dated, and Michael Baker, Petitioner's former coworker, would have testified that K.B. looked up to Petitioner, Petitioner was trustworthy, and he was aware K.B. had a "tendency to tell stories." *Id.* at 48-49. Petitioner does not name the neighbor his attorney should have called as a witness, and does not describe what the neighbor would have testified about or provide a citation to the neighbor's proposed testimony.

[9] Affidavits from other individuals are included in the Original Record; however, as Petitioner is represented by counsel, the Court has focused only on those witnesses discussed in the Petition.

Id. at 49. As for Jack Haley, he would have testified that K.B. was loud, liked to be the center of attention, and that he "did not trust the child.'" *Id.* at 49. Renee Haley would have testified that K.B. was happy and "smiled a lot" but that her mother had asked her to pray for K.B. because she was not doing her school work and had started rumors. *Id.* at 49 (citing Or. 666). Jack Tracy and Donnie Miller would have each testified that Petitioner and his wife asked them to provide religious counseling for K.B.'s lying. *Id.* at 49.

Petitioner also claims trial counsel should have asked Kelly Whitely – K.B.'s mother and Petitioner's wife – specific questions so as to elicit testimony that K.B. often lied. *See id.* at 52. Mrs. Whitely would have allegedly testified that K.B. had a habit of lying and would try to "get her brother in trouble." *Id.*

b. The OCCA's Decision

The district court found Petitioner's affidavits unpersuasive, noting many had "minimal relevance at best," and others were based on hearsay. Dist. Ct. Order dated Nov. 24, 2015 at 10-11. More importantly, the court found that "[d]efense counsel was able to provide specific instances of untruthfulness to the jury" and had argued "that [K.B.] was a 'troubled' and 'untruthful' child in his closing argument." *Id.* The OCCA affirmed on appeal. *See* OCCA Order at 5-10. The Court should find the OCCA reasonably applied *Strickland* in so doing.

c. Analysis

Petitioner's attorney elicited testimony from K.B.'s friend that people at school called K.B. a liar, *see* Tr. Vol. II at 381, and K.B. herself admitted that she had been in trouble for lying. Tr. Partial Proceedings (dated Jan. 24, 2007) at 97. And, while K.B. claimed not to remember the meeting, Petitioner's attorney was able to suggest through his questioning that K.B. had visited with Jack Tracy about her lying. *Id.* Additionally, trial counsel called Petitioner's father, Larry

Whitely, who presented evidence that K.B. could not have hidden in the closet or under the bed as she had suggested. *See* Tr. Vol. IV at 791-92. Finally, in questioning Dr. Ingraham, Petitioner's attorney elicited evidence that K.B., after making her allegations, "was getting attention" "which is important to a child." *Id.* at 743. In closing argument, trial counsel used all this information to emphasize K.B.'s alleged dishonesty and the incredibility of her allegations. *See* Tr. Vol. V at 858, 860-61.

In light of this evidence, and based in large part of the generalness of the proffered testimony, Petitioner simply cannot establish any reasonable probability that the outcome of his trial would have been any different if trial counsel had called these witnesses, or, in the case of Kelly Whitely, asked her different questions. Accordingly, the OCCA reasonably applied *Strickland* in finding no prejudice in trial counsel's failure to call these witnesses, and subsequently, in appellate counsel's failure to raise this claim on direct appeal.

5. Summary

Under § 2254(d)(1), this Court's inquiry is not whether the OCCA's decision was correct or incorrect, but whether it was "'objectively unreasonable.'" *Owens v. Trammell*, 792 F.3d 1234, 1242 (10th Cir. 2015) (citation omitted). Under this standard, Petitioner cannot prevail. As discussed above, Petitioner has not established that the OCCA unreasonably applied *Strickland* when it found that trial counsel's conduct was not prejudicial at trial, and accordingly, that there is not a reasonable probability that the outcome of the direct appeal would have been different had appellate counsel raised these claims on direct appeal. So, the Court should deny habeas relief on Ground One.

B. Ground Two – Prosecutorial Misconduct

In Ground Two, Petitioner alleges that the State committed prosecutorial misconduct by threatening Mrs. Whitely with the loss of her children if she did not believe K.B.'s accusations. *See* Pet. at 55-60. According to Petitioner, this prevented him from putting forth a defense through Mrs. Whitely. Additionally, Petitioner claims that because the State knew Mrs. Whitely did not believe Petitioner was guilty, it knowingly presented false evidence when is "adduced evidence that Mrs. Whitely was not [at trial] to support her husband." *Id.* at 57.

1. Clearly Established Law

It is clearly established that prosecutorial misconduct, if it occurs, can "create constitutional error in one of two ways." *Matthews v. Workman*, 577 F.3d 1175, 1186 (10th Cir. 2009). "First, prosecutorial misconduct can prejudice 'a specific [constitutional] right . . . as to amount to a denial of that right.'" *Id.* (*citing Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). When this occurs, a petitioner need not show that his entire trial was rendered fundamentally unfair. *See Dodd v. Trammell*, 753 F.3d 971, 990 (10th Cir. 2013). Instead, he must show "that the constitutional guarantee was so prejudiced that it effectively amounted to a denial of that right." *Torres v. Mullin*, 317 F.3d 1145, 1158 (10th Cir. 2003). "Second, even if the prosecutor's improper remarks do not impact a specific constitutional right, they may still create reversible error if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Matthews*, 577 F.3d at 1186 (*citing Donnelly*, 416 U.S. at 643)).

Petitioner's claims fall into both categories. That is, the Fifth and Sixth Amendments provide a criminal defendant the right to present a defense by compelling the attendance of favorable witnesses. *See United States v. Spence*, 721 F.3d 1224, 1228 (10th Cir. 2013); *see also United States v. Pablo*, 696 F.3d 1280, 1295 (10th Cir. 2012) ("The Due Process Clause and the

Compulsory Process Clause work together to ensure a defendant has 'the right to present a defense by compelling the attendance, and presenting the testimony, of his own witnesses.'" (citation and internal brackets omitted)). So, Petitioner's claim that the State coerced Mrs. Whitely into not fully testifying on his behalf falls under the specific-right category. To succeed on this claim, Petitioner must show that the State substantially interfered with Mrs. Whitely's decision to testify. *See Pablo*, 696 F.3d at 1295 (holding under the Fifth and Sixth Amendments, "the government cannot substantially interfere with a defense witness's decision to testify"). "'Interference is substantial when the government actor *actively discourages* a witness from testifying through threats of prosecution, intimidation, or coercive badgering." *Id.* (citation omitted; emphasis in original). Furthermore, Petitioner must make a plausible showing that Mrs. Whitely's testimony would have been material and favorable to his defense, and not merely cumulative to other witnesses' testimony. *See United States v. Caballero*, 277 F.3d 1235, 1241 (10th Cir. 2002). It is not enough to show "the mere potential for favorable testimony" or to "merely point to any conceivable benefit" from a witness's testimony. *Id.* (citations omitted).

Petitioner's claim that the State knowingly offered false evidence through Mrs. Whitely falls into the more general, fundamental unfairness category. *See Torres*, 317 F.3d at 1160 ("A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (brackets omitted; *citing United States v. Agurs*, 427 U.S. 97, 103 (1976)); *see also Tate v. Jones*, No. CIV-11-370-R, 2011 WL 7637185, at *9 (W.D. Okla. Nov. 29, 2011) (unpublished report and recommendation) ("To succeed on his claim that the prosecution knowingly submitted false testimony Petitioner must show the prosecutor's alleged conduct rendered his trial fundamentally unfair."), *adopted*, No. CIV-11-370-R, 2012 WL 1066136 (W.D.

Okla. Mar. 29, 2012) (unpublished district court order). More specifically, Petitioner must show that: "(1) [Mrs. Whitely's] testimony was in fact false, (2) the prosecution knew it to be false, and (3) the testimony was material." *Caballero*, 277 F.3d at 1243 (citation omitted).

2. The OCCA's Decision

The OCCA affirmed the state district court's denial of Petitioner's prosecutorial misconduct claim, holding:

> The victim's mother, Kelly Whitely, claimed that she felt pressured into not supporting her husband, [Petitioner], based on [the Department of Human Service's (DHS)] threats of reprisal. [The district court] noted there was no supporting evidence in the record for the claims that statements made by the prosecution or DHS were false, nor was there any evidence to support a finding that Kelly Whitely was encouraged to make false statements at trial. The court determined that Kelly Whitely's affidavit offered in support of Whitely's application for post-conviction relief contained statements which were inconsistent with statements made by other witnesses, and are "highly susceptible to credibility attacks". [The district court] also found that there was no evidence that Kelly Whitely was coerced into giving false testimony at trial based on a threat of legal action to remove her children from her custody. The court found the claim of prosecutorial misconduct did not warrant relief.
>
> [S]everal of the affidavits offered by [Petitioner] in his post-conviction application call into question Kelly Whitely's credibility and her character for truthfulness. The post-conviction claim is that Kelly was faced with a difficult choice when appearing at Whitely's trial. We do not disagree. However, after the trial and prior to knowing that D.H.S. would not be returning her children to her custody, Kelly wrote a letter to the district court prior to Whitely's sentencing advising the court that she did not believe Whitely committed the offenses and expressing her belief that [K.B.] was lying. It is difficult to reconcile Kelly Whitely's claim that she was too intimidated to testify at trial because she feared losing her children but she was not afraid of losing them when she chose to write a letter on Whitely's behalf prior to sentencing.

OCCA Order at 9.

3. Analysis

The Court should find that the OCCA reasonably applied federal law in rejecting Petitioner's two-part prosecutorial misconduct claim.

a. Alleged Coercion of a Witness

Petitioner's main argument is that the State, in conjunction with DHS, told Mrs. Whitely that she would not have her children returned to her custody if she failed to believe K.B.'s allegations. *See* Pet. at 55-56. According to Petitioner, this coercion prevented Mrs. Whitely from fully testifying on his behalf; specifically, testifying that K.B. was dishonest and that she did "not believe [Petitioner] did anything to [K.B.]." *Id.* at 58. The Court should find that Petitioner's claim fails.

First, as noted above, Petitioner must initially show that the State actually and substantially interfered with Mrs. Whitely's decision to testify. *See supra* p. 26. But Mrs. Whitely did in fact testify, and as a defense witness. *See* Tr. Vol. IV at 819-26. According to Mrs. Whitely's testimony, she regularly checked K.B.'s undergarments for blood, believing K.B. would soon begin menstruating, and never found any. *Id.* at 820-21. Moreover, Petitioner claims that had trial counsel asked her at trial, Mrs. Whitely "would have testified" about K.B.'s lying. Pet. at 52-53. Finally, as the OCCA noted, Mrs. Whitely wrote a letter to the district court, approximately one-month after trial, claiming that she did not believe K.B. and asking the court to overturn the verdict. Or. at 158 (filed stamped Feb. 22, 2007). Then, in March 2007, Mrs. Whitely testified at Petitioner's sentencing and after *repeated* cautions from the district court that her statements could be used against her in the DHS case, Mrs. Whitely said she was "going to stand by my letter." Tr. of Partial Proceedings (dated March 29, 2007) at 4-6, 10-11, 13-17. The OCCA found, essentially, that this evidence showed a lack of substantial coercion and this Court presumes that factual finding to be correct. *See, e.g., Johnson v. Zavaras*, 141 F.3d 1184, 1998 WL 141968, at *1 (10th Cir. Mar. 30, 1998) (unpublished op.) (holding, in the context of a confession, "an underlying factual determination that the police did not engage in coercive conduct is presumed correct").

Petitioner has not provided clear and convincing evidence to overcome that presumption of correctness.

Second, Petitioner must show that Mrs. Whitely's testimony would have been material and favorable to his defense, and not merely cumulative to other witnesses' testimony. *See supra* p. 26. As discussed above, trial counsel elicited testimony regarding K.B.'s alleged dishonesty, and while certainly her mother could have given "favorable testimony," this is insufficient to show prosecutorial misconduct through coercion of a witness. *Id.* Petitioner has failed to demonstrate that his specific right to put forth a defense was so prejudiced as to be a denial of that right, and therefore, the OCCA's rejection of Petitioner's prosecutorial misconduct claim on this issue was a reasonable application of federal law.

b. Alleged Eliciting of False Evidence

The same holding should be reached for Petitioner's related prosecutorial misconduct claim. The State asked Mrs. Whitely on cross-examination: "Are you here today in support of [Petitioner]?" to which Ms. Whitely responded: "No." Tr. Vol. IV at 826. According to Petitioner, this constituted "false evidence" because the State knew Mrs. Whitely did not believe Petitioner was guilty and also knew she "had to give a lack of support answer to have a chance at child custody." Pet. at 57. Petitioner complains the State further compounded the error when it told the jury, in closing arguments, "You didn't hear her mom come in here and you didn't hear her mom say she was a liar. And she would be the one who would know more than anyone." *Id.* at 57 (citing Tr. Vol. V at 926).

