APPENDIX A

Webster v. Dauffenbach

United States Court of Appeals for the Tenth Circuit

May 20, 2021, Filed

No. 21-1048

Reporter
2021 U.S. App. LEXIS 15073 *; __ Fed. Appx. __; 2021 WL 2022104

RONALD WEBSTER, Petitioner - Appellant, v. SCOTT DAUFFENBACH, Warden; COLORADO ATTORNEY GENERAL, THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Respondents - Appellees.

Notice: PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Prior History: **[*1]** (D.C. No. 1:19-CV-03475-RM). (D. Colo.).

Core Terms

ineffective assistance, appellate counsel, district court, defaulted, interview

Counsel: RONALD WEBSTER, Petitioner - Appellant, Pro se, Canon City, CO.

For SCOTT DAUFFENBACH, Warden, COLORADO ATTORNEY GENERAL, THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Respondents - Appellees: Christine Cates Brady, Esq., Office of the Attorney General for the State of Colorado, Denver, CO.

Judges: Before MATHESON, BRISCOE, and PHILLIPS, Circuit Judges.

Opinion by: Mary Beck Briscoe

Opinion

ORDER DENYING CERTIFICATE OF APPEALABILITY*

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Petitioner Ronald Webster, a Colorado state prisoner, seeks a certificate of appealability (COA) to challenge the district court's denial of his petition for a writ of habeas corpus under *28 U.S.C. § 2254*. Because Webster has failed to satisfy the standards for issuance of a COA, we deny his request and dismiss this matter.

I

In 2011, Webster was convicted by a jury in Colorado state court of one count of sexual assault on a child, one count of sexual assault on a child-pattern of abuse, two counts of contributing to the delinquency of a minor, and one count of distribution of a controlled substance. Webster was sentenced to a term of imprisonment of 24 years to life. On direct appeal, the Colorado Court of Appeals (CCA) affirmed Webster's conviction. The Colorado **[*2]** Supreme Court denied certiorari.

Webster filed a postconviction motion under *Colorado Rule of Criminal Procedure 35(c)*, which was denied by a Colorado state court in 2015. The CCA affirmed on October 25, 2018, and the Colorado Supreme Court denied certiorari on June 3, 2019.

Webster filed the *§ 2254* petition at issue here on December 9, 2019, raising the following claims:

1(a). Ineffective assistance of trial counsel for failing to use experts in DNA analysis and child forensic interviewing, and for failing to object to the district court's ruling allowing unfettered jury access to an audiotape interview.[1]

1(b). Ineffective assistance of appellate counsel for failing to raise the issues of a DNA confrontation violation and admission of res gestae evidence.

2(a). The trial court erred by giving improper responses to jury questions suggesting it was having trouble reaching a unanimous verdict, in violation of due process, a fair trial, and the right to an impartial jury.

2(b). Ineffective assistance of trial counsel based on the trial-court error as alleged in claim 2(a).

On June 22, 2020, the district court dismissed with prejudice Webster's 1(b) claims for ineffective assistance of appellate counsel because the claims were procedurally defaulted **[*3]** in state court. The district court pointed to the CCA's decision not to consider Webster's claims of ineffective assistance of appellate counsel because he raised them for the first time on appeal of his *Rule 35(c)* motion. That decision, the district court concluded, was an independent and adequate state procedural ground that barred federal habeas relief.

The district court later denied claims 1(a), 2(a), and 2(b) on the merits on January 19, 2021. Webster seeks a COA only to appeal the June 22, 2020 order dismissing the 1(b) claims as procedurally defaulted.

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[1] This latter claim was initially raised by Webster as one for ineffective assistance of both trial and appellate counsel. *See* ROA at 15. The State and the district court initially characterized it as a claim related only to appellate counsel. *See* ROA at 32 (State Pre-Answer Response to Habeas Petition), Dist. Ct. Order for Answer in Part, Dismissal in Part, And State Court Record, ECF No. 17, at 1-2 (June 22, 2020). But upon the State's recognition that the claim was properly brought against trial counsel—which went unchallenged by Webster—the district court characterized this claim as one for ineffective assistance of trial counsel when it ruled on the merits of the *§ 2254* petition. *See* ROA at 308 (State Answer to Petition), 359 (District Court Order). As explained more below, this did not "open the door" to the merits of considering his other claims of ineffective assistance of appellate counsel, as Webster contends. Aplt. Combined Op. Brief and App. for COA at 17.

II

To appeal the district court's order dismissing certain claims in his *§ 2254* petition, Webster must first obtain a COA. *28 U.S.C. § 2253(c)(1)(A)*. Because the district court dismissed Webster's claims on procedural grounds, Webster must show 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 v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*. Because Webster is proceeding pro se, we construe his filings liberally, "but our role is not to act as his advocate." *Gallagher v. Shelton, 587 F.3d 1063, 1067 (10th Cir. 2009)*.

Webster first argues that he properly presented his ineffective **[*4]** assistance of appellate counsel claims to the Colorado courts. He acknowledges that he initially presented these claims as abuses of discretion by the trial court but maintains that "every single one of these errors were attributable first to appellate counsel's failure to raise them on appeal." Aplt. Br. at 16. In his view, to conclude that he did not fairly present these claims to the Colorado courts is "to construe . . . form over substance." *Id.* We disagree. The CCA concluded that the ineffective assistance of appellate counsel claims that Webster *did* raise in his *Rule 35(c)* motion differed from those he raised on appeal of that motion:

> In his postconviction motion, Webster asserted that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness; specifically, trial counsel's (1) being subject to a conflict of interest because his wife worked for the public defender's office; (2) failing to interview and endorse key witnesses; (3) failing to consult with or call to testify at trial a forensic child interview expert or a DNA expert. In that motion, he also raised, under the heading of abuse of the trial court's discretion, the trial court's alleged evidentiary errors **[*5]** in admitting the DNA and res gestae evidence and in allowing access to the recording. But he did not argue that these were issues that appellate counsel should have raised on appeal. He now asserts that we should liberally construe his motion to include the errors he now raises as ineffective assistance claims in his postconviction appeal. We decline to do so.

