FILED
United States Court of Appeals
Tenth Circuit

November 7, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RANDY PHIPPS,

Petitioner - Appellant,

v.

RICK RAEMISCH, Director of the Colorado Department of Corrections; MICHAEL MILLER, Warden; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 18-1396
(D.C. No. 1:17-CV-01833-PAB)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **PHILLIPS**, and **CARSON**, Circuit Judges.

Randy Phipps, a state prisoner appearing pro se, seeks a certificate of appealability (COA) to appeal the district court's denial of his application for habeas relief under 28 U.S.C. § 2254. He also seeks leave to proceed *in forma pauperis* ("*ifp*"). Exercising jurisdiction under 28 U.S.C. §§ 1291 and 2253(a), we deny his requests for a COA and to proceed IFP and dismiss this matter.[1]

---

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

[1] Because Mr. Phipps is pro se, we construe his filings liberally, but we do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

I. BACKGROUND

A. *State Court Proceedings*

In 2011, Mr. Phipps pled guilty to sexual assault on a child by a person in a position of trust and as part of a pattern of sexual abuse. The state court sentenced him to an indeterminate prison term of seventeen years to life. He did not appeal.

In 2014, Mr. Phipps filed a motion for postconviction relief under Colo. R. Crim. P. 35(c) asserting multiple ineffective assistance of counsel ("IAC") claims. The state district court denied the motion, and Mr. Phipps appealed. The Colorado Court of Appeals ("CCA") affirmed after considering Mr. Phipps's IAC claims on the merits. In doing so, it summarized the facts and procedural history of Mr. Phipps's case as follows:[2]

> During an investigation to detect child pornography shared over the Internet, the police remotely searched a computer onto which at least two files depicting child pornography had been downloaded. Using that computer's Internet Protocol (IP) address, the police determined that the computer was located in Phipps' home. The police obtained and executed a search warrant of Phipps' home.
>
> Phipps was not home at the time of the search, but an officer spoke with him on the phone during the search and explained why his home was being searched. During that recorded phone call, Phipps admitted that he stored child pornography on his computer and that once the officer searched his computer, "his life was over." The police seized Phipps' computer, on which they found over thirty videos of children engaged in sexual acts.
>
> One of these videos depicted Phipps' stepdaughter when she was approximately eight or nine years old. She was mostly nude, and the video showed Phipps instructing her to use sex toys as well as Phipps using sex toys on her. In her police interview, Phipps' stepdaughter identified herself

[2] In reviewing a § 2254 application, "[w]e presume that the factual findings of the state courts to be correct" unless the applicant presents clear and convincing evidence to the contrary. *Fairchild v. Workman,* 579 F.3d 1134, 1139 (10th Cir. 2009); *see* 28 U.S.C. § 2254(e)(1). Mr. Phipps does not challenge the state court's determination of the facts stated above.

and Phipps in the video and stated that Phipps had sexually assaulted her numerous times.

Phipps was charged with sexual assault on a child (position of trust—pattern of abuse) under sections 18–3–405.3(1), (2)(b), C.R.S. 2016; aggravated incest under section 18–6–302(1)(a), C.R.S. 2016; sexual exploitation of a child (inducement) under section 18–6–403(3)(a), C.R.S. 2016; and sexual exploitation of children (possession) under section 18–6–403(3)(b.5). The court found Phipps indigent and appointed counsel to represent him.

A plea agreement was negotiated and Phipps pleaded guilty to the sexual assault charge. In exchange, the district attorney dismissed the remaining charges and promised that the United States Attorney would not prosecute Phipps on child pornography charges.

At the sentencing hearing, Phipps took full responsibility for his crimes. He stated that he did not wish to put his family through a "horrific ordeal with a jury trial," and that his "remorse, regrets, shame, despair, sadness, and sorrow cannot be measured."

In his motion for postconviction relief, Phipps made numerous claims of ineffective assistance of counsel. The arguments Phipps renews on appeal are:

- His counsel failed to challenge the legality of the initial, remote search of Phipps's computer, which violated his Fourth Amendment rights.

  . . .

- His counsel's failure to investigate and challenge the prosecution's forensic computer evidence or hire an expert to do so constituted deficient performance.

- His counsel failed to advise him that, as a condition of his parole eligibility, he might be required to reveal past crimes, exposing him to additional criminal charges.

- His counsel failed to advise him that evidence of his crimes might be destroyed after he pleaded guilty.

  . . .

- His counsel misadvised him about the minimum amount of prison time he would have to serve before being eligible for parole.

- His counsel misled him with regard to whether he was pleading guilty to a crime of violence.

> The district court did not hold a hearing, but concluded that the existing record demonstrated that Phipps' claims failed one or both prongs of *Strickland* [*v. Washington*, 466 U.S. 668 (1984)].

People v. Phipps, 411 P.3d 1157, 1160-61 (Colo. App. 2016) (paragraph numbers omitted) (also available at R. Vol. 2 at 301, 302-06).

The CCA affirmed the trial court's order denying Mr. Phipps's claims for postconviction relief because his "allegations were bare and conclusory in nature, directly refuted by the record, and, even if proven true, would have failed to establish one of the prongs of the test prescribed in *Strickland*." *Id.* at 1160. It did not, however, address his cumulative-error argument. The Colorado Supreme Court denied Mr. Phipps's application for certiorari.

B. *Federal District Court Proceedings*

Mr. Phipps next filed this action challenging his conviction under 28 U.S.C. § 2254. He asserted 13 claims. Claims 1-7 each attempted to allege both an IAC claim and one or more separate but related constitutional claims.[3] Claims 8 and 10 alleged state constitutional errors. Claims 11 and 13 alleged IAC. And Claims 9 and 12 alleged cumulative error.

After an initial round of briefing by the parties, the district court issued a detailed order assessing which claims Mr. Phipps had exhausted and whether the unexhausted

[3] For example, in Claim 1, Mr. Phipps alleged counsel was ineffective by coercing his guilty plea, and also alleged violation of equal protection and due process as a result of the allegedly coerced plea.

claims were procedurally barred ("Procedural Order"). The court concluded Mr. Phipps had failed to exhaust his non-IAC federal constitutional claims, which were asserted as part of Claims 1-7 and in Claims 8 and 10 of his habeas application. The court further concluded these claims were procedurally defaulted because they would be procedurally barred under state law if he attempted to present them to the state court. The district court therefore dismissed these non-IAC constitutional claims with prejudice. This left the IAC allegations in Claims 1-7, 11, and 13; and the cumulative error allegations in Claims 9 and 12.

After receiving additional briefing from the parties, the district court issued a second lengthy order ("Merits Order"). It reviewed Mr. Phipps's exhausted claims under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), except for his cumulative-error claims, which it reviewed de novo. Based on this review, the court concluded Mr. Phipps was not entitled to habeas relief and dismissed his case with prejudice. It also denied a COA and denied leave for Mr. Phipps to proceed *ifp* on appeal.

Mr. Phipps (1) requests a COA to appeal portions of the Procedural Order[4] and the entirety of the Merits Order; (2) seeks to appeal the district court's failure to grant his "Motion to Object, Compel, and Sanction," which he filed two days before the district court dismissed the case; and (3) renews his *ifp* request.

[4] Mr. Phipps does not challenge the district court's ruling that he had failed to exhaust Claims 8 and 10 and that they must be dismissed as procedurally defaulted.

II. DISCUSSION

A. *COA Standard*

We must grant a COA to review a district court's denial of a § 2254 petition. *See* 28 U.S.C. § 2253(c)(1)(A). To receive a COA, the petitioner must make "a substantial showing of the denial of a constitutional right," *id.* § 2253(c)(2), and must show "that reasonable jurists could debate whether . . . 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).

Under AEDPA, when a state court has adjudicated the merits of a claim, a federal district court cannot grant habeas relief on that claim unless the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2).

When the district court has denied habeas relief because the petitioner failed to overcome AEDPA, our COA decision requires us to determine whether reasonable jurists could debate the court's application of AEDPA to the state court's decisions. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Where, as here, the district court dismissed certain claims in the application on procedural grounds, we will grant a COA as to those claims only if the applicant can demonstrate both "that jurists of reason would find it debatable whether the petition states

a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

B. ***Analysis of COA Application***

Mr. Phipps is not entitled to a COA because reasonable jurists would not debate whether the district court correctly decided the issues he seeks to appeal.

1. **Claims Dismissed as Unexhausted**

In his amended § 2254 application, Mr. Phipps asserted an IAC claim and a non-IAC claim within each of his first seven listed claims. The district court dismissed each of the non-IAC claims, concluding they were unexhausted because Mr. Phipps had not fairly presented them to the state courts and also were procedurally barred.[5] *See* R. Vol. 2 at 182-94, 197-98. Mr. Phipps seeks a COA to challenge this procedural ruling as to these seven claims.

a. *Legal background*

Title 28 U.S.C. § 2254(b)(1) states: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless . . . the applicant has exhausted the remedies available in the courts of the State." To satisfy this exhaustion requirement, a state prisoner must fairly present his or her claims to the state's highest court—either by direct review or in a postconviction

[5] The district court dismissed Mr. Phipps's non-IAC constitutional claims with prejudice upon finding these claims were procedurally barred. Mr. Phipps does not challenge this finding, but only the district court's threshold finding that the claims were unexhausted.

attack—before asserting them in federal court. *See Fairchild v. Workman*, 579 F.3d 1134, 1151 (10th Cir. 2009) ("Exhaustion requires that the claim be fairly presented to the state court." (internal quotation marks omitted)); *Brown v. Shanks*, 185 F.3d 1122, 1124 (10th Cir. 1999) ("The exhaustion requirement is satisfied if the issues have been properly presented to the highest state court, either by direct review of the conviction or in a postconviction attack." (internal quotation marks omitted)).

"Fair presentation of a prisoner's claim to the state courts means that the substance of the claim must be raised there." *Patton v. Mullin*, 425 F.3d 788, 809 n.7 (10th Cir. 2005) (internal quotation marks omitted). To satisfy the "fair presentation" requirement, "[t]he prisoner's allegations and supporting evidence must offer the state courts a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." *Id.* (internal quotation marks omitted). The "petitioner bears the burden of demonstrating that he has exhausted his available state remedies." *McCormick v. Kline*, 572 F.3d 841, 851 (10th Cir. 2009) (internal quotation marks omitted).

