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APPENDIX C

FOR THE EIGHTH CIRCUIT

No: 20-1557

Ronald W. Greer

Appellant

v.

Sherie Korneman, Warden

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00675-NKL)

ORDER

The petition for rehearing by the panel is denied.

October 20, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-1557

Ronald W. Greer

Plaintiff - Appellant

v.

Sherie Korneman, Warden

Defendant - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00675-NKL)

JUDGMENT

Before KELLY, WOLLMAN, and STRAS, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. The appellant's motion for leave to proceed on appeal in forma pauperis is denied as moot.

September 01, 2020

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

JUDGMENT IN A CIVIL CASE

Ronald W. Greer,

Petitioner,

V.

Case No. 19-00675-CV-W-NKL-P

Sherie Korneman,

Respondent.

- ☐ **JURY VERDICT.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- ☒ **DECISION OF THE COURT.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: ORDERED that Petitioner's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED, a certificate appealability is DENIED, and this case is DISMISSED.

Entered on: February 18, 2020.

PAIGE WYMORE-WYNN
CLERK OF COURT

/s/ C. Davies
(By) Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Respondent.

Case No. 19-00675-CV-W-NKL-P

Petitioner is a convicted state prisoner and filed this pro se matter pursuant to 28 U.S.C. § 2254. He challenges his 2013 conviction and sentences for forcible rape, forcible sodomy, resisting arrest, and two counts of armed criminal action, which were entered in the Circuit Court of Pettis County, Missouri. For the reasons set forth below, this case is DISMISSED and a certificate of appealability is DENIED.¹

On Monday, June 11, 2012, the Victim was jogging on the Katy Trail near her home in Sedalia when she observed a man, later identified as Ronald Greer, passing her and moving in the direction of an empty parking lot. Greer walked back in the direction of the trail and sat on a nearby park bench. When the Victim passed by, Greer stood up and began jogging alongside her. Greer engaged the Victim in conversation, at one point commenting on her physical attractiveness. The Victim later testified that she became scared when Greer stated that his cousin had recently been released from prison. The Victim declined Greer's invitation to continue along the trail with him and turned around. Throughout their interaction, Greer asked the Victim questions about her daily routine, including whether she "usually come[s] out on the trail every day" and "what time [she] usually come[s] out." The Victim responded that she came to the trail every

² “[F]ederal habeas courts must make as the starting point of their analysis the state courts’ determinations of fact” *Williams v. Taylor*, 529 U.S. 362, 387 (2000). “[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.” 28 U.S.C. § 2254(e)(1). In this case, Petitioner fails to rebut any of the state court’s determination of the facts with clear and convincing evidence. Accordingly, the Court adopts without alteration the facts as set out by the Missouri Court of Appeals on the denial of post-conviction relief. Doc. 9-17 at 4-9.

day but refused to respond with an exact time. The Victim testified that Greer made her uncomfortable, so she decided to return home.

When the Victim got back to her house, she saw two neighbors and went over to tell them about her experience on the trail. She told her neighbors that "this really weird guy was talking to me, followed me, and . . . just made me feel very uncomfortable[.]" The Victim testified that she told her neighbors about her encounter with Greer "in case something happened to [her]." The Victim also told her husband about the encounter, and told other neighbors nearby.

At trial, one of the Victim's neighbors confirmed that the Victim had told him and another neighbor about her encounter with Greer on Monday, June 11, 2012. He testified that the Victim was "really upset" when she came to speak with them because "she couldn't shake him" on the trail and "she thought he was a creep."

The Victim refrained from jogging on the trail for the next two days. On Thursday, June 14, the Victim decided to resume her jogging routine. In an effort to avoid Greer, the Victim left home later in the afternoon. As she headed east on the trail, she noticed a male figure sitting on a concrete slab on the side of the trail. The person who had been sitting approached her and said, "Fancy meeting you here again." At some point, the Victim realized that the person was Greer, whom she had met on the trail three days earlier. Greer started walking beside her and chatting with her. As they approached a heavily wooded area, Greer said, "Oh, I think I hear a bike coming." When the Victim turned to look, Greer forced her to the ground and held a knife to her throat. The Victim tried screaming and fighting back but she could not stand up. Greer told the Victim to stand and follow his directions, then he forced her into a clearing in the wooded area. Greer lifted her skirt, and began touching and kissing her. Although the Victim screamed for help and attempted to resist, Greer inserted his fingers and his penis into the Victim's vagina, and forced her to perform oral sex on him. Greer slapped the Victim repeatedly in the face. He told the Victim to "[d]o what I tell you or I will kill you and your babies."

Greer ultimately left, and the Victim got dressed and ran out of the woods towards her house, screaming. She stopped when she reached a radio station near the trail. An employee of the radio station testified that the Victim entered, looking distraught and noticeably disheveled. The employee noted that the Victim had leaves and sticks in her hair and scratches on her legs. The Victim said that she had been sexually assaulted and described the assault to the employee. The employee conveyed the details to the office manager, who called the police. Police responded to the scene with medical personnel.

Police responding to the radio station observed that the Victim was "hysterical" and "very, very upset." She gave police a description, Greer's first name, and his place of employment (which he had volunteered the first day he had followed her on the trail). The police used that information to identify Greer as a suspect. Greer was not at his residence when police went there, but his girlfriend told them he could be found at Centennial Park.

In the meantime, the Victim was transported to the hospital. She complained of pain during the sexual assault exam, and was "very tender and

sore." The Victim was very anxious and crying, and appeared to have been traumatized. The Victim's appearance was disheveled and she had vegetation in her hair.

