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FILED
United States Court of Appea
Tenth Circuit

March 30, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPE

FOR THE TENTH CIRCUIT

KEVIN A. LARSON,

Petitioner - Appellant,

v.

SHANE STUCKER; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 25-1233
(D.C. No. 1:24-CV-01979-SKC)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **BACHARACH**, **McHUGH**, and **ROSSMAN**, Circuit Judges.

Kevin A. Larson, a Colorado prisoner, seeks a certificate of appealability (COA) under 28 U.S.C. § 2253(c)(1)(A) to appeal the district court's denial of his 28 U.S.C. § 2254 petition for habeas corpus relief. We deny a COA.

I. Background

In 2014, Mr. Larson was charged with five crimes involving sexual abuse and exploitation of a minor. He entered a plea agreement under which he would maintain his innocence pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), while pleading

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

Eg, "Appendix A"

guilty to one of the charged crimes. However, he later withdrew that plea, after the prosecution gave notice it would present evidence of aggravating circumstances which could increase the minimum term of his sentence. He was then convicted by a jury on all five charged crimes and sentenced to an indeterminate term of 36 years to life.

Mr. Larson appealed and the Colorado Court of Appeals (CCA) affirmed his conviction. *People v. Larson (Larson I)*, No. 17CA0774, 2018 WL 11714832 (Colo. App. Aug. 30, 2018) (unpublished). The Colorado Supreme Court denied certiorari. Mr. Larson then sought post-conviction relief, which the state district court denied. The CCA again affirmed. *People v. Larson (Larson II)*, No. 22CA1105, 2023 WL 12061341, at *1 (Colo. App. Oct. 19, 2023) (unpublished). And the Colorado Supreme Court again denied certiorari. Mr. Larson then filed a § 2254 petition. The district court denied his petition and denied a COA. He now requests a COA from this court.

II. Legal Standards

To appeal, Mr. Larson must first obtain a COA by making "a substantial showing of the denial of a constitutional right." § 2253(c)(2). This requires him to show that "reasonable jurists could debate whether (or, for that matter, agree that) [his] 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 addition, because the Colorado courts rejected all three of Mr. Larson's habeas claims on their merits, our evaluation of his COA application incorporates the

"deferential treatment of state court decisions" under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Pacheco v. Habti*, 62 F.4th 1233, 1247 (10th Cir. 2023) (internal quotation marks omitted). Mr. Larson may obtain relief only if the state courts' resolution of his claims was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2).

In applying this standard, "deference and reasonableness are our watchwords." *Meek v. Martin*, 74 F.4th 1223, 1248 (10th Cir. 2023). We must "give the benefit of the doubt" to the state courts' merits decisions. *Klein v. Martin*, 146 S. Ct. 589, 596 (2026) (internal quotation marks omitted). To obtain § 2254 relief, Mr. Larson "must show far more than clear error"; he "must instead establish that the state court blundered so badly that every fairminded jurist would disagree with the decision." *Id.* (brackets and internal quotation marks omitted).[1]

III. Discussion

A. Claim One—Exclusion of Alternate Suspect Evidence

Before trial, Mr. Larson sought to introduce evidence to show three former boyfriends of the victim's mother could also have committed the crimes. The trial court

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

excluded this proffered evidence as irrelevant. Mr. Larson argues its evidentiary ruling violated his right to present a complete defense.

The CCA rejected this claim on its merits.[2] It reasoned Mr. Larson's proffered evidence showing that the other men "lavished gifts and attention on the victim" and she "acted out around" one of them provides only circumstantial evidence they "might have had a motive or opportunity to commit sexual crimes" and is "insufficient to create a non-speculative connection" to the crimes for which Mr. Larson was convicted. *Larson I*, 2018 WL 11714832, at *3. As to evidence the other men were previously charged with sexual offenses against the victim and another child, the CCA concluded that absent a showing of similarity to the crimes Mr. Larson was accused of, the prior conduct and charges "[did] not give rise to a non-speculative connection between an alternate suspect and the crimes charged in [Mr. Larson's] case." *Id.*

The district court concluded the CCA's decision was reasonable. It recognized the Supreme Court has held that evidence related to alternate suspects "'may be excluded where it does not sufficiently connect the other person to the crime, as for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial.'" R. at 418 (quoting *Holmes v. South*

[2] Mr. Larson argues for a COA based on an apparent non-substantive typographical or scrivener's error in the district court's order, which incorrectly stated "[t]he CCA concluded that the trial court *did* abuse its discretion." R. at 414 (emphasis added). This provides no basis for relief. The district court went on to quote in full the CCA's reasoning for affirming the trial court's ruling, including the statement "[the CCA] cannot conclude that the trial court abused its discretion." *Id.* at 416 (quoting *Larson I*, 2018 WL 11714832, at *3).

Carolina, 547 U.S. 319, 327 (2006)). It agreed with the CCA that Mr. Larson's proffered evidence was speculative, concluding "[a]t most, [it] tends to show that, in addition to Mr. Larson, other men might [also] have sexually abused the victim. That does not mean Mr. Larson didn't commit the crimes for which he was tried and convicted." R. at 418.

Reasonable jurists would not debate that ruling. Mr. Larson does not identify a Supreme Court holding the CCA unreasonably applied. *See Martinez v. Quick*, 134 F.4th 1046, 1056 (10th Cir.) ("In reviewing under § 2254(d)(1), we must first determine the relevant clearly established law, which comes exclusively from the holdings of the Supreme Court, not its dicta." (internal quotation marks omitted)), *cert. denied*, 146 S. Ct. 385 (2025). Arguing the evidence should have been admitted, he relies on the Colorado Rules of Evidence and Colorado court cases. This could at most show the CCA erroneously applied Colorado law. But Mr. Larson cannot obtain federal habeas relief based on a violation of state law. *See* § 2254(d)(1); *Davis v. Workman*, 695 F.3d 1060, 1078 (10th Cir. 2012) ("[E]ven if the state rule[s] [were] violated, [a habeas petitioner] cannot obtain relief on that ground under § 2254, which limits review to claims based on federal law."). And the very broad statements he cites discussing a defendant's right to present a defense cannot support relief under § 2254(d)(1). *See Martinez*, 134 F.4th at 1064 ("[H]oldings that speak only at a high level of generality do not supply clearly established federal law under AEDPA." (internal quotation marks omitted)).[3]

[3] Mr. Larson argues the district court erred by stating he had not "explain[ed] how the alternate suspect evidence would support his defense against the crime charged," because he contends his briefing on direct appeal and in state post-conviction proceedings had explained in detail how this evidence tends to show his innocence. Aplt. Opening Br.

B. Claim Two—Right to Confront Victim's Mother

The trial court allowed the victim's mother to invoke her Fifth Amendment privilege. It held hearings which established that federal officials wanted her to be prosecuted based on information discovered in the investigation of Mr. Larson. The trial court concluded her testimony could "lead to some type of pimping" or similar charges and ruled no party could call her as a witness except to ask general questions about "demographic information." *Larson I*, 2018 WL 11714832, at *4. Mr. Larson argues its ruling violated his Sixth Amendment rights to confront and question witnesses against him and prevented him from presenting exculpatory testimony.

The CCA rejected this claim, applying the rule that "before a court may compel a witness to respond . . . it must be 'perfectly clear' that the witness's answers 'cannot possibly' have a tendency to incriminate.'" *Id.* (quoting *People v. Blackwell*, 251 P.3d 468. 474 (Colo. App. 2010)).

The district court concluded the state courts had "reasonably concluded [the] Mother had a real and appreciable fear of self-incrimination were she to testify." R. at 423. It found the state courts' factual findings "amply supported by the record, which was carefully developed . . . over the course of two separate hearings," and that Mr. Larson had not shown the CCA's decision was contrary to or unreasonably applied any clearly established federal law. R. at 424. It also rejected Mr. Larson's argument

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at 6. However, he cannot satisfy Rule 28 of the Federal Rules of Appellate Procedure merely by incorporating or referring to arguments made in earlier proceedings. *See Rocky Mountain Wild v. Dallas*, 98 F.4th 1263, 1304 n.20 (10th Cir. 2024).

that the mother should have been required to invoke the Fifth Amendment on the witness stand in response to questions, observing this court has "'repeatedly held that neither the prosecution nor the defense may call a witness to the stand simply to compel [her] to invoke the privilege against self-incrimination.'" R. at 425 (quoting *United States v. Rivas-Macias*, 537 F.3d 1271, 1275 n.3 (10th Cir. 2008) (collecting cases)).

Reasonable jurists would not debate the district court's ruling. The CCA's decision was consistent with established federal law. *Compare Larson I*, 2018 WL 11714832, at *4 *with United States v. Chalan*, 812 F.2d 1302, 1310 (10th Cir. 1987) ("A trial judge should order the witness to answer questions only if it is '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the answers *cannot possibly*' tend to incriminate the witness." (ellipsis and brackets omitted) (quoting *Hoffman v. United States*, 341 U.S. 479, 488 (1951)). Mr. Larson repeats his general contention that the trial court's ruling is unfair and violated the Sixth Amendment. But he does not identify any Supreme Court precedent that is inconsistent with the CCA's decision. Nor does he argue the state courts' factual determinations were unreasonable.

C. Claim Three—Ineffective Assistance of Counsel

In his third habeas claim, Mr. Larson argues he received ineffective assistance of counsel when he chose to withdraw from the plea agreement.

