FILED
United States Court of Appeals
Tenth Circuit

April 13, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SANDRO RAMOS,

Petitioner - Appellant,

v.

CHRIS RANKINS,

Respondent - Appellee.

No. 22-7045
(D.C. No. 6:19-CV-00112-RAW-KEW)
(E.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **HARTZ**, **BALDOCK**, and **McHUGH**, Circuit Judges.

Sandro Ramos, a state prisoner proceeding pro se, seeks to appeal from the denial by the United States District Court for the Eastern District of Oklahoma of his application for relief under 28 U.S.C. § 2254. Mr. Ramos was convicted in Oklahoma court of first-degree rape and four counts of lewd molestation; he was sentenced to a life term and four ten-year terms of imprisonment, all running consecutively. As we construe his brief in this court, Mr. Ramos now argues that the Oklahoma Court of Criminal Appeals (OCCA) improperly denied his postconviction claims that his counsel on direct appeal was constitutionally ineffective because she (1) failed to argue that the prosecution

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Appendix A

suppressed, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), a letter written by the alleged victim of his crimes that was evidence favorable to his case; and (2) failed to argue that his trial was tainted because a juror conversed with the victim's family during trial.[1] The OCCA denied each claim on its merits.

Before a state prisoner can appeal the denial of a § 2254 application, he must obtain a certificate of appealability (COA). *See* 28 U.S.C. § 2253(c)(1)(A); *Montez v. McKinna*, 208 F.3d 862, 869 (10th Cir. 2000). A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires the applicant to show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). In other words, the applicant must show that the district court's resolution of the constitutional claim was either "debatable or wrong." *Id.*

In assessing whether to grant a COA, we must review the prisoner's claims in light of the restrictions on relief imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). That Act provides that when a claim has been adjudicated on the

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[1] Mr. Ramos's brief in this court addresses only the merits of the *Brady* and jury-influence claims. But his § 2254 application did not raise either claim solely on its merits, instead arguing that his appellate counsel had been constitutionally ineffective because she failed to bring those two claims. Because we cannot review a claim that was not raised in the § 2254 application, *see Childers v. Crow*, 1 F.4th 792, 799 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2718 (2022), we liberally construe the pro se brief in this court, *see Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008), as raising the preserved ineffective-assistance claims.

merits in a state court, a federal court can grant relief only if the applicant establishes that the state-court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1), (2). As we have explained:

> Under the "contrary to" clause, we grant relief only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the [Supreme] Court has on a set of materially indistinguishable facts.

Gipson v. Jordan, 376 F.3d 1193, 1196 (10th Cir. 2004) (original brackets and some internal quotation marks omitted). Relief is provided under the unreasonable-application clause "only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (brackets and internal quotation marks omitted).

Thus, a federal court may not issue a habeas writ simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. *See id.* Rather, "[i]n order for a state court's decision to be an unreasonable application of this Court's case law, the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Virginia v. LeBlanc*, 582 U.S. 91, 94 (2017) (per curiam) (internal quotation marks omitted). To prevail, "a litigant must show that the state court's ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any

possibility for fairminded disagreement." *Id.* (ellipsis and internal quotation marks omitted). In addition, AEDPA establishes a deferential standard of review for state-court factual findings. "AEDPA . . . mandates that state court factual findings are presumptively correct and may be rebutted only by 'clear and convincing evidence.'" *Saiz v. Ortiz,* 392 F.3d 1166, 1175 (10th Cir. 2004) (quoting 28 U.S.C. § 2254(e)(1)). Applying this standard to Mr. Ramos's claims, we deny a COA and dismiss this matter.

"[I]n analyzing an appellate ineffectiveness claim based upon the failure to raise an issue on appeal, we look to the merits of the omitted issue." *Cargle v. Mullin*, 317 F.3d 1196, 1202 (10th Cir. 2003) (internal quotation marks omitted). Before Mr. Ramos can succeed on his ineffective-assistance claims, he must show that his *Brady* and jury-influence claims themselves have merit. Then, Mr. Ramos must show both that his counsel's performance was deficient—"that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant" by the Constitution—and that "the deficient performance prejudiced [his] defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

The OCCA denied on the merits both ineffective-assistance claims raised in this court by Mr. Ramos. The district court ruled that those denials were neither contrary to nor an unreasonable application of clearly established rulings by the United States Supreme Court, nor were they based on an unreasonable interpretation of the facts. Mr. Ramos has failed to show that a reasonable jurist could debate the correctness of the district court's ruling. We address each claim in turn.

The OCCA affirmed the decision by the Oklahoma trial court that Mr. Ramos's appellate counsel was not constitutionally ineffective in failing to claim that the prosecution suppressed evidence favorable to Mr. Ramos's defense. The trial court heard evidence relating to this issue at two pretrial hearings and at trial. From the presented evidence, the trial judge could reasonably find (1) that the alleged victim's letter was not suppressed by the prosecution but had been given by police to her family and then lost, and (2) that the letter did not contain evidence favorable to the defense. Mr. Ramos complains that the state trial court should have conducted a postconviction evidentiary hearing to hear testimony by a judge who had seen the letter while serving as an assistant district attorney. But he fails to show error in denying a hearing or prejudice from the failure to conduct such a hearing.[2]

As for the claim that appellate counsel was ineffective for failing to raise the issue of improper contact with a juror, Mr. Ramos alleges that during "a recess for deliberations before the verdict," two witnesses—his girlfriend and a family friend—saw a juror, who they later learned was the jury foreman, conversing with the victim's family. Aplt. Br. at 22. The OCCA, however, affirmed the denial of this claim by the state trial court, which, after an evidentiary hearing, found that no member of the victim's family communicated with a juror about the merits of the case or had any discussion at all with a juror after the case was submitted to the jury.

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[2] Mr. Ramos also argues that his *Brady* claim "should not be subjected to procedural default." Aplt. Br. at 26. But the district court did not apply a procedural bar to Mr. Ramos's ineffective-assistance *Brady* claim, the only *Brady*-related claim Mr. Ramos raised in district court. We therefore summarily dismiss this argument.

We **DENY** Mr. Ramos's request for a COA on both issues he has raised and dismiss this case. We **GRANT** Mr. Ramos's motion to proceed in forma pauperis.

Entered for the Court

Harris L Hartz
Circuit Judge

AO450 (Rev. 5/85) Judgement in a Civil Case

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF OKLAHOMA

JUDGMENT IN A CIVIL CASE

SANDRO RAMOS
V.
CHRIS RANKINS

Case Number: CIV-19-112-RAW-KEW

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issued have been tried and the jury rendered its verdict.

X **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is for the Respondent and against the Petitioner.

8/29/2022
Date

Bonnie Hackler
Clerk

s/ A Green
(By) Deputy Clerk

Appendix B

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

SANDRO RAMOS,

Petitioner,

v.

WILLIAM "CHRIS" RANKINS,[1]
Interim Warden,

Respondent.

Case No. 19-CV-112-RAW-KEW

OPINION AND ORDER

This action is before the Court on Sandro Ramos' (Ramos) 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus (Dkt. 2). Ramos is a state inmate represented by counsel. Ramos presents the following claims:

> **Claim One**: Hearsay evidence was improperly admitted in violation of the Confrontation Clause of the Sixth Amendment.
>
> **Claim Two**: Hearsay evidence was improperly admitted, and improper bolstering was permitted in violation of the Sixth Amendment Right to a Fair Trial.
>
> **Claim Three**: Trial counsel was ineffective in failing to object to Andrea Hamilton's being qualified as an expert. [2]
>
> **Claim Four**: Propensity evidence, testimony of a similar act of child molestation, was improperly admitted in violation of the Sixth Amendment right to a fair trial.

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[1] According to the offender website maintained by the Oklahoma Department of Corrections (okoffender.doc.ok.gov), Ramos is currently incarcerated at the Oklahoma State Reformatory (OSR) in Granite, Oklahoma. The Court therefore substitutes the OSR interim warden, William "Chris" Rankins, in place of Jimmy Martin as party respondent. Rule 2(a), *Rules Governing Section 2254 Cases in the United States District Courts*. The Clerk of Court shall note this substitution on the record.

[2] The Court notes that Claim Three raises an identical claim as raised in portion of Claim Six. *See* Dkt. 2 at 29-31, 40. The Court will address this issue only once.

Claim Five: Prosecutorial misconduct occurred in violation of the Sixth Amendment right to a fair trial.

Claim Six: Trial counsel was ineffective in misstating the law and failing to object to object to hearsay evidence, Andrea Hamilton's expert qualification, propensity evidence, and prosecutorial misconduct.

Claim Seven: Cumulative errors deprived Ramos of his Sixth Amendment Right to a Fair Trial.

Claim Eight: Appellate counsel ineffective assistance in failing to raise (1) five substantive claims in his trial counsel's advisory list, (2) a claim of witness intimidation, (3) a *Brady*[3] claim, and (4) a claim of juror misconduct.

Claim Nine: Appellate counsel was ineffective in failing to raise a *Brady* violation.[4]

Dkt. 2, generally.

Respondent concedes that Ramos has timely filed his habeas petition but urges this Court to deny the petition as to all claims (Dkt. 11 at 2, 86). The following records have been submitted to the Court for consideration in this matter:

A. Ramos' direct appeal brief in *Ramos v. State*, No. F-2014-880 (Okla. Crim. App.) (Dkt. 11-1).

B. The State's brief in Ramos direct appeal in Case No. F-2014-880 (Dkt. 11-2).

C. Opinion affirming Ramos' judgment and sentence. *Ramos v. State*, No. F-2014-880 (Okla. Crim. App. Jan. 7, 2016) (unpublished) (Dkt. 2-1).

D. Ramos' application for post-conviction relief filed in *Ramos v. State*, CF-2013-165 (Choctaw Cnty. Dist. Ct. Dec. 5, 2016) (Dkt. 11-3).

E. Order denying application for post-conviction relief, filed in *Ramos*, CF-2013-165, on Oct. 15, 2018 (Dkt. 2-2).

F. Ramos' Petition in Error in *Ramos v. State*, No. PC-2018-1230 (Okla. Crim. App.) (Dkt. 11-4).

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[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

[4] The Court notes that Claim Nine's *Brady* violation is identical to Claim Eight's claims of a *Brady* violation. *See* Dkt. 2 at 44, 47-50. The Court will address this issue only once.