The Victim had injuries on both sides of her face, her back, legs, arms, left ankle, and in her genital area. The Victim told the examining nurse that her assailant had tried to penetrate her vagina with his penis and had used his fingers "down there." The Victim told the nurse that Greer had forced her "to swallow [during oral sex] by threatening her and her children's lives." The nurse testified that the Victim's physical condition, demeanor and reported history were consistent with a sexual assault.

When police officers approached Greer at Centennial Park, he ran, but was ultimately apprehended. Police found a folding pocket knife in the left pocket of Greer's shorts, which the Victim identified as the weapon he used during the attack. While waiting at the station house, Greer said, "I needed to be caught," that "I deserve this[,] " that he was not mad at officers because "I did it myself[,] " and that he "[c]an't be mad at you for something I done." Greer also said that before being arrested he had plans to leave town and that he was going to take a bus or train "far, far away."

After being advised of his *Miranda* rights, Greer signed a waiver form and agreed to speak with Detective Jill Green. Both a video recording and a transcript of the interview were admitted at trial (as Exhibits 25 and 25-T). Greer's counsel objected to the introduction of the transcript (Exhibit 25-T) on the basis that it violated the best evidence rule, but the court overruled counsel's objection. The video recording (Exhibit 25) was admitted without objection and played for the jury.

Detective Green testified that, in a portion of the interrogation which was not recorded, Greer said, "I just love sex, but actually, for taking it, I haven't taken it. Don't cross my mind. I mean, it does sometimes, but I just—I know better."

On the recording, when Greer was confronted with information that "we've got a girl that says you raped her tonight[,] " his response was, "Tonight?" Detective Green corrected the time frame to "this afternoon." After Greer was told that the Victim had described their first encounter, Greer denied meeting a woman on the Katy Trail on Monday, June 11, 2012. He then told Detective Green that "[y]ou're not going to get nothing out of me, so you might as well just send me to county, wherever you're sending me." Greer stated, "I could care less what [the Victim] says. . . . I'm not going to beat around the bush. . . . I don't care. . . . No sense in keeping you here." Detective Green terminated the interrogation at that point.

After the aborted interrogation, police transported Greer to a hospital so that a suspect rape kit could be performed on him. Greer told an examiner he had last had sex at 10:00 a.m. that day (the attack occurred after 3:00 p.m.). Greer allowed blood and urine samples and an oral DNA swab, but refused to allow some evidence to be collected. The examiner noted that Greer had scrapes on his shins. Greer denied that he had penetrated the Victim's vagina.

Greer's DNA was found in semen on the Victim's underwear; the DNA would occur once in 1.35 quintillion Caucasians.

On June 18, 2012, Greer's probation and parole officer interviewed him at the Pettis County jail regarding his alleged rape of the Victim. Greer did not admit that he had committed the crime, but he asked for the officer's help so that he could be sent to the Sexually Violent Predator Unit.

While Greer was being transported by a Deputy Sheriff from a local jail to the Department of Corrections on a parole violation, he got sick, and the Deputy stopped to let him use the restroom. Greer slipped out of his restraints, attacked the officer, knocked him down, and took his keys. The Deputy wrestled with Greer, and a Highway Department caretaker intervened, but together they could not restrain Greer. Greer left the restroom and escaped in the patrol vehicle with two other inmates in the back seat. The Deputy testified that he suffered injuries to his back, arms, hand, face, and head as a result of Greer's assault.

The Victim identified Greer as her attacker in a photo lineup at the hospital and at trial. Greer declined to testify at trial but his trial counsel admitted during his opening statement that Greer had a sexual encounter with the Victim near the Katy Trail that included both digital penetration and oral sex. Trial counsel portrayed the encounter as consensual.

The jury found Greer guilty of forcible rape, forcible sodomy, two counts of armed criminal action, and resisting arrest. The circuit court found Greer to be a persistent sexual offender. The court sentenced him to life imprisonment without parole for the rape and sodomy convictions, to life imprisonment on each armed criminal action conviction, and to seven years' imprisonment for resisting arrest, with the sentences to run consecutively to each other, and to any other sentences imposed on Greer.

Doc. 9-17 at 4-9 (footnotes omitted).

Petitioner's judgment and sentence were affirmed on direct appeal. Doc. 9-8. Petitioner sought post-conviction relief under Missouri Supreme Court Rule 29.15, the denial of which was affirmed on appeal. Doc. 9-17.

II. Standard

State prisoners who believe that they are incarcerated in violation of the Constitution or laws of the United States may file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Before doing so, petitioners must exhaust their state remedies. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

"[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation and citation omitted). This Court's review of the petition for habeas corpus is limited by the Antiterrorism and Effective Death Penalty Act

("/ "AEDPA"), 28 U.S.C. § 2254. *Id.* at 97. AEDPA "bars relitigation [in federal court] of any claim adjudicated on the merits in state court, subject only to the exceptions in §§ 2254(d)(1) and (2)." *Harrington*, 562 U.S. at 98. Accordingly, a state habeas petitioner is not entitled to relief unless the state court proceedings:

- (1) resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §§ 2254(d).

