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Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DANIEL CORTEZ-LAZCANO,

Petitioner - Appellant,

v.

RICK WHITTEN,

Respondent - Appellee.

No. 22-5031

**Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 4:19-CV-00095-GKF-JFJ)**

James L. Hankins, Edmond, Oklahoma, for Petitioner – Appellant.

Joshua R. Fanelli, Assistant Attorney General (John M. O'Connor, Attorney General, and Tanner A. Herrmann, Assistant Attorney General, on the brief), Oklahoma City, Oklahoma, for Respondent – Appellee.

Before **MORITZ**, **BALDOCK**, and **MURPHY**, Circuit Judges.

MORITZ, Circuit Judge.

A jury in Tulsa County, Oklahoma, convicted Daniel Cortez-Lazcano of child sexual abuse. After unsuccessfully appealing his conviction to the Oklahoma Court of Criminal Appeals (OCCA), Cortez-Lazcano sought habeas relief under 28 U.S.C. § 2254 in federal court. He argued, among other things, (1) that the prosecution used

its peremptory strikes to remove prospective jurors based on their race, in violation of his Fourteenth Amendment rights under *Batson v. Kentucky*, 476 U.S. 79 (1986); and (2) that defense counsel provided ineffective assistance by failing to notify him of a favorable plea offer, in violation of his Sixth Amendment rights under *Strickland v. Washington*, 466 U.S. 668 (1984). Applying the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, the district court denied habeas relief but granted Cortez-Lazcano a certificate of appealability (COA) on his *Batson* and *Strickland* claims. Because the OCCA's decision did not involve an unreasonable application of federal law or rest on an unreasonable determination of the facts, we affirm.

Background

This appeal arises from Cortez-Lazcano's conviction for sexually abusing his then-wife's younger sister, V.C. In late 2012, nine-year-old V.C. told her older sister that for years, Cortez-Lazcano had sexually abused her. About two months later, Oklahoma charged Cortez-Lazcano with two counts of child sexual abuse—the first for "willfully or maliciously putting his penis in [V.C.'s] vagina" and the second for "willfully or maliciously touching [her] vagina." App. vol. 8, 21. After four plea offers and multiple continuances, Cortez-Lazcano's case went to trial in 2016.

Before jury selection, the trial court conducted a pretrial hearing to discuss on the record the four plea offers the prosecution had extended to Cortez-Lazcano. At the outset, the prosecutor explained that the only outstanding offer was a recommended 25-year sentence in exchange for a guilty plea to both charges. She then described the first two offers extended to and rejected by Cortez-Lazcano,

reading from memos in the prosecution's case file detailing the rejected offers. After she did so, defense counsel interjected to note that "there was [also] an offer of a five-year suspended [sentence,] with a reduction in the charge to something that" would not have required Cortez-Lazcano to register as a sex offender. App. vol. 3, 7. Although this third offer "apparently did not make the memo[s]," defense counsel explained, "that's what we rejected the last time we came to court." *Id.* at 7–8. The prosecutor then clarified that she "wasn't finished" describing the offers and that the prosecution's case file also contained a memo about this third offer. *Id.* at 8. That memo specifically noted that in January 2015, Cortez-Lazcano rejected the prosecution's offer of a five-year suspended sentence in exchange for a plea of no contest to assault with intent to commit a felony. After the trial court asked Cortez-Lazcano if he remembered that offer, defense counsel requested to go off the record to speak with him.

Back on the record, the trial court reiterated that the only plea offer still "on the table" was the prosecution's fourth and final offer. *Id.* at 8–9. Cortez-Lazcano declined that offer. But defense counsel then stated that their off-the-record discussion revealed "a bigger problem": Cortez-Lazcano did not remember receiving the prosecution's third offer. *Id.* at 9. Defense counsel explained that "it [wa]s normally [his] practice and procedure to relay [such an] offer to the client," but in light of Cortez-Lazcano's inability to remember the offer, he could not "say with any amount of certainty" whether he did so here. *Id.* at 10–11. In response, the prosecutor argued that Cortez-Lazcano did receive and reject the offer, pointing to the memo in

the prosecution's case file noting as much.