G. Ramos' brief in support of post-conviction appeal in *Ramos*, No. PC-2018-1230 (Dkt. 11-5).

H. Order affirming denial of application for post-conviction relief, filed in Case No. PC-2018-1230 on Feb. 15, 2019 (Dkt. 2-3).

I. Trial counsel's advisory list (Dkt. 16-1).

J. Transcripts and Original Record (Dkt. 12).

I. PROCEDURAL BACKGROUND

The State of Oklahoma charged Ramos in Choctaw County District Court, Case No. CF-2013-165, with one count of first degree rape (victim under the age of 14) (Dkt. 12-17 at 4). Subsequently, an amended Information was filed, charging Ramos with one count of first degree rape (victim under the age of 14) and four counts of lewd molestation. *Id.* at 19. Ramos was convicted of each count, and sentenced to life for first degree rape, and 10 years' imprisonment for each count of lewd molestation. *Id.* at 187-91, 203. Ramos' sentences were to run consecutively. *Id.* at 203.

Following his conviction, Ramos appealed his judgment and sentence to the Oklahoma Court of Criminal Appeals (OCCA) in Case No. F-2014-880 (Dkt. 11-1). The OCCA reviewed Ramos' claims, and on January 7, 2016, affirmed the trial court's judgment and sentence in *Ramos v. State*, No. F-2014-880 at 6 (Okla. Crim. App. Jan. 7, 2016) (unpublished) (Dkt. 2-1).

On December 5, 2016, Ramos filed an application for post-conviction relief (Dkt. 11-3). The OCCA reviewed Ramos' application for post-conviction relief on appeal and denied the same on February 15, 2019, in *Ramos v. State*, Case No. PC-2018-1230 (Okla. Crim. App. Feb. 15, 2019) (Dkt. 2-3).

II. FACTUAL BACKGROUND

At trial, the state presented evidence that Ramos and A.N.M., the minor victim, were in a "relationship" prior to A.N.M.'s becoming 12 years old (Dkt. 12-8 at 193). The relationship was first discovered when Brandy Rymel, A.N.M.'s seventh grade English teacher, confiscated a spiral notebook from A.N.M. and discovered its contents contained references to A.N.M.'s engaging in sexual acts with Ramos (Dkt. 12-8 at 161, 164). The spiral notebook appeared to be notes passed between A.N.M. and J.H., another minor who was A.N.M.'s best friend and gymnastics' partner. *Id.* a 159-61; Dkt. 12-9 at 9-10. Ms. Rymel contacted A.N.M.'s parents, who contacted police, and the investigation into Ramos began (Dkt. 12-8 at 166).

A.N.M.'s parents brought her to the Oklahoma State Bureau of Investigation's (OSBI) office in Antlers, Oklahoma, where Special Agent Angie Edwards conducted a forensic interview of A.N.M. (Dkt. 12-9 at 48; Dkt. 12-12 at 166). In this interview, A.N.M. stated that she believed she was in a relationship with Ramos, that Ramos molested on four occasions and engaged in intercourse once, and the contents of the spiral notebook were not all true statements (Dkt. 12-12 at 166).

Police obtained A.N.M.'s cell phone. The text messages between Ramos and A.N.M. included Ramos referring to A.N.M. as "baby", winky-face emojis, statements of "love" (Dkt. 12-12 at 142-61). Officer Larry Hendrix in his investigation went to A.N.M.'s school to retrieve two letters written by A.N.M. (Dkt. 12-10 at 37-38). The first letter was turned over to defense counsel, but the second letter, not addressed to anyone and referencing A.N.M.'s wanting to hurt herself, was given to her parents, so they could address the mental health issues A.N.M. was facing. *Id.* at 37-43.

Prior to trial, it was discovered that similar allegations against Ramos existed in South Carolina. In South Carolina, another minor, C.L., had alleged Ramos, her gymnastics coach at the

time, attempted to rape her with she was 14 or 15 years old (Dkt. 12-9 at 66, 75-77). She testified that Ramos locked himself in the bathroom with her, made her take her clothes off, and attempted to rape her. *Id.* at 75-77.

A.N.M. testified at trial that she believed she was in a relationship with Ramos and that they were in love when she was 12 years old, and Ramos was 39 years old (Dkt. 12-8 at 193, 196-97). A.N.M. testified that her relationship with Ramos began with winks and holding hands. *Id.* at 193-94. Ramos then began kissing A.N.M. while she was at his home. *Id.* at 194-96. Eventually, Ramos engaged in oral sex with A.N.M. on four occasions before finally engaging her once in intercourse. *Id.* at 212-232.

The state also introduced recorded conversations between Ramos and his current girlfriend, Amanda Siniga, while Ramos was in custody (Dkt. 12-12). In these conversation, Ms. Siniga asks Ramos how this could have happened. *Id.* at 183, 193-94. Ramos responds that he "fell into temptation" and that he didn't know what he was thinking. *Id.* at 183. Ramos also stated, "I know its [sic] my fault" and that "I've asked God for forgiveness for everything I've done." *Id.* at 193-94

III. STANDARD OF REVIEW

Under the Anti-Terrorism and Effective Death Penalty Act, federal habeas corpus relief is proper only when the state court adjudication of a claim:

> (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).

IV. EXHAUSTION OF STATE COURT REMEDIES

Before a federal court may grant habeas relief, the state prisoner must exhaust available state remedies, under 28 U.S.C. § 2254(b)(1)(A), by "fairly present[ing] the substance of his federal habeas claim[s] to state courts." *Hawkins v. Mullin*, 291 F.3d 658, 668 (10th Cir. 2002). Generally, a Court must dismiss a state prisoner's habeas petition if the petitioner has not exhausted available state court remedies as to his federal claims. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *see also Wood v. McCollum*, 833 F.3d 1272, 1273 (10th Cir. 2016) (permitting a court to deny the petition, with unexhausted claims, on the merits).

In federal habeas corpus actions, the petitioner bears the burden of showing he has exhausted his state court remedies as required by 28 U.S.C. § 2254(b). *See Clonce v. Presley*, 640 F.2d 271, 273 (10th Cir. 1981); *Bond v. Oklahoma*, 546 F.2d 1369, 1377 (10th Cir. 1976). "The exhaustion requirement is satisfied if the federal issue has been properly presented to the highest state court, either by direct review of the conviction or in a post-conviction attack." *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1534 (10th Cir. 1994). Under the doctrine of comity, a federal court should defer action on claims properly within its jurisdiction until a state court with concurrent power has had an opportunity to consider the matter. *Rose v. Lundy*, 455 U.S. 509, 518–19 (1982).

As a general rule, "a federal court should dismiss unexhausted claims without prejudice so that the [prisoner] can pursue available state-court remedies." *Grant v. Royal*, 886 F.3d 874, 891-92 (10th Cir. 2018) (quoting *Bland v. Sirmons*, 459 F.3d 999, 1012 (10th Cir. 2006)). However, dismissal of unexhausted claims "is not appropriate if the state court would now find the claims procedurally barred on independent and adequate state procedural grounds." *Id.* at 892 (quoting *Smallwood v. Gibson*, 191 F.3d 1257, 1267 (10th Cir. 1999)). This is called an anticipatory

procedural bar. *Moore v. Schoeman,* 288 F.3d 1231, 1233 n.3 (10th Cir. 2002) ("[An] [a]nticipatory 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.").

In order for a state procedural ground to be independent, "it must rely on state law, rather than federal law." *Smallwood*, 191 F.3d at 1268. A state procedural ground is considered adequate if the procedure must be "strictly or regularly followed and applied evenhandedly to all similar claims." *Id.* (internal citations omitted). In Oklahoma, a defendant must bring all available claims on direct appeal, or they are deemed waived. Okla. Stat. tit. 22, § 1086; *see also Hale v. Gibson,* 227 F.3d 1298, 1330 (10th Cir. 2000) (Oklahoma's Post–Conviction Procedure Act "is an adequate state bar to . . . claims raised on post-conviction review that could have been raised on direct appeal.").

The Tenth Circuit recognizes that Oklahoma's "'waiver rule for claims not previously raised' is 'regularly and even-handedly applied by the state courts.'" *Johnson v. Patton*, 634 Fed. Appx. 653, 663 (10th Cir. 2015) (quoting *Smallwood*, 191 F.3d at 1268) (unpublished)[5]; *see also Ellis v. Hargett*, 302 F.3d 1182, 1186 (10th Cir. 2002) (holding Okla. Stat. tit. 22, § 1086 is an independent and adequate state ground for denying habeas relief"). Further, the waiver rule represents an independent state ground. *Id.*

A petitioner may overcome the anticipatory procedural bar "by making either of two alternate showings: he may demonstrate 'cause and prejudice' for his failure to raise the claim in his initial application for post-conviction relief, or he may show that failure to review his claim

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

will result in a 'fundamental miscarriage of justice.'" *Thacker v. Workman*, 678 F.3d 820, 841-42 (10th Cir. 2012); *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "Cause for a procedural default exists where 'something external to the petitioner, something that cannot fairly be attributed to him[,] . . . impeded [his] efforts to comply with the State's procedural rule.'" *Maples v. Thomas*, 565 U.S. 266, 280 (2012) (quoting *Coleman*, 501 U.S. at 753); *see also Spears v. Mullin*, 343 F.3d 1215, 1255 (10th Cir. 2003). Cause may be established by demonstrating "'that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that some interference by officials made compliance impracticable.'" *Scott v. Mullin*, 303 F.3d 1222, 1228 (10th Cir. 2002) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). "If cause is established, the petitioner must then show that he suffered actual prejudice as a result of the alleged violation of federal law." *Demarest v. Price*, 130 F.3d 922, 941 (10th Cir. 1997).

"Alternatively, a federal court may proceed to the merits of a procedurally defaulted claim, if the petitioner establishes that a failure to consider the claim would result in a fundamental miscarriage of justice." *Demarest*, 130 F.3d at 941. "[T]he fundamental miscarriage of justice exception seeks to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup v. Delo,* 513 U.S. 298, 324 (1995). To invoke this exception, the petitioner "must make a colorable showing of factual innocence." *See Marshall v. Jones*, 639 F. Supp. 2d 1240, 1256 (N.D. Okla. 2009)

"To make a credible showing of actual innocence, a petitioner must support his allegations of constitutional error with new reliable evidence–whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." *Frost v. Pryor*, 749 F.3d 1212, 1231-32 (10th Cir. 2014) (internal citations and quotations omitted).

The new evidence "must be sufficient to show that it is more likely than not that no reasonable juror would have convicted the petitioner in the light of the new evidence." *Id.* (internal citations and quotations omitted). This standard is "demanding and permits review only in the extraordinary case." *Id.* (internal citations and quotations omitted).

