UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

MICHAEL A. FARRELL,

Petitioner,

v.

Case Nos. 18-C-1581
and 16-C-934

REED RICHARDSON,

Respondent.

SCREENING ORDER

Petitioner Michael A. Farrell, who is currently serving a state sentence for three counts of repeated sexual assault of a child in violation of Wisconsin Statute § 948.025 and one count of exposing a child to harmful materials in violation of Wisconsin Statute § 948.11, filed a third petition for federal relief under 28 U.S.C. § 2254 on October 9, 2018. The judgment of conviction was entered on March 21, 2012, and was based on a Milwaukee County jury's guilty verdict on all four counts. Farrell filed his first petition for federal relief on September 24, 2015. Case No. 15-C-1154. That petition was dismissed without prejudice at Farrell's request so that he could exhaust his state court remedies as to several claims he sought to raise in this court. On July 18, 2016, Farrell filed a second petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in Case No. 16-C-934. Along with this petition, Farrell filed a motion to stay and administratively close the case pending exhaustion of state court remedies on three of his six claims. Given the relatively short time left on the one-year limitations period, the court granted Farrell's motion, stayed his petition, and administratively closed the case on August 2, 2016. Farrell then proceeded to exhaust his state court

Appendix A

remedies. Farrell has now filed a new petition which has been assigned Case No. 18-C-1581. Because it challenges the same conviction, and so as not to lose the earlier filing date, I have elected to treat the new petition as an amended petition in Case No. 16-C-934. Accordingly, the stay in that case is lifted and the clerk is directed to file the new petition in Case No. 18-C-1581 as an amended petition in Case No. 16-C-934.

I must give the case prompt initial consideration pursuant to Rule 4 of the Rules Governing § 2254 Cases, which reads:

> If it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner. If the petition is not dismissed, the judge must order the respondent to file an answer, motion, or other response within a fixed time . . . .

Rule 4, Rules Governing § 2254 Cases. During my initial review of habeas petitions, I look to see whether the petitioner has set forth cognizable constitutional or federal law claims and exhausted available state remedies.

Farrell's amended petition asserts several claims for federal relief. He first claims that his trial attorney provided ineffective assistance of counsel in violation of the Sixth Amendment by failing to cross-examine Dr. Kelly Hodges, the state's expert witness who was asked on direct examination about the absence of any physical evidence of the assaults alleged, and failing to call a defense expert. Ineffective assistance of counsel requires, first, a showing that counsel's performance was deficient. This means that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, the petitioner must show that "the deficient performance prejudiced the defense." *Id.*

Dr. Hodges testified that the vast majority of child victims of sexual assault had normal physical examinations because most did not immediately report the assault and the mucus membranes in the affected areas heal quickly. Case No. 18-C-1581, ECF No. 2-1 at 3, 5. The last assault to the alleged victim in Farrell's case occurred nine to ten months before it was reported. Farrell's trial counsel elected not to ask Dr. Hodges any questions. When asked at a hearing on Farrell's motion for post conviction relief why he chose not to cross-examine Dr. Hodges, counsel testified that he did not think cross-examining the doctor would be beneficial. Counsel testified that he thought she would be hostile to his cross-examination and that her credentials were unassailable. Dr. Hodges had explained why the absence of physical injuries was not surprising and counsel thought that her reasons were well supported by the record.

In addition, however, counsel offered as a reason for not cross examining Dr. Hodges his intent to cross-examine the examining nurse about those issues. He testified that he planned to cover it with the examining nurse because he believed she would not be as well prepared. In fact, it appears counsel testified that he did cross-examine the examining nurse and had reviewed that testimony with the jury in his closing. The problem with counsel's explanation is that the examining nurse did not testify at the trial. Only the child, her mother, a detective, Dr. Hodges, and the officer involved in locating Farrell testified. *Id.* at 17–18.

In addition to Farrell's trial counsel, nurse practitioner and professor Maureen Van Dinter testified about child sexual assaults. Although Van Dinter agreed with Dr. Hodges that most child sexual assault victims have normal physical examinations, she thought that in this case, there should have been observable injury. *Id.* at 4–7. As recounted by the Wisconsin Court of Appeals, Van Dinter testified that, "given the facts of this case, it would not be accurate to say there would be no

sign of an injury; instead, 'an accurate statement would be that in some situations – and the research definitely supports this – that you may see evidence of repeated trauma, particularly in the three to nine o'clock position, and that a careful examination would show that evidence.'" *Id.* at 7.