As to § 2254(d)(1), a state court violates the "contrary to" clause if it "applies a rule that contradicts the governing law set forth" by the Supreme Court or if the state court "confronts a set of facts that are materially indistinguishable from a decision of [the] Court and nevertheless arrives at a [different] result." *Williams v. Taylor*, 529 U.S. 362, 406 (2000). A state court violates the "unreasonable application" clause of § 2254(d)(1) if it "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407. "It is not enough for us to conclude that, in our independent judgment, we would have applied federal law differently from the state court; the state court's application must have been objectively unreasonable." *Flowers v. Norris*, 585 F.3d 413, 417 (8th Cir. 2009) (citation omitted).

As to § 2254(d)(2), "a petitioner must show that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Perry v. Kemna*, 356 F.3d 880, 889 (8th Cir. 2004) (internal quotation omitted). A state court's factual determinations are presumed correct and will stand unless the petitioner rebuts this presumption with clear and convincing contrary evidence. 28 U.S.C. § 2254(e)(1); *Grass v. Reitz*, 749 F.3d 738, 743 (8th Cir. 2014). Additionally, federal courts afford great deference to a state court's credibility findings. *Smulls v. Roper*, 535 F.3d 853, 864 (8th Cir. 2008) (en banc).

III. Analysis

Petitioner brings nine grounds.

A. Ground One: Parole Officer's Testimony

Petitioner contends that the trial court erred in allowing testimony by his parole officer that Petitioner wanted to be placed in the Sexually Violent Predator Unit with her help because Petitioner had already invoked his *Miranda* right to remain silent and the parole officer subjected Petitioner to another interrogation without renewed *Miranda* warnings. Doc. 1 at 16. Petitioner moved to suppress the parole officer's testimony, but the trial court overruled the motion on the ground that the statement had probative value. At trial, the parole officer testified that she visited Petitioner while he was in jail to question him about the rape allegation, that he did not admit the rape, but that Petitioner had asked to be sent to the SVP Unit for help. In its review, the Missouri Court of Appeals determined that Petitioner had invoked his right to remain silent with a detective and again at a hospital and that the trial court erred in admitting the evidence. The Court then examined for harmless error, as follows:

Here, the detective immediately ceased interrogation upon the defendant's request after the detective's attempt to persuade Mr. Greer to respond to the accusations was met with his callous attitude and response. The police officer who questioned Mr. Greer at the hospital at approximately 11:20 p.m., also presumably did not pose additional questions after Mr. Greer refused to speak about the case. Thereafter, the police did not again interrogate Mr. Greer. Rather, four days later, his parole officer questioned him. Contrary to Mr. Greer's assertion, nothing in the record suggests that the parole officer was working with the police when she questioned him about the case. Thus, the parole officer's interview with Mr. Greer was separate and distinct and did not constitute a third interrogation such that the parole officer's actions cannot be imputed to the police. *Contra Westover v. United States*, 384 U.S. 436, 495-96 (1966) (imputing the violation of defendant's rights by the local police to the FBI because the FBI benefited from the violation). Consequently, whether the police scrupulously honored Mr. Greer's invocation of his right to silence is irrelevant. The deciding issue is whether Mr. Greer knowingly waived his right to silence when statements were made to his parole officer.

It is undisputed that the parole officer here did not *Mirandize* Mr. Greer before questioning him. A parole officer acts with governmental authority, and, thus, must provide *Miranda* warnings before questioning a suspect that is in police custody. *See Birmingham*, 132 S.W.3d at 322-23 (citing *State v. Williams*, 486 S.W.2d 468, 474 (Mo. 1972)) (finding reversible error when the trial court admitted a confession to a parole officer because the defendant had not received *Miranda* warnings). "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 322 (internal quotation marks and citation omitted). A violation of this right only requires reversal of a

conviction when the State fails to “prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *State v. Ramirez*, 447 S.W.3d 792, 797 (Mo. App. W.D. 2014); *see also State v. Barriner*, 34 S.W.3d 139, 151-52 (Mo. banc 2000).

Mr. Greer claims that he was prejudiced because the request for the SVP Unit showed that he viewed himself as a sexually violent predator who needed help, which constituted an admission of the sexual assault charges against him. He further claims that the State used the damaging evidence for that purpose by telling the jury, in its closing argument, that Mr. Greer requested the SVP Unit because “[h]e knew that he needed that kind of help” and “knew that he was guilty of the offenses.”

In determining prejudice, we must conclude, “when considered with and balanced against all of the evidence properly admitted, there is a reasonable probability that the jury would have reached a different conclusion but for the erroneously admitted evidence.” *Barriner*, 34 S.W.3d at 150. “When evidence challenged on constitutional grounds is cumulative of other properly[]admitted evidence, the disputed evidence could not have contributed to the defendant’s conviction and is thus harmless beyond a reasonable doubt.” *Ramirez*, 447 S.W.3d at 798 (internal quotation marks and citation omitted); *see also State v. Fuente*, 871 S.W.2d 438, 444 (Mo. banc 1994) (applying the harmless error rule to affirm a conviction for the possession of marijuana because the confession, allegedly obtained in violation of the defendant’s right to remain silent, was cumulative).

As stated earlier, Mr. Greer made voluntary statements during booking that were played for the jury that could constitute admissions, including the statement that he needed to be caught. The record also shows the prosecutor reading the following statements made by Mr. Greer to the detective, without any objection: “I just love sex, but actually, for taking it, I haven’t taken it. It don’t cross my mind. I mean, it does sometimes, but I just -- I know better.” The improperly admitted statements are cumulative, which did not have a decisive effect on the jury, compared to the voluntary and properly admitted statements. Additionally, the evidence, as shown above, was significant against him. Accordingly, Mr. Greer’s first two points are denied.