After the pretrial hearing, the trial court turned to jury selection. The prosecution exercised four of its six peremptory strikes to remove four Black prospective jurors: Z.C., D.R., K.M., and B.B.[1] Cortez-Lazcano—who is Latino—challenged each strike under *Batson*, arguing that there were only a few minorities on the panel, that he was also a minority, and that the strikes displayed a pattern of racial discrimination. The prosecutor responded with facially race-neutral explanations for each strike, and the trial court overruled all four *Batson* challenges. Ultimately, the jury convicted Cortez-Lazcano on the first count but acquitted on the second. For that conviction, the trial court sentenced Cortez-Lazcano to 25 years in prison.

Cortez-Lazcano then appealed his conviction to the OCCA. He asserted ten claims, including (1) a *Batson* claim centered on the prosecution's peremptory strikes of the four Black prospective jurors and (2) a *Strickland* claim based on defense counsel's alleged failure to convey the prosecution's third plea offer. The OCCA rejected his claims on the merits and affirmed his conviction. *See Cortez-Lazcano v. State*, No. F-2016-606 (Okla. Crim. App. Nov. 22, 2017) (unpublished). After his unsuccessful direct appeal, Cortez-Lazcano turned to federal court and filed a § 2254 petition, reasserting several claims he had presented to the OCCA. The district court denied habeas relief but issued a COA on Cortez-Lazcano's *Batson* and *Strickland* claims. Those two claims are now before us.

[1] To protect the prospective jurors' privacy, the district court referred to them only by their initials. We do the same.

Analysis

We review de novo the district court's decision denying habeas relief.[2] *Smith v. Duckworth*, 824 F.3d 1233, 1241–42 (10th Cir. 2016). But because the OCCA rejected Cortez-Lazcano's claims on the merits, we apply AEDPA's highly deferential standard of review. *See* 28 U.S.C. § 2254(d). Under this standard, Cortez-Lazcano must show that the OCCA's decision (1) "was contrary to, or involved an unreasonable application of, clearly established [f]ederal law" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate[-]court proceeding." *Id.*

A state court's decision is "contrary to clearly established federal law" when it "applies a rule that contradicts the governing law set forth in Supreme Court cases or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent." *Smith*, 824 F.3d at 1241 (quoting *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir. 2016)). And a state-court decision involves an unreasonable application of clearly established federal law when it "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular [petitioner's] case." *Williams v.*

[2] Given this standard of review, we need not address Cortez-Lazcano's argument that the district court erred by "fail[ing] to engage in any meaningful analysis" when rejecting his *Batson* claim. Aplt. Br. 17. Even if such an error occurred, it would not independently justify reversal or an award of habeas relief because we must conduct our own analysis of the OCCA's decision.

Taylor, 529 U.S. 362, 407–08 (2000).

In reviewing a state court's factual determinations, "[w]e will not conclude [that such] findings are unreasonable 'merely because we would have reached a different conclusion in the first instance.'" *Smith*, 824 F.3d at 1241 (quoting *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015)). Instead, we must "defer to the state court's factual determinations so long as 'reasonable minds reviewing the record might disagree about the finding in question.'" *Id.* (quoting *Brumfield*, 576 U.S. at 314). Consistent with this deference, we must also presume that a state court's factual findings are correct, "and the petitioner bears the burden of rebutting that presumption by 'clear and convincing evidence.'" *Id.* (quoting § 2254(e)(1)).

In short, AEDPA imposes "a formidable barrier to federal habeas relief for [petitioners] whose claims have been adjudicated [on the merits] in state court." *Id.* (quoting *Burt v. Titlow*, 571 U.S. 12, 19 (2013)). Applying AEDPA's deferential standard, we now consider Cortez-Lazcano's *Batson* and *Strickland* claims.

I. *Batson* Claim

Cortez-Lazcano argues that the district court erred in denying habeas relief on his *Batson* claim. In *Batson*, the Supreme Court "held that the Fourteenth Amendment's Equal Protection Clause prohibits the prosecution's use of peremptory challenges to exclude potential jurors on the basis of their race." *House v. Hatch*, 527 F.3d 1010, 1020 (10th Cir. 2008) (quoting *Saiz v. Ortiz*, 392 F.3d 1166, 1171 (10th Cir. 2004)). Although a defendant has no right to a jury of any specific racial composition, *Batson* made clear that the Equal Protection Clause guarantees "the

right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." 476 U.S. at 85–86.