I am unable to determine from only the face of the petition and attached exhibits that Farrell is not entitled to relief on this basis. The court of appeals found that he had not established a claim for ineffective assistance of counsel because Dr. Hodges' testimony was reasonable and Van Dinter was assuming full penetration of Farrell's penis into the child's vagina, an assumption the trial court found unwarranted. Without a more complete view of the record, I am unable to say whether the state court's decision was either contrary to or an unreasonable application of clearly established federal law, or an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). The claim for ineffective assistance of counsel for failing to cross-examine the state's expert and/or call a defense expert will therefore proceed.

Farrell also asserts a claim that his trial counsel committed perjury in a *Machner* hearing when, in explaining why he chose not to cross-examine Dr. Hodges, he stated that he decided instead to cover the issues concerning the absence of physical injury with the examining nurse. As noted above, the examining nurse never testified at trial. Farrell claims the assistant district attorney representing the state at the post conviction hearing compounded his trial attorney's errors by submitting "perjured proposed findings of fact and conclusions of law" that the judge later adopted.

Neither of these claims warrants further consideration. Counsel's erroneous testimony at the hearing on Farrell's post conviction motion, whether intentionally false or not, was clear from the record and had no impact on the state court decisions denying his motion. The claim that counsel's performance was constitutionally deficient will stand or fall on its own, regardless of his erroneous

testimony. And the claim that the assistant district attorney submitted perjured proposed findings of fact has no basis in the record. Farrell may disagree with the proposed findings, but that doesn't make them perjured. In any event, the court is responsible for its own findings of fact and conclusions of law. These claims will therefore be dismissed.

Farrell next challenges trial counsel's failure to offer argument in support of his motion to dismiss at the close of the state's case and the sufficiency of the evidence. Obviously, if the evidence was sufficient to support the jury's verdict, the first ground fails. As a result, the claim that counsel was ineffective in failing to offer argument is subsumed in the claim that the evidence was constitutionally insufficient. Insufficiency of the evidence can state a constitutional claim. *Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (holding that "applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt"). As to this claim, too, I am unable to determine from the face of the petition and the attachments that Farrell is not entitled to relief. While it appears from the state court decisions attached to the petition that the state presented evidence from the child that Farrell sexually assaulted her and showed her a pornographic video, Farrell suggests that the child's testimony was patently incredible given the absence of physical evidence that he suggests should have been available to corroborate it if it was true. Without a more complete record, I am unable to assess this claim.

Farrell next claims that his attorney was ineffective in allowing the court to rely on inaccurate information in sentencing him. More specifically, he claims that the judge relied upon the victim's mother's testimony that when she telephoned to confront him about what he had done, he made a statement to the effect that he was "partying" or "whooping it up before I spend the rest of my life

in jail." Farrell contends that in fact, police reports show the statement to be that he intended to get drunk one last time "before he went to jail for something he didn't do." He contends his attorney was ineffective in failing to bring this to the attention of the sentencing court. He also contends the judge misstated the length of time over which the abuse allegedly occurred.

As a general rule, a criminal defendant has the due process right to be sentenced on the basis of accurate information. *United States v. Tucker*, 404 U.S. 443, 447 (1972). "But not all inaccuracies deprive a defendant of due process; the incorrect information must be 'materially untrue.'" *Promotor v. Pollard*, 628 F.3d 878, 888 (7th Cir. 2010) (quoting *Townsend v. Burke*, 334 U.S. 736, 741 (1948)). I am unable to determine from just the petition and its attachments whether either statement was untrue and material. Accordingly, this claim will also go forward.

Next, Farrell claims his attorney was ineffective in failing to interview and call the state crime lab technicians who gathered evidence and tested it for the presence of DNA. Farrell argues that the fact that DNA evidence was apparently not found on some of the items taken by the technicians shows the victim's testimony was not credible. He claims his attorney was ineffective in failing to call these witnesses so they could explain the significance of their findings. Here, again, I am unable to conclude that Farrell is not entitled to relief as to this claim from my review of only the petition and its attachments. Accordingly, this claim will also proceed.