Respondent contends that Ramos has not exhausted Claim One, portions of Claim Two, and Claim Four (Dkt. 11 at 2). Because Ramos did not raise these claims in either his direct appeal or post-conviction proceeding, Respondent argues these claims are procedurally barred. *Id.* Ramos did not file a reply to Respondent's response and presents no argument for why these claims should not be denied as procedurally barred.

The Court addresses the exhaustion of Claims One, Two, and Four below. The Court finds the remaining claims are exhausted or may be addressed pursuant to 28 U.S.C. § 2254(b)(2).

A. Claim One

In Claim One, Ramos alleges the trial court improperly admitted hearsay evidence, specifically a video of a forensic interview of the victim, A.N.M., that was played for the jury and a spiral notebook authored by the victim and another minor, J.H., in violation of the Sixth Amendment's Confrontation Clause (Dkt. 2 at 14). Ramos' primary complaint is that there was no *in camera* hearing held on the admissibility of these statements prior to trial, which violated Oklahoma statutes and the Confrontation Clause of the Sixth Amendment.

Ramos, in his direct appeal, raised the issue of improperly admitted hearsay because no *in camera*, reliability hearing was held (Dkt. 11-1 at 18). Nowhere in Ramos' direct appeal did he argue federal law applied, the Confrontation Clause, or even cite federal law in passing. *Id.* Rather, Ramos posited this issue to the OCCA solely under Oklahoma law, stating the trial court

committed error by not holding an *in camera* hearing as required by Okla. Stat. tit. 12, § 2803.1. *Id.*

In the instant case, Ramos has failed to put the OCCA on notice of the federal claim raised in claim one. This is confirmed by the OCCA's holding, which only addresses state law issues relating to an *in camera* hearing prior to admission of a minor's hearsay statements. *Ramos*, No. F-2014-880 at 2 (Dkt. 2-1). As such, Claim One is unexhausted, as this Confrontation Clause claim has not been presented to the highest state court. Ramos' first claim is also procedurally barred, because Okla. Stat. tit. 22, § 1086 is independent and adequate, and because Ramos has failed to bring this claim on direct appeal.

Moreover, the record demonstrates that Ramos knew of the factual background raised in Claim One before his direct appeal. Ramos raised the factual issues but posited it to the OCCA as a state law issue (Dkt. 11-1 at 18-22). As such, Ramos cannot show cause, *i.e.*, some external factor that prevented presentation of the claim, to overcome the procedural bar to Claim One. Nor has Ramos presented new evidence that was not presented at trial to show he is factually innocent. Thus, Ramos cannot meet the stringent requirements of the fundamental miscarriage of justice exception. As such, this Court applies an anticipatory procedural bar to Claim One.

Based on the foregoing, Claim One is denied.

B. Claim Two

In Claim Two, Ramos alleges that certain hearsay evidence was duplicative, prejudicial, and improperly admitted, and a state witness improperly bolstered the credibility of the victim (Dkt. 2 at 25).[6] He argues these errors denied him a fair trial in violation of the Sixth and

[6] The Court notes that Claim One and Claim Two concern evidence of the forensic interview and spiral notebook. However, the distinction is that Claim One is raised as a Confrontation Clause Claim and Claim Two is raised as a fundamental fairness claim. *See* Dkt. 2 at 22, 25.

Fourteenth Amendments. *Id.* Specifically, Ramos argues the recorded forensic interview and the spiral notebook, co-authored by A.N.M., were duplicative and prejudicial, denying him a fair trial. *Id.* Additionally, he argues the testimony by the forensic interviewer, Angie Edwards, improperly bolstered A.N.M.'s credibility and rendered his trial fundamentally unfair. *Id.* In his direct appeal, Ramos raised this issue to the OCCA, but only made reference to Ms. Edwards' testimony and the recorded forensic interview (Dkt. 11-1 at 23-26). Nowhere in his direct appeal did Ramos complain the admission of the spiral notebook denied him a fundamentally fair trial. *Id.*

As in Claim One, a claim of fundamental fairness regarding the spiral notebook was not presented to the OCCA for review. The Court finds Ramos has failed to put the OCCA on notice of the federal claim raised in Claim Two related to the spiral notebook's admission into evidence. Thus, this portion of Claim Two is unexhausted. Moreover, this claim could have been brought on direct appeal. Ramos knew of the factual background, as he cites to the spiral notebook in other portions of his direct appeal brief (Dkt. 11-1 at 20). Because Okla. Stat. tit. 22, § 1086 would procedurally bar Ramos from presenting this portion of Claim Two to the OCCA, the Court finds the portions of Claim Two related to the spiral notebook are procedurally barred.

Ramos makes a passing, single citation to the Sixth and Fourteenth Amendments in his direct appeal brief related to the forensic interview and Ms. Edwards' testimony bolstering the credibility of the victim (Dkt. 11-1 at 23). While the remaining portion of Claim Two is likely unexhausted, the Court may address the merits of this issue, notwithstanding exhaustion, if the claim is to be denied. 28 U.S.C. §2254(b)(2). The Court does not reach a ruling on exhaustion with regard to the fundamental fairness of the forensic interview or Ms. Edwards' testimony, but rather will address the merits of the remaining portions of Claim Two below. *Id.*

Based on the foregoing, the portion of Claim Two related to the spiral notebook is denied.

C. Claim Four

In Claim Four, Ramos alleges the trial court improperly admitted propensity evidence in violation of his Sixth Amendment right to a fair trial[7] (Dkt. 2 at 31). At trial, the state presented evidence of another child molestation act committed by Ramos while he was a gymnastics coach in South Carolina (Dkt. 12-9 at 66). Before admission of this evidence, the trial court conducted an *in camera* hearing on this issue (Dkt. 12-8 at 8). The minor victim in South Carolina, C.L., testified in detail about Ramos' molesting her and attempted rape when she was 14 or 15 years old. *Id.* at 13-18. The trial court heard C.L. testify and found her testimony credible and admissible. *Id.* at 24.

On direct appeal, Ramos raised the issue of improperly admitted propensity evidence solely under state law (Dkt. 11-1 at 29). Nowhere in his direct appeal does Ramos argue or even reference federal law. *Id.* Rather, the issues focused on the Oklahoma Evidentiary Code. *Id.* The OCCA reviewed this claim, and citing to only state law, denied the claim. *Ramos*, No. F-2014-880 at 3-4 (Dkt. 2-1). Because Ramos did not argue a violation of the Sixth Amendment to the OCCA, this claim is unexhausted.

This claim is also procedurally barred. Ramos knew of the factual background raised in Claim Four before his direct appeal, as he raised the factual issues but posited it to the OCCA as a state law issue (Dkt. 11-1 at 29-33). Thus, Ramos cannot show cause, *i.e.*, some external factor that prevented presentation of the claim, to overcome the procedural bar to Claim Four. Further, Ramos presents no new evidence that was not presented at trial to show he is factually innocent.

[7] It is unclear which provision of the Sixth Amendment Ramos is attempting to assert in this claim. The heading in the habeas petition contains reference to the Sixth Amendment, but the body and argument do not state any federal law or even reference the Sixth Amendment (Dkt. 2 at 31-33).

Thus, Ramos cannot meet stringent requirements of the fundamental miscarriage of justice exception. As such, this Court applies an anticipatory procedural bar to Claim Four

Based on the foregoing, Claim Four is denied.

V. SIXTH AMENDMENT RIGHT TO FAIR TRIAL CLAIMS

In Claims Two, Five, and Seven, Ramos argues he did not receive a fair trial, in violation of the Sixth Amendment. The Sixth Amendment guarantees an accused the right to a fair and impartial trial. *Baker v. Hudspeth*, 129 F.2d 779, 781 (10th Cir. 1942) (There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury."). "But, when . . . one charged with an offense against laws of the United States by a valid indictment, is tried in a court of competent jurisdiction, represented by counsel, before a jury of twelve men, under the superintendence of a judge of that court, which results in the conviction, affirmance and a denial of certiorari, it will be presumed in the absence of plain and cogent evidence to the contrary that the petitioner was accorded a fair and impartial trial as guaranteed by the Constitution, and that all rules of due process have been observed." *Id.*

A. Claim Two

In Claim Two, Ramos alleges that certain hearsay evidence was duplicative, prejudicial, and improperly admitted and that a state witness improperly bolstered the credibility of the victim, denying him a fair trial in violation of the Sixth and Fourteenth Amendments (Dkt. 2 at 25). Prior to trial, the minor victim, A.N.M., was forensically interviewed by Angie Edwards (Dkt. 12-12 at 166; Dkt. 12-9 at 48). This interview was recorded and played at trial for the jury (Dkt. 12-9 at 50-53). Ramos argues this interview was improperly shown, because A.N.M.'s trial testimony was inconsistent with her forensic interview (Dkt. 2 at 3). Had the trial court held an *in camera*

reliability hearing, Ramos believes the evidence would have been excluded. *Id.* Instead, Ramos argues the admission of this unreliable evidence denied him a fair trial. *Id.*

In addition, Ramos argues that Ms. Edwards vouched for A.N.M.'s truthfulness in her testimony. In support, Ramos points to a portion of the trial where Ms. Edwards was discussing the difference between a compliant and a non-compliant victim, and he argues reference to A.M.M. in this discussion was improper bolstering. Ms. Edwards testified as follows:

> A compliant victim is someone who obviously sees themselves in a relationship with someone. They may very well feel that they're an equal partner in the decision making of that relationship. However, we're usually talking about in a compli -- when they're -- the victimization is that you're talking about a child. She was 12 years old. He's 39 years old. But, yet, A.N.M.['s] perception was that they were equals in a relationship. And so therefore she thinks that she was giving of herself to him. It was, you might want to say, agreed upon. She cares for him. And one of the things I picked up on is a great -- a greater emotional bond. And in that process, the compliant victim becomes compliant in sexual behaviors with someone else because they have that strong emotional bond that's been set. He identified with her such as he cared about what her -- how her boyfriends were treating her, that he cared about her and wanted to make sure, you know, she had good boyfriends, the winking. She felt like she could tell them anything. They were like her second parents. And so in that compliant process is a very strong emotional bond that that -- that the adult takes the child into a level of trust that takes them into that physical relationship.

Dkt. 12-9 at 54-55.