Doc. 9-8 at 14-17 (footnotes omitted).

Given the record at bar, including Petitioner’s voluntary statements and the overwhelming evidence, the Court finds no error in the state court’s harmless error analysis. Specifically, the Court notes Petitioner’s statements to an officer while in the booking room when he was arrested for the charged offenses that were played for the jury that could constitute admissions (“I mean, I needed to be caught”; “But she turned me in . . . I don’t blame her”; “I knew I was going to be caught and be on the run”; “The rest of [the items] throw in the trash. I ain’t never going to need [them.]”; and “I deserve this. I’m not mad at you [detective] . . . I did it

myself.” The victim testified that Petitioner raped and sodomized her against her will by threatening to kill her while placing a knife at her throat. Witnesses testified that she appeared frantic and disheveled with twigs in her hair when she reported the rape. The physical evidence showed that the victim had bruises on her legs; scratches on her legs and arms; a scratched, sore, and red genital area, which was consistent with forced sex; and 2013 hip treatments to correct injuries that stemmed from the June 2012 incident. Petitioner’s DNA was found on the victim’s panties, and a pocketknife was in his possession at the time of arrest. *See* Doc. 9-7 at 11-12.

Thus, state court’s determinations did not result in “a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or in “a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,” *see* 28 U.S.C. §2254(d)(1) and (2). *See also Davis v. Grandlienard*, 828 F.3d 658, 666 (8th Cir. 2016) (affirming denial of relief under § 2254; Minnesota Supreme Court had provided detailed analysis explaining that any trial court error as to admissible statements under *Miranda* was harmless beyond a reasonable doubt in part because it was cumulative to other testimony).

B. Ground Two: *Doyle* violation

Petitioner alleges error in the admission of evidence of the entirety of a post-*Miranda* interview by a detective, including the part of the interview when Petitioner cut off questioning, in violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). Once again, the Missouri Court of Appeals noted that it is a violation of *Doyle* to use a defendant’s invocation of the right to silence leading to the termination of an interrogation to incriminate the defendant. Because Petitioner did not object at trial, the Missouri Court of Appeals reviewed for plain error, as follows:

Mr. Greer is correct that the law precludes the use of a defendant’s invocation of the right to silence leading to the termination of an interrogation to incriminate the defendant. *See State v. Ervin*, 398 S.W.3d 95, 100 (Mo. App. S.D. 2013). The impermissible use is known as a *Doyle* violation. *Id.* However, the law permits the State to adduce evidence showing the conclusion of an interrogation when “no inference of guilt can reasonably be drawn from [that] evidence.” *Id.* For example, it is improper to show circumstances where it demonstrates that “the defendant clammed up” under circumstances calling imperatively for an admission or denial.” *Id.* We must now carefully scrutinize the circumstances of the invocation to determine whether they improperly support a reasonable inference of guilt. *See id.*

Here, contrary to Mr. Greer’s assertion, he did not invoke after he was faced with the accusation of rape. Instead, he made two statements. The detective

informed Mr. Greer that someone had accused him of rape, to which he replied "tonight." The detective answered affirmatively and told him that the victim had described him, including the clothes that he was currently wearing. He remained silent. She then stated that he met the victim on the trail on Monday, which was immediately followed by her question, "Did you meet a girl on Monday?" He then replied, "Not that I know of." After she said, "OK," and began another question, he invoked. These circumstances show that Mr. Greer clammed up after that question, which was incriminating because the identity of the rapist was premised on the allegation that the rapist had encountered the victim earlier during the week on the trail. Showing the invocation was thus improper because they supported an inference of guilt. *See State v. Dexter*, 954 S.W.2d 332, 338 (Mo. banc 1997) (finding a *Doyle* violation because the detective's testimony described the defendant invoking his right to an attorney after he had summed up the incriminating evidence against the defendant and told him that he did not believe his statements).

We now determine whether Mr. Greer was prejudiced by the *Doyle* violation. *See Ervin*, 398 S.W.3d at 101. We must look at the entire record to determine whether the admission of the invocation had a decisive effect on the jury. *Dexter*, 954 S.W.2d at 340. In doing so, we employ a four-factor test: "(1) whether the government made repeated *Doyle* violations; (2) whether the trial court made any curative effort; (3) whether the defendant's exculpatory evidence is transparently frivolous; and (4) whether the other evidence of the defendant's guilt is otherwise overwhelming." *Id.*

Here, there were no repeated *Doyle* violations. Mr. Greer references the prosecutor's closing argument that Mr. Greer did not provide an innocent man's response to indicate another *Doyle* violation. The prosecutor may comment on a defendant's statements or silence in response to questions that were posed after a waiver and before the invocation revoking that waiver. *Ervin*, 398 S.W.3d at 100. Mr. Greer's statement, "tonight," was made before he invoked. Thus, it was not post-*Miranda* silence, and the prosecutor's comment on it was thereby not a *Doyle* violation. Mr. Greer also references testimony by officers about refusing to talk at the hospital; clearly, defense counsel, and not the prosecutor, adduced their mention of Mr. Greer's refusal to talk.

Nor were there any curative efforts for the only *Doyle* violation because no objection was raised. However, "the necessity for a curative effort by the trial court was less crucial" because there was only one *Doyle* violation. *State v. Jones*, 7 S.W.3d 413, 418 (Mo. App. E.D. 1999).

Doc. 9-8 at 10-12 (footnote omitted).