Farrell claims that his post conviction counsel was also ineffective to the extent he failed to raise these issues on direct appeal and in his post conviction motion. To the extent post conviction counsel failed to do so, Farrell can proceed on this claim as well. Farrell's claim that the Court of Appeals' decision constitutes a manifest injustice will not proceed, however, since this is simply a composite of his other claims.

In sum, Farrell may proceed on his claims of ineffective assistance of counsel involving (1) his trial counsel's failure to cross-examine the state's expert and/or call a defense expert; (2) trial counsel's failure to challenge inaccurate information relied upon by the sentencing court; (3) trial counsel's failure to call DNA technicians to address the significance of the absence of DNA evidence on the items tested; (4) trial counsel's failure to challenge the sufficiency of the evidence; and (5) post conviction counsel's failure to raise one or more of such issues on appeal or in a post conviction motion. All other claims are dismissed. Counsel for respondent remains free to seek dismissal of the surviving claims on grounds of exhaustion, procedural default, and on any other basis as counsel believes honestly supportable.

IT IS THEREFORE ORDERED that within 60 days of the date of this order Respondent shall either file an appropriate motion seeking dismissal or answer the petition, complying with Rule 5 of the Rules Governing § 2254 Cases, and showing cause, if any, why the writ should not issue.

IT IS FURTHER ORDERED that Petitioner shall have 45 days following the filing of Respondent's answer within which to file a reply and/or supplement the memorandum he filed in conjunction with his petition. Respondent shall have 45 days thereafter, or 90 days from the filing of his answer, whichever is greater, within which to file a brief in opposition; and Petitioner shall have 30 days following the filing of Respondent's opposition brief within which to file a reply brief, if any. If Respondent files a dispositive motion in lieu of an answer, this briefing schedule will be suspended and the briefing schedule will instead be as follows: (1) Petitioner shall have 30 days following the filing of Respondent's dispositive motion and supporting initial brief within which to file a brief in opposition; and (2) Respondent shall have 15 days following the filing of Petitioner's opposition brief within which to file a reply brief, if any.

IT IS FURTHER ORDERED that the plaintiff shall submit all correspondence and legal material to:

Honorable William C. Griesbach
c/o Office of the Clerk
United States District Court
Eastern District of Wisconsin
125 S. Jefferson Street, Suite 102
Green Bay, WI 54301

PLEASE DO NOT MAIL ANYTHING DIRECTLY TO THE COURT'S CHAMBERS. It will only delay the processing of the matter.

Because Petitioner's filings will be electronically scanned and entered on the docket upon receipt by the clerk, Petitioner need not mail to counsel for the Respondent copies of documents sent to the court.

Pursuant to Rule 4 of the Rules Governing § 2254 Cases, as well as a Memorandum of Understanding entered into between the Wisconsin Department of Justice and the U.S. District Clerk of Court for the Eastern District of Wisconsin, copies of the petition and this order have been sent via a Notice of Electronic Filing (NEF) to the State of Wisconsin Respondent through the Attorney General for the State of Wisconsin through the Criminal Appeals Unit Director and lead secretary. The Department of Justice will inform the court within 21 days from the date of the NEF of the names of the respondents on whose behalf the Department will not accept service of process, the reason for not accepting service for them, and the last known address of the respondent. The Department of Justice will provide the pleadings to those respondents on whose behalf they have agreed to accept service of process.

Finally, the stay previously entered in Case No. 16-C-934 is hereby lifted and the Clerk is

directed to file the new petition in Case No. 18-C-1581 as an amended petition in Case No. 16-C-934. Case No. 18-C-1581 may be closed, and all further filings shall be in Case No. 16-C-934.

Dated this 29th day of October, 2018.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court

STATE OF WISCONSIN | CIRCUIT COURT Branch 38 | MILWAUKEE COUNTY

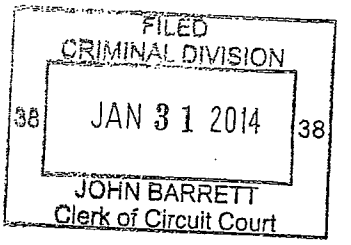
STATE OF WISCONSIN,

Plaintiff,

vs.

MICHAEL FARRELL,

Defendant.