ROA at 252.

As the CCA highlighted, "abuse of the trial court's discretion in deciding evidentiary issues and appellate counsel's failure to raise those alleged errors on direct appeal are two distinct issues." *Id.* at 253. The CCA therefore declined to consider those claims that Webster raised for the first time on appeal. The CCA's rule that it will not consider issues raised for the first time on appeal is an independent and adequate state procedural bar. *Hickman v. Spears, 160 F.3d 1269, 1271 (10th Cir. 1998)* ("A state procedural ground is independent if it relies on state law, rather than federal law, as the basis for the decision. For the state ground to be adequate, it must be strictly or regularly followed and applied evenhandedly to all similar claims." (quotations and citations omitted)); *People v. Goldman, 923 P.2d 374, 375 (Colo. App. 1996)* ("Allegations not raised in a *[Rule] 35(c)* motion or during the hearing on that motion and thus **[*6]** not ruled on by the trial court are not properly before this court for review."); *People v. Stovall, 284 P.3d 151, 153, 2012 COA 7M, 2012 COA 7M-2 (Colo. App. 2012)* (applying *Goldman* and declining to consider claims not raised in *Rule 35(c)* motion before the trial court); *People v. Chipman, 370 P.3d 330, 335, 2015 COA 142 (Colo. App. 2015)* (same). We therefore conclude that reasonable jurists could not debate whether the district court's procedural ruling on that ground was correct.

Webster next contends that when the district court later considered his claim regarding the jury access to an audiotape interview, it opened the door to consider his procedurally defaulted claims relating to "DNA confrontation and res gestae" evidence. But upon our review of the record, it is clear that the district court only considered the audiotape interview claim after the state highlighted—and Webster did not challenge—that it was more properly understood as a claim for ineffective assistance of *trial* counsel, not appellate counsel. *See* ROA at 308 (State Answer to Petition), 359 (District Court Order). The district court considered that claim, even though it was procedurally defaulted, pursuant to the Supreme Court's decision in *Martinez v. Ryan*. In that decision, the Supreme Court held that "[w]here, under state law, claims of ineffective assistance of trial **[*7]** counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *566 U.S. 1, 17, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*. But "*Martinez* applies only to 'a prisoner's procedural default of a claim of ineffective assistance at *trial*,' not to claims of deficient performance by appellate counsel. *Banks v. Workman, 692 F.3d 1133, 1148 (10th Cir. 2012)* (quoting *Martinez, 566 U.S. at 9*). Therefore, *Martinez* cannot serve as cause to consider Webster's procedurally defaulted claims for ineffective assistance of appellate counsel.

III

Webster's request for a COA is DENIED, his request to proceed *in forma pauperis* is GRANTED,[2] and the matter is dismissed.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

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[2] Given the confusion over the re-classification of the audiotape access claim and the district court's ultimate consideration of that claim subject to *Martinez*, we cannot say that Webster's appeal—though ultimately without merit—was frivolous. Because Webster has demonstrated an inability to pay, we grant his motion to proceed in forma pauperis. *McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 812-13 (10th Cir. 1997)*.

APPENDIX B

Webster v. Dauffenbaugh

United States District Court for the District of Colorado

January 19, 2021, Decided; January 19, 2021, Filed

Civil Action No. 19-cv-03475-RM

Reporter
2021 U.S. Dist. LEXIS 97569 *; 2021 WL 2024909

RONALD WEBSTER Applicant, v. SCOTT DAUFFENBAUGH, Warden, and THE ATTORNEY GENERAL OF THE STATE OF COLORADO, Respondents.

Prior History: *People v. Webster, 2018 Colo. App. LEXIS 1508, 2018 WL 5295837 (Colo. Ct. App., Oct. 25, 2018)*

Core Terms

trial counsel, modified, state court, deliberation, trial court, deadlock, defense counsel, questions, interview, ineffective assistance, unanimous verdict, forensic, clearly established federal law, audiotape, contends, mistrial, merits, objective standard of reasonableness, deficient performance, clarification, adjudicated, consulted, reply, ineffective assistance of counsel claim, clear and convincing evidence, trial counsel's performance, habeas corpus, make progress, circumstances, deferential

Counsel: **[*1]** Ronald Webster, Petitioner, Pro se, Canon City CO.

Judges: RAYMOND P. MOORE, United States District Judge.

Opinion by: RAYMOND P. MOORE

Opinion

ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS

The matter before the Court is an Application for a Writ of Habeas Corpus Pursuant to *28 U.S.C. § 2254* filed *pro se* by Applicant. *See* ECF No. 1.

I. Background

Applicant was convicted by a jury of one count of sexual assault on a child, one count of sexual assault on a child-pattern of abuse, two counts of contributing to the delinquency of a minor, and one count of distribution of a controlled substance.in Denver County District Court Case No. 10CR837. *See* ECF No. 11-8 at 3. On direct appeal, the Colorado Court of Appeals (CCA) affirmed the conviction. *See State of Colo. v. Webster*, No. 16CA0808, 11 (Colo. App. Oct. 25, 2018); ECF No. 11-8 at 13. Applicant is serving a term of twenty-four years to life in prison. *See* ECF No. 11-8 at 3. In the CCA's order affirming Applicant's conviction, the CCA summarized the underlying facts of the criminal case as follows:

> Webster was arrested and charged for alleged sexual and drug-related offenses involving two underage girls. He was accused of having engaged in sexual activity with the girls in exchange for providing them with drugs.