When a federal court determines that an applicant's claims are not exhausted, it may deny the claims on the merits, *see* 28 U.S.C. § 2254(b)(2), or dismiss the unexhausted claims without prejudice to allow the applicant to return to state court to exhaust the claims, *see Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006). Permitting the applicant to return to state court is not appropriate, however, if the applicant's claims are subject to an anticipatory procedural bar. *See id.*; *Frost v. Pryor*, 749 F.3d 1212, 1231 (10th Cir. 2014) ("Anticipatory procedural bar occurs when the federal courts apply procedural bar to an unexhausted claim that would be procedurally

barred under state law if the petitioner returned to state court to exhaust it." (internal quotation marks omitted)).

When a federal court applies an anticipatory procedural bar to a habeas applicant's claims, the applicant's claims are "considered *exhausted* and *procedurally defaulted* for purposes of federal habeas relief." *Thomas v. Gibson*, 218 F.3d 1213, 1221 (10th Cir. 2000) (emphases added); *see also Woodford v. Ngo*, 548 U.S. 81, 92-93 (2006) ("In habeas, state-court remedies are described as having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability."); *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991) (noting that "there is a procedural default for purposes of federal habeas review" if "the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred"); *Cannon v. Gibson*, 259 F.3d 1253, 1266 n.11 (10th Cir. 2001) (same).

There are two circumstances where a federal court may nevertheless consider claims subject to an anticipatory procedural bar: (1) if the prisoner has alleged sufficient "cause" for failing to raise the claim and resulting "prejudice," *Coleman*, 501 U.S. at 750, or (2) if denying review would result in "a fundamental miscarriage of justice," *id.*, because the applicant has made a "credible" showing of actual innocence, *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). *See Frost*, 749 F.3d at 1231.

b. *Analysis*

Mr. Phipps argues he met this burden to show exhaustion because he (1) informed the state court in his memorandum of law supporting his postconviction motion that

"there [were] multiple issues infused into each claim of this motion," COA Appl. at 6 (quoting St. Ct. R., Doc. 43, at 3 (available on St. Ct. R. CD, Doc. 43, in the district court docket)); (2) "framed the issues in his IAC motions as United States Constitutional violations," *id.*; and (3) cited "numerous" Supreme Court, Tenth Circuit and other federal appellate decisions to support the alleged constitutional issues, *id.*

Mr. Phipps fails to cite to any part of the state court record demonstrating that he fairly presented a specific non-IAC constitutional claim to the state court. He may not rely on mere conclusory allegations and must instead support his arguments with "citations to the authorities and parts of the record on which [he] relies." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840-41 (10th Cir. 2005) (internal quotation marks omitted). Mr. Phipps's briefing of the exhaustion issue is deficient under this standard, which forfeits appellate consideration of this issue. *See id.* at 841; *see also Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007).

Even if we were to overlook Mr. Phipps's deficient briefing, his conclusory assertions fail to meet his burden of demonstrating exhaustion of his available state remedies for each non-IAC claim included in Claims 1-7 of his habeas application. Nor does he offer any reason for jurists to debate the district court's ruling that his IAC claims did not fairly present his allegations of separate and analytically distinct constitutional violations to the state court for decision.[6]

---

[6] *See, e.g.*, Procedural Order, R. Vol. 2 at 185-86 (citing *Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986) (explaining that applicant's Sixth Amendment IAC claim alleging counsel failed to pursue a Fourth Amendment claim was not identical to the

Not only has Mr. Phipps failed to show exhaustion of his non-IAC claims, he has not even attempted to contest the district court's determination that they are subject to anticipatory procedural bar. Further, he has not shown sufficient cause for failure to raise these claims or shown that he is actually innocent.

We thus deny Mr. Phipps's request for a COA on the district court's dismissal of the non-IAC constitutional claims as unexhausted, subject to anticipatory procedural bar, and procedurally defaulted.

2. **Claims Dismissed on the Merits**

The claims that remained after the district court's exhaustion and procedural default analysis each alleged Mr. Phipps received ineffective assistance of counsel in violation of the Sixth Amendment.

a. *Legal background—ineffective assistance of counsel*

The Supreme Court clearly established the ineffective assistance of counsel standard in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires a showing of (1) deficient performance that (2) causes prejudice. *Id.* at 687. The first step requires showing that defense counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed ... by the Sixth Amendment." *Id.* The

---

defaulted Fourth Amendment claim because the claims are "distinct, both in nature and in the requisite elements of proof"); *White v. Mitchell*, 431 F.3d 517, 525-26 (6th Cir. 2005) (holding claim that counsel was ineffective for failing to raise equal protection challenge to jury selection did not exhaust related claim that prosecution violated applicant's right to equal protection in selecting the jury); *Rose v. Palmateer*, 395 F.3d 1108, 1110-12 (9th Cir. 2005) (holding claim that counsel was ineffective for failing to seek suppression of confession did not exhaust claim that confession was involuntary because the claims are distinct and must be "separately and specifically presented to the state courts")).

performance assessment is "highly deferential." *Id.* at 689. Counsel's actions are presumed to constitute "sound trial strategy." *Id.* (internal quotation marks omitted). At the second step, *Strickland* requires a demonstration that counsel's errors and omissions resulted in actual prejudice, *id.* at 687; that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

When coupled with AEDPA, the *Strickland* standard is doubly deferential. *See Cullen v. Pinholster*, 563 U.S. 170, 190 (2011); *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). This is so because "[w]e take a highly deferential look at counsel's performance," as required by *Strickland*, "through the deferential lens of § 2254(d)." *Cullen*, 563 U.S. at 190 (internal quotation marks omitted).

b. *Analysis of the claims*

i. Causing Mr. Phipps to plead guilty to a crime of violence

In Claim 1 of his habeas application, Mr. Phipps asserted his counsel misled and coerced him into pleading guilty to a crime of violence. He alleged that he would have gone to trial rather than "plead[] guilty to a crime of violence, or a crime associated with violence in any way." R. Vol. 1 at 255 (internal quotation marks omitted).

The CCA held this claim failed both prongs of the *Strickland* standard. It found counsel's performance was not deficient because (1) he reasonably construed his client's position to be that he would never plead guilty to a crime that involved violence; (2) counsel informed the court at the plea hearing that Mr. Phipps denied using or

threatening violence when he sexually assaulted his step-daughter; and (3) the crime to which Mr. Phipps pled guilty, sexual assault on a child by a person in a position of trust as part of a pattern of sexual abuse, *see* Colo. Rev. Stat. § 18-3-405.3(1), (2)(b), is neither defined as a crime of violence nor includes the use or threat of violence as one of its elements. *See Phipps*, 411 P.3d at 1166. On the prejudice prong, the CCA concluded Mr. Phipps's own statement of reasons to the court for pleading guilty—that he wanted to take full responsibility for his crime and not put the victim and his family through the ordeal of a jury trial—established there was no reasonable probability that he would have proceeded to trial but for his counsel's allegedly deficient performance on this issue. *See id.*

Mr. Phipps argued in his habeas application that the CCA erred in concluding he had not pled guilty to a crime of violence because his non-violent crime was treated as a crime of violence for sentencing and thus was considered a "per se" crime of violence under Colorado law. *Chavez v. People*, 359 P.3d 1040, 1043 (Colo. 2015). But Mr. Phipps has not shown to be erroneous the CCA's factual findings that his counsel reasonably understood his client would not plead guilty to a crime that involved violent conduct and that he and Mr. Phipps both informed the state court of this position.[7] Under AEDPA, these factual findings are presumed correct unless the habeas applicant rebuts them by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

[7] Mr. Phipps declares in his COA application that the "crime of violence" issue is separate from the "violent crime" issue. COA Appl. at 10. To the extent he intended this as a challenge to the district court's assessment of the CCA's decision on this issue, he failed to explain the basis for this challenge or support it with citations to the record.

The only evidence Mr. Phipps mentions is "material evidence in letters not yet allowed in the record." COA Appl. at 10. But AEDPA limits review of a state court decision to the record that was before the state court. *See Cullen*, 563 U.S. at 181 (limiting review under § 2254(d)(1) to "the record that was before the state court that adjudicated the claim on the merits"); 28 U.S.C. § 2254(d)(2) (limiting review "to the evidence presented in the State court proceeding").[8] As a result, Mr. Phipps has not overcome the presumption that these state court findings are correct.

The district court concluded Mr. Phipps had failed to demonstrate that the CCA's rejection of this IAC claim was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the

[8] At some points in his COA application, Mr. Phipps appears to argue that the district court erred by not holding an evidentiary hearing that would have allowed him to present evidence that was not considered by the Colorado courts. But AEDPA limits the availability of a federal evidentiary hearing in habeas proceedings, providing a hearing shall not be held unless the applicant makes certain showings. *See* 28 U.S.C. § 2254(e)(2); *Milton v. Miller*, 744 F.3d 660, 672-73 (10th Cir. 2014). Mr. Phipps has not attempted to demonstrate that he complied with AEDPA's requirements for obtaining an evidentiary hearing. In particular, he has not shown that the evidence he would present in a hearing could not have been discovered and presented to the state court through the exercise of due diligence. *See Milton*, 744 F.3d at 672-73 (stating that "where a state habeas petitioner has failed to develop the factual basis of a claim in State court proceedings," he "must show that he made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court in the manner prescribed by state law" (internal quotation marks omitted)). Under these circumstances, the district court did not abuse its discretion in failing to hold an evidentiary hearing. *See Fairchild*, 579 F.3d at 1147 (applying abuse of discretion standard to denial of evidentiary hearing). Mr. Phipps is not entitled to a COA on this issue because reasonable jurists would not debate the district court's denial of an evidentiary hearing. Even if a COA were not required, *see Harbison v. Bell*, 556 U.S. 180, 183 (2009), the foregoing discussion shows no error.

facts in light of the evidence presented in the state court. R. Vol. 2 at 359-61. Mr. Phipps has not demonstrated that reasonable jurists would debate the district court's conclusion. We therefore deny a COA on this claim.

ii. Failing to raise a Fourth Amendment challenge to the search of his home computer[9]

In Claims 2 and 3 of his § 2254 application, Mr. Phipps alleged his counsel was ineffective because he failed (1) to raise a Fourth Amendment challenge to the police's initial remote warrantless search of his home computer and (2) to investigate and prove that law enforcement lied about the software on his computer in the affidavit supporting the search warrant for the computer. The CCA rejected both claims, holding counsel's inaction, even if it constituted deficient performance, did not prejudice Mr. Phipps because both the initial remote search and the search warrant were lawful. *See Phipps*, 411 P.3d at 1163.