Respondent correctly notes that under Eighth Circuit precedent, review for plain error in the state court is a procedural bar to habeas review. *Clark v. Bertsch*, 780 F.3d 873 (8th Cir. 2015) (determining that a state court's discretionary plain-error review of [a petitioner's] unpreserved claim cannot excuse his procedural default."). As noted above, a petitioner must

exhaust state remedies. In other words, to avoid procedurally defaulting on a claim, a federal habeas petitioner must have first fairly presented the substance of the claim to the state courts to afford the state courts a fair opportunity to apply controlling legal principles to the facts pertinent to the claim. *Wemark v. Iowa*, 322 F.3d 1018, 1020–21 (8th Cir. 2003) (citation omitted); *see also Baldwin v. Reese*, 541 U.S. 27, 29 (2004). A claim has been fairly presented when a petitioner has properly raised the same factual grounds and legal theories in the state courts that he is attempting to raise in his federal petition. *Wemark*, 322 F.3d at 1021 (internal quotation marks and citations omitted). Claims that have not been fairly presented to the state courts are procedurally defaulted. *Id.* at 1022 (quoting *Gray v. Netherland*, 518 U.S. 152, 161–62 (1996)); *Smith v. Goose*, 998 F.2d 1439, 1441 (8th Cir. 1993) (citation omitted) (holding that failure to comply with state procedural requirements “serves as an adequate and independent state procedural bar to review.”).

A federal court may not review procedurally defaulted claims “unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750. To demonstrate cause, a petitioner must show that “some objective factor external to the defense impeded [the petitioner’s] efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 491 (1986). To establish prejudice, a petitioner must demonstrate that the claimed errors “worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982); *Ivy v. Caspari*, 173 F.3d 1176 (8th Cir. 1999) (noting standard in plea context). Lastly, in order to assert the fundamental miscarriage of justice exception, a petitioner must “present new evidence that affirmatively demonstrates that he is innocent of the crime for which he was convicted.” *Murphy v. King*, 652 F.3d 845, 850 (8th Cir. 2011) (quoting *Abdi v. Hatch*, 450 F.3d 334, 338 (8th Cir. 2006)).

Here, Petitioner has not shown good cause and actual prejudice to overcome his default, nor has he established a fundamental miscarriage of justice. *Ex gratia*, the Court determines that in light of the overwhelming evidence of guilt, any error was harmless. *See Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993) (holding that the harmless-error standard applies to an alleged *Doyle* violation in context of § 2254).

C. Ground Three: Evidence of Attempted Escape

Petitioner alleges error in the admission of three photographs showing injuries sustained by the deputy when Petitioner attempted to escape custody during transport. The Missouri Court of Appeals examined the claim and found it without merit, as follows:

At trial, the officer testified that Mr. Greer escaped from custody in August 2012, when he was transporting him to another facility. The officer stated that he pulled into a rest stop and took Mr. Greer to the restroom. To his surprise, Mr. Greer then slipped out of his restraints, attacked him, and took his keys from his person, despite the officer and the rest-stop guard wrestling to restrain him. Mr. Greer then drove off, leaving the officer at the rest stop. The State then asked the officer to identify the injuries that Mr. Greer inflicted upon him, to which he complied. Finally, the State proffered photographs of the injuries, to which Mr. Greer objected. Mr. Greer claimed that, while the testimony may be appropriate, the pictures were prejudicial. The court ruled that the photographs were proof of the facts and overruled it. The pictures were entered into evidence and published to the jury. During closing arguments, the State asked the jury to remember the officer's injuries.

"Photographs are admissible if they accurately and fairly represent what they purport to depict and tend to prove or disprove any elements of the charged offense." *Jaco*, 156 S.W.3d at 778. "They must show relevant facts that will aid the jury." *Id.* "If a photograph is relevant, it should not be excluded because it may be inflammatory, unless the situation is so unusual that the extent of the prejudice overrides the photograph's probative value." *State v. Murray*, 744 S.W.2d 762, 772 (Mo. banc 1988). A relevant photograph should not be excluded because testimony has described the matters shown therein. *Id.* "[We] will reverse only if the [erroneous admission of the photograph] was so prejudicial that it deprived [Mr. Greer] of a fair trial." *See State v. Stevenson*, 852 S.W.2d 858, 863 (Mo. App. S.D. 1993).

The photographs here did not tend to prove or disprove any elements of the charged offense. Although the photographs were inflammatory and served no aid to the jury in understanding Mr. Greer's escape, they depicted the severity of the injuries that the officer named. Because those photographs lacked any probative value to the charged offenses, their prejudicial effect outweighed any probative value. The trial court thus abused its discretion in admitting them.

However, we cannot say that the admission of the photographs was prejudicial error in light of the testimony naming the injuries without an objection. Generally, photographs will not inflame the minds of the jury any more than the uncontroverted testimony of a defendant's acts. *See State v. Jackson*, 499 S.W.2d 467, 472 (Mo. 1973). We thus conclude that the admission of the photographs of the injuries had no more of a decisive effect on the jury than the testimony naming them. Mr. Greer's fourth point is denied.

Doc. 9-8 at 20-23 (footnote omitted).

