

# United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 16, 2020

**Before**

DIANE S. SYKES, *Chief Judge*

AMY C. BARRETT, *Circuit Judge*

No. 19-3414

OTHA S. HAMILTON,  
*Petitioner-Appellant,*

Appeal from the United States District  
Court for the Southern District of  
Indiana, Indianapolis Division.

*v.*

No. 1:18-CV-02740-TWP-DWL

DENNIS REAGLE, Warden,  
*Respondent-Appellee.*

Tanya Walton Pratt,  
*Judge.*

## **ORDER**

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc, and both judges voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

# United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Submitted August 13, 2020

Decided August 19, 2020

Before

DIANE S. SYKES, *Chief Judge*

AMY C. BARRETT, *Circuit Judge*

No. 19-3414

OTHA S. HAMILTON,  
*Petitioner-Appellant,*

Appeal from the United States District  
Court for the Southern District of Indiana,  
Indianapolis Division.

*v.*

No. 1:18-CV-02740-TWP-DML

DENNIS REAGLE,  
*Respondent-Appellee.*

Tanya Walton Pratt,  
*Judge.*

## ORDER

Otha Hamilton has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254 and an application for a certificate of appealability. We have reviewed the final order of the district court and the record on appeal and find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, we **DENY** the request for a certificate of appealability and **DENY** Hamilton's motion to proceed in forma pauperis.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

OTHA S. HAMILTON,

Petitioner,

v.

DUSHAN ZATECKY,

Respondent.

No. 1:18-cv-02740-TWP-DML

## Final Judgment

The Court now enters final judgment in favor of the respondent and against the petitioner.

The petition for a writ of habeas corpus is denied, and no certificate of appealability shall issue.

Date: 11/6/2019

Darryl Walton Craft

TANYA WALTON PRATT, JUDGE  
United States District Court  
Southern District of Indiana

Laura Briggs, Clerk of Court

By: James R. Hunter  
Deputy Clerk

**Distribution:**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

OTHA S. HAMILTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:18-cv-02740-TWP-DML
	)	
DUSHAN ZATECKY,	)	
	)	
Respondent.	)	

**Order Denying Petition for a Writ of Habeas Corpus**

In his petition for a writ of habeas corpus, petitioner Otha S. Hamilton ("Hamilton") challenges his 2010 Marion County conviction for Class A child molesting. The conviction stems from Hamilton forcing his wife's nine-year-old granddaughter to perform oral sex on him. For the reasons explained in this Order, Hamilton's petition for a writ of habeas corpus is **denied**, and the action is dismissed with prejudice. In addition, the Court finds that a certificate of appealability should not issue.

**I. Background**

The Indiana Supreme Court summarized Hamilton's offense as follows:

Forty-four-year-old Otha S. Hamilton resided in Indianapolis with his wife, who had twelve grandchildren, none of them by a child of Hamilton. Several of the grandchildren would regularly visit at any given time, usually on the weekends.

Sometime between October and December 2009, one grandchild, nine-year-old T.M., stayed overnight at her grandmother's house so her grandmother could take her to a dentist appointment the next morning. No other grandchildren were present. After arriving, T.M. watched television and had dinner that evening. She later went downstairs to the basement to play pool with Hamilton, her stepgrandfather.

After T.M.'s grandmother had gone to bed, Hamilton and T.M. continued playing pool. Hamilton then told T.M. to smoke a cigarette and to drink some of his beer. He then told T.M. to go with him upstairs and outside to the unattached garage because he had something he wanted to give her.

In the garage, Hamilton told T.M. to perform oral sex on him. At first, T.M. refused, but Hamilton told T.M. that he would hurt her grandmother if she did not. Hamilton pushed T.M. to her knees and then pushed her head down. Hamilton's penis was in T.M.'s mouth for about ten minutes before he ejaculated, causing T.M. to vomit on the table and the floor. T.M. went back inside the house and did not tell anyone right away about the incident.

The incident first came to light about five or six months later.

*Hamilton v. State*, 955 N.E.2d 723, 724–25 (Ind. 2011) (“*Hamilton I*”) (citations omitted).