A. *Batson* Framework

When faced with a *Batson* challenge, a trial court must apply a three-step burden-shifting framework to determine whether a prosecutor unconstitutionally removed a prospective juror based on their race. *See id.* at 96–98. At the first step, the trial court must "determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race." *Rice v. Collins*, 546 U.S. 333, 338 (2006). If the defendant makes that showing, "the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror." *Id.* At this second step, nearly any race-neutral explanation will suffice, even if it is not "persuasive, or even plausible." *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995) (per curiam)). The trial court must then determine at step three "whether the defendant has carried his burden of proving purposeful discrimination." *Id.* The "critical question" at this third step is "the persuasiveness of the prosecutor's justification for [the] peremptory strike," which typically turns on whether the trial court finds the prosecutor's race-neutral explanation either credible or pretextual. *Miller-El v. Cockrell* (*Miller-El I*), 537 U.S. 322, 338–39 (2003).

To prove purposeful discrimination at *Batson*'s third step, the "defendant may rely on 'all relevant circumstances.'" *Miller-El v. Dretke* (*Miller-El II*), 545 U.S. 231, 240 (2005) (quoting *Batson*, 476 U.S. at 96–97); *see also Hernandez v. New York*, 500 U.S. 352, 363 (1991) (plurality opinion) (explaining that "invidious

discriminatory purpose may often be inferred from the totality of the relevant facts" (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976))). The defendant may, for instance, offer "side-by-side comparisons of some [B]lack venire panelists who were struck and white panelists allowed to serve." *Miller-El II*, 545 U.S. at 241. "If a prosecutor's proffered reason for striking a [B]lack panelist applies just as well to an otherwise-similar non[-B]lack [panelist] who is permitted to serve, that is evidence tending to prove purposeful discrimination." *Id.* The defendant may also present statistical evidence of racial disparities in the prosecutor's strikes or show that the prosecutor misrepresented the record when defending the strikes. *See id.* at 240–41, 244–46. Whatever the circumstances relied on, the burden of proving purposeful discrimination "rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768.

The trial court's determination "on the ultimate question of discriminatory intent represents a finding of fact" entitled to "great deference." *Hernandez*, 500 U.S. at 364–65. Thus, on direct appeal, a reviewing court must uphold that finding unless it is "clearly erroneous." *Id.* at 369. Under that standard, the reviewing court may "not reverse [the trial] court's finding of fact simply because [it] 'would have decided the case differently.'" *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). Instead, it "must ask whether, 'on the entire evidence,' it is 'left with the definite and firm conviction'" that the trial court made a mistake. *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). So when "there are two permissible views of the evidence," the

reviewing court may not conclude that the trial court's "choice between them [was] clearly erroneous." *Hernandez*, 500 U.S. at 369 (quoting *Anderson*, 470 U.S. at 574).

B. Discussion

On direct appeal to the OCCA, Cortez-Lazcano centered his *Batson* claim on the prosecutor's peremptory strikes of Z.C., D.R., K.M., and B.B. To show that the prosecutor engaged in purposeful racial discrimination when she struck these four Black prospective jurors, he argued that the prosecutor offered pretextual reasons for the strikes, twice misstated the governing law, and used her strikes to remove four of only five Black prospective jurors. The OCCA, however, rejected Cortez-Lazcano's *Batson* claim. It explained that "the prosecutor offered race-neutral reasons for the challenged strikes" and that "[t]he trial court removed the prospective jurors" after finding that Cortez-Lazcano "had not shown purposeful discrimination." App. vol. 1, 9. Recognizing that the trial court's findings were "entitled to great deference," the OCCA concluded that "the trial court properly overruled [Cortez-Lazcano]'s *Batson* objections." *Id.*

In this appeal, Cortez-Lazcano says little about the OCCA's decision. At most, he faults the OCCA for "concluding simply in one paragraph that the trial court properly overruled" his *Batson* objections. Aplt. Br. 17. According to Cortez-Lazcano, the OCCA's one-paragraph analysis suggests that it may not have "even [been] aware that" it should consider all relevant circumstances when deciding whether he had shown purposeful discrimination. *Id.* To be sure, the OCCA's *Batson* discussion was brief and did not expressly address the circumstances on which