As the OCCA reasonably held, Petitioner cannot establish a due process violation because he fails to prove that Mrs. Whitely's testimony was actually false. *See Van Woudenberg v. Gibson*, 211 F.3d 560, 569 (10th Cir. 2000) (upholding the denial of habeas relief in part because the

petitioner had failed to provide any evidence that the testimony was actually false), *abrogated on other grounds*, *McGregor v. Gibson*, 248 F.3d 946 (10th Cir. 2001). The State did not ask Mrs. Whitely if she believed her husband, but whether she was at trial in support of him. According to Petitioner, her "No" answer was in fact true (if not by choice). Moreover, even if the State committed misconduct in asking the question, or in making its comment in closing argument, Petitioner cannot show that it rendered his trial fundamentally unfair. The jury heard testimony that K.B. lied, it would have understood that Mrs. Whitely had not testified in support of her daughter, and it would have understood that the short testimony Mrs. Whitely did give was favorable to Petitioner. Under such circumstances, Petitioner cannot establish the OCCA unreasonably applied federal law when it found no prosecutorial misconduct or fundamental unfairness in the alleged presentation of false evidence.

4. Summary

Petitioner has failed to establish that the OCCA unreasonably applied clearly established federal law when it rejected his prosecutorial misconduct claims on the merits, and this Court should deny habeas relief on Ground Two.

RECOMMENDATION

For the foregoing reasons, it is recommended that the Court DENY the Petition [Doc. No. 1]. The OCCA reasonably applied *Strickland* when it held that trial counsel's alleged errors were not prejudicial and that, in turn, appellate counsel's failure to raise those alleged errors on direct appeal was not prejudicial. Likewise, the OCCA reasonably applied federal law when if found that the State's alleged misconduct did not deprive Petitioner of the specific right to compel testimony from a favorable witness or cause his trial to be fundamentally unfair.

NOTICE OF RIGHT TO OBJECT

The parties are advised of their right to object to this Report and Recommendation. *See* 28 U.S.C. § 636. Any objection must be filed with the Clerk of the District Court by January 31, 2018. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *See Moore v. United States*, 950 F.2d 656 (10th Cir. 1991).

STATUS OF REFERRAL

This Report and Recommendation terminates the Chief District Judge's referral in this matter.

ENTERED this 10th day of January, 2018.

BERNARD M. JONES
UNITED STATES MAGISTRATE JUDGE

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY ALAN WHITELY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC 2015-1120**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 22 2016
MICHAEL S. RICHIE
CLERK

ORDER GRANTING REQUEST TO ASSOCIATE COUNSEL AND AFFIRMING DENIAL OF POST-CONVICTION RELIEF

On December 23 2015, Petitioner Whitely, by and through counsel Mark Barrett, appealed to this Court from an order of the District Court of Cleveland County denying his request for post-conviction relief in Cleveland County Case No. CF-2006-250.

On January 15, 2016, counsel Barrett filed a Motion to Associate Counsel in this matter, seeking an order permitting counsel Rhonda Gorden of Whitefish Bay, Wisconsin to practice in the above-styled and numbered cause pursuant to the Rules Creating and Controlling the Oklahoma Bar Association. Counsel's application is supported by Gorden's signed application, certificate of good standing and certificate of compliance from the Oklahoma Bar Association. Gorden, licensed in the State of Wisconsin, requests an order recognizing that she is associated with local counsel Mark Barrett, O.B.A. No. 557 and that she is authorized to represent Whitely in the above-styled appeal. Pursuant to Rule 1.6(A), *Rules of the Oklahoma Court of Criminal* Appeals, Title 22, Ch.18, App.

(2016), counsel's Motion to Associate Counsel is **GRANTED**.

On March 24, 2007, Petitioner Whitely, represented by counsel, was sentenced to twenty (20) years imprisonment as to each count after being convicted by a jury of two counts of Lewd Molestation in the District Court of Cleveland County Case No. CF-2006-250. The sentences were ordered to be served concurrently. Whitely appealed his conviction to this Court and his judgment and sentences were affirmed in an unpublished opinion issued April 22, 2009. *See Whitely v. State,* F-2008-215, April 22, 2009 (Not for Publication).[1]

On June 28, 2010, Whitely filed an Application for Post-Conviction Relief in the District Court of Cleveland County. On October 27, 2011, the District Court of Cleveland County, the Honorable Lori M. Walkley, issued an order granting Whitely's request for an evidentiary hearing on his claim of ineffective assistance of appellate counsel. The hearing was conducted February 23, 2012 and May 10, 2012, and on November 7, 2012, Judge Walkley denied Whitely's request for

[1] Whitely presented the following claims of error on direct appeal:

1. Admission of tainted statements and testimony gained through leading, suggestive and manipulative police interrogation of the 11 year old victim violated Whitely's substantive due process rights;
2. Whitely was prejudiced by the admission of child hearsay evidence without a reliability determination based on the totality of the circumstances surrounding their making;
3. Instructional error left Appellant's jury without proper guidance to consider his theory of defense;
4. Whitely was prejudiced by the admission of lay and expert witness testimony to the truthfulness of K.B.'s statement and testimony alleging abuse and the untruthfulness of her corresponding denials;
5. The trial court abused its discretion in refusing a proper defense challenge for cause of a prospective jury, denying Whitely a fair trial;
6. Jurors were mis-instructed on the range of punishment and Whitely's sentence must be modified;
7. Whitely's sentence is excessive and must be favorably modified in the interest of justice; and
8. Any failure to preserve issues for review was the result of ineffective assistance of counsel.

post-conviction relief. Whitely appealed the denial to this Court, and on January 24, 2014, this Court issued an order reversing the District Court's order denying the request for relief, and remanded the matter for further proceedings.

In response to this Court's order, the matter was set for hearing on August 8, 2014. Instead of conducting an additional hearing, Judge Walkley set a schedule for the parties to submit further filings setting forth their positions on Whitely's claims. On December 19, 2014, Judge Walkley issued an order recommending that Whitely be granted a "new appeal on the basis of ineffective assistance of trial counsel" after determining that appellate counsel failed to fully investigate and develop theories related to additional medical testimony which may have had an effect on the trial outcome.[2] In an order entered March 27, 2015, this Court denied Whitely's application for post-conviction relief and remanded the matter for further proceedings. The District Court was directed to review Whitely's post-conviction claims and to issue an order affirming or denying his request for relief as provided by statute.[3]

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[2] Whitely's appeal of that order alleged that Judge Walkley correctly determined that appellate counsel was ineffective, but erred in denying his request for a new trial. He then argued that this Court should order a new trial in this matter based on evidence that the victim's mother and grandfather developed beliefs that the victim's statements were untrue and that the State Department of Human Services coerced these witnesses to withhold their testimony by threatening removal of the mother's other children from her custody.

[3] Judge Walkley found it "evident" that Whitely had been provided ineffective assistance of appellate counsel, and recommended that this Court grant him a subsequent direct appeal on this issue. This Court determined that a "new" direct appeal is not one of the remedies allowed by the Post-Conviction Procedure Act. The order issued by the District Court of Cleveland County did not address Whitely's request for a new trial presented in his application for post-conviction relief, nor did it properly grant or deny Whitely's request for relief. The matter was remanded to the District Court of Cleveland County for further proceedings to properly address Petitioner's application for post-conviction relief and to enter a final order granting or denying post-conviction relief as provided by statute.

Whitely's current application for post-conviction relief filed with this Court alleges two propositions of error. First, he argues that appellate and trial counsel's failure to discover medical evidence and other expert and non-expert evidence of Whitely's innocence requires relief. His second argument espouses that the district attorney (D.A.) and the Department of Human Services (D.H.S.) threatened Whitely's wife, Kelly Whitely, with the removal of her children in the event she supported her husband and did not believe her daughter, preventing Whitely from presenting critical defense evidence, notably that Kelly Whitely did not believe her daughter's claims and did not believe that Whitely had abused the victim.

In a most thorough and complete order entered and filed November 24, 2015, Judge Walkley denied Whitely's request for post-conviction. Judge Walkley had previously determined that Whitely met his burden with regard to the first prong of the *Strickland* [4] test when she entered her November 7, 2012 order. The district court incorporated by reference, into this most recent order, the portion of the November 7, 2012 order which made that finding. Judge Walkley noted that the instant order was focused on two issues:

1. Whitely's claim of prosecutorial misconduct as it related to Whitely's claims of pressure allegedly exerted against the victim's mother; and

2. Whitely's claim of ineffective assistance of trial counsel in failing to present additional medical and forensic evidence at trial as well as evidence relating to the child's credibility.

Judge Walkley found that Whitely was barred from re-litigating claims presented

[4] *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

on direct appeal simply by restating those claims in his application for post-conviction relief. The district court determined that the only remaining issue with regard to those claims related to trial counsel's failure to put forth additional evidence to contradict the State's evidence.

In a prior order, Judge Walkley found that appellate counsel failed to conduct an off-record review to determine the viability of an ineffective assistance of trial counsel claim on direct appeal. The court also determined that this behavior was constitutionally deficient. After conducting an in-depth analysis of the omitted information, Judge Walkley, in this most recent order, ruled that trial counsel's failure to offer additional medical/forensic testimony, and additional evidence to support the claim that the victim was untruthful was not objectively unreasonable. The victim's mother, Kelly Whitely, claimed that she felt pressured into not supporting her husband, Whitely, based on DHS's threats of reprisal. Judge Walkley noted there was no supporting evidence in the record for the claims that statements made by the prosecution or DHS were false, nor was there any evidence to support a finding that Kelly Whitely was encouraged to make false statements at trial. The court determined that Kelly Whitely's affidavit offered in support of Whitely's application for post-conviction relief contained statements which were inconsistent with statements made by other witnesses, and are "highly susceptible to credibility attacks". Judge Walkley also found that there was no evidence that Kelly Whitely was coerced into giving false testimony at trial based on a threat of legal action to remove her children from her custody. The court found the claim of prosecutorial misconduct did not warrant relief.

Addressing trial counsel's affidavit that he had no valid reason for not calling several other witnesses, the court noted that the bulk of the information provided by these witnesses, and by Kelly Whitely, was based on the belief that Whitely did not commit the charged offenses, that he is of good character and that the witnesses disbelieve the child victim because of her propensity to lie. Judge Walkley determined that opinion evidence of the alleged sexual offense was not admissible pursuant to 12 O.S.2011 § 2412(A)(1). She also ruled that opinion testimony as to the victim's believability was inadmissible because weighing the truthfulness of a witness is a matter reserved exclusively to the fact-finder. The court determined that trial counsel's failure to call additional witnesses, who provided cumulative information regarding issues that were put before the jury at trial, did not fall below an objective standard of reasonableness, and therefore did not constitute ineffective assistance of counsel. Judge Walkley determined that trial counsel's representation was not deficient, despite the "plethora of alternative theories which could have been espoused." Finding that the underlying claims of ineffective assistance of trial counsel and prosecutorial misconduct were not viable, the court determined that Whitely could not meet the second prong of the *Strickland* test to support his claim of ineffective assistance of appellate counsel. Judge Walkley determined Whitely was not entitled to post-conviction relief and denied his request for the same.

We agree. The Post-Conviction Procedure Act is not a substitute for a direct appeal, nor is it intended as a means of providing a petitioner with a second direct appeal. *Fowler v. State*, 1995 OK CR 29, ¶ 2, 896 P.2d 566, 569;

Maines v. State, 1979 OK CR 71, ¶4, 597 P.2d 774, 775-776.

As set forth in *Logan v. State,* 2013 OK CR 2, ¶ 5, 293 P.3d 969, Post-Conviction claims of ineffective assistance of appellate counsel are reviewed under the standard for ineffective assistance of counsel set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Smith v. Robbins,* 528 U.S. 259, 289, 120 S.Ct. 746, 765, 145 L.Ed.2d 756 (2000) ("[Petitioner] must satisfy both prongs of the *Strickland* test in order to prevail on her claim of ineffective assistance of appellate counsel."). Under *Strickland,* a petitioner must show both (1) deficient performance, by demonstrating that counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 687-89, 104 S.Ct. at 2064-66. And we recognize that "[a] court considering a claim of ineffective assistance of counsel must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011) (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065).

We find no error warranting relief in Whitely's claims alleged in his Post-Conviction application. We note first that appellate counsel raised the issue of ineffective assistance of trial counsel on direct appeal citing counsel's failure to preserve errors for appeal. That claim was rejected by this Court. Whitely's post-conviction ineffective assistance of appellate counsel claim alleges multiple

trial counsel errors, and claims appellate counsel erred for failing to adequately raise the errors on direct appeal. Judge Walkley, while finding that counsel committed error, found no support for the claim that but for these errors, the results in Whitely's case would have been different.