Webster, No. 16CA0808 at 1; ECF No. 11-8 at **[*2]** 3.

Applicant filed the *28 U.S.C. § 2254* Application, ECF No. 1, on December 9, 2019. On December 11, 2019, the magistrate judge directed Respondents to file a Pre-Answer Response and to address the affirmative defenses of timeliness under *28 U.S.C. § 2244(d)*, and exhaustion of state court remedies under *28 U.S.C. § 2254(b)(1)(A)*, if Respondents intended to raise either or both in this action. *See* ECF No. 5. Respondents filed a Pre-Answer Response, ECF No. 11, on January 29, 2020. Applicant filed a Reply, ECF No. 14, on March 27, 2020.

The Court reviewed the Pre-Answer Response and the Reply and filed an Order for Answer in part on June 22, 2020. *See* ECF No. 17. In the June 22 Order, the Court dismissed Claim 1(b) with prejudice as procedurally defaulted in state court and barred from federal habeas review. *See* ECF No. 17 at 8. The Court found that Claims 1(a) and 2(a) are exhausted and instructed Respondents they may include additional arguments concerning the merits of Claim 2(b) in the Answer. *Id.* Respondents were directed to file an answer in compliance with *Rule 5 of the Rules Governing Section 2254 Cases* that fully addresses the merits of the remaining claims. *Id.* On August 21, 2020, Respondents filed an Answer, ECF No. 24. After being granted an extension, *see* ECF No. 27, Applicant failed **[*3]** to reply to the Answer within the time allowed. Nonetheless, on January 4, 2021, Applicant filed a pleading titled, "Narrative Summary of the Evidence," ECF No. 28, which addresses the credibility of the DNA evidence.

The Court has reviewed the Application, ECF No. 1, the Answer, ECF No. 24, the state court record, ECF No. 21, and the January 4, 2021, pleading, ECF No. 28, and has determined that the Application can be resolved on the parties' briefing without an evidentiary hearing. Under *Rule 8(c) of the Rules Governing Section 2254 Cases in the United States District Courts*, only when an evidentiary hearing is warranted must the judge appoint an attorney to represent an applicant who qualifies to have counsel appointed under *18 U.S.C. § 3006A*.

The Application will be denied, and the action dismissed, for the following reasons.

II. Habeas Claims

The claims for review on the merits are as follows:

1) Claim 1(a)-Ineffective assistance of trial counsel for failure to obtain DNA and child forensic interviewing experts, and for not objecting to providing the jury with an audiotape (subject to *Martinez* review), which violated Applicant's rights to due process, confrontation, and a fair trial;[1]

2) Claim 2(a)-Trial court error by giving improper responses to jury questions that suggested the jury **[*4]** was having trouble reaching a unanimous verdict and was deadlocked, which violated due process, a fair trial, and the right to an impartial jury; and

3) Claim 2(b)-Ineffective assistance of trial counsel based on the trial court error set forth in claims 2(a) (subject to *Martinez* review).

ECF No. 1 at 4-9.

III. Legal Standards

Section 2254(d) 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.

The Court reviews claims of legal error and mixed questions of law and fact pursuant to *28 U.S.C. § 2254(d)(1)*. *See Cook v. McKune, 323 F.3d 825, 830 (10th Cir. 2003)*. The threshold question pursuant to *§ 2254(d)(1)* is whether Applicant 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, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)*. The "review under *§ 2254(d)(1)* is limited to the record that was before the state court that **[*5]** adjudicated the prisoner's claim on the merits." *Cullen v. Pinholster, 563 U.S.170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011)*. "Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from [the Supreme Court] has become time barred or has been disposed of." *Greene v. Fisher, 565 U. S. 34, 39, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011)* (citing *Griffith v. Kentucky, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)*.

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." *Williams, 529 U.S. at 412*. Furthermore,

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[1] The Court has reviewed (1) the state court record, (2) Applicant's opening brief on appeal in his Rule 35(c) postconviction motion; (3) the CCA's order denying his ineffective assistance of counsel claims in his Rule 35(c) postconviction motion; (4) the *28 U.S.C. § 2254* application that initiated this action; and (5) Respondents' Answer, specifically pages 6-8. The Court also takes notice that Applicant has failed to reply to Respondents' Answer and challenge Respondents' characterization of Claim 1(a) and the treatment of Applicant's Jury Access to Audiotape Interview claim pursuant to *Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012)*. The Court, therefore, has identified Claim 1(a) in this Order, as set forth above. The DNA confrontation violation claim, the res gestate evidence claim, and the jury access to an audiotape interview claim were addressed by the Court in the June 22, 2020, Order and dismissed the claims with prejudice as they pertain to ineffectiveness of appellate counsel. Now that Respondents have addressed these three claims in the posture of ineffective assistance of trial counsel, and Applicant has not challenged Respondents' arguments, the Court finds no basis for construing either the DNA confrontation violation claim or the res gestate evidence claim as ineffective assistance of trial counsel claims. Further, the review of the audiotape interview claim pursuant to *Martinez* is proper and will be addressed in this Order.

> 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 **[*6]** 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* (internal quotation marks and 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*. Additionally, we have recognized that an unreasonable application may occur if the state court either unreasonably extends, or unreasonably refuses to extend, a legal principle from Supreme Court precedent to a new context where it should apply. *Carter v. Ward, 347 F3d. 860, 864 (10th Cir. 2003)* (quoting *Valdez v. Ward, 219 F.3d 1222 1229-30 (10th Cir. 2000)* (brackets omitted).

House, 527 F.3d at 1018.