Cortez-Lazcano relied to show purposeful discrimination. But AEDPA does not require state courts to show their work. *See Harrington v. Richter*, 562 U.S. 86, 99 (2011) (holding that AEDPA deference applies even when state court issues summary ruling); *Johnson v. Williams*, 568 U.S. 289, 300 (2013) ("[F]ederal courts have no authority to impose mandatory opinion-writing standards on state courts."). So although "under *Batson* a state court assuredly must evaluate the totality of the evidence and consider 'all relevant circumstances,'" it need not "prove to a federal court that it did so by setting out every relevant fact or argument in its written opinion." *Lee v. Comm'r, Ala. Dep't of Corrs.*, 726 F.3d 1172, 1212 (11th Cir. 2013). Cortez-Lazcano's "readiness to attribute error" to the OCCA based solely on its failure to explicitly address in its decision the relevant circumstances on which he relied is incompatible with both "the presumption that state courts know and follow the law" and AEDPA's "demand[] that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). We therefore reject Cortez-Lazcano's suggestion that the OCCA unreasonably applied federal law by failing to explicitly address the relevant circumstances on which he relied. *See* § 2254(d)(1).

Beyond criticizing its brevity, Cortez-Lazcano does not focus on the OCCA's decision. Instead, he simply repeats his direct-appeal argument: that the prosecutor engaged in purposeful discrimination when she struck Z.C., D.R., K.M., and B.B. But because the ultimate question of discriminatory intent under *Batson* is a "pure issue of fact," *Hernandez*, 500 U.S. at 364, "in the AEDPA context, the deferential

analytical rubric of § 2254(d)(2) comes into play," *Grant v. Royal*, 886 F.3d 874, 949 (10th Cir. 2018). Under that rubric, Cortez-Lazcano must show that "it was unreasonable to credit the prosecutor's race-neutral explanations for the *Batson* challenge." *Rice*, 546 U.S. at 338. AEDPA's "'presumption of correctness,'" moreover, "applies to state[-]court findings relating to the ultimate factual question at *Batson*'s [third] step." *Grant*, 886 F.3d at 949 (quoting § 2254(e)(1)). Although "we could end our analysis here," given Cortez-Lazcano's failure to tie his argument to the governing legal standard, *id.* at 952, we now consider whether it was unreasonable for the OCCA to uphold the trial court's determination that the prosecutor did not engage in purposeful discrimination when she struck the four Black prospective jurors, *see* § 2254(d)(2). We also consider whether he has rebutted with clear and convincing evidence the presumption of correctness that attaches to the OCCA's factual findings.[3] *See* § 2254(e)(1).

In attempting to establish a *Batson* violation, Cortez-Lazcano first challenges the prosecutor's race-neutral reasons for striking Z.C., K.M., and B.B.[4] As to Z.C., Cortez-Lazcano argues that the prosecutor's explanation was pretextual because it

[3] In so doing, however, we do not address Cortez-Lazcano's assertion that "this case is not an isolated incident in Tulsa County." Aplt. Br. 18. Although historical evidence of racial discrimination "is relevant to the extent it casts doubt on the legitimacy of the motives underlying the [prosecutor]'s actions in [the] petitioner's case," *Miller-El I*, 537 U.S. at 347, Cortez-Lazcano produced no such evidence in state court. And our review under AEDPA "is plainly limited to the state-court record." *Cullen v. Pinholster*, 563 U.S. 170, 185 n.7 (2011).

[4] Cortez-Lazcano does not challenge the prosecutor's race-neutral explanation for striking D.R.

contradicted Z.C.'s own voir dire testimony. The prosecutor explained that she struck Z.C. because his grandfather was a criminal-defense attorney, with whom she "had several cases." App. vol. 3, 294. According to Cortez-Lazcano, Z.C. testified that his grandfather was an attorney but that he did not know what type of law his grandfather practiced. Yet the record reveals that when asked about the type of law his grandfather practiced, Z.C. responded: "I believe it's criminal." *Id.* at 142. The *prosecutor* then said that Z.C.'s grandfather, whom she knew "very well," took "all different types of cases." *Id.* at 142–143. And after Z.C. responded "[r]ight," the prosecutor immediately clarified that by "cases," she meant "criminal cases." *Id.* at 143. So contrary to Cortez-Lazcano's contention, the record supports the prosecutor's assertion that Z.C.'s grandfather was a criminal-defense attorney. Thus, we cannot say the OCCA's determination that the trial court properly credited the prosecutor's race-neutral explanation for striking Z.C. was unreasonable on this ground.