Hamilton's defense focused in part on Hamilton's difficulty obtaining an erection. Hamilton's wife testified that he had a surgery before they were married that affected his erection. Trial Tr. 169–70. Hamilton's penis “had firmness” but would not get “really rigid” or “stand up straight.” Trial Tr. 171. He could obtain an erection sufficient for sexual intercourse. *Id.* If he was sitting in a chair, he could obtain enough of an erection sufficient that his penis would “point straight forward,” but it would not rise above his legs. Trial Tr. 174–75.

A jury convicted Hamilton, and the trial court sentenced him to 50 years in prison. *Id.* at 725. Hamilton appealed, arguing that he was convicted based on insufficient evidence and that his sentence was inappropriate. Dkt. 7-3. The Indiana Court of Appeals affirmed. *Hamilton v. State*, 2011 WL 2139074 (Ind. Ct. App. May 31, 2011) (“*Hamilton I*”). The Indiana Supreme Court affirmed the judgment of conviction but reduced Hamilton's sentence to 35 years. *Hamilton II*, 955 N.E.2d at 728.

Hamilton filed a state post-conviction petition alleging that trial counsel was ineffective for (i) failing to investigate Hamilton's erectile dysfunction, (ii) stipulating to the admission of a video of T.M.'s interview with a forensic child interviewer, and (iii) failing to impeach T.M. regarding her out-of-court statement. *See Hamilton v. State*, 2017 WL 6003138, at \*2–3 (Ind. Ct. App. Dec. 5, 2017) (“*Hamilton III*”). He further alleged that trial counsel failed to subject the State's case to adversarial testing and that direct appeal counsel was ineffective for failing to argue

that the trial court abused its discretion by allowing a demonstrative exhibit during closing argument. *See id.* at \*4–6. The trial court denied Hamilton’s petition following a hearing, and the Indiana Court of Appeals affirmed. *Id.* at \*7. The Indiana Supreme Court denied Hamilton’s petition to transfer. Dkt. 7-9 at 9.

Hamilton next filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that

- A. he was convicted based on insufficient evidence;
- B. trial counsel was ineffective for
  - 1. failing to investigate Hamilton’s erectile dysfunction;
  - 2. stipulating to the admission of a video of T.M.’s interview with a forensic child interviewer; and
  - 3. failing to impeach T.M. regarding her out-of-court statement;
- C. trial counsel failed to subject the State’s case to meaningful adversarial testing; and
- D. direct appeal counsel failed to argue that the prosecution’s use of a demonstrative during closing statements was fundamental error.

Dkt. 1.

## II. Applicable Law

A federal court may grant habeas relief only if the petitioner demonstrates that he is in custody “in violation of the Constitution or laws . . . of the United States.” 28 U.S.C. § 2254(a).

Where a state court has adjudicated the merits of a petitioner’s claim, a federal court cannot grant habeas relief unless the state court’s 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). “A state court’s determination that a claim lacks merit precludes federal

habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

"The decision federal courts look to is the last reasoned state-court decision to decide the merits of the case." *Dassey v. Dittmann*, 877 F.3d 297, 302 (7th Cir. 2017) (en banc). If the last reasoned state court decision did not adjudicate the merits of a claim, or if the adjudication was unreasonable under § 2254(d), federal habeas review of that claim is *de novo*. *Thomas v. Clements*, 789 F.3d 760, 766–68 (7th Cir. 2015). Under § 2254(d) or *de novo* review, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

### III. Discussion

#### A. Sufficient Evidence of Guilt

Hamilton argues that he was convicted based on insufficient evidence, in violation of due process. The Indiana Court of Appeals rejected this claim in a reasoned opinion on direct appeal, and the Indiana Supreme Court summarily affirmed. *Hamilton II*, 955 N.E.2d at 725. Because the Indiana Supreme Court's opinion contains no reasons for its result, this Court "looks through" to the state appellate court's opinion for § 2254(d) purposes. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018).