The Court's inquiry pursuant to the "unreasonable application" clause is an objective one. *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 **[*7]** 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*. In addition,

> evaluating 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.

Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (internal quotation marks and citation omitted). The Court "must determine what arguments or theories supported or, . . . could have supported, the state court's decision" and then "it must 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*. "[E]ven a strong case for relief does not mean the state court's contrary conclusion was **[*8]** unreasonable." *Id.* (citation omitted). "*Section 2254(d)* reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id. at 102-03* (internal quotation marks and citation omitted).

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*. Furthermore,

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

Richter, 562 U.S. at 103.

The Court reviews claims of factual errors pursuant to *28 U.S.C. § 2254(d)(2)*. *See Romano v. Gibson, 278 F.3d 1145, 1154 n.4 (10th Cir. 2002)*. *Section 2254(d)(2)* allows a court to grant a writ of habeas corpus only if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. Pursuant to *§ 2254(e)(1)*, the Court must presume that the state court's factual determinations are correct, *see Sumner v. Mata, 455 U.S. 591, 592-93, 102 S. Ct. 1303, 71 L. Ed. 2d 480 (1982)*, and Applicant bears the burden of rebutting the presumption by clear and convincing evidence, *see Houchin v. Zavaras, 107 F.3d 1465, 1470 (10th Cir. 1997)*. "The standard is demanding **[*9]** but not insatiable . . . [because] '[d]eference does not by definition preclude relief.'" *Miller-El v. Dretke, 545 U.S. 231, 240, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005)* (quoting *Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)*).

A claim, however, 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. *Richter, 562 U.S. at 98*. ("[D]etermining 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."). Furthermore, "[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*.

In other words, the 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, the Court "must uphold the state court's summary decision unless [its] independent review of the record and pertinent federal law persuades [it] that [the] 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." **[*10]** *Id. at 1178*. "This 'independent review' should be distinguished from a full de novo review of the [applicant's] claims." *Id.* (citation omitted).

Likewise, the Court applies the AEDPA (Antiterrorism and Effective Death Penalty Act) deferential standard of review when a state court adjudicates a federal issue relying solely on a state standard that is at least as favorable to the applicant as the federal standard. *See Harris v. Poppell, 411 F.3d 1189, 1196 (10th Cir. 2005)*. 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 § 2254(d)(1) deferential standard does not apply. *See* Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004).

IV. Analysis

A. Ineffective Assistance of Counsel

Claim 1(a) and Claim 2(b) assert ineffective assistance of trial counsel.

It was clearly established when Applicant was convicted that a defendant has a *Sixth Amendment* right to the effective assistance of counsel. *See* Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Ineffective assistance of counsel claims are mixed questions of law and fact. *See* id. at 698.

To establish that counsel was ineffective, Applicant 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. "Judicial scrutiny of counsel's performance must be highly **[*11]** deferential." Id. at 689. "A court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within a wide range of reasonable professional assistance." United States v. Rushin, 642 F.3d 1299, 1306 (10th Cir. 2011) (citations and internal quotation marks omitted). It is an applicant's burden to overcome this presumption by showing that the alleged errors were not sound strategy under the circumstances, *see* Strickland, 466 U.S. at 689, and that the errors were so serious that "counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment," Rushin, 642 F.3d at 1307 (quoting Richter, 562 U.S. at 104) (emphasis, citation, and internal quotation marks omitted). Applicant bears the burden of rebutting this presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). An applicant must show counsel failed to act "reasonab[ly] considering all the circumstances." Cullen, 563 U.S. at 189 (quoting Strickland, 466 U.S. at 688).

If Applicant 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. Pursuant to § 2254(e)(1), the factual findings of the state courts are presumed correct. And, 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).

Under the prejudice prong, an applicant must establish "a reasonable probability that, but **[*12]** 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.* In assessing prejudice under *Strickland*, the question is whether it is reasonably likely the result would have been different. Richter, 562 U.S. at 111. "The likelihood of a different result must be substantial, not just conceivable." Id. at 112 (citing Strickland, 466 U.S. at 693.)

Furthermore, under AEDPA, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether trial counsel's performance fell below *Strickland's* standard," which is the question asked "on direct review of a criminal conviction in a United States district court." Richter, 562 U.S. at 101. When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." Id. at 105.

1. *Claim 1(a)/ Ineffective assistance of trial counsel in failing to use experts in DNA analysis and child forensic interviewing*

In Claim 1(a), Applicant contends there is no "actual evidence" that trial counsel consulted with an expert. ECF **[*13]** No. 1 at 8. And without actual evidence that trial counsel consulted with a DNA expert, Applicant contends that the CCA wrongly determined trial counsel's decision to forego the use of a DNA expert at trial was a reasonable strategic decision. *Id.* Applicant further contends that even if trial counsel had consulted a DNA expert there were several DNA related factors, set forth in the postconviction opening brief on appeal, which were not rebutted by a defense DNA expert at trial and resulted in improper influence on, and confusion of, the jury. *Id.*

The CCA addressed the ineffective assistance of trial counsel as follows:

> Webster contends that the postconviction court erred by denying his ineffective assistance of trial counsel claims, alleging that trial counsel should have consulted with and/or obtained the testimony of experts in DNA analysis and in child forensic interviewing. We disagree.
>
> Counsel has a duty to conduct a reasonable investigation, meaning an investigation "that is 'sufficient to reveal potential defenses and the facts relevant to guilt.'" *Newmiller ¶ 45* (quoting *Davis v. People, 871 P.2d 769, 773 (Colo. 1994)*). Any decision that was strategic and adequately informed following such an investigation creates a "virtually unchallengeable" **[*14]** presumption that counsel's decision was objectively reasonable. *Id. at ¶ 46* (quoting *Strickland, 466 U.S. at 690*). The decision whether to call a particular witness or expert is a strategic decision. *See Davis, 871 P.2d at 773*; *People v. Bradley, 25 P.3d 1271, 1275 (Colo. App. 2001)*.
>
> The victims here were approximately fourteen years old during the relevant time. DNA testing and analysis was performed on underwear that had allegedly belonged to them and was found on Webster's property. Thus, their testimony and the results from the DNA testing were important pieces of evidence. [Note 1: Only one of the victims testified at trial.] The other ran away before trial and was unavailable to testify.]
>
> First, regarding a DNA expert, the record reflects that defense counsel consulted with a DNA expert before trial. Thus, we reject that portion of Webster's contention. And, having reviewed the record, we also reject Webster's contention that defense counsel's decision not to call a DNA expert to testify constituted deficient performance.
>
> Counsel thoroughly questioned the police officer who had recovered the items containing the DNA evidence from Webster's apartment and the prosecutor's scientific experts. This questioning shows a reasonable understanding of DNA procedures and DNA testing. Counsel used technical **[*15]** terms; questioned the witnesses about possible errors in collecting, testing, and analyzing the evidence; and referenced scientific articles relevant to the issues in this case. There is nothing in the record that indicates that the DNA expert who was consulted, or any other expert, intended to refute the testimony of the prosecution witnesses.
>
> Based on our review, we conclude that defense counsel's performance did not fall below an objective standard of reasonableness. *See Newmiller*, ¶¶ 43, 47; *Aguilar*, ¶ 12.
>
> Second, as to whether defense counsel should have called a child forensic interview expert to testify, we again note that we have reviewed the record. Counsel thoroughly cross-examined the victim about inconsistencies in her story, highlighting possible credibility concerns. Reviewing this conduct in

> hindsight, we cannot conclude that the decision to attack the victim's credibility through cross-examination rather than through a child forensic interview expert fell below an objective standard of reasonableness. *See Davis, 871 P.2d at 773*; *Newmiller, ¶ 47*.
>
> Accordingly, we conclude that trial counsel was not ineffective for failing to call a DNA or child forensic interview expert to testify.

Webster, No. 16CA0808, at 9-11; ECF No. 11-8 at 11-13.

First, **[*16]** the Court addresses trial counsel's performance. As stated above, trial counsel's performance must fall below an objective standard of reasonableness and the deficient performance must result in prejudice to Applicant's defense. *See Strickland, 466 U.S. at 687*. Judicial scrutiny of counsel's performance is highly deferential, *id. at 689*, and there must be a strong presumption that counsel's representation was within a wide range of reasonable professional assistance, *Rushin, 642 F.3d at 1306*. Applicant must overcome this presumption by showing errors were not sound strategy under the circumstances, *see Strickland, 466 U.S. at 689*, and the errors were so serious that counsel violated the *Sixth Amendment*, *Rushin, 642 F.3d at 1307*. Applicant bears the burden of rebutting this presumption by clear and convincing evidence. *See 28 U.S.C. § 2254(e)(1)*; *see Houchin, 107 F.3d at 1470*.

As stated above, "review under *§ 2254(d)(1)* is limited to the record that was before the state court that adjudicated the prisoner's claim on the merits." *Cullen, 563 U.S. at181*. Also, stated above, pursuant to *§ 2254(e)(1)*, the Court must presume that the state court's factual determinations are correct, *see Sumner, 455 U.S. at 592-93*.

The Court has reviewed the pretrial and trial transcripts and finds the following:

First, Applicant's claim that trial counsel never consulted an DNA expert is belied by the trial transcript. On more than one occasion, trial **[*17]** counsel refers to the DNA expert he had obtained and who was reviewing the DNA evidence to assist counsel in Applicant's case. *See* Crim. Case No. 10CR837, July 8, 2011, Mot. Hr'g Tr. at 4 (trial counsel refers to his expert); 6-9 (trial counsel estimates time his expert would need to review a June 29 report and concedes he has not endorsed a DNA expert, but confirms he was "relying heavily upon [his] expert to interpret" results).

Second, trial counsel cross-examined Investigator Goodfellow at a preliminary hearing, *see* Dec. 2, 2010, P.M. Pretrial Hr'g at 21-41; and cross-examined Mr. Goodfellow at trial, *see* July 12, 2011, Trial Tr. at 166-82. Mr. Goodfellow is a criminal investigator for the Denver District Attorney's Office. July 12, 2011, Trial Tr. at 154. Trial counsel conducted a pretrial examination of Ms. Berdine, *see* July 11, 2011, Pretrial Tr. at 19-35, and cross examined her during trial, *see* July 15, 2011, P.M. Trial Tr. at 115-31. Ms. Berdine is the supervisor for ten forensic scientists at the Denver Police Department Crime Laboratory. *Id.* at 64. The questions trial counsel posed to Investigator Goodfellow and to Ms. Berdine, on all occasions, illustrate his thoroughness **[*18]** and understanding of DNA testing and procedures.

Third, the same is clear regarding trial counsel's decision not to call a child forensic interview expert and to rely on a cross examination of the victim. The Court has reviewed trial counsel's cross examination of B. W., the only victim available at trial. *See* July 13, 2011, Trial Tr. at 208-40 and 244-45. The transcript supports the CCA's finding that trial counsel "thoroughly cross-examined the victim about inconsistencies in her story, highlighting possible credibility concerns."

Finally, Applicant fails to set forth what either a DNA or a child forensic interview expert would have attested to and how such testimony would have supported either a finding that trial counsel's performance fell below an objective standard of reasonableness and the deficient performance resulted in prejudice to Applicant's defense.