Some background on applicable sentencing law is needed to understand this claim. Under the plea agreement, Mr. Larson pled guilty to the class 4 felony of internet sexual exploitation of a child. That crime is defined as a "sex offense," for which Colorado law requires imposition of a "'an indeterminate term'" in correctional custody. *Larson II*,

2023 WL 12061341, at *3 (quoting Colo. Rev. Stat. § 18-1.3-1004(1)(a)). The length of the indeterminate term must be "at least the minimum of the presumptive range" set by statute. The maximum length is "the [defendant's] natural life." *Id.*

As indicated in the plea agreement, Mr. Larson's presumptive sentencing range—which would establish the minimum length of his indeterminate prison term—would have been two to six years. However, the prosecution gave notice it intended to present evidence of extraordinary aggravating circumstances. If the sentencing court found such circumstances, it could increase the minimum length of the sentence, up to twice the high end of the presumptive range, or twelve years. *See id.* (citing Colo. Rev. Stat. § 18-1.3-401(6) and *Vensor v. People*, 151 P.3d 1274, 1279 (Colo. 2007)).

Mr. Larson's ineffective assistance claim is predicated on *Alleyne v. United States*, 570 U.S. 99, 116 (2013), which held that under the Sixth Amendment "facts that increase mandatory minimum sentences must be submitted to the jury." Mr. Larson argues *Alleyne* would have made it unconstitutional for the sentencing court to increase the minimum length of the sentence contemplated in his plea agreement based on a judicial fact-finding of aggravating circumstances. He therefore argues his plea counsel was constitutionally ineffective because she did not advise him he could have maintained the guilty plea but objected under *Alleyne* to any increase of the minimum length of his sentence. If plea counsel had so advised him, he argues, he would not have withdrawn from the plea agreement and would have received a sentence much shorter than was imposed after he was convicted on all charges.

The CCA rejected this claim on post-conviction appeal, holding plea counsel was not ineffective. *See Larson II*, 2023 WL 12061341, at *4. It observed the Colorado Supreme Court had upheld the constitutionality of the procedure for increasing the minimum length of an indeterminate sentence in *Vensor*. *See id.*; *Vensor*, 151 P.3d at 1280 (holding that because an indeterminate sentence "must include a maximum sentence equal to . . . the offender's natural life, the lower term . . . whether or not it is beyond the presumptive range . . . cannot constitutionally entitle [a defendant] to a jury determination" of aggravating circumstances). And the CCA observed "no court had held that *Vensor* was no longer good law" at the time Mr. Larson withdrew his plea. *Larson II*, 2023 WL 12061341, at *4. It therefore concluded that objecting to sentencing based on *Alleyne* (and contrary to *Vensor*), would have been "a novel claim." *Id.* Applying a rule that "[i]n the *Strickland* context, attorneys are not required to anticipate changes in otherwise dispositive authority in the controlling jurisdiction," the CCA concluded plea counsel had not been ineffective for "failing to advise [Mr. Larson] that they could assert a novel legal argument if they proceeded to sentencing on his guilty plea." *Id.*

The district court concluded the CCA's decision was not contrary to or an unreasonable application of any controlling federal law. It found *Alleyne* "readily distinguishable" because while *Alleyne* addressed a statutory mandatory minimum sentence, Mr. Larson's case involves "Colorado's unique indeterminate sentencing scheme for felony sex offenses" and "the applicable *range* of the lower term of years," for a sentence that would still "require[] an upper ceiling of [Mr. Larson's] natural life."

R. at 434. It therefore concluded that although "the rule that Mr. Larson argues for may be a logical extension of *Alleyne* . . . . the law applicable to [his] claim was not clearly established." R. at 434–35.

Reasonable jurists would not debate the district court's ruling. As it recognized, *Alleyne* addressed application of a mandatory minimum sentence, 18 U.S.C. § 924(c)(1)(A)(ii), *i.e.*, a provision that increased "the floor of a sentencing range." 570 U.S. at 112. In contrast, the sentencing provision applicable to Mr. Larson provides that a sentencing court "*may* impose a sentence . . . greater than the presumptive range," if it finds extraordinary aggravating circumstances. Colo. Rev. Stat. § 18-1.3-401(6) (emphasis added); *see also Lopez v. People*, 113 P.3d 713, 719–20 (Colo. 2005) (stating "[s]ection 18-1.3-401(6) does not mandate a restricted or increased sentencing range based on judicial fact-finding," but gives the sentencing judge "full discretion to sentence within [a] widened range"). So reasonable jurists would not debate the district court's conclusion that *Alleyne* does not offer clearly established law for Mr. Larson's habeas claim. *See Meek*, 74 F.4th at 1251 (recognizing that under the "threshold" inquiry of "whether there exists clearly established federal law," the court must "construe [the Supreme Court's] holdings narrowly, and will not extract clearly established law from the general legal principles developed in factually distinct contexts" (internal quotation marks omitted)).[4]

[4] If Mr. Larson's habeas claim were that he was sentenced in violation of *Alleyne*, then he might have a reasonably debatable argument that *Alleyne*'s facts are sufficiently "closely-related or similar" to provide clearly established law, and that the CCA "unreasonably refuse[d] to extend[] a legal principle from [*Alleyne*] to a new context

Instead, because Mr. Larson's habeas claim is ineffective assistance of counsel, the relevant clearly established law arises from *Strickland v. Washington*, 466 U.S. 668 (1984). This requires Mr. Larson to show his "'counsel's representation fell below an objective standard of reasonableness.'" overcoming "a 'strong presumption' that [the] representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 688, 689). Our review of his claim under § 2254(d) is also "doubly deferential," *Dunn v. Reeves*, 594 U.S. 731, 738 (2021), giving "deference to both [Mr. Larson's] counsel *and* the state court," *id.* at 739. "Because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard." *Shinn v. Kayer*, 592 U.S. 111, 119 (2020) (brackets and internal quotation marks omitted). In the habeas context, the "question is not merely whether counsel performed reasonably under *Strickland*; instead, it is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Martinez*, 134 F.4th at 1057 (brackets and internal quotation marks omitted).

Given this highly deferential review, reasonable jurists would not debate whether the CCA's decision unreasonably applied *Strickland* when concluding Mr. Larson's counsel performed reasonably by providing representation consistent with the then-

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where it should apply." *House v. Hatch*, 527 F.3d 1010, 1017, 1018 (10th Cir. 2008) (recognizing "'extension of legal principle'" as one of "two analytic strands" of "the 'unreasonable application' prong of § 2254(d)(1)" (internal quotation marks omitted)). But his habeas claim is for ineffective assistance of counsel under *Strickland*, not for violation of *Alleyne* itself.

controlling holding of *Vensor*, and was not instead required to make an argument for extending *Alleyne*, or advise Mr. Larson he could do so. *Compare Larson II*, 2023 WL 12061341, at *4 (stating "counsel's performance is not deficient if [they] fail to advance novel legal theories or arguments that have merit in hindsight but are not supported by the then-existing precedent, fail to anticipate changes in the law, or fail to argue for an extension of precedent") *with United States v. Babcock*, 40 F.4th 1172, 1177 (10th Cir. 2022) (stating counsel "are not ineffective because they fail to conceive, research, and raise every novel argument that has a chance to prevail") *and Scott v. Hepp*, 62 F.4th 343, 348 (7th Cir. 2023) ("failure to object to an issue that is not settled law within [the jurisdiction] is not unreasonable [representation] by defense counsel" (brackets and internal quotation marks omitted)).

Mr. Larson maintains an argument based on *Alleyne* would not have been "novel," because *Alleyne* was decided three years before he withdrew his plea and had already been cited many times during the intervening years. Aplt. Opening Br. at 16. But he does not identify any case decided before he withdrew his plea agreement that indicated *Alleyne* had either abrogated *Vensor* or applies to Mr. Larson's sentencing.[5] So he has not shown his counsel's actions were objectively unreasonable, given the circumstances present at the time of the representation. *See Babcock*, 40 F.4th at 1177.

[5] Mr. Larson also has not cited any case decided more recently that has held *Alleyne* abrogated *Vensor* or makes the application of § 18-1.3-401(6) to increase the minimum length of an indeterminate sentence unconstitutional.

Mr. Larson's other arguments also do not show a COA is warranted. To the extent he claims the clearly-established law misapplied by the CCA was his general right to due process, that undeveloped argument does not show the CCA debatably misapplied clearly established law. *See Harrington*, 562 U.S. at 101 ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."). He suggests his counsel should have "moved to enforce the signed plea agreement" by claiming a violation of *Alleyne*. Aplt. Opening Br. at 20. And he argues the trial court's rulings allowing him to withdraw his guilty plea and granting his request to replace plea counsel based on having been "misadvised regarding the plea agreement" show her representation was deficient. *Id.* at 21. But these arguments are still predicated on the claim that effective representation required plea counsel to provide different representation based on *Alleyne*. For the reasons discussed above, a COA is not warranted on that claim.

D. Denial of Request to Appoint Counsel

Mr. Larson also argues the district court "[f]ailed to respond" to a motion he filed to reconsider the denial of his motion to appoint counsel. *Id.* at 25. He attached a copy of a motion to reconsider to his opening brief and COA application. That motion, dated January 24, 2025, does not appear to have been filed in the district court's docket. *See* R. at 4–5. We will construe his argument as appealing the district court's decision not to appoint counsel. He does not need a COA to appeal that ruling. *See Harbison v. Bell*, 556 U.S. 180, 194 (2009). But we review it only for an abuse of discretion. *See Rachel v. Troutt*, 820 F.3d 390, 397 (10th Cir. 2016). The district court reasonably exercised its

discretion, considering factors we have held relevant to the decision whether to appoint counsel.[6] *See id.*

IV. Conclusion

We deny a COA. We grant Mr. Larson's second motion to proceed without prepayment of the filing fee (Dkt. No. 13) and deny his first motion (Dkt. No. 12) as moot. We affirm the district court's denial of Mr. Larson's motion(s) to appoint counsel and otherwise dismiss this matter.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

[6] The district court's January 10, 2025 order denying Mr. Larson's motion to appoint counsel was not made part of the record on appeal but we take judicial notice of its contents. *See United States v. Richardson*, 136 F.4th 1261, 1269 n.7 (10th Cir. 2025).