Case No. 11CF004621

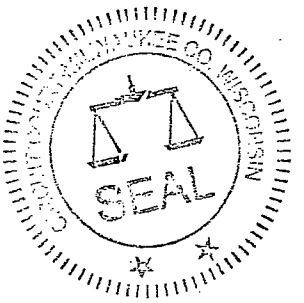
DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On November 11, 2013 and November 25, 2013, this court held an evidentiary hearing on defendant's postconviction motion which was filed on March 6, 2013 and briefed by the parties. The parties have submitted their findings of fact and conclusions of law, which the court has reviewed. Based on an examination of the record, the evidentiary hearing transcripts, and the findings of fact that were submitted, the court adopts the State's proposed findings of fact and conclusions of law as its decision in this matter.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is **DENIED.**

Dated this 31st day of January, 2014, at Milwaukee, Wisconsin.

BY THE COURT:



Jeffrey A. Wagner
Circuit Court Judge

B(1)

B

STATE OF WISCONSIN | CIRCUIT COURT CRIMINAL DIVISION | MILWAUKEE COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case No. 2011CF4621

MICHAEL FARRELL,

Defendant.

STATE'S PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW ON DEFENDANT'S MOTION FOR POST CONVICTION RELIEF

INTRODUCTION

The State of Wisconsin, by Assistant District Attorney Sara Beth Lewis, respectfully submits the following proposed findings of fact and conclusions of law it asks this court to reach in support of a decision and order denying the Defendant's motion for post-conviction relief for claimed ineffective assistance of counsel at trial of this matter.

ISSUES BEFORE THE COURT

The Defendant's Motion for Post-Conviction Relief sets forth two separate grounds for post conviction relief, each premised on a claim of ineffective assistance of trial counsel:

I. **Issue #1:** Trial counsel was ineffective when it failed to cross examine Dr. Kelly Hodges, who had performed a sexual assault examination on the child victim in this matter, Victoria Dawson, and who testified at some length about the fact that "normal" examinations are common among the great majority of children reporting childhood sexual abuse and provided numerous reasons why this is the case. In addition to contending that trial counsel's lack of cross examination was ineffective assistance the defendant goes on to take the position that not only should trial counsel have conducted

cross examination of Dr. Hodges but also should have looked into calling it's own "expert" to rebut Dr. Hodges testimony about circumstances under which normal exams might be expected.

II. **Issue #2:** Trial counsel was ineffective because trial counsel essentially forced or bullied the defendant into waiving his right to testify and that the defendant's on record waiver was essentially not valid because it was coerced by his counsel.

FINDINGS OF FACT

The State respectfully asks that the court find that the following facts have been established in the totality of the case record, including the record made at trial of this matter, and during the evidentiary hearings conducted on the claims raised in the defendant's Motion for Post Conviction Relief:

Issue #1:

1. Find that trial counsel for the defendant in this matter, attorney Douglas Bihler, provided an appropriate and justifiable "strategic" purpose for his decision to not cross examine Dr. Hodges. *See*, Transcript, "Machner Hearing," November 25, 2013, P.21, lines 13-25; P.22, lines 1-12; P.33, lines 14-25.
2. Find that in addition to believing that cross examination of Dr. Hodges would not be productive or enhance the defense position further, because attorney Bihler recollected any possible issues that he would address with the doctor were already examined through other witnesses, attorney Bihler also made the reasoned strategic decision not to consult or engage an "expert" of his own on the issue of whether observable injuries would be "expected" because the child reported all sexual abuse ceased some nine to ten months prior to her disclosing the incidents to police and being examined. *See*, Transcript, "Machner Hearing," November 25, 2013, P.23, lines 2-13; P.34, lines 4-24; P.35, lines 1-25; P. 36, lines 1-10.

3. Find that no where in the trial record is there any testimony to support the assertion made during the post conviction motion hearing by defense counsel that the child was alleging "sexual intercourse" *and* "full penetration" on occasion. The testimony is far more accurately characterized as describing instances of sexual contact with the exposed vagina and possible partial penetration by the penis when it is described as having gone "in." That the totality of the testimony does not support the conclusion that the child sustained "full penetration" of her vagina by the defendant's penis and that to the extent acts of penetration occurred at all they occurred nine to ten months prior to the exam so any injury would have healed. *See, generally*, Transcript, Trial Testimony, March 19-20, 2012, Witness: Victoria Dawson.
4. Find that Dr. Hodges testifies upon proper foundation that the hymen and genital tissue in general is mucus membrane and it's tissue that heals very quickly and that any injury caused to the area will heal quickly within days to weeks. Accordingly, where abuse is alleged to have occurred many months earlier – in this instance nine to tens months – the likelihood of evidence of any injury remaining is extremely remote. This is not readily refutable especially in light of the nature of the acts the child describes in her testimony. *See*, Transcript, "Jury Trial," March 21, 2012, P.23, lines 13-25; P.24, lines 1-17.