On the remote search, the CCA held that Mr. Phipps, having downloaded a peer-to-peer sharing software, did not have a legitimate expectation of privacy in the home computer files. *See id.* at 1162-63. The warrantless search thus did not violate the Fourth Amendment. In reaching this conclusion, the CCA considered and rejected as

[9] The Supreme Court has held that defendants may not bring Fourth Amendment challenges in habeas proceedings when they could have raised the same challenges in pretrial proceedings. *Stone v. Powell*, 428 U.S. 465, 494 (1976). But a habeas petitioner may allege counsel was ineffective for failure to move to suppress. In *Kimmelman v. Morrison*, 477 U.S. 365, 382-83 (1986), the Supreme Court held that although habeas petitioners may not raise Fourth Amendment arguments, they may allege counsel's ineffectiveness for failing to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment.

immaterial Mr. Phipps's argument that the remote search was unlawful because the police improperly identified the peer-to-peer sharing software he had downloaded as LimeWire, when in fact he had downloaded LimeWire's sister program, FrostWire. *See id.* at 1162 n.3. The CCA also rejected Mr. Phipps's argument that he retained a reasonable expectation of privacy in his home computer files because he intended to keep them private and was not aware that they were publicly available through the peer-to-peer sharing software he had installed. *See id.* at 1163. The CCA further concluded that because the initial remote search of Mr. Phipps's computer was lawful and discovered unlawful child pornography, the resulting issuance of the search warrant also was lawful. *See id.*

In his habeas application, Mr. Phipps renewed his claims that the remote search and search warrant were unlawful because the police and the state courts misidentified the peer-to-peer sharing software he used as LimeWire and he subjectively had intended to keep his home computer files private. The district court rejected the first contention because he had not presented clear and convincing evidence to overcome the CCA's key factual finding that police had discovered child pornography on Mr. Phipps's computer because he had installed peer-to-peer sharing software. *See* R. Vol. 2 at 364-65. It further found the CCA had correctly relied upon relevant Fourth Amendment authority in concluding Mr. Phipps had no reasonable expectation of privacy in the files downloaded to a publicly accessible folder through file sharing software. *See id.* at 365-66. As a result, Mr. Phipps had not shown that his counsel's failure to raise a Fourth Amendment challenge to the computer searches was objectively unreasonable or that he was

prejudiced by his counsel's inaction. The district court therefore concluded that the CCA's denial of these IAC claims was not contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts. *See id.* at 366-67.

Mr. Phipps does not address the district court's conclusions under AEDPA in his COA application or address the legal authority on which the CCA relied in deciding the computer searches were lawful. He thus has not demonstrated that reasonable jurists would debate the district court's denial of habeas relief on these claims. We deny a COA on them.

iii. Computer evidence and the state's forensic procedures

1) Claims 4, 5, 6

In Claims 4, 5 and 6, Mr. Phipps asserted his counsel failed to investigate or hire an expert to review the computer evidence against him or the state's forensic procedures. He also alleged that his counsel did not ensure that the state preserved the computer evidence and the results of its "botched" forensic examination. R. Vol. 1 at 267; *see id.* at 266-69.

The CCA rejected these claims because Mr. Phipps appeared to assert that the computer evidence, if properly investigated, would have shown that he never shared pornographic material on the internet. The CCA held this assertion was irrelevant to the crime of sexual assault on a child, the only charge to which Mr. Phipps pled guilty, or the other charged crimes. *See Phipps*, 411 P.3d at 1164. Further, the CCA held, even if his counsel's performance was deficient as alleged, Mr. Phipps could not establish prejudice

because he "admitted that he possessed numerous files containing child pornography on his computer, and that he had produced a video of him sexually assaulting his underage stepdaughter." *Id.*

The district court denied habeas relief on these claims. It determined that Mr. Phipps had not demonstrated that the CCA's decision was contrary to or was an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence before the state court. *See* R. Vol. 2 at 368-69.

In his COA application, Mr. Phipps does not address the district court's conclusions. He instead insists the computer evidence, if properly investigated and preserved, would have (1) substantiated his Fourth Amendment claims relating to the searches of his home computer, and (2) been essential to his defense in other unexplained ways. He also asserts he would not have pled guilty to sexual assault on a child if he had known his counsel had not addressed the computer evidence to his satisfaction.

These arguments are conclusory and unsupported by record citations or authority. Mr. Phipps fails to explain how investigation and preservation of the computer evidence or the state's forensic examination pertained to his crime of sexual assault on a child or his decision to plead guilty to this crime. Most important, these arguments fail to show that reasonable jurists would debate the district court's denial of habeas relief on these claims under AEDPA's strict standards.

2) Claim 7

Mr. Phipps raised a related claim in Claim 7. He alleged that his counsel was ineffective because he did not inform him that the state had "wiped" or destroyed the hard drive on his home computer after examining it and that he would not have pleaded guilty if he had known this had happened.

The CCA rejected this claim, concluding the record demonstrated Mr. Phipps's counsel had advised him this evidence might not be preserved. *See Phipps*, 411 P.3d at 1165. The CCA said Mr. Phipps also had not shown prejudice because, in view of his own admissions and "the overwhelming evidence of his guilt, there is no reasonable likelihood that Phipps would have changed his decision to plead guilty merely because evidence of his crimes might be destroyed." *Id.*[10]

The district court found Mr. Phipps's conclusory allegations in his habeas application failed to demonstrate the CCA court ruling was contrary to or involved an unreasonable application of clearly established law or was based on an unreasonable determination of the facts. *See* R. Vol. 2 at 369-71. Mr. Phipps does not squarely address this conclusion in his COA application or put forward any reason that reasonable jurists might debate it. We deny a COA on this issue.

[10] For example, Mr. Phipps admitted to sexually assaulting his step-daughter during his allocution at the sentencing hearing and later in a motion for reconsideration of his sentence.

iv. Falsifying transcripts

In Claim 7, Mr. Phipps contends his counsel conspired with the state to falsify the transcript of his sentencing hearing. He alleged this transcript was altered to omit the prosecutor's statements about wiping the hard drives on Mr. Phipps computer and not conducting a professional forensic examination of the computer evidence.

The CCA rejected this claim, finding there was "no evidence whatsoever on this record that the sentencing transcript was altered" and that Mr. Phipps had not identified how he was prejudiced by the alleged alteration. *Phipps*, 411 P.3d at 1166. The district court denied habeas relief after concluding Mr. Phipps had not demonstrated the CCA's ruling was contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the state court record. *See* R. Vol. 2 at 369-71.

Mr. Phipps's arguments on this issue in his COA application are conclusory, unsupported, and do not address the CCA's and district court's holdings that he had failed to show any prejudice from his counsel's participation in allegedly altering the transcript. Reasonable jurists would not debate the district court's denial of relief on this claim, and we therefore deny a COA.

v. Sexual history interview required by plea agreement

Mr. Phipps argues in Claim 11 that his counsel failed to advise him that the sexual history interview to which Mr. Phipps agreed in his plea agreement "may carry the risk of

prosecution" if he revealed past sexual crimes during the interview. R. Vol. 1 at 274.[11] The CCA denied this claim because the record showed Mr. Phipps agreed to participate in this review, "which would reasonably include past sexual crimes." *Phipps*, 411 P.3d at 1165.

The district court held Mr. Phipps had failed to demonstrate that the CCA's decision was contrary to or based on an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts as required to obtain habeas relief under AEDPA. *See* R. Vol. 2 at 371-73. In his COA application, Mr. Phipps does not address the district court's conclusion or its examination of this claim under AEDPA. At no time has Mr. Phipps identified clearly established Supreme Court law on this issue. Reasonable jurists would not debate that Mr. Phipps failed to show he is entitled to habeas relief on this claim.

vi. Parole eligibility

In Claim 13, Mr. Phipps asserted his counsel erroneously advised him that he would be eligible for parole after serving "60% or less" of his prison sentence. R. Vol. 1 at 275. Instead, he claimed he is not eligible for parole until he serves 100 percent of his sentence, and that he would not have pled guilty if he had known this.

The CCA denied this claim upon finding Mr. Phipps acknowledged in his plea agreement that he understood he would be eligible for parole only "upon completion of the minimum incarceration specified in the indeterminate sentence." *Phipps*, 411 P.3d

[11] Mr. Phipps does not assert that either possibility, self-incrimination or prosecution, has come to pass.

at 1165 (internal quotation marks and emphasis omitted). The court also held that even if the advice Mr. Phipps received from counsel conflicted with the plea agreement, Mr. Phipps could not seek postconviction relief on this basis because he had not asked the state court to clarify the issue when given an opportunity to do so at the plea hearing. *See id.* The district court denied habeas relief on this claim because Mr. Phipps had not rebutted the presumption that the CCA's factual finding regarding Mr. Phipps's knowledge of the parole requirements was correct or had not shown that the CCA's denial of the claim was contrary to or an unreasonable application of clearly established federal law. *See* R. Vol. 2 at 374-75.