FILED
United States Court of Appeals
Tenth Circuit

June 8, 2026

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

KEVIN A. LARSON,

Petitioner - Appellant,

v.

SHANE STUCKER, et al.,

Respondents - Appellees.

No. 25-1233
(D.C. No. 1:24-CV-01979-SKC)
(D. Colo.)

ORDER

Before **BACHARACH**, **McHUGH**, and **ROSSMAN**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

Per Curiam

Eg, "Appendix B"

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

June 16, 2026

Mr. Jeffrey P. Colwell
United States District Court for the District of Colorado
Office of the Clerk
Alfred A. Arraj U.S. Courthouse
901 19th Street
Denver, CO 80294-3589

RE: 25-1233, Larson v. Stucker, et al
Dist/Ag docket: 1:24-CV-01979-SKC

Dear Clerk:

Pursuant to Federal Rule of Appellate Procedure 41, the Tenth Circuit's mandate in the above-referenced appeal issued today. The court's March 30, 2026 judgment takes effect this date. With the issuance of this letter, jurisdiction is transferred back to the lower court.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Brian Lanni
Kevin A. Larson

CMW/jm

Eg., "Appendix B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
District Judge S. Kato Crews

Civil Action No. 24-cv-01979-SKC

KEVIN A. LARSON,

Petitioner,

v.

SHANE STUCKER, and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER

A state-court jury found Petitioner Kevin A. Larson guilty of multiple sex offenses against a child. The convictions resulted in sentences totaling 36-years to life. Mr. Larson brings this habeas corpus action under 28 U.S.C. § 2254 to collaterally challenge the state convictions. His habeas application presents five claims for relief, two of which have been dismissed on procedural grounds. (*See* ECF No. 33). After reviewing the application, answer, reply, and state-court record, no basis for habeas relief has been shown. The Court therefore rejects each of Mr. Larson's remaining three claims (Claims 1(b), 1(c), and 2(a)) on the merits and denies the habeas application.

Eg., "Appendix C"

STANDARDS OF REVIEW

"The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter 'adjudicated on the merits in State court' to show that the relevant state-court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Wilson v. Sellers*, 584 U.S. 122, 124-25 (2018) (citing 28 U.S.C. § 2254(d)(1) and (2)). Mr. Larson's remaining claims were adjudicated on the merits in state court. As such, it is well-settled that "when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion[,] a federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Id.* "[A] state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011). Mr. Larson bears the burden of proof under § 2254(d). *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam).

Because Mr. Larson is *pro se*, the Court liberally construes his filings, but will not act as an advocate. *James v. Wadas*, 724 F.3d 1312, 1315 (10th Cir. 2013).

BACKGROUND

In 2014, "Larson was charged with sexual assault on a child committed as part of a pattern of abuse, sexual exploitation of children, pandering of a child, patronizing a prostituted child, and internet sexual exploitation of a child." (ECF No. 14-10 at 2). "On the second day of trial, the parties reached a plea agreement, which called for Larson to plead guilty to internet sexual exploitation of a child in exchange for the dismissal of the remaining charges." (*Id.*). The plea agreement specified "that the class 4 felony sex offense to which Larson was pleading guilty would subject him to an indeterminate sentence and that the presumptive sentencing range for the lower term of his indeterminate sentence was two to six years. The upper term of his sentence would be life." (*Id.* at 2-3). The plea documents did not speak to what the lower term of Mr. Larson's sentence would be if aggravating circumstances were found. Once Mr. Larson was notified that the prosecution intended to "introduce evidence of extraordinary aggravating circumstances to increase the lower term of Larson's indeterminate sentence," he withdrew his guilty plea and proceed to trial. (*Id.* at 3-4). "A jury found Larson guilty as charged. The trial court imposed an aggregate, indeterminate sentence of thirty-six years to life in prison." (*Id.* at 4).

Mr. Larson appealed his convictions to the Colorado Court of Appeals (CCA). On direct appeal, he argued "that the trial court erred in (1) denying his pretrial request to present evidence of alternate suspects and (2) permitting the victim's

mother to assert her Fifth Amendment privilege in response to many of his proposed questions." (ECF No. 14-5 at 2). Ultimately, the CCA rejected Mr. Larson's appellate challenges and affirmed his convictions. (*Id.* at 14). The Colorado Supreme Court (CSC) dismissed his petition for writ of certiorari. (ECF No. 14-6).

After the convictions were affirmed on direct appeal, Mr. Larson sought postconviction relief under Colo. R. Crim. P. 35(c). Relevant here, Mr. Larson "asserted in his Crim. P. 35 (c) motion that defense counsel was ineffective for failing to advise him that, if he proceeded to sentencing on his *Alford* plea, he could have challenged the application of an aggravated sentencing range to the lower term of his indeterminate sentence as violating the requirements of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004)." (ECF No. 14-10 at 7-8). After an evidentiary hearing, the trial court denied the claim. (*Id.* at 4-5). Mr. Larson appealed the denial of his 35(c) motion to the CCA. As discussed more fully below, the CCA rejected Mr. Larson's ineffective assistance claim on the merits. (*Id.* at 7-13). The CSC denied certiorari on May 13, 2024. (ECF No. 14-11).

Mr. Larson then filed his § 2254 application in this court. What remains for consideration on the merits is whether the CCA's rejection of these three claims, which are reasserted here, entitles Mr. Larson to federal habeas relief. (ECF No. 1). Claim 1(b) asserts that Mr. Larson's constitutional right to present a complete defense was violated because the trial court denied his request to present evidence of

alternate suspects. (*Id.* at 11-16).

Claim 1(c) contends that Mr. Larson's constitutional right to confront a witness against him was violated when the trial court permitted the victim's mother to invoke her Fifth Amendment right against self-incrimination in response to various questions posed by defense counsel. (*Id.* at 16-19).

Claim 2(a) contends that plea counsel was constitutionally ineffective for not advising Mr. Larson that he could both plead guilty and object at the sentencing phase to the prosecution's introduction of evidence of aggravating circumstances to increase the lower term of his indeterminate sentence. (*Id.* at 19-23).

As relief, Mr. Larson requests the following: "To be remanded back to the District Court to have convictions overturned and receive a new trial, to present a complete defense and confront witnesses, by a fair and impartial jury. Or vacate sentence and release Mr. Larson from custody within 90 days." (*Id.* at 6).

In their answer, Respondents contend the CCA's resolution of each claim was not contrary to, or an unreasonable application of, clearly established federal law—barring habeas relief under § 2254(d)(1). (ECF No. 36). Nor were the CCA's factual findings unreasonable, making relief unavailable under § 2254(d)(2). (*Id.*). In reply, Mr. Larson maintains that the state criminal proceedings violated his constitutional rights, requiring habeas relief. (ECF No. 37). The Court will now discuss each claim.

DISCUSSION

Claim 1(b)—Alternate Suspect Evidence. This claim contends that Mr. Larson's constitutional right to present a complete defense was violated because the trial court denied his request to present evidence of alternate suspects. (ECF No. 1 at 11-16). The Court will recount why the CCA rejected the claim, and then address whether the requirements of § 2254 have been met.

1. CCA's denial of the claim.

The CCA concluded that the trial court did abuse its discretion in excluding Mr. Larson's proffered "alternate suspect" evidence.

> II. Alternate Suspects
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> Before trial, Larson sought to introduce evidence that three other men — all former boyfriends of mother — could have committed the charged offenses. The trial court denied the request, finding that the proffered evidence was irrelevant. Larson contends this alleged error deprived him of his right to present a complete defense. We disagree.
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> A. Additional Facts
>
> Before trial, Larson filed a notice of intent to introduce evidence "tending to show that either [J.R.] or [M.M.] was the actual perpetrator of the sexual assault and exploitation of a child." In support of this theory, Larson argued that the discovery in the case had revealed that the victim was not "acting out or exhibiting behavioural [sic] changes when [Larson] was in close contact with the family," but did act out around J.R., who had "started spoiling" the victim. In Larson's view, the "spoiling," combined with the victim's "acting out" and mother's unstable relationship status and living situation "clearly connect[ed] J.R. sufficiently to make him a viable alternate suspect." Similarly, Larson argued, M.M. "had the means and opportunity to commit the crimes charged" because he (1) cohabitated with the victim and mother; (2) bought things for the victim; and (3) "takes real good care of [the victim], and is always helping out and taking her places." Larson asserted that,

without the proposed alternate suspect evidence, his right to present a defense would be infringed.

Later, Larson supplemented his alternate suspect motion, alleging that (1) M.M. had previously been charged with several sexual offenses against a child, which were dismissed pursuant to a guilty plea; (2) the victim had denied an allegation that M.M. had kissed her on the lips; (3) another former boyfriend of mother's, J.S., had also been accused of sexual assault by the victim and had charges pending in the same jurisdiction. This evidence, he argued, should be admitted under the rape shield statute, § 18-3-407, C.R.S. 2017, because it was "relevant and material to whether an alternate suspect is the actual perpetrator of any sexual assaults committed against the [victim]."

After receiving the prosecution's response, the trial court denied Larson's request in a written order, finding that the proffered evidence was presumptively irrelevant under the rape shield statute. And, the court found, the evidence was not otherwise relevant to a material issue in the case.

B. Governing Standards and Analysis

A criminal defendant is constitutionally entitled "to all reasonable opportunities to present evidence that might tend to create doubt" as to his guilt. *People v. Elmarr*, 2015 CO 53, ¶ 26. However, the right to present a defense is constrained by well-established rules governing the admissibility of evidence. *Id.* at ¶ 27.