Judge Walkley thoroughly examined Whitely's claims regarding what seems to be a battle of the experts. A review of trial counsel's affidavit reveals that, in hindsight, counsel feels that he could have handled Whitely's trial differently, and that some of the strategic decisions he made did not work out as intended. He readily admits, after reviewing information provided to him by others, that different approaches could have been used with various witnesses that might have resulted in a favorable ruling for Whitely. He also confirms that Whitely wanted to testify in his defense, but that he, Smith, ultimately convinced Whitely not to take the stand. His statement regarding Kelly Whitely reads as follows:

> 16. I realize also that the jury missed some critical information from my client's wife who is also Kyla's [the victim's] mother. Although I had some reasons, at the time, for what I did and did not ask Kelly Whitely, I think it would have had a major impact on the jury if the jury had known that Kelly Whitely did not believe the allegations against my client and that Kyla lied on many occasions.

The affidavit clearly indicates, while not being specific, that Smith had reasons for not asking Kelly Whitely questions which she now indicates in her affidavit she would have been willing to answer. As noted in this Court's prior order, the question to be resolved is whether or not Kelly Whitely refused to answer these questions because she was truly intimidated by D.H.S. and the prosecution or

whether at this point, having nothing to lose, she has changed her story. The real question is, had Kelly Whitely testified that she disbelieved the victim and believed her husband, would the results at Whitely's trial have been different.

Although he asserts that Kelly's testimony might have had an impact on the jury, defense counsel Smith states that he had an unspecified reason for limiting his questioning of Kelly Whitely. We cannot find this strategic behavior to be objectively unreasonable. Additionally, as noted by Judge Walkley, several of the affidavits offered by Whitely in his post-conviction application call into question Kelly Whitely's credibility and her character for truthfulness. The post-conviction claim is that Kelly was faced with a difficult choice when appearing at Whitely's trial. We do not disagree. However, after the trial and prior to knowing that D.H.S. would not be returning her children to her custody, Kelly wrote a letter to the district court prior to Whitely's sentencing advising the court that she did not believe Whitely committed the offenses and expressing her belief that Kyla was lying. It is difficult to reconcile Kelly Whitely's claim that she was too intimidated to testify at trial because she feared losing her children but she was not afraid of losing them when she chose to write a letter on Whitely's behalf prior to sentencing.

To support his ineffective assistance of appellate counsel claim, Whitely must show that appellate counsel would have prevailed on direct appeal had she argued trial counsel was deficient and that these enumerated errors resulted in prejudice. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. After examining Whitely's claims of ineffective assistance of counsel, based on

appellate counsel's failure to adequately raise these claims, and pursuant to this Court's decision in the *Logan* and *Strickland* standards stated above, we find Whitely has failed to establish that appellate counsel's performance was deficient or objectively unreasonable and has failed to establish any resulting prejudice.

As Petitioner has failed to establish that he is entitled to Post-Conviction relief, the order of the District Court of Cleveland County in Case No. CF-2006-250, denying Petitioner's application for Post-Conviction relief is **AFFIRMED**.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2016), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 22nd day of April, 2016.

Clancy Smith
CLANCY SMITH, Presiding Judge

GARY L. LUMPKIN, Vice Presiding Judge

Arlene Johnson
ARLENE JOHNSON, Judge

DAVID B. LEWIS, Judge

ROBERT L. HUDSON, Judge

ATTEST:

Clerk

PA/F

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CF-2006-250
	)	
LARRY ALAN WHITELY,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court pursuant to the Remand Order from the Court of Criminal Appeals to further assess the ineffective assistance of appellate counsel claim. After receiving briefing from counsel and after review of the record herein, this Court finds and orders as follows:

1. This matter originally came before this Court on Defendant's Application for Post Conviction Relief. This matter was heard by the Honorable William C. Hetherington as the trial judge. (Judge Hetherington later became a judge on the Oklahoma Court of Civil Appeals and thus, the Application for Post Conviction Relief was assigned to the undersigned judge.) A jury trial was held and the Defendant was found guilty of the charges. An appeal of the jury verdict was taken and the matter was affirmed. Subsequently, this matter came before this Court on the Application for Post Conviction Relief. This Court entered an order on October 27, 2011, which found that the only remaining issue for review was Defendant's claim of Ineffective Assistance of Appellate Counsel as the other issues raised were either heard on direct appeal or should have been heard and were therefor waived. The matter was set for evidentiary hearing commencing January 18, 2012. Due to insufficient time, the matter was continued to February 23, 2012. At

the request of Defendant, the hearing set for February 23, 2012 was stricken and reset to May 10, 2012. After preparation of the record and review of the same as well as review of relevant authority, this Court found by the Order entered the 7th day of December, 2012, that appellate counsel was not ineffective and denied the request of Defendant.

2. That Order was appealed and the matter was reversed and remanded for a further determination of whether appellate counsel's performance was objectively unreasonable for failing to conduct an off record review of whether additional evidence was available that should have been presented to the jury and whether the victim's mother did not testify truthfully due to prosecutorial misconduct. Based upon the concerns raised in the remand order, this Court entertained further briefs by the parties and entered an Order December 29, 2014, finding that the first prong of Strickland had been met by appellate counsel's failure to conduct an off record review and recommending that Defendant by granted a new appeal as to that issue. The second prong of *Strickland* was not addressed by this Court but this Court determined that recommending a new appeal was an appropriate remedy based upon *Smith v. State*, 1980 OK CR 43, ¶ 2, and the subsequent cases that established a vehicle by which an Appellant could seek an out-of-time appeal if he was denied an appeal through no fault of his own. See also, *Blades v. State*, 2005 OK CR 1 and *Dixon v. State*, 2010 OK CR 3. In this matter, this Court found that Defendant was denied an appeal as to the issues of ineffective trial counsel as it relates to additional expert testimony due to appellate counsel's failure to conduct an off record review.

3. On March 27, 2015, the Court of Criminal Appeals issued an order remanding this matter back to this Court for a further determination regarding what is ostensibly the second prong under *Strickland* so that the appellate court could properly determine the entire issue at

hand. Further, the Court of Criminal Appeals found that the remedy fashioned by this Court, a new appeal on the issues, was not an appropriate remedy available under the posture of this particular matter.

4. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984, the United States Supreme Court set forth the test for reviewing an ineffectiveness of counsel claim. The same standard applies to both ineffective assistance of trial counsel claims and ineffective assistance of appellate counsel claims. Under *Strickland*, a petitioner "must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding. . .would have been different." *Logan v. State*, 2013 OK CR 2 ¶5. In this matter, based upon the concerns raised by the Court of Criminal Appeals and the volume of materials presented by Defendant, this Court found that Defendant had met his burden with regard to the first prong of *Strickland*. This Court did not address the second prong which was error. The second prong of *Strickland* is the focus of this ruling with the prior rulings of this Court incorporated herein by reference.

5. This matter has been partially addressed by the Order of November 7, 2012, and the same is incorporated herein by reference. The Remand Order of January 24, 2014, focuses on two primary areas which will be the focus of this review as well. Those issues are: (1) Defendant's claim for prosecutorial misconduct as it relates to alleged pressure placed on the victim's mother, and (2) Defendant's claim for ineffective assistance of trial counsel in failing to present additional medical and forensic evidence as well as evidence relating to the child's credibility at trial.

6. It is well settled that appellate counsel need not raise every issue on appeal. In *Woodruff v. State*, 1996 OK CR 5, the Court stated: "It is the role of appellate counsel to carefully select and develop the legal issues to be presented to the court and not raise every non-frivolous issue conceivable." See also, *Mitchell v. State*, 1997 OK CR 9: "An attorney's failure to raise an arguably meritorious claim on appeal, without proof that the omission was professionally deficient, will not support a finding of deficient performance." The most instructive case in making a determination on an ineffective assistance of appellate counsel is *Slaughter v. State*, 1998 OK CR 63. Like the instant matter, the Petitioner in *Slaughter* claimed that appellate counsel was ineffective for failing to investigate, develop, and present all facts and issues relevant to the constitutionality of Petitioner's conviction and sentence; raise valid appellate issues with respect to trial counsel, and present a persuasive ineffective assistance of counsel claim, thereby breaching a duty to Petitioner. The *Slaughter* Court adopted the three-prong test set forth in *Walker v. State*, 1997 OK CR 3, for reviewing ineffective assistance of appellate counsel claims. "Under this analysis, 1) the threshold inquiry is whether appellate counsel actually committed the act which gave rise to the ineffective assistance allegation. If a petitioner establishes appellate counsel actually did the thing supporting the allegation of ineffectiveness, this Court then 2) determines whether the performance was deficient under the first of the two-pronged test in *Strickland*, 466 U.S. at 677-78, 104 S.Ct. at 2059. If this burden is met, 3) this Court then considers the mishandled substantive claim, asking whether the deficient performance supports a conclusion "either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent." *Walker,* 933 P.2d at 333 n. 25 (quoting 22 O.S.Supp.1995, § 1089(C)(2))."

7. In describing the test for the first prong of the *Walker* test, the Court in *Slaughter*, differentiated between claims raised on direct appeal and issues that are raised on post-conviction that are different from those raised on direct appeal. Those raised on direct appeal are barred and the lack of success on direct appeal is not grounds for a finding of ineffectiveness. The *Slaughter* Court further stated:

> That post-conviction counsel raises the claims in a different posture than that raised on direct appeal is not grounds for reasserting the claims under the guise of ineffective assistance of appellate counsel. The doctrine of *res judicata* does not allow the subdividing of an issue as a vehicle to relitigate at a different stage of the appellate process. . . . Just because post-conviction counsel has the benefit of reviewing appellate counsel's brief on direct appeal, and with the benefit of hindsight, envisions a new method of presenting the arguments is not a legal basis for disregard of the procedural bar. In other words, "post-conviction review does not afford defendants the opportunity to reassert claims in hopes that further argument alone may change the outcome in different proceedings." *Trice v. State*, 912 P.2d 349, 353 (Okl.Cr.1996). *See also Hooks v. State*, 902 P.2d 1120, 1124 (Okl.Cr.1995).

Applying this test to the instant case, it is clear that the issues relating to the admission of allegedly tainted statements and testimony gained through the leading and suggestive police interrogation of the victim and the forensic interview of the victim and admission of the same cannot be the basis for relief under post-conviction review. These issues were handled on direct appeal and the efforts of post-conviction counsel to recast those issues are barred. The only remaining issue with regard to those claims would relate to an alleged failure of trial counsel to put forth additional evidence to contradict the State's evidence. That issue will be more clearly determined below.

8. Regarding issues raised for the first time on post-conviction, the *Slaughter* Court reiterated that failing to raise all possible issues does not constitute deficient appellate performance. See above authority as well as *Slaughter*. However, this Court has previously

found that appellate counsel should have conducted an off record review to further determine the viability of those claims. In particular, whether additional forensic and/or medical testimony and whether the testimony of Defendant's wife and other witnesses as to the character of the victim would have created a reasonable probability that the result would have been different at trial. Applying the first prong of the *Walker* test to these issues, it is clear that appellate counsel was responsible for the act alleged–failing to conduct an off record review in deciding whether to put forth an ineffective assistance of trial counsel claim in the direct appeal.

9. The second prong of *Walker* relates to whether the conduct alleged was constitutionally deficient under *Strickland*. Based upon the concerns raised by the Court of Criminal Appeals, this Court previously ruled that Defendant had met the first prong of *Strickland*. See Order of December 19, 2014. Thus the second prong of *Walker* has been met.

10. The final prong of *Walker* requires this Court to determine whether the failure resulted in prejudice to the Defendant. This prejudice is demonstrated by a finding that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. In this matter, in order to make a determination of whether appellate counsel's performance in failing to conduct an off record review resulted in prejudice which demonstrates a reasonable probability that, but for appellate's counsel's failure to conduct an off record review, the result of the appeal would have been different, this Court must look to the underlying claims of ineffective assistance of trial counsel by failing to bring forth the evidence now advanced by Defendant. Again, based upon the prior Orders of this Court and the Remand Orders of the Court of Criminal Appeals, the only issues remaining relate to the additional

medical/forensic evidence now proffered by Defendant, the character evidence of the victim and the issue of prosecutorial misconduct in the alleged pressuring of Defendant's then wife.

11. In determining the underlying ineffective of assistance of trial counsel, this Court must look to both prongs under *Strickland* with regard to those claims. In *Strickland*, the U.S. Supreme Court reasoned that a reviewing court must be highly deferential of strategic decisions made by trial counsel. The alleged ineffective conduct must be outside the prevailing professional norms and could not be considered sound trial strategy. *Strickland*, 466 U.S. at 689. The *Strickland* Court went on to state: "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at that time." *Id.* Thus, reviewing the claims now before the court, Defendant has the burden of proving that trial counsel's performance was so deficient and that the strategic decisions made were not sound trial strategy in order to meet the first prong of *Strickland*. If that prong is met, then this Court must determine if there is any resulting prejudice.