The OCCA reviewed this claim, and held that, despite the trial court's error in not conducting an *in camera* hearing of the recorded interview, the trial court did not abuse its discretion in admitting Ms. Edwards' testimony of a compliant victim and that the failure to conduct an *in camera* hearing of the recorded interview "did not seriously affect the fairness, integrity or public reputation of the proceedings." *Ramos*, No. F-2014-880 at 2-3 (Dkt. 2-1).

1. Admission of Forensic Interview

Generally, it is not the province of the federal courts to review evidentiary ruling based on state law. *Smallwood v. Gibson,* 191 F.3d 1257, 1275 (10th Cir.1999) (citing *Estelle v.*

McGuire, 502 U.S. 62, 67–68 (1991)) ("Federal habeas review is not available to correct state law evidentiary errors; rather, it is limited to violations of constitutional rights."). An exception occurs if the federal habeas court determines the state court's rulings were so "grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Revilla v. Gibson*, 283 F.3d 1203, 1212 (10th Cir. 2002) (quoting *Fox v. Ward*, 200 F.3d 1286, 1296 (10th Cir. 2000)). Only then should a federal habeas court examine the merits of the claim to ensure the petitioner's constitutional rights were not violated. *Estelle*, 502 U.S. at 68.

The Court of Criminal Appeals' interpretation of Oklahoma evidentiary law is binding on this Court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2006) (federal courts are bound by state court's interpretation of state law on direct appeal). The Tenth Circuit has specifically held that the failure to comply with the provision of Okla. Stat. tit. 12, § 2803.1 is not a cognizable claim before the Court. *Hamburger v. Allbaugh*, 679 Fed. Appx. 665, 667 (10th Cir. 2017) (unpublished) ("To the extent that this argument is based on an alleged violation of Okla. Stat. tit. 12, § 2803.1, which requires a finding of reliability of child victim statements prior to admission, such a claim is not cognizable under § 2254."). Likewise, even when the OCCA assigns harmless error to a state evidentiary matter, the Court's review remains limited to whether "alleged error was so grossly prejudicial that it fatally infected the trial." *Revilla*, 283 F.3d at 1212.

Oklahoma law requires "that the court find 'in a hearing outside the presence of the jury, that the time, content, and totality of circumstances surrounding the taking of the statement provide sufficient indicia of reliability so as to render it inherently trustworthy.'" *Durbin v. Province*, 448 Fed. Appx. 785, 787 n. 1 (10th Cir. 2011) (unpublished); Okla. Stat. tit. 12, § 2803.1(A)(1). "In determining such trustworthiness, the court may consider, among other things, the following factors: the spontaneity and consistent repetition of the statement, the mental state of the declarant,

whether the terminology used is unexpected of a child of similar age or of an incapacitated person, and whether a lack of motive to fabricate exists . . ." Okla. Stat. tit. 12, § 2803.1(A)(1).

At trial, A.N.M. testified that she met Ramos through gymnastics, as he was her coach (Dkt. 12-8 at 179). She testified that over time she began staying at Ramos' house, usually on Thursday nights, because she did not have school on Friday and had no way to get to gymnastics on Friday. *Id.* at 186-87. A.N.M. testified that when she was in the seventh grade and only 12 years old, her and Ramos' relationship developed into "something more." *Id.* at 191-92. Ramos began to kiss A.N.M. and eventually their relationship turned sexual, including oral sex and intercourse. *Id.* at 194-96, 214, 219-20, 230-31.

In her forensic interview, A.N.M. made similar statements (Dkt. 12-12 at 166). She stated that she had a sexual relationship with Ramos, and her statements appeared spontaneous. *Id.* A.N.M.'S mental status appeared normal for a girl her age, and the language used by A.N.M. appeared typical and ordinary for a girl of her age. *Id.* Moreover, A.N.M. testified and was subject to cross-examination (Dkt. 12-8 at 178-272).

In sum, the Court finds admission of the forensic interview was not so grossly prejudicial that it infected the trial and denied Ramos a fair trial. *Revilla*, 283 F.3d at 1212. As such, this portion of Claim Two is denied.

2. Admission of Ms. Edwards' "Compliant Victim" Testimony

Likewise, admission of Ms. Edwards' testimony is an evidentiary matter. This is confirmed by Ramos' petition that argues only state law matters (Dkt. 2 at 26-28) (citing to Okla. Stat. tit. 12 § 2403, 2803.1 and *Lawrence v. State*, 796 P.2d 1176, 1177 (Okla. Crim. App. 1990)). To restate, this Court is bound by the OCCA's evidentiary ruling, unless they are so "grossly

prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Revilla*, 283 F.3d at 1212 (quoting *Fox*, 200 F.3d at 1296).

The Court agrees with the OCCA that Ms. Edwards' testimony did not constitute inappropriate bolstering of the victim's credibility. Ms. Edwards' testimony discussing a compliant versus non-compliant victim was to illustrate that A.N.M.'s disclosures were typical of someone her age, a permissible topic (Dkt. 12-9 at 54-55). She testified that A.N.M.'s perception was that A.N.M. felt she was in a relationship with Ramos. *Id.* at 55. A.N.M.'s feeling she was in a relationship was no secret. She kept a spiral notebook with multiple references to her love for Ramos and sent text messages indicating the same (Dkt. 12-12 at 3-68, 142-61).

To the extent her testimony could be read as bolstering, the Court finds her testimony was not so "grossly prejudicial that it fatally infected the trial and denied the fundamental fairness that is the essence of due process." *Revilla*, 283 F.3d at 1212 (quoting *Fox*, 200 F.3d at 1296). The evidence against Ramos was overwhelming and corroborative.

As such, the entirety of Claim Two is denied.

B. Claim Five

In Claim Five, Ramos alleges that prosecutorial misconduct infected his trial, causing prejudice, and denying him a fair trial (Dkt. 2 at 34). Ramos points to the state's closing argument, wherein it argued that A.N.M. lost her innocence due to Ramos' conduct and asked the jury, "[W]hat are you going to do about a man who rapes a 12-year-old girl?" *Id.* at 34-35. Ramos argues the state's closing argument invoked sympathy for the victim and "brought into the jury's mind issues broader than guilt or innocence by trying to create societal harm." *Id.* at 35. Ramos also argues that the state called him a liar in closing by stating, "[Ramos] has not been truthful with you." *Id.*

Respondent maintains the OCCA's denial of this claim on direct appeal was not contrary to or an unreasonable application of federal law (Dkt. 22 at 42). Respondent argues the comments, taken as a whole, do not invoke sympathy for the victim, and the extent they did, the jury was instructed not to let sympathy or prejudice enter into their deliberation, thus curing any prejudicial effect of the statements. *Id.* at 45-46. Respondent also argues the comments made during closing argument was not an improper appeal to societal alarm, because the argument focused on the facts of the case. *Id.* at 46. Finally, Respondent asserts the statements about the truthfulness of Ramos were directed towards the veracity of his story, a permissible argument. *Id.* at 48-49.

At trial, the relevant portion of the state's closing argument was as follows:

> The Defense Counsel said something at the beginning of this case that I had to write down. He said that no one was innocent in this matter. He -- he might be right. A.N.M. is no longer innocent. She had that innocence stripped away by him, that childhood innocence. Mr. Ramos' guilt is far more reaching. You've seen the evidence. You know these events occurred. A.N.M.'s come forward reluctantly at the beginning, and we know why, she was in love with him. He fostered that. She understood as a child and she thought as a child and she thought she -- she might be his wife someday. She wasn't capable of understanding a relationship on an adult level. She wasn't savvy to the ways that men might manipulate her later on in life. She's learned a very hard lesson, a very public lesson, a very humiliating lesson.
>
> She's done everything she can up to this point. She's come to you seeking justice. Sonny Stewart, he conducted his interview, his investigation. He's done everything he can. Ms. Herron and I, our part in this matter is about over. We've done what we can in this -- in this event, in this case. We've brought you the evidence. The question is, Members of Choctaw County, what are you going to do about a man who rapes a 12-year-old girl and molests her on four separate occasions?
>
> * * *
>
> Not only did he rape and molest A.N.M., but he's not been truthful with you. I submit to you that he has offered the most absurd explanation for a clear confession. Mr. Uptegrove and I, we could have kept you guys here till 10 o'clock last night cross-examining him, and it would have been a lot of fun for us, and it probably would have been some good entertainment. But, really, what was the point? What was the point? We have more respect for your time. You believe that ridiculous explanation that he gave you yesterday for that confession? I've got some ocean-

> front property right here in downtown Hugo. There was no sense at that point in us beating a dead horse. Agent Stewart made it real clear. He asked where the sexual intercourse occurred. He said on the floor of the bedroom. Said no condom was used. Didn't think she was pregnant because he ejaculated mostly in his hand.
>
> And Agent Stewart told you it's really hard to say out loud I raped and molested a 12-year-old girl. Sometimes that's real difficult. He explained that to you, so he asked those qualifying questions. And it was a clear confession. But the Defendant, he's had nothing to do for the last ten months, but he's been sitting in jail, and so he's had a lot of time to try and come up with some explanation for his confession. So for the first time yesterday, first time, you get this unbelievable explanation.

Dkt. 12-11 at 34-35, 51-52.

Ramos raised this claim to the OCCA on direct appeal (Dkt. 11-1 at 34). The OCCA reviewed this claim and found that "the challenged comments met no timely objection," so the OCCA reviewed the claim under the plain error standard. *Ramos*, No. F-2014-880 at 4 (Dkt. 2-1). The OCCA's plain error standard consisted of evaluating the misconduct within the context of the entire trial, considering the strength of the evidence against the defendant, and the corresponding arguments of counsel. *Id.* Ultimately, the OCCA held "the prosecutor's comments individually or collectively [did not] deprive [Ramos] of a fair trial." *Id.*

"Generally, a prosecutor's improper remarks require reversal of a state conviction only if the remarks 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Le v. Mullin*, 311 F.3d 1002, 1013 (10th Cir. 2002) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, 645, (1974)). "Alternatively, if the alleged prosecutorial misconduct denied the petitioner a specific constitutional right (rather than the general due process right to a fair trial) a valid habeas corpus claim may be established without proof that the entire trial was rendered fundamentally unfair." *Id.* In the instant case, Ramos has raised the issue of prosecutorial misconduct under the Due Process Clause of the Fourteenth Amendment, rather than

under a specific constitutional right (Dkt. 2 at 34-37). As such, this Court reviews the claims for fundamental fairness.

