UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

GUY L. COULSTON JR., Petitioner, vs. LAWRENCE G. WASDEN, Respondent.	Case No. 1:20-cv-00468-REP **MEMORANDUM DECISION AND ORDER**

Petitioner Guy L. Coulston Jr. filed an Amended Petition for Writ of Habeas Corpus challenging his state court conviction. Dkt. 12. Respondent seeks dismissal of the Petition on procedural grounds. Dkt. 19. That motion is now fully briefed. Dkts. 24, 27.

All named parties have consented to the jurisdiction of a United States Magistrate Judge to enter final orders in this case. Dkt. 5. *See* 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. Upon review of the record, the Court concludes that Petitioner's claims are procedurally defaulted and, alternatively, under a de novo standard of relief, he is not entitled to relief on the merits of any claim.

BACKGROUND

Petitioner asserts actual innocence of his Kootenai County criminal conviction of lewd and lascivious conduct with his step-daughter, A.R.M., a minor under sixteen years

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of age. He faults his trial counsel for not doing more with the discrepancies in the minor victim's testimony, which allegedly demonstrate his innocence. He also faults his direct appeal counsel for not presenting particular trial errors to the state appellate courts.

Petitioner started out as kind of hero in A.R.M.'s life. Petitioner and A.R.M.'s mother, Millicent, had a relationship lasting several years, beginning when A.R.M. was three. Petitioner and Millicent had two daughters of their own during their relationship. Millicent temporarily left the family to take care of her aging parents for about a year until their deaths. At that point, Millicent decided she wanted a divorce, and she left all of her children, including 10-year-old A.R.M. (not Petitioner's natural child), with Petitioner. A.R.M.'s natural father was out of the picture.

Petitioner continued parenting alone, raising A.R.M. alongside his two much younger natural daughters. He relied on A.R.M. to do cooking, cleaning, and mothering tasks for her younger sisters, as she had done in the past. *See* State's Lodgings A-1, A-2, A-6.

A few weeks before A.R.M.'s eleventh birthday, Petitioner began to treat her as if she were his adult girlfriend. He told her this was okay because they were not related by blood. They began to have regular sexual encounters, including intercourse, which he called "love-ins." *See* State's Lodging A-6. In an interview with police investigator

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Darrell Oyler, Petitioner agreed that this was the term they used; at trial he said, "I've never heard that word." State's Lodging A-2, p. 211.[1]

In his police interview, Petitioner asserted that A.R.M. initiated sex with him when she was 13 years old. He said he was "freaked out" when he awoke one night and found her on top of him." State's Lodging A-6. At trial, when asked whether he pushed her off, he replied, "No – well, yes." State's Lodging A-2, p. 210.

Petitioner told the investigator that after the first instance, no sexual contact occurred for some time, but eventually, A.R.M. wanted to have sex with him a couple of times a month, and so they had what he termed "consensual sex." *See id.*

The "love-ins" continued until A.R.M. was a high school sophomore. A.R.M. said that Petitioner told her they would run away together if she became pregnant. State's Lodging A-2, p. 102. When A.R.M. was 15, Petitioner put so many restrictions on what she could do in her free time, that she began to desire to end the entire relationship with Petitioner. *Id.* Also about that time, she realized that "parents don't have sex with their kids." State's Lodging A-1, p. 34. She said she let the sexual activity go on for four to five years because she was scared about what would happen to her younger sisters or where they would end up. State's Lodging A-2, p. 104.

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[1] References to the trial transcript are to the Court's ECF docket pages, not the transcript pages, which are copied four to a page.

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On a day when Petitioner required A.R.M. to come home right after school and miss her regular extracurricular activities, she was angry and confided in a close friend about the sexual conduct with Petitioner. *Id.*, p. 98. The friend encouraged her to go to the high school counselor and discuss the situation. A.R.M. said that she spoke to the school counselor because, in her words, "I got fed up with my home life and I didn't think I could handle it anymore. And I told them that particular day because I was scared to go home." *Id.*, p. 87. The counselor reported the situation to police. A.R.M reported to Detective Oyler that Petitioner had been verbally, physically, and sexually abusing her since the age of 10. State's Lodging A-1, pp. 23-25.

Detective Oyler decided to take the two younger girls into protective custody and had them picked up after school. The babysitter reported to Petitioner that the children did not arrive home. A.R.M. agreed to make a confrontation call to Petitioner. State's Lodging A-7. Petitioner did not deny the allegations of sexual activity A.R.M. made during the phone call, despite knowing that something was wrong, because he already knew the other two children had been intercepted by government officials. *See* State's Lodging A-1, pp. 32-34. Petitioner's conversation with A.R.M. was laced with profanity. *See* State's Lodging A-7.

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Oyler asked Petitioner to come to the police department to meet with him. Petitioner was read his *Miranda* rights[2] and initialed a card showing that he acknowledged them. See State's Lodgings A-5, A-9. The investigator began by questioning Petitioner about whether he was physically and verbally abusive to his daughters. *See* State's Lodging A-6.

At about 28 minutes into the interview, Petitioner told Oyler: "Guess from here on out, cause I know you guys got your things, better talk to an attorney. I have no idea." Oyler continued questioning him without a pause. At about 36 minutes into the interview, Petitioner admitted to having had sex with A.R.M. State's Lodging A-6.

Petitioner's defense attorney, Rick Baughman, filed a pretrial motion to suppress, arguing that all statements made after Petitioner invoked his right to counsel must be suppressed. *See* State's Lodgings A-1, pp. 83-84; A-5, A-6. The district court held that Petitioner's request for counsel was ambiguous and denied his motion to suppress. *Id.*, p. 99.

At trial, evidence was presented that corroborated A.R.M.'s story, such as specific sexual lubricants that A.R.M. had discussed with Oyler. Further, DNA evidence pointed to Petitioner as the perpetrator. *See* State's Lodgings A-2, A-10 through A-47.

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[2] *See Miranda v. Arizona*, 384 U.S. 436 (1966).

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The jury believed A.R.M.'s version of events. Petitioner was found guilty of lewd conduct with a minor under sixteen. State's Lodging A-1, p. 286. In a later proceeding, Petitioner was sentenced to a 35-year unified term of incarceration, with the first 15 years fixed. *Id.*, pp. 298-302.

The district court's denial of the motion to suppress was upheld on direct appeal. State's Lodgings B-5 to B-9. Petitioner obtained no relief on state post-conviction review. State's Lodgings D-1 to F-3.

PRELIMINARY MOTIONS

1. Petitioner's Evidentiary Motions

Petitioner filed a "Motion for Inspecting the Entirety and Integrity of Sexual Assault Kit Inspection [sic]." Dkt. 11. The Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) generally does not permit factual development on the merits of claims in federal habeas corpus actions. *See* 28 U.S.C. § 2254(e)(2)). However, that prohibition does not apply when bringing forward new evidence to show actual innocence to overcome procedural default, as here. *Dickens v. Ryan*, 740 F.3d 1302, 1320-21 (9th Cir. 2014) (en banc) (discussing *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011)).

A gateway actual innocence claim requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *House v. Bell*, 547 U.S. 518, 537 (2006). All

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requests for habeas corpus discovery require a showing of "good cause." Rule 6(a) of the Rules Governing § 2254 Cases. In the context of a request for discovery on the merits of a claim, the United States Supreme Court has defined "good cause" as circumstances "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he [or she] is ... entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908 (1997) (internal citation omitted). Where the petitioner meets this standard, "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Id.*

Petitioner raises reasons he should be permitted to develop the factual basis for his actual innocence claim: (1) that forensic scientist Rylene Nowlin testified at trial that some of the DNA swabs from the sexual assault kit and bloodstain sample of the victim were "missing"; (2) that the DNA evidence was manufactured; and (3) that there was a broken chain of custody. Petitioner provides little support in his motion.

Respondent has filed a response to the motion explaining in great detail how Petitioner has misunderstood the testimony at trial. Dkt. 20. That explanation is clear and tracks the trial transcript. *See* State's Lodging A-2, pp. 105-114. Based upon its review of the record and the arguments of the parties, the Court concludes that Petitioner is not entitled to develop further factual grounds for his actual innocence claim.

Analysis of sexual assault kits at the Idaho State Police Forensic Laboratory is a two-step process, as Rylene Nowlin, a bachelor's level forensic scientist with over ten

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years of experience, explained at trial. First, a forensic scientist tests all items in the sexual assault kit and creates samples of the victim's and, if available, the defendant's DNA (from either blood or saliva). Not all items in the sexual assault kit will contain DNA. The forensic scientist tests each item for DNA and removes those items that do contain DNA from the sexual assault kit, along with the DNA samples from the victim and defendant, and creates a DNA packet containing only the evidence containing DNA. The forensic scientist then deposits the DNA packet (the smaller subset of the sexual assault kit) at the "front of the laboratory" and turns custody of the packet over to the staff there. State's Lodging A-2, p. 107. The receiving staff member puts the DNA packet into a freezer in the lab's secure vault. *Id.* Later, a second forensic scientist will pick up the DNA packet, analyze it, and prepare a report. *See id.*, pp. 107-09.

Nowlin testified that, in this particular case, she tested each swab in the sexual assault kit and removed the ones that had semen present, which were "all swabs, vaginal, back and inner thighs" of the victim. *Id.*, p. 107-09. She also took the liquid blood sample from the victim and created a blood stain card. *Id.* at 107. She compiled a DNA packet (the smaller subset of the sexual assault kit) and deposited it at the front of the lab. *Id.* The sexual assault kit was not admitted at trial.

A second forensic scientist, Stacy Guess, a master's level forensic scientist with nine years of experience at the Idaho State Police Forensic Services Laboratory, analyzed the vaginal swab, the known sample bloodstain from the victim, and the known reference

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swab Detective Oyler obtained from Petitioner. State's Lodging A-2, p. 109. After testing the vaginal swab and finding that it was 87 billion times more likely that the mixture of DNA came from the victim and Petitioner rather than the victim and another contributor, Guess did not analyze the swabs from the victim's back or inner thighs, as is her regular policy. *Id.*, p. 111. Guess later received additional evidence, the victim's underwear, and found that sperm on the underwear matched Petitioner's DNA profile. Guess testified that the likelihood that another person in the general population would match Petitioner's sperm found on the victim's underwear was 1 in 14 quintillion (14 followed by 18 zeroes). *Id.* Guess created a report showing the outcome of the testing. State's A-2, pp. 105-106.

As to Petitioner's first argument, the Court agrees with Respondent that Petitioner has misunderstood trial testimony. That the sexual assault kit samples that contained DNA were separated from samples that did not and placed into a subset of the kit called a DNA packet does not mean that the samples no longer exist, despite Nowlin using the term "missing." This argument is based on a mistake of fact.

As to Petitioner's second argument, there is no evidence in the record that the DNA evidence was fabricated. This argument is without factual or legal grounds. Petitioner mentions only that "Idaho State Police Forensic Laboratory in 2015 was found with over 300 sexual assault kits untested with statistics to the kits." Dkt. 11, p. 1. This argument generally is based on public news from the Idaho State Police that a 2016 audit

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had revealed that there was a backlog of sexual assault kits that had never been tested. An Idaho State Police news release from December 29, 2021, reported that the "final test [from] all kits identified in the 2016 audit as needing to be submitted to the lab, or already in the lab at that point, have now been completed, with reports provided to investigators and prosecutors, and any hits in the National DNA Index System (CODIS) provided to local law enforcement for further follow-up."[3] Petitioner has not made any causal connection between the sexual assault kits that were not tested, and the victim's kit, which was tested. Nor has Petitioner made any causal connection between the nontesting of other kits and the work or credibility of the forensic scientists who testified in his case.

As to Petitioner's third argument—that Guess is not listed as a custodian on the chain of custody for this evidence—the Court concludes that the record provides sufficient evidence showing that Nowlin and Guess performed their analyses on the correct samples, and that there is insufficient evidence of tampering in the record.

Nowlin testified that it appeared the chain of custody had been maintained. *Id.*, p. 108. Nowlin identified Exhibit 3 and 4 as the turquoise-and-black striped panties and the green panties from the victim. Nowlin could see her own taped seal and the tape seal of a

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[3] The Court takes judicial notice of the existence of the news release. *See* https://www.kpvi.com/news/local_news/after-5-years-of-work-idaho-state-police-completes-final-untested-sexual-assault-kit/article_905fe868-6921-11ec-aebc-1b0b5d0f3817.html.

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coworker on one of the items. She testified that, on both, there was no indication that the proper chain of custody was not followed. Newlin found semen on both pairs of the panties. *Id.*, pp. 108-09.

Guess testified that her date of analysis and initials were on Exhibit No. 3. She said that the container appeared to be in substantially the same condition as when it came to her, only it now had a chain of custody placed over the tape seal. *Id.* at p. 112. And, she testified, nothing would indicate that the chain of custody had not been followed. Id.

The DNA evidence repackaging is confirmed by Guess's written report, attached to his Amended Habeas Petition. Dkt. 12-5, pp. 11-12. That report shows that "[a] tape-sealed DNA Packet envelope, created in the laboratory on March 8, 2012," contained the allegedly "missing" items from the sexual assault kit at trial. Dkt. 12-5, p. 11. A break in the chain of custody is mere speculation on the part of Petitioner.

Alternatively, the Court agrees with Respondent that, even if the swabs and other items were missing from the kit or the packet at the time of trial, there is no other evidence suggesting that the experts' opinions were compromised—because the testing was completed long before trial.

In addition, even if a break in custody occurred, that would not have affected the admissibility of the experts' opinions. *See Dachlet v. State*, 40 P.3d 110, 114 (Idaho 2002) ("Generally, in laying a proper foundation for the admission of test results of a blood sample the practicalities of proof do not require the prosecution to negate all

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possibilities of substitution or tampering," citing *State v. Gilpin*, 977 P.2d 905, 909 (Idaho Ct. App. 1999). Indeed, "the party offering the exhibit need not exclude all possibility of tampering. Where the court is satisfied that in all reasonable probability the article has not been changed in any material respect, the article is admissible into evidence." *State v. Crook*, 565 P.2d 576, 577 (Idaho 1977).

The Court also agrees with Respondent that, even if this Court granted Petitioner an opportunity to have the kit inspected, and the inspector found something missing, that would not establish actual innocence, considering Petitioner's incriminating statements during the staged confrontation call between the victim and Petitioner, his confession during the interview with Detective Oyler, and the evidence found in Petitioner's residence supporting A.R.M.'s testimony. *See* State's Lodging A-2, pp. 460-480.

Petitioner's sparse allegations that items are now missing from the sexual assault kit (even if not currently contained in the DNA packet), that the DNA evidence was fabricated, and that the chain of custody of the DNA evidence was broken do not meet the standard for a showing of actual innocence—that "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). The Court does not have reason to believe that, if Petitioner is permitted to have an expert review the DNA packaging and swabs, he may be able to demonstrate that ~~he is~~ entitled to relief. This is not a situation where a stranger sexually assaulted a victim and the identity of the perpetrator might be called into question.

Rather, both Petitioner and the victim admitted they had sexual intercourse on the Sunday before Petitioner's arrest, and the results of the DNA testing reflects their admissions. For all of these reasons, the motion to conduct discovery will be denied.

2. Extensions of Time

Respondent requested two extensions of time to file the Reply in support of the Motion to Dismiss. Good cause appearing, the motions will be granted, and the Reply is considered timely.

REVIEW OF MOTION TO DISMISS

Respondent contends that all of Petitioner's claims are procedurally defaulted because none were presented to the Idaho Supreme Court in a proper manner. Because it is now too late for Petitioner to go back to state court to engage in proper exhaustion, Respondent requests that all of the claims be dismissed with prejudice.

1. Standards of Law

A. *Exhaustion Requirement*

A petitioner must "properly exhaust" his state court remedies before pursuing a claim in a federal habeas petition. 28 U.S.C. § 2254(b). That means "fairly presenting the claim" based on a federal theory to the highest state court for review in the manner prescribed by state law. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Unless a petitioner has properly exhausted his state court remedies for a particular claim, a federal

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district court cannot grant relief on that claim, although it does have the discretion to deny the claim. 28 U.S.C. § 2254(b)(2).

State remedies are considered technically exhausted, but not *properly* exhausted, if a petitioner failed to pursue a federal claim in state court and there are no remedies now available. *O'Sullivan*, 526 U.S. at 848. A claim may also be considered exhausted, though not properly exhausted, if a petitioner pursued a federal claim in state court, but the state court rejected the claim on an independent and adequate state law procedural ground. *Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991). If a claim has not been properly exhausted in the state court system, the claim is considered "procedurally defaulted." *Id.* at 731.

B. *Exceptions to Procedural Default Bar*

Even if a claim is procedurally defaulted, Petitioner may qualify for an exception that permits the Court to hear the merits of his claims: "cause and prejudice" or "actual innocence." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The Court now explains those standards of law.

i. *Traditional* Coleman *Cause*

Ordinarily, to show "cause" for a procedural default, a petitioner must prove that some objective factor external to the defense impeded his or his counsel's efforts to comply with the state procedural rule at issue. *Coleman*, 501 U.S. at 753. A defense attorney's errors that rise to the level of a violation of the Sixth Amendment right to

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effective assistance of counsel may, under certain circumstances, serve as a cause to excuse the procedural default of other claims. *Carrier*, 477 U.S. at 488. However, an allegation of ineffective assistance of counsel will serve as cause to excuse the default of other claims *only* if the ineffective assistance of counsel claim itself is not procedurally defaulted or, if defaulted, a petitioner can show cause and prejudice for the default. *Edwards v. Carpenter*, 529 U.S. 446, 454 (2000).

A petitioner does not have a federal constitutional right to effective assistance of counsel during state postconviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 554 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993). As a result, the general rule is that any errors of counsel during a postconviction action cannot serve as a basis for cause to excuse a procedural default. *Coleman*, 501 U.S. at 752.

ii. Martinez *Cause*

A limited exception to the *Coleman* rule was created in *Martinez v. Ryan*, 566 U.S. 1 (2012)—that inadequate assistance of post-conviction review (PCR) counsel (or a lack of counsel) "at initial-review collateral review proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* at 9. To show ineffective assistance of PCR counsel, Petitioner must show that the defaulted ineffective assistance of trial counsel claims are "substantial," meaning that the claims have "some merit." *Id.* at 14. To show that each claim is substantial, Petitioner must show that trial counsel performed deficiently, resulting in prejudice, defined as a reasonable

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probability of a different outcome at trial. *Id.*; *see Strickland v. Washington*, 466 U.S. 668, 695-96 (1984).

The *Martinez v. Ryan* exception applies only to defaulted claims of ineffective assistance of trial counsel; it has not been extended to other types of claims. *See Davila v. Davis*, 137 S. Ct. 2058 (2017) (holding that *Martinez* is not applicable to claims of ineffective assistance of direct appeal counsel); *Hunton v. Sinclair*, 732 F.3d 1124 (9th Cir. 2013) (holding that *Martinez* is not applicable to a defaulted *Brady* claim).

iii. *Prejudice*

A petitioner must show both cause *and* prejudice to excuse a procedural default. To show "prejudice," a petitioner must demonstrate "not merely that the errors [in his proceeding] constituted a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire [proceeding] with errors of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170 (1982).

iv. *Actual Innocence*

If a petitioner cannot show cause and prejudice for a procedurally defaulted claim, the Court can hear the merits of the claim if he meets the "fundamental miscarriage of justice" exception. *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). A miscarriage of justice means that a constitutional violation has probably resulted in the conviction of someone who is actually innocent. *Carrier*, 477 U.S. at 496.

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Actual innocence must be premised on "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 64, 623 (1998). Petitioner must support his allegations of constitutional error with new reliable evidence that was not presented at trial, *Schlup v. Delo*, 513 U.S. 298 (1995). For example, types of evidence "which may establish factual innocence include credible declarations of guilt by another, *see Sawyer v. Whitley*, 505 U.S. 333, 340 (1992), trustworthy eyewitness accounts, *see Schlup*, 513 U.S. at 331, and exculpatory scientific evidence, *see Pitts v. Norris*, 85 F.3d 348, 350-51 (8th Cir. 1996).

The petitioner bears the burden of demonstrating that "in light of all the evidence, including evidence not introduced at trial, it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327; *see also House*, 547 U.S. at 539. The standard is demanding and permits review only in the "extraordinary" case. *Schlup*, 513 U.S. at 327.

2. History of Claims presented to State Appellate Courts and Claims Presented in Amended Habeas Petition

Petitioner's direct appeal raised a single claim—that Detective Oyler violated Petitioner's Fifth Amendment rights when he continued to interrogate Petitioner after Petitioner questioned aloud whether he should consult an attorney. That ruling was upheld on appeal. *See* State's Lodgings B-1, B-5.

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Petitioner pursued a first state post-conviction petition in 2016. After summary dismissal of his claims in the state district court, Petitioner pursued an appeal, raising two claims: (1) that the district court had a duty to inquire into an alleged conflict of interest between Petitioner and his privately-retained counsel, and (2) that his right to an open and public trial was violated when the trial court interviewed two members of the jury venire in the presence of counsel and Petitioner but not in the public courtroom. The Idaho Court of Appeals affirmed the district court's summary dismissal of both claims, holding that there is no such duty as to his first claim and that he should have raised his second claim on direct appeal. State's Lodging D-9.

Petitioner filed a second post-conviction action in state court in 2018. He raised five claims. He received no relief in the state district court. He filed a notice of appeal, but voluntarily dismissed his case in 2020, upon his belief that he had no access to the courts during the COVID-19 quarantine period. *See* State's Lodgings E-1 to F-3.[4] Thus ended Petitioner's state court matters related to his conviction and sentence.

In the Amended Petition for Writ of Habeas Corpus, Petitioner brings the following ineffective assistance of trial counsel and direct appeal counsel claims:

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[4] There is nothing in the record to support an argument that Petitioner had no access to the Idaho appellate courts during COVID. Petitioner has not produced evidence that the prison refused to make filings or that the Idaho Court of Appeals refused to accept late filings or refused to grant motions for extension of time to make filings during the worst of the COVID pandemic. All courts continued to operate, albeit more slowly and under different conditions, during the COVID pandemic.

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1.1 Trial counsel Rick Baughman failed to file a motion to suppress Petitioner's coerced statements made to Detective Oyler during a police interrogation.

1.2 Trial counsel did not object to the questioning of two potential jurors off record, Mrs. Leatham and Ms. Evans.

1.3 Trial counsel should not have stipulated to the admission of DNA evidence admitted at trial.

1.4 Trial counsel should have brought forward evidence that the victim said she contracted Chlamydia from Petitioner, but that Petitioner did not have Chlamydia.

1.5 Trial counsel failed to impeach the victim with perjured testimony from the preliminary hearing and from her direct examination at trial and failed to file a motion for mistrial or motion for a new trial based on the victim's perjured testimony.

2.1 Direct appeal counsel Eric Fredrickson and Sara Thomas failed to raise DNA evidence admissibility issues on appeal.

2.2 Direct appeal counsel failed to raise the Chlamydia issues on appeal.

2.3 Direct appeal counsel failed to raise the issue of the victim's perjured testimony on appeal.

Dkt. 12.

The Court earlier dismissed Claim 2.4, that the state district court committed judicial misconduct during post-conviction proceedings when it failed to accept Petitioner's "Affidavit of Conflict." Dkt. 15, pp. 4-5. A federal habeas corpus action is

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not the proper avenue to address errors in a state's post-conviction review process. *Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989), *cert. denied*, 493 U.S. 1012 (1989).

3. Discussion of Failure to Present Claims to Idaho Supreme Court and Alternative Denial on the Merits

A. Claim 1.1: Coerced Confession

Claim 1.1 is that trial counsel Rick Baughman failed to file a motion to suppress Petitioner's "coerced statements" made to Detective Oyler during a police interrogation. Petitioner alleges that, during the interrogation, Oyler used Petitioner's children "as a weapon" to coerce inculpatory statements from him. Dkt. 12, p. 7. Based upon Oyler's vague implications that Petitioner would be better off cooperating if he wanted his children back, Petitioner alleges that he decided that Oyler would not arrest him if he falsely admitted to the sexual allegations. This was the defense theme used at trial.

Baughman signed an affidavit on September 6, 2017, stating his belief that he fell below the standard of care in his representation of Petitioner on the basis of this "coerced confession" claim. Baughman declared:

> [A]t the Jury Trial I should have sought and presented expert testimony on the issue of false confession. I did not do so because [sic] I felt that the video of Coulston's interrogation clearly showed that his statements were coerced and under duress."

Dkt. 12-2, p. 62.

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Petitioner exhausted a related but different claim on direct appeal—the underlying claim that Detective Oyler violated his Fifth Amendment *right to counsel* when he continued to question Petitioner after he said, "I better talk to an attorney. I have no idea." (*See* State's Lodging B-1.) Presentation of that claim did not exhaust the present claim, which is based on coercion, a different legal theory, with an ineffective assistance of counsel overlay.

This particular claim should have been presented in the first post-conviction petition. It was not, and it was never presented to the Idaho Supreme Court in any collateral review action. As cause for the default, Petitioner asserts that his post-conviction counsel was ineffective for failing to present it, given his trial counsel's admission of deficient performance, and that the *Martinez v. Ryan* exception should be applied to allow the Court to hear the merits of the claim de novo.

The Court reviews the claim to determine if it is "substantial" under *Martinez*. The *Martinez* court described "substantial" as having "some merit." 566 U.S. at 14 (analogizing to *Miller–El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue). The Court alternatively reviews this claim de novo on the merits to determine whether there was prejudice to Petitioner's defense. The merits review standard is a higher standard than the *Martinez* prejudice prong ("no" merit versus "some" merit).

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The clearly-established law governing a Sixth Amendment claim of ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on an ineffective assistance claim, a petitioner must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that (2) the petitioner was prejudiced by the deficient performance. *Id.* at 684.

In assessing trial counsel's performance under *Strickland*'s first prong, a court must view counsel's conduct at the time that the challenged act or omission occurred, making an effort to eliminate the distorting lens of hindsight. *Id.* at 689. The court must indulge in the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

In assessing prejudice under *Strickland*'s second prong, a court must find that, under the particular circumstances of the case, there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 684, 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.* at 694.

To review whether counsel performed deficiently, the Court begins with the substantive law that underlies the alleged deficiency. For this claim, it is clearly established that the use of an involuntary confession violates a criminal defendant's right to due process under the Fourteenth Amendment. *Blackburn v. Alabama*, 361 U.S. 199, 205 (1960). The fact that Petitioner lost the right-to-counsel argument on direct appeal

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does not foreclose a coerced confession claim. *See Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry.").

A confession is coerced or involuntary if "the defendant's will was overborne at the time he confessed." *Lynumn v. Illinois*, 372 U.S. 528, 534 (1963). Coercion can be mental or physical, but to render a statement involuntary, coercion must exist to such a degree that the statement is not "the product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973); *see also Blackburn*, 361 U.S. at 206.

In determining the voluntariness of a confession, the court must consider "the totality of all the surrounding circumstances - both the characteristics of the accused and the details of the interrogation." *United States v. Preston*, 751 F.3d 1008, 1016 (9th Cir. 2014). The "surrounding circumstances" of the confession are all relevant, including "the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, [and] the diverse pressures which sap or sustain his powers of resistance and self-control." *Id.* Other factors include the defendant's maturity and education. *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993).

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court described how investigators are trained to use psychological ploys:

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> To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

Id. at 450.

Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985),[5] addressed a situation like Petitioner's, where investigators informed the defendant that cooperating would be beneficial to him. *Id.* at 924–27. In pretrial proceedings, Martin challenged the voluntariness of his confession obtained during a five-hour interrogation in which the United States Attorney participated. Martin alleged several aspects of coercion: (1) the police denied his request to postpone the interrogation one day; (2) the three interrogators used a "good guy, bad guy" technique; (3) one detective falsely told Martin that his codefendant had confessed; (4) the United States Attorney promised to get Martin

[5] *Martin* was modified on other grounds by 781 F.2d 185 (11th Cir.), *cert. denied*, 479 U.S. 909 (1986).

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psychiatric help; and (5) the United States Attorney told Martin that while a confession would hurt him in the guilt phase of his bifurcated trial, it might help him in sentencing, and admonished that "only the truth can help you." *Id.* Under these circumstances, the Eleventh Circuit found that, although such tactics were distasteful, their cumulative effect was not sufficiently coercive to overbear Martin's will. *Id.* at 926.

In *Lynumn v. Illinois*, 372 U.S. 528 (1963), addressing a circumstance involving investigator threats to disrupt the defendant's relationship with her children, the Supreme Court found that the totality of circumstances amounted to coercion:

> [T] the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her, if she did not "cooperate." These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up." There was no friend or adviser to whom she might turn. She had had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.
>
> We think it clear that a confession made under such circumstances must be deemed not voluntary, but coerced.

372 U.S. 528, 534 (1963).

Similarly, in *Brown v. Horell*, 644 F.3d 969 (9th Cir. 2011), the confession was deemed coerced where "the connection between Brown's truthfulness and Brown's ability to be with his girlfriend and child was a major, if not the dominant, theme running

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throughout [the investigator's] interrogation." *Id.* at 980. The court described the tactics of Ms. Overall, a polygrapher from the attorney general's office, as follows:

> Overall suggested she could pack up and go home. She told [Brown], The "only reason I'm talkin' to you is cuz you got a baby on the way, and I'd like to see you get to be with that baby, and these [detectives] have got a case they have to work." [Brown] said, "I wish I could be there for my baby." Overall responded, "I want to see you be there for your baby.... I can't get your side of what happened out there if you don't tell me. Do you want me to go get them? Do you want to let it go down like this? Or do you want to do the right thing for yourself, for your girlfriend and for your baby?" [Brown] repeated that he wanted to "be able to see the baby born." Overall said, "Okay. I want—I want that, too.... [¶][W]e need to tell them that. I can't go out there and talk to them for you if you're not going to tell me what happened." [Brown] continued to deny he had a firearm or shot Cheryl.

Id. at 976.

In Petitioner's case, the video interview was about 54 minutes long. *See* State's Lodging A-6. Detective Oyler was respectful, quiet, kind, and slow in his questioning. Petitioner's demeanor was likewise quiet, respectful, and contemplative, with a few exclamatory outburts. A written summary of the video interview is attached to this Order as Appendix A.

The record reflects that Petitioner was approximately 31 years old. Petitioner's counsel described him as "not an extremely highly educated man" (State's Lodging A-2, p. 15), but Petitioner expressed himself thoughtfully and intelligently in the interview.

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State's Lodging p. 6. He generally drove trucks for a living and was attending trade school to learn diesel engine mechanics. *Id.*

At 39 minutes into the interview, the following colloquy occurred:

Petitioner: Well, I guess my next question is, you're not going to stop here, Detective, where do we go from here?"

Oyler: Right, we're at talking. Except we got a process and part of the process is collecting DNA evidence, and it's time consuming, because once you collect it and send it to the lab, it sits down there for months and months and months and months.

It depends on if you want to play ball or not. Do you want to work with us through this? I meant, is this something where you want your kids back? Do you want to, you know, go easy though this process or hard through this process. Do you want to sit in jail for three months while we are waiting from DNAs to come back?" Do you know what I mean?

Petitioner: Yeah, but either way no matter what goes on, I'm going to jail anyway.

Oyler: At this stage, yeah, I'm going to arrest you, I'm not going to lie to you. I'm going to arrest you. Unless you told me something that totally turned this thing around. Are you going to work with us or against us?

I am going to arrest you today. Everything was in my mind leaning that way. Unless there's something I don't know. We don't know 100% 'til you come in the door. Are you going to work with us or against us?

Petitioner: I'm going to work with you guys.

Appendix A, pp. 6-7; State's Lodging A-6.

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At trial Petitioner testified that he thought Detective Oyler was going to let him pick up his other two daughters and go free if he falsely confessed to having sexual relations with A.R.M. Petitioner testified at trial about his thought processes during the interview: "I'm thinking now I'm going to have to more or less confess to something that I didn't do so I can get my kids back and go back home." State's Lodging A-2, p. 214.

However, Petitioner's trial testimony clearly is contrary to what he said in the interview. *See* Appendix A; State's Lodging A-6. In the interview, he asked questions, reasoned through his options, and drew his own conclusions from Oyler's comments about potential benefits of confessing. Importantly, Petitioner pointed out that the possibility of getting his kids back was incompatible with his 100% chance of going to jail immediately. *See id.*

At trial, defense counsel asked Petitioner: "Why did you feel compelled to admit to something you didn't do if you were already going to go to jail and you knew it?" Petitioner responded: "Because he gave me the option. In my head he gave me the option If I did something that I didn't do, admit to something that I didn't do, I would get my kids back. And that's exactly what he said." State's Lodging A-2, p. 228.

However, the fact that Petitioner himself recognized that Oyler's suggestion that Petitioner might get his kids back did not make sense because Petitioner knew he was going to jail immediately shows Petitioner's will was not overborne. Oyler's suggested benefits for cooperating were all extremely vague. There was never any clear indication

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of what benefits Petitioner might receive if he "worked with" the government. The comment about the children was made once, 39 minutes into a 54-minute interview. The statement does not amount to the type of pressure that would "sap [one's] powers of resistance and self-control," as the Supreme Court put it in *Columbe v. Connecticut*, 367 U.S. 568, 602 (1961). Oyler's comment about getting the children back was insignificant and not psychologically oppressive as compared to the situations addressed in *Lynumn*, and *Brown*, above. The facts here are far less psychologically coercive, if at all, than in *Martin*, where the court labeled the detectives' false information and promises of benefits as "distasteful" but not enough to overcome the defendant's will.

In addition, the Court reviews whether Oyler exhibited any overtly oppressive treatment in the interview process that could be considered additional pressure to falsely confess. None appears evident in the video interview. See State's Lodging A-6. Petitioner testified several times that he did not feel threatened during the interview. At the suppression hearing, the following colloquy addressed potential coercion by Detective Oyler:

Q. He didn't threaten you at any time?

A. No.

Q. He was cordial with you?

A. He asked me questions like a normal person.

Q. Polite?

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A. Yeah. State's Lodging A-2, p. 14. And, at trial, Petitioner similarly stated that Detective Oyler never raised his voice with Petitioner, kept his voice at the same level throughout the interview, and wasn't threatening in a physical way. *Id.*, p. 221.

The Court concludes that the video recording, the preliminary hearing testimony, and Petitioner's trial testimony, together show that Petitioner was not coerced into confessing under the standard set forth in precedent. Regardless of Baughman's "admission" in his affidavit that he performed deficiently for not raising this issue in a motion to suppress, the Court finds that the record shows that no coercion occurred. Neither trial counsel nor post-conviction counsel performed deficiently in not raising the issue, and no prejudice occurred to Petitioner. Therefore, the *Martinez* exception does not apply to excuse the procedural default of this claim. Alternatively, the Court denies the claim on de novo review.

B. *Claim 1.2*

Claim 1.2 is that Petitioner's trial counsel did not object to the questioning of two potential jurors off the record, Mrs. Leatham and Ms. Evans. Dkt. 12, pp. 8-9.

Petitioner brought the underlying substantive issue without the ineffective assistance of counsel overlay as a claim on post-conviction review, but the state district court determined that the claim was procedurally barred because he failed to object at trial and could have raised the claim on direct appeal. On appeal, the Idaho Court of

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Appeals affirmed the district court on the procedural basis. State's Lodging D-9 p. 3. For federal habeas corpus purposes, that claim—whether asserted as the underlying claim or with an ineffective assistance of counsel overlay—is procedurally defaulted.

Regardless of the procedural default, the facts in the record show that there is no factual basis for this claim. The Sixth Amendment provides that criminal defendants are entitled to "a speedy and public trial." The right to "a public trial is for the benefit of the accused." *Waller v. Georgia*, 467 U.S. 39, 46 (1984). Defendants may waive the right to a public trial. *See Levine v. United States*, 362 U.S. 610, 619 (1960). Defendants forfeit their right to a public trial by failing to timely object to the closure of the courtroom during voir dire. *See Peretz v. United States*, 501 U.S. 923, 936, (1991); *Levine v. United States*, 362 U.S. 610, 619 (1960).

During voir dire, the state district court asked if any of the potential jurors desired to have discussions about their ability to be impartial in a more private setting, because of the sensitive topic of the criminal charge. Several desired to be questioned privately. The court then asked counsel and Petitioner whether they were willing to waive the right to a public forum for this particular questioning. After the Court informed Petitioner of the "right to have this type of questioning take place in the courtroom in front of the press," both counsel and Petitioner himself said they were willing to waive. State's Lodging A-2, p. 30. The transcript of the original proceeding shows that the court questioned the

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potential jurors on the record with the prosecutor, Petitioner, and Petitioner's counsel present. *See* State's Lodgings A-2, D-7. p. 87.

The Court concludes that there is no merit to this claim. A public record was created for appeal during the in camera interview. Beyond the First Amendment issues, counsel's decision had positive effects on the proceedings. The potential jurors were more likely to be open without the presence of the other jurors and the public, making it clearer for counsel to determine whether to dismiss them. In addition, it was less likely that these jurors could have said something that might have tainted the entire jury panel. For all of these reasons, Petitioner has not shown deficient performance or prejudice from defense counsel's decision to agree to the in-camera questioning of these potential jurors.

C. *Remaining Claims: Procedural Default*

The remaining claims in the Petition are procedurally defaulted because neither they, nor the underlying substantive claims, were presented to the Idaho Supreme Court. Because these claims are without merit, the Court will deny them under a de novo review standard.

> 1.3 Trial counsel should not have stipulated to the admission of DNA evidence admitted at trial, and 2.1 Direct appeal counsel Eric Fredrickson and Sara Thomas failed to raise DNA evidence admissibility issues on appeal.

Petitioner asserts that Baughman should not have stipulated to admission of the DNA evidence. He disagrees with Baughman's affidavit:

> "The decision to stipulate to admission of DNA evidence was strategic/tactical, as the evidence would likely have come in despite any challenge on behalf of Coulston and the opportunity to cross-examine remained. The decision also served to save Coulston a significant amount of money."

Dkt. 12, p. 11.

The last alleged sexual incident between Petitioner and the victim occurred on Sunday, November 26, 2011, and the testing was performed on November 29, 2011. Petitioner asserts that his DNA could not have been found on A.R.M.'s body after three days and two showers. Petitioner has not provided any scientific evidence showing that this proposition is accurate.

Further, the accuracy of the contested evidence is bolstered by Petitioner's admission to Detective Oyler that he last had sex with the victim on the previous Sunday and by the fact that the DNA from the victim's vagina and her underwear pointed to Petitioner's profile in a statistically-significant way. Baughman was not deficient in seeing the opportunity to decline a stipulation as an unhelpful avenue of defense. He appropriately made a tactical and strategic decision not to challenge the evidence. Nor was Petitioner prejudiced by the stipulation, because he has not shown any reason why the DNA evidence would have been excluded had Baughman objected to its admission. For the same reasons, direct appeal counsel was not ineffective.

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1.4 Trial counsel should have brought forward evidence that the victim said she contracted chlamydia from Petitioner, but that Petitioner did not have chlamydia, and 2.2 Direct appeal counsel failed to raise the chlamydia issues on appeal

Medical records of the victim from the dates in question show that the victim had chlamydia, *see* State's Lodging E-2, but Petitioner did not. At the preliminary hearing, the victim testified that she contracted chlamydia from Petitioner and found out when she had the sexual assault examination done. State's Lodging A-49, pp. 23-24. Chlamydia is a reportable disease, and Petitioner says that A.R.M. did not list Petitioner as a sexual partner on the Idaho Department of Health reporting form.

Petitioner argues that Baughman performed deficiently because Petitioner should not have been prevented from presenting evidence that he did not have chlamydia in his rebuttal case. He argues that the absence of his name in the records proves that he never had sexual intercourse with the victim.

Baughman declared by affidavit:

> Coulston and I disagreed regarding the value of the sexually transmitted disease (STD) evidence and testimony. Coulston stated that he wanted to present the evidence to attach the victim's credibility. I counseled him that the issue was not the STD, but rather, whether Mr. Couston actually penetrated the victim's vagina."

Dkt. 12-2, p. 10.

Petitioner argues that this was a decision that he, not counsel, should have made, because it was not a strategic or tactical decision. Petitioner argues that an STD proves

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that there was penetration into a vagina by a person who had chlamydia—and he does not fit that description.

Petitioner's reasoning behind his request is flawed. If, in fact, the records show that the minor victim did not list Petitioner as a sexual partner, it does not demonstrate anything more than the deductions that can be made from the current record: either that the minor victim lied several times about having sex with Petitioner, or that the minor victim had sex with Petitioner but tried to conceal that fact from other adults.

The omission of this evidence does not change the fact that Petitioner himself admitted to having sex with the minor victim and that Petitioner's DNA was found in her vagina and underwear. Counsel was not deficient for declining to make this evidence a part of the defense. Contrary to Petitioner's argument, this was a tactical decision. The jury was likely to see this issue as a red herring, because, as discussed directly above, the evidence does not preclude Petitioner as a person having sex with the victim; it merely suggests that another person (perhaps someone her own age) likely had sex with her. Because Idaho Rule of Evidence 412 precludes admission of evidence of a sexual assault victim's past sexual behavior, Baughman was not deficient in rejecting Petitioner's suggestion to attempt to bring this evidence forward at trial.

Petitioner was not prejudiced by it because of the strength of the evidence against him. Therefore, Baughman was not ineffective. For the same reasons, direct appeal counsel was not ineffective.

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1.5 Trial counsel failed to impeach the victim with perjured testimony from the preliminary hearing and from her direct examination at trial and failed to file a motion for mistrial or motion for a new trial based on the victim's perjured testimony, and 2.3 Direct appeal counsel failed to raise the issue of the victim's perjured testimony on appeal

Petitioner argues that A.R.M's whole testimony was called into question after her "admitted perjured testimony" regarding whether she had oral sex with him. The chronological facts underlying this claim are as follows.

During the police interview, A.R.M. denied having oral sex with Petitioner. *See* State's Lodging A-1, p. 24. During the preliminary hearing, A.R.M. testified that they did not engage in oral sex. State's Lodging A-49, p. 23.

However, at trial, A.R.M. testified:

Q. At no time was there oral sex?

A: No

Q At no time...

A: Yes, there was. I lied.

Q. Excuse me?

A. He had given me oral sex.

Q. Well, do you recall testifying at the preliminary hearing that that absolutely did not happen?

A. Well, from what I remember, I didn't give him any oral sex.

State's Lodging A-2, p. 97.

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Under cross-examination, A.R.M. testified she did not recall what she told Detective Oyler about whether there had been any oral sex. She did not recall what she said at the preliminary hearing, stating: "I have blocked out a lot of stuff out of my memory, and I am just now remembering this." *Id.*, p. 98. Also at trial, A.R.M. clarified that, at the preliminary hearing, she had been referring to the fact that she had not given him oral sex, but he had given her oral sex. *Id.*, p. 97.

Petitioner asserts that the admission that A.R.M. lied means that she has no credibility, the State has no case, and Petitioner is innocent. Petitioner asserts that Baughman should have done more to highlight the discrepancies in A.R.M.'s versions of events at trial. He also asserts that defense counsel was ineffective for failing to either move for a mistrial or a new trial.

Even though this factual discrepancy seems like a very important matter to Petitioner, it is not when considered against the whole record. It was yet another credibility issue for the jury to decide when the jury weighed all of the other evidence in the record. There could be any number of explanations behind A.R.M.'s statement. It is very common modern vernacular for people to say, "I lied," when they circle back in conversation and correct something they said that was not accurate. It does not necessarily mean, "I intended to not be truthful," but may mean, "I need to correct something I said that was incorrect." Or, the jury could have inferred that A.R.M. was saying at trial that she was intentionally lying about having oral sex with Petitioner.

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As to the preliminary hearing testimony, A.R.M. explained the discrepancy away by saying that her interpretation of the question had been different (which is understandable, given her young age). She explained away the investigation discrepancy by saying that she tried to block the sexual experiences from her memory (which was understandable, given the constant overlay of worries of what might happen to her and her sisters if she reported the sexual abuse). It was up to the jury to assess these explanations and find A.R.M. or Petitioner more credible, based on the totality of the evidence presented at trial.

Petitioner does not show what more counsel could have or should have done. In fact, his counsel's questioning that *was* done raised the issue of A.R.M.'s credibility with the jury in a subtle, non-offensive way. For tactical and strategic reasons, many defense attorneys are very careful to avoid being overly aggressive with child witnesses, because aggression can backfire and cause jurors to begin to feel sympathy for them. There is no deficient performance and no prejudice, because the discrepancies in A.R.M.'s testimony *were* raised at trial for the jury to consider. Had Baughman filed a motion for a mistrial or new trial, it would have been denied on the grounds that this was simply a credibility issue to be determined by the jury. This claim will be denied on the merits under a de novo review standard.

Petitioner also has combed through the record for other discrepancies in A.R.M.'s testimony. He is simply amiss in thinking that a jury is going to fault a 15-year-old for

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not knowing the frequency she had sex with an adult over a four- to five-year period of time—beginning when she was ten years old. He also argues that he was a long-distance truck driver, and could not have had frequent sex with A.R.M.. However, testimony showed that during the last part of their "relationship," Petitioner was going to diesel mechanic school locally, as he told Detective Oyler. *See* State's Lodging A-6. A minor child is not going to be able to match up Petitioner's dates of employment or being on the road with the frequency of sex with a father figure when testifying about incidents that occurred between the time she was ten and fifteen. Any discrepancies as to these issues were not going to make a significant difference to the jury given the other strong evidence pointing to him as the perpetrator of the crimes.

Petitioner also asserts that Baughman could have done a better job of asserting that A.R.M. fabricated the sexual relationship story because she was angry with Petitioner for not allowing her to go to scheduled extracurricular activities and for requiring her to check in with him while she was away. However, counsel cross-examined A.R.M. adequately on this subject. State's Lodging A-2, p. 98.

Petitioner has not shown that trial counsel performed deficiently, nor has he shown prejudice to his case. The record reflects that Baughman adequately cross-examined A.R.M. and adequately raised her credibility issues in a manner that would not inflame the jury. He highlighted discrepancies in her various statements about the frequency of sex, whether he gave her a body massage, where Petitioner kept lubricating products, and

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whether or not she told Detective Stinebaugh at the school that she was afraid to go home. *See* State's Lodging A-2, pp. 96-98.

Petitioner's suggested motions based on A.R.M.'s credibility issues would have been denied because there was no legal basis for filing such motions. Petitioner was not prejudiced by his counsel's decisionmaking regarding credibility issues of the witnesses. For all of these reasons, the Court concludes, under a de novo standard of review, that direct appeal counsel was not ineffective.

SUMMARY

Petitioner's claims are procedurally defaulted for failure to properly present them to the Idaho Supreme Court. However, the Court has analyzed them on the merits as if they were not procedurally defaulted. None of the claims warrants granting a writ of habeas corpus. This case presents some of the strongest evidence the Court has seen in support of a lewd conduct conviction. Petitioner has not shown actual innocence. The Petition for Writ of Habeas Corpus will be denied and dismissed, and a Certificate of Appealability will not issue.

ORDER

IT IS ORDERED:

1. The parties' Motions for Extension of Time (Dkts. 25, 26) are GRANTED.
2. Petitioner's "Motion for Inspection of Sexual Assault Kit" (Dkt. 11) is DENIED.
3. Respondent's Motion for Summary Dismissal (Dkt. 19) is GRANTED.

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4. The Petition for Writ of Habeas Corpus (Dkt. 1) is DENIED and DISMISSED with prejudice.

5. The Court does not find its resolution of this habeas matter to be reasonably debatable, and a certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c); Rule 11 of the Rules Governing Section 2254 Cases. If Petitioner files a timely notice of appeal, the Clerk of Court shall forward a copy of the notice of appeal, together with this Order, to the United States Court of Appeals for the Ninth Circuit. Petitioner may seek a certificate of appealability from the Ninth Circuit by filing a request in that court.

DATED: March 31, 2022

Honorable Raymond E. Patricco
United States Magistrate Judge

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

GUY COULSTON, Petitioner, vs. STATE OF IDAHO, Respondent.	CASE NO. CV-2016-3882 ORDER GRANTING MOTION FOR SUMMARY DISMISSAL

INTRODUCTION

Petitioner Guy Coulston has requested post-conviction relief, and the state has subsequently moved for summary dismissal. The Court conducted a hearing on the Respondent's motion on September 21, 2018. The Court took the matter under advisement. This order shall constitute the Court's findings of fact and conclusions of law.

Petitioner, through counsel, filed an amended petition for post conviction relief. The amended petition raised numerous allegations, and the Respondent seeks summary disposition on all of them. In his briefing and in his oral argument, the petitioner only responded to a single issue relating to jury

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selection. Nevertheless, the Court will address all of the issues as requested by the Respondent.

PRIOR PROCEEDINGS

State v. Coulston, No. 41398, 2015 WL 4275935 (Idaho Ct. App. July 15, 2015) states:

> Coulston was charged with lewd conduct with a child under sixteen. The victim reported the abuse to her high school counselor, who reported it to the police. While investigating the allegation, an officer called Coulston and asked him to go to the police department to meet with the officer. . . . Coulston . . . made a number of incriminating statements. After being charged, Coulston filed a motion to suppress . . . . The district court . . . denied his motion to suppress. A jury found Coulston guilty of lewd conduct with a child under sixteen. Coulston appeal[ed], challenging the district court's denial of his motion to suppress.

Id. at *1. The District Court was affirmed.

LEGAL STANDARDS FOR POST CONVICTION RELIEF

A post-conviction remedy is available to anyone who has been convicted of, or sentenced for, a crime and who shows:

> (1) that the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
>
> (2) that the court was without jurisdiction to impose sentence;
>
> (3) that the sentence exceeds the maximum authorized by law;
>
> (4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> (5) that ~~this~~ sentence has expired, his probation, or conditional

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> release was unlawfully revoked by the court in which he was convicted, or that he is otherwise unlawfully held in custody or other restraint;
>
> (6) subject to the provisions of section 19-4902(b) through (f), Idaho Code, that the petitioner is innocent of the offense; or
>
> (7) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy: may institute, without paying a filing fee, a proceeding under this act to secure relief.

Idaho Code § 19-4901(a).

An applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; and *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990). "The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c).

> Idaho Code Section 19–4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19–4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law.

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Lint v. State, 145 Idaho 472, 476, 180 P.3d 511, 515 (Ct.App.2008) (citations omitted).

Summary judgment may be properly granted only where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, a court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, in the light most favorable to the non-moving party. *Id. See also Sewell v. Nielson, Monroe, Inc.*, 109 Idaho 192, 706 P.2d 81 (Ct.App.1985). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 918 P.2d 583 (1996). When ruling on a motion for summary judgment, the trial court must not weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 671 P.2d 1063 (1983). If the evidence reveals no disputed issues of material fact, summary judgment should be granted. *Smith, supra*, at 718, 918 P.2d at 587.

The moving party has the burden, at all times, to establish the absence of a genuine issue of material fact. *Tingley v. Harrison*, 125 Idaho 86, 867 P.2d 960 (1994). To meet this burden, the moving party "must challenge in its motion and establish through evidence the absence of any genuine issue of material fact on an element of the nonmoving party's case." *Smith, supra*, at 719, 918 P.2d at 588. Should the moving party fail to meet its burden, the nonmoving party is not required to respond with supporting evidence. *Id.* Should the moving party meet

its burden, however, the burden shifts to the nonmoving party to come forward with sufficient evidence to create a material issue of fact. The nonmoving party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial." *Id., citing* I.R.C.P. 56(e). If the nonmoving party fails to meet this burden, summary judgment is appropriate. *Id.*

Hilliard v. Murphy Land Co., LLC, 158 Idaho 737, 351 P.3d 1195 (2015), reh'g denied (July 20, 2015) discussed the standards applicable to cases tried to the court as follows:

> As a general rule, a trial court does not make findings of fact when deciding a motion for summary judgment because it cannot weigh credibility, must liberally construe the facts in favor of the non-moving party, and must draw all reasonable inferences from the facts in favor of the non-moving party. Because this case was to be tried to the district court rather than to a jury, the court was entitled to determine the most reasonable inferences from the undisputed facts and was not required to draw all reasonable inferences in favor of the non-moving party. When the trial court does so, it is making factual findings and must comply with Rule 52(a).

Id. 158 Idaho at 744, 351 P.3d at 1202. I.R.C.P. 52(a)(1) states in pertinent part:

> In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court.

Id. Quemada v. Arizmendez, 153 Idaho 609, 288 P.3d 826 (2012) states:

> [W]hether a motion for summary judgment goes uncontested or is fervently fought, the district court, in ruling on the motion, need not scour the record for evidence of a genuine issue of material fact.

Id. 153 Idaho at 616, 288 P.3d at 833.

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FACTS

The transcript of the trial in the underlying criminal case, CR-2011-20976, states:

THE COURT: It is – these type of cases are always very hard.

Anyone else?

This next question is going to be probably my last question. And this is what I call the catchall question. Here's what often takes place. I will ask this question, and there may be a few jurors who raise their hand. And then there might be a break, and then the jurors will go and talk with the bailiff and say to the bailiff, "Tell the judge this and this and this and this." Well, that doesn't work. So I know this is a sensitive and a difficult topic for many of you to deal with. And many of you may have had a personal experience or had close family members or close friends who have had an experience that would affect you in sitting as a juror in this case. And I will allow you as jurors, if you wish, to discuss it outside the presence of the entire panel. We will make arrangements for you to discuss the issue with me, the attorneys, the court reporter, the clerk, and the defendant being present outside the presence of the entire panel, if you wish.

Here's the question. Do any of you have any other reason why you cannot give this case your undivided attention and render a fair and impartial verdict? Is there anyone who feels that way? So please raise your hand yes. Would you like to talk about this in private?

PROSPECTIVE JUROR LEATHAM: Yes.

THE COURT: And so Ms. Leatham and Ms. Evans, is it?

PROSPECTIVE JUROR EVANS: Yes, it is. In private.

THE COURT: Anyone else? All right. Counsel, why don't we take up Ms. Evans and Ms. Leatham. And the rest of you jurors, again, you're going to be excused. I don't think this is going to take too long. Probably five to seven minutes.

Again, I instruct you do not discuss this case amongst yourselves. Do not allow anyone to discuss this case with you. You must wait until this case is submitted to you. You're not to form or express any opinions concerning the merits of this case.

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So I'm going no excuse you until ten minutes until 11:00. And if you two could come in the hallway with Mr. Smit, and we'll meet back there.

(Proceedings in chamber.)

THE COURT: All right. The record should reflect that this hearing is taking place in the jury room attached to Courtroom No. 9 here in Kootenai County. Prior to this I did talk with both counsel and -- about this process, and that discussion took place off the record. Does either side have any objection to having this type of hearing take place outside the presence of the jurors and outside the presence of any potential press?

MR. VERHAREN: No, Judge.

MR. BAUGHMAN: No, Your Honor.

THE COURT: And does your client understand that he has a right to have this type of questioning take place in the court room in front of the press?

MR. BAUGHMAN: He does now.

THE COURT: And does he have any objection in terms of waiving his constitutional right with regard to having that type of forum as opposed to having questioning take place in private?

THE DEFENDANT: No.

MR. BAUGHMAN: No.

Transcript at 85-87. Although she was not mentioned in the portion of the transcript quoted above, prospective juror Inbody was also briefly interviewed in chambers along with prospective jurors Leatham and Evans. See Transcript at 90-91.

ISSUE

The main issue is whether petitioner waived his constitutional right to a public trial when a portion of the jury selection was done outside of the public

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courtroom.

ANALYSIS

In opposing summary dismissal, the only claim that petitioner apparently raises is an alleged violation of his constitutional right to a public trial by the brief questioning of three prospective jurors out of the hearing of the public. As a result, he apparently abandons all other claims in his amended petition for post-conviction relief. In deciding a summary dismissal motion, the Court "need not scour the record for evidence of a genuine issue of material fact." *Quemada*, 153 Idaho at 616, 288 P.3d at 833. Accordingly, this Court need not search the record to determine whether petitioner's other claims, which were not addressed by petitioner on summary dismissal, are supported in the record.

PETITIONER'S RIGHT TO A PUBLIC TRIAL WAS NOT VIOLATED.

The Sixth Amendment to the United States Constitution guarantees that a criminal defendant has the right to a speedy and public trial. This right is also guaranteed by Article 1 Section 13 of the Constitution of the State of Idaho. He claims that his right to a public trial was violated when the court allowed a limited *voir dire* of potential jurors outside the presence of the public.

Petitioner cites *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) in support of his contention that his right to a public trial was violated. That case is discussed in *State v. Fairchild*, 158 Idaho 577, 349 P.3d 431 (Ct.App.2015) wherein the Idaho Court of Appeals held that Fairchild's right to a public trial was not violated because Fairchild failed to object to a trial court

proceeding held in chambers out of Fairchild's presence in order to amend the prosecutor's information. The court held:

> ***[A]bsent a defense objection, the right to a public trial cannot be violated*** in any event, as the right applies only when all or part of the trial is closed over a defense objection. See *Waller v. Georgia*, 467 U.S. 39, 42, 104 S.Ct. 2210, 2213, 81 L.Ed.2d 31, 35–36 (1984) (noting that the suppression hearing in the defendant's case was closed to the public over the defendant's objection before addressing the merits of the claim that the defendant's right to a public trial was violated); see also *State v. Overline*, 154 Idaho 214, 219, 296 P.3d 420, 425 (Ct.App.2012) (noting that one defendant's case in *Waller* was remanded for consideration of whether he was procedurally barred under state law from challenging the closure of the suppression hearing on appeal because his counsel did not object to the closure). Moreover, counsel is permitted to waive a defendant's right to a public trial, which Fairchild's counsel tacitly did here by objecting to and arguing the merits of the state's motion to amend outside the presence of the jury. See *Overline*, 154 Idaho at 219, 296 P.3d at 425 (concluding that waiver of the right to a public trial is not a decision for which the defendant's consent is required).

Id. 158 Idaho at 581, 349 P.3d at 435 (emphasis added).

Here, petitioner's attorney represented that he did not object to the brief questioning of the three jurors out of the public's hearing, and in his opposition brief, petitioner does not contend that his attorney was ineffective in making that representation. Absent a defense objection, petitioner's right to a public trial could not have been violated. See *Id.* Accordingly, petitioner has shown no genuine issue of material fact which would preclude summary dismissal.

In addition, petitioner cites *Press–Enterprise Co. v. Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). Both of these cases, as well as *Waller*, were cited in *State v. Overline*, 154 Idaho 214,

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296 P.3d 420 (CtApp.2012) which was, in turn, cited in *Fairchild*. In *Overline*:

> The following exchange . . . occurred:
>
> [PROSECUTOR]: And I'm wondering if I can just publish [the exhibits] personally to the jury or we can clear the courtroom out since it is a young victim.
>
> THE COURT: I—I would probably clear—clear the area. I think that would make more sense. Is that okay with you?
>
> [DEFENSE COUNSEL]: That's fine.
>
> THE COURT: Okay. But this isn't like videos or anything like that? It's just photographs?
>
> [PROSECUTOR]: Photographs.
>
> THE COURT: And it's up to you whether you want to just publish it individually or put it on the overhead. But if you—I think if you want to do it on the overhead, that's fine, and then we can—we'll just have everybody out.

At trial, the district court excluded spectators from the courtroom on at least two occasions, without defense objection, while the photographs were being shown as exhibits. One closure occurred while the victim identified herself in the photos, and one while a computer forensic examiner identified the photos as those that had been found on a computer in Overline's home. The courtroom apparently was open for all other portions of the trial, including the victim's testimony that was unrelated to the photographs. The jury returned guilty verdicts on all three charges.

Overline appeals, asserting that his convictions must be reversed because the closure of the courtroom violated his constitutional right to a public trial.

Id. 154 Idaho at 216, 296 P.3d at 422. The Idaho Court of Appeals affirmed the district court's closure of the proceedings, holding:

> [W]aiver of the right to a public trial is not a decision for which the defendant's consent is required.
>
> . . . .

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> [W]e hold that Overline's defense attorney effectively waived any objection to the closure of the courtroom during portions of the trial. Because Overline's counsel waived the constitutional right at issue.

Id. 154 Idaho at 219-220, 296 P.3d at 425-26.

Defendant cites no Idaho authority contrary to *Overline* and *Fairchild*. Here, as in *Overline*, defendant's attorney affirmatively represented that he had no objection to the limited closure of a portion of the trial proceedings. Moreover, although it was not required by either *Overline* or *Fairchild*, petitioner affirmatively represented that he also had no objection. By his affirmative representation that he did not object to the brief closure, petitioner's trial counsel effectively waived defendant's constitutional right to have the limited *voir dire* conducted in a public setting, and petitioner may not now legitimately contend that his public trial right was violated by the closed *voir dire*.

CASE LAW FROM WASHINGTON STATE

Petitioner cites *State v. Bone-Club*, 906 P.2d 325 (Wash.1995) which applied a rule contrary to that applied in the Idaho *Fairchild* and *Overline* cases. There, the Washington Supreme Court held that a defendant's failure to object to a closed suppression hearing did *not* waive his public trial right. In the much more recent Washington State case: *In re Copland*, 309 P.3d 626 (Wash.App.2013) the Washington Court of Appeals applied the *Bone-Club* rationale to a collateral attack in a post-conviction "relief from personal restraint" matter, holding that a partial closure of jury selection did not violate petitioner Copland's public trial right.

Actual and Substantial Prejudice Not Shown

Even if Idaho were to apply the Washington rule that a failure to object was not a waiver, and even if Idaho were otherwise to accept Washington case law, petitioner has not shown "actual and substantial prejudice," as required in *Copland* for collateral review, or even argued that such prejudice exists. *Copland* held:

> Considering the weight of opinion that—in almost all cases—***petitioners must show actual and substantial prejudice when they claim constitutional error on collateral review***, this court could dismiss Mr. Copland's public trial claim due to his failure to argue anything but presumptive prejudice. But also considering the Supreme Court's specific reservation of a ruling on this issue, as well as the few cases like *St. Pierre* that hold that some errors may be presumed prejudicial in personal restraint petitions, we are not inclined to dismiss on this basis alone.

Id. 309 P.3d at 631 (emphasis added).

Copland and Bone-Club Factors Satisfied

Even if petitioner had shown "actual and substantial prejudice" required in *Copland*, the considerations required by *Bone-Club*, and cited by petitioner, appear to be present here.

> [T]he *Bone-Club* criteria require the trial court, on the record, to at least (1) state the public trial right that will be lost by moving proceedings into a private room, (2) identify the compelling interest that motivates the closure, (3) weigh the competing rights, (4) give an opportunity to object, and (5) adopt the least restrictive alternative of closure."

Copland, 309 P.3d at 630.

Concerning the first factor, the *Copland* court stated:

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> [W]e first ask whether the trial court stated that the public trial right would be abridged by moving *voir dire* for some jurors into chambers. Although the trial judge did not specifically use the words "right to public trial" or "Bone-Club " in court, it is clear from the transcript that defense counsel's request to close the courtroom during juror selection was rejected as a potential public trial violation. Each of the parties understood that interviewing selected jurors in chambers impinged on the public's right to an open and public trial.

Id. 309 P.3d at 633 (citation omitted).

Likewise, the District Court here made it clear "that interviewing selected jurors in chambers impinged on the public's right to an open and public trial." *Id.*

The Court stated on the record with the parties present:

> THE COURT: . . . . Does either side have any objection to having this type of hearing take place outside the presence of the jurors and outside the presence of any potential press?
>
> . . . .
>
> THE COURT: And does your client understand that he has a right to have this type of questioning take place in the court room in front of the press?
>
> . . . .
>
> THE COURT: And does he have any objection in terms of waiving his constitutional right with regard to having that type of forum as opposed to having questioning take place in private?

Transcript at 87.

> Concerning the second factor, the *Copland* court stated:
>
> The "compelling interest" mentioned by the parties as motivating the partial closure (*Wise's* second factor) was threefold: to protect juror privacy in sensitive subject areas, to allow jurors to be more candid in their answers, and to prevent contamination of potential jurors from publicity. The larger interest protected is thus Mr. Copland's right to an impartial jury and a fair trial.

Copland, 309 P.3d at 633. Here, the District Court stated:

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> [M]any of you may have had a personal experience or had close family manners or dose friends who have had an experience that would affect you in sitting as a juror in this case. And I will allow you as jurors, if you wish, to discuss it outside the presence of the entire panel. We will make arrangements for you to discuss the issue with me, the attorneys, the court reporter, the clerk, and the defendant being present outside the presence of the entire panel, if you wish.
>
> Here's the question. Do any of you have any other reason why you cannot give this case your undivided attention and render a fair and impartial verdict? Is there anyone who feels that way? So please raise your hand yes. Would you like to talk about this in private?

Transcript at 85-86. As in *Copland*, the clear intent of the Court here, in conducting limited in-chambers *voir dire*, was to ensure an impartial jury.

Concerning the third factor, the *Copland* court stated:

> Under the third *Wise* factor (the fourth *Bone-Club* factor), the court must weigh on the record the competing rights of the proponent of closure and the public. When, as here, the defendant has requested the closure to ensure a fair trial, his or her right to an impartial jury must be harmonized with the public's right to openness. Here, the trial court refused defense counsel's request to fully close the courtroom during *voir dire*, agreed with the parties' suggestion that jurors with specific privacy and bias issues could be interviewed privately, and asked the media representatives on the second day if they objected. The trial court in its ruling on the closure stated that the privacy issues of certain jurors justified the interviews in chambers. The court's reluctance to close the courtroom and careful consideration of arguments from both parties that partial closure was appropriate, implicitly—if not overtly—complied with the *Wise* and *Bone-Club* requirement to weigh competing interests.

Copland, 309 P.3d at 634 (citations omitted). Here, as in *Copland* the Court indicated that "the privacy issues of certain jurors justified the interviews in chambers" and closed *voir dire* on a very limited basis was necessary in order to ensure an impartial panel. *Id.*

Concerning the fourth factor, the *Copland* court stated:

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> The fourth *Wise* factor (and second *Bone-Club* factor) requires the trial court to give the public an opportunity to object to closure. Mr. Copland contends the court's failure to ask those present in the courtroom on March 28, 2006, whether they had any objection to the partial closure was a violation of the public trial right that requires reversal. (The audience was given an opportunity to object on March 29, 2006.) The record does not reveal whether other spectators were in the audience, and Mr. Copland does not assert any public trial right other than the right of the media.
>
> It is still an open question whether a criminal defendant has standing to assert the public's right to an open trial under article I, section 10. The trial court here did not specifically ask those present in the courtroom on March 28, 2006, whether they had an objection to the private questioning of some jurors in chambers. But when asked the next day if they objected to the jury selection proceedings, the media representatives indicated that they did not. And they did not rebut the prosecutor's statement that they had not objected to the partial closures during *voir dire* on March 28, 2006. Thus, even if Mr. Copland has standing to assert the public's right to an open trial, he fails to show that the right was violated or that he was prejudiced.

Copland, 309 P.3d at 634 (citations omitted).

The *Copland* case states that "[i]t is still an open question whether a criminal defendant has standing to assert the public's right to an open trial," and petitioner has not cited any authority to the contrary. *Id.* Even if defendant could assert this Washington State right of the public in the instant Idaho case, here as in *Copland* "the record does not reveal whether other spectators were in the audience." *Id.* At least, no party has cited any evidence from the record indicating that spectators were present, and the Court is not required to search the record for such evidence. *Quemada*, 153 Idaho at 616, 288 P.3d at 833.

Concerning the fifth factor, the *Copland* court stated:

> The fifth *Wise* factor (and fifth *Bone-Club* factor) requires the trial court to adopt the least restrictive alternative of closure. In this case, the trial court denied a defense motion for full closure during *voir dire* and limited the private interviews to those jurors who had

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> indicated they had issues with alcohol use and criminal history or who had prior knowledge of the case. Accordingly, the record shows that the trial court attempted to adopt the least restrictive partial closure of *voir dire*.

Copland, 309 P.3d at 634.

Here, the Court estimated that the closure to the general public would last only "five to seven minutes." It was limited to only three potential jurors who had difficulty with the topic of the case or had close family members or friends with an experience that would affect the potential juror. As in *Copland*, "the record shows that the trial court attempted to adopt the least restrictive partial closure of *voir dire*." *Id.*

FAILURE TO RAISE ISSUE ON APPEAL

Even if petitioner had objected at trial to the brief partial closure of *voir dire*, the state points out that petitioner failed to raise the issue of the partial closure on direct appeal. The state cites I.C. § 19-4901(b) which provides:

> This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction. Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier. Except as otherwise provided in this act, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

"Idaho Code § 19-4901(b) prohibits presentation in post-conviction relief proceedings of any issue that could have been raised on direct appeal except in

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limited circumstances." *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App.1994). The "limited circumstances" referenced in *Roman* are undoubtedly the "substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier" required by I.C. § 19-4901(b). Petitioner has not shown, or even argued, that these "limited circumstances" exist. Since petitioner failed to raise the issue of *voir dire* closure at trial or on appeal, and since he has not shown that the limited I.C. § 19-4901(b) exception applies, he may not now raise that issue in these post-conviction relief proceedings.

OUTCOME NOT AFFECTED

Even the I.C. § 19-4901(b) "limited circumstances" existed, and even if the limited in-chambers *voir dire* were fundamental error cognizable in these proceedings, the state argues correctly that petitioner has failed to make the necessary showing that the brief closure affected the outcome of the trial, citing *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010) which held:

> [I]n cases of unobjected to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.

Id. 150 Idaho at 226, 245 P.3d at 978 (footnote omitted).

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OTHER CLAIMS

In its motion, the state addressed several claims that were raised in the amended petition, but were not subsequently addressed by petitioner in his brief opposing summary dismissal.

Malicious Prosecution Claim

Concerning petitioner's malicious prosecution claim, the state argues:

> There is quite simply no support for any claim of malicious prosecution by Petitioner, no issue of material fact exists, and Respondent is entitled to judgment as a matter of law with regard to the allegation. Idaho Code §19-4906(c). Petitioner purports that the State of Idaho prosecuted him "when evidence clearly proves he could not have committed the crime charged in this case." Amended Petition for Post-Conviction Relief, p. 2, ¶ 2.3. Petitioner's allegation is at best misguided, as a probable cause finding was made on or about January 5, 2012, Petitioner was bound over for trial, a jury weighed the evidence and determined the evidence proved beyond a reasonable doubt that he did commit the crime charged, and the jury issued its verdict against him. Further, Petitioner has not provided this Court with evidence to establish the elements of malicious prosecution. A malicious prosecution action requires proof of six elements: (1) a prosecution, (2) terminating in favor of the plaintiff, (3) that the defendant was the prosecutor, (4) malice, (5) lack of probable cause, and (6) damages. *Shannahan v. Gigray*, 131 Idaho 664, 667, 962 P.2d 1048, 1051 (1998). As Petitioner has not and cannot establish any proof of malice on the part of the State, and as he was convicted by a jury, any claim of malicious prosecution, whether raised properly on direct appeal or raised improperly in the instant action, must fail. Plainly, Petitioner has not met his burden with regard to his allegation of malicious prosecution.

Respondent's motion at 3-4 (footnotes omitted). Petitioner does not respond.

The state's argument is correct. Summary dismissal is granted.

Actual Innocence Claim

Concerning petitioner's actual innocence claim, the state argues:

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> Similarly, Petitioner's actual innocence claim is has not been supported by evidence, i.e. affidavit(s) based on otherwise verifiable information. See e.g., *Nguyen*, 126 Idaho at 497, 887 P.2d at 4, *Draper*, 103 Idaho at 617, 651 P.2d at 651. And a claim of actual innocence could have been raised by Petitioner on direct appeal, having failed to do so, Petitioner has forfeited the instant claim. I.C. §19-4901(b). Nor has Petitioner presented this Court with any new evidence of purported innocence.
>
> The Idaho Supreme Court established the standard of actual innocence in *Rhoades v. State*, writing: "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." 148 Idaho 247, 253, 220 P.3d 1066, 1072 (2009), quoting *Schlup v. Delo*, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995). Here, Petitioner has failed to produce new, otherwise verifiable evidence of his innocence; lacking such new, otherwise verifiable evidence of his innocence, and facing the bar of Idaho Code §19-4901(b), Petitioner has failed to establish even a *prima facie* case of actual innocence.

Respondent's motion at 4-5 (reference to footnote omitted). Petitioner does not respond. The state's argument is correct. Summary dismissal is granted.

Claim of Deprivation of Rights Based on Allegedly Inaccurate Witness Testimony

Concerning petitioner's claim of deprivation of rights based on allegedly inaccurate witness testimony, the state argues:

> Petitioner alleges that both the victim's testimony and the testimony of Brooke Mechling at trial were "inaccurate." Amended Petition for Post-Conviction Relief, pp. 2-3, ¶¶ 2.2 and 2.4. Petitioner has failed to present admissible evidence to support his claims. He has failed to identify which witness statements are allegedly "inaccurate," whether his trial counsel objected thereto, and whether the Court abused its discretion in allowing the testimony.
>
> In *Pierce v. State*, the Idaho Court of Appeals affirmed the dismissal of a post-conviction petition alleging, *inter alia*, that two others involved in the robbery of which petitioner was convicted committed perjury compelled by the State's plea bargains. 109 Idaho 1018, 1019, 712 P.2d 719, 720 (Ct.App.1985). The Court of Appeals in *Pierce* determined that the petitioner's "broad

allegations" did not prove by a preponderance of the evidence that the State requested the delivery of false testimony or that the State was even aware the testimony was false, and, "[w]ithout such a showing the allegations are reduced to questions of credibility of the witnesses." *Id.*

> In the instant matter, Petitioner's allegations do not rise to the level of perjury accusations, but are also essentially reduced to questions of witness credibility. In Idaho, it is axiomatic that a reviewing Court will not substitute its judgment for that of the trier of fact as to witness credibility, weight of evidence, or reasonable inferences to be drawn from evidence. *State v. Abdullah*, 158 Idaho 386, 426, 348 P.3d 1, 41 (2015), quoting *State v. Adamcik*, 152 Idaho 445, 460, 272 P.3d 417, 432 (2012). Thus, Petitioner has failed to meet his burden with regard to his allegations of "inaccurate" testimony.

Respondent's motion at 5-6. Petitioner does not respond. The state's argument is correct. Summary dismissal is granted.

Allegation Regarding a Juror Who Was a Victim of the Crime Charged

Concerning petitioner's allegation regarding a juror who had been a victim of the crime charged, the state argues:

> Petitioner next alleges that relief may be based upon a juror's having been the victim of the crime charged and having been allowed to remain on the jury. Amended Petition for Post-Conviction Relief p. 3, ¶ 2.5. The question now before this Court is whether said juror's impartiality should have been challenged for actual or implied bias. In *State v. Lankford*, the Idaho Supreme Court wrote:
>
> > As this Court has noted many times, the right to a fair trial before an impartial jury is fundamental to both the U.S. Constitution and the Idaho Constitution. The Supreme Court of the United States has noted: "it is elementary that a fair trial in a fair tribunal is a basic requirement of due process," and this Court has stated that the due process requirements of the Idaho Constitution require "a fair trial by impartial jury." The impartiality of a juror may be challenged for "actual or implied" bias. Actual bias deals with the specific state of mind of an individual juror and is proved by

> questioning the juror as to whether he or she can serve with entire impartiality. Implied bias, however, conclusively presumes bias as a matter of law based on the existence of a specific fact.

(citations omitted) 162 Idaho 477, 485, 399 P.3d 804, 812 (2017). Neither the particular causes of challenge set forth in Idaho Code §19-2019, nor the nine enumerated grounds for a challenge based on implied bias listed in Idaho Code § 19-2020 are present in this case.

In fact, in *voir dire* questioning that took place in a jury room, the juror at issue testified, "Well, I am a victim, was a victim from the age of 12 to 15. I just really feel like I should disclose that." Exh. C to the Affidavit of Lucia Saitta, MTS and Jury Trial Transcript, pp. 89-90, ll. 25, 1-2. And, "I still think I could be impartial, which is why I did not answer the question that that's how it was posed. I pride myself on that, but I do feel like I should disclose that. It was a boyfriend of my mother. So very similar." *Id.*, at ll. 4-8. As required by the Supreme Court, the juror was made available for questioning by counsel for the State and defense, she explicitly testified under oath to her ability to serve with entire impartiality. Therefore, Petitioner has failed to meet his burden as to his allegation.

Respondent's motion at 6-7 (footnotes omitted). Petitioner mentions this juror in connection with his right to a public trial, but does not otherwise respond. The state's argument is correct. Summary dismissal is granted.

Allegation Regarding Three Jurors Allegedly Related to Law Enforcement

Concerning petitioner's allegation regarding three jurors allegedly related to law enforcement, respondent argues:

> Petitioner also alleges he was deprived of rights as a result of three jurors, each allegedly related to law enforcement, being allowed to remain on the jury panel. Amended Petition for Post-Conviction Relief, p. 5, ¶ 2.14. Again, there is no evidence before the Court that any of the three jurors held actual or implied bias. Simply being related to law enforcement is insufficient to sustain a challenge. Idaho Code § 19-2020 permits a challenge for implied

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> bias where consanguinity or affinity to the fourth degree exists between a juror and, *inter alia*, the person on whose complaint the prosecution was instituted. Here, however, there is no evidence of actual or implied bias on the part of the jurors.

Respondent's motion at 7 fn. 5. Petitioner does not respond. The state's argument is correct. Summary dismissal is granted.

Claim that Voir Dire Took Place Outside of the Presence of Counsel

Concerning petitioner's claim that *voir dire* took place outside of the presence of counsel, the state argues:

> Petitioner's Claims that *voir dire* took place outside of the presence of counsel are false and violative of Idaho Rule of Civil Procedure 11(b).
>
> Allegations are insufficient for a grant of relief under the Uniform Post-Conviction Procedure Act where they are clearly disproved by the record or do not warrant relief as a matter of law. *Cootz v. State*, 129 Idaho 360, 368, 924 P.2d 622, 630 (Ct.App.1996), citing *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). But, beyond warranting no entitlement to relief, Petitioner's claims at paragraphs 2.7, 2.8, 2.9, 2.10, and 2.11 of his Amended Petition are false, without evidentiary support, and were obviously presented without any reasonable inquiry.
>
> In Idaho, a party and his or her attorney shall avoid frivolous, unsupported litigation and arguments. See e.g., I.R.C.P. 11. By presenting a pleading, written motion, or other paper, an attorney certifies that, after reasonable inquiry, the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law and that factual contentions have evidentiary support. I.R.C.P. 11(b). Presentation of the claims at paragraphs 2.7, 2.8, 2.9, 2.10, and 2.11 of the Amended Petition does not meet these requirements. Petitioner claims he was denied the right to an open, public trial via questioning of jurors in chambers, he goes on to claim that jurors were questioned outside his and his trial counsel's presence. See Amended Petition for Post Conviction Relief, p. 3. Petitioner then claims that no specific findings were made to avoid Petitioner's public trial rights being violated, and that no record was made of the Court's interaction with jurors on the record. *Id.*, at pp.

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> 3-4. Finally, Petitioner alleges that he was not properly advised of his right to counsel and to have a public trial. *Id.*, at p. 4.
>
> Petitioner's presence in chambers, along with his trial counsel, counsel for the State, and a court reporter is on the record. Exhibit C to the Affidavit of Lucia Saitta, MTS and Jury Trial Transcript, p. 87. The Court's explanation of his Constitutional right to have void dire in public, and Petitioner's waiver thereof, are also on the record. It follows that no reasonable inquiry has been made into the allegations prior to their presentation in the Amended Petition for Post-Conviction Relief.

Respondent's motion at 10-11. Petitioner does not respond. The state's argument on the merits is correct. The Court does not find any violation of I.R.C.P. 11 has been established. Summary dismissal is appropriate on this claim.

Claims with Regard to DNA Evidence

Concerning petitioner's claims with regard to DNA evidence, the state argues:

> Petitioner's claims with regard to DNA evidence are without merit and must fail.
>
> Petitioner alleges that his rights were violated via the introduction on "nonconclusive DNA." Amended Petition for Post-Conviction Relief, p. 4, ¶ 2.12. It must be noted at the outset that Idaho Courts utilize Idaho Rule of Evidence 702 as the standard for admitting new scientific evidence. *State v. Faught*, 127 Idaho 873, 876, 908 P.2d 566, 569 (1995). In *Faught*, the defendant did not challenge an expert witness' qualifications as DNA expert, but rather argued that the expert's testimony on the statistical probability of another male having the same DNS was not based on reliable scientific evidence and any probative value of the testimony was therefore outweighed by prejudice. *Id.*, at 877, 908 P.2d at 570. The Idaho Supreme Court however determined that admission of statistical probability DNA evidence was not an abuse of discretion. *Id.*
>
> Petitioner's claim of "inconclusive" DNA evidence having been introduced is inaccurate. Rather, the forensic scientist testimony at trial was that Petitioner "could not be excluded as the contributor" and that "it was 87 billion times more likely that the H DNA came from a mixture of [the victim] and Mr. Coulston as opposed to if the

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mixture came from [the victim] and an unknown random person selected from the population." Exhibit C to the Affidavit of Lucia Saitta, MTS and Jury Trial Transcript, pp. 409, ll. 16-25; p. 409, ll. 5-10. On cross-examination, the forensic scientist testified that, as to the vaginal swab tested, "I cannot say for sure that is his DNA, no." *Id.*,at p. 420, l. 1. But as to the victim's underwear tested, the forensic scientist testified that "yes," she could testify that the DNA was Petitioner's. *Id.*, at p. 420, ll. 2-3.

Importantly, Petitioner is not entitled to the relief he seeks: to have the State's DNA evidence retested and compared to Petitioner's and others' DNA. Amended Petition for Post-Conviction Relief, p. 7, ¶ 3.1. The Uniform Post-Conviction Procedure such DNA evidence "was not subject to the testing that is now requested because the technology for the testing was not available at the time of trial." I.C. §19-4902(b). Petitioner's trial took place in April of 2013. There is no support for any contention that the testing Petitioner now seeks was based on technology unavailable in 2013.

Petitioner has not, and cannot, demonstrate for this Court that the forensic scientist testimony and/or the DNA test results themselves were improperly admitted, that the Court abused its discretion, or that the testimony and evidence were given improper weight by the trier of fact. Petitioner has failed to meet his burden.

Respondent's motion at 11-13. Petitioner does not respond. The state's argument is correct. Summary dismissal is granted.

Claim Regarding the Sentencing Judge Not Being the Trial Judge

Concerning petitioner's claim regarding the sentencing judge not also being the trial judge, respondent argues:

Petitioner's claim regarding the sentencing judge not being the trial judge must fail.

"Although it is a far better practice for the judge that presided over the trial to sentence the defendant, it is not per Se reversible error for a different judge to pronounce sentence." *State v. Kralovec*, 161 Idaho 569, 576, 388 P.3d 583, 590 (2017). Fairness at sentencing requires that certain conditions be satisfied: (1) that the defendant is afforded a full opportunity to present favorable evidence, (2) that the defendant is afforded a reasonable opportunity to examine all materials in the presentence report, and

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(3) that the defendant is afforded a full opportunity to explain and rebut evidence. *State v. Sivan*, 127 Idaho 387, 391, 901 P.2d 494, 498 (1995).

> Petitioner alleges that he was deprived of due process constitutional rights as a result of the Trial Judge not presiding over his sentencing. Amended Petition for Post-Conviction Relief, p. 5, ¶ 2.13. But, Petitioner has set forth no evidence to demonstrate he did not have full opportunities to explain and rebut evidence and/or to present favorable evidence, or that he was unable examine the entire pre-sentence report. In fact, at sentencing, the Court inquired whether Petitioner had the opportunity to review the pre-sentence report. Exh. C to the Affidavit of Lucia Saitta, MTS and Jury Trial Transcript, p, 979, ll. 7-8. Petitioner's counsel stated that he had and went on to make numerous corrections. *Id.*, at pp. 979-983. The Sentencing Court also offered the defense the opportunity to ask questions of the victim's father and to present evidence, which the defense declined. *Id.*, at p. 993, ll. 13-21. There is simply no evidence before this Court that the sentencing Judge failed to satisfy the *Sivak* factors in the underlying criminal matter.

Respondent's motion at 13-14 (footnotes omitted). Petitioner does not respond.

The state's argument is correct. Summary dismissal is granted.

Claims Regarding Trial Counsel's Alleged Failures at Sentencing

Concerning petitioner's claims regarding trial counsel's alleged failures at sentencing, the state argues:

> Additionally, there is no evidence before the Court to establish that Trial Counsel's not having moved to continue the sentencing hearing or otherwise to challenge the Sentencing Judge's imposition of sentence fell below an objective reasonableness standard or prejudiced Petitioner. See, Petition for Post-Conviction Relief, p. 7, ¶ 2.24. Pursuant to *Strickland*, it is Petitioner's burden to demonstrate that any such motion/challenge would have been successful and that a more favorable outcome to Petitioner would have resulted. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. He has not done so.

Respondent's motion at 14 fn. 7. Petitioner does not respond. The state's argument is correct. Summary dismissal is granted.

Claims as to the Suppression of Petitioner's Statements

Concerning petitioner's claims as to the suppression of his statements, respondent argues:

> In its unpublished July 15, 2015, opinion on appeal, the Court of Appeals affirmed Petitioner's conviction for lewd conduct with a child under sixteen. Exhibit B to the Affidavit of Lucia Saitta. The Court of Appeals found Coulston's comment, that he "better talk to an attorney. I have no idea," to be an ambiguous request for counsel insufficient to invoke his Fifth Amendment right. *Id.* In light of the Court of Appeals' having upheld the Trial Court's denial of Petitioner's motion to suppress, Petitioner's claims that law enforcement was improperly permitted to testify about a statement made after a verbal request for counsel and that a video recording thereof was improperly admitted are unfounded and violative of I.R.C.P. 11(b). See, Amended Petition for Post-Conviction Relief, p. 5, ¶¶ 2.15 and 2.16.
>
> And, as the Uniform Post Conviction Procedure Act makes clear, a petition for post-conviction relief is not a substitute for an appeal. I.C. §19-4901(b). A claim that was, or could have been, raised on appeal cannot be considered in a post-conviction action. *Whitehawk v. State*, 116 Idaho 831, 832-33, 780 P.2d 153, 154-55 (Ct.App.1989).
>
> Similarly, Petitioner's claim that law enforcement "improperly moved items of evidence" so as to "stage evidence," and then introduced those items as evidence at trial is also waived. See, Amended Petition for Post-Conviction Relief, p. 5, ¶ 2.17. Objections to searches, seizures, and evidence admission can be raised on appeal and therefore cannot be considered in the instant petition. See, *Maxfield v. State*, 108 Idaho 493, 499, 700 P.2d 115, 121 (Ct.App.1985) ("Generally, post-conviction relief cannot 'be used to correct mere errors or irregularities in the proceedings of a trial court which are not jurisdictional and which, at most, render a judgment merely voidable . . . . Clearly, Maxfield is attempting to use the post-conviction procedures act as a substitute for a direct appeal from his convictions of counts XVII and XVIII. This, he cannot do").

Respondent's motion at 14-16 (footnote omitted). Petitioner does not respond.

The state's argument is correct. In addition, the decision of the Court of Appeals in Coulston's criminal case is *res judicata* here. See *State v. Rhoades*, 134

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Idaho 862, 863, 11 P.3d 481, 482 (2000). Summary dismissal is granted.

Claims of Ineffective Assistance of Counsel

Concerning petitioner's ineffective assistance of counsel claims, respondent states:

Petitioner's claims of ineffective assistance of counsel must fail.

> To prevail on an ineffective assistance of counsel claim, it is the Petitioner's burden to demonstrate both (a) deficiency, i.e. that his counsel's performance fell below an objective standard of reasonableness and (b) prejudice, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668. 687-688, 104 S.Ct. 2052-2064 (1984).
>
> There is a presumption that counsel is competent and that counsel's tactics were based on sound legal strategy. *Aragon v. State*, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988). Strategic and tactical decisions made by counsel should not be second guessed by the Court. *State v. Larkin*, 102 Idaho 231, 233, 628 P.2d 1065, 1067 (1981) ("This is an area where we will not second guess counsel without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation.")
>
> 1. Petitioner's Trial Counsel's and Appellate Counsel's Strategic and Tactical Decisions Cannot be Second-Guessed by This Court.
>
> Petitioner alleges that trial counsel failed to investigate whether an individual was a sexual partner of the victim. Amended Petition for Post-Conviction Relief, p. 5, ¶ 2.18. In Idaho, the duty to investigate the law and facts relevant to plausible options only requires that counsel conduct a reasonable investigation. *Stevens v. State*, 156 Idaho 396, 388, 327 P.3d 372, 412 (CtApp.2013), citing *Mitchell v. State*, 132 Idaho 274, 280, 971 P.2d 727, 733 (1998).
>
> > In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to "counsel's perspective at the time" investigative decisions are made, and by giving a "heavy measure of deference to counsel's judgments."

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Rompilla v. Beard, 545 U.S. 374, 381, 125 S.Ct. 2456, 2462 (2005), citing *Strickland*, 466 U.S. at 689-91, 104 S.Ct. at 2052.

In his Affidavit, Trial Counsel testifies that, "[t]he decision not to investigate the victim's alleged sexual partners was a strategic/tactical decision made in light of Idaho Rule of Evidence 412." Affidavit of Rick Baughman, p. 4, ¶ 20. Trial Counsel's position in this regard was reasonable because, "admission of evidence of an alleged victim's past sexual behavior is constitutionally required only in extraordinary circumstances. *State v. Ozuna*, 155 Idaho 697, 702, 316 P.3d 109, 114 (Ct.App.2013). In fact, the Idaho Court of Appeals has recognized that a defendant's constitutional right to present a defense can be limited by I.R.E. 412 because a defendant "has no right to present irrelevant evidence and even if the evidence is relevant, it may be excluded in certain cases." *State v. Self*, 139 Idaho 718, 722, 85 P.3d 1117, 1121 (Ct.App.2003).

It is Petitioner's burden to establish that, had Trial Counsel made a motion to admit the victim's sexual history, such a motion would have been successful and the outcome would have been more favorable to Petitioner. *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068. "The defendant must show that there is a reasonable probability hat, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Where a motion lacks merit and would have been denied, counsel is not deficient in failing to pursue it, and "concomitantly, the petitioner could not have been prejudiced by the want of its pursuit." *Huck v. State*, 124 Idaho 155, 158-59, 857 P.2d 634, 637-38 (Ct.App.1993). In the underlying criminal case, Petitioner was charged with one count of lewd conduct with a child under the age ~~of sixteen~~. Nonetheless, the Sentencing Court noted at sentencing that:

> Mr. Verharen is correct, the information charges one count of lewd conduct but states that this occurred over a period between August, 2007, and November 27, 2011. The jury heard the evidence. They heard of more than one act. How many times this occurred, I don't know. But it was more than one time.

Exhibit C to the Affidavit of Lucia Saitta, MTS and Jury Trial Transcript, p. 1008, ll. 8-13. It is Petitioner's burden to demonstrate that, had a motion for admission of I.R.E. 412(b) evidence been made, the Court would have exercised it discretion to allow it. He has not done so, and given that his DNA was entered into

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evidence, Petitioner cannot offer that someone else was the source of the semen, nor can Petitioner offer that someone else engaged in sexual behavior with the victim at the time of the event giving rise to the charge because Petitioner engaged in said lewd conduct for over four years. I.R.E. 412(b)(1) and (4).

Respondent's motion at 16-18 (footnote omitted). At footnote 9, respondent states:

> The long time period within which the charged behavior occurred also undercuts Petitioner's claim that Trial Counsel was ineffective for failing to rehabilitate Petitioner on the stand after the State's cross examination by introducing alibi evidence. See, Amended Petition for Post-Conviction Relief, p. 7, ¶ 2.26. Petitioner has not presented the Court with four years' worth of alibi evidence to demonstrate the ineffectiveness of counsel. Nor has Petitioner proven that, had said alibi evidence been introduced, the outcome would have been more favorable to him.

Respondent's motion at 18 fn. 9. At page 19 of the motion respondent states:

> Along the same lines, Petitioner's claim that Trial Counsel was ineffective for failing to investigate the victim's Chlamydia diagnosis when he claims to have never been afflicted by it is also flawed. See, Amended Petition for Post-Conviction Relief, p. 6, ¶ 2.21. Trial Counsel testifies that the decision not to introduce Petitioner's negative STD test was made because its introduction would only have served to demonstrate that Petitioner did not have a sexually transmitted disease at the time of testing. Affidavit of Rick Baughman, p. 4, ¶ 22. As such, the absence of Chlamydia on the date of testing would have little to no probative value. *Id.* Trial Counsel also testifies that, as a matter of strategy, he believed that focus on the victim's credibility as related to a sexually transmitted disease was misplaced, but that the question of whether Petitioner actually penetrated the victim's vagina was at issue. *Id.* at pp. 2-3, ¶ 9. Petitioner cannot demonstrate that Trial Counsel's strategic/tactical decision in this regard fell below and [sic] objective standard of reasonableness or that he was prejudiced thereby.
>
> Petitioner's allegations with regard to his Trial Counsel's jury selection must also fail. . . . Petitioner has not demonstrated any actual or implied bias, as those terms are defined in Idaho Code §§ 19-2019 and 19-2020. Trial Counsel testifies that he selected the best jury for the case based on his over twenty-six years of trial experience. *Id.* at p. 2, ¶ 11. It follows that Petitioner has not met his burden of demonstrating that his Trial Counsel's actions with

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regard to the jury panel fell below an objectively reasonable standard or that he was prejudiced thereby.

While Petitioner alleges Trial Counsel was ineffective for failing to introduce Petitioner's own truck driving logbooks into evidence, his Trial Counsel testifies that the decision not to do so was, again, strategic and/or tactical. See, Amended Petition for Post-Conviction Relief, p. 6, ¶ 2.22. "The decision not to introduce Coulston's truck driving logs was strategic/tactical as such evidence would have little probative value but would have opened the door to evidence of Coulston's having allegedly taken the victim on numerous trips." Affidavit of Rick Baughman, p. 4, ¶ 21. And, contrary to Petitioner's claim that Trial Counsel was ineffective for failing to call a witness to challenge the victim's credibility, "there is no evidence that the decision was based on "inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." *Howard v. State*, 126 Idaho 231, 233, 880 P2d 261, 263 (Ct.App.1994). Rather, Trial Counsel recognized the bar to admission of the victim's past sexual behavior and noted the damage that would be done to Petitioner's case were the jury to see the victim crying on the stand. Affidavit of Rick Baughman, pp. 2-4, ¶¶ 19 and 20.

Finally, Petitioner's allegation that Appellate Counsel was ineffective for failing to pursue every issue on appeal falls well short of meeting his burden in this regard. See, Amended Petition for Post-Conviction Relief, p. 7, ¶ 2.27. In *Heilman v. State*, 158 Idaho 139, 146, 344 P.3d 919, 926 (Ct.App.2015) the Court of Appeals wrote:

> Specifically, Heilman does not explain why his appointed appellate counsel's failure to raise the issues he alleges constituted objectively deficient performance or how he was prejudiced thereby. An indigent defendant does not have a constitutional right to compel appointed appellate counsel to press all nonfrivolous arguments that the defendant wishes to pursue. Rather the process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being the evidence of incompetence, is the hallmark of effective appellate advocacy. Indeed, it is difficult to demonstrate that counsel was incompetent based on failure to raise a particular claim on appeal. Only when ignored issues are clearly stronger than those presented will the strong presumption of effective assistance of counsel be overcome. Heilman provides no evidence or

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> argument to indicate that the issues he contends should have been raise [sic] on his direct appeal were clearly stronger than those actually presented.
>
> Petitioner, much as the Petitioner in *Heilman*, has presented no evidence that the various issues he claims were improperly not pursued on appeal are stronger than the issue of whether his request for counsel while being questioned was unequivocal. In sum, Petitioner has failed outright to show that his Trial Counsel's and/or his Appellate Counsel's performance was deficient and that he was prejudiced thereby.

Respondent's motion at 19-21 (footnote omitted). Petitioner does not respond.

The state's argument is correct. Summary dismissal is granted on this claim.

CONCLUSION

In conclusion, petitioner has shown no genuine issues of material fact which would preclude summary dismissal on all of the claims in the amended petition for post conviction relief. As a result, the state is entitled to such a dismissal. IT IS THEREFORE ORDERED that the state's motion for summary dismissal is GRANTED, and petitioner's request for post-conviction relief is DENIED.

DATED this 9 day of October, 2018.

Scott Wayman

SCOTT L. WAYMAN, District Judge

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IN THE SUPREME COURT OF THE STATE OF IDAHO

GUY LEWIS COULSTON, JR.,

Petitioner-Appellant,

v.

STATE OF IDAHO,

Respondent.

Order Denying Petition for Review

Docket No. 46558-2018

Kootenai County District Court No. CV-2016-3882

The Appellant having filed a Petition for Review on May 01, 2020, and a supporting brief on June 01, 2020, seeking review of the unpublished Opinion of the Court of Appeals released April 07, 2020; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's Petition for Review be, and is hereby, denied.

Dated June 10, 2020

By Order of the Supreme Court

Melanie Gagnepain
Clerk of the Courts

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IN THE COURT OF APPEALS OF THE STATE OF IDAHO

GUY LEWIS COULSTON, JR.,

Petitioner-Appellant,

v.

STATE OF IDAHO,

Respondent.

Remittitur

Docket No. 46558-2018

Kootenai County District Court
CV-2016-3882

TO: First Judicial District, County of Kootenai

The Court having announced its unpublished Opinion in this cause April 07, 2020, and the Supreme Court having denied Appellant's Petition for Review on June 10, 2020; therefore;

IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the unpublished Opinion, if any action is required.

Dated: June 10, 2020

Melanie Gagnepain
Clerk of the Courts

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