The admissibility of alternate suspect evidence is governed by CRE 401 and CRE 403. *See id.* at ¶ 22. Accordingly, such evidence must be relevant and its probative value must not be substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. *See id.* "The touchstone of relevance in this context is whether the alternate suspect evidence establishes a non-speculative connection or nexus between the alternate suspect and the crime charged." *Id.* at ¶ 32. Such evidence "must create more than just an unsupported inference or possible ground for suspicion." *Id.* And evidence that merely shows another person's motive or opportunity to commit the charged crime is too "tenuous and speculative" to qualify for admission. *Id.* at ¶ 34. Rather, to establish a non-speculative connection, a "defendant must proffer something 'more,'" such as additional evidence circumstantially

or inferentially linking the alternate suspect to the charged crime. *Id.*

"Sometimes, the 'more' offered to establish the non-speculative connection between the alternate suspect and the charged crime is evidence that the alternate suspect committed other similar acts or crimes." *Id.* at ¶ 35. However, the inference that an alternate suspect committed both the other acts and the crime charged is only permissible when "the prior acts and the charged crime share sufficient similar characteristics or details." *Id.* at ¶ 39. Likewise, the rape shield statute creates a presumption that evidence relating to a victim's sexual conduct, including prior sexual victimization, is irrelevant to the proceedings. *People v. Cook*, 2014 COA 33, ¶ 37. That presumption may be rebutted if the defendant offers sufficient proof that the evidence is relevant to a material issue in the case. *Id.*

We review a trial court's decision to exclude alternate suspect evidence for an abuse of discretion. *Elmarr*, ¶ 20. A trial court abuses its discretion when its ruling is manifestly arbitrary, unreasonable, or unfair, or when it is based on an erroneous view of the law. *Id.*

Here, we cannot conclude that the trial court abused its discretion in excluding Larson's proffered alternate suspect evidence. As to J.R. and M.M., Larson's allegations that the victim acted out around one of the men and that both men lavished gifts and attention on the victim is circumstantial evidence only that both men might have had a motive or opportunity to commit sexual crimes. Standing alone, this is insufficient to create a nonspeculative connection to the instant offenses. *See Elmarr*, ¶ 34. And although Larson alleged that M.M. and J.R. had previously been charged with sexual offenses against the victim and a child other than the victim, he did not allege that these prior acts and the charged crime shared similar characteristics or details. *See id.* at ¶ 39; *see also* § 18-3-407(1)(b). Without more, the inference that the victim might have been abused or exploited by more than one of mother's boyfriends does not give rise to a non-speculative connection between an alternate suspect and the crimes charged in this case. *See People v. Salazar*, 2012 CO 20, ¶ 26 (The acts and circumstances of a proposed alternate suspect's prior alleged acts and the acts and circumstances of the assaults on the victim were not "distinctive or unusual enough to support a finding that the same person probably was involved in both cases."); *see also Cook*, ¶¶ 44, 46 (no abuse of discretion in excluding the

> defendant's proposed alternate suspect evidence where the defendant alleged that another person had also been accused of sexually assaulting the victim, but, among other things, the descriptions of the crimes were dissimilar and the victim specifically identified the defendant as perpetrating the charged crimes).

(ECF No. 14-5 at 4-9).

2. Application of § 2254.

There is no basis for federal habeas relief on this claim.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The Due Process Clause is violated only if the exclusion of evidence violated a fundamental principle of justice. *Patterson v. New York*, 432 U.S. 197, 201-02 (1977). That includes the right to present relevant evidence. *United States v. Scheffer*, 523 U.S. 303, 308 (1998). Of course, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (citing Fed. R. Evid. 403); *see also Crane v. Kentucky*, 476 U.S. 683, 689-90 (1986) (recognizing that "the constitution leaves the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive . . ., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'"); *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (observing that "only rarely"

has the Supreme Court "held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence").

The state court did not unreasonably apply Supreme Court precedent in rejecting this claim. As explained in the CCA's opinion, the proffered "alternate suspect" evidence was speculative. *See Holmes*, 547 U.S. at 327 (recognizing, in the context of alternate suspect evidence, that evidence "may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial"). Neither in state court, nor in this court, does Mr. Larson explain how the "alternate suspect" evidence would support his defense against the crimes charged. *Id.* At most, the proffered evidence tends to show that, in addition to Mr. Larson, other men might have sexually abused the victim. That does not mean Mr. Larson didn't commit the crimes for which he was tried and convicted. *See Dodd v. Trammell*, 753 F.3d 971, 988 (10th Cir. 2013) (finding no unreasonable application of clearly established federal law when state courts affirmed exclusion of alternate suspect evidence because it was "ambiguous and entirely speculative as to a potential alternate suspect"). Additionally, the CCA's factual findings are supported by the record, and Mr. Larson fails to present clear and convincing evidence to rebut the presumption of correctness required by AEDPA. *See* 28 U.S.C. § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct.

The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."). Habeas relief is therefore barred by 28 U.S.C. § 2254(d)(1) and (2).

Claim 1(c)—Confrontation of a Witness. In this claim, Mr. Larson argues that his constitutional right to confront a witness against him was violated when the trial court permitted the victim's mother to invoke her Fifth Amendment right against self-incrimination. (ECF No. 1 at 16-19). The Court will recount the CCA's decision, and then discuss whether the requirements of § 2254 have been met.

1. CCA's decision.

The CCA rejected this claim, finding no error with the trial court allowing the victim's mother to invoke her Fifth Amendment privilege against self-incrimination.

> III. Mother's Fifth Amendment Privilege
>
> Larson contends that the trial court erred in allowing mother to assert her Fifth Amendment privilege against self-incrimination in response to his proposed questions to her. In particular, he argues that the court erred in allowing mother to invoke the privilege in response to questions about (1) why she relinquished her parent-child legal relationship with the victim and (2) the contents of her discussions with the prosecutor. We disagree.
>
> A. Pertinent Facts
>
> After opening statement, but before the prosecution presented its first witness, the trial court held a hearing on whether mother would be permitted to invoke her Fifth Amendment privilege against self-incrimination if she were called as a witness. The prosecutor represented that, as a result of this case, the Federal Bureau of Investigation (FBI) was investigating mother, and that the prosecution did not object to mother's invocation of her Fifth Amendment privilege. Mother, through counsel, indicated that the prosecution had received a

request to prosecute mother from federal authorities, but that she did not yet know the details of the request. As a result, counsel had advised her to invoke her Fifth Amendment privilege as to "almost every question other than strictly . . . biographical information."

Larson objected, arguing that he was entitled to examine mother on the witness stand and have her invoke her Fifth Amendment privilege as she and her counsel deemed necessary. The trial court disagreed with this position, but agreed to conduct an in camera hearing so defense counsel could ask his questions and determine the extent to which mother intended to invoke her privilege.

Mother answered basic biographical questions about herself and the victim, and she confirmed that she had met Larson on a dating website. But mother invoked her Fifth Amendment privilege on, among other things, why she had relinquished her parent-child legal relationship with the victim and whether she had contacted police, who she had spoken to in the district attorney's office or police department, and whether and when she became informed that she might be prosecuted.

The trial court determined that mother should be permitted to invoke her Fifth Amendment privilege on all of these topics:

> I find that [mother's] invocation of her right may possibly — the answers to those questions may, in fact, all of them, possibly incriminate her. We're talking about a relatively brief period of time, all the questions relate to whether or not she introduced her daughter to the defendant. Those could lead to some type of pimping charges or other similar type charges, possibly human trafficking type charges.
>
> Several questions regarding whether or not she was taking money, again, similar type charges could be brought based on that information, including any time frames, because time frames do in fact touch upon these issues, and admission to those could in fact furnish a link in the chain of evidence needing to prosecute her for such acts, and so, as such, I am making a finding that her invocation of her Fifth Amendment right is proper under case law as I just read it.

> I cannot find, particularly after listening to the opening statements in this case, and then listening to the questions that were asked by counsel, I certainly cannot find that it is absolutely clear that [mother] is mistaken and that the testimony cannot possibly incriminate her. I think the opposite has probably been shown. And so no party may call [mother] unless they will ask her the general questions that [defense counsel] had asked her at the beginning having to do with basic demographic information.

B. Governing Standards and Analysis

A criminal defendant has a constitutional right under the Sixth Amendment to present a defense by compelling witness testimony. *People v. Clark*, 2015 COA 44, ¶ 81. However, this right is not absolute. *Id.* Rather, the protections of the Fifth Amendment to the United States Constitution may be invoked by a witness whose answers to questioning "might" incriminate that person by admitting the commission of illegal acts or furnishing a link in the chain of evidence needed to prosecute her for a crime. *People v. Blackwell*, 251 P.3d 468, 471 (Colo. App. 2010). "When a defendant's rights under the Sixth Amendment collide with a witness's Fifth Amendment rights, the defendant's right to compulsory process must give way to the witness's privilege not to give self-incriminating testimony." *People v. Coit*, 50 P.3d 936, 938 (Colo. App. 2002). And before a court may compel a witness to respond in these circumstances, it must be "perfectly clear" that the witness's answers "cannot possibly" have a tendency to incriminate. *Blackwell*, 251 P.3d at 471 (quoting *People v. Razatos*, 699 P.2d 970, 976 (Colo. 1985)); *see also Clark*, ¶ 109.

Reviewing mother's assertion of her Fifth Amendment privilege de novo, *see Clark*, ¶ 108, we conclude that the trial court did not err because it is not "perfectly clear" that mother's answers to the challenged questions could not possibly incriminate her. *See Blackwell*, 251 P.3d at 474. Both the prosecutor and mother's attorney expressed a belief that mother had a legitimate basis for invoking her Fifth Amendment privilege. The reasons underlying mother's relinquishment of her parental rights could have incriminated her because the record indicates that dependency and neglect proceedings began as a result of mother's involvement in this case. Likewise, it is far from clear that mother's conversations with the prosecution and law enforcement could not furnish a link in the chain of evidence needed to prosecute mother for crimes like those articulated by

> the trial court. Indeed, the record reflects that federal authorities intended to prosecute mother based on evidence that came to light during the investigation of this case.

(ECF No. 14-5 at 10-14).