To evaluate fundamental fairness, a court must examine the entire proceeding. *Le*, 311 F.3d at 1013. This includes the strength of the evidence presented, any cautionary steps, *i.e.*, instruction to the jury, offered by the court to counteract improper remarks, and counsel's failure to object to the comments.[8] *Id.* "[I]t is not enough that the prosecutor's remarks were undesirable or even universally condemned. Ultimately, this court considers the jury's ability to judge the evidence fairly in light of the prosecutor's conduct." *Id.* (internal citations and quotation omitted).

1. Invocation of Sympathy and Societal Harm

State and federal Courts hold that during closing argument, counsel for the defense and prosecution are afforded liberal freedom to argue the evidence presented and any logical or reasonable inferences arising therefrom. *Hooper v. Mullin*, 314 F.3d 1162, 1172 (10th Cir. 2002). S*ee also Thornburg v. Mullin*, 422 F.3d 1113, 1134 (10th Cir. 2005) ("[a] prosecutor may comment on and draw reasonable inferences from evidence presented at trial"). However, an attorney's range of argument is not boundless. "The jury should make decisions based on the strength of the evidence, and not on raw emotion, though we realize that some emotional influence is inevitable." *Wilson v. Sirmons*, 536 F.3d 1064, 1120 (10th Cir. 2008), *opinion reinstated sub nom. Wilson v. Workman*, 577 F.3d 1284 (10th Cir. 2009). Further, the Tenth Circuit presumes that when a jury is instructed not to let sympathy or sentiment enter its deliberations, the instruction is followed. *Id.*

[8] "Counsel's failure to object to the comments, while not dispositive, is also relevant to a fundamental fairness assessment." *Le,* 311 F.3d at 1013 (*citing to Trice v. Ward,* 196 F.3d 1151, 1167 (10th Cir.1999)).

In the instant case, the Court finds the state's remarks did not "so [infect] the trial with unfairness as to make the resulting conviction a denial of due process." *Le*, 311 F.3d at 1013. The Court first notes the state comments do not invoke sympathy for the victim or raise alarm about a societal harm. The state's argument about A.N.M.'s innocence was based on the evidence presented at trial and her loss of innocence is merely an inference from the facts presented. Moreover, the state's argument – "what are you going to do about a man who rapes a 12-year-old girl and molests her on four separate occasions?" – was based directly on the evidence, because A.N.M. was 12 years-old at the time of the rape and accused Ramos of molesting her on four occasions.

Regardless, all the considerations set forth in *Le* weigh against Ramos. First, the strength of the evidence – a spiral notebook with the victim's notes, text messages between Ramos and A.N.M., the victim's testimony, and testimony from C.L. about similar attacks, among other evidence – was overwhelming and corroborated. Second, the trial court instructed the jury that they "should not let sympathy, sentiment or prejudice enter into [their] deliberations, but should discharge [their] duties as jurors impartially, conscientiously, and faithfully" (Dkt. 12-17 at 161). Finally, Ramos' trial counsel did not object to the state's comments (Dkt. 12-11 at 34-35). Based on the foregoing, Ramos has failed to show the state's closing argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Le*, 311 F.3d at 1013.

2. Calling Ramos a Liar

Likewise, the Tenth Circuit has said the there is no *per se* rule against referring to a defendant's "testimony as a lie." *United States v. Hernandez-Muniz*, 170 F.3d 1007, 1012 (10th Cir. 1999). There is a distinction between a prosecutor "directly accusing defendant of lying," and a prosecutor providing "a commentary on the implausibility of the defendant's story." *Id.* The

Hernandez-Muniz Court found the prosecutor's characterization of the defendant's statements as lies "was merely commentary on the veracity of the defendant's story. The conflicting testimony on key aspects of the case required the jury to make determinations of witness credibility and truthfulness. The prosecutor's argument fit within the bounds of this context." *Id.* As such, "it is permissible for the prosecution to comment on the veracity of a defendant's story." *Bland v. Sirmons*, 459 F.3d 999, 1025 (10th Cir. 2006). Accordingly, the Tenth Circuit denied habeas relief for a prosecutorial error claim "where the prosecution referred to a defendant as a liar on account of irreconcilable discrepancies between the defendant's testimony and other evidence in the case." *Id.*

In this case, the state's argument was clearly directed at the veracity of Ramos' testimony. Ramos testified and denied all allegations (Dkt. 12-10 at 222). Instead, Ramos offered a story about A.N.M. coming into his bedroom, removing her clothes and attempting to come onto him. *Id.* at 214-18. The state's argument was meant to test the veracity of Ramos' account compared with A.N.M.'s account that he approached her in the bedroom and came onto her. Moreover, as stated above, the evidence against Ramos was overwhelming, the Court instructed the jury to put aside their prejudices, and Ramos' trial counsel did not object to this argument. Thus, not only does the argument fall within the realms of permissible argument, the factors set for in *Le* weigh against a finding that Ramos' trial was so infected by this argument as to deny him a fair trial or due process. *Le*, 311 F.3d at 1013

As such, the Court holds the OCCA's decision and denial of this claim was properly based on federal law, which was not applied unreasonably. 28 U.S.C. § 2254(d)(1). Further, the OCCA's decision was based on the record and evidence presented at trial and was not an unreasonable determination of the fact. 28 U.S.C. § 2254(d)(2).

Based on the foregoing, Claim Five is denied.

VI. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS

In Claims Three and Six, Ramos argues that he received ineffective assistance of trial counsel, in violation of the Sixth and Fourteenth Amendments. To prevail on a claim of ineffective assistance of counsel, a prisoner has the burden of showing his counsel was deficient and that such deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). A reviewing court's "scrutiny of counsel's performance must be highly deferential," and the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Even if counsel's performance is shown to be unreasonable under this deferential standard, *Strickland* requires the defendant to show prejudice, *i.e.*, to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694.

Section 2254(d)(1) adds a second layer of deference. When a federal habeas court reviews a state court's decision on a *Strickland* claim, the habeas court must grant the state court "a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). The only question for the habeas court is whether the state court had a reasonable basis for rejecting the *Strickland* claim. *Id.* "The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id.* at 105.

A. Claim Three

In Claim Three, Ramos argues he received ineffective assistance of trial counsel when his trial counsel failed to object to the qualification of OSBI special agent Andrea Hamilton as an expert in "child disclosures" and "grooming" (Dkt. 2 at 30). While Agent Hamilton testified to

her background, experience, education and training, Ramos argues the record is void of any considerations of the factors set forth in Okla. Stat. tit. 12, § 2803.1, or the factors set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). *Id.* Ramos also implies that the areas of grooming and child disclosures are novel scientific realms that require such analysis before their admission. *Id.*

On direct appeal, Ramos argued this point to the OCCA, and the OCCA rejected his claim (Dkt. 11-1 at 41). The OCCA held that the failure to object was likely not deficient performance, as the underlying claim did not have merit or, at most, it amounted to harmless error. *Ramos*, No. F-2014-880 at 5 (Dkt. 2-1). Even if the performance was deficient, the OCCA held that no prejudice occurred, and that Ramos had not shown a reasonable probability the outcome of his trial would have been different absent this deficiency. *Id.*

At trial, Agent Hamilton testified that prior to joining the OSBI, she performed forensic interviews for a non-profit and was a child welfare investigator for several years (Dkt. 12-9 at 92-93). After joining the OSBI, Agent Hamilton was a child abuse response team agent, investigating and interviewing children about maltreatment. *Id.* at 93. She testified that she has performed roughly 1,650 forensic interviews of children and been qualified as an expert witness in grooming behaviors of offenders and forensic interviews. *Id.* 93-94. She has a bachelor's degree in psychology and a master's in social work. *Id.* at 94. She attends and teaches training courses on forensic interviews and has several hundred hours of training beyond her education in child forensic interviews and sexual abuse dynamics. *Id.* at 95.

Based on this extensive curriculum vitae, some of which is not discussed here, the Court finds that had Ramos' trial counsel objected, the trial court would likely have overruled the objection. Thus, the underlying claim is without merit. Further, Ramos is represented by counsel,

yet does not state how, even if this Court were to consider the underlying claim meritorious, it would have affected the outcome of his trial. Nowhere in Ramos' petition does he argue there is a reasonable probability that the outcome of his trial would have been different had his trial counsel objected to Agent Hamilton's being qualified as an expert. As such, the Court finds there is ample evidence in the record to support the OCCA's finding that counsel's performance was not deficient, and to the extent there was error, Ramos suffered no prejudice. *See* 28 U.S.C. § 2254(d)(2). Moreover, the OCCA's decision was properly based on federal law under *Strickland*, and the OCCA applied the federal law reasonably. *See* 28 U.S.C. § 2254(d)(1).

Based on the foregoing, Claim Three is denied.

B. Claim Six

In Claim Six, Ramos argues he received ineffective assistance of trial counsel, because his counsel misstated the law, causing the burden to be shifted onto himself, and failed to make contemporaneous objections during trial to the issues raised in Claims Two, Three, Four, and Five.

1. Shifting the Burden of Proof

Ramos argues that during both voir dire and opening, his trial counsel misstated the law, destroying his presumption of innocence and shifting the burden onto himself to prove his innocence. During voir dire, Ramos' trial counsel stated:

> Okay. Well, the way I have come up with it is not guilty would be, say, a jury or a Court finds a person accused of an offense and that would be based on whether the State met their burden, whether they failed to prove all the elements of the case beyond a reasonable doubt. Now, innocent, in my humble opinion, I don't think no one -- anyone is innocent. And in this case, you're going to hear all kinds of testimony, and I believe you'll probably agree with me that no one is innocent.

Dkt. 12-8 at 115.

In his opening statement, Ramos argues his trial counsel inappropriately shifted the burden of proof from the state onto himself by stating:

> Good afternoon, ladies and gentlemen of the jury. As you will probably expect, I strongly disagree with a lot of what our Prosecutor sees the way evidence will fall in this case. Right from the beginning, there has been a rush to judgment against Sandro Ramos. Now, today, Sandro Ramos has a story to tell. For ten months, he has been at the county jail, the Choctaw County jail. There have been lots of rumors, lots of publicity about this case, but this is Sandro's time to prove he is an innocent man.

Dkt. 12-8 at 152-53.

Ramos raised this claim on direct appeal. The OCCA reviewed this claim and held that "[c]ounsel's isolated comment that the trial was [Ramos'] chance to 'prove' his innocence, even if objectively deficient, does not create a reasonable probability of a different outcome at trial" (Dkt. 11-1 at 4-5).