In his COA application, Mr. Phipps again fails to squarely address the basis for the district court's decision. Also, he makes the conclusory assertion that he would not have pled guilty but for his counsel's inaccurate advice on this issue because "he had nothing to loose [sic] by insisting on trial." COA Appl. at 50. But this statement conflicts with the CCA's finding, based on Mr. Phipps's own statements at the sentencing hearing, that he decided to plead guilty because it was "[t]he only right and proper choice" and that he wished to take "full responsibility" for what he had done and to spare the victim and his family "the horrific ordeal" of a jury trial. *Phipps*, 411 P.3d at 1166 (internal quotation marks omitted). Reasonable jurists would not debate that the district court properly denied this claim.

* * * *

As to each of his IAC claims, Mr. Phipps fails to address the AEDPA standards he must meet to obtain habeas relief, and therefore fails to show that reasonable jurists could

debate the district court's rejection of these claims. We find no basis on which to grant a COA.

3. **Cumulative-Error Claims**

In Claims 9 and 12 of his habeas application, Mr. Phipps asserted that his counsel's deficient performance and deliberate lies to him "throughout the [state] proceeding," R. Vol. 1 at 272, resulted in cumulative error that prejudiced him. The district court reviewed these claims without reference to AEDPA's deferential standards because Mr. Phipps asserted cumulative error in his state postconviction briefs and the CCA did not address it. *See Cook v. McKune*, 323 F.3d 825, 830 (10th Cir. 2003) (holding AEDPA standards do not apply when state courts have not denied claim on the merits).

The district court held Mr. Phipps was not entitled to habeas relief on his cumulative-error theory because the court had "not found two or more constitutional errors during Mr. Phipps's criminal proceedings that would warrant a cumulative-error analysis." R. Vol. 2 at 375; *see Littlejohn v. Trammell*, 704 F.3d 817, 868 (10th Cir. 2013) (holding "the only otherwise harmless errors that can be aggregated [under the cumulative-error doctrine] are federal constitutional errors" (internal quotation marks omitted)). In his COA application, Mr. Phipps disagrees with the district court's conclusion that he failed to demonstrate constitutional errors, but offers no argument casting doubt on this conclusion. He has not demonstrated a basis for reasonable jurists to debate the district court's denial of his cumulative-error claims.

4. **Denial of Motion to Compel**

Finally, Mr. Phipps challenges the district court's alleged failure to address his "Motion to Object, Compel, and Sanction." Mr. Phipps filed this motion on September 10, 2018, months after the parties completed briefing on his § 2254 application and two days before the district court entered the Merits Decision dismissing it. In the motion, Mr. Phipps accused the Respondents of defying the district court's standard order requiring them to file with the district court "a copy of the complete record of [Mr. Phipps's] state court proceedings . . ., including physical evidence that is relevant to the asserted claims." *See* R. Vol. 2 at 199. In his COA application, Mr. Phipps argues the Respondents violated this order by not producing any physical evidence and that the district court abused its discretion in dismissing this case without compelling Respondents to do so.

Although the district court did not expressly rule on the motion, it effectively denied it when it dismissed Mr. Phipps's § 2254 application at the conclusion of the Merits Order and entered judgment against him the next day. *See Drake v. City of Ft. Collins*, 927 F.2d 1156, 1163 (10th Cir. 1991) (concluding district court's order dismissing plaintiff's complaint impliedly denied pending motions). Mr. Phipps has not shown the district court abused its discretion in doing so. *See Norton v. City of Marietta*, 432 F.3d 1145, 1156 (10th Cir. 2005) (applying abuse of discretion standard).

First, Mr. Phipps fails to demonstrate that the Respondents violated the district court's order regarding production of physical evidence. The order required only that they include in the record "physical evidence [in the state court files] that is relevant to

the asserted claims." R. Vol. 2 at 199. Mr. Phipps does not describe in his COA application what allegedly relevant physical evidence the Respondents failed to produce. It appears from the motion that he was referring primarily to the hard drives and other computer-related evidence seized from his home. The state court records show that this and other physical evidence from his home was destroyed or wiped clean and returned to his family under to the "Evidence Disposition Agreement" that Mr. Phipps signed on the same day as his sentencing hearing. *See* St. Ct. R., Doc. 15, at 62-67. These items therefore would not have been in the state files for the Respondents to produce.

Mr. Phipps also acknowledged in his habeas application that the computer evidence was not preserved because he alleged he received ineffective assistance of counsel based on its destruction. To the extent Mr. Phipps asserts the Respondents should have produced other physical evidence in response to the district court's order, his allegations are vague and conclusory and are therefore inadequate. *See Garrett*, 425 F.3d at 840-41.[12]

[12] Mr. Phipps was not diligent in seeking to compel disclosure of any allegedly relevant physical evidence. He first raised the issue in a motion filed with the district court on April 13, 2018, before Respondents filed their answer to his application. The district court denied this motion, holding it was premature and that Mr. Phipps had not shown a specific need for the evidence, but also stated Mr. Phipps could renew the motion after the Respondents answered "if he can demonstrate that specific portions of the record are necessary to establish that he is entitled to federal habeas relief." R. Vol. 2 at 219. But Mr. Phipps did not renew this request until September 10, 2018, four and half months after the Respondents filed their answer and more than three months after Mr. Phipps filed his reply. If Mr. Phipps believed specific physical evidence was in the state court file and was necessary to establish his entitlement to habeas relief, he should have renewed his motion before briefing was completed on his habeas application.

Finally, even assuming the district court abused its discretion in failing to grant the motion, this error is harmless if it did not affect Mr. Phipps's substantial rights. *See* Fed. R. Civ. P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."). Based on our review of the motion and Mr. Phipps's argument we conclude the district court's error, if any, was harmless under this standard. Mr. Phipps is not entitled to a COA on this issue because reasonable jurists would not debate the district court's denial of his motion to compel. Further, even if a COA were not required, *see Harbison v. Bell*, 556 U.S. 180, 183 (2009), the foregoing discussion shows no error.

III. CONCLUSION

Mr. Phipps has failed to show that reasonable jurists would find the district court's thorough and well-reasoned assessment of his § 2254 application debatable or wrong. Nor is there any basis for reasonable jurists to debate the district court's denial of Mr. Phipps's late-filed motion regarding the state court record. We therefore deny his application for a COA and dismiss this matter. And because Mr. Phipps has not presented "a reasoned, nonfrivolous argument on the law and facts in support of the issues raised on appeal," *Watkins v. Leyba*, 543 F.3d 624, 627 (10th Cir. 2008) (internal quotation marks omitted), we deny leave to proceed IFP and order him to pay the balance of the appellate filing fees.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Philip A. Brimmer

Civil Action No. 17-cv-01833-PAB

RANDY PHIPPS,

Applicant,

v.

RICK RAEMISCH, Director of the Colorado Department of Corrections,
MICHAEL MILLER, Warden, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

Applicant, Randy Phipps, is a prisoner in the custody of the Colorado Department of Corrections. Mr. Phipps has filed *pro se* an Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [Docket No. 14]. He is challenging the validity of his conviction and sentence in the District Court for Jefferson County, Colorado, Case Number 11CR961. Respondents have filed an Answer to Petition for Writ of Habeas Corpus [Docket No. 40], and Mr. Phipps filed a Reply to the People's Answer to Applicant's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [Docket No. 41]. After reviewing the Application, Answer, and Reply, along with the state court record, the Court denies relief on the remaining claims.

I. BACKGROUND

The relevant factual and procedural background was summarized by the Colorado Court of Appeals as follows:

During an investigation to detect child pornography shared over the Internet, the police remotely searched a computer onto which at least two files depicting child pornography had been downloaded. Using that computer's Internet Protocol (IP) address, the police determined that the computer was located in Phipps' home. The police obtained and executed a search warrant of Phipps' home.

Phipps was not home at the time of the search, but an officer spoke with him on the phone during the search and explained why his home was being searched. During that recorded phone call, Phipps admitted that he stored child pornography on his computer and that once the officer searched his computer, "his life was over." The police seized Phipps' computer, on which they found over thirty videos of children engaged in sexual acts.

One of these videos depicted Phipps' stepdaughter when she was approximately eight or nine years old. She was mostly nude, and the video showed Phipps instructing her to use sex toys as well as Phipps using sex toys on her. In her police interview, Phipps' stepdaughter identified herself and Phipps in the video and stated that Phipps had sexually assaulted her numerous times.

Phipps was charged with sexual assault on a child (position of trust – pattern of abuse) under sections 18-3-405.3(1), (2)(b), C.R.S. 2016; aggravated incest under section 18-6-302(1)(a), C.R.S. 2016; sexual exploitation of a child (inducement) under section 18-6-403(3)(a), C.R.S. 2016; and sexual exploitation of children (possession) under section 18-6-403(3)(b.5). The court found Phipps indigent and appointed counsel to represent him.

A plea agreement was negotiated and Phipps pleaded guilty to the sexual assault charge. In exchange, the district attorney dismissed the remaining charges and promised that the United States Attorney would not prosecute Phipps on child pornography charges.[1]

At the sentencing hearing, Phipps took responsibility for his crimes. He stated that he did not wish to put his family through a "horrific ordeal

[1] A Colorado district attorney does not have the power to agree that the United States will not prosecute a defendant. Presumably, either Phipps' counsel or the Colorado district attorney negotiated an agreement not to prosecute with the United States Attorney, although that agreement is not contained in the record.

with a jury trial," and that his "remorse, regrets, shame, despair, sadness, and sorrow cannot be measured."

In his motion for postconviction relief, Phipps made numerous claims of ineffective assistance of counsel. The arguments Phipps renews on appeal are:

- His counsel failed to challenge the legality of the initial, remote search of Phipps' computer, which violated his Fourth Amendment rights.

- His counsel's decision to waive the preliminary hearing constituted deficient performance.

- His counsel's failure to request a bond reduction constituted deficient performance.

- His counsel's failure to investigate and challenge the prosecution's forensic computer evidence or hire an expert to do so constituted deficient performance.

- His counsel failed to advise him that, as a condition of his parole eligibility, he might be required to reveal past crimes, exposing him to additional criminal charges.

- His counsel failed to advise him that evidence of his crimes might be destroyed after he pleaded guilty.

- His counsel failed to advise him that he might be ordered to pay restitution to his stepdaughter.

- His counsel misadvised him about the minimum amount of prison time he would have to serve before being eligible for parole.