12. Issues Related to the Alleged Failure to Offer Additional Medical/Forensic Testimony

A. Dr. Stuemky:

Defendant suggests that trial counsel's performance was deficient because he did not offer an alternative medical theory to the testimony of Dr. McKinnon such as that laid out in Dr. Stuemky's affidavit. Further, that the outcome of trial may have been different if such evidence would have been presented. Dr. Stuemky is a well respected physician with many years of experience as it relates to child sexual abuse. His credentials are above reproach. His review of

this matter, however, did not include a review the testimony of Dr. McKinnon and he did not offer an opinion of whether he would agree or disagree with that testimony. In fact, although not offered in his affidavit, the 90% statistic is a well known opinion of Dr. Stuemky and thus his testimony may have tended to support the testimony of Dr. McKinnon. In addition, while it is not directly stated by Dr. Stuemky, it is clear that he believes this may be one of the 10% cases due to the allegations. It is interesting to note that Dr. Stuemky does not say that there **would be** physical findings in this matter only that it would "seem more likely that there should have been physical findings." Dr. McKinnon was thoroughly cross-examined on this point and concedes in effect the same conclusion: that the number of episodes, with force, without lubrication may have left physical finding and that he found none. The information proffered by Defendant was clearly before the jury without the introduction of additional testimony.

Of the nine (9) points offered by Dr. Stuemky, seven (7) deal with the disclosures made by and interviews of the child rather than the physical examination itself. All seven of those concerns were addressed by defense counsel in the cross-examination of Dr. McKinnon. In addition, defense counsel addressed many of those issues with Linda Ingraham, the expert forensic psychologist called by the defense. Dr. Stuemky also opines that the first interview of the child was appropriate and well done. This information, if testified to, would have further supported State's case and would have contradicted another proffered expert, Dr. Maggie Bruck. In fact, Defendant specifically alleges that bolstering the State's case is problematic when he argues that trial counsel was ineffective by presenting Dr. Ingraham, who also testified that the forensic interviews were appropriately done. Either Dr. Stuemky would be supporting, yet again,

the opinion that the interview was appropriate or, if Dr. Bruck had testified, he would be contradicting another defense witness. This would have been detrimental to the defense.

The final statement by Dr. Stuemky relates to his opinion that the medical exam was incomplete as Dr. McKinnon did not take a history of the abuse. Dr. McKinnon explained his philosophy regarding taking a history of abuse on direct examination and was questioned about this process on cross-examination. While this is a practice issue, nothing in Dr. Stuemky's affidavit indicates that Dr. McKinnon's examination fell below a reasonable medical standard only that he would have done it differently. In reviewing the record, the trial decisions made in not presenting the additional testimony had valid strategic value and thus were not objectively unreasonable. Furthermore, this Court does not find that the affidavit offered by Dr. Stuemky creates a reasonable probability that the result at trial would have been different if defense counsel had called him to testify because the information to be provided was properly before the jury from other sources.

B. Dr. Maggy Bruck and Dr. Dr. H.D. Kirkpatrick

Both of these additional experts are now offered as alternatives to the defense expert Dr. Linda Ingraham. Both are as well qualified in their fields as Dr. Ingraham and espouse alternative theories to present to the jury. Dr. Bruck, primarily puts forth a position of attacking the credibility of the child as opposed to the memory distortion theory espoused by Dr. Ingraham and would present information regarding the invalidity, from her perspective, of the forensic interviews. Dr. Kirkpatrick would present information about confirmatory bias thus attacking the interview techniques. A portion of the opinions were covered in the cross-examinations of Dr. McKinnon, Tracy Koelling (forensic interviewer) and Officer Cox as well as in the direct

examination of Dr. Ingraham. Some of the opinions proffered clearly contradict other expert evidence given. However, particularly as it relates to Dr. Bruck, there are valid strategic reasons to proceed with opinions such as that offered at trial. In particular, attacking the credibility of child witness is perilous. A jury may feel more sympathy for the child after the repeated attempts to cast her as a liar. The defense offered two theories for not believing the statements of the child–that the child had fabricated the story and that she had a distorted memory of the events. These are valid defense theories which provided the jury with options. Because a valid strategic reason exists for the manner in which the underlying case proceeded, it cannot be found to be below an objectively reasonable standard. This seems to be exactly the trap that the *Strickland* court warns against–that hindsight often provides us with many different avenues to traverse. But this Court does not find, based upon the totality of the trial record, that trial counsel's strategic decision to offer the memory distortion theory was unreasonable or fell below the standard required.

13. Defendant also complains that trial counsel was ineffective for failing to present certain witnesses that would possessed relevant information that would tend to disprove the allegations of the child. The Affidavits of Danny Moss, Jeanna Moss, Shirely Orsak, and Toni Snyder are observations of neighbors who had no extensive contact with the Whitelys or the child. The testimony proffered is that they never saw anything that would indicate to them that abuse was occurring. (For example: "I never noticed anything unusual about our neighbors", "They appeared to be a normal family"...). These statements have minimal relevance at best. The Affidavits of Renee Haley, Jack Tracy, and Jack Haley, all rely on hearsay as the basis for their opinions as to the child's character for untruthfulness. Frances Burnett could only testify as

to the general character for untruthfulness but had no specific instances. These statements would not have been admissible and therefore it was not error on the part of trial counsel to not sponsor those witnesses. In addition, their observations as to not observing any behavior on the part of the child or the Defendant, like those of the witnesses above, would only have minimal relevance. This is particularly true in light of the fact that the same information was presented by Larry Whitely, Sr. Furthermore, Defense counsel was able to provide specific instances of untruthfulness to the jury through the testimony of L. Woodard. Defense counsel was also able to argue that the victim was a "troubled" and "untruthful" child in his closing argument. Counsel's conduct was not objectively unreasonable.

14. Kelly Whitely, Gary Brokaw, Pat Brokaw:

Defendant asserts that these witnesses could offer more than simply their assessment of the character of the victim. Kelly Whitely, Gary Brokaw and Pat Brokaw would have been able to testify as to their observations of the behavior of the child while in the presence of the Defendant, the relationship between the Defendant and the child as well as child's behavior in general (school grades, etc...). Kelly Whitely did testify but was not asked these questions. In his affidavit, trial counsel states that he did not ask certain questions of Ms. Whitely because he believed her fear of DHS might consume her. This was a valid strategic reason not to ask particular questions–counsel did not know whether Ms. Whitely's testimony would assist his client. Furthermore, the affidavit of Kelly Whitely now proffered is inconsistent with other statements. In particular, that the child always lied and made bad grades. The affidavit offered by the child's teacher indicates that she was her "top student", was not dishonest and was a very moral child. See Affidavit of Julie Curry. This was also indicated by the Affidavit of Melisha

Nichole McMahan (offered by the Defendant) when she stated that Kyla never lied about big stuff and only told little white lies. In addition, the Affidavit of Michael Baker (offered by the Defendant) calls into question the character and credibility of Kelly Whitely. All of this evidence, offered by the Defendant, tends to cast doubt on the credibility of the statement of Kelly Whitely offered long after she "had nothing left to lose".

These issues also are relevant to the claim of Prosecutorial Misconduct raised by the Defendant. Ms. Whitely states that she was pressured into not supporting her husband, the defendant, for fear of reprisals from DHS. However, nothing in the record indicates that the statements made by the prosecution or DHS were false nor that anyone indicated to Ms. Whitely that she should make false statements in court. The Court in *Roy v. State*, 2006 OK CR 47, stated that "Relief will be granted on a prosecutorial misconduct claim only where the prosecutor committed misconduct that so infected the defendant's trial that it was rendered fundamentally unfair, such that the jury's verdicts should not be relied upon. In this matter, because the statements of Ms. Whitely are highly susceptible to credibility attacks (as stated above) and that there is no evidence that a legal action on behalf of the State in removing her children caused her to testify falsely, the claim of prosecutorial misconduct must also fail.

Trial counsel asserts in his affidavit that he had no valid reason for not calling Pat and Gary Brokaw to testify as to their observations and opinions. It should be noted that the bulk of the information provided by the Brokaws, and to a certain extent Ms. Whitely, is their belief that the Defendant did not commit the crimes charged, that he is of good character and that they do not believe the child based upon her propensity to lie. Pursuant to 12 O.S. §2412(A)(1), evidence regarding an opinion of the sexual offense alleged is not admissible. Furthermore,

conclusions as to the believability of the child as to the offense alleged is not admissible because weighing the truthfulness of a witness is a matter reserved exclusively to the fact finder. See *Lawrence v. State*, 1990 OK CR 56 and *Warner v. State*, 2006 OK CR 40.

Other portions of the proffered testimony, such as the configuration of the beds and closets which would provide a factual dispute as to the disclosures made by the child would be relevant. However, it should be noted that the same issues were before the jury through the testimony of Larry Whitely, Sr. This is also true of the observations that the child did not demonstrate any fear or distrust of the defendant and that the family was a happy family unit. This Court cannot find that the exclusion of these additional witnesses fell below an objective standard of reasonableness.

15. Based upon the record, it is clear that the conduct of trial counsel was not deficient, although the record does indicate a plethora of alternative theories which could have espoused. This Court finds that trial counsel's conduct was not objectively unreasonable. Because the underlying claims for ineffective assistance of trial counsel and prosecutorial misconduct are found not to be viable claims, it is clear that Defendant cannot meet the second prong of *Strickland* as to the ineffective assistance of appellate counsel.

16. Based upon the totality of the review of the trial record, all briefs and affidavits submitted as well as the testimony and argument received in these proceedings, this Court finds that the foregoing facts and authority demand that Defendant's request for Post Conviction Relief be DENIED.

IT IS SO ORDERED this 24th day of November, 2015!

JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I, Kari Wilder, Secretary/Bailiff to Judge Walkley to hereby certify that a true and correct copy of the foregoing pleading was mailed/delivered to Jennifer Austin, Assistant District Attorney, 21st Judicial District, Mr. Mark Barrett, Attorney for Defendant, P.O. Box 896, Norman, Oklahoma 73070, Larry A. Whitely, Lawton Correctional Facility, 8607 Flower Mound Road, Lawton, Oklahoma 73501, on the 24th day of November, 2015.

Furthermore, a file-stamped copy was forward to the Court of Criminal Appeals, 2100 N. Lincoln, Oklahoma City, Oklahoma 73105, to be filed in MA-2015-0873 pursuant to the Mandamus Order issued in that matter.

Kari Wilder, Secretary/Bailiff

ORIGINAL

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY ALAN WHITELY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. MA 2015-0873**
	)	
HONORABLE LORI WALKLEY, DISRICT JUDGE, CLEVELAND COUNTY,	)	
	)	
Respondent.	)	

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
OCT 21 2015
MICHAEL S. RICHIE
CLERK

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS AND DIRECTING THE HONORABLE LORI WALKLEY, DISTRICT JUDGE, TO ENTER A DISPOSITION ORDER ON PETITIONER'S APPLICATION FOR POST-CONVICTION RELIEF

Petitioner, by and through counsel Mark Barrett, filed with the Clerk of this Court a petition for a writ of mandamus requesting this Court issue a Writ of Mandamus to the District Court of Cleveland County in Case No. CF-2006-250. Petitioner alleges that as of the date of filing this request for relief with this Court, the District Court has failed to rule on Petitioner's application for post-conviction relief which Petitioner alleges has been pending in the District Court since March 27, 2015.

In an Order issued January 24, 2014, this Court reversed the District Court order denying Petitioner post-conviction relief and remanded the matter to the District Court for further proceedings, Case No. PC 2012-1093. In an Order issued March 27, 2015, Case No. PC 2015-0049, this Court remanded the matter to the District Court a second time for further proceedings to

properly address Petitioner's application for post-conviction relief and to enter a final order.

Petitioner states that he filed a motion for a status conference in the District Court on April 16, 2015, which was denied on April 23, 2015, with the District Court stating that it had ample record to review and that an order would be issued within 120 days. Petitioner states that the 120-day period concluded on August 21, 2015, and the District Court has not ruled on the post-conviction application.

For a writ of mandamus, Petitioner has the burden of establishing that (1) he has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. Rule 10.6(B), *Rules of the Oklahoma Court of Criminal* Appeals, Title 22, Ch.18, App. (2015). Petitioner has met this burden and the application for a writ of mandamus is **GRANTED**.