As stated above, the evidence presented at trial was more than sufficient to support Ramos' conviction. The victim testified about Ramos' inappropriately touching her, coming onto her, and having sex with her. Another minor, J.H., testified corroborating A.N.M.'s story, stating that A.N.M. told her of the sexual acts. In addition, the spiral notebook that contained contemporaneous notes, text messages between Ramos and A.N.M., and testimony of C.L. who was victimized by Ramos in a similar manner, all support Ramos' conviction. But most troubling for Ramos is that his counsel does not state how this failure would lead to a reasonable probability of a different outcome at trial had counsel abstained from these comments. In sum, the evidence in the record supports the OCCA's findings, and the Court finds the OCCA's decision was not based on an unreasonable determination of the facts in light of the evidence presented. *See* 28 U.S.C. § 2254(d)(2). Moreover, the OCCA's decision was properly based on federal law under *Strickland*, and the OCCA applied the federal law reasonably. *See* 28 U.S.C. § 2254(d)(1).

Based on the foregoing, this portion of Claim Six is denied.

2. Failure of Trial Counsel to Object

In the remaining portion of Claim Six, Ramos argues his counsel was deficient for (1) failing to demand a reliability hearing on child hearsay, (2) not objecting to admission of the forensic interview (Claim Two), (3) not objecting to Agent Hamilton's designation as an expert witness (Claim Three),[9] (4) not objecting to the propensity evidence presented by C.L. that similar acts occurred in South Carolina (Claim Four), and (5) failing to object to prosecutorial misconduct (Claim Five).

Ramos raised these claims on direct appeal (Dkt. 11-1 at 40-42). The OCCA reviewed the claims and held "Petitioner's various propositions of error likewise creates no reasonable probability of a different outcome, as we found those individual allegations of error either lacked merit or were, at most, harmless error." *Ramos*, No. F-2014-880 at 4-5 (Dkt. 2-1).

a. Failure to demand reliability hearing

In this claim, Ramos argues that his counsel failed to demand a reliability hearing on the admission of A.N.M.'s forensic interview or the spiral notebook. Ramos raised this claim on direct appeal (Dkt. 11-1 at 41). The OCCA reviewed this claim and held that despite the trial court's failure to hold a hearing pursuant to Okla. Stat. tit. 12, § 2803.1, the court's omission was harmless because A.N.M.'s testimony was reliable. *Ramos*, No. F-2014-880 at 2 (Dkt. 2-1). The OCCA noted that "the declarant testified at trial subject to cross-examination, and the existing record demonstrates that the hearsay statements met the test of trustworthiness required by statute. The failure to hold this hearing did not seriously affect the fairness, integrity, or public reputation of

[9] The Court notes that Ramos' third sub-proposition of Claim Six – failure to object to Agent Hamilton's expert witness designation – is identical to Claim Three. The Court refers the reader to the above Claim Three for analysis on trial counsel's conduct related to Agent Hamilton's expert witness designation.

the proceedings." *Id.* Thus, Ramos suffered no prejudice related to his ineffective assistance of counsel claim. *Id.* at 5.

The Court finds that the OCCA's decision that Ramos has failed to show prejudice from this error was not unreasonable. The record shows that A.N.M. testified that she believed she was in a relationship with Ramos. She testified that he molested her on four occasions and engaged in sexual intercourse with her while she was 12 years old. This testimony is consistent with the forensic interview and the spiral notebook.

Ramos' petition is solely focused on the alleged error and does not present any grounds of prejudice. Nor could Ramos show prejudice that even had his trial counsel demanded a reliability hearing, the trial court would have excluded either piece of evidence or that had the evidence been excluded, the outcome of his trial would have been different. Because of this, Ramos cannot show prejudice, *i.e.*, 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.

As such, this portion of Claim Six is denied.

b. Failure to object to the admission of the forensic interview

In a similar vein as his previous claim, Ramos argues it was error for his trial counsel not to object to the playing the forensic interview before the jury (Dkt. 2 at 39). Ramos argues this evidence was cumulative and more prejudicial than probative. *Id.* However, Ramos again does not address how this affected the outcome of his trial, or that had his counsel objected, the evidence would have been excluded. Nor can he show prejudice. The evidence contained within the forensic interview is consistent with the testimony given at trial. The OCCA found there was no error in the underlying claim (Dkt. 11-1 at 2-3). Likewise, the failure to object was not error. Because Ramos cannot show error or prejudice in his counsel's failure to object, this claim fails.

As such, this portion of Claim Six is denied.

c. Failure to object to testimony of C.L.

In this claim, Ramos argues that, while his trial counsel did object to the propensity evidence of C.L.'s testimony of similar acts/crimes that occurred in South Carolina, his trial counsel did not demand a ruling that contained an analysis balancing the probative and prejudicial interests of the evidence. The record shows that the subject of other crimes was presented to the trial court by way of motion in limine on February 13, 2014, seeking its exclusion (Dkt. 11-7 at 2-3). Thereafter, the state filed a Notice of Intent to Offer Evidence of Other Crimes and Notice Pursuant to Okla. Stat. tit. 12, § 2414 (*Id.* at 6-7), and Ramos filed a response and objection to the same (Dkt. 12-17 at 38-39). The trial court set the matter for hearing (Dkt. 11-7 at 5). At the hearing, the State offered an Incident Report Supplemental from South Carolina law enforcement describing the investigation of alleged sexual misconduct between Ramos and one of his former gymnastics students (Dkt. 12-4 at 2; Dkt. 12-17 at 34). The trial court entered the following order:

> The Court has read the report. Based upon the statute regarding sexual crimes in Oklahoma, the Court's tentative ruling on this matter is that under that statute this evidence would be admissible. Your motion in limine will be tentatively overruled. Now, having done that, I do that based on the presumption that at an *in camera* hearing that the victim would – when here in person would – from South Carolina would testify substantially with what is contained in the report marked as State's Exhibit 1.

Dkt. 12-4 at 2.

Prior to the start of trial, the trial court conducted an *in camera* hearing on this issue (Dkt. 12-8 at 8-24). The minor victim from South Carolina, C.L., testified about Ramos' molesting her and attempting to rape when she was 14 or 15 years old. *Id.* at 13-18. The trial court heard C.L. testify and found her testimony credible and admissible. *Id.* at 24.

Thereafter, the trial court found the following:

> The Court has already previously heard argument on this issue. The Court has now heard the testimony. I find that the witness's testimony was credible. I find that it was a similar act with similar relationships between the Defendant and the alleged victim. I find that the testimony of the other incident will be admitted over the Defendant's objection.

Dkt. 12-8 at 24. Additionally, the jury was instructed on the limited purpose for which other crimes evidence may be considered (Dkt. 11-7 at 15).

Based on the record, this Court finds the OCCA's decision that no error or prejudice occurred is supported by the record. The OCCA's decision was not an unreasonable determination of the facts, because trial counsel did object to the evidence, and the trial court took multiple steps to review the evidence before its admission.

As such, this portion of Claim Six is denied.

d. Failure to object to prosecutorial misconduct

In his final complaint about trial counsel, Ramos argues his trial counsel should have objected to statements made by the prosecution that elicited sympathy for the victim, invoked a sense of societal danger, and portrayed him as a liar. The OCCA reviewed this claim on direct appeal and held the underlying claim did not warrant relief, and thus, the ineffective assistance of trial counsel claim did not warrant relief either.

As this Court found above, the prosecutors' closing arguments did not invoke sympathy for the victim, did not invoke a sense of societal danger, and did not portray Ramos as a liar. Rather, the statements were based on the evidence presented, its reasonable inferences, and sought to show discrepancies with his story. Because the underlying claim of prosecutorial misconduct failed, Ramos cannot show deficiency in counsel's performance or prejudice.

As such, the entirety of Claim Six is denied.

VII. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS

In Claims Eight and Nine, Ramos argues that he received ineffective assistance of appellate counsel, in violation of the Sixth and Fourteenth Amendments. The *Strickland* standard applies equally to this type of alleged constitutional violation. Thus, to prevail on a claim of ineffective assistance of appellate counsel, a prisoner has the burden of showing his counsel was deficient and that such deficient performance was prejudicial. *Strickland*, 466 U.S. at 688, 692. Generally, this means that a prisoner must show that appellate counsel performed deficiently by inadequately presenting or by omitting certain claims from the prisoner's direct appeal. But as with any *Strickland* claim, a reviewing court's "scrutiny of counsel's performance must be highly deferential," and the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. Even if counsel's performance is shown to be unreasonable under this deferential standard, *Strickland* requires the defendant to show prejudice, *i.e.*, to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *Strickland* requires the reviewing court to view counsel's performance with great deference. *Id.* at 689. As stated above, Section 2254(d) adds a second layer of deference. Thus, when a federal habeas court reviews a state court's decision on a *Strickland* claim, the habeas court must grant the state court "a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Richter*, 562 U.S. at 101. The only question for the habeas court is whether the state court had a reasonable basis for rejecting the *Strickland* claim. *Richter*, 562 U.S. at 101. "The *Strickland* standard is a general one, so the range of reasonable applications is substantial." *Id.* at 105.

A. Claim Eight

In Claim Eight, Ramos alleges he received ineffective assistance of appellate counsel and raises four propositions.

1. Trial Counsel's Advisory List

In his first proposition under Claim Eight, Ramos argues his appellate counsel was deficient for failing to raise five claims listed on his "Trial Counsel's Advisory list" (Dkt. 2 at 41).[10] These claims are (1) excessive punishment, (2) trial court's failure to sustain Ramos' demur to the sufficiency of the evidence, (3) admission of C.L.'s testimony, (4) the verdict was contrary to law or evidence, and (5) insufficient evidence for jury verdict of guilty (Dkt. 16-1 at 4). In his post-conviction proceedings, Ramos raised this claim to both the trial court and on appeal to the OCCA (Dkt. 11-3 at 3; Dkt. 11-5 at 12). The OCCA reviewed this claim under *Strickland* and held they agreed with the trial court's conclusion that appellate counsel's performance was not deficient. *Ramos*, No. PC-2018-1230 at 4-5 (Dkt. 2-3).