"[E]vidence is sufficient to support a conviction if, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Coleman v. Johnson*, 566 U.S. 650, 654 (2012) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "[H]abeas reviews of *Jackson* claims are subject

to two levels of judicial deference creating a high bar: first, the state appellate court determines whether any rational trier of fact could have found the evidence sufficient; second, a federal court may only overturn the appellate court's finding of sufficient evidence if it was objectively unreasonable." *Saxon v. Lashbrook*, 873 F.3d 982, 988 (7th Cir. 2017).

The Indiana Court of Appeals held that T.M.'s testimony was sufficient evidence to convict Hamilton. *Hamilton I*, 2011 WL 2139074, at \*2. The "'testimony of a single eyewitness suffices for conviction even if 20 bishops testify that the eyewitness is a liar.'" *United States v. Torres-Chavez*, 744 F.3d 988, 992 (7th Cir. 2014) (quoting *Hayes v. Battaglia*, 403 F.3d 935, 938 (7th Cir. 2005)).

The elements of Class A child molesting are satisfied where a person at least 21 years old engages in oral sex<sup>1</sup> with a person less than 14 years old. Ind. Code 35-42-4-3(a)(1) (2009). Ind. Code 35-41-1-9(1) (2009). Here, nine-year-old T.M. testified that Hamilton gave her beer her, told her to put his penis in her mouth, threatened to hurt T.M.'s grandmother if she did not comply, and pushed T.M. to her knees while he sat in a chair with his penis exposed. Trial Tr. 31–32, 36–37. T.M. further testified that she put Hamilton's penis in her mouth for several minutes until he ejaculated. Trial Tr. 37–38.

Hamilton argues that T.M.'s testimony should be disregarded because of her description of his erection. Dkt. 11 at 9–10. T.M. testified that she could not see Hamilton's penis but that it felt "straight" when it was in her mouth. Trial Tr. 36–37; *see also* Trial Tr. 54–55. According to Hamilton, this would have been impossible given his medical condition. Dkt. 11 at 9–10. But Hamilton's wife testified that he was capable of obtaining an erection sufficient for sexual

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<sup>1</sup> When Mr. Hamilton committed his offense, the statute referred to "deviate sexual conduct." Ind. Code 35-42-4-3(a)(1) (2009). Now, the statute refers to "other sexual conduct." Ind. Code 35-42-4-3(a)(1) (2019). Both definitions include oral sex. Ind. Code 35-41-1-9 (2009); Ind. Code 35-31.5-2-221.5 (2019).



intercourse. Trial Tr. 171. She also testified that if he was sitting in a chair his penis could “point straight forward.” Trial Tr. 174–75. This testimony is consistent with the nine-year-old victim’s testimony that Hamilton’s penis was “straight” when he made her perform oral sex on him. Trial Tr. 36–37.

The state appellate court reasonably held that there was sufficient evidence to convict Hamilton of child molesting, so this claim is barred by 28 U.S.C. § 2254(d).

### **B. Trial Counsel’s Effectiveness**

To succeed on a claim that trial counsel was ineffective, a petitioner must show that counsel’s performance was deficient and prejudicial. *Maier v. Smith*, 912 F.3d 1064, 1070 (7th Cir. 2019) (citing *Strickland v. Washington*, 466 U.S. 668, 689–92 (1984)). Deficient performance means that counsel’s actions “fell below an objective standard of reasonableness,” and prejudice requires “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694.

In federal habeas proceedings, counsel’s performance is entitled to “doubly deferential” review. *Richter*, 562 U.S. at 105. The state court applied the first level of deference by deciding only whether counsel’s performance was reasonable, not whether it was optimal. *Id.* at 111. This Court then applies a second level of deference by deciding only whether the state court’s decision was reasonable, not whether it was right. *Id.* at 103.

Hamilton complains regarding three aspects of trial counsel’s performance. The Court will address each in turn.

#### **1. Investigation of Erectile Dysfunction**

Hamilton asserts that he told trial counsel four days before trial that he had a medical condition that prevented him from obtaining an erection. Dkt. 11 at 13. He complains that counsel

did not properly investigate the medical condition. The Indiana Court of Appeals on post-conviction review held that Hamilton failed to show deficient performance or prejudice. *Hamilton III*, 2017 WL 6003138, at \*3. That holding was reasonable.