2. Application of § 225.1.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled." *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County*, 542 U.S. 177, 189 (2004) (citation omitted). The Fifth Amendment provides broad protection against self-incrimination to assure individuals are not compelled to produce evidence that may later be used against them in a criminal action. *Maness v. Meyers*, 419 U.S. 449, 461 (1975). "The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him [or her] in a criminal prosecution." *Id.* The privilege further "extends to admissions that may only tend to incriminate." *Empsake v. United States*, 349 U.S. 190, 197 (1955). The right to remain silent is properly invoked when the danger of self-incrimination is "real and appreciable," as opposed to "imaginary and unsubstantial." *Brown v. Walker*, 161 U.S. 591, 599 (1896)). Federal courts will uphold an individual's

invocation of the privilege against self-incrimination unless it is "*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken that the answer(s) *cannot possibly* have such tendency to incriminate." *Hoffman v. United States*, 341 U.S. 476, 486 (1951) (internal quotations omitted; emphasis in original).

Mr. Larson argues that the privilege against self-incrimination should have been applied narrowly to specific questions asked of the victim's mother (hereinafter referred to as "Mother"), not as a blanket refusal to testify. (ECF No. 1 at 16-17). According to Mr. Larson, the trial court failed to analyze whether each refusal to answer was valid under the Fifth Amendment and instead accepted all of Mother's refusals without proper scrutiny. (*Id.*). Mr. Larson further contends that the "District Court and Colorado Court of Appeals decisions [were] based on reading of the facts that were objectively unreasonable," concluding that he "was deprived of his due process right to present a complete defense and to confront witnesses against him." (*Id.* at 16).

None of Mr. Larson's arguments merit habeas relief. The state court reasonably concluded that Mother had a real and appreciable fear of self-incrimination were she to testify in this case. Mother introduced the victim to Mr. Larson, she received and used some of the money Mr. Larson sent to the victim, Mother helped set up an account for Mr. Larson to transfer money to the victim, and

Mother would accompany her daughter and Mr. Larson near the times he was alleged to have had sex with the victim. Thus, whether Mother had knowledge about what was going on between Mr. Larson and the victim, and whether she facilitated the incidents, could certainly furnish a link in the chain of evidence leading to her prosecution, as well as evidence which reasonably could be used against her in a criminal prosecution. On top of that, the FBI interviewed the victim, with the focus of the interview being on Mother. The FBI issued a request for prosecution of Mother, was in regular contact with the state prosecutor, and the state prosecutor himself interviewed Mother. Thus, as the state court found, any questions other than biographical information had the tendency to incriminate Mother, making invocation of the Fifth Amendment proper. Mr. Larson does not cite any controlling law or a materially indistinguishable Supreme Court decision that would compel a different result. *House v. Hatch*, 527 F.3d 1010, 1016 (10th Cir. 2008) ("clearly established law consists of Supreme Court holdings in cases where the facts are at least closely-related or similar to the case sub judice."). Therefore, he fails to demonstrate the state court's determination with respect to this claim was contrary to, or an unreasonable application of, clearly established federal law under § 2254(d)(1).

Moreover, the state-court's factual findings are amply supported by the record, which was carefully developed by the trial court over the course of two separate hearings held on two consecutive days. (*See* ECF No. 21, Trial. Tr. at 202-212

[1/17/2017] and 223-243 1/18/2017). Mr. Larson fails to present clear and convincing evidence to rebut the presumption of correctness under § 2254(e)(1).

Mr. Larson resists these conclusions. He claims that Mother was required to take the stand and invoke the privilege in response to each individual question asked by counsel, and that the trial court erred by prohibiting either party from calling her as a witness unless their questioning had to do with basic demographic information. But these arguments hold no sway. "Because a jury may not draw any legitimate inferences from a witness' decision to exercise his Fifth Amendment privilege, [the Tenth Circuit has] repeatedly held that neither the prosecution nor the defense may call a witness to the stand simply to compel him to invoke the privilege against self-incrimination." *United States v. Rivas-Macias*, 537 F.3d 1271, 1276 n. 3 (10th Cir. 2008); *see also United States v. Serrano*, 406 F.3d 1208, 1215 (10th Cir. 2005) (citing the decision of eight circuits that "have held a defendant's right to present a defense does not include the right to compel a witness to waive his Fifth Amendment privilege against self incrimination").

Mr. Larson does not establish that the CCA's decision contradicted a binding Supreme Court case, or that it was based on an unreasonable determination of the facts. Consequently, the requirements for habeas relief have not been met under §§ 2254(d)(1) or (2).

Claim 2(a)—Ineffective Assistance of Counsel. Mr. Larson's final claim

contends that plea counsel was constitutionally ineffective for not advising him that he could both plead guilty and object at the sentencing phase to the prosecution's introduction of evidence of aggravating circumstances to increase the lower term of his indeterminate sentence. (ECF No. 1 at 19-23). The Court will set forth the CCA's resolution of the claim, and then discuss whether the requirements of § 2254 have been met.

1. CCA's resolution.

The CCA denied this claim, finding that Mr. Larson's counsel did not perform deficiently.

> III. Failure to Advise Regarding the Trial Court's Authority to Impose an Aggravated Sentence
>
> Larson asserted in his Crim. P. 35 (c) motion that defense counsel was ineffective for failing to advise him that, if he proceeded to sentencing on his *Alford* plea, he could have challenged the application of an aggravated sentencing range to the lower term of his indeterminate sentence as violating the requirements of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). The postconviction court rejected this argument, finding that it had been rejected by the Colorado Supreme Court in *Vensor v. People*, 151 P.3d 1274 (Colo. 2007).
>
> In his opening brief, Larson reasserts this argument and claims that the postconviction court erred by relying on *Vensor* because it was abrogated by the United States Supreme Court's ruling in *Alleyne v. United States*, 570 U.S. 99 (2013) which was decided before Larson entered his later withdrawn guilty plea. We reject this claim.
>
> A. Additional Authority
>
> Internet sexual exploitation of a child is a class 4 felony. § 18-3-405.4(3), C.R.S. 2023. Class 4 felonies are subject to a presumptive sentencing range of two to six years in prison. § 18-1.3-401(1)(a)(V)(A). But, as

relevant here. "[I]f the court finds . . . extraordinary . . . aggravating circumstances, it may impose a sentence which is . . . greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum . . . authorized in the presumptive range for the punishment of the offense." § 18-1.3-401(6).

Internet sexual exploitation of a child is also a sex offense and thus is subject to sentencing laws for sex offenses. § 18-1.3-1003(5)(a)(XII), C.R.S. 2023. A person convicted of a sex offense must be sentenced "to the custody of the department [of corrections] for an indeterminate term of at least the minimum of the presumptive range specified in section 18-1.3-401 for the level of offense committed and a maximum of the [person's] natural life." § 18-1.3-1004(1)(a), C.R.S. 2023; *see also* § 18-1.3-1003(4). The [Colorado] supreme court has interpreted this language, in conjunction with section 18-1.3-401(6),

> to require an indeterminate sentence for the class two, three, and four felony sex offenses to which it applies, consisting of an upper term of the sex offender's natural life and a lower term of a definite number of years, not less than the minimum nor more than twice the maximum of the presumptive range authorized for the class of felony of which the defendant stands convicted.

Vensor, 151 P.3d at 1279. A court may impose a number of years on the lower term of an indeterminate sentence that exceeds the presumptive range only if it finds the presence of extraordinary aggravating circumstances. *Id.* at 1280 (citing § 18-1.3-401(6)).

In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory *maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added); *see also Blakely*, 542 U.S. at 301 (applying this rule).

In applying *Blakely*, the Colorado Supreme Court determined that an aggravated sentence is proper only when it relies on one of four kinds of facts: (1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant stipulates to judicial factfinding for sentencing purposes; and (4) facts

regarding prior convictions. *Lopez v. People*, 113 P.3d 713, 719 (Colo. 2005). Under section 18-1.3-401(6), the existence of one of these constitutionally-permissible aggravating facts "widens the sentencing range on . . . the . . . maximum end[] . . . to a ceiling of double the presumptive maximum." *Lopez*, 113 P.3d at 731.

In *Vensor* the supreme court held that, because an indeterminate sentence's lower term is *not* the statutory maximum of such a sentence, the imposition of a number of years for the lower term that exceeds the presumptive maximum need *not* be based on a jury's determination of the facts warranting an aggravated sentence. *Vensor*, 151 P.3d at 1280-81.

After *Vensor* was decided, the United States Supreme Court in *Alleyne* clarified that *Apprendi* "necessarily include[d] not only facts that increase the ceiling [of a sentencing range], but also those that increase the floor" because "[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment." *Alleyne*, 570 U.S. at 108. Thus, the Court extended *Apprendi* and *Blakely* to the determination of facts that increase the minimum of a sentencing range to which a defendant could be exposed. *Id.* at 103, 108, 111-16; *see also People v. Heisler*, 2017 COA 58, ¶ 29.

B. Analysis

For several reasons, we conclude that the postconviction court did not err by denying Larson's ineffective assistance of counsel claim. *See People v. Hamm*, 2019 COA 90, ¶ 23 ("[W]e will affirm district court's denial of a Rule 35 motion on any ground supported by the record, even if the district court did not consider or contemplate that ground.").

The parties appear to agree that *Alleyne* abrogated *Vensor*. We need not address whether the parties are correct in this respect because at the relevant time, no court had held that *Vensor* was no longer good law. *Alleyne* did not reverse the Colorado Supreme Court's decision in *Vensor* (nor did the Supreme Court cite *Vensor* at all.) The Colorado Supreme Court did not overrule *Vensor* and no division of the Colorado Court of Appeals had, prior to Larson's withdrawal of his plea, recognized the abrogation of *Vensor*. Thus, the argument that *Vensor* had been abrogated by *Alleyne* was a novel claim.