The Court first finds that claims of excessive punishment and admission of C.L.'s testimony were raised on direct appeal (Dkt. 11-1 at 29-33, 44). Thus, counsel could not be deficient because these claims were raised. Moreover, as stated above, the evidence presented at trial consisted of the victim's testimony, text messages between the victim and Ramos, corroboration of the molestation and rape by J.H., testimony of acts that occurred under a similar relationship in South Carolina, and a spiral notebook that documented A.N.M.'s relationship with Ramos, among other evidence. The evidence was overwhelming and supports the OCCA's conclusion that any claim regarding the sufficiency of the evidence, demur thereto, or verdict not

[10] The Court notes that this proposition is poorly raised. While Ramos' habeas petition is not entitled to liberal construction, the Court is only able to understand the argument through a review of Ramos' post-conviction application, which was filed *pro se* and is entitled to liberal construction (Dkt. 11-3 at 3). *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

based the evidence was without merit and counsel was not deficient for failing to raise these claims. Because the record supports the OCCA's decision that these claims were without merit and were reviewed under *Strickland*, the Court finds the OCCA's decision is not contrary to federal law or an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1)-(2).

As such, this portion of Claim Eight is denied.

2. Witness Intimidation

In his second proposition under Claim Eight, Ramos argues he received ineffective assistance of counsel when his appellate counsel failed to raise a claim of witness intimidation by the prosecution (Dkt. 2 at 43). In support of this claim, Ramos states that the prosecution engaged in witness intimidation by jailing a minor, S.M., in a juvenile detention center prior to trial. *Id.*

Respondent first argues that this proposition is inadequately briefed, because Ramos fails to "identify what juvenile proceeding on the unrelated matter the prosecution pursued against S.M. so as to intimidate her or what testimony S.M. would have provided" (Dkt. 11 at 70). Respondent next argues that even if properly briefed, the record is devoid of any proof, and Ramos presents no new evidence, that S.M. was intimidated by the prosecution or that S.M.'s decision to not testify was based on prosecutorial intimidation. *Id.* at 70-73

The trial court revied this claim and found:

> The Petitioner next alleges that by proceeding against a juvenile witness in Juvenile Court on an unrelated matter the State engaged in witness intimidations [sic]. The Petitioner had full opportunity to explore that issue at trial and cross-examine witness and subpoena witness to explore and impeach witness. Any denial of access to any witness could have been presented to the trial court. The Defendant subpoenaed the witness who was not in custody at the time of subpoena.

State v. Ramos, No. CF-2013-165, at 2 (Choctaw Cnty. Dist. Ct. Oct. 15, 2018) (Dkt. 2-2). The OCCA reviewed this claim under *Strickland* and agreed with the state court's merits determination

that counsel was not ineffective for failing to raise, as the claims as the claims were without merit. *Ramos*, No. PC-2018-1230 at 3-5 (Dkt. 2-3).

A criminal defendant has a right to present his defense and to compel the attendance of favorable witnesses. *Washington v. Texas*, 388 U.S. 14, 19 (1967). The Due Process Clause and the Compulsory Process Clause work together to ensure a defendant has "the right to present a defense by compelling the attendance, and presenting the testimony, of his own witnesses[.]" *United States v. Pablo*, 696 F.3d 1280, 1295 (10th Cir. 2012) (quoting *Serrano*, 406 P.3d at 1215). The prosecution may not infringe on this right by interfering with a defense witness's decision to testify. *Webb v. Texas*, 409 U.S. 95, 97-98 (1972); *United States v. Crawford*, 707 F.2d 447, 449 (10th Cir. 1983). In assessing whether the prosecution interfered with a defense witness' decision to testify, the defendant must "provide evidence that there was actual government misconduct in threatening or intimidating potential witnesses and that such witnesses otherwise would have given testimony both favorable to the defense and material." *United States v. Allen*, 603 F.3d 1202 (10th Cir. 2010). The government's interference with a defense witness' decision to testify must be "substantial," and something akin to "threats of prosecution, intimidation, or coercive badgering." *United States v. Serrano*, 406 F.3d 1208, 1216 (10th Cir. 2005).

In a § 2254 habeas proceeding, a determination of a factual issue made by a state court is presumed correct, and the petitioner as the burden of rebutting the correctness of findings by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Ramos attaches no affidavit or other evidence to his petition. Thus, this Court is left with same record considered by the OCCA.

In the instant case, Ramos makes only blanket assertions that the prosecution used an unrelated juvenile proceeding to intimidate S.M. Ramos fails to even state what "threats of prosecution, intimidation, or coercive badgering" the prosecution engaged in. *Serrano*, 406 F.3d

at 1216. Instead, Ramos appears to be asking this Court to find that a witness can never be prosecuted, because the prosecution by its very nature is prosecutorial intimidation. Regardless, "[t]here is no hint as to what testimony these witnesses might have given, and no evidentiary support for the claim of misconduct." *Allen*, 603 F.3d at 1211.

The record supports the OCCA's decision that no deficient performance existed, and Ramos has failed to present evidence to the contrary. As such, the Court finds the OCCA's decision was not contrary to federal law or resulted in an unreasonable determination of the facts in light of the evidence presented to the OCCA. 28 U.S.C. § 2254(d)(1)-(2).

As such, this portion of Claim Eight is denied.

3. *Brady* Violation[11]

In his third proposition under Claim Eight, Ramos argues he received ineffective assistance of counsel when his appellate counsel failed to raise a claim that exculpatory evidence was not turned over to the defense. The letter at issue is not directly discussed in Ramos' petition, but the Court presumes Ramos is discussing a suicide letter written by A.N.M. after Ramos was arrested. (Dkt. 12-5 at 6-7). This letter was given to A.N.M.'s mother rather than retained by police. *Id.*

Respondent argues that this proposition "borders on incomprehensible," and that any attempt to resolve this issue requires liberal construction, to which Ramos is not entitled because he is represented by counsel (Dkt. 11 at 74). Even if the Court were to look at the merits, Respondent argues the suicide note was neither favorable or exculpatory, not suppressed by the state, and no prejudice was suffered by not having this letter. *Id.* at 74-79. The OCCA reviewed this claim and denied the same. *Ramos*, No. PC-2018-1230 at 3-5 (Dkt. 2-3).

[11] The Court notes that this proposition is identical to Claim Nine in Ramos' petition. As such, the Court address both this proposition and Claim Nine here.

At a pre-trial motion hearing, the defense brought this discovery issue to the trial court's attention (Dkt. 12-5 at 6). The prosecutor explained he was aware of one letter that was seized by A.N.M.'s school principal. *Id.* at 3-6. Additionally, there was a second letter which was a suicide letter from A.N.M. *Id.* at 6. Defense counsel argued A.N.M. was going to send the letter to Petitioner since the letter emerged after Petitioner was arrested and jailed. *Id.* The prosecutor said he believed the suicide letter was with A.N.M.'s mother. *Id.* at 7. The trial court asked the prosecution to make an attempt to obtain the two letters before the next hearing. *Id.* at 7-8.

On July 22, 2014, defense counsel amended his witness list and added The Honorable Bill Baze to the witness list (Dkt. 11-7 at 8). Counsel noted that Judge Baze was the former prosecutor who prosecuted this matter and was involved in the discovery process concerning "the existence and/or disappearance" or letters or notes written by A.N.M. *Id.* The State filed a motion to quash defense counsel's subpoena of Judge Baze, and defense counsel filed a response. *Id.* at 10-12. At the July 29, 2014, pre-trial hearing, the court addressed defense counsel's motion to subpoena Judge Baze (Dkt. 12-7 at 2). Defense counsel admitted the prosecution produced one letter, but the second letter was never provided. *Id.* at 10-11. Counsel claimed Judge Baze recalled a second letter, but he believed the letter was not exculpatory. *Id.* at 11-12. The prosecutor assigned to the case explained:

> I visited with Judge Baze, and he -- he recalls the general nature of the -- of the writing. From what he tells me, it was not a letter to the Defendant. It was a writing that was found at the school in which the victim was having suicidal-type thoughts. And my argument to the Court would be that it's not relevant. It has really no bearing on whether or not this crime was committed or not. It doesn't tend to prove or disprove anything. If anything, I would argue that it probably helps the State.

Dkt. 12-7 at 13.

The prosecutor affirmed the letter could not be located. *Id.* The court sustained the State's Motion to Quash unless defense counsel could establish the evidence was unavailable through

another source. *Id.* at 13-14, 18. Since the transaction regarding the letter involved Officer Larry Wayne Hendrix, defense counsel indicated he was going to interview him. *Id.* at 14-15.

At trial, defense counsel called Officer Hendrix (Dkt. 12-10 at 36). Defense counsel asked Officer Hendrix about his involvement in the case, and Officer Hendrix said he went to the school in Fort Towson to pick up two handwritten documents supposedly authored by A.N.M. *Id.* at 37-38. Based on a conversation Officer Hendrix had with OSBI Agent Sonny Stewart, the letters appeared to lack evidentiary value. *Id.* at 38. One letter was turned over to the District Attorney's office and the other letter was given to A.N.M.'s family. *Id.* The second letter was not turned over to the district attorney's office because it concerned A.N.M. "talking about being depressed and possibly wanting to injure herself." *Id.* The letter was not addressed to anyone and did not claim the allegations in the case were a lie or prove or disprove disputed facts. *Id.* at 42-43. Officer Hendrix said the assistant district attorney at the time reviewed the letter and decided that the letter did not need to be brought to district attorney's office. *Id.* at 39. The suicide letter was then turned over to A.N.M.'s parents, so they could address the mental health issues facing A.N.M. *Id.* at 40-42.

"The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See also Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) ("A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused"). To show a *Brady* violation occurred, "[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Douglas v. Workman*, 560 F.3d

1156, 1173 (10th Cir. 2009) (quoting *Banks v. Dretke*, 540 U.S. 668, 691, (2004)). A showing of prejudice requires the suppressed evidence be material so that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 433 (1995)). When a habeas petitioner alleges a *Brady* violation occurred, the petitioner must prove the state acted in bad faith by failing to preserve the potentially exculpatory evidence. *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988).

In the instant case, Ramos has failed show the letter at issue is either favorable or exculpatory. To the contrary, a suicide letter written by a child victim would likely be favorable to the state, showing the suffering this victim endured after being molested and raped by Ramos. Moreover, Ramos has failed to show any prejudice, and the record reflects none. Even if the letter had been turned over to counsel, Ramos does not argue the letter would have been introduced at trial, admitted by the Court, or that it would have altered the outcome of his trial. *Strickland*, 466 U.S. at 694. In short, the OCCA's decision in denying this claim was not contrary to federal law or based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1)-(2).

As such, this portion of Claim Eight is denied.

4. Jury Misconduct

In his fourth and final proposition under Claim Eight, Ramos argues his appellate counsel was deficient for failing to raise a claim of jury misconduct. He alleges jury misconduct occurred when the jury foreman spoke with the victim's family for roughly 15 minutes in the courthouse parking lot (Dkt. 2 at 45-46). Ramos argues the OCCA's finding that he suffered no prejudice from this claim is an unreasonable determination based on the facts presented at trial. *Id.*

Respondent argues the trial court and the OCCA handled this claim constitutionally by, after receiving notice of potential juror misconduct, holding a hearing to investigate (Dkt. 11 at 79-86). The trial court made findings that Ramos did not suffer any prejudice and that no misconduct occurred. *Ramos*, No. CF-2013-165 at 3-4 (Dkt. 2-2). Respondent argues these findings are reasonable and based on the record, thus Ramos is not entitled to relief (Dkt. 11 at 85-86).

The record shows that in his first post-conviction application, Ramos argued his appellate counsel was ineffective for failing to raise a claim of jury misconduct (Dkt. 11-3 at 3). He stated that jury misconduct occurred when the jury foreman and the victim's family spoke with each other in the courthouse parking lot. *Id.* at 7. After receiving this claim, the trial court appointed counsel for Ramos and held an evidentiary hearing, where several witnesses testified. *Ramos*, No. CF-2013-165 at 3-4 (Dkt. 2-2). Ramos' trial counsel testified he was told by someone, whom he could not recall, that an interaction between a juror and the victim's family had occurred (Dkt. 12-15 at 5-6). Trial counsel did not report this contact to the trial court or prosecution because the statement to him was "such a vague statement." *Id.* at 7. Amanda Siniga, Ramos' girlfriend, testified she saw the jury foreman approach and speak with the victim's family. *Id.* at 9-10. Ms. Siniga did not hear the conversation or remember exactly who the foreman spoke with but was sure it was the victim's family. *Id.* at 10-11. J.M. testified she saw the jury foreman speak with the victim's family for five to ten minutes and that the foreman was "the primary one talking." *Id.* at 17. She also testified she did not hear the conversation and was not aware of the substance of the conversation, stating, "I can't say that I saw anything of importance or anything." *Id.* at 17, 19. The victim's mother was the final witness to testify. *Id.* at 21. Ms. Mills disputed Ms. Siniga and J.M.'s testimony and stated she never had contact with any juror. *Id.* at 22.

Based on this testimony, the trial court made the following conclusions of fact and law on this underlying claim:

FINDINGS OF FACT

(1) Petitioner failed to establish that any communication with any juror occurred regarding the merits of the case.

(2) Petitioner failed to produce evidence that any communication occurred after submission.

(3) The Defendant's evidence clearly demonstrated that the Defendant had all of the evidence of any communication available to them during the trial.

(4) Any alleged juror misconduct could have been raised at the Jury Trial, thereby allowing Trial Court to make inquiry. This was not done.

(5) The Petitioner failed to produce any evidence of prejudice.

(6) Petitioner failed to produce evidence of actual misconduct.

CONCLUSIONS OF LAW

(1) It is incumbent on the defense to show actual misconduct before they can allege error. Particularly is this true when the alleged misconduct occurs prior to the submission of the case to the Jury. When alleged misconduct was prior to submission of the case, there must be a showing that the defendant was prejudiced thereby before it could constitute misconduct of a prima facie nature. *Parks v. State*, 457 P.2d 818[.]

(2) Proof of jury misconduct must be clear and convincing before relief can be granted. *Glascow v. State*, 370 P.2d 933.

(3) Post-conviction claims that could have been raised in previous appeals, but were not, are generally waived. *Murphy v. State*, 124 P.3d 1198.

Petitioner's proposition 4 is denied.

Ramos, No. CF-2013-165 at 3-4 (Dkt. 2-2).

Ramos appealed this decision to the OCCA (Dkt. 11-5). The OCCA reviewed the underlying claim of jury misconduct and held the trial court did not err in denying this claim. *Ramos*, No. PC-2018-1230 at 5 (Dkt. 2-3). Although not entirely clear, it appears the OCCA

denied Ramos' ineffective assistance of appellate counsel claim because the underlying claim was not meritorious. *Id.*

"The Sixth Amendment as incorporated by the Fourteenth Amendment guarantees the right of a trial by jury in all state criminal cases." *Goss v. Nelson*, 439 F.3d 621, 627 (10th Cir. 2006). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." *Id.* (internal citations and quotations omitted). "Included in that right is the right to a jury capable and willing to decide the case solely on the evidence before it." *United States v. Brooks*, 569 F.3d 1284, 1288 (10th Cir. 2009) (quotation omitted). "Though no trial can be perfect, one touchstone of a fair trial is an impartial trier of fact." *United States v. Cerrato–Reyes*, 176 F.3d 1253, 1258–59 (10th Cir. 1999) (citation, quotation, and brackets omitted). "Because impartial jurors are the cornerstone of our system of justice and central to the Sixth Amendment's promise of a fair trial, we guard jealously the sanctity of the jury's right to operate as freely as possible from outside unauthorized intrusions purposefully made." *Stouffer v. Duckworth*, 825 F.3d 1167, 1177 (10th Cir. 2016) (internal citations and quotations omitted).

The Tenth Circuit in *Stouffer* provides the framework a court is to follow when a credible allegation of juror misconduct occurs. *Stouffer*, 825 F.3d at 1177. "Faced with credible evidence of jury tampering–that is, improper external communication with a juror about a matter pending before the jury–a trial court has a duty to investigate." *Id.* (internal citations and quotations omitted). "When a trial court is apprised of the fact that an extrinsic influence may have tainted the trial, the proper remedy is a hearing to determine the circumstances of the improper contact and the extent of the prejudice, if any, to the defendant." *Id.* at 1214 (quotations omitted). "These hearings are known as '*Remmer* hearings,' after the Supreme Court's seminal decision in *Remmer v. United States*, 347 U.S. 227 (1954)." *Id.* at 1178. In *Remmer*, the Court held that "[i]n a criminal

case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. U.S.*, 347 U.S. 227, 229 (1954). "[T]he presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and a hearing of the defendant, that such contact with the juror was harmless to the defendant." *Stouffer*, 825 F.3d at 1177. "Once the government rebuts the presumption of prejudice in a *Remmer* hearing, the burden then shifts to defendant to show actual prejudice." *United States v. Armendariz*, 922 F.2d 602, 606 (10th Cir. 1990).

After presentation of the parties' evidence, the district court analyzes the substance of any improper communications in light of the entire record. *United States v. Aguirre*, 108 F.3d 1284, 1288 (10th Cir. 1997); *see also Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 924 (10th Cir. 1992). The court's inquiry should be "objective," asking only how a reasonable person in the juror's position would be affected by the improper communications. *United States v. Klein*, 93 F.3d 698, 703 (10th Cir. 1996).

If a defendant's right to an impartial jury has been violated, he is entitled to a new trial. *See United States v. Scull*, 321 F.3d 1270, 1280 (10th Cir. 2003). But "not every incident [involving bias] requires a new trial. The test is whether . . . the misconduct has prejudiced the defendant to the extent that he has not received a fair trial." *United States v. Lawrence*, 405 F.3d 888, 904 (10th Cir. 2005) (quotation omitted).

In conducting the fair-trial analysis, "the Constitution 'does not require a new trial every time a juror has been placed in a potentially compromising situation ... [because] it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.'" *United States v. Day*, 830 F.2d 1099, 1103 (10th Cir. 1987) (quoting *Rushen v. Spain*, 464

U.S. 114, 118 (1983) (per curiam)). "Surmise and suspicion may not be used to assail the integrity of a jury; it is presumed that jurors will be true to their oath and will conscientiously observe the instructions and admonitions of the court." *Vigil v. Solano*, 947 F.2d 955, 1991 WL 230177, at *4 (10th Cir. Nov. 8, 1991) (unpublished) (quoting *United States v. Gigax*, 605 F.2d 507, 515 (10th Cir. 1979)). Accordingly, "something more than 'unverified conjecture' [is] needed where only potentially suspicious circumstances are shown." *Id.* (quoting *United States v. Jones*, 707 F.2d 1169, 1173 (10th Cir. 1983)).

In habeas proceedings, a determination of a factual issue made by a state court is presumed correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. *Id.* Ramos presents no new evidence on this issue and relies on the record to say the OCCA's decision was unreasonable based on the facts presented.

The record reflects that no witness heard the conversation between the jury foreman and the victim's family. Rather, Ramos relies solely on the fact the victim's family and the foreman interacted as the basis to say misconduct occurred. This is the 'unverified conjecture' and 'potentially suspicious circumstance' that *Stouffer* held to be insufficient to show misconduct or prejudice. *Stouffer*, 825 F.3d at 1179. As such, the OCCA's decision was not based on an unreasonable determination of the facts presented. 28 U.S.C. § 2254(d)(2).

Based on the foregoing, the entirety of Claim Eight is denied.

VIII. Claim Seven

In Claim Seven, Ramos argues the cumulative errors cited throughout his petition deprived him of a fair trial (Dkt. 2 at 40). The OCCA rejected this claim, concluding that, while one error occurred, the failure to hold a reliability hearing on child hearsay, that error was harmless, and there was no prejudicial accumulation of errors. *Ramos*, No. F-2014-880 at 5 (Dkt. 2-1).

"[I]n the federal habeas context, a cumulative-error analysis aggregates all constitutional errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Alverson v. Workman*, 595 F.3d 1142, 1162 (10th Cir. 2010) (brackets and internal quotation marks omitted) (quoting *Brown v. Sirmons*, 515 F.3d 1072, 1097 (10th Cir. 2008)). But a cumulative-error analysis is warranted "only if there are at least two errors." *Lott v. Trammell*, 705 F.3d 1167, 1223 (10th Cir. 2013) (quoting *Hooks v. Workman*, 689 F.3d 1148, 1194-95 (10th Cir. 2012)). In analyzing the claims raised by Ramos, the Court found no constitutional errors. As a result, Petitioner is not entitled to habeas relief on his cumulative-error claim, and the Court denies the petition as to Claim Seven.

IX. CERTIFICATE OF APPEALABILITY

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

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. William "Chris" Rankins is substituted as Respondent.
2. The Petition for Writ of Habeas Corpus (Dkt. 1) is DENIED.

3. A certificate of appealability is DENIED.

4. A separate judgment shall be entered in this matter.

DATED this 29th day of August 2022.

Ronald A. White
United States District Judge
Eastern District of Oklahoma

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