Issue #2:

1. Find that attorney Bihler's credible testimony during the "Machner Hearing" establishes that he never coerced or in any fashion compelled or threatened his client, the above named defendant, into waiving his right to testify but rather that he laid out the defendant's options for him and gave the defendant his advice and the basis for his advice, which was to exercise his right to remain silent, but that at all times attorney Bihler made it clear to the defendant that it was his decision and his decisions alone.

See, Transcript, "Machner Hearing," November 25, 2013, P.26, lines 5-25; P.27, lines 1-18; P.28, lines 2-25; PP.29-30; P.36, lines 11-15; P. 37, lines 1-9.

2. Find that attorney Bihler's credible testimony establishes that he spent a good deal of time discussing the pros and cons of testifying with his client at various time before his client made the decision to exercise his right not to testify which he himself admits he exercised without coercion. *Id.*

3. Find that the defendant himself testified consistent with attorney Bihler's credible testimony that his attorney gave him advice, which he indicates he followed but that he always understood that it was his choice whether or not testify. *See*, Transcript, "Machner Hearing," November 25, 2013, P.49, lines 8-25; P.50, lines 1-3.

CONCLUSIONS OF LAW

The State respectfully asks that the court make the following conclusions of law as applied to the proposed findings of fact set forth above as to the two issues raised in the defendant's Motion for Post Conviction Relief:

Generally as to Ineffective Assistance of Counsel Claims:

In order to establish a claim of ineffective assistance of counsel, a defendant must first show that "counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This requires showing that counsel's actions or inactions fell so seriously below an objective standard of reasonableness that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* In considering this element, the Supreme Court has instructed courts not to engage in "the distorting effects of hindsight," and to "evaluate the conduct from counsel's perspective at the time." *Id.* at 688-91; *see also United States v. Shukri*, 207 F.3d 412, 418 (7th Cir. 2000)(noting that the ineffective assistance of counsel standard set forth in *Strickland* is "highly deferential to counsel, presuming reasonable judgment and declining to second guess strategic choices."). The defendant must overcome *a strong presumption* that counsel acted

reasonably within professional norms. *State v. Johnson,* 153 Wis.2d 121, 127, 449 N.W.2d 845 (1990). Thus, there is a "strong presumption" that counsel's decisions constitute reasonable litigation strategy. *Strickland*, 466 U.S. at 696; *see also United States v. Trevino*, 60 F.3d 333, 338 (7th Cir. 2005) (holding that "because counsel is presumed effective, a party bears a heavy burden in making out a winning claim based on ineffective assistance of counsel.").

Issue #1:

1. Conclude that the defendant has failed to put forth any credible evidence to rebut the strong presumption that counsel's decision not to cross examine Dr. Hodges or call a defense medical expert constituted anything other than a reasonable litigation strategy under the circumstances in this particular case and trial. Attorney Bihler's testimony regarding why he declined to cross examine Dr. Hodges is not only apparently reasonable but would appear to have been an advantageous strategic decision on the part of the defense given the nature of the acts actually described in the child's testimony (as compared with the assertions made by post conviction counsel), the passage of nine to ten months between the last possible act of sexual assault and the exam, and Dr. Hodges compelling and well supported testimony on direct examination that this area of the child's body heals quickly with the obvious inference being that any injury sustained to the area, nine months prior, would be fully healed and not observable. *See generally id.*
2. Further conclude that a review of the trial record in conjunction with the post conviction hearing testimony makes clear that Dr. Hodges, a medical doctor specializing in pediatric medicine, who had conducted some hundred sexual assault examinations on children, and who has testified as to well established medical concepts, would not likely be susceptible to any meaningful challenge on any of these well established points by any other credentialed expert.