- His counsel misled him with regard to whether he was pleading guilty to a crime of violence.

The district court did not hold a hearing, but concluded that the existing record demonstrated Phipps' claims failed one or both prongs of *Strickland*.

Docket No. 41-1at 2-6; *People v. Phipps,* 411 P.3d 1157, 1160-61 (Colo. App. 2017).

In the § 2254 Application, Mr. Phipps asserts the following claims:

- Claim 1: "The petitioner was coerced and enticed into pleading guilty to a crime of violence in repugnance to his 'non-negotiable' stance to not pleading guilty to a 'crime of violence.'" Docket No. 14 at 5, 10-11.

- Claim 2: "The government violated the defendant's 4th Amend. Rights, and attendant rights in the Colo. Const. regarding the right to be free from unreasonable searches and seizures, and or, right to privacy. And his federal and state rights to due process and equal protection." *Id.* at 6, 11-15.

- Claim 3: "Law enforcement, and the People, in reckless disregard for the truth, lied on the warrant-less search report and the sworn affidavit in support of a search warrant violating the petitioner's 4th Amend. rights in the U.S. Const. and attendant rights in the Colo. Const., and federal and state due process and equal protection." *Id.* at 6, 16-17.

- Claim 4: "Counsel failed to conduct independent investigation." *Id.* at 21-22.

- Claim 5: "The prosecutor destroyed evidence in this case, thereby suppressing it, not preserving it, and not presenting it for the defense to review the same original ESI evidence he did." *Id.* at 22-23.

- Claim 6: "Counsel was ineffective because he allowed the prosecutor to suppress ESI evidence, and did not compel them to provide the professional report of their 'botched' forensic examination." *Id.* at 23-24.

- Claim 7: "The district court, and or, the DA, and or, defense counsel conspired to falsify the sentencing transcripts by extracting substantial parts of the hearing of January 12, 2012." *Id.* at 24-25.

- Claim 8: "The petitioner claimed that the district court did redact, suppress and ignore the 140+ page post-conviction motion factually received by the court on May 14, 2014." *Id.* at 25-27.

- Claim 9: "The petitioner claimed that counsel's deliberately lied to him numerous times throughout the proceeding." *Id.* at 27-28.

- Claim 10: "The petitioner claimed he was not allowed to raise issues on appeal because of violations of his rights to federal and state due process and equal protection." *Id.* at 29.

- Claim 11: "The petitioner claimed 5th, 6th, and 14th Amend. violations in the U.S. Const. and accompanying rights in the Colo. Const. surrounding the sexual history review in the plea agreement." *Id.* at 29-30.

- Claim 12: "The petitioner claimed the prejudicial effect of his claims individually and cumulatively regarding IAC and prejudice under the 5th, 6th, and 14th Amend. Rights in the U.S. Const. And accompanying rights in the Colo. Const." *Id.* at 30.

- Claim 13: "The petitioner was erroneously advised that he would serve '60% or less' before being eligible for parole." *Id.*

The Court previously entered an Order to Dismiss in Part and for Answer and State Court Record, Docket No. 33, dismissing Claims 8 and 10 and any non-ineffective assistance of counsel arguments asserted in Claims 1-7. The Court will review the remaining ineffective assistance of counsel (IAC) claims under the standards set for below.

II. STANDARDS OF REVIEW

The Court must construe the Application and other papers filed by Mr. Phipps liberally because he is not represented by an attorney. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court should not be an advocate for a *pro se* litigant. *See Hall*, 935 F.2d at 1110.

Title 28 U.S.C. § 2254(d) of the Anti-terrorism and Effective Death Penalty Act

("AEDPA") provides that a writ of habeas corpus may not be issued with respect to any claim that was adjudicated on the merits in state court unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Mr. Phipps bears the burden of proof under § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

A claim may be adjudicated on the merits in state court even in the absence of a statement of reasons by the state court for rejecting the claim. *See Harrington v. Richter*, 562 U.S. 86, 98-99 (2011). In particular, "determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning." *Id.* at 98. Thus, "[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99. Even "[w]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Id.* at 98. In other words, the federal habeas court "owe[s] deference to the state court's result, even if its reasoning is not expressly stated." *Aycox v. Lytle*, 196 F.3d 1174, 1177 (10th Cir. 1999). Therefore, this

Court "must uphold the state court's summary decision unless [the Court's] independent review of the record and pertinent federal law persuades [the Court] that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented." *Id.* at 1178. "[T]his 'independent review' should be distinguished from a full de novo review of the petitioner's claims." *Id.*

The threshold question the Court must answer under § 2254(d)(1) is whether Mr. Phipps seeks to apply a rule of law that was clearly established by the Supreme Court at the time his conviction became final. *See Williams v. Taylor*, 529 U.S. 362, 390 (2000). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. Furthermore,

> clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.

House v. Hatch, 527 F.3d 1010, 1016 (10th Cir. 2008). If there is no clearly established federal law, that is the end of the Court's inquiry pursuant to § 2254(d)(1). *See id.* at 1018.

If a clearly established rule of federal law is implicated, the Court must determine whether the state court's decision was contrary to or an unreasonable application of that clearly established rule of federal law. *See Williams*, 529 U.S. at 404-05.

A state-court decision is contrary to clearly

> established federal law if: (a) "the state court applies a rule that contradicts the governing law set forth in Supreme Court cases"; or (b) "the state court 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." *Maynard* [*v. Boone*], 468 F.3d [665,] 669 [(10th Cir. 2006)] (internal quotation marks and brackets omitted) (quoting *Williams*, 529 U.S. at 405). "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams*, 529 U.S. at 405 (citation omitted).
>
> A state court decision involves an unreasonable application of clearly established federal law when it identifies the correct governing legal rule from Supreme Court cases, but unreasonably applies it to the facts. *Id.* at 407-08.

House, 527 F.3d at 1018.

The Court's inquiry pursuant to the "unreasonable application" clause is an objective inquiry. *See Williams*, 529 U.S. at 409-10. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be unreasonable." *Id.* at 411. "[A] decision is 'objectively unreasonable' when most reasonable jurists exercising their independent judgment would conclude the state court misapplied Supreme Court law." *Maynard*, 468 F.3d at 671. Furthermore,

> [E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. [I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme] Court.

Richter, 562 U.S. at 101 (internal quotation marks and citation omitted). In conducting this analysis, the Court "must determine what arguments or theories supported or . . . could have supported[] the state court's decision" and then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court." *Id.* at 102. In addition, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

Under this standard, "only the most serious misapplications of Supreme Court precedent will be a basis for relief under § 2254." *Maynard*, 468 F.3d at 671; *see also Richter*, 562 U.S. at 102 (stating "that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable").

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

Richter, 562 U.S. at 103.

Section 2254(d)(2) allows the Court to grant a writ of habeas corpus only if the relevant state court decision was based on an unreasonable determination of the facts in light of the evidence presented to the state court. Pursuant to § 2254(e)(1), the Court presumes the state court's factual determinations are correct and Mr. Phipps bears the burden of rebutting the presumption by clear and convincing evidence. The presumption of correctness applies to factual findings of the trial court as well as state appellate courts. *See Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015). The

presumption of correctness also applies to implicit factual findings. *See Ellis v. Raemisch*, 872 F.3d 1064, 1071 n.2 (10th Cir. 2017). "The standard is demanding but not insatiable . . . [because] '[d]eference does not by definition preclude relief.'" *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)).

Finally, the Court's analysis is not complete even if Mr. Phipps demonstrates the existence of a constitutional violation. "Unless the error is a structural defect in the trial that defies harmless-error analysis, [the Court] must apply the harmless error standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993) . . . ." *Bland v. Sirmons*, 459 F.3d 999, 1009 (10th Cir. 2006); *see also Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) ("For reasons of finality, comity, and federalism, habeas petitioners are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice.") (internal quotation marks omitted); *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007) (providing that a federal court must conduct harmless error analysis under *Brecht* any time it finds constitutional error in a state court proceeding regardless of whether the state court found error or conducted harmless error review). Under *Brecht*, a constitutional error does not warrant habeas relief unless the Court concludes it "had substantial and injurious effect" on the jury's verdict. *Brecht*, 507 U.S. at 637. "A 'substantial and injurious effect' exists when the court finds itself in 'grave doubt' about the effect of the error on the jury's verdict." *Bland*, 459 F.3d at 1009 (citing *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)). "Grave doubt" exists when "the matter is so evenly balanced that [the Court is] in virtual equipoise as to the harmlessness of the error." *O'Neal*, 513 U.S. at 435. The Court makes this harmless error determination based upon a review

of the entire state court record. *See Herrera v. Lemaster*, 225 F.3d 1176, 1179 (10th Cir. 2000). Notably, however, a second prejudice inquiry under *Brecht* is unnecessary in the context of an ineffective assistance of counsel claim in which prejudice under *Strickland* is shown. *See Byrd v. Workman*, 645 F.3d 1159, 1167 n.9 (10th Cir. 2011).

If a claim was not adjudicated on the merits in state court, and if the claim also is not procedurally barred, the Court must review the claim *de novo* and the deferential standards of § 2254(d) do not apply. *See Gipson v. Jordan*, 376 F.3d 1193, 1196 (10th Cir. 2004).

III. MERITS OF APPLICANT'S REMAINING CLAIMS

A. Clearly Established Federal Law

A defendant in a criminal case has a Sixth Amendment right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). Ineffective assistance of counsel claims are mixed questions of law and fact. *See id.* at 698. To establish counsel was ineffective, Mr. Phipps must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice to his defense. *See id.* at 687. Furthermore, "the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

"Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. There is "a strong presumption" that counsel's performance falls within the range of "reasonable professional assistance." *Id.* Mr. Phipps bears the burden of overcoming this presumption by showing that the alleged errors were not sound strategy under the circumstances. *See id.* "For counsel's performance to be

constitutionally ineffective, it must have been completely unreasonable, not merely wrong." *Boyd v. Ward*, 179 F.3d 904, 914 (10th Cir. 1999).