> In the *Strickland* context, attorneys are not required to anticipate changes in otherwise dispositive authority in the controlling jurisdiction. *People v. Houser*, 2020 COA 128, ¶¶ 33, 37-38
> Thus, viewing defense counsel's representation from her perspective at the relevant time and indulging a strong presumption that her conduct fell within a wide range of reasonable professional assistance, *see Ardolino*, 69 P.3d at 76, we conclude Larson failed to show that counsel provided deficient representation by failing to advise him that they could assert a novel legal argument if they proceeded to sentencing on his guilty plea. *See Id.* at¶¶ 33, 37-38 (counsel's performance is not deficient if her fail [sic] to advance novel legal theories or arguments that may have merit in hindsight but are not supported by the then-existing precedent, fail to anticipate changes in the law, or fail to argue for an extension of precedent).

(ECF No. 14-10 at 7-13).

2. Application of § 2254.

The CCA applied the correct legal standard to Mr. Larson's ineffective assistance of counsel claim, and did so in a reasoned manner. A defendant in a criminal case has a Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that counsel was ineffective, Mr. Larson must demonstrate both deficient performance and that counsel's deficient performance resulted in prejudice. *Id.* at 687. If Mr. Larson fails to satisfy either prong of the *Strickland* test, the ineffective assistance of counsel claim must be dismissed. *Id.* at 697. In general, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. There is "a strong presumption" that counsel's performance falls within the range of "reasonable professional

assistance." *Id.* It is Mr. Larson's burden to overcome this presumption by showing the alleged errors were not sound strategy under the circumstances. *See id.*

The challenge of demonstrating counsel was ineffective is even greater for a state prisoner seeking federal habeas corpus review under § 2254(d). *See Harmon v. Sharp*, 936 F.3d 1044, 1058 (10th Cir. 2019). "When assessing a state prisoner's ineffective-assistance-of-counsel claims on habeas review, [federal courts] defer to the state court's determination that counsel's performance was not deficient and, further, to the attorney's decision in how to best represent a client." *Id.* (internal quotation marks and brackets omitted). Thus, review under § 2254(d) is "doubly deferential." *Id.* "The question is whether *any* reasonable argument exists that counsel satisfied *Strickland's* deferential standard." *Id.* (citations and internal quotes omitted). "And because the *Strickland* standard is a general standard, a state court has . . . more latitude to reasonably determine that a defendant has *not* satisfied that standard." *Id.* Put simply, deference to the state court is "near its apex" when a state prisoner's habeas petition involves a *Strickland* claim. *Sexton v. Beaudreaux*, 585 U.S. 961, 968 (2018) (per curiam).

Under the prejudice prong, Mr. Larson must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*; *see also Richter*,

562 U.S. at 112 (stating that the "likelihood of a different result must be substantial, not just conceivable"). In determining whether Mr. Larson has established prejudice, the Court must look at the totality of the evidence and not just the evidence that is helpful to him. *See Boyd v. Ward*, 179 F.3d 904, 911 (10th Cir. 1999).

Here, the CCA ultimately found that counsel's performance was not deficient because "the argument that *Vensor* had been abrogated by *Alleyne* was a novel claim." (ECF No. 14-10 at 12). That finding was reasonable. To begin with, as of the date of this order, the Colorado Supreme Court's *en banc* decision in *Vensor* has not been abrogated or overruled. In fact, the Colorado Supreme Court has reaffirmed the reasoning of *Vensor*. *See Isom v. People*, 407 P.3d 559, 562-63 (Colo. 2017) (discussing the reasoning of *Vensor* at length and then concluding that "upon a finding of extraordinary aggravating circumstances, a sentencing court may set the minimum end of a habitual sex offender's indeterminate sentence at any point between three and six times the presumptive maximum"). As the CCA concluded, counsel was not required to advise Mr. Larson of a novel legal theory of questionable validity or pursue a strategy that required overturning precedent from the Colorado Supreme Court—*Strickland* imposes no such duty. *Young v. Sirmons*, 486 F.3d 655, 682 (10th Cir. 2007) (rejecting *Strickland* claim where counsel "chose to pursue an alternative theory, making exactly the type of strategic decision the Supreme Court and this court have held is not ineffective assistance of counsel"); *United States v. Davis*, 106

F. App'x 268, 271 (10th Cir. 2010) (rejecting ineffective assistance claim where the petitioner "essentially argues that his trial counsel was ineffective because she failed to think of or advance a novel argument of questionable validity"). If anything, Colorado precedent cuts against Mr. Larson's preferred legal strategy. Put differently, it was a reasonable strategic decision for plea counsel to argue that the terms of the plea agreement limited the presumptive sentencing range, instead of objecting at the sentencing hearing based on an *Alleyne*-type argument as Mr. Larson insists. Mr. Larson's arguments all boil down to a claim that counsel should have done more or done something different. "But the question under *Strickland* is not whether counsel could have done more, but whether counsel's decision not to do more was '[objectively unreasonable] in all the circumstances, applying a heavy measure of deference to counsel's judgments.'" *Turrentine v. Mullin*, 390 F.3d 1181, 1209 (10th Cir. 2004) (quoting *Strickland*); *Mora v. Williams*, 111 F. App'x 537, 550 (10th Cir. 2004) (unpublished) ("To state the obvious: the trial lawyers, in every case, could have done something more or something different.") (citation and internal quotation omitted).

Mr. Larson tries to avoid this conclusion. He argues that the Supreme Court's decision in *Alleyne v. United States*, 570 U.S. 99 (2013), a case decided three years before the sentencing issue arose in his case, "directly involving and dispositive on the precise issue facing Mr. Larson in his sentencing under the Plea Agreement,

competent counsel should have been aware of that binding U.S. Supreme Court case and advised Mr. Larson accordingly." (ECF No. 1 at 20; *see also* ECF No. 37 at 9-17 (same)). According to Mr. Larson, a proper objection under *Alleyne* would have prevented the prosecution from introducing evidence of "extraordinary aggravating circumstances" at sentencing to increase the sentencing range from 2-6-years to life to his ultimate sentence of 36-years to life. (*Id.*).[1]

Mr. Larson's reliance on *Alleyne* is misplaced. As discussed above, then-existing, and still-existing, Colorado Supreme Court precedent in *Vensor* and *Isom* contradict the very argument he insists should have been made by counsel. *See Vensor*, 151 P.3d at 1280 (holding that "the lower term of the sex offender's indeterminate sentence, whether or not it is beyond the presumptive range for the offender's particular class of felony, cannot constitutionally entitle him to a jury determination of sentencing factors"). Nor does the holding of *Alleyne* stretch far enough to require a different result. *Apprendi* and *Blakely* establish the following: Any fact that increases the penalty for a crime beyond the prescribed statutory

1 As a subpart to this claim, Mr. Larson argues that had his counsel properly advised him of his constitutional rights under *Alleyne*, he would have accepted the signed plea agreement with confidence about the outcome instead of withdrawing it, which ultimately led to his conviction at trial and a much harsher sentence. (*Id.*). This is a slight variation on Mr. Larson's claim that, had he been properly advised of his options, he would not have withdrawn his guilty plea and would have proceed to sentencing on the guilty plea. The trial court and the CCA rejected this contention, finding "that it was incredible that Larson was not advised of and did not understand, the consequences of withdrawing his guilty plea and proceeding to trial." (ECF No. 11-10 at 16). Mr. Larson does not establish that the CCA's decision contradicted a binding Supreme Court case, or was based on an unreasonable determination of the facts. It therefore fails.

maximum must be submitted to a jury and proved beyond a reasonable doubt, except for the fact of a prior conviction. In *Alleyne*, the Supreme Court extended this principle to mandatory minimum sentences. There, the trial judge, not a jury, found that "a firearm was brandished" in relation to the crimes of conviction. *Alleyne*, 570 U.S. at 117. That factual finding increased the mandatory minimum term for the defendant's federal firearms offense from five to seven years. *Id.*

Alleyne is readily distinguishable from this case. Unlike *Alleyne*, this case does not involve a mandatory minimum sentence applicable to a federal firearm offense. It concerns the State of Colorado's nuanced indeterminate sentencing scheme applicable to sex offenses, and the applicable *range* of the lower term of years applicable to Mr. Larson's indeterminate sentence—an indeterminate sentence that also requires an upper ceiling of his natural life. *Alleyne* did not consider whether judicial fact-finding could increase the presumptive sentencing *range* for the lower term of an indeterminate sentence based on aggravating circumstances. Similarly, the aggravating circumstances found by the trial judge in this case had no effect on the upper term of Mr. Larson's indeterminate sentence, which always remained a term equal to his natural life. Because this case involves Colorado's unique indeterminate sentencing scheme for felony sex offenses, it is materially distinguishable from *Alleyne*.

Though the rule that Mr. Larson argues for may be a logical extension of

Alleyne—as *Alleyne* itself was a logical extension of *Apprendi* and *Blakely*—it would still be an extension. That means, at a minimum, the law applicable to this claim was not clearly established. For a state prisoner to obtain federal habeas relief, Supreme Court cases "must be construed narrowly and consist only of something akin to on-point holdings." *House*, 527 F.3d at 1015. Clearly established federal law does not flow "from general principles teased from precedent." *Id.* at 1016. Because Mr. Larson does not show how the CCA arrived at a conclusion opposite the Supreme Court on a question of law under materially indistinguishable facts, the claim fails. *Id.* at 1018 ("The absence of clearly established federal law is dispositive under § 2254(d)(1)."). And since it was not clearly established that *Alleyne* would have prevented the prosecution from introducing evidence of "extraordinary aggravating circumstances" at sentencing, an ineffective assistance claim based on the purported failure likewise lacks merit. *See Lafler v. Cooper*, 566 U.S. 156, 167 (2012) ("Because the objection upon which his ineffective-assistance-of-counsel claim was premised was meritless, [petitioner] could not demonstrate an error entitling him to relief."); *Miller v. Mullin*, 354 F.3d 1288, 1298 (10th Cir. 2004) (explaining that "if the issue is meritless, its omission will not constitute deficient performance").