The Honorable Lori Walkley, District Judge, is directed to act upon the post-conviction application and enter a final order within thirty (30) days from the date of this order, and forward a certified copy of the disposition order to this Court, and Petitioner. If the District Court has already ruled upon Petitioner's application, a certified copy of the disposition order shall be forwarded to this Court and to Petitioner.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 21st day of October, 2015.

CLANCY SMITH, Presiding Judge

GARY L. LUMPKIN, Vice Presiding Judge

ARLENE JOHNSON, Judge

DAVID B. LEWIS, Judge

NOT PARTICIPATING

ROBERT L. HUDSON, Judge

ATTEST:

Clerk

OA

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)		STATE OF OKLAHOMA } S.S. CLEVELAND COUNTY }
	)		
Plaintiff,	)		FILED
	)		
vs.	)	CF-2006-250	APR 23 2015
	)		
LARRY ALAN WHITELY,	)		In The Office of the Court Clerk RHONDA HALL
	)		
Defendant.	)		

SUMMARY ORDER

This Court is in receipt of Defendant's Motion for Status Conference following the Order Reversing and Remanding this Court's Order regarding Defendant's request for Post-Conviction Relief received from the Court of Criminal Appeals. The Motion for Status Conference is denied. This Court has an ample record to review in making the determination required by the Order of the Court of Criminal Appeals. This Court will undertake a full review, to include the trial transcripts of this matter as well as the pleadings, briefs, authority and transcripts of post-conviction proceedings. Due the voluminous nature of this matter, an Order as required by the Court of Criminal Appeals shall issue within 120 days of the date of this Order.

IT IS SO ORDERED this 22nd day of April, 2015!

JUDGE OF THE DISTRICT COURT

(198)

147

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY ALAN WHITELY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No. PC 2015-49**
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF AND REMANDING MATTER TO DISTRICT COURT FOR FURTHER PROCEEDINGS

On January 20, 2015, Petitioner Whitely, by and through counsel Mark Barrett, appealed to this Court from an order of the District Court of Cleveland County recommending that this Court grant Petitioner a "new appeal on the basis of ineffective assistance of trial counsel." Whitely appeals seeking a new trial and requests in the alternative that "a new appeal be ordered as to all issues." Petitioner's request for a "new appeal" is **DENIED** and this matter is **REMANDED** to the District Court of Cleveland County for further proceedings consistent with this order.

On March 24, 2007, Petitioner Whitely, represented by counsel, was sentenced to twenty years imprisonment as to each count after being convicted by a jury of two counts of Lewd Molestation in the District Court of Cleveland County Case No. CF-2006-250. The sentences were ordered to be served concurrently. Whitely appealed his conviction to this Court and his judgment and sentences were affirmed in an unpublished opinion issued April 22, 2009. *See Whitely v. State,* F-2008-215, April 22, 2009 (Not for Publication).

On June 28, 2010, Whitely filed an Application for Post-Conviction Relief in the District Court of Cleveland County. On October 27, 2011, the District Court of Cleveland County, the Honorable Lori M. Walkley, issued an order granting Whitely's request for an evidentiary hearing on his claim of ineffective assistance of appellate counsel. The hearing was conducted February 23, 2012 and May 10, 2012, and on November 7, 2012, Judge Walkley denied Whitely's request for post-conviction relief. Whitely appealed the denial to this Court, and on January 24, 2014, this Court issued an order reversing the District Court's order denying the request for relief, and remanded the matter for further proceedings.

In response to this Court's order, the matter was set for hearing on August 8, 2014. Instead of conducting a hearing, Judge Walkley set a schedule for the parties to submit further filings setting forth their positions on Whitely's claims. On December 19, 2014, Judge Walkley issued an order recommending that Whitely be granted a "new appeal on the basis of ineffective assistance of trial counsel" after determining that appellate counsel failed to fully investigate and develop theories related to additional medical testimony which may have had an effect on the trial outcome. It is this order which Whitely now appeals.

In his brief filed with this Court, Whitely alleges that Judge Walkley correctly determined that appellate counsel was ineffective, but erred in denying his request for a new trial. He then argues that this Court should order a new trial in this matter based on evidence that the victim's mother and grandfather developed beliefs that the victim's statements were untrue and that the State Department of Human Services coerced these witnesses to withhold their

testimony by threatening removal of the mother's other children from her custody.

In an order entered and filed December 19, 2014, the District Court of Cleveland County, the Honorable Lori M. Walkley, District Judge, granted in part and denied in part, Whitely's request for post-conviction relief. In reviewing Whitely's application, Judge Walkley determined that Whitely's claim of ineffective assistance of appellate counsel had merit. The District Court made the following statements in its post-conviction order:

> "2. After review of further briefs it is evident that appellate counsel's failure to fully investigate and develop theories related to the additional medical testimony which may have been available and may have had an effect on the trial outcome fell below an objectively reasonable standard. As such, Defendant was prejudiced by the failure by not having an opportunity for appeal as to the issue of ineffective assistance of trial counsel as it relates to trial counsel's failure to recognize and utilize evidence properly at trial. It is not clear to this court whether trial counsel's strategy fell below an objectively reasonable standard, however, failure of appellate counsel to fully investigate and develop this issue is cause for a new appeal as to this issue....
>
> 4. Based upon this ruling, this Court grants Defendant's request for Post-Conviction Relief to the extent that Defendant shall be granted an [sic] new appeal on the basis of ineffective assistance of trial counsel."

On January 20, 2015, Whitely filed his Petition in Error with this Court appealing Judge Walkley's order. The matter was assigned this Court's Case No. PC-2015-49.

A direct appeal from a judgment in a criminal action may be taken as a matter of right as set forth in Section 1051 of Title 22, and the procedure for the

filing of a direct appeal is provided in the Rules of the Court of Criminal Appeals. Rule 2.1, *et seq, Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015). Petitioner has already been provided a direct appeal of his conviction. Excluding a timely direct appeal, the only remaining method to challenge a conviction or sentence is through post-conviction procedures. The Uniform Post-Conviction Procedure Act (hereinafter "The Act") "encompasses and replaces ***all*** common law and statutory methods of challenging a conviction or sentence." 22 O.S.2011 § 1080, *et seq.* (emphasis added.) There is no procedure for providing a defendant a "second" direct appeal.

A party seeking to challenge a conviction or sentence after being provided a direct appeal may do so through the Act. *Id.* If the trial court finds in favor of the post-conviction applicant, it may grant post-conviction relief. The remedies available through the Act include vacating and setting aside the judgment and sentence, discharging the petitioner's sentence, granting a new trial, or correcting and modifying the judgment and sentence as may appear appropriate. 22 O.S.2011 §§ 1085.

This Court's Rules specify the procedure for appealing from a District Court order granting or denying post-conviction relief. Rule 5.2(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015) provides that an appeal to this Court under the Act constitutes an appeal *from the issues raised*, the record, and findings of fact and conclusions of law made in the District Court.

In this case, the trial court found it "evident" that Whitely had been provided ineffective assistance of appellate counsel, and recommended that he be granted a subsequent direct appeal on this issue. The District Court did not address Whitely's request that he be granted a new trial.

A "new" direct appeal is not one of the remedies allowed by the Act. The order issued by the District Court of Cleveland County did not address Whitely's request for a new trial presented in his application for post-conviction relief, nor did it properly grant or deny Whitely's request for relief. This Court will not review the granting or denial of post-conviction relief until the application has been presented to the trial court, has been properly reviewed and a final order has been issued granting or denying post-conviction relief as provided in the Act. 22 O.S.2011 § 1087, Rules 5.1 and 5.2, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015).

The District Court can fully review Whitely's claim of ineffective assistance of appellate counsel, and the underlying issues which Whitely alleges should have been presented on direct appeal. *Braun v. State*, 1997 OK CR 26, ¶ 20, 937 P2d. 505; *Cargle v. Mullin*, 317 F.3 1196, 1202-1205(10th Cir. 2003) (citations omitted). The Act specifically allows for such a review, and purposely gives the District Court ***wide*** latitude in fashioning a remedy appropriate for resolving legitimate claims of error. The Cleveland County District Court has already determined that Whitely was denied effective assistance of appellate counsel. It should address Whitely's claims which form the basis of his request for relief, through whatever manner it deems proper, subject to the limitations set forth in

the Act. The District Court may review the original record, and may allow depositions and affidavits for good cause shown. 22 O.S.2011 § 1083(a). It may also conduct an evidentiary hearing. 22 O.S.2011 § 1084. The District Court is charged with making specific findings of fact and conclusions of law as to each issue presented. *Id.*

Once the District Court has made its determination regarding the petitioner's application, it should then issue its order with appropriate findings of fact and conclusions of law, granting or denying relief as specified in § 1085 of the Act. This Court may review the District Court's ruling upon request of either of the parties, once a final order is issued, assuming filing of a timely post-conviction appeal. 22 O.S.2011 § 1087.

Accordingly, this matter is **REMANDED** to the District Court of Cleveland County for further proceedings to properly address Petitioner's application for post-conviction relief and to enter a final order granting or denying post-conviction relief as provided by statute.

Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 27th day of March, 2015.

Clancy Smith

CLANCY SMITH, Presiding Judge

GARY L. LUMPKIN, Vice Presiding Judge

ARLENE JOHNSON, Judge

DAVID B. LEWIS, Judge

ATTEST:

Clerk

PA

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CF-2006-250
	)	
LARRY ALAN WHITELY,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court pursuant to the Remand Order from the Court of Criminal Appeals to further assess the ineffective assistance of appellate counsel claim. After receiving briefing from counsel and after review of the record herein, this Court finds and orders as follows:

1. Defendant contends that appellate counsel was ineffective for failing to raise issues of ineffective assistance of trial counsel and prosecutorial misconduct. Furthermore, that appellate counsel was ineffective for failing to conduct an "off record review" to support these contentions. On remand, the Court of Criminal Appeals has directed this Court to determine whether appellate counsel's performance was objectively unreasonable and that the Defendant suffered prejudice based thereon. The Court of Criminal Appeals addresses two primary areas of concern: the allegation that the victim's mother did not testify truthfully based upon prosecutorial misconduct and the failure of appellate counsel to investigate whether additional evidence was available which should have been presented during the course of the investigation.

2. After review of further briefs, it is evident that appellate counsel's failure to fully investigate and develop theories related to the additional medical testimony which may have been available and may have had an effect on the trial outcome fell below an objectively reasonable standard. As such, Defendant was prejudiced by the failure by not having an opportunity for an appeal as to the issue of ineffective assistance of trial counsel as it relates to trial counsel's failure to recognize and utilize evidence properly at trial. It is not clear to this court whether trial counsel's strategy fell below an objectively reasonable standard, however, failure of appellate counsel to fully investigate and develop this issue is cause for a new appeal as to this issue.

3. The Court of Criminal Appeals also directed this Court to make a determination as to whether witnesses were deterred by the prosecution, including DHS personnel, from fully and truthfully testifying or whether the witnesses had changed their story after the fact because they no longer had anything to lose. However, Defendant had a fully and fair opportunity to present such evidence at the two day evidentiary hearing. The burden is on the Defendant to bring forth sufficient evidence to support his contentions. Failure to do so does not provide cause for yet another bite at that proverbial apple.

4. Based upon this ruling, this Court grants Defendant's request for Post-Conviction Relief to the extent that Defendant shall be granted an new appeal on the basis of ineffective assistance of trial counsel.

IT IS SO ORDERED this 19th day of December, 2014!

JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I, Kari Wilder, Secretary/Bailiff to Judge Walkley to hereby certify that a true and correct copy of the foregoing pleading was mailed/delivered to Jennifer Austin, Assistant District Attorney, 21st Judicial District, Mr. Mark Barrett, Attorney for Defendant, P.O. Box 896, Norman, Oklahoma 73070, Larry A. Whitely, Lawton Correctional Facility, 8607 Flower Mound Road, Lawton, Oklahoma 73501, on the 19th day of December, 2014.

Kari Wilder, Secretary/Bailiff

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LARRY ALAN WHITELY, Petitioner, -vs- THE STATE OF OKLAHOMA, Respondent.	)	No. PC-2012-1093

ORDER REVERSING DISTRICT COURT ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF AND REMANDING FOR FURTHER PROCEEDINGS

The Petitioner has appealed to this Court from an order of the District Court of Cleveland County denying his application for post-conviction relief in Case No. CF-2006-250.