Cortez-Lazcano further contends that the prosecutor's race-neutral explanation for striking Z.C. was "dubious." Aplt. Br. 11. But in so doing, he merely presumes that the prosecutor struck Z.C. because she believed Z.C. had "some sympathy for the defense or some legal knowledge from his grandfather." *Id.* And he posits that "any sympathy [Z.C.] may have had for the defense would have been offset through interaction[s] with his grandmother," who worked "in law enforcement." *Id.* Such speculative assertions fail to establish that it was unreasonable for the OCCA to find that the trial court properly credited the prosecutor's race-neutral explanation for striking Z.C. *See Smallwood v. Gibson*, 191 F.3d 1257, 1279 n.14 (10th Cir. 1999)

("Petitioner's pure speculation about what did or did not occur . . . cannot form the basis of habeas relief.").

Cortez-Lazcano next argues that the prosecutor's proffered race-neutral explanation for striking K.M. was pretextual. The prosecutor explained that she chose to strike K.M. because not only did K.M. have a prior misdemeanor charge for domestic assault, but "more important[ly]," K.M.'s husband had lost his job at a children's shelter just the year before based on allegations that he physically abused children there. App. vol. 3, 297–98. To show pretext, Cortez-Lazcano compares K.M. to other prospective jurors who he says "had similar [legal] issues" but were not struck. Aplt. Br. 14. He notes, for example, that one prospective juror had an expunged minor-in-possession conviction, another prospective juror's son had served a prison sentence, and yet another prospective juror had a brother-in-law with three felony convictions.

But setting aside the fact that Cortez-Lazcano never presented this comparator evidence to the trial court, the comparisons are feeble. *See Snyder v. Louisiana*, 552 U.S. 472, 483 (2008) (explaining that "a retrospective comparison of jurors based on a cold appellate record may be very misleading" because "an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable"). Although the prosecutor cited K.M.'s prior criminal charge as a basis for the strike, the prosecutor explained that the child-abuse allegations against K.M.'s husband were the main reason she struck K.M. in this child sex-abuse case. Given the prosecutor's primary basis for the strike, the OCCA

could have reasonably determined that those other prospective jurors were not similarly situated to K.M., such that their differential treatment did not constitute "evidence tending to prove purposeful discrimination . . . at *Batson*'s third step." *Miller-El II*, 545 U.S. at 241.

Resisting this conclusion, Cortez-Lazcano points to another prospective juror who, like K.M., had a family member accused of child abuse. But the record shows material differences between K.M. and this comparator, both in terms of their relationship to the accused and the staleness of the accusations. Unlike K.M., whose spouse lost his job just a year earlier based on child-abuse allegations, the comparator said that his cousin had faced child sex-abuse charges some 16 or 17 years ago and had since passed away. In light of these material differences, we agree with the district court that "it would not have been objectively unreasonable for . . . the OCCA to find that [the comparator]'s much less recent experience of having a now-deceased cousin accused of child molestation . . . was not sufficiently comparable to demonstrate that [the prosecutor]'s reason for excusing K.M." was pretextual. App. vol. 1, 200.

The prosecutor used her final peremptory strike to remove B.B., who was one of three potential alternate jurors. In response to Cortez-Lazcano's *Batson* challenge, the prosecutor said that she had used a "process of elimination" to decide which of the three prospective alternates to strike. App. vol. 3, 300. She explained that she believed the first two would be "wonderful juror[s]," noting that one was a foster mother who had previously "voted guilty [i]n a criminal jury trial" and the other was

"a volunteer clown who spen[t] his free time going to places like the Child Abuse Network . . . [to] rais[e children's] spirits." *Id.* at 301. Although there was "nothing in particular" about B.B. she disliked, the prosecutor pointed out that B.B. "did say, [']It's enough to show one lie; that destroys [a witness's] credibility.[']" *Id.* So given "those three choices," the prosecutor struck B.B. *Id.*