Applicant, therefore, fails to meet the burden of rebutting the presumption by clear and convincing evidence that trial counsel was effective with respect to either obtaining or utilizing DNA and child forensic interviewing experts. Based on these findings, Applicant does not establish that there was a reasonable probability **[*19]** that the result of the trial would have been different had experts testified. For the reasons stated above, the CCA's decision regarding this claim did not result in a decision that was contrary to, or involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, and did not result in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. Claim 1(a) lacks merit.

2. *Claims 1(a)and 2(b) Ineffective Assistance of Counsel Regarding Audio Tape and Trial Court Error/ Martinez Review*

In *Martinez v. Ryan*, the Supreme Court held:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

566 U.S. at 17. The Tenth Circuit has held that *Martinez* applies to Colorado cases, because there is an "expressed preference" for defendants to raise ineffective assistance **[*20]** of trial counsel claims in collateral review proceedings in Colorado. *Linzy v. Faulk, 602 F. App'x 701, 702 n.3 (10th Cir. 2015)*.

Applicant acted *pro se* in his initial collateral proceeding addressing his ineffective assistance of counsel claims. Having met three of the four requirements set forth in *Martinez*, Applicant is left with establishing the two defaulted ineffective assistance of counsel claims are substantial.

i. Claim 1(a)/Ineffective Assistance of Counsel Based on Jury Access to Audiotape Interview

Applicant asserts that trial counsel was ineffective in agreeing with the court to give the jury access to an audio tape of a police interview with B.W., a victim in Applicant's case. ECF No. 1 at 15. Applicant further asserts that the jury was given unfettered and unsupervised access to the audio and without a "limiting or cautionary instruction about the method of use or the weight or emphasis to be put on the evidence." *Id.* Finally, Applicant contends that, had he been "afforded the benefit of counsel on his initial review collateral proceeding, this claim would have been put before the court on proper procedural theories of ineffectiveness against . . . trial counsel . . . ." *Id.*

Applicant may disagree with the strategy trial counsel **[*21]** chose, but his claims do not support a finding of deficient performance. As stated above, trial counsel's performances must fall below an objective standard of reasonableness and the deficient performance must result in prejudice to Applicant's defense. *See Strickland, 466 U.S. at 687*. Judicial scrutiny of counsel's performance is highly deferential,

id. at 689, and there must be a strong presumption that counsel's representation was within a wide range of reasonable professional assistance, *Rushin, 642 F.3d at 1306*. Applicant must overcome this presumption by showing errors were not sound strategy under the circumstances, *see Strickland, 466 U.S. at 689*, and the errors were so serious that counsel violated the *Sixth Amendment*, *Rushin, 642 F.3d at 1307*. Applicant bears the burden of rebutting this presumption by clear and convincing evidence. See *28 U.S.C. § 2254(e)(1)*.

The colloquy between the trial court, the prosecution, and trial counsel regarding the providing of the audiotape to the jury is as follows:

> THE COURT: We need to call the trial. It's 10CR837. People versus Webster. Ms. Melnick's here for the People. Mr. Stuart and Mr. Webster are present. The jury has asked to review the audiotape of Ms. Woodson. People have a position on that?
> MS. MELNICK: No, Your Honor.
> THE COURT: Mr. Stuart?
>
> MR. STUART: We request you send it back. **[*22]**
> THE COURT: All right. There's some case law that suggests that there's some findings I'm supposed to make. I don't know if that's required, if there's only an objection, but I think it would be helpful to the jury. I don't think it's overly prejudicial, and I think that in the light of all the other evidence, it's not—it's not overwhelming or highlighting any other piece of evidence. Any other record you think I need to make, Ms. Melnick?
> MS. MELNICK: No.
> THE COURT: Mr. Stuart?
> MR. STUART: No, thank you
> THE COURT: All right. We'll give it to them and they can listen to it unfettered and unsupervised. Ms. Melnick?
> MS. MELNICK: I agree with that, Your Honor.
> THE COURT: Mr. Stuart?
> MR. STUART: Agreed.
> THE COURT: Okay.

July 21, 2011, A.M. Trial Tr. at 3-4.

Applicant's claim is not substantial. It is clear from trial counsel's cross examination of B. W., discussed above, and of trial counsel's closing arguments, *see* July 18, 2011, Trial Tr. at 68-74, 82, the use of the audiotape was strategic. Trial counsel used the audiotape to support the defense strategy that B.W. was not credible. Furthermore, Applicant fails to assert what was on the audiotape that would not support trial counsel's defense strategy **[*23]** and would have had "the potential to be given undue weight or emphasis by the jury," ECF No. 1 at 15, as he suggests in the Application. Trial counsel's performance does not fall below an objective standard of reasonableness and without such deficient performance Applicant is not prejudiced. The audiotape claim, therefore, is not substantial under *Martinez*.

Accordingly, the audiotape claim is procedurally defaulted and barred from federal habeas relief.

ii.. Claim 2(b)/Ineffective Assistance of Counsel Based on Trial Court Error

In Claim 2(b), Applicant argues that trial counsel "should have continued to demand an instruction on the propriety of a deadlock," not doing so was ineffective assistance of counsel, and default should be excused for failure to raise the claim in Applicant's Colo. R. Crim. P. 35(c). ECF No. 1 at 20.

Based on the Court's finding below in addressing Applicant's trial court error claim, Claim 2(b), an ineffective assistance of counsel claim for not demanding an instruction on the propriety of a deadlock, is not substantial. Applicant fails to set forth any law that supports a finding that the failure to give an *Allen* charge is a constitutional error. Further, based on the trial court record, **[*24]** July 20, 2011, Trial Tr. at 6-14, nothing in the record indicates the jury was at a deadlock. It is clear that trial counsel's performance does not fall below an objective standard of reasonableness and without such deficient performance Applicant is not prejudiced. The failure by trial counsel not to insist on a deadlock instruction, or modified *Allen* instruction, therefore, is not substantial under *Martinez*.