Petitioner was originally charged in Case No. CF-2006-250 with four counts of Rape, First Degree – victim under age 14. The charges were subsequently amended to two counts of Lewd Molestation. The charges alleged that on at least two occasions Petitioner knowingly and intentionally touched the body and private parts of his stepdaughter, and had sexual intercourse involving vaginal/anal penetration with the stepdaughter, when the stepdaughter was 10-11 years old. At trial, the State's evidence consisted of the testimony of five witnesses; the victim and four other persons the victim had told about the sexual abuse. The State also admitted eleven exhibits, which included video and audio interviews with the victim conducted by two of the other State witnesses, and

pictures taken after the fact of the house where the abuse occurred. The Petitioner's defense evidence consisted of the testimony of a forensic psychologist on memory creation and distortion; the testimony of Appellant's father; and brief testimony from the Petitioner's wife (also the victim's mother). The defense also admitted nine exhibits consisting of a letter written by the victim, and pictures. Petitioner was convicted by a jury of two counts of Lewd Molestation and was sentenced in accordance with the jury's verdict to the maximum punishment of twenty years imprisonment in each count, with the sentences allowed to run concurrently.

Petitioner appealed to this Court raising the following propositions of error:

1. THE ADMISSION OF TAINTED STATEMENTS AND TESTIMONY GAINED THROUGH LEADING, SUGGESTIVE AND MANIPULATIVE POLICE INTERROGATION OF THE 11 YEAR OLD CLAIMANT VIOLATED MR. WHITELY'S SUBSTANTIVE DUE PROCESS RIGHTS AND REQUIRES REVERSAL.

2. MR. WHITELY WAS PREJUDICED BY THE IMPROPER ADMISSION OF CHILD HEARSAY EVIDENCE WITHOUT A RELIABILITY DETERMINATION BASED ON THE TOTALITY OF THE CIRCUMSTANCES SURROUNDING THEIR MAKING.

3. INSTRUCTIONAL ERROR LEFT APPELLANT'S JURY WITHOUT PROPER GUIDANCE TO CONSIDER HIS THEORY OF DEFENSE.

4. MR. WHITELY WAS PREJUDICED BY THE ADMISSION OF LAY AND EXPERT WITNESS TESTIMONY TO THE TRUTHFULNESS OF K.B.'S STATEMENTS AND TESTIMONY ALLEGING ABUSE, AND THE UNTRUTHFULNESS OF HER CORRESPONDING DENIALS.

5. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING A PROPER DEFENSE CHALLENGE FOR CAUSE OF A PROSPECTIVE JUROR, THEREBY DENYING MR. WHITELY A FAIR TRIAL.

6. JURORS WERE MIS-INSTRUCTED ON THE RANGE OF PUNISHMENT AND MR. WHITELY'S SENTENCES MUST BE MODIFIED.

7. MR. WHITELY'S SENTENCE IS EXCESSIVE AND MUST BE FAVORABLY MODIFIED IN THE INTEREST OF JUSTICE.

8. ANY FAILURE TO PRESERVE ISSUES FOR REVIEW WAS THE RESULT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL.

This Court denied each of the positions of error and affirmed Petitioner's Judgment and Sentence. *Whitely v. State*, No. F-2008-215 (Okl.Cr. April 22, 2009) (not for publication).

Petitioner filed an application for post-conviction relief in the District Court alleging the following propositions of error:

I. THE DISTRICT ATTORNEY'S OFFICE, WITH THE ASSISTANCE OF THE DEPARTMENT OF HUMAN SERVICES, ENGAGED IN PROSECUTORIAL MISCONDUCT, IN VIOLATION OF OKLAHOMA LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY THREATENING MR. WHITELY'S KEY DEFENSE WITNESS AND ELICITING FALSE TESTIMONY.

   A. THE DEPARTMENT OF HUMAN SERVICES AND THE DISTRICT ATTORNEY'S OFFICE PREVENTED MR. WHITELY'S WIFE FROM FREELY TESTIFYING IN SUPPORT OF HIS INNOCENCE BY COERCIVELY THREATENING TO PERMANENTLY REMOVE HER CHILDREN IF SHE BELIEVED OR SUPPORTED HER HUSBAND IN ANY WAY, CAUSING MR. WHITELY TO LOSE CRITICAL EVIDENCE FROM HIS WIFE.

   B. THE PROSECUTOR ELICITED, AND FAILED TO CORRECT, TESTIMONY FROM MR. WHITELY'S WIFE THAT CREATED THE FALSE IMPRESSION THAT HIS WIFE DID NOT BELIEVE HER HUSBAND'S CLAIMS OF INNOCENCE WHEN THE PROSECUTOR ASKED HER IF SHE WAS TESTIFYING IN SUPPORT OF HER HUSBAND TO WHICH SHE FELT COMPELLED TO ANSWER "NO" IN COMPLIANCE WITH DHS[1] REQUIREMENTS FOR THE RETURN OF HER CHILDREN.

II. MR. WHITELY WAS NOT PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL, UNDER OKLAHOMA LAW AND THE SIXTH AND

[1] The Oklahoma Department of Human Services.

FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, FOR PREPARATION AND REPRESENTATION OF HIM AT HIS CHILD SEXUAL ABUSE TRIAL AS COUNSEL FAILED TO REASONABLY INVESTIGATE AND SUBPOENA AVAILABLE WITNESSES AND ELICIT EVIDENCE FROM THE STATE'S WITNESSES TO IMPEACH THE CREDIBILITY OF THE ACCUSING GIRL AND TO PROTECT HIS CREDIBILITY.

A. TRIAL COUNSEL FAILED TO INVESTIGATE AND SUBPOENA AVAILABLE WITNESSES TO IMPEACH THE GIRL'S CREDIBILITY.
B. THERE WERE NUMEROUS AVAILABLE WITNESSES TRIAL COUNSEL COULD HAVE DISCOVERED THROUGH REASONABLE INVESTIGATION TO TESTIFY MR. WHITELY WAS INCAPABLE OF COMMITTING THE ALLEGED CRIMES, THEREBY SUPPORTING MR. WHITELY'S CREDIBILITY.
C. TRIAL COUNSEL FAILED TO MEET WITH MR. WHITELY TO DEVELOP DEFENSE STRATEGIES, TO KEEP HIM INFORMED AND TO BE PREPARED TO REFUTE THE STATE'S CASE.
D. TRIAL COUNSEL FAILED TO PROPERLY EXAMINE AND CROSS-EXAMINE WITNESSES FOR EVIDENCE TO PROVE THE ALLEGATIONS WERE FALSE AND FAILED TO PREPARE DEFENSE WITNESSES TO TESTIFY.
E. TRIAL COUNSEL FAILED TO SEEK A MEDICAL EXPERT OPINION ABOUT THE LACK OF PHYSICAL EVIDENCE IN A CASE OF REPETITIVE, FORCED ANAL RAPE, FAILED TO DISCOVER WHAT MEDICAL EXPERT TESTIMONY THE STATE INTENDED TO PRESENT AND FAILED TO PRESENT OTHER NECESSARY EXPERT TESTIMONY FOR THE DEFENSE.
F. MR. WHITELY WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL, UNDER OKLAHOMA LAW AND UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS TRIAL COUNSEL FAILED TO PREPARE HIM TO TESTIFY, THUS PRECLUDING THE POSSIBILITY THAT HE COULD PRESENT THE DEFENSE VERSION OF THE CASE TO THE JURORS.
G. TRIAL COUNSEL FAILED TO PROTECT MR. WHITELY FROM PROSECUTORIAL MISCONDUCT. (SEE SECTIONS I AND III).

III. TRIAL COUNSEL FAILED TO AVOID A SITUATION WHERE THE SINGULAR AND CUMULATIVE EFFECT OF THIS INEFFECTIVE REPRESENTATION IN THE ABOVE AREAS VIRTUALLY LEFT MR. WHITELY WITHOUT A DEFENSE TO COMBAT THE STATE'S EXPERT TESTIMONY, THE GIRL'S HIGHLY PREJUDICIAL ASSERTIONS THROUGHOUT HER TESTIMONY THAT HER STEPFATHER PUT HIS PENIS IN HER BUTTHOLE AND HER SCHOOLFRIEND'S CONCERN.

A. THE PROSECUTOR'S IMPROPER COMMENTS.
B. THE STANDARD OF REVIEW FOR PROSECUTORIAL IMPROPER COMMENT WHEN TRIAL COUNSEL FAILS TO OBJECT IS WHETHER THE COMMENTS RESULTED IN A DENIAL OF DUE PROCESS.
C. ARGUMENT IN FAVOR OF REVERSING MR. WHITELY'S CONVICTION BASED ON PROSECUTORIAL IMPROPER COMMENT.

IV. MR. WHITELY WAS DEPRIVED OF HIS RIGHTS, UNDER OKLAHOMA LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE HIS POTENTIALLY MERITORIOUS CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL AND PROSECUTORIAL MISCONDUCT ON DIRECT APPEAL AND TO REQUEST AN EVIDENTIARY HEARING OR AN ORDER FOR SUPPLEMENTATION OF THE RECORD TO PROVIDE EVIDENCE ABSENT FROM THE RECORD IN SUPPORT OF THE CLAIMS.

A. APPELLATE COUNSEL'S PERFORMANCE WAS OBJECTIVELY UNREASONABLE AND PREJUDICED THE APPEAL RESULT.
B. THE COURT SHOULD DENY ANY ATTEMPT BY THE STATE TO RAISE THE PROCEDURAL BAR OF WAIVER.

V. TRIAL AND APPELLATE COUNSELS' DEFICIENT PERFORMANCE PREJUDICED THE RESULT.

In support of these post-conviction propositions raised in the District Court, Petitioner attached over seven hundred pages of materials. Notable materials include (1) the declaration of a physician, who is also an Associate Professor of Pediatrics and Director of a Child Protection Team at the University

of Oklahoma, College of Medicine, that questions the interviewing techniques used on the victim, questions the victim's testimony about physical effects and feelings during the incidents, questions the lack of physical findings on the victim based upon the victim's own testimony, and questions the lack of a complete medical history of the victim; (2) the affidavit of a professor and director of a university department of psychiatry and behavioral sciences that condemns the bias of the interviewers in this case and questions defense strategy of presenting evidence concerning memory distortion rather than evidence concerning childhood lies; and (3) the affidavit of a doctor with a PH. D. in Psychology that also questions the bias of the interviewers in this case and questions implausible testimony by the victim. The materials also include numerous affidavits, declarations and statements from people who know Petitioner and the victim, or who worked with them during the course of this case. Another notable affidavit is that of Petitioner's wife, the victim's mother, who avers she never suspected and does not believe any sexual abuse occurred, and would have testified for Petitioner and against the victim if she would have felt free to do so. Petitioner's trial attorney also prepared a declaration acknowledging that he had no strategic reason for failing to obtain the information presented in the post-conviction application, and that the information would have had a major impact on the jury and likely would have changed the outcome of the case. It is also noteworthy that Petitioner does not have a recantation from any of the prosecution witnesses at his trial.

In addressing Petitioner's post-conviction application, the District Court

found that Petitioner's propositions of error regarding prosecutorial misconduct and ineffective assistance of trial counsel are waived or procedurally barred. The District Court found that Petitioner's claim of ineffective assistance of appellate counsel was ripe for review and created a material issue of fact such that an evidentiary hearing should be conducted. At the evidentiary hearing, four witnesses testified. The first witness was a financial officer with the Oklahoma Indigent Defense System who testified about budgeted amounts available for indigent appellate counsel for hiring investigators and for forensic testing. Petitioner's appellate counsel testified concerning her representation of Petitioner. Appellant's father testified about things he asked trial and appellate counsel to do that were not done. Finally, Appellant testified about things he discussed with trial and appellate counsel that were not raised.

In denying Petitioner's application for post-conviction relief, the District Court cited *Hale v. State*, 1997 OK CR 16, 934 P.2d 1100, to conclude that the law requires Petitioner to show that, because of the alleged errors of appellate counsel in failing to raise the ineffective assistance of trial counsel issues as well as the issues of prosecutorial misconduct, not only would the result of the appeal been different but also that the errors so upset the balance of the system that the appeal is rendered unreliable. *Hale*, 1997 OK CR 16 at ¶ 10, 934 P.2d at 1102-03. The District Court found the record factually supported appellate counsel's determination that a claim of ineffective trial counsel could not be maintained because (a) the propensity of the victim to lie was fully litigated and argued, and additional witnesses may have caused the jury to feel sympathy for

the victim; (b) additional witnesses regarding Petitioner's character could have opened the door to evidence excluded under the *Burks* hearing; (c) there were excellent examples of cross-examination and presentation of evidence in the record; (d) there was no need for an additional medical expert because the State's expert testified there were no physical injuries consistent with the victim's claim of abuse, and the physician's declaration contained portions that would be detrimental to Petitioner's case; and (e) Petitioner waived his right to testify on the record. The District Court further found that even if trial counsel should have and would have called all of the additional witnesses suggested by Petitioner's post-conviction application, "there is no guarantee that a jury would have found differently based upon the evidence contained in the record." Finally, the District Court found that the trial record contains no indication that Petitioner's spouse did not have a full opportunity to present her evidence at trial, and that the record is clear that any alleged coercion caused by DHS or the District Attorney's treatment of the deprived matter had no effect on Petitioner's wife.