As noted above, federal habeas actions are allowed “only on the grounds that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). “[F]ederal courts are limited to deciding whether a state conviction violated the federal Constitution or laws.” *Schleeper v. Goose*, 36 F.3d 735, 737 (8th Cir. 1994) (citation omitted). “A federal court may not re-examine a state court’s interpretation of and application of state law.” *Id.*; see also *Carter v. Armontrout*, 929 F.2d 1294, 1296 (8th Cir. 1991) (claims that do not reach constitutional magnitude cannot be addressed in a petition for habeas corpus). Further, a federal court will reverse a state-court evidentiary ruling “only if the petitioner shows that the alleged improprieties were so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair.” *Anderson v. Goeke*, 44 F.3d 675, 679 (8th Cir. 1995). To meet that burden, a petitioner must show that absent the alleged impropriety, the verdict probably would have been different. *Id.* Factors include the frequency and pervasiveness of the alleged misconduct in the context of the entire trial and the weight of the evidence supporting guilt. *Id.*

After review, the Court finds that Petitioner’s broad claims here fail to allege facts that meet the high burden required to receive federal habeas review on a state-court evidentiary ruling. See *United States v. Hester*, 140 F.3d 753, 759 (8th Cir. 1998) (noting the “admissibility of photographs is left to the sound discretion of the trial court and will not be overturned except for a clear abuse of discretion”) (citation omitted). Further, as set out above, based on the record, Petitioner cannot show that absent any error, the verdict probably would be different. Ground Three is denied. *Id.*

D. Ground Four: Ineffective assistance of counsel as to *Doyle*

Petitioner next challenges that the state court’s decision that trial counsel was not ineffective for failing to object to evidence that included the end of an interview by a detective in which Petitioner cut off questioning in violation of *Doyle*. Doc. 1 at 27.

To prevail on a claim of ineffective assistance of counsel, a habeas petitioner must show that: (1) “counsel’s representation fell below an objective standard of reasonableness”; and (2) “the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 688 (1984). “The first prong requires a showing ‘that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” *White v. Dingle*, 757 F.3d 750, 752 (8th Cir. 2014) (quoting *Strickland*, 466 U.S.

at 687). “The second prong requires a showing that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* at 753 (quoting *Strickland*, 466 U.S. at 694).

“[W]hen reviewing an ineffective-assistance-of-counsel claim, ‘a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *Woods v. Donald*, 135 S.Ct. 1372, 1375 (2015) (quoting *Strickland*, 466 U.S. at 689). “Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult.” *Harrington v. Richter*, 562 U.S. 86, 105 (2011). “The standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.” *Id.* (internal citations omitted). To grant relief under § 2254, this Court must conclude that the state court unreasonably applied the *Strickland* test or that, in reaching its conclusion regarding the performance of Petitioner’s attorney, it made unreasonable factual conclusions. *Gabaree v. Steele*, 792 F.3d 991, 996 (8th Cir. 2015) (citing *Harrington*, 562 U.S. at 131 (additional citation omitted)).

Here, the Missouri Court of Appeals noted the *Strickland* standard and analyzed the claim as follows:

On direct appeal we found that the admission of Greer’s invocation of his right to remain silent constituted a *Doyle* violation. We assume, without deciding, that counsel’s failure to object to the admission of Greer’s invocation constituted deficient performance under the *Strickland* standard. *See Strickland*, 466 U.S. at 687–91 (setting forth the performance prong of the two-step ineffectiveness inquiry). Even assuming that counsel performed deficiently by failing to object to the introduction of Greer’s invocation, however, Greer cannot show that he was prejudiced by counsel’s performance. “[W]here there is overwhelming evidence of guilt, a movant fails to establish *Strickland* prejudice.” *Butler v. State*, 557 S.W.3d 427, 437 (Mo. App. W.D. 2018); *accord McKee v. State*, 540 S.W.3d 451, 457 (Mo. App. W.D. 2018) (citing *Taylor v. State*, 382 S.W.3d 78, 82 (Mo. banc 2012)). While we applied a somewhat different prejudice standard in Greer’s direct appeal, our discussion as to why Greer did not suffer a manifest injustice due to the *Doyle* violation also establishes that there was no reasonable probability of a different outcome if the *Doyle* violation had not occurred.

Mr. Greer made voluntary statements to an officer while in the booking room when he was arrested for the charged offenses that were played for the jury that could constitute admissions. He stated, “I mean, I needed to be caught”; “But she turned me in . . . I don’t blame her”; “I knew I was going to be caught and be on the run”; “The rest of [the items] throw in the trash. I ain’t never going

to need [them.]"; and "I deserve this. I'm not mad at you [detective] . . . I did it myself." The victim testified that he raped and sodomized her against her will by threatening to kill her while placing a knife at her throat. Witnesses testified that she appeared frantic and disheveled with twigs in her hair when she reported the rape. Additionally, the physical evidence showed that the victim had bruises on her legs; scratches on her legs and arms; a scratched, sore, and red genital area, which was consistent with forced sex; and 2013 hip treatments to correct injuries that stemmed from the June 2012 incident. Moreover, Mr. Greer's DNA was found on the victim's panties, and a pocketknife was in his possession at the time of arrest. Clearly, this case involved far more evidence than merely the conflicting accounts of Mr. Greer and the victim.

Mr. Greer's consent defense was weak because his conduct after the incident—resisting arrest, planning to leave Missouri before he was arrested, and escaping custody after his arrest—indicates that he was guilty. *See [State v.] O'Neal*, 392 S.W.3d [556,] 572 [(Mo. App. W.D. 2013)]; *see also State v. Williams*, 97 S.W.3d 462, 469 (Mo. banc 2003). Additionally, Mr. Greer's statement to the detective that he visited the trail earlier that day excluded the location of the incident, although his defense, the victim, and a jogger told the jury that he had been on the trail in the afternoon. *See O'Neal*, 392 S.W.3d at 572 (stating that exculpatory statements proven to be false manifest a consciousness of guilt). Moreover, he told the nurse that the last time he had consensual sex was that morning, but the incident had occurred in the afternoon. Accordingly, we cannot say that the admission of the invocation had a decisive effect on the jury.

