

**FILED**  
**United States Court of Appeals**  
**Tenth Circuit**

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**April 20, 2023**

**Christopher M. Wolpert**  
**Clerk of Court**

---

JAZMINE SHAWN'TE HOWARD,

Petitioner - Appellant,

v.

ABOUTANAA EL HABTI, Warden,

Respondent - Appellee.

No. 23-6023  
(D.C. No. 5:22-CV-00622-D)  
(W.D. Okla.)

---

**ORDER DENYING CERTIFICATE OF APPEALABILITY\***

---

Before **MATHESON, BRISCOE, and EID**, Circuit Judges.

---

Jazmine Howard, an Oklahoma prisoner appearing pro se, seeks a certificate of appealability (COA) to appeal the district court’s order dismissing her petition for federal habeas relief under 28 U.S.C. § 2254. For the reasons explained below, we deny Howard’s request for a COA and dismiss this matter.

I

On the evening of June 9, 2017, Howard met a man named Jose Miguel Lopez outside of an Oklahoma City bar. Howard agreed to provide sexual services to Lopez in exchange for money. Lopez then drove Howard to a dark and secluded area. There,

---

\* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel.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

while Howard was performing oral sex on Lopez, Lopez abruptly got out of his truck, walked around to the passenger side, opened the door, and pulled Howard's head towards his crotch while also pulling on her arms. Howard, confused by Lopez's actions, and fearful due in part to the fact that no one else was in the area, pulled a gun out of her purse and shot Lopez in the chest. Howard and her boyfriend returned later to the scene, transported Lopez's body to a nearby river, and dumped the body over the side of a bridge into the river.<sup>1</sup>

Howard was subsequently charged with first degree murder in Oklahoma state court. At trial, Howard testified in her own defense and her trial counsel requested that the trial court instruct the jury on self-defense and the lesser-included offenses of second-degree depraved-mind murder, first-degree heat-of-passion manslaughter, and first-degree manslaughter while resisting criminal attempt. The trial court agreed to instruct the jury on second-degree depraved-mind murder, but refused to give the other requested instructions. The jury found Howard guilty of second-degree murder. The trial court, in accordance with the jury's recommendation, sentenced Howard to a term of imprisonment of thirty years.

Howard filed a direct appeal raising six propositions of error. The Oklahoma Court of Criminal Appeals (OCCA) rejected all six claims and affirmed Howard's conviction and sentence on January 7, 2021.

---

<sup>1</sup> This factual description of the crime is based upon Howard's testimony at trial.

On December 1, 2021, Howard filed an application for post-conviction relief with the state trial court, asserting the same six claims for relief that she asserted on direct appeal. The state trial court denied Howard's application on April 11, 2022. Howard filed a petition in error with the OCCA challenging the denial of four of her claims for relief. The OCCA affirmed the denial of post-conviction relief on July 11, 2022.

## II

Howard initiated these federal proceedings on July 25, 2022, by filing a pro se petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Oklahoma. ROA, Vol. I at 5. Howard asserted the same six grounds for relief in her petition that she asserted in her direct appeal. In Ground One, Howard alleged that she “was denied her fundamental right to present a defense by the trial court’s refusal to instruct the jury on the defense of self-defense and the lesser included offenses of Manslaughter in the First Degree by Heat of Passion, and Manslaughter in the First Degree by Resisting Criminal Attempt.” *Id.* at 9. In Ground Two, Howard alleged that “[t]he introduction of grotesque and disturbing photographs of the victim decomposing and covered in maggots w[as] unfairly prejudicial” and “violated [her] right to a fundamentally fair trial” because “other photographs showed the same injuries in a less gruesome manner.” *Id.* at 21. Ground Three of the petition alleged that “[o]ther crimes evidence was improperly admitted” by the trial court “in violation of Okla. Stat. Tit. 12 § 2404(B), the prohibition against evidentiary harpoons, and the due process clauses of the State and Federal Constitution.” *Id.* at 27. Ground Four of the petition alleged that “[p]rosecutorial misconduct, whether purposeful or not, deprived . . .

Howard of a fundamentally fair trial.” *Id.* at 29. Ground Five of the petition alleged that “Howard was denied the right to effective assistance of counsel when trial counsel committed multiple deficiencies that resulted in an unfair trial.” *Id.* at 31. Lastly, Ground Six of the petition alleged cumulative error.