Appellant asserts four propositions of error in this post-conviction appeal:

I. APPELLATE AND TRIAL COUNSEL'S FAILURE TO DISCOVER MEDICAL EVIDENCE AND OTHER EVIDENCE OF MR. WHITELY'S INNOCENCE, DUE TO BOTH COUNSEL'S FAILURE TO INVESTIGATE AND FAILURE TO KEEP MR. WHITELY ADVISED OF IMPORTANT DEVELOPMENTS IN THE DEFENSE, REQUIRES RELIEF PURSUANT TO THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION.

II. APPELLATE COUNSEL'S FAILURE TO INVESTIGATE AND IDENTIFY EVIDENCE OF THE PROSECUTOR'S MISCONDUCT,

CONTAINED ON AND OFF THE RECORD, COMBINED WITH TRIAL COUNSEL'S FAILURE TO PROTECT MR. WHITELY FROM THE PROSECUTOR'S MISCONDUCT, REQUIRES RELIEF PURSUANT TO THE 6TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION.

III. BECAUSE THE STATE OF OKLAHOMA DOES NOT PROVIDE MEANINGFUL REPRESENTATION TO INDIGENT APPELLATE CLIENTS ALLEGING OFF RECORD CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL, MR. WHITELY'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE FEDERAL CONSTITUTION WERE VIOLATED.

IV. THE TRIAL COURT FAILED TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MULTIPLE ISSUES RAISED IN MR. WHITELY'S APPLICATION FOR POST-CONVICTION RELIEF REGARDING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS REQUIRED BY RULE 5.4(A).

ANALYSIS

The District Court correctly found that Petitioner's propositions of error including prosecutorial misconduct and ineffective assistance of trial counsel either were or could have been previously raised and ruled upon by this Court, and are thus procedurally barred or waived. 22 O.S.2011, § 1086; *Logan v. State*, 2013 OK CR 2, ¶3, 293 P.3d 969, 973. However, this post-conviction proceeding is Petitioner's first opportunity to allege and argue a claim of ineffective assistance of his appellate counsel, and such a claim could provide sufficient reason why his other propositions were not asserted or were inadequately raised in the prior proceedings. *Id.* In order to prevail on his claim of ineffective assistance of appellate counsel, Petitioner must show both (1) deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error, the result of

the proceeding (in this case the appeal) would have been different. *Logan*, 2013 OK CR 2 at ¶5, 293 P.3d at 973 (citing *Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S.Ct. 2052, 2064-67, 80 L.Ed.2d 674 (1984)).

The District Court found that appellate counsel's review of the record in this case and counsel's reasoning for not conducting further off record review "are supported by the trial record in this matter." The District Court thus found that appellate counsel's performance was not objectively unreasonable. *Id.* We begin our analysis of the first prong of *Strickland* by noting that an appellate attorney's performance could be considered objectively unreasonable for the failure to recognize that available evidence was not properly utilized at trial; or for the failure to realize that an adequate investigation had not been made to identify evidence which should have been made available during the course of trial. *See* Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014) (provides appellate counsel a method to supplement the appeal record with such evidence).

As stated above, Petitioner has attached a significant volume of material to his post-conviction application. He is arguing that his appellate counsel was ineffective for failing to recognize the material that was available and not properly utilized at trial, or for failing to identify the material that should have been utilized as evidence at trial. Petitioner claims that if appellate counsel had properly utilized the material in his appeal proceedings it would have changed the result of his appeal and ultimately the result of his trial.

While we are not necessarily impressed with the quantity, the quality of

some of the evidence included in Petitioner's post-conviction materials causes us pause. The affidavit of Petitioner's wife, the victim's mother, states in part that she would have testified for Petitioner and against the victim if she could have, because she did not believe Petitioner did anything to the victim and she never perceived Petitioner to be a threat to the victim. The wife/mother avers that she did not so testify at trial because she was not prepared by Petitioner's attorney and because DHS was basically forcing her to admit to the crimes, otherwise she would never get her children back. The District Court found that "it is clear that the alleged coercion [by the prosecution and/or DHS] had no effect on the [wife/mother as a] witness." What is not explained is, if the coercion had no effect on the witness, then why didn't the wife/mother testify at trial as she has averred in her affidavit. The maternal grandfather of the victim, no relation to Appellant, avers in part that he was very close to the victim but saw no signs of abuse, and that DHS guarded the victim from family contact and would not consider him and his wife for placement of the children because they did not believe the allegations. While the protection of children is imminently important, a defendant's right to the presumption of innocence prior to trial is also a bedrock principle. If witnesses were deterred by the prosecution, including DHS personnel, from feeling free to testify fully or truthfully, the failure to recognize and utilize such evidence would not have been insignificant in this criminal case. On the other hand, if witnesses are changing their story after the fact because they no longer have anything to lose, that too needs to be determined.

That leads us to another set of post-conviction materials, affidavits of three

medical professionals, whose declarations and averments were not identified on appeal and were not utilized during the course of this criminal case. (O.R. 477-636). All three of the medical professionals condemn the techniques of the two trial witnesses who interviewed the victim in this case. The professionals state such things as the witnesses used interviewer bias by trying to cause the victim to confirm the abuse, and the witnesses failed to explore the hypothesis that the victim deliberately lied in her initial disclosure of the abuse. Evidence presented at trial that the interviewers in this case could have unwittingly manipulated the victim to fabricate the abuse would not have been insignificant. In its post-conviction order, the District Court did not address Petitioner's allegation that, if his appellate counsel had investigated and asked to supplement the appeal record with this information provided by his three medical professionals, the outcome of his appeal would have been different.

The District Court also accepted appellate counsel's determination that there was no need for an additional medical expert to testify that the victim's lack of physical injuries were not consistent with her claims of abuse. This assessment was correctly based upon the fact the State's trial expert testified there were no physical injuries, and based upon the cross-examination by Petitioner's trial counsel highlighting that there was no physical evidence of abuse. However, Petitioner's more important challenge in this matter concerns the testimony of the State's medical expert that in more than ninety percent (90%) of sexual abuse cases there are no physical injuries present. Petitioner has presented the declaration of John M. Stuemky, M.D., Associate Director of

Pediatrics and Director of the Child Protection Team at the University of Oklahoma Medical Center, who states that if all of the facts testified to by the victim actually occurred, it would seem more likely that there should have been physical findings on the victim. Petitioner is thus arguing that this case falls within the less that ten percent (10%) of sexual abuse cases where physical injuries should be present; and appellate counsel was ineffective for failing to recognize this and to investigate and ask to supplement the appeal record with such evidence. The District Court found appellate counsel was not ineffective with regard to Dr. Stuemky's report because portions of it would be detrimental to Petitioner. The District Court order does not explain which portions of the report would be detrimental or how they would be detrimental. Appellate counsel explained she did not pursue such an avenue because further examination could have resulted in a diagnosis of abuse. However, further examination could have resulted in a diagnosis of fabricated testimony. The District Court order is incomplete with regard to this issue.

Finally, the District Court erred by using an incorrect standard of review in determining that, even if appellate counsel had conducted an investigation and discovered the evidence now presented, the outcome of Petitioner's appeal and trial would not have been different. The District Court found "there is no guarantee" evidence in the materials attached to his post-conviction would have changed the outcome of his appeal, or his trial. The second prong of *Strickland* regarding resulting prejudice does not require a 'guarantee' that the result of the proceeding would have been different; it requires a "reasonable probability" the

result of the proceeding would have been different. *Logan*, 2013 OK CR 2 at ¶5, 293 P.3d at 973 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674 (1984)). The District Court should assess Petitioner's claims using the correct legal standard.

IT IS THEREFORE THE ORDER OF THIS COURT that the order of the District Court of Cleveland County denying Petitioner's application for post-conviction relief in Case No. CF-2006-250 should be, and is hereby, **REVERSED** and **REMANDED** to the District Court for further post-conviction proceedings and entry of a new order in accordance with this order.

The party aggrieved by the District Court's post-conviction order on remand may file a new appeal pursuant to Section V, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2014). Pursuant to Rule 3.15, *Rules, supra*, the MANDATE is ORDERED issued forthwith upon the filing of this decision with the Clerk of this Court.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 24th day of January, 2014.

- Dissent

DAVID B. LEWIS, Presiding Judge

CLANCY SMITH, Vice Presiding Judge

Dissent

GARY L. LUMPKIN, Judge Petitioner has already had an evidentiary hearing in [redacted] Presently the Non-Capital Appellate

CHARLES A. JOHNSON, Judge

ARLENE JOHNSON, Judge

ATTEST:

Clerk

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CF-2006-250
	)	
LARRY ALAN WHITELY,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on Defendant's Application for Post Conviction Relief. By Order entered October 27, 2011, the only remaining issue for review is Defendant's claim of Ineffective Assistance of Appellate Counsel. The matter was set for evidentiary hearing commencing January 18, 2012. Due to insufficient time, the matter was continued to February 23, 2012. At the request of Defendant, the hearing set for February 23, 2012 was stricken and reset to May 10, 2012. After preparation of the record and review of the same as well as review of relevant authority, this Court finds and orders as follows:

1. Defendant contends that appellate counsel was ineffective for failing to raise issues of ineffective assistance of trial counsel and prosecutorial misconduct. Furthermore, that appellate counsel was ineffective for failing to conduct an "off record review".

2. Ineffective assistance of trial counsel is judged by the same legal standard as ineffective assistance of trial counsel. *Hale v. State*, 1997 OK CR 16, 934 P.2d 1100. The *Hale* Court stated:

> The test for determining the effectiveness of both trial and appellate counsel is the standard of "reasonably effective [934 P.2d 1103] assistance" set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674, 692-693 (1984);

Hooks v. State, 902 P.2d 1120, 1123 n.14 (Okl.Cr.1995). Interpreting *Strickland*, the Supreme Court has held:

> . . . a criminal defendant alleging prejudice must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S., at 687, 104 S.Ct., at 2064; see also *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L.Ed.2d 305 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect"); *Nix v. Whiteside*, supra, at 175. Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him. See Cronic, supra, at 658. *Lockhart v. Fretwell*, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180, 189 (1993) (footnote omitted).

3. Based on the foregoing authority, Defendant must be able to show that absent the errors of appellate counsel in failing to raise the ineffective assistance of trial counsel issues as well as the issues of prosecutorial misconduct that not only would the result have been different but that the errors so upset the balance of the system that the proceeding is rendered unreliable. *See Hale, supra.,* and *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). Defendant points to trial counsel's failure to present medical evidence, failure to present a forensic expert, failure to present witnesses regarding the victim's character, failure to produce evidence that the victim made a false accusation against a classmate, failure to present witnesses of defendant's character, and, failure to properly cross-examine witnesses. Furthermore, Defendant asserts that the prosecution interfered with Defendant's spouse's testimony by threats and coercive activities in the juvenile deprived matter relating to her children and made improper closing arguments. Defendant alleges that these errors should have been brought forth in the direct appeal but were not as a result of appellate counsel's failure to conduct an off record review.

4. Appellate counsel reviewed the entire record of the proceedings and based upon her review, determined that she could not maintain an ineffective assistance of counsel claim under *Strickland*. See Tr. pp. 122-123, 144 (1/18/12). Appellate counsel was privy to the issues and concerns of Defendant based upon correspondence and reviewed the record with those concerns in mind. In particular, appellate counsel considered the following:

a. The issue of whether additional witnesses regarding the character of the victim should have been presented would not meet the *Strickland* test based upon the evidence that was presented at trial from the victim and other witnesses that did testify. Based upon review of the record, the propensity of the child to lie was fully litigated and argued by defense counsel. Additional witnesses may have caused the jury to feel sympathy for the victim and thereby causing more harm to the defendant. See Tr. pp. 131, 136-137 (1/18/12).

b. The issue of whether additional witnesses regarding the character of the defendant should have been presented could have been a strategic decision based upon the fact that Defendant did not testify (and thereby put his character at issue) and based upon the fact that certain character testimony could have opened the door to evidence excluded under the Burk's hearing. Tr. pp. 28-29, 117, 120, 137-139 (1/18/12).

c. There were ample examples of excellent cross-examination in the record as well as presentation of evidence. Tr. pp. 112, 125-126, 129-130, 143-144 (1/18/12).

d. Based upon trial counsel's cross-examination of State's medical expert, there was no need for an additional medical expert to testify that the victim's lack of physical injuries were not consistent with her claims of abuse. Tr. pp 122 (1/18/12). Furthermore, the proffered report of Dr. Stuemky did not provide evidence of trial counsel's incompetence as portions of the report would be detrimental to Defendant's case. Tr. pp.141-140 (1/18/12).

e. The record did not reflect that trial counsel failed to prepare Defendant to testify. In fact, the record reflected that the Defendant, in an on the record discussion, stated that he waived his right to testify on his own behalf. See Trial Transcript pp. 829-830.