Accordingly, ineffective assistance of counsel with respect to failure to insist on deadlock or a modified *Allen* instruction is procedurally defaulted and barred from federal habeas relief.

B. Denial of Due Process and Impartial Jury

In Claim 2(a), Applicant asserts the trial court denied defense counsel's two requests, that the court (1) give the jury a modified *Allen* instruction; and (2) advise the jury of the option to not return a verdict, which results in a mistrial. ECF No. 1 at 18. Applicant contends that the responses to the jury's questions were more than mere comments or observations, because the court (1) told the jury that to reach a verdict all twelve votes must be the same for a verdict of either guilty or not guilty; and (2) did not inform the jury that a no verdict **[*25]** was an option. *Id.* Applicant further contends that the chain of events, denied him of his "protected right to a hung jury." *Id.* at 19.

Applicant also asserts that a finding of invited or waived error is erroneous. ECF No. 1 at 20. Applicant contends that trial counsel did not abandon his objections when he agreed that the court's responses to the jury's questions were appropriate without a modified *Allen* instruction. *Id.*

The CCA addressed the denial of due process and impartial jury claims as follows:

> The single issue defendant raises on appeal arises from the trial court's answers to jury questions submitted during deliberations. After closing arguments, the jury deliberated for approximately fifteen minutes and was then excused for the evening to return the next morning. During the next day's deliberations, the jury submitted several questions, two of which the court labeled Questions 3A and 3B.
>
> Question 3A asked, "Does 'unanimous' mean all 12 individual votes to be the same? If we pick ten guilty versus two not guilty, is that not guilty?" The court proposed a possible reply stating, in part, that "[t]o reach a verdict on a particular count, all 12 votes must be the same" and referencing **[*26]** another instruction that provided the jury must reach a unanimous verdict on each count. Neither the People nor defense counsel objected, and the instruction was given as proposed by the court.
>
> Question 3B read, "When would we be deadlocked on a charge?" On hearing this question, defense counsel remarked, "Judge, I think some sort of version of the modified *Allen* instruction might be beneficial." [footnote omitted]. *See* Allen v. People, 660 P.2d 896 (Colo. 1983). The court stated that it was not ready to give a modified-*Allen* instruction because the deliberations had not been lengthy given the seven-day trial and the number of counts. The court concluded: "As I said, I think a

modified *Allen* instruction is premature . . . . I don't think we're there yet. I am just going to tell them to please continue to deliberate on any?on any count for which you have not reached a verdict." The People agreed that the court's proposed response was "appropriate," and defense counsel said, "Okay." The court instructed the jury: "Please continue with your deliberations on any counts for which you have not reached a verdict."

Following a recess, the jury submitted two more questions, which the court labeled Question 4, Parts 1 and 2. Question **[*27]** 4, Part 1 read, "Does a verdict of guilty or not guilty mean 12 to zero vote?" Both the People and defense counsel agreed that the answer to that question would be "yes."

Question 4, Part 2 asked, "If one juror said not guilty and eleven say guilty, do we keep deliberating or are we not guilty because we cannot agree? Sorry again for asking again." Both the People and the defense counsel initially suggested giving a modified-*Allen* instruction in response to the second question. On reflection, however, the People and the court concluded that a modified-*Allen* instruction would not answer the question, which was, as the People described it, "[I]f it is 11 guilty, one not guilty, does that then mean it's not guilty."

Defense counsel then said, "I agree that's the question, Judge, but I guess the second part is asking if they are deadlocked, which it sounds like the second part says they are deadlocked, what do they do. That's the part I think the modified *Allen* should be for."

After further discussion, the court concluded that the question did not imply that the jury was at an impasse, and, absent that implication, it did not believe a modified-*Allen* instruction was appropriate. Rather, the **[*28]** court suggested that under *People v. Lewis, 676 P.2d 682 (Colo. 1984)*, superseded by statute as stated in *People v. Richardson, 184 P.3d 755 (Colo. 2008)*, he should first ask the jury whether there was a likelihood of progress towards a unanimous verdict upon further deliberation.
Defendant's counsel responded that any response should inform the jurors that a mistrial would be declared if they could not reach a unanimous verdict. The court responded that it was "a little too early for that." The court advised counsel it would answer the question by stating that a verdict requires all twelve jurors to vote either guilty or not guilty, and that a vote of less than twelve meant that the jury had not reached a verdict of guilty or not guilty. It would also ask them whether there was a likelihood of progress toward a unanimous verdict upon further deliberation. Both the People and defense counsel stated that they had "no objection" to that response.

The jury responded to the court's question of whether there was likelihood of progress toward a unanimous verdict upon further deliberation by stating, "No; we are making progress. Just needed clarification." The court interpreted that response: "So those two parts of that sentence are a little inconsistent based on the question that **[*29]** I asked them, but I'm going to take that to mean that they are making progress, and they just needed clarification." Again, the People made no objection, and defense counsel replied, "Okay."
After asking two more questions unrelated to the definition of a deadlock, the jury found defendant guilty of the charges listed above.

II. Analysis

Defendant contends that the trial court reversibly erred when it responded to two of the jury questions Questions 3B and 4, Part 2 — regarding the definition of a deadlock during deliberations by failing to

give a modified-*Allen* instruction containing a mistrial advisement and to inform the jury that it had the option not to return any verdict.

We disagree that reversal is required for two reasons. First, we conclude defense counsel invited the court's responses, or waived any objections to the trial court's responses to jury questions. Second, whether or not there was invited error or waiver, the trial court did not err because the answers to the jury questions met the appropriate criteria in this situation.

....