Under the prejudice prong, Mr. Phipps also must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Richter*, 562 U.S. at 112 (stating that "[t]he likelihood of a different result must be substantial, not just conceivable."). A defendant is prejudiced by counsel's deficient performance that allegedly led to the improvident acceptance of a guilty plea if "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. In determining whether Mr. Phipps has established prejudice, the Court must look at the totality of the evidence and not just the evidence that is helpful to Mr. Phipps. *See Boyd*, 179 F.3d at 914.

If Mr. Phipps fails to satisfy either prong of the *Strickland* test, the ineffective assistance of counsel claim must be dismissed. *See Strickland*, 466 U.S. at 697. Furthermore, conclusory allegations that counsel was ineffective are not sufficient to warrant habeas relief. *See Humphreys v. Gibson*, 261 F.3d 1016, 1022 n.2 (10th Cir. 2001). Finally, "because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

B. Claim 1

Mr. Phipps contends his counsel was ineffective in misleading him as to whether he was pleading guilty to a crime of violence. Docket No. 14 at 5, 10-11.

The Colorado Court of Appeals considered this claim and concluded that Mr. Phipps failed to establish a constitutional violation:

> Phipps argues that his counsel misled him with regard to whether he was pleading guilty to a crime of violence.
>
> Phipps pleaded guilty to sexual assault on a child (position of trust – pattern of abuse), a class three felony under section 18-3-405(2)(d). A class three felony is presumptively punishable by a term of four to twelve years. § 18-1.3-401(1)(a)(V)(A), C.R.S. 2016. But because Phipps' crime was punishable as if it were a crime of violence under section 18-1.3-406, C.R.S. 2016, the minimum was the mid-point of the presumptive range (eight years) and the maximum was twice the top of that range (twenty-four years). § 18-1.3-401(8)(a)(I). The court advised him of this sentencing range at the providency hearing, and Phipps also was advised of this range in the plea agreement.
>
> While sexual assault on a child is not a 'defined' crime of violence, because it nevertheless is *treated* as a crime of violence for purposes of sentencing, it constitutes a 'per se' crime of violence. *Chavez v. People,* 2015 CO 62, ¶ 12.
>
> Phipps asserts that if he had been advised that the plea deal required him to plead guilty to "any crime that was associated in any way with violence or a crime of violence," he would have rejected the plea deal and insisted on going to trial.
>
> Phipps' argument fails both prongs of *Strickland.* Regarding the deficient performance prong, at the plea hearing, Phipps' counsel advised that court that:
>
> > [A] matter of great importance to my client is he does want the Court to know – and we will expand on this at sentencing – that violence – no use of violence or threat of violence was ever made. We realize this was a terrible crime, and we're not trying to lessen that at all. But this isn't a situation where the child was threatened, if you tell, this is going to happen to you. Nothing of that sort ever occurred.
>
> At sentencing, Phipps told the trial court that "there was never any violence or threats of violence, ever" and that "[t]here was never any violence. If [my son] heard [the victim] saying please don't, in her room one time, there were times that I spanked my kids."

> Phipps' expressed position, reasonably construed by his plea counsel, the trial court, and this court, was that he would never plead guilty to a violent crime. In common usage, a violent crime is one that includes, as an element of the offense, "the use, attempted use, threatened use or substantial risk of use of physical force against the person or property of another." Black's Law Dictionary 453 (10th ed. 2014). Phipps did not plead guilty to a violent crime in that sense, and thus the record disproves that his counsel's performance was deficient.
>
> As to the prejudice prong, Phipps' own statements explaining his reasons for pleading guilty refute his argument. At sentencing, Phipps stated that:
>
> > The only right and proper choice of direction for me was to plead guilty, to take full responsibility for what I have done, what I put [the victim] through, my family – and my family through. I'm sorry. I could not put [the victim] or my family through the horrific ordeal with a jury trial.
>
> In view of these statements, the record establishes that there is no reasonable probability that Phipps would have elected to proceed to trial if he had been advised that sexual assault on a child was a "per se" crime of violence. *Stovall,* ¶ 19.

Docket No. 41-1 at 22-24.

In the Application, Mr. Phipps first asserts that the Colorado Court of Appeals disregarded *Hill v. Lockhart* as the proper standard to evaluate prejudice for an IAC claim challenging a guilty plea. *See* Docket No. 41 at 9. Mr. Phipps also cites state law supporting his position that sexual assault of a child under C.R.S. § 18-3-405(2)(d) is a "crime of violence." *Id.* Mr. Phipps further alleges he was unaware that he was pleading guilty to a crime of violence, and that "if he was given the correct statutory information from counsel before he plead in this case. He would have insisted on trial and refused the plea deal." *Id.*

The Colorado Court of Appeals correctly identified and applied the two-part

Strickland test in rejecting Mr. Phipps' claim that counsel gave deficient advice regarding whether he was pleading guilty to a crime of violence by pleading guilty to sexual assault on a child (position of trust – pattern of abuse). Docket No. 41-1 at 22-24. While the Colorado Court of Appeals did not cite *Hill*, the state court followed its analysis in finding that Mr. Phipps could not demonstrate he was prejudiced by his counsel's performance. The Colorado Court of Appeals specifically determined that Mr. Phipps failed to demonstrate a "reasonable probability that Phipps would have elected to proceed if he had been advised that sexual assault on a child was a 'per se' crime of violence" for sentencing purposes. *Id.* at 24. Thus, Mr. Phipps has not shown that the state appellate court decision was contrary to clearly established federal law under *Hill*.

The Court further finds that the state court decision was neither an unreasonable application of clearly established federal law nor an unreasonable determination of the facts. In evaluating both *Strickland* prongs, the Colorado Court of Appeals found that

> (1) Mr. Phipps' counsel advised the trial court that "a matter of great importance to my client is that he does want the Court to know – and we will expend on this at sentencing – that violence – no use of violence or threat of violence was ever made;" and
>
> (2) Mr. Phipps told the court "the only right and proper choice of direction for me was to plead guilty, to take full responsibility for what I have done . . . I could not put [the victim] or my family through the horrific ordeal with a jury trial . . . [but] "if you believe nothing else that I said or I will say, please believe me there was never any violence or threats of violence, ever."

Docket No. 41-1 at 23-24; *See also* State Court R. 10/31/11 Tr. 8:22-9:6; 1/13/12 Tr. 24:9-23.

The Court presumes these factual determinations are correct, and Mr. Phipps bears the burden of rebutting the presumption by clear and convincing evidence. *See* 28

U.S.C. § 2254(e)(1). Although Mr. Phipps obviously disagrees with the state appellate court's factual findings premised on the statements he and his counsel made in connection with his decision to plead guilty to sexual assault of a child, Mr. Phipps does not present clear and convincing evidence to overcome the presumption of correctness afforded these factual findings. Further, based on the factual findings as reflected in the state court record, this Court cannot find it was unreasonable for the Colorado Court of Appeals to conclude that the ineffective assistance of counsel claim lacked merit because Mr. Phipps failed to demonstrate that his counsel's performance was deficient, and that he was prejudiced by the alleged failure to advise him that he was pleading guilty to a crime of violence for sentencing purposes.

In short, Mr. Phipps fails to demonstrate that the state appellate court decision (1) contradicted or misapplied clearly established federal law because it was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d); *Richter*, 562 U.S. at 103.

Accordingly, the Court will deny habeas relief for Claim 1.

C. Claims 2 and 3

Mr. Phipps next contends that his attorney rendered ineffective assistance in failing to conduct a proper investigation and challenge the legality of the search of his home computer. Docket No. 14 at 11-15.

The Colorado Court of Appeals analyzed the alleged Fourth Amendment failure as follows:

> We first address Phipps' argument that his counsel provided deficient representation when he failed to challenge the legality of the initial, remote search of his computer. The district court rejected this claim, concluding that there was no arguable basis to make such a challenge and that the challenge inevitably would have failed.
>
> The police initially discovered child pornography on Phipps' computer by using LimeWire, which is a "peer-to-peer file sharing application that connects users who wish to share data files with one another." *United States v. Stults*, 575 F.3d 834, 842 (8th Cir. 2009) (quoting *United States v. Lewis*, 554 F.3d 208, 211 (1st Cir. 2009)).[2]
>
> The Eighth Circuit described the operation of LimeWire software as follows:
>
> > When a user wants to download files from other users, he launches LimeWire and inputs a search term or terms. The application then seeks matches for those terms in the file names and descriptions of all files designated for sharing on all computers then running the LimeWire application. . . . LimeWire will then display a list of file names that match the search terms, and the user can select one or more of those to begin downloading the files.
>
> *Id.* (citations and alteration omitted).
>
> When the police conducted the initial Internet search of computers to uncover child pornography, they did not have a warrant to search any particular computer. Phipps contends that the initial discovery of child pornography files on his computer constituted a warrantless search that violated the Fourth Amendment.

[2] On petition for rehearing, Phipps argues that FrostWire, not LimeWire, was installed on his computer. FrostWire and LimeWire are sister programs, both of which permit users to share files on the internet. *United States v. Robinson*, 714 F.3d 466, 468 (7th Cir. 2013). For present purposes, whether Phipps had installed FrostWire or LimeWire on his computer makes no difference.

A search violates the Fourth Amendment only when the defendant has a "legitimate expectation of privacy in the areas searched or the items seized." *People v. Curtis*, 959 P.2d 434, 437 (Colo. 1998) (citation omitted). No Colorado appellate court has addressed whether a person has a legitimate expectation of privacy in computer files accessed through peer-to-peer sharing software such as LimeWire. However, federal and other state courts have uniformly held that a person who installs and uses file sharing software does not have a reasonable expectation of privacy in those files.

The leading case is *United States v. Ganoe,* 538 F.3d 1117, 1127 (9th Cir. 2008). There, the court held that while, generally, an individual has a reasonable expectation of privacy in his or her personal computer, that expectation does not survive the installation and use of file sharing software, such as LimeWire, at least with respect to the files made available through the file sharing software. *Id.*; *see also United States v. Borowy,* 595 F.3d 1045 (9th Cir. 2010).