Hamilton failed to show—either in state court or on habeas review—any exculpatory evidence that counsel would have uncovered with further investigation. This fact alone dooms his claim. *See United States v. Lathrop*, 634 F.3d 931, 939 (7th Cir. 2011) (“When a petitioner alleges that counsel’s failure to investigate resulted in ineffective assistance, the petitioner has the burden of providing the court with specific information as to what the investigation would have produced.”). Hamilton suggests that counsel should have sought medical records. Dkt. 11 at 13–14. But Hamilton has not asserted that any medical records would have provided meaningfully different information than his wife’s first-hand descriptions.

Accordingly, § 2254(d) bars relief on this complaint regarding counsel’s performance.

## **2. Stipulation to Out-of-Court Statement**

Hamilton complains that trial counsel was ineffective for stipulating to the introduction of a video recording of T.M.’s out-of-court interview with a forensic child interviewer. The Indiana Court of Appeals on post-conviction review held that counsel made an informed, reasonable, strategic decision. *Hamilton III*, 2017 WL 6003138, at \*3. That holding was reasonable.

Trial counsel had reviewed the video, and he thought it would benefit Hamilton because of inconsistencies between T.M.’s recorded statements and her trial testimony. Indeed, as trial counsel explained to the trial court during the stipulation, he preferred introducing the video to impeaching T.M. through live questioning:

I don’t want to have to call T.M. back; I don’t want to have to call [the forensic child interviewer] tomorrow if I can help it. If I have to, I will. But if they can play the tape and it resolves that issue . . . it’ll allow me to argue what I want to. Certainly

I think the State could still argue against it and they may even feel like they can make a better argument having—but I’m willing to risk that, I’m fine with that.

Trial Tr. 139.

To impeach T.M. based on her prior inconsistent statements, counsel had the choice to either (1) cross-examine a nine-year-old girl to point out her prior inconsistent statements or (2) stipulate to introduction of a recorded interview that *showed* her prior inconsistent statements. Choosing the latter was reasonable according to the Indiana Court of Appeals. This Court agrees that this holding was reasonable. Accordingly, § 2254(d) bars relief on this complaint regarding counsel’s performance.

### **3. Failure to Impeach Victim Regarding Prior Statement**

Hamilton concedes that counsel impeached T.M. regarding her trial testimony, but he complains that counsel “totally failed to impeach T.M. in regards to her pre trial statement.” *Id.* The Indiana Court of Appeals held on post-conviction review that trial counsel was not deficient in this regard. *Hamilton III*, 2017 WL 6003138, at \*3. That holding was reasonable.

As the Indiana Court of appeals noted, trial counsel extensively cross-examined T.M., challenging her on details of her account and her failure to report Hamilton’s actions sooner. *Id.* In closing argument, trial counsel emphasized the inconsistencies between T.M.’s trial testimony and her out-of-court statement. Trial Tr. 284–89. Hamilton offers no additional information that counsel should have elicited on cross-examination or impeachment evidence that counsel should have introduced. He has therefore failed to show that the Indiana Court of Appeals was unreasonable in finding that counsel’s impeachment of T.M. was not deficient. Section 2254(d) bars relief on this complaint regarding counsel’s performance.

### **C. “Meaningful Adversarial Testing”**

Hamilton also alleges that trial counsel failed to subject the state’s case to meaningful adversarial testing—an allegation that suggests he is invoking *United States v. Cronin*, 466 U.S. 648 (1984). But Hamilton disavows any reliance on *Cronin* in his reply and explains that he merely intended to argue cumulative prejudice based on trial counsel’s alleged errors. Dkt. 11 at 18–19. Because Hamilton has failed to show deficient performance, a cumulative prejudice argument cannot salvage his ineffective-assistance claim.