B. Modified-*Allen* Instruction and Mistrial Advisement

Moreover, the trial court did not abuse its discretion in not giving the jury a modified- **[*30]** *Allen* instruction and mistrial advisement.

. . . .

Whether or not to give a modified-*Allen* charge before declaring a mistrial is within the trial court's discretion. *Id. at 1012*. On September 22, 1971, the Chief Justice of the Colorado Supreme Court issued a directive forbidding the use of the *Allen* charge and prescribing a new modified-*Allen* instruction.

The modified-*Allen* instruction may be given only in narrowly prescribed circumstances. *Id.* Before giving the instruction, the trial court must first determine whether there is likelihood of progress toward a unanimous verdict upon further deliberation. *Id.*; *see also Lewis, 676 P.2d at 689* (holding that before giving the modified-*Allen* instruction, the trial court should ask the jury whether there is a likelihood of unanimous progress upon further deliberation).

Here, the trial court did not abuse its discretion by not giving the jury a modified-*Allen* instruction and mistrial advisement. The court properly inquired first as to whether the jury was making progress toward a unanimous verdict before giving a modified-*Allen* instruction. *See Schwartz, 678 P.2d at 1012*; *see also Lewis, 676 P.2d at 689*. The jury replied to the court's query, "No; we are making progress. Just needed clarification."

Noting that parts of the reply **[*31]** were "a little inconsistent," the trial court determined that the jury was merely asking for clarification and not informing the court that it had reached an impasse. Because the jury explicitly said that it was "making progress" and "[j]ust needed clarification" of legal terminology, the trial court did not abuse its discretion in concluding that the jury's questions regarding a possible deadlock were hypothetical, that the jury had not yet reached a deadlock, and that therefore a modified-*Allen* instruction was premature.

Furthermore, in the recent decision in *Gibbons v. People, 328 P.3d 95, 2014 CO 67*, the supreme court concluded that even if the court exercises its discretion to give a modified-*Allen* instruction, it is not required to give a mistrial advisement, as defendant urges.

Webster, No. 11CA2278 at 1-6, 8-10; ECF No. 11-4 at 3-8, 10-12.

The CCA's decision is based on a detailed analysis of the trial court record. This Court has reviewed the transcript, specifically the colloquy between the trial court, the jury, the prosecution, and trial counsel and finds Claim 2(a) lacks merit for the following reasons.

It was clearly established at the time Applicant was convicted that a criminal defendant "being tried by a jury **[*32]** is entitled to the uncoerced verdict of that body." *Lowenfield v. Phelps, 484 U.S. 231, 241, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988)*. *Allen* instructions are derived from a supplementary jury instruction approved by the Supreme Court in *Allen v. United States, 164 U.S. 492, 17 S. Ct. 154, 41 L. Ed. 528 (1896)*. The instructions encourage a divided jury to agree on a verdict so as to avoid a mistrial. *See Gilbert v. Mullin, 302 F.3d 1166, 1173 (10th Cir. 2002)*. Nonetheless, an *Allen* charge may violate a defendant's right to due process and *Sixth Amendment* rights to an impartial jury trial and to a unanimous verdict if it imposes such pressure on the jury such that the accuracy and integrity of their verdict becomes uncertain. *See United States v. McElhiney, 275 F.3d 928, 937 n.4, 940 (10th Cir. 2001)*.

Although an *Allen* charge can be unconstitutionally coercive under some circumstances, *see United States v. Zabriskie, 415 F.3d 1139, 1147-48 (10th Cir. 2005)*, Applicant does not cite to any case where a court held that the failure to give an *Allen* charge is a constitutional error. *See White v. Medina*, 464 F. App'x 715, 719 (10th Cir. 2012). Moreover, there was no jury deadlock, fundamental misunderstanding of the law, or any indication of impropriety. The jury inquiries were nothing more than requests for clarification.

The telling part of the colloquy between the trial court and the jury is when the court asked the jury whether there was a likelihood of progress toward a unanimous verdict upon further deliberation and the jury responded, "No; we are making process. Just needed clarification." *See **[*33]*** July 20, 2011, Trial Tr. at 13. Even though the first part of the jury's response is "no," and somewhat inconsistent, it is clear from the second part of the response that the jury was making progress in their deliberation. Accordingly, the trial court was well within its discretion to not use a modified *Allen* instruction.

Based on this Court's finding that the trial court was well within its discretion to not use a modified *Allen* instruction, this Court finds no need to address whether trial counsel invited the court error by acquiescing in the trial court's decision not to use the instruction.

Applicant has failed to present clear and convincing evidence that the trial court's decision not to give the jury a modified *Allen* instruction so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. The CCA's decision regarding Claim 2(a) is not contrary to or an unreasonable application of clearly established rule of federal law or an unreasonable determination of the facts in light of the evidence presented to the state court. Claim 2(a), therefore, lacks merit.

V. Orders

Accordingly, it is

ORDERED that the Application **[*34]** for a Writ of Habeas Corpus Pursuant to *28 U.S.C. ' 2254*, ECF No. 1, is dismissed with prejudice. It is

FURTHER ORDERED that the issuance of a Certificate of Appealability pursuant to *28 U.S.C. § 2253(c)* is denied. Applicant has not made a substantial showing of the denial of a constitutional right such that reasonable jurists could disagree as to the disposition of his Application pursuant to the standards of *Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)*. *See 28 U.S.C. § 2253(c)(2)*. 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 is not taken in good faith, and, therefore, *in forma pauperis* status is denied for the purpose of appeal. *See Coppedge v. United States, 369 U.S. 438, 82 S. Ct. 917, 8 L. Ed. 2d 21 (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 this 19th day of January, 2021.

BY THE COURT:

/s/ Raymond P. Moore

RAYMOND P. MOORE

United States District Judge

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