5. The issues considered by appellate counsel and her conclusions are supported by the trial record in this matter. In addition, even assuming that trial counsel should have and would have been allowed to add all of the witnesses suggested by Defendant in his brief, there is no guarantee that a jury would have found differently based upon the evidence contained in the record.

6. The final area that Defendant claims that his appellate counsel was ineffective in presenting is a prosecutorial misconduct issue. Defendant asserts that the prosecution interfered with Defendant's spouse's testimony by threats and coercive activities in the juvenile deprived matter relating to her children and that appellate counsel failed to raise this issue on direct appeal. The trial record contains no indication that Defendant's spouse (K.Whitely) did not have a full opportunity to present her evidence at trial. In fact, K. Whitely did indeed testify in support of her husband. Appellate counsel was aware of this not only from the transcript but from Defendant's correspondence to her. Defendant's correspondence (attached to the hearing record at Exhibit C-2) states: "My wife Kelly has been supportive and states she knows I didn't do it. She even took the stand in my defense costing her to lose the battle at the time with DHS." See also Tr. pp 35-46. It is clear from the record that whether the Department of Human Services or the District Attorney's treatment of the deprived matter had a coercive effect on Defendant's witness (his wife), it is clear that the alleged coercion had no effect on the witness. Based upon this review of the record, there would be no need for an off the record investigation and appellate counsel's representation was reasonable based upon the testimony adduced at trial.

7. Based upon the totality of the review of the trial record as well as the testimony and argument received in these proceedings, this Court finds that the foregoing facts and authority demand that Defendant's request for Post Conviction Relief be DENIED.

IT IS SO ORDERED this 7th day of November, 2012!

JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I, Kari Wilder, Secretary/Bailiff to Judge Walkley to hereby certify that a true and correct copy of the foregoing pleading was mailed/delivered to Jennifer Austin, Assistant District Attorney, 21st Judicial District, Mr. Mark Barrett, Attorney for Defendant, P.O. Box 896, Norman, Oklahoma 73070, Larry A. Whitely, Lawton Correctional Facility, 8607 Flower Mound Road, Lawton, Oklahoma 73501, on the 7th day of November, 2012.

Kari Wilder, Secretary/Bailiff

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT AND COMPLETE COPY OF THE INSTRUMENT HEREWITH SET OUT AS IT APPEARS ON RECORD IN THE COURT CLERK'S OFFICE OF CLEVELAND COUNTY, OKLAHOMA
WITNESS MY HAND AND SEAL THIS 13 DAY OF Nov, 2012
RHONDA HALL, COURT CLERK
BY _____ DEPUTY

BARCODE ONLY

1017170513

IN THE DISTRICT COURT OF CLEVELAND COUNTY, STATE OF OK

State — DA/ Austin

Plaintiff(s) — Attorney(s) for Plaintiff(s)

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

—vs— Case No. CF-06-250

FILED In The
Office of the Court Clerk

Whiteley — Barrett

Defendant(s) — Attorney(s) for Defendants(s)

DEC 15 2011

DOCKET PAGE RECORDED
Rhonda Hall, Court Clerk
DEPUTY

SUMMARY ORDER

Date: 12/15/11 **Court Reporter** JD **Judge:** LMW

Matter comes on for discovery mtn. Argument taken.

Mtn O/R. except as to dep of prior appel. counsel allowed

JUDGE

(151)

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IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED In The
Office of the Court Clerk
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Rhonda Hall, Court Clerk
_____ DEPUTY

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CF-2006-250
	)	
LARRY ALAN WHITELY,	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on Defendant's Application for Post Conviction Relief and Motion for Summary Disposition. Upon review of the pleading on file herein, the Court finds and orders as follows:

1. This matter was originally assigned to Judge Hetherington. Following Judge Hetherington's appointment to the Court of Civil Appeals, this matter was assigned to Judge Ring and then his successor, Judge Schumacher. Judge Schumacher recused from this matter which was then reassigned to the undersigned judge. Due to inadvertent errors in delivering pleadings to the newest judge, this Court was not aware of the status of this matter until the letter from Defendant's counsel of September 8, 2011. At that time, this Court undertook a review of the voluminous filings in this case. It should be noted that the post conviction matters comprise four (4) court files.

2. Based upon review of the briefs, pleadings, transcripts, statements and other documents contained in the court files, this Court finds that, as a matter of law, Defendant has waived the arguments with regard to prosecutorial misconduct and ineffective assistance of trial counsel for failing to waive the same on direct appeal. *Rojem v. State*, 829 P.2d 683 (Okla. Cr.

1992).

3. Defendant's request for relief as to the issues of ineffective assistance of appellate counsel is ripe for adjudication. However, the Court finds that there are facts in dispute which would entitle Defendant to relief and therefore, the request for Summary Adjudication is denied. Accordingly, this matter shall be set hearing before the undersigned judge. Counsel are directed to contact Judge Walkley's office to schedule said hearing. The hearing on Defendant's request for Post Conviction Relief shall be limited to the issues relating to ineffective assistance of appellate counsel as set forth in Defendant's Application.

IT IS SO ORDERED this 26th day of October, 2011!

JUDGE OF THE DISTRICT COURT

CERTIFICATE OF MAILING

I, Kari Wilder, Secretary/Bailiff to Judge Walkley to hereby certify that a true and correct copy of the foregoing pleading was mailed/delivered to Jennifer Austin, Assistant District Attorney, 21st Judicial District, Mr. Mark Barrett, Attorney for Defendant, P.O. Box 896, Norman, Oklahoma 73070, Larry A. Whitely, Lawton Correctional Facility, 8607 Flower Mound Road, Lawton, Oklahoma 73501, on the 27 day of October, 2011.

Furthermore, a courtesy copy of this order was mailed to Michael S. Ritchie, Clerk of the Court of Criminal Appeals with a request that this order be filed in MA-2011-928.

Kari Wilder, Secretary/Bailiff

IT IS THEREFORE THE ORDER OF THIS COURT that this matter is **REMANDED** to the District Court of Caddo County where the District Court shall direct the District Court Clerk to reassemble the record on appeal and forward the completed record and a new Notice of Completion to the Clerk of this Court within ten (10) days of the date of this Order. Finally, Appellee's briefing time **SHALL** start anew upon the District Court Clerk's filing of a new Notice of Completion of Record on Appeal with the Clerk of this Court.

9 **MA-2011-921**
Payne County
Case No. CF-2010-722
Honorable STEPHEN R. KISTLER
Associate District Judge

AMON W. PERSHALL, JR., v. STATE OF OKLAHOMA

ORDER DIRECTING RESPONSE

Petitioner has filed with the Clerk of this Court a petition for a writ of mandamus requesting this Court issue a Writ of Mandamus to the District Court of Payne County. Petitioner alleges that as of the date of filing this request for relief with this Court, the District Court has failed to rule on Petitioner's May 27, 2011 motion for speedy trial and Petitioner's July 25, 2011, motion to suppress the evidence.

The District Court of Payne County, the Honorable Stephen R. Kistler, Associate District Judge, or a designated representative, shall determine whether Petitioner has filed the above-referenced pleadings. If no such motions were filed, the District Court shall advise this Court by memorandum. If the District Court has already disposed of Petitioner's motions, a certified copy of the disposition orders shall be forwarded to this Court and Petitioner. If the motions were filed and disposition has not been made, the District Court shall act upon the motions within thirty (30) days from the date of this Order, and forward a certified copy of the disposition order to this Court, and Petitioner.

10 **MA-2011-928**
Cleveland County
Case No. CF-2006-250
Honorable LORI WALKLEY
District Judge

LARRY ALAN WHITELY v. HON. LORI WALKLEY, ET AL.,

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED In The
Office of the Court Clerk
OCT 25 2011
DOCKET_____ PAGE_____ RECORDED
Rhonda Hall, Court Clerk
DEPUTY

ORDER DIRECTING RESPONSE

Petitioner has filed with the Clerk of this Court a petition for a writ of mandamus requesting this Court issue a Writ of Mandamus to the District Court of Cleveland County. Petitioner alleges that as of the date of filing this request for relief with this Court, the District Court has failed to rule on Petitioner's June 28, 2010 application for post-conviction relief and Petitioner's February 28, 2011, motion for summary disposition.

The District Court of Cleveland County, the Honorable Lori Walkley, District Judge, or a designated representative, shall determine whether Petitioner has filed the above-referenced pleadings. If no such motions were filed, the District Court shall advise this Court by memorandum. If the District Court has already disposed of Petitioner's motions, a certified copy of the disposition orders shall be forwarded to this Court and Petitioner. If the motions were filed and disposition has not been made, the District Court shall act upon the motions within thirty (30) days from the date of this Order, and forward a certified copy of the disposition order to this Court, and Petitioner.

11 **C-2011-836**
Tulsa County
Case No. CF-2010-1229
Honorable TOM C. GILLERT
District Judge

DENISE MARIE FLANAGAN v. STATE OF OKLAHOMA

ORDER GRANTING MOTION TO AMEND DESIGNATION OF RECORD

Appellant, by and through counsel, has filed a Motion to Amend Designation of Record, pursuant to Rule 3.11(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2011). Counsel states that the June 24, 2010 preliminary hearing transcript was inadvertently omitted from the September 8, 2010 Designation of Record. Appellant asks this Court to permit supplementation of the record on appeal to include the June 24, 2010 preliminary hearing transcript, to assist in the preparation of his appeal. For good cause shown, we **FIND** the motion to amend the Designation of Record on appeal should be **GRANTED**.

12 **MA-2011-933**
Oklahoma County
Case No. CF-1998-7316
Honorable KENNETH C. WATSON
District Judge

ROBERT NIETO v. THE STATE OF OKLAHOMA

ORDER DIRECTING RESPONSE

Petitioner, *pro se*, filed with the Clerk of this Court a petition for a writ of mandamus requesting this Court issue a Writ of Mandamus to the District Court of Oklahoma County. Petitioner alleges that as of the date of filing this request for relief with this Court, the District Court has failed to rule on Petitioner's motion for an order *nunc pro tunc* which Petitioner alleges was filed in the District Court on September 14, 2010.

The District Court of Oklahoma County, the Honorable Kenneth C. Watson, District Judge, or a designated representative, shall determine whether Petitioner has filed the above-referenced pleading. If no such request was filed, the District Court shall advise this Court by memorandum. If the District Court has already disposed of Petitioner's request, a

IN THE DISTRICT COURT O [redacted], STATE OF OKLAHOMA

1004829553

State of Oklahoma — DA/ Jennifer Austin
Plaintiff(s) — Attorney(s) for Plaintiff(s)

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED In The Office of the Court Clerk
APR 02 2007
Florida Hall, Court Clerk
DEPUTY

—VS— Case No. CF-06-250

Larry Alan Whitely — David Smith
Defendant(s) — Attorney(s) for Defendant(s)

DOCKET PAGE RECORDED

SUMMARY ORDER

Date: 3-29-07 — Judge BH

Court Reporter A.T.

Parties appear, D w/ counsel for pre-trial conf. Proceedings. Sworn testimony taken & following argument of counsel Order F & E in each of Cts I & II to be entered of record, Ordering this D confined to the care & custody of DOC for a period of twenty (20) years on each County

JUDGE

(1)

(78)

16d

IN THE DISTRICT COURT OF CLEVELAND COUNTY, STATE OF OKLAHOMA

(7)

Plaintiff(s) | Attorney(s) for Plaintiff(s)

—vs— Case No. CF-06-250

Defendants(s) | Attorney(s) for Defendants(s)

SUMMARY ORDER

Date: 3-29-07 **Judge** BH

Court Reporter

to run Concurrent each with the other. He is Ordered to pay all costs & fees of this Action per Rule 8 & is Ordered to report to Dept Admin Restitution w/in Next (2) Weeks of his release. Advised of Appeal rights & right to remain in CCDC for 10 days & ~~[illegible]~~ / does not waive the 10 days.

JUDGE

162

App.153

FILED
United States Court of Appeals
Tenth Circuit

January 16, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LARRY ALAN WHITELY,

Petitioner - Appellant,

v.

JIM FARRIS, Warden,

Respondent - Appellee.

No. 18-6085

ORDER

Before **HARTZ**, **MURPHY**, and **CARSON**, 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

CHRISTOPHER M. WOLPERT, Clerk

§22-1084. Evidentiary hearing - Findings of fact and conclusions of law.

If the application cannot be disposed of on the pleadings and record, or there exists a material issue of fact, the court shall conduct an evidentiary hearing at which time a record shall be made and preserved. The court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the applicant brought before it for the hearing. A judge should not preside at such a hearing if his testimony is material. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.

Laws 1970, c. 220, § 5, eff. July 1, 1970.