After briefing in the matter was complete, the magistrate judge assigned to the case prepared a report and recommendation recommending that Howard’s petition be denied in its entirety. The magistrate judge addressed each of the six claims on the merits and concluded that none of them entitled Howard to federal habeas relief pursuant to § 2254. Specifically, the magistrate judge concluded as follows with respect to the six claims:

- 1) *Jury instructions.* The magistrate noted that “the OCCA determined that the trial court had not abused its discretion in failing to instruct the jury on self-defense” because, whether or not Howard’s fear of Lopez was objectively reasonable, “she never even claimed [at trial] to have had the degree of fear necessary to justify lethal force.” *Id.* at 745–46 (quoting ECF No. 13–1 at 4). The magistrate judge in turn concluded that “[t]he OCCA’s decision” on this point was “not contrary, or an unreasonable application of federal law, nor [wa]s it an unreasonable application of the law to the facts in this case.” *Id.* at 746. As for the trial court’s refusal to instruct the jury on the lesser-included offenses “of manslaughter in the first degree by heat of passion and manslaughter in the first degree by resisting criminal attempt,” the magistrate judge noted that “the Supreme Court ‘has never recognized a federal

constitutional right to a lesser included offense instruction in non-capital cases,” and therefore concluded that “the OCCA’s rejection of this ground for relief [wa]s not reviewable in this habeas action.” *Id.* at 746 (quoting *Tiger v. Workman*, 445 F.3d 1265, 1268 (10th Cir. 2006) (internal quotation marks and citations omitted)).

- 2) *Admission of photographs of the victim.* The magistrate noted that the OCCA “reached the merits of [this] due process claim” and concluded that the trial “court thoughtfully considered the probative value and unfairly prejudicial effect of the photos at issue,” and in turn concluded there was “no unfair prejudice in the admission of these photos.” *Id.* at 748–49 (quoting ECF No. 13–1 at 6–7). The magistrate judge concluded that the OCCA’s decision was “neither contrary to nor an unreasonable application [of] Supreme Court law,” and that “the OCCA did not unreasonably determine the facts in light of the evidence presented in the State court proceeding.” *Id.* at 749.
- 3) *Other crimes evidence.* The magistrate judge noted that Howard was contending that she was denied a fair trial when the prosecutor, in an effort to impeach Howard’s testimony that she had never been in trouble before, questioned her about charges being brought against her for violating a restraining order. The magistrate in turn noted that the OCCA considered this same claim and concluded that “[t]he prosecutor’s reference to [her] prior misconduct in cross-examination was proper.” *Id.* at 748 (quoting ECF No. 13–1 at 7). “Based on the OCCA’s rejection of [this] proposition of error,” the

magistrate judge “presume[d] the OCCA did not find the impeachment evidence rendered her trial fundamentally unfair,” and concluded “[t]he OCCA’s decision was reasonable.” *Id.* at 751.

- 4) *Prosecutorial misconduct.* The magistrate judge noted that Howard was “contend[ing] the prosecutor improperly questioned her about prior inconsistent statements she made during plea negotiations even though introduction of such statements is limited under Oklahoma law,” and “that the prosecutor improperly argued that she had previously lied and that the jury should not believe [her] testimony because of her inconsistent statements.” *Id.* at 751. The magistrate judge in turn noted that “[t]he OCCA rejected [these] assertions of prosecutorial misconduct” on the merits. *Id.* at 752. Specifically, the OCCA concluded “that it was defense counsel,” during his direct examination of Howard, “who first inquired about” the statements that Howard made to a police detective that were inconsistent with her testimony. *Id.* (quoting ECF 13–1 at 8). “This,” the OCCA concluded, “opened the door to cross-examination from the prosecutor about the same material.” *Id.* (quoting ECF 13–1 at 8). The OCCA in turn concluded that “[t]he prosecutor’s closing arguments were based on the evidence and were proper.” *Id.* (quoting ECF 13–1 at 8). The magistrate judge concluded that “[t]he OCCA’s decision was neither contrary to, [n]or an unreasonable application of clearly established federal law,” and was not “based on an unreasonable determination of the facts in light of the state court record.” *Id.* at 753.