3. Also conclude that the alleged "expert" the defense called to testify at post conviction does not rebut the above described legal presumption given attorney Bihler's testimony and the balance of the record. The so-called "expert," Ms. VanDinder is a nurse practitioner with a fraction of the real life experience conducting child sexual assault examinations and a fraction of the educational background Dr. Hodge's possesses. Further, it is the position of the state that Ms. VanDinder's assertion that she read the entire transcript of the child's trial testimony lacks credibility given her responses to certain questions. Further, that her conclusions, based on little information and possibly inaccurate assertions or characterizations of the record, that in this case there would have to have been injuries – injuries – presumably detectable or observable nine to ten months later – lacks foundation and is simply not as reliable as the testimony of Dr. Hodges, the examining physician, which was offered at trial.

Issue #2:

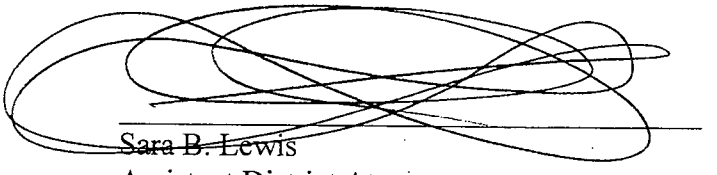
1. Conclude that the constitutional right to testify or to remain silent belongs exclusively to the defendant. While trial counsel may give a defendant advice regarding whether counsel believes, in his or her professional opinion, it would be prudent to testify or not to testify, the decision ultimately resides with the defendant himself or herself - as is evidenced during the detailed colloquy each court undertakes when a defendant waives his right to testify or his alternative right to remain silent.
2. Conclude that it is appropriate, and actually quite *effective* assistance of counsel, for counsel to offer advice to a defendant regarding whether to testify or remain silent although it would be improper and possibly rise to ineffective assistance of counsel if counsel were to coerce the defendant into testifying or not testifying or in some fashion take that right away from the defendant by making the decision for him.

3. Conclude that in this case the record clearly establishes that attorney Bihler never usurped or took away from the defendant his right to decide whether he testified or not and that the testimony of both attorney Bihler and the defendant himself, at post conviction motion hearing (see findings of fact above) leave no doubt as to the fact that the defendant made an independent decision not to testify on his own behalf and that attorney Bihler more than adequately advised him regarding his right to testify or not testify and that the defendant understood the right belonged to him and him alone and simply choose not to testify consistent with the sound and well reasoned advice of his trial counsel.

CONCLUSION

For the foregoing reasons the State respectfully requests that the court deny the defendant's Motion for Post-Conviction Relief.

Dated this 21st day of January, 2014



Sara B. Lewis
Assistant District Attorney
State Bar Number 1027610

(7)

frequency with which you as a physician and others, you know, in a similar capacity to you actually observe discernable injuries on children when performing this type of sexual assault exam?

A. Yes. Well, my own experience sort of mirrors what's in the literature and what's been published nationally. The vast majority of children that I exam who have been victims of sexual abuse have normal physical exams.

So when I do a complete exam with a colposcope, examine the area, the genital area, the anal area, there's usually no injuries on my exam which like I said sort of mirrors what's been found by others who have done studies on these kids that sort of the mantra is it's normal to be normal. That most victims of child sexual abuse have normal physical exams.

Q. And can you tell me, Doctor, based on your own experience and your training in the area do you have any belief or do you have any understanding based on your training as to whether there's any explanations for why normal exams are so frequent in children that are reporting or alleging sexual abuse?

F-1

APP. C-1

ATTORNEY BIHLER: Objection to the form.

THE WITNESS: There's lots --

THE COURT: Wait. Okay.

ATTORNEY BIHLER: Lack of foundation.

THE COURT: Try one more time.

ATTORNEY BIHLER: Objection to the form of the question. Also lack of foundation.

THE COURT: Overruled. You can answer the question.

THE WITNESS: Okay. So my experience as well as what's sort of been published is that there's a number of different reasons why this is thought to be.

Number one, a lot of times kids who come forward and say they've been sexually abused don't do so immediately after the incident has happened. So we are talking months or years later. So if there was ever an injury, by that time it's usually not visible to the examiner.

Another reason is sort of the hymen and genital tissue in general it's mucus

F-2 902

App. I-2 App. C-2

membrane and it's tissue that heals very quickly. So if there is an injury even, you know, within a few days or weeks a lot of times that area just heals really quickly. When you are examining them, there's not any evidence.

I get this a lot when kids had said, yes, there was bleeding. So we suspect there was an injury. But when I look, I can't see any injury.

And another reason is that a lot of times there is no injury to see. So that there can be contact with that area but not enough to cause any bleeding, disruption, anything that we would be able to see.

So, you know, if there was never any injury, there's nothing really for us to see when we examine.

ATTORNEY LEWIS:

Q. And can you tell me, Doctor, do you recall examining a child by the name of V[redacted] L. D[redacted]?

A. I do.

Q. And, Doctor, I'm going to ask you a question regarding that examination. I'm actually going to mark this next item as exhibit number I

F-3 903

App. F-3 App. C-3

injury?

A. No. Her examination was normal, and I did not find any injuries.

ATTORNEY LEWIS: I have no further questions.

THE COURT: Mr. Bihler, any questions?

ATTORNEY BIHLER: No questions.

THE COURT: Any questions from the jury for Dr. Hodges? Thank you for coming, Doctor. You are all done.

THE WITNESS: Okay. Thank you.

(The witness is excused.)

THE COURT: Miss Lewis, your next witness.

ATTORNEY LEWIS: At this point in time, the State rests subject to rebuttal.

THE COURT: Ladies and gentlemen, you heard all the testimony that the State wishes to present to you at this point.

Mr. Farrell might wish to present additional evidence. He might wish to present the case to you based on the evidence that has been presented already.

We are going to take a break at

C5 F-5 904

App C-4

30. The Court of Appeals ruled...."The Circuit Court concluded that Van Dinter's testimony was based on **"possible inaccurate assertions about the record"** (Dkt. 21-7, P.5) , In fact, the Circuit Court's ruling was based on inaccurate assertions about the record.

The Circuit Court ruled.....

> ....the testimony is far more accurately characterized as describing instances of sexual conduct with the exposed vagina and "**possible** partial penetration" by the penis when it's described as have gone in (Dkt. 21-4:24,Dkt. 21-4:#3).

Not only did the Court of Appeal's affirm this ruling, it also repeated this inaccurate assertion in its ruling as well (Dkt. 21-7: P.15).

Possible - 2A: being something that **may or may not occur, B.** being something that may or **may not be true** or actual. Webster's Ninth New Collegiate Dictionary, pg, 918.

The court further ruled Ms. Van Dinters testimony... "...was simply not as reliable as Hodges." (Dkt. 21-7: P.5).

31. The following case laws prove's defense expert Ms. Van Dinter's opinion is **highly reliable.** Hodges medical report describes the alleged assaults as "penis to vagina contact on multiple occasions." (Dkt.21-12: 28, 29). Ms. Van Dinter's testified she based her opinion on the trial testimony of the alleged assaults (Dkt. 21-29: 16,17,18,26). The court's ruling is so lacking in justification that there was a error well understood and comprehended in existing law beyond any possible fair minded agreement.

see: *Simonson v. Hepp*, 2007 U.S. Dist. LEXIS 78942, (U.S. District Court of the Western District of Wisconsin) , Sexual assault nurse examiner Julie Kennedy-Oelhert testified, **the exam she performed more then ONE YEAR after the assault,**

> "...the victim's **hymen** was damaged by the insertion of something into her vagina."

App. D-1

The seven year old testified..."her father put his penis in her vagina, (one time)". Kennedy-Oelhert also testified "...if a child doesn't have an estrogenized hymen that tissue is considered friable, which means it tears easily, it's traut and tears easily.." (Dkt. 21-11:26).

Also see: *Michael R.B v. State*, 175 Wis.2d 736, 499 N.W.2d 641, Supreme Court of Wisconsin. The exam was performed **more than 2 months after the assault**, the doctor testified under oath...

"...the **hymen** had been more widely open for a child of her age.. this **unusually wide hymenal opening** was consistent with that of a child **who experienced some type of vaginal penetration...normal activity would not account for the amount it was open."** (Dkt. 21-11:27).

Also see: *State v. Whitelaw,* 201 Wis.2d 214, 549 N.W.2d 791. (Court of Appeals District ONE) the exam was **performed 3-4 months after the assault**, the doctor reported...

"..**old hymen tears were found"**. The 12 year old girl testified..
"..he put his penis **halfway into my vagina"**. (Dkt. 21-11: 27)

Also see, *State v. Kelly*, 2001 Wis. App. 254, 248 Wis.2d 527, 635 N.W.2d 906 (Court of Appeals District two)

"the exam revealed a "**small healed tear on the child's hymenal ring"**. (Dkt. 21-11:27).

Also see: *State v. Koller*, 2001 Wi. App. 253, 243 Wis.2d 259, 635 N.W.2d 838 (Court of Appeals District ONE). The nurse testified the exam she performed **TWO YEARS** after the assault, the condition was consistent with the reported assault. The report stated..

"**Hymen was not smooth** as would be expected with an 8 year old girl." (Dkt.21-11: 28)

P-B

Also see: *People v Inman*, 315 Mich. 456, 24 N.W.2d 176 (**Michigan Supreme Court**), the exam was performed **more than TWO YEARS after the assault** and revealed ..

> "..she had intercourse.." The court ruled.." **if the private parts of the defendant entered this of a child, then only 7 years old, as the testimony of the state tends to show, the marks of penetration would be permanent**. (Dkt. 21-11: 28).

Also see: *People v. Milkula*, 84 Mich.App. 108, 269 N.W.2d 195...the exam was **performed 6 months after the assault** and revealed ..

> "..did not have an intact hymenal ring....and her **vagina opening was unusually open for a child her age**." (Dkt. 21-11:28)

32. If defense counsel would have investigated he would have found these medical experts testifying under oath to **a variety of different injuries** found **months to years** after an assault, which supports Farrell's argument, Farrell's medical experts opinion Ms. Van Dinter. In fact, the Court of Appeals ruled "..Ms. Van Dinters testimony was simply not as reliable as Hodges." (P. 28, supra.) These cases laws prove different!

33. A cross examination of the states expert witness, to the **variety** of different injuries was vital to Farrell's defense. **The exam**, in Farrell's case, **is exculpatory evidence!**

34. The medical experts in these case's, supra, testified for the prosecution during evidentiary hearings in the Court of Appeals to affirm the convictions, which they were successful. For the courts to accept this expert medical testimony (provided by the prosecution) to affirm convictions, then the court has to accept this expert medical testimony to acquit Mr. Farrell.

D-3

in the court record (Dkt. 21-4: 14-17). Ms.Van Dinter testified "***do to the facts of this case*** there should have been evidence of such sexual assaults". As ~~this~~ the U.S. District Court acknowledged in it's screening order (Appendix D:3, P.3). On ov.25, 2013, (machner hearing) defense counsel testified the reason he did not cross - examine the states expert, Dr.Kelly Hodges, about the possibilities of injuries, is because he cross-examined "the other witness instead" he testified ....

a) ..my recollection was that strategically I made a decision to cross-examine the nurse about all those issues. ***Because it's my recollection she had all the same qualifications as the so called denominated expert the state called.*** And I recall in my cross examination of the examining nurse, which I did as matter of strategie ... ***and I remember exploring those issues with her regarding injury*** and all the commonalty and all that sort of stuff through that witness. I believe I did talk about these facts to the jury. Because I felt I had dealt with all those issues with the previous examining nurse. (Dkt.27-3: 21-22, L's 21-12)

b) ..My recollection is that ***regarding the issues about whether there should have been any injury showing based on what the girl reported had had happened*** **to her,** my recollection is I asked the questions I wanted to ask the nurse who had testified earlier in the trial; because I got that information for her, ***I didn't interview the doctor.*** *see*: Dkt.26 par.21, Dkt.21-11:14-15. (Dkt,21-3: 37-38, L.'s 20-1)

c) ..***Because I had achieved the points I wanted to through the [other witness].*** Because I knew this witness would be hostile to my cross examination, and I didn't believe I'd be able to gain much that was going to be helpful to the defense through that witness, ***I thought strategically it made sense just to leave her alone at that point.*** (Dkt.27-3: 34, L.'s 19-25) (Dkt.26: par22.)

The problem is, there was no other witness to cross-examine, (as the said U.S.District Court acknowledged in it's screening order, ruling the testimony was "***erroneous***" see:(Appendix D: P.7.)

The Machner court denied petitioner relief (adopting the state's proposed Findings of fact and conclusions of Law,(Dkt.21-12:10), ruling...

"Attorney Douglas Bihler, provided an appropriate and justifiable purpose for his decision to not cross-examine Dr. Hodges...and that in addition to believing that cross-examination of Dr. Hodges would not be productive or enhance the defense position further, ***because attorney Bihler recollected any possible issue that he would address with the doctor were already examined through other witnesses***". (Id.@ P.1, #1, #2).

App. E