In addition to its deficient performance finding, the state court reasonably concluded that Mr. Larson failed to show prejudice under *Strickland*. The CCA said, "[f]or several reasons, that the postconviction court did not err by denying Larson's

ineffective assistance of counsel claim." (ECF No. 14-10 at 11). The CCA's written opinion did not specifically address the prejudice prong after finding that counsel did not perform deficiently. But the postconviction court did address prejudice, finding it had not been shown. When the last state court decision on the merits does not come accompanied with the reasons it rejected a claim, the federal court should "look through" the unexplained decision to the last related state-court decision that does provide a relevant rationale and presume that the unexplained decision adopted the same reasoning. *Wilson*, 584 U.S. at 125. As such, the Court must "look through" the CCA's decision to consider the postconviction court's rationale for finding no prejudice.

The postconviction court's no-prejudice finding is supported by the record. It conducted a hearing on this claim where Mr. Larson's plea counsel and trial counsel testified. (ECF No. 21 Trial Ct. R. at 2556-2583). Based on its observations and the demeanor of counsel at the hearing, the court found counsel's testimony credible. (*Id.* at 2564). Plea counsel testified that after the prosecution indicated it would seek to introduce evidence of aggravating circumstances, Mr. Larson "told them unequivocally that he did not want a plea and not to pursue one again." (*Id.* at 2578). Likewise, trial counsel testified that Mr. Larson "was not interested in negotiating." (*Id.*). Mr. Larson offers nothing to rebut the presumption that these factual findings were correct. *See* 28 U.S.C. § 2254(e)(1). Thus, in addition to the CCA's finding that

counsel did not perform deficiently, the record supports the postconviction court's finding that Mr. Larson suffered no prejudice from the claimed ineffective assistance of counsel. For all these reasons, the requirements for habeas relief have not been met and this claim will be denied.

CONCLUSION

It is **ORDERED** that:

The Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is **DENIED** and this case is **DISMISSED WITH PREJUDICE**;

A certificate of appealability pursuant to 28 U.S.C. § 2253(c) will not issue because Mr. Larson has not made a substantial showing of the denial of a constitutional right;

Leave to proceed *in forma pauperis* on appeal is **DENIED WITHOUT PREJUDICE** to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit; and

Mr. Larson's requests for status updates (ECF Nos. 38, 39) are **DENIED** as moot.

DATED: May 14, 2025.

BY THE COURT:

S. Kato Crews
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-01929-SKC-SKC

KEVIN A. LARSON,

Petitioner,

v.

SHANE STUCKER and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order [ECF No. 40] entered by United States District Judge S. Kato Crews on May 14, 2025, it is

ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 [ECF No. 1] is DENIED and this case is DISMISSED WITH PREJUDICE. It is

FURTHER ORDERED that that no certificate of appealability shall issue because Petitioner has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. It is

FURTHER ORDERED that this case is closed.

DATED at Denver, Colorado, this 14th day of May, 2025.

FOR THE COURT:

Jeffrey P. Colwell, Clerk

By: s/C. Pearson, Deputy Clerk

22CA1105 Peo v Larson 10-19-2023

COLORADO COURT OF APPEALS

Court of Appeals No. 22CA1105
Montrose County District Court No. 14CR110
Honorable Keri A. Yoder, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kevin Larson,

Defendant-Appellant.

ORDER AFFIRMED

Division A
Opinion by CHIEF JUDGE ROMÁN
Hawthorne* and Berger*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced October 19, 2023

Philip J. Weiser, Attorney General, Brittany Limes Zehner, Assistant Solicitor General, Denver, Colorado, for Plaintiff-Appellee

Jeffrey C. Parsons, Alternate Defense Counsel, Broomfield, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

Ex. "Appendix D"

¶ 1 Defendant, Kevin Larson, appeals the trial court's order denying his Crim. P. 35(c) motion for postconviction relief, in which he asserted ineffective assistance of counsel claims regarding plea proceedings. We affirm.

I. Background

¶ 2 Larson was charged with sexual assault on a child committed as part of a pattern of abuse, sexual exploitation of children, pandering of a child, patronizing a prostituted child, and internet sexual exploitation of a child. On the second day of trial, the parties reached a plea agreement, which called for Larson to plead guilty to internet sexual exploitation of a child in exchange for the dismissal of the remaining charges. His guilty plea was made under the procedure established in *North Carolina v. Alford*, 400 U.S. 25 (1970)

¶ 3 The "Sentence Concessions/Stipulations" section of the written "Plea Agreement," which was signed by all parties, called for "open" sentencing. The written "Petition to Plead Guilty," which was signed by Larson, stated that the class 4 felony sex offense to which Larson was pleading guilty would subject him to an indeterminate sentence and that the presumptive sentencing range

for the lower term of his indeterminate sentence was two to six years. The upper term of his sentence would be life. These documents said nothing about an aggravated sentencing range.

¶ 4 At the providency hearing, the trial court confirmed that Larson understood that the Plea Agreement called for an open sentence, which meant that the court had discretion to impose any lawful sentence and that "there's no guarantee as to what the sentence will be." The court accepted Larson's *Alford* plea to internet sexual exploitation of a child.

¶ 5 Before sentencing, the prosecution filed a notice of its intent to introduce evidence of extraordinary aggravating circumstances to increase the lower term of Larson's indeterminate sentence under section 18-1.3-401(6), C.R.S. 2023. Larson objected, arguing that the plea agreement called for the indeterminate sentence's lower term to be imposed within the presumptive range of two to six years.

¶ 6 The parties argued the issue at a hearing, but the trial court deferred a ruling until sentencing. The court required Larson to decide whether to proceed to sentencing or move to withdraw his guilty plea.

¶ 7 Later, Larson moved to withdraw his guilty plea "due to his misunderstanding of the plea agreement regarding the possible sentence that c[ould] be imposed by the [c]ourt." The prosecution did not object, and the court permitted Larson to withdraw his guilty plea. The original charges were reinstated, and the case was reset for a jury trial.

¶ 8 Defense counsel then moved for appointment of new counsel, in part, because Larson alleged that "counsel ha[d] misadvised [him] in numerous matters pertaining to the previous agreement, the plea from which Mr. Larson recently withdrew, and the process and litigation involved with the newly set trial." The court appointed alternate defense counsel.

¶ 9 A jury found Larson guilty as charged. The trial court imposed an aggregate, indeterminate sentence of thirty-six years to life in prison. A division of this court affirmed the judgment of conviction. *See People v. Larson*, (Colo. App. No. 17CA0774, Aug. 30, 2018) (not published pursuant to C.A.R. 35(e)).

¶ 10 Larson filed a Crim. P. 35(c) motion, which was supplemented when the court appointed counsel. Among the many claims assertedwere ineffective assistance of counsel claims related to the

plea proceedings. After an evidentiary hearing, the postconviction court denied the motion.

II. Legal Authority and Standard of Review

¶ 11 "A criminal defendant is constitutionally entitled to effective assistance from [their] counsel." *Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003). This right to effective assistance of counsel extends to the plea bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

¶ 12 "In order to prevail on an ineffective assistance of counsel claim, a defendant must prove that 1) counsel's performance was deficient and 2) the deficient performance prejudiced the defense." *Dunlap v. People*, 173 P.3d 1054, 1062 (Colo. 2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The failure to prove one of these two prongs defeats an ineffective assistance claim. *People v. Thompson*, 2020 COA 117, ¶ 50.

¶ 13 To establish deficient performance, a defendant must prove that counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. "[J]udicial scrutiny of counsel's performance must be highly deferential, evaluate particular acts and omissions from counsel's perspective at

the time, and indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Ardolino*, 69 P.3d at 76.

¶ 14 Attorneys provide deficient representation if they fail to present their client with the opportunity to make a reasonably informed decision about whether to accept a plea offer. *Carmichael v. People*, 206 P.3d 800, 806 (Colo. 2009), *overruled in part on other grounds as recognized by People v. Delgado*, 2019 COA 55, ¶ 1. Attorneys also provide deficient performance when they fail to appropriately advise a client regarding a plea bargain in relation to the risks of going to trial. *See Frye*, 566 U.S. at 145; *Lafler*, 566 U.S. at 160; *Carmichael*, 206 P.3d at 806; *People v. Perry*, 68 P.3d 472, 477 (Colo. App. 2002).

¶ 15 To establish prejudice, a defendant must show that "there is 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. Reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.*; *see also People v. Washington*, 2014 COA 41, ¶¶ 23-29 (rejecting the application of

the preponderance of the evidence standard to a defendant's burden of proving each prong of the *Strickland* test).

¶ 16 In the context of a rejected plea offer, a defendant must show a reasonable probability that (1) he would have accepted the plea offer if counsel had correctly advised him, (2) the prosecution would not have withdrawn the offer and the court would have accepted the agreement, and (3) the conviction, sentence, or both under the plea offer's terms would have been less severe than under the judgment and sentence that were in fact imposed. *Delgado*, ¶¶ 19-23; *see also Lafler*, 566 U.S. at 163-64; *Frye*, 566 U.S. at 147-48.

¶ 17 "Both prongs of the ineffectiveness inquiry present mixed questions of law and fact." *Dunlap*, 173 P.3d at 1063. "When reviewing a postconviction court's findings on a mixed question of law and fact, we defer to the court's findings of fact if they are supported by the record but review legal conclusions de novo." *Id.*

III. Failure to Advise Regarding the Trial Court's Authority to Impose an Aggravated Sentence

¶ 18 Larson asserted in his Crim. P. 35 (c) motion that defense counsel was ineffective for failing to advise him that, if he proceeded to sentencing on his *Alford* plea, he could have challenged the

application of an aggravated sentencing range to the lower term of his indeterminate sentence as violating the requirements of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). The postconviction court rejected this argument, finding that it had been rejected by the Colorado Supreme Court in *Vensor v. People*, 151 P.3d 1274 (Colo. 2007).