Greer I, No. WD76945, Mem. Op. at 11-12.

In addition to the evidence discussed in Greer's direct appeal, his claim of a consensual sexual encounter is also disproven by the fact that the Victim had reported her concerns about Greer to multiple people before the sexual assault ever occurred.

Given the physical evidence, the Victim's behavior before and after the attack, the Victim's severe injuries, and Greer's own incriminating statements and actions, his claim of a consensual sexual encounter at trial was highly implausible, and stood little or no chance of success. There is no basis on this record to find a reasonable probability of a different outcome if the circuit court had excluded the brief exchange during Greer's interrogation in which he invoked his right to remain silent.

Doc. 9-17 at 11-12.

Once again, given the record and thorough *Strickland*-based analysis, the state court's determinations did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1) and (2). This Court agrees there is no prejudice under *Strickland*. Ground Four is denied.

E. Ground Five: Ineffective assistance of counsel as to statutory privilege

Petitioner next claims his trial counsel was ineffective for failing to object to the testimony of the parole officer that Petitioner had asked to go to the Sexually Violent Predator Unit on the ground that these statements were privileged under Missouri Revised Statute § 559.125.2. That statute states in part that "[i]nformation and data obtained by a probation or parole officer shall be privileged information and shall not be receivable in any court."

The Missouri Court of Appeals examined this claim on post-conviction review and found that there was no *Strickland* prejudice, and noted that on direct appeal that the appellate court had found the claim was without merit because the evidence was harmless beyond a reasonable doubt. See *supra* Section IIIA. This decision is consistent with a reasonable application of *Strickland*. In light of the overwhelming evidence of guilt, there is no reasonable probability the outcome of the trial was changed by this testimony.

F. Ground Six: Ineffective assistance of counsel concerning officer's injuries

Petitioner next claims trial counsel was ineffective for not objecting to evidence of injuries he received when Petitioner escaped his custody during transport.

The Court of Appeals determined that counsel acted reasonably because the evidence was admissible as its admission had been litigated in a motion *in limine*. More specifically, the Court of Appeals determined that the injuries Petitioner inflicted during his escape were relevant to show consciousness of guilt, and there was no *Strickland* prejudice in light of the overwhelming evidence of guilt. Doc. 9-17 at 12-16.

Once again, given the record and thorough *Strickland*-based analysis, the state court's determinations did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1) and

(2). Ground Six is denied.

G. Ground Seven: Petitioner's statements while *Mirandized*

Petitioner next contends counsel should have objected to the admission of statements Petitioner made to detectives after he had been arrested and transported to the police station and handcuffed to a bench. Doc. 1 at 37. Petitioner contends these statements were obtained in violation of *Miranda* and that the admission of the statements violated his right to effective assistance of counsel, a fair trial, and due process, in violation of the Fifth, Sixth, and Fourteenth Amendments. Doc. 1 at 36.

Petitioner concedes this claim is procedurally defaulted. As noted above, this Court may not review procedurally defaulted claims “unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman*, 501 U.S. at 750

Here, Petitioner contends he is entitled to review through *Martinez v. Ryan*, in which the Supreme Court recognized a “narrow exception” to *Coleman* by holding that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” 132 S.Ct. 1309, 1315 (2012). The primary concern in *Martinez* “is the prisoner’s potential inability—caused by ineffective counsel or a complete lack of counsel altogether—to present the merits of his ineffective assistance claim to some court with the authority to decide the matter.” *Franklin v. Hawley*, 879 F.3d 307, 312 (8th Cir. 2018).

As to Petitioner’s claim that trial counsel was ineffective for failing to object to the admission of certain statements, the Court notes that to establish “cause” to overcome procedural default under *Martinez*, a petitioner must show: (1) the underlying ineffective assistance of trial counsel claim is “substantial,” (2) the “cause” consisted of there being no counsel or ineffective counsel during the post-conviction relief proceeding, (3) the state post-conviction relief proceeding was the initial review proceeding, and (4) state law required (or forced as a practical matter) the petitioner to bring the claim in the initial review collateral proceeding. *Trevino v. Thaler*, 133 S. Ct. 1911, 1918 (2013).

Here, there is no dispute as to the third and fourth elements, because Missouri does not permit a petitioner to bring an ineffective assistance of counsel claim on direct appeal. *Martinez*,

132 S.Ct. at 1313. Rather, Missouri law requires a petitioner to bring such a claim in a collateral review proceeding. *Id.* *Martinez* thus may provide a path for Petitioner to demonstrate cause if he can show the first two *Martinez* elements: (1) that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, and (2) that his post-conviction relief counsel was ineffective under *Strickland*.

As to substantiality, “a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotation marks and alterations omitted). Stated another way, a claim is “insubstantial” if “it does not have any merit or . . . is wholly without factual support.” *Martinez*, 132 S.Ct. at 1319.

