

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

No: 23-3263

Joseph Miller

Petitioner - Appellant

v.

Dan Redington

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Springfield
(6:23-cv-03058-MDH)

JUDGMENT

Before LOKEN, GRUENDER, and KELLY, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

The motion to proceed in forma pauperis is denied as moot.

December 26, 2023

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

/s/ Michael E. Gans

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Appeal from U.S. District Court for the Western District of Missouri - Springfield
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ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

March 12, 2024

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

/s/ Michael E. Gans

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

JOSEPH MILLER,

Petitioner,

vs.

DAN REDINGTON,

Respondent.

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Case No. 6:23-cv-03058-MDH-P

ORDER

Petitioner, a convicted state prisoner currently confined at Northeast Correctional Center, has filed pro se a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Doc. 1. For the reasons set forth below, the petition for writ of habeas corpus is DENIED, a certificate of appealability is DENIED, and this case is DISMISSED.

I. Statement of Facts

Given the issues raised, there is no need to detail the particulars of the crime Petitioner was convicted of committing. Petitioner serves two consecutive seven-year sentences for forcible sodomy and second-degree assault. On direct appeal Petitioner alleged that the trial court erred in not allowing him to put on evidence that the victim, who was on probation at the time of the crime, committed a probation violation after the time of the attack. Doc. 7-6 at 1–2. The Missouri Court of Appeals held that the claim was without merit.

The post-conviction review court, after an evidentiary hearing, rejected three claims that Petitioner presented. Doc.7-11 at A1–A2. Petitioner alleged that his fourteen-year aggregate sentence is cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at A1. Petitioner alleged counsel was ineffective not objecting to “speculative” medical testimony, not objecting to “irrelevant” DNA evidence, and not submitting a converse instruction on criminal intent. *Id.* at A2. Petitioner alleged appellate counsel was ineffective for not raising the sufficiency of the evidence on appeal. *Id.* The court found the sentence was within the range of punishment for the offenses and did not constitute cruel and unusual punishment. *Id.* at A5–A6. The court found that the expert testimony was the legally admissible testimony of a qualified expert. *Id.* at A7. The court found that the DNA evidence was legally and logically relevant and admissible and

an objection would have been of no benefit to Petitioner. *Id.* at A7–A9. The court found that counsel did submit a converse instruction and the record refuted the allegation that counsel did not. *Id.* at A9–A10. The court found that the record established that the evidence was sufficient for conviction and a claim that appellate counsel was ineffective for not arguing otherwise lacked legal merit. *Id.* at A10.

In the appeal of the denial of the post-conviction relief motion, Petitioner alleged that direct appeal counsel was ineffective for not challenging the sufficiency of the evidence and that trial counsel was ineffective for not objecting to the State’s expert. Doc. 7-13 at 1–2. The Court of Appeals found both claims to be without merit. *Id.* The Court of Appeals found that the testimony of the State’s expert was the legally admissible testimony of a qualified expert and any objection to the testimony would have been without merit and would have been overruled. *Id.* at 12–13. The Court of Appeals found that the evidence was clearly sufficient to prove the charged conduct, and appellate counsel was not ineffective for not making meritless challenges on appeal. *Id.* at 15.

The Circuit Court of Pike County rejected a habeas petition containing three claims. These were that the prosecutor knowingly used perjured testimony from the victim, that trial counsel ineffectively failed to object to this prosecutorial misconduct, and that trial counsel was ineffective for not impeaching the victim about the allegedly perjured testimony. *Id.* at 1–2. The court found these claims were procedurally barred and that Petitioner could not show actual innocence or cause and prejudice to excuse the default. *Id.* at 3–5. In an alternate holding, the court found that the claims were without legal merit. *Id.* at 6–9.

The Petitioner raised the same three claims in his habeas petition to the Missouri Court of Appeals that he had raised in his Pike County petition. *See* Doc. 7-15 at 9. The Missouri Court of Appeals summarily denied the petition. Doc. 7-16.

In this instant case, Petitioner filed his timely petition pursuant to 28 U.S.C. § 2254. Doc. 1.

II. Legal Standard

State prisoners who believe that they are incarcerated in violation of the Constitution or laws of the United States may file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. “[H]abeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102-03 (2011) (internal quotation and citation omitted). When a petitioner seeks federal habeas relief raising a claim that was adjudicated on the merits in the state court proceedings, the

federal habeas court's inquiry is limited to whether (1) the state proceedings resulted in a decision that is contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court, or (2) the state proceedings resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

A state court decision is contrary to clearly established federal law if “the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or . . . decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Jones v. Luebbbers*, 359 F.3d 1005, 1011 (8th Cir. 2004) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)) (alteration in original). A state court decision unreasonably applies clearly established federal law if “the state court identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* (quoting *Williams*, 529 U.S. at 413) (alteration in original). Finally, a state court decision involves an unreasonable determination of the facts only if Petitioner shows the state court’s factual findings lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *see Jones*, 359 F.3d at 1011; § 2254(e)(1) (Petitioner bears the burden to rebut the presumption of correctness applied to state determinations of factual issues by “clear and convincing evidence”). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. 1984) (en banc), cert. denied, 469 U.S. 842 (1984). Because the state court’s findings of fact have fair support in the record and because Petitioner has failed to establish by clear and convincing evidence that the state court findings are erroneous, the Court defers to and adopts those factual conclusions.

III. Analysis

A. Grounds One, Two and Three

Respondent argues Grounds One, Two and Three are each procedurally barred. Generally, federal habeas review for state prisoners is permitted only after petitioners have “exhaust[ed] the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A). “A habeas petitioner is required to pursue all available avenues of relief in the state courts before the federal courts will consider a claim.” *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995), *cert. denied*, 516 U.S. 1056 (1996). “[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process” before presenting those issues in an application for habeas relief in federal court.

O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). “If a petitioner fails to exhaust state remedies and the court to which he should have presented his claim would now find it procedurally barred, there is a procedural default.” *Sloan*, 54 F.3d at 1381. Here, based on the record before this Court, Petitioner procedurally defaulted all three grounds for relief.

In Ground One, Petitioner argues the State knowingly failed to correct false and perjured testimony by the victim. Doc. 1-1 at 1-13. In Ground Two, Petitioner claims trial counsel was ineffective for failing to object to the State’s knowing use of perjured testimony by the victim and bolstering the credibility of that testimony during closing argument. *Id.* at 14-24. In Ground Three, Petitioner alleges trial counsel was ineffective for failing to impeach the false testimony of the victim. *Id.* at 25-33. ^① The Circuit Court of Pike County found that each of these claims were procedurally defaulted because Petitioner did not raise these claims in the ordinary course of review. Doc. 7-13 at 3-5. ^② The court pointed out that Petitioner did not set out a claim of gateway innocence to excuse the default, holding that Petitioner presents no new evidence but relies on evidence already in the record. *Id.* at 4-5. ^③ As to Ground Two, the court also found that the claim was without legal basis as there was no false testimony to which to object. *Id.* at 8. ^④ As to Ground Three, the habeas court also found that cross-examination is a matter of trial strategy, that counsel did cross-examine the victim with prior “inconsistent” statements although the statements were not necessarily inconsistent with the victim’s trial testimony, that counsel’s actions were reasonable professional conduct, and that there was no *Strickland* prejudice. *Id.* at 8-9.

A federal court may not review procedurally defaulted claims “unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Under the cause and prejudice test, cause “must be something *external* to the petitioner, something that cannot fairly be attributed to him.” *Id.* at 753 (emphasis in original). Here, Petitioner does not plead any facts to excuse his failure to fully present these claims to the state court. Consequently, Petitioner has not exhausted his remedies and the claims are procedurally defaulted. Petitioner’s Grounds One, Two and Three are denied.

B. Ground Four

In Ground Four, Petitioner argues gateway actual innocence excuses his defaults of Grounds One, Two and Three. Doc. 1-1 at 34-39. As argued by Respondent, the Circuit Court of Pike County correctly rejected this claim. A showing of gateway innocence requires new reliable

evidence, not available at trial that could not have been discovered through due diligence in light of which no reasonable juror would vote to convict. *Amrine v. Bowersox*, 238 F.3d 1023, 1028–1029. Petitioner has failed to present any new reliable evidence. Rather, Petitioner argues that from the evidence available at trial the jury should not have convicted him. Consequently, Ground Four fails.

C. Ground Five

In Ground Five, Petitioner contends the trial court abused its discretion in not admitting evidence that the victim committed a probation violation after the crime. Doc. 1-1 at 40-41. Petitioner presented this argument on direct appeal. Upon review of the record, the Missouri Court of Appeals held this claim was without merit.

The Court of Appeals explained the victim had a probation violation after the attack for taking a prescription Tylenol pill that had not been prescribed for her. Doc. 7-6 at 2–3. The court noted the victim was on probation and the prosecutor was not notified of the incident. *Id.* at 3. Ultimately, the Court of Appeals found that the probation violation had been resolved prior to trial without the prosecutor being notified, and Petitioner failed to show any bias on the part of the victim. *Id.* at 5.

In denying Petitioner’s claim, this Court finds the state court reasonably rejected this claim. The Court also finds that the Missouri courts’ adjudication of this claim was not contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented to the state court. §§ 2254(d)(1) and (2). Therefore, Petitioner is not entitled to habeas relief on this basis, and Ground Five is denied.

D. Ground Six

In Ground Six, Petitioner claims trial counsel provided ineffective assistance by not objecting to the testimony of the State’s expert on the cause of the injuries to the victim. Doc. 1-1 at 42-47. On appeal, the Court of Appeals found that the testimony of the State’s expert was legally admissible testimony of a qualified expert and any objection to the testimony would have been without merit and would have been overruled. Resp. Ex. 13 at 12–13. “A federal habeas court may not re-examine a state court’s interpretation and application of state law.” *Skillicorn v. Luebbbers*, 475 F.3d 965, 974 (8th Cir. 2007).

This Court finds the state court’s decision to be reasonable. Additionally, the Missouri courts’ adjudication of this claim was not contrary to or involved an unreasonable application of

clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented to the state court. §§ 2254(d)(1) and (2). Therefore, Petitioner is not entitled to habeas relief on this basis, and Ground Six is denied.

E. Ground Seven

In Ground Seven, Petitioner alleges direct appeal counsel ineffectively failed to challenge the sufficiency of the evidence to prove criminal intent. Doc. 1-1 at 48-50. However, as stated by Respondent, the Court of Appeals found the evidence was clearly sufficient to prove the charged conduct, and appellate counsel was not ineffective for not making meritless challenges on appeal. *See* Doc. 7-13 at 15.

Upon review of the state court's reasoning, the Court finds the state court made a reasonable determination. The Court also finds that the Missouri courts' adjudication of this claim was not contrary to or involved an unreasonable application of clearly established federal law or was based on an unreasonable determination of the facts in light of the evidence presented to the state court. §§ 2254(d)(1) and (2). Therefore, Petitioner is not entitled to habeas relief on this basis. Ground Seven is denied.

IV. Certificate of Appealability

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

V. Conclusion

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

IT IS SO ORDERED.

/s/ Douglas Harpool
DOUGLAS HARPOOL, JUDGE
UNITED STATES DISTRICT COURT

Dated: September 25, 2023