### **D. Appellate Counsel’s Effectiveness**

Finally, Hamilton asserts that direct appeal counsel was ineffective for failing to argue fundamental error based on the prosecutor’s use of a demonstrative exhibit during rebuttal closing argument. “The general *Strickland* standard governs claims of ineffective assistance of appellate counsel as well as trial counsel.” *Makiel v. Butler*, 782 F.3d 882, 897 (7th Cir. 2015) (noting that when the claim is poor issue selection, “appellate counsel’s performance is deficient under *Strickland* only if she fails to argue an issue that is both ‘obvious’ and ‘clearly stronger’ than the issues actually raised”).

At trial, the prosecutor used a demonstrative that displayed a (correct) proposition of Indiana law and supporting citations to Indiana appellate decisions. Trial Tr. 263, 298–99. Trial counsel did not make a contemporaneous objection. Instead, he jumped at the chance to present a sur-rebuttal, which the trial judge had suggested would be available if the prosecutor presented the demonstrative on rebuttal. Trial Tr. 265, 308–11.

The Indiana Court of Appeals on post-conviction review held that direct appeal counsel was not ineffective for failing to argue for reversal based on the demonstrative. *Hamilton III*, 2017 WL 6003138, at \*4–6. Because trial counsel did not make a contemporaneous objection, the use

of a demonstrative could have been reviewed on direct appeal only for fundamental error. *Hamilton III*, 2017 WL 6003138, at \*6. The post-conviction appellate court concluded, as a matter of state law, that such an argument would have failed. *Id.* This Court cannot question an Indiana Court's application of Indiana law. *Miller v. Zatecky*, 820 F.3d 275, 277 (7th Cir. 2016) (citing *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991)). Moreover, if—as the Indiana Court of Appeals held—Hamilton's proposed argument would have failed on direct appeal, counsel cannot have been ineffective for failing to raise it. *Id.* at 276.

#### IV. Certificate of Appealability

“A state prisoner whose petition for a writ of habeas corpus is denied by a federal district court does not enjoy an absolute right to appeal.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, the prisoner must first obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). “A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). In deciding whether a certificate of appealability should issue, “the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck*, 137 S. Ct. at 773 (citation and quotation marks omitted).

Rule 11(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts requires the district court to “issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” Here, no reasonable jurist could disagree that Hamilton's claims are barred by 28 U.S.C. § 2254(d) or are otherwise without merit. A certificate of appealability is therefore denied.

**V. Conclusion**

Hamilton's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is **denied**, and a certificate of appealability shall not issue. Final judgment in accordance with this decision shall issue.

**IT IS SO ORDERED.**

Date: 11/6/2019



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TANYA WALTON PRATT, JUDGE  
United States District Court  
Southern District of Indiana

Distribution:

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

OTHA S. HAMILTON,

Petitioner,

v.

DUSHAN ZATECKY,

Respondent.

No. 1:18-cv-02740-TWP-DML

**Order Denying Motion for Certificate of Appealability and  
Denying Motion to Proceed *In Forma Pauperis* on Appeal**

The Court denied petitioner Otha S. Hamilton's 28 U.S.C. § 2254 petition for a writ of habeas corpus, declined to issue a certificate of appealability, and entered final judgment on November 6, 2019. Dkts. 15 and 16. Mr. Hamilton filed a notice of appeal on December 6, 2019. Dkt. 17.

Mr. Hamilton seeks leave to proceed *in forma pauperis* on appeal. An appeal may not be taken *in forma pauperis* if the trial court certifies that the appeal is not taken in good faith. 28 U.S.C. § 1915. "[T]o sue in bad faith means merely to sue on the basis of a frivolous claim, which is to say a claim that no reasonable person could suppose to have any merit." *Lee v. Clinton*, 209 F.3d 1025, 1026 (7th Cir. 2000). As discussed in the Court's order denying the petition, no objectively reasonable jurist could find merit in Mr. Hamilton's claims. Mr. Hamilton's motion for leave to proceed *in forma pauperis* on appeal, dkt. [18], is **denied**.

Mr. Hamilton's motion for certificate of appealability rehashes the arguments raised in his petition and reply. The Court considered those arguments in denying a certificate of appealability. Mr. Hamilton's motion for certificate of appealability, dkt. [19], is therefore **denied** for the reasons discussed in the Court's order denying habeas relief.