Here, Petitioner fails to establish that his claim of ineffectiveness based on counsel’s failure to object to statements he made when he was not *Mirandized* is substantial. The record Petitioner provides does not include context as to the statements (Doc. 1-1 at 76-), but as best as can be discerned, the statements to which Petitioner refers appear to be mostly spontaneous comments he made to an officer in a waiting area, not in response to any questions about the case, that were recorded by a camera in the area.

Further, Petitioner fails to establish that post-conviction relief counsel was ineffective under *Strickland* and thus has failed to establish “cause” to excuse his procedural default. Specifically, in light of the overwhelming evidence of guilt, Plaintiff cannot establish prejudice. *See Chavez v. Weber*, 497 F.3d 796, 805 (8th Cir. 2007) (holding that “The admission of statements obtained in violation of *Miranda* may constitute harmless error where there remains overwhelming independent evidence as to the defendant’s guilt.”).

Petitioner fails also to show that a fundamental miscarriage of justice will result if his defaulted claim is not considered. *See Murphy*, 652 F.3d at 850 (a petitioner must present new evidence that affirmatively demonstrates that he is actually innocent of the crime for which he was convicted in order to fit within the fundamental miscarriage of justice exception). As a result, this ground is procedurally defaulted. Ground Seven is denied.

H. Ground Eight: Ineffective assistance of counsel concerning potential witness

Petitioner next contends that counsel was ineffective for not calling Petitioner’s niece to provide an explanation of why Petitioner had a bus ticket to Florida after the crime.

Petitioner concedes this claim is procedurally defaulted. Petitioner's counsel raised this claim in the amended post-conviction relief motion, and the post-conviction review court rejected the claim after an evidentiary hearing. The motion court found counsel was aware of the niece, but did not think her testimony would be helpful; the motion court further found and that at the time of trial her whereabouts were unknown and she could not have been subpoenaed or called. Doc. 9-13 at 9. Post-conviction appellate did not to pursue the claim in the appeal of the denial of post-conviction relief. Doc. 9-12. The claim was rejected in a merits decision, then defaulted in the appeal of the denial of post-conviction relief.

Again, the Court finds that Petitioner has not shown good cause and actual prejudice to overcome his default, nor has he established a fundamental miscarriage of justice. *Ex gratia*, the Court determines that in light of the overwhelming evidence of guilt, any error was harmless. *See Sanders v. Trickey*, 875 F.2d 205, 210 (8th Cir. 1989) (holding that "Since appellant offers only speculation that he was prejudiced by the failure of his counsel to interview [a witness], he has not made the required showing of prejudice under *Strickland*."). Ground Eight is denied.³

J. Ground Nine: Ineffective assistance of counsel due to public defender system

In Ground Nine, Petitioner appears to allege that his counsel at every critical stage of his case was ineffective because Missouri public defenders are by their nature ineffective. That claim is procedurally barred. Further, this ground does not raise a cognizable claim of a constitutional violation. *See Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012) (rejecting claim of system failure of Missouri public defender system). A claim of ineffective assistance of counsel must be based on a specific act or omission outside the wide range of professional competence that standing on its own created a reasonable probability the outcome of the proceeding was changed. *See Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006) (rejecting attempt to group ineffectiveness claims, finding alleged errors that are not constitutional violations individually cannot be grouped to create a cumulative violation, and each claimed error must stand or fall on its own individual merits); *Cole v. Roper*, 623 F.3d 1183, 1196 (8th Cir. 2010). That kind of cognizable individual claim is not what Petitioner alleges here.

³ To the extent Petitioner contends his counsel was ineffective for failing to appeal an issue raised but denied in the motion court, this claim is defaulted and not cognizable under *Martinez*. That is because Petitioner has no constitutional right to effective legal assistance on appeal. In *Dansby v. Hobbs*, the Eighth Circuit explicitly "decline[d] to extend *Martinez* to claims alleging ineffective assistance of counsel on direct appeal." 766 F.3d 809, 833-34 (8th Cir. 2014).

Further, this claim is procedurally barred because Petitioner did not present it to the Missouri courts.⁴ Again, the Court finds that Petitioner has not shown good cause and actual prejudice to overcome his default, nor has he established a fundamental miscarriage of justice. Ground Nine is denied.

VI. Certificate of Appealability

Under 28 U.S.C. § 2253(c), the Court may issue a certificate of appealability only “where a petitioner has made a substantial showing of the denial of a constitutional right.” To satisfy this standard, Petitioner must show that “reasonable jurists” would find the district court ruling on the constitutional claim(s) “debatable or wrong.” *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability will be denied.

VII. Conclusion

For the foregoing reasons, Petitioner’s petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DENIED, a certificate appealability is DENIED, and this case is DISMISSED.

IT IS SO ORDERED.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY, JUDGE
UNITED STATES DISTRICT COURT

DATED: February 18, 2020

⁴ Further, to the extent Petitioner argues he could not have uncovered the facts until after the proceedings were closed, he has not met his heightened pleading standards in that regard. To comply with Rule 2(c) of the Rules Governing Section 2254 Proceedings, Petitioner must state specific, particularized facts that entitle him to relief for each ground specified. *Adams v. Armontrout*, 897 F.2d 332, 333-34 (8th Cir. 1990) (holding that “to substantially comply with the Section 2254 Rule 2(c), a petitioner must state specific, particularized facts which entitle him or her to habeas corpus relief for each ground specified.” The petitioner’s “facts must consist of sufficient detail to enable the court to determine, from the face of the petition alone, whether the petition merits further habeas corpus review.”). Petitioner did not allege specific facts concerning an actual conflict of interest, nor did he provide citations to the record.