¶ 19 In his opening brief, Larson reasserts this argument and claims that the postconviction court erred by relying on *Vensor* because it was abrogated by the United States Supreme Court's ruling in *Alleyne v. United States*, 570 U.S. 99 (2013) which was decided before Larson entered his later withdrawn guilty plea. We reject this claim.

A. Additional Authority

¶ 20 Internet sexual exploitation of a child is a class 4 felony. § 18-3-405.4(3), C.R.S. 2023. Class 4 felonies are subject to a presumptive sentencing range of two to six years in prison. § 18-1.3-401(1)(a)(V)(A). But, as relevant here, "[I]f the court finds . . . extraordinary . . . aggravating circumstances, it may impose a sentence which is . . . greater than the presumptive range; except that in no case shall the term of sentence be greater than

twice the maximum . . . authorized in the presumptive range for the punishment of the offense." § 18-1.3-401(6).

¶ 21 Internet sexual exploitation of a child is also a sex offense and thus is subject to sentencing laws for sex offenses. § 18-1.3-1003(5)(a)(XII), C.R.S. 2023. A person convicted of a sex offense must be sentenced "to the custody of the department [of corrections] for an indeterminate term of at least the minimum of the presumptive range specified in section 18-1.3-401 for the level of offense committed and a maximum of the [person's] natural life." § 18-1.3-1004(1)(a), C.R.S. 2023; *see also* § 18-1.3-1003(4). The supreme court has interpreted this language, in conjunction with section 18-1.3-401(6),

> to require an indeterminate sentence for the class two, three, and four felony sex offenses to which it applies, consisting of an upper term of the sex offender's natural life and a lower term of a definite number of years, not less than the minimum nor more than twice the maximum of the presumptive range authorized for the class of felony of which the defendant stands convicted.

Vensor, 151 P.3d at 1279. A court may impose a number of years on the lower term of an indeterminate sentence that exceeds the

presumptive range only if it finds the presence of extraordinary aggravating circumstances. *Id.* at 1280 (citing § 18-1.3-401(6)).

¶ 22 In *Apprendi*, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory *maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added); *see also Blakely*, 542 U.S. at 301 (applying this rule).

¶ 23 In applying *Blakely*, the Colorado Supreme Court determined that an aggravated sentence is proper only when it relies on one of four kinds of facts: (1) facts found by a jury beyond a reasonable doubt; (2) facts admitted by the defendant; (3) facts found by a judge after the defendant stipulates to judicial factfinding for sentencing purposes; and (4) facts regarding prior convictions. *Lopez v. People*, 113 P.3d 713, 719 (Colo. 2005). Under section 18-1.3-401(6), the existence of one of these constitutionally-permissible aggravating facts "widens the sentencing range on . . . the . . . maximum end[] . . . to a ceiling of double the presumptive maximum." *Lopez*, 113 P.3d at 731.

¶ 24 In *Vensor* the supreme court held that, because an indeterminate sentence's lower term is *not* the statutory maximum of such a sentence, the imposition of a number of years for the lower term that exceeds the presumptive maximum need *not* be based on a jury's determination of the facts warranting an aggravated sentence. *Vensor*, 151 P.3d at 1280-81.

¶ 25 After *Vensor* was decided, the United States Supreme Court in *Alleyne* clarified that *Apprendi* "necessarily include[d] not only facts that increase the ceiling [of a sentencing range], but also those that increase the floor" because "[b]oth kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment." *Alleyne*, 570 U.S. at 108. Thus, the Court extended *Apprendi* and *Blakely* to the determination of facts that increase the minimum of a sentencing range to which a defendant could be exposed. *Id.* at 103, 108, 111-16; *see also People v. Heisler*, 2017 COA 58, ¶ 29.

B. Analysis

¶ 26 For several reasons, we conclude that the postconviction court did not err by denying Larson's ineffective assistance of counsel claim. *See People v. Hamm*, 2019 COA 90, ¶ 23 ("[W]e will affirm a

district court's denial of a Rule 35 motion on any ground supported by the record, even if the district court did not consider or contemplate that ground.").

¶ 27 The parties appear to agree that *Alleyne* abrogated *Vensor*. We need not address whether the parties are correct in this respect because at the relevant time, no court had held that *Vensor* was no longer good law. *Alleyne* did not reverse the Colorado Supreme Court's decision in *Vensor* (nor did the Supreme Court cite *Vensor* at all.) The Colorado Supreme Court did not overrule *Vensor* and no division of the Colorado Court of Appeals had, prior to Larson's withdrawal of his plea, recognized the abrogation of *Vensor*. Thus, the argument that *Vensor* had been abrogated by *Alleyne* was a novel claim.

¶ 28 In the *Strickland* context, attorneys are not required to anticipate changes in otherwise dispositive authority in the controlling jurisdiction. *People v. Houser*, 2020 COA 128, ¶¶ 33, 37-38

¶ 29 Thus, viewing defense counsel's representation from her perspective at the relevant time and indulging a strong presumption that her conduct fell within a wide range of reasonable professional

assistance, *see Ardolino*, 69 P.3d at 76, we conclude Larson failed to show that counsel provided deficient representation by failing to advise him that they could assert a novel legal argument if they proceeded to sentencing on his guilty plea. *See Id.* at¶¶ 33, 37-38 (counsel's performance is not deficient if her fail to advance novel legal theories or arguments that may have merit in hindsight but are not supported by the then-existing precedent, fail to anticipate changes in the law, or fail to argue for an extension of precedent).

IV. Failure to Advise of the Consequences of Withdrawing the Guilty Plea and Proceeding to Trial

¶ 30 In his motion, Larson also argued that defense counsel was ineffective for failing to advise him of the sentencing consequences of withdrawing his guilty plea and proceeding to trial. The postconviction court held an evidentiary hearing on this question and found that "the credible evidence at the [postconviction evidentiary] hearing showed that plea counsel . . . did adequately advise [Larson] of the consequences of withdrawing his plea" and that "[i]t [wa]s incredible that [Larson] did not understand his exposure if he proceeded to trial."

¶ 31 On appeal, Larson asserts that the postconviction court erred by finding that he failed to establish this claim. We disagree.

¶ 32 Larson signed the Petition to Plead Guilty and initialed his agreement to, and understanding of, each advisement contained therein. The Petition advised Larson that a person convicted of a sex offense would be subject to indeterminate sentencing and confirmed his understanding of this type of sentencing.

¶ 33 On the written "Attorney's Certification" form, defense counsel affirmed that she "fully explained to the [d]efendant the charges in the original Information/Complaint" and "explained to the [d]efendant the possible penalties and the elements of each of said charges." Counsel also "certif[ied] that [she] ha[d] thoroughly reviewed with the [d]efendant the Sex Offenders' statute as it applies in [his] case, so that [he] c[ould] truthfully answer" his understanding of indeterminate sentencing in the Petition.

¶ 34 At the providency hearing, the trial court explained, and ensured Larson's understanding of, indeterminate sentencing.

¶ 35 At the postconviction evidentiary hearing, defense counsel testified that, during pretrial proceedings, she met with Larson to discuss his case and the evidence against him. She also met with

him to discuss the plea offer, and she described the information she provides to clients:

> I will tell my clients, you know, it's their decision because it always is. But I will always be honest with them and tell them, here are the bad facts that I see, here are the helpful facts that I see, *here are the risks if you lose at trial.* I believe we actually wrote up for one of the meetings a couple-page-long letter detailing the problematic issues with the case. And we advised him we thought it would be a good idea for him to not risk it. But I don't ever say, you know, that he should or shouldn't because that's not really my decision.

(Emphasis added.)

¶ 36 Counsel also testified that, after the prosecution filed their notice to introduce evidence of extraordinary aggravating circumstances, she met with Larson to outline his options. She said that, during this conversation, Larson never indicated any misunderstanding of his options and was "always lucid and coherent."

¶ 37 Larson testified that he met with counsel pretrial to discuss strategy and to review the evidence. He acknowledged that, before the accepted plea agreement, the prosecution had extended two other plea offers that were discussed.

¶ 38 Larson accepted the plea offer "[b]ecause . . . there[] [were] so many charges and everything, and they had the evidence to prove that" he committed internet sexual exploitation of a child. He testified that, at the providency hearing, indeterminate sentencing had not been sufficiently explained to him and that, despite the advisements, he did not know what it meant.

¶ 39 Larson said that defense counsel advised him that, if he proceeded to sentencing on the guilty plea, the maximum aggravated sentence the court could impose was twelve years on the indeterminate sentence's lower term, but that counsel also said that the most he could receive at trial would be twelve years. He testified that he was not told that, if he went to trial, he could receive a thirty-six-year to life sentence.

¶ 40 We conclude that this record supports the postconviction court's finding that it was incredible that Larson was not advised of, and did not understand, the consequences of withdrawing his guilty plea and proceeding to trial. *See Washington*, ¶ 17 ("The postconviction court determines the weight and credibility to be given to the testimony of witnesses in a Crim. P. 35(c) hearing," and, "[w]hen the evidence in the record supports the court's

JUDGE HAWTHORNE and JUDGE BERGER concur.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: November 22, 2023 CASE NUMBER: 2022CA1105
Montrose County 2014CR110	
Plaintiff-Appellee: The People of the State of Colorado, v. **Defendant-Appellant:** Kevin Larson.	Court of Appeals Case Number: 2022CA1105
ORDER OF COURT	

The PETITION FOR REHEARING filed in this appeal by:

Kevin Larson, Defendant-Appellant,

is **DENIED**.

Issuance of the Mandate is stayed until: December 21, 2023

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

DATE: November 22, 2023

BY THE COURT:
Román, C.J.
Hawthorne*, J.
Berger*, J.

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

cg, "Appendix E"