In *Stults*, 575 F.3d at 843, the Eighth Circuit similarly held that the defendant did not have a "reasonable expectation of privacy in files that the FBI retrieved from his personal computer where [the defendant] admittedly installed and used LimeWire to make his files accessible to others for file sharing." The court analogized the defendant's actions to giving his house keys to all of his friends, and concluded that he "should not be surprised should some of them open the door without knocking." *Id.*

Other federal and state courts have reached the same result. *See United States v. Conner,* 521 F. App'x 493, 498 (6th Cir. 2013) (computer user had no reasonable expectation of privacy in the contents of files that had been downloaded to a publicly accessible folder through file sharing software); *United States v. Perrine,* 518 F.3d 1196, 1205 (10th Cir. 2008) (same); *State v. Welch,* 340 P.3d 387, 391 (Ariz. Ct. App. 2014) (same); *State v. Aston,* 125 So. 3d 1148, 1154 (La. Ct. App. 2013) (same); *State v. Peppin,* 347 P.3d 906, 911 (Wash. Ct. App. 2015) (same). Indeed, we have found no reported case that has held that a computer owner has a reasonable expectation of privacy in files that he or she makes available through software such as LimeWire.

Phipps argues that he nevertheless retained a reasonable expectation of privacy in his computer files because he was not aware that the files stored on his computer were publicly accessible through LimeWire, and that, therefore, he did not "knowingly or intelligently allow[] private files and information on his PC to be broadcast out to the network and web." The Ninth Circuit Court of Appeals rejected a similar argument

> in *Borowy*. In that case, the defendant had installed a feature which allowed him to prevent others from downloading or viewing his files, but that feature was not engaged when the police located the files. *Borowy*, 595 F.3d at 1047. The court concluded that because the files were "still entirely exposed to public view," the defendant's "subjective intention not to share his files did not create an objectively reasonable expectation of privacy in the face of such widespread public access." *Id.* at 1048. We agree with this analysis.
>
> Consistent with these cases, we hold that Phipps did not have a reasonable expectation of privacy in the files that he made available for public viewing through LimeWire. Because Phipps did not have a reasonable expectation of privacy in those files, his counsel's failure to challenge the search on Fourth Amendment grounds, even if deficient, could not have constituted *Strickland* prejudice.
>
> It is unclear whether Phipps argues that because the initial, remote search of the computer was unlawful, so was the search warrant that was based on the initial search. Because the initial electronic search of the computer was lawful and the police discovered unlawful child pornography in that search, the resulting issuance of the search warrant was clearly lawful. *People v. Rabes*, 258 P.3d 937, 941 (Colo. App. 2010) (images of child pornography may be used to establish probable cause for a search warrant).
>
> To the extent that Phipps argues that he had not installed peer-to-peer file sharing software on his computer and that the software was planted by the police, that argument is directly refuted by the record. According to the presentence report, Phipps told the police that he used LimeWire (or its sister program, FrostWire) to download child pornography. Furthermore, the district court correctly concluded, based on the entirety of the record, that "there is no reasonable basis for believing that the government has planted, destroyed, or lost computer evidence."

Docket No. 41-1 at 9-15.

Here, Mr. Phipps primarily argues that the state appellate court's decision was based on an unreasonable determination of the facts in light of the evidence presented. He specifically challenges the state court's factual determination that he "installed and used LimeWire to make his files accessible to others for sharing" and that the police

used LimeWire to discover the unlawful child pornography. *See* Docket No. 14 at 12-13; Docket No. 41 at 12.

Mr. Phipps again fails to rebut the presumption of correctness afforded the state appellate court's determination of the facts. The Colorado Court of Appeals stated that the police did not have a warrant to search any particular computer, but initially discovered child pornography on Mr. Phipps' computer by using LimeWire, a peer-to-peer sharing application. Docket No. 41-1 at 10. The state appellate court later noted that LimeWire and FrostWire are sister programs, which permit users to share files on the internet, and whether it was LimeWire or FrostWire did not change its analysis of Mr. Phipps' ineffective assistance of counsel claims based on a failure to challenge the search of his home computer. *Id.* Aside from his conclusory allegations that he did not download LimeWire and that the police could not have utilized LimeWire, Mr. Phipps does not present any clear and convincing evidence to overcome the presumption of correctness afforded that state court factual finding that police uncovered child pornography on Mr. Phipps' computer by using peer-to-peer sharing software. *See* 28 U.S.C. § 2254(e)(1).

Mr. Phipps second argument -- that because he had "no knowledge of the design of the FrostWire software," his expectation of privacy was not relinquished for Fourth Amendment purposes. Docket No. 41 at 10, 13-16. This assertion does not demonstrate that the state appellate court's decision was contrary to, or involved an unreasonable application of, *Strickland* under § 2254(d)(1). Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the

merits." *Cullen*, 563 U.S. at 181. Therefore, the Court must limit its review of Claims 2 and 3 to the evidence presented to the state courts in the postconviction proceedings.

The Colorado Court of Appeals recognized that a search violates the Fourth Amendment only when there is a "legitimate expectation of privacy." Docket No. 41-1 at 11. The Colorado Court of Appeals reasonably concluded that Mr. Phipps' counsel was not deficient because "there was no arguable basis to make such a challenge and that the challenge inevitably would have failed" based on federal and state law holding that computer users have no reasonable expectation of privacy in the contents of files downloaded to a publicly accessible folder through file sharing software. Docket No. 41-1 at 9.

The Court finds that the Colorado Court of Appeals correctly cited federal law concerning Fourth Amendment principles and reasonably concluded that Mr. Phipps could not demonstrate any *Strickland* prejudice based on counsel's decision to forego a Fourth Amendment challenge because Mr. Phipps did not retain an expectation of privacy in his shared computer files. Docket No. 41-1 at 11-13. Therefore, Mr. Phipps has not established that defense counsel's performance was objectively unreasonable. Nor does Mr. Phipps establish prejudice given that any such challenge lacked merit.

This Court cannot find that the state court decision (1) contradicted or misapplied clearly established federal law because it was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement;" or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. See 28 U.S.C.

§ 2254(d); *Richter*, 562 U.S. at 103.

Accordingly, Claims 2 and 3 are without merit and will be denied.

D. Claims 4, 5, and 6

Mr. Phipps contends his attorney was deficient in failing to conduct an independent investigation or hire an expert to review the computer evidence against Mr. Phipps and the forensic procedures used by the state. Docket No. 14 at 21-22. He further claims that his counsel failed to ensure preservation and review of the computer evidence and the "botched" forensic investigation. *Id.* at 22-24.

The Colorado Court of Appeals rejected this IAC claim for the following reasons:

> Phipps argues that his counsel failed to investigate whether he had ever shared pornographic material, which he denied that he had ever done. He also argues that he believed that the police investigation of his computer was "botched," and therefore his counsel erred in refusing to request a report of the forensic investigation or to hire an expert to determine if the police investigation had been properly conducted.
>
> Sharing of pornography was not an element of sexual assault on a child – the only charge to which Phipps pleaded guilty – or of any of the other charges that were dismissed. Indeed, the prosecution stated during the sentencing hearing that it did not believe that Phipps had shared the video of his stepdaughter, and the court stated: "I happen to believe that it is true that you did not send [the video] on the [I]nternet, I don't think that you did." Thus, whether Phipps had shared pornographic material was irrelevant to his plea agreement.
>
> Even if it were true that the lawful, forensic investigation of his computer was "botched," and that Phipps' counsel was deficient in failing to investigate whether the investigation had been properly conducted, the claim nevertheless failed the prejudice prong of *Strickland*. Phipps admitted that he possessed numerous files containing child pornography on his computer, and that he produced a video of him sexually assaulting his underage stepdaughter.

Docket No. 41-1 at 16-17.

Mr. Phipps does not identify any materially indistinguishable Supreme Court decision that would compel a different result. *See House*, 527 F.3d at 1018. Therefore, he is not entitled to relief with respect to Claims 4, 5, and 6 under the "contrary to" clause of § 2254(d)(1).

Mr. Phipps also fails to demonstrate that the state appellate court's ruling regarding whether he was prejudiced by counsel's performance was based on an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2) or an unreasonable application of *Strickland* under § 2254(d)(1). Again, review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. *Cullen*, 563 U.S. at 181. Therefore, the Court must limit its review of Claims 4, 5, and 6 to the evidence presented to the state courts in the postconviction proceedings. The Colorado Court of Appeals stated that Mr. Phipps admitted he had produced a pornographic video of him committing a sexual assault on his stepdaughter. *See* Docket No. 41-1 at 17. Mr. Phipps does not present any clear and convincing evidence to overcome the presumption of correctness that attaches to the state court's factual determination. *See* Docket No. 41-1 at 17. Further, given the evidence of the crime to which Mr. Phipps pleaded guilty, in the form of forensic computer evidence, Mr. Phipps simply cannot show that his counsel's advice to plead guilty was deficient.

Ultimately, Mr. Phipps is not entitled to relief because he fails to demonstrate that the state court decision (1) contradicted or misapplied clearly established federal law because it "was so lacking in justification that there was an error well understood and

comprehended in existing law beyond any possibility for fairminded disagreement"; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d); *Richter*, 562 U.S. at 103.

The Court, therefore, will deny habeas relief for Claims 4, 5, and 6.

E. Claim 7

Mr. Phipps asserts he received ineffective assistance because his counsel conspired with the state to falsify transcripts by extracting substantial parts of the January 13, 2012 sentencing hearing. Docket No. 14 at 24-25.

The Colorado Court of Appeals denied this claim as follows:

> There is no evidence in the record that the court either altered or failed to review any properly filed motion. The court appropriately refused to review a 140-page document, styled as a Crim. P. 35(c) motion, which was apparently filed by a person acting on Phipps' behalf. That person was not a lawyer and therefore the court had no obligation to review it, and, indeed, could not. § 12-5-101(1), C.R.S. 2016. The court did review and rule on the replacement Crim. P. 35(c) motion filed by Phipps.
>
> There is also no evidence whatsoever on this record that the sentencing transcript was altered. Even if it were altered, Phipps does not identify what portions of the transcript were missing or how he has been prejudiced. We therefore reject this conclusory allegation of error. *People v. Zuniga,* 80 P.3d 965, 973 (Colo. App. 2003).