- 5) *Ineffective assistance of trial counsel.* The magistrate judge noted that Howard was “contend[ing] her trial counsel was ineffective in failing to object to the prosecutor’s questions about her prior misconduct” and “her prior inconsistent statements given to a police detective.” *Id.* The magistrate judge noted that the OCCA, “[h]aving previously found that . . . Howard was not prejudiced by the underlying grounds for relief, . . . denied [her] request for an evidentiary hearing and determined she had not been prejudiced by [her] counsel’s strategic decisions.” *Id.* at 754. The magistrate judge concluded that “[h]abeas relief [wa]s not warranted on this ground” because it “previously found the underlying arguments supporting . . . Howard’s ineffective assistance of counsel claims to be without merit.” *Id.*
- 6) *Cumulative error.* The magistrate judge concluded, after citing Tenth Circuit case law discussing cumulative error analysis in the context of federal habeas cases, that “the cumulative effect analysis [wa]s not applicable to this case” because Howard failed to establish the existence of any errors. *Id.* at 755.

The magistrate judge’s report advised Howard that she had a “right to file an objection to this Report and Recommendation . . . by January 17, 2023,” and “that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein.” *Id.*

Howard did not file objections to the magistrate judge’s report and recommendation. On February 1, 2023, the district court issued an order adopting the

magistrate judge’s report and recommendation in its entirety and dismissing Howard’s petition without prejudice. The district court entered judgment that same day.

Two days later, on February 3, 2023, the district court issued an order *nunc pro tunc* dismissing Howard’s petition with prejudice. The district court entered an amended judgment that same day.

Howard filed a notice of appeal on February 23, 2023.

On March 14, 2023, a two-judge panel of this court issued an order directing a limited remand to the district court to consider whether to issue a COA for this appeal.

On March 15, 2023, the district court issued an order denying Howard a COA.

## II

Howard now seeks a COA from this court in order to challenge the district court’s order dismissing her federal habeas petition. *See* 28 U.S.C. § 2253(c)(1)(A). A COA is a jurisdictional prerequisite to our review. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Where, as here, the district court dismissed the petition on procedural grounds,

“[d]etermining whether a COA should issue . . . has two components, one directed at the underlying constitutional claims and one directed at the district court’s procedural

holding.” *Slack v. McDaniel*, 529 U.S. 473, 484–85 (2000). The first component

requires Howard to make “a substantial showing of the denial of a constitutional right.”

*Id.* at 484. This means that Howard must demonstrate “that reasonable jurists could

debate whether . . . the petition should have been resolved in a different manner or that

the issues presented were adequate to deserve encouragement to proceed further.” *Id.*

The second component requires Howard to show that “jurists of reason would find it



debatable whether the district court was correct in its procedural ruling.” *Id.* “[B]oth showings [must] be made before [we] may entertain the appeal.” *Id.* at 485. Because each component “is part of [the] threshold [jurisdictional] inquiry, . . . a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments.” *Id.*

Howard has filed two separate pleadings attempting to make these two showings. First, she has filed a combined opening brief and application for COA in which she attempts to make a substantial showing of the denial of a constitutional right. Second, she has also filed a separate memorandum brief that addresses the district court’s procedural ruling. In that brief, she asserts that she was unable to file timely objections to the magistrate judge’s report and recommendation because the prison library that she has access to was closed for eight days during the fifteen-day period she was afforded to respond to the report and recommendation.

After reviewing Howard’s combined opening brief and application for COA, we conclude she has failed to make the first requisite showing. In her opening brief, Howard essentially repeats each of the six grounds for relief asserted in her petition. Howard does not, however, make any attempt to challenge the magistrate judge’s analysis and rejection of each of these claims. And, in any event, having carefully examined the magistrate judge’s report and recommendation, we are not persuaded that “reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack*,

529 U.S. at 484 (internal quotation marks omitted). We therefore need not address whether Howard can establish that the district court was correct in its procedural ruling.

III

Howard's request for a COA is DENIED and this matter is DISMISSED. Howard's motions to proceed in forma pauperis on appeal and for appointment of counsel are also DENIED.

Entered for the Court

Mary Beck Briscoe  
Circuit Judge