Cortez-Lazcano argues that the prosecutor's explanation for striking B.B. was "nonsensical." Aplt. Br. 15. But we again agree with the district court that his "argument requires little discussion because it is premised on a truncated version of [the prosecutor]'s reasons for excusing B.B." App. vol. 1, 202. Indeed, Cortez-Lazcano focuses solely on the prosecutor's statement that there was "nothing in particular" she disliked about B.B., ignoring the prosecutor's explanation that she struck B.B. through a process of elimination—that is, she chose to remove B.B. because she believed the other two prospective alternate jurors would be more favorable to the prosecution in a child sex-abuse case. Because the prosecutor's race-neutral explanation for the strike was grounded in accepted trial strategy, it was not unreasonable for the OCCA to determine that the trial court properly credited the prosecutor's race-neutral explanation. *See Miller-El I*, 537 U.S. at 339 (explaining that credibility of prosecutor's race-neutral explanation "can be measured . . . by whether the proffered rationale has some basis in accepted trial strategy").

Next, Cortez-Lazcano argues that the prosecutor misstated the governing law when she responded to his initial two *Batson* challenges. In particular, Cortez-Lazcano observes that when he raised his first *Batson* challenge objecting to the

strike of Z.C., the prosecutor erroneously asserted that "there has to be a pattern of striking minorities before a *Batson* challenge can be lodged." App. vol. 3, 293; *see also Snyder*, 552 U.S. at 478 ("[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." (alteration in original) (quoting *United States v. Vasquez-Lopez*, 22 F.3d 900, 902 (9th Cir. 1994))). And when he raised his second *Batson* challenge objecting to the strike of D.R., the prosecutor remarked: "[J]ust for the record, both [Z.C.] and [D.R.] are [B]lack[,] and [Cortez-Lazcano] is not." App. vol. 3, 294–95. Cortez-Lazcano contends that this second statement "show[s] yet *another* fundamental misunderstanding of the law." Aplt. Br. 12; *see also Powers v. Ohio*, 499 U.S. 400, 402 (1991) ("[A] criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race[].").

We agree with Cortez-Lazcano that the first challenged statement reflects a misstatement of the governing law, which does not require a defendant raising a *Batson* challenge to show a pattern of discriminatory strikes. *See Snyder*, 552 U.S. at 478. The second challenged statement, however, could just as likely have been made to simply clarify, for the record, the races of Cortez-Lazcano and the two prospective jurors. Indeed, as the prosecutor noted after making that statement, the record is "color-blind." App. vol. 3, 295. In any event, Cortez-Lazcano fails to appreciate that both statements went to *Batson*'s first step: whether he had made a prima facie showing that the prosecutor struck Z.C. and D.R. based on their race. And the prosecutor then moved on to *Batson*'s second step, offering race-neutral explanations

for the strikes that the trial court ultimately credited at the third step. In this situation, when the *Batson* inquiry has proceeded through all three steps, "the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez*, 500 U.S. at 359. To the extent Cortez-Lazcano contends that the prosecutor's statements nevertheless constitute an additional relevant circumstance to consider at *Batson*'s third step, he "assign[s] the [statements] more weight than [they] can bear." *Rice*, 546 U.S. at 340–41. Even if the statements "bear []on the issue of racial animosity," *Snyder*, 552 U.S. at 478, they do not "demonstrate[] that a reasonable factfinder *must* conclude the prosecutor lied . . . and struck [the prospective jurors] based on [their] race," *Rice*, 546 U.S. at 341 (emphasis added).

In a final attempt to show purposeful discrimination, Cortez-Lazcano points to the prosecutor's overall striking pattern, emphasizing that she used her peremptory strikes to remove four of only five Black prospective jurors. Although that pattern is certainly a relevant factor at *Batson*'s third step, it "does not necessarily establish racial discrimination." *Johnson v. Martin*, 3 F.4th 1210, 1225 (10th Cir. 2021) (quoting *Brinson v. Vaughn*, 398 F.3d 225, 235 (3d Cir. 2005)); *cf. also Miller-El II*, 545 U.S. at 265 (finding *Batson* violation where prosecution struck 10 of 11 Black prospective jurors because, when evidence was "*viewed cumulatively*[,] its direction [wa]s too powerful to conclude anything but discrimination" (emphasis added)); *Dungen v. Estep*, 311 F. App'x 99, 104–05 (10th Cir. 2009) (noting *Miller-El II* "did not . . . state that numbers alone could establish discrimination" and declining to grant COA on *Batson* claim where petitioner's "only evidence of discrimination" was

prosecution's striking pattern).[5] And here, despite the prosecutor's striking pattern and what Cortez-Lazcano refers to as "fundamental misunderstanding[s] of the law," Aplt. Br. 12, we cannot conclude based on the totality of the circumstances that it was unreasonable for the OCCA to determine that the trial court properly credited the prosecutor's race-neutral explanations for the strikes, *see* § 2254(d)(2). Cortez-Lazcano, moreover, has not presented the clear and convincing evidence necessary to rebut the presumption of correctness afforded to the OCCA's factual determinations. *See* § 2254(e)(1).

For these reasons, Cortez-Lazcano is not entitled to habeas relief on his *Batson* claim.

II. *Strickland* Claim

Cortez-Lazcano next argues that the district court erred in denying habeas relief on his *Strickland* claim. The Supreme Court in *Strickland* held that the Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel. 466 U.S. at 685–86. That right extends to all critical stages of criminal litigation, including plea-bargain proceedings. *See Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

A. *Strickland* Framework

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) "that counsel's performance was deficient" and (2) "that the deficient

[5] We cite *Dungen* for its persuasive value. *See* 10th Cir. R. 32.1(A).

performance prejudiced the defense." *Strickland*, 466 U.S. at 687. In the plea context, the failure to convey a plea offer can constitute deficient performance because, as a general rule, "counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Frye*, 566 U.S. at 145. And to establish prejudice in the plea context, the defendant must show that "the outcome of the plea process would have been different with competent advice." *Lafler*, 566 U.S. at 163. To make this showing, the defendant must, among other things, establish "a reasonable probability he and the trial court would have accepted the guilty plea" but for counsel's deficient performance. *Id.* at 174.

The *Strickland* standard is highly deferential to counsel, requiring courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Thus, "[s]urmounting *Strickland*'s high bar is never an easy task." *Richter*, 562 U.S. at 105 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). And because "[t]he standards created by *Strickland* and [AEDPA] are both 'highly deferential,' . . . when the two apply in tandem, review is 'doubly' so." *Id.* (first quoting *Strickland*, 466 U.S. at 689; and then quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). The resulting "doubly deferential" standard of review requires us to give "both the state court and the defense attorney the benefit of the doubt." *Titlow*, 571 U.S. at 15.

B. Discussion

On direct appeal to the OCCA, Cortez-Lazcano argued that defense counsel

provided ineffective assistance by failing to convey the prosecution's third plea offer, which consisted of a five-year suspended sentence in exchange for a no-contest plea to assault with intent to commit a felony. In his accompanying motion seeking to supplement the record under Oklahoma Criminal Appeals Rule 3.11(B)(3)(b), Cortez-Lazcano attached affidavits from himself and defense counsel. In his affidavit, Cortez-Lazcano stated that he did "not remember being offered a five-year suspended sentence for the offense of assault with intent to commit a felony," and "[h]ad [his] attorney told [him] about the offer," he "would have accepted it." App. vol. 1, 180. Defense counsel, for his part, stated that in his 20 years of practice, he "ha[d] the custom of relating any and all plea[-]bargain offers to [his] clients." *Id.* at 182. He also explained that he could not "specifically recall" if he told Cortez-Lazcano about the prosecution's third offer, stressing that the case spanned three years and that, in those years, he "had many clients and hundreds of conversations with those clients." *Id.*

In its decision, the OCCA first explained that to succeed on his Rule 3.11 motion, Cortez-Lazcano needed to show by "clear and convincing evidence that there [wa]s a strong possibility [defense] counsel was ineffective" under *Strickland*. *Id.* at 10. The OCCA further explained that because "[t]his test is less demanding than *Strickland* itself, . . . the denial of such a motion . . . necessarily includes a finding that no *Strickland* violation occurred." *Id.*; *see also Lott v. Trammell*, 705 F.3d 1167, 1213 (10th Cir. 2013) (explaining that OCCA decision denying Rule 3.11 motion "operates as an adjudication on the merits of a [petitioner's] *Strickland* claim and is

therefore entitled to deference under § 2254(d)(1)"). Turning to the merits, the OCCA found "it most probable," based on its review of the trial record and affidavits, that defense counsel conveyed the prosecution's third plea offer to Cortez-Lazcano and that Cortez-Lazcano rejected it. App. vol. 1, 10. It alternatively determined that even if defense counsel never conveyed the offer, there was no reasonable probability that Cortez-Lazcano would have accepted it. Thus, the OCCA concluded that Cortez-Lazcano failed to satisfy the Rule 3.11 standard, and it accordingly denied both his Rule 3.11 motion and *Strickland* claim.

Cortez-Lazcano now argues that the OCCA's decision rested on an unreasonable determination of the facts. *See* § 2254(d)(2). On *Strickland*'s deficient-performance prong, he maintains that, contrary to the OCCA's factual determination that it was "most probable" defense counsel conveyed the offer, the evidence establishes defense counsel never did so. App. vol. 1, 10. In support, Cortez-Lazcano points to defense counsel's statements at the pretrial hearing and to the affidavits he submitted on direct appeal, which show that neither he nor defense counsel specifically remember if defense counsel conveyed the offer.

But despite Cortez-Lazcano's and defense counsel's asserted lack of recollection, evidence in the record supports the OCCA's factual determination.[6] For

[6] We note that in making its finding, the OCCA erroneously stated the offer would have required Cortez-Lazcano "to plead *guilty*," rather than no contest, "to a lesser charge." App. vol. 1, 10 (emphasis added). But because the OCCA's misstatement does not go to "a material factual issue that is central" to the deficient-performance prong of Cortez-Lazcano's *Strickland* claim, that misstatement did not

example, during the pretrial hearing, it was defense counsel who first brought up the offer and stated that this was the offer "*we* rejected the last time we came to court." App. vol. 3, 7–8 (emphasis added). And the prosecutor confirmed that a memo in the prosecution's case file specifically noted Cortez-Lazcano rejected that offer. Further, at sentencing, defense counsel once again represented on the record that Cortez-Lazcano rejected the offer, asserting that the prosecution at one point "thought the case was worth a five-year suspended [sentence] and a reduction down to a non-sex offense," but "*Cortez-Lazcano rejected that offer*." App. vol. 2, 111–12 (emphasis added). And in his affidavit, defense counsel stressed that in his 20 years of practice, he had "the custom of relating *any and all* plea[-]bargain offers to [his] clients." App. vol. 1, 182 (emphasis added).

Cortez-Lazcano does not confront this evidence, focusing instead on his and defense counsel's lack of recollection. But even if we agreed with Cortez-Lazcano as to the significance of that lack of recollection, the question under AEDPA is not whether "we would have reached a different conclusion in the first instance"—it is whether the OCCA's factual determination was unreasonable. *Smith*, 824 F.3d at 1241 (quoting *Brumfield*, 576 U.S. at 313–14). In other words, it is not enough for Cortez-Lazcano to show that "reasonable minds reviewing the record might disagree about the finding in question." *Id.* (quoting *Brumfield*, 576 U.S. at 314). And having reviewed the record here, including the evidence Cortez-Lazcano fails to confront,

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"fatally undermine the fact-finding process" on that prong. *Smith*, 824 F.3d at 1231 (quoting *Ryder*, 810 F.3d at 739).

we cannot say it was unreasonable for the OCCA to find it "most probable" that defense counsel conveyed the offer to Cortez-Lazcano and therefore did not perform deficiently.[7] App. vol. 1, 10; *see also* § 2254(d)(2). As a result, Cortez-Lazcano is not entitled to habeas relief on his *Strickland* claim.

Conclusion

Because the OCCA's decision did not involve an unreasonable application of federal law or rest on an unreasonable determination of the facts, we affirm the district court's denial of habeas relief on Cortez-Lazcano's *Batson* and *Strickland* claims.

[7] Having so concluded, we need not address the OCCA's prejudice analysis. *See Strickland*, 466 U.S. at 697 (explaining that courts need not address both *Strickland* prongs "if the defendant makes an insufficient showing on one").