Docket No. 41-1 at 24-25.

Here, Mr. Phipps asserts he would not have pled guilty if he had known that the prosecution had already "wiped" his computer prior to sentencing. Docket No. 14 at 24-25. Mr. Phipps, however, offers no explanation as to how this allegation is connected to the claim that his counsel was ineffective. His conclusory allegations of ineffective

assistance are insufficient to meet the standard imposed by *Strickland*. *See Cummings v. Sirmons,* 506 F.3d 1211, 1228-29, 31-32 (10th Cir. 2007) (holding that allegations based on unsubstantiated assertions of fact are not sufficient to satisfy *Strickland*).

Mr. Phipps also fails to demonstrate that the state court's ruling was based on an unreasonable determination of the facts, or its resolution of the claim was an unreasonable application of clearly established federal law. Mr. Phipps has not identified evidence supporting his assertion that the sentencing transcript was altered or how the alleged alteration would have changed the outcome of his guilty plea. The record shows that, during sentencing, Mr. Phipps exercised his right to allocution and made incriminating statements by admitting to the acts, taking full responsibility for his crime, and expressing remorse and a promise to "never stray from my path of redemption and rehabilitation from anyone that will let me pursue it." State Court R., 1/13/12 Tr. 25:17-19. The record further demonstrates that four months after sentencing, Mr. Phipps filed a motion for reconsideration of sentence in which he continued to admit he was guilty of sexually assaulting his stepdaughter; he was pleading guilty to avoid putting his stepdaughter through the agony of a protracted jury trial; and he hoped to obtain treatment to address his "deviant behavior." State Court R., at 79-82. It is well-established that "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison,* 431 U.S. 63, 74 (1977). The record directly refutes Mr. Phipps' assertion that he would have proceeded to go to trial had he known that the prosecutor had "wiped" his computer or that the sentencing transcript had been altered.

Ultimately, Mr. Phipps is not entitled to relief for this claim because he fails to demonstrate that the state court ruling (1) involved an unreasonable application of federal law because it "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement; or (2) was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d); *Richter*, 562 U.S. at 103.

The Court will deny habeas relief for Claim 7.

F. Claim 11

Mr. Phipps contends he received ineffective assistance "surrounding the sexual history review in the plea agreement" because defense counsel failed to inform him that the sexual history review "may carry the risk of prosecution." Docket No. 14 at 29-30.

The Colorado Court of Appeals construed and rejected this claim as follows:

> Phipps argues that had he known that as a condition of his parole eligibility he might be required to reveal past crimes, exposing him to additional criminal charges, he would not have pleaded guilty. He asserts that his counsel failed to advise him of the possibility of self-incrimination, and that the parole eligibility requirement to disclose additional crimes violates his Fifth Amendment rights.
>
> Phipps' contention that he was not advised of the requirement to disclose past crimes is refuted by the record. By signing the plea agreement, Phipps acknowledged that he would be required to submit to a sexual history interview, which would reasonably include past sexual crimes. Nowhere in the plea agreement does it state that Phipps would be immune from additional charges based on the revelation of additional crimes.

Docket No. 41-1 at 18-19.

Mr. Phipps does not identify any materially indistinguishable Supreme Court

decision that would compel a different result. *See House*, 527 F.3d at 1018. Therefore, he is not entitled to relief with respect to Claim 11 under the "contrary to" clause of § 2254(d)(1).

Mr. Phipps also fails to demonstrate that the state court's ruling was based on an unreasonable application of *Strickland* under § 2254(d)(1) or an unreasonable determination of the facts in light of the evidence presented under § 2254(d)(2). The plea agreement specifically states that:

> I understand that upon a plea of guilty to . . . Sections 18-3-405, 18-3-405.3 . . . I agree to and will be required to undergo and pay the expense of, based on my ability to pay, a mental health offense sex offense specific evaluation which conforms with the standards developed by the Colorado Sex Offender Management Board, including:
>
> (a) a structured clinical and *sexual history interview* and offense specific psychological testing, and
>
> (b) physiological testing or some other means of measuring deception and/or deviant sexual arousal.

State Court R. at 52-53.

Mr. Phipps further affirmed, in writing and at the plea hearing, that he had read and understood the plea agreement he signed. *Id.* at 54; Trial Tr. 2:19-4:19. Mr. Phipps did not present the state courts, nor has he presented this Court, with any convincing evidence that he was not aware he was required to submit to a sexual history interview, which reasonably would include past sexual crimes. Therefore, based on the state court's factual determinations, the Court finds the state court's legal conclusion that counsel was not ineffective in failing to advise Mr. Phipps of the consequences of his guilty plea, including the possibility of self-incrimination, was not unreasonable.

In short, Mr. Phipps fails to demonstrate that the state appellate court's decision

(1) contradicted or misapplied clearly established federal law because it was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"; or (2) was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d); *Richter*, 562 U.S. at 103.

Accordingly, the Court will deny habeas relief for Claim 11.

G. Claim 13

Mr. Phipps contends his attorney erroneously advised him that he would serve "60% or less" of his sentence in prison before being eligible for parole. Docket No. 14 at 30.

The Colorado Court of Appeals rejected this claim because the record directly refutes Mr. Phipps' position. Specifically, the plea agreement provides:

> I understand that if I am sentenced to the Department of Corrections, *upon completion of the minimum period of incarceration specified in the indeterminate sentence*, the State Board of parole will hold a hearing to determine whether to release me on parole. The parole board will determine whether I have successfully progressed in treatment and whether I would not pose an undue threat to the community and whether there is a strong and reasonable probability I will violate the law, in order to determine whether to release me on parole. The Department of Corrections will make recommendations to the State Board of Parole concerning whether to release me on parole and under what conditions.

State Court R., at 48-50 (emphasis added). Based on the agreement, the state appellate court found that

> "[e]ven if Phipps' counsel had given him advice that was different from the information in the plea agreement, he was required to seek clarification when given an opportunity to do so. *People v. DiGuglielmo,* 33 P.3d 1248, 1251 (Colo. App. 2001). Phipps failed to seek clarification, and he cannot now claim as a basis for postconviction relief that he was

confused at the providency hearing."

Docket No. 41-1 at 21-22.

This Court cannot conclude that the state appellate court's decision was an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The Court must presume, as the state court found, that Mr. Phipps was advised in his written plea agreement that he must complete the minimum prison sentence specified in the indeterminate sentence he received, *i.e.,* 17 years. He also indicated that he fully understood the sentencing ranges he faced. State Court Record, at 48-50; 10/31/11 Trial Tr. 6:15-7:7. Although the presumption that these factual findings are correct may be rebutted by clear and convincing evidence, Mr. Phipps fails to present such evidence. *See* 28 U.S.C. § 2254(e)(1).

Mr. Phipps further fails to demonstrate that the state court's resolution of the claim was contrary to, or an unreasonable application of, clearly-established federal law. *See Chrisman v. Mullins,* 213 F. App'x 683, 689 (10th Cir. 2007) (unpublished) (recognizing that, as a matter of law, defendant's confusion regarding parole did not render his plea involuntary based upon a unilateral expectation of parole) (citing *Worthen v. Meachum,* 842 F.2d 1179, 1184 (10th Cir. 1988) ("A defendant's expectation of parole that is based on a bad guess by his attorney does not render a plea involuntary.")). And under *Blackledge,* the Court may dismiss habeas corpus claims based on alleged "unkept promises and misunderstandings when the court record refutes the claim." *Lasiter v. Thomas,* 89 F.3d 699, 703 (10th Cir. 1996). Based on the state court's factual determinations set forth above, the Court finds that the state court's legal determination

that counsel was not ineffective is not an unreasonable application of clearly established federal law.

As such, the Court will deny Claim 13.

H. Claims 9 and 12

Mr. Phipps contends that defense counsel's deficient performance as asserted above and his "deliberate" lies resulted in cumulative error, which prejudiced him. Docket No. 14 at 27-28, 30.

Although Mr. Phipps asserted a cumulative error argument in his postconviction briefs, the Colorado Court of Appeals did not address a cumulative error claim. Thus, the deferential AEDPA standards do not apply, and the Court reviews "questions of law *de novo* and questions of fact for clear error." *Cook v. McKune*, 323 F.3d 825, 830 (10th Cir. 2003) (citation omitted).

"[T]he only otherwise harmless errors that can be aggregated are federal constitutional errors, and such errors will suffice to permit relief under cumulative error doctrine only when the constitutional errors committed in the state court trial so fatally infected the trial that they violated the trial's fundamental fairness." *Littlejohn v. Trammell*, 704 F.3d 817, 868 (10th Cir. 2013) (internal quotation marks omitted). The Court has not found two or more constitutional errors during Mr. Phipps' criminal proceedings that would warrant a cumulative-error analysis. As a result, he is not entitled to relief with respect to Claims 9 and 12.

IV. CONCLUSION

For the reasons discussed in this order, Mr. Phipps is not entitled to relief on his

remaining claims. Accordingly, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [Docket No. 14] is denied and this case is dismissed with prejudice. It is further

ORDERED that there is no basis on which to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c). It is further

ORDERED that leave to proceed *in forma pauperis* on appeal is denied. The Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this order would not be taken in good faith. *See Coppedge v. United States*, 369 U.S. 438 (1962). If Applicant files a notice of appeal, he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* in the United States Court of Appeals for the Tenth Circuit within thirty days in accordance with Fed. R. App. P. 24.

DATED September 12, 2018.

BY THE COURT:

s/Philip A. Brimmer
PHILIP A. BRIMMER
United States District Judge

Appendix C

FILED
United States Court of Appeal
Tenth Circuit

December 31, 2019

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RANDY PHIPPS,

Petitioner - Appellant,

v.

RICK RAEMISCH, Director of the Colorado Department of Corrections, et al.,

Respondents - Appellees.

No. 18-1396

ORDER

Before **MATHESON**, **PHILLIPS**, and **CARSON**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk