

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

No: 23-3707

David R. Schachtner

Petitioner - Appellant

v.

Chris Brewer, Warden, CRCC

Respondent - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Joplin
(3:23-cv-05084-MDH)

JUDGMENT

Before GRUENDER, SHEPHERD, and ERICKSON, 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 motions for appointment of counsel and for leave to proceed in forma pauperis are denied as moot.

April 03, 2024

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

/s/ Stephanie N. O'Banion

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

DAVID R. SCHACHTNER,

Petitioner,

vs.

CHRIS BREWER,

Respondent.

Case No. 23-05084-CV-SW-MDH-P

**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS
AND DENYING THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY**

Petitioner, a convicted state prisoner currently confined at the Crossroads Correctional Center in Cameron, Missouri, has filed *pro se* a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2019 conviction and sentence for statutory sodomy or attempted statutory sodomy in the first degree,¹ which were entered in the Circuit Court of Jasper County, Missouri. Doc. 1, p. 1. Petitioner's conviction was affirmed on direct appeal. Doc. 4-10. Petitioner's motion for post-conviction relief filed pursuant to Mo. Sup. Ct. R. 29.15 was denied following an evidentiary hearing (Doc. 4-13; Doc. 4-15, pp. 43-61), and that denial was affirmed on appeal therefrom (Doc. 4-20). 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. Background

In affirming the denial of post-conviction relief, the Missouri Court of Appeals, Southern District, set forth the following facts:

¹ Petitioner states in his petition that he is challenging his conviction and sentence for "attempted statutory sodomy" and argues in his pleadings that the state court record misidentifies the crime for which he was convicted and sentenced. Doc. 1, p. 1; Docs. 6, 8. The judgement entered after Petitioner's trial describes the charge of which Petitioner was convicted as "Statutory Sodomy or Attempted Statutory Sodomy" and imposes a "[l]ife imprisonment for crime of attempted statutory sodomy as a prior offender." Doc. 4-5, pp. 153-54. Prior to the entry of the judgment, Petitioner's attorney filed a motion to correct the issue, and the trial court clarified on the record that the relevant statute "doesn't distinguish the difference between statutory sodomy or attempt to commit statutory sodomy," so, therefore, the charge code for first-degree statutory sodomy included attempt and was not further modified by a finding of attempt. Doc. 4-1, pp. 470-75. Nevertheless, the trial court noted that "it was attempt to commit that the jury found," which is what the judgment would clarify, presumably for the purposes of the potential collateral consequences highlighted by defense counsel. *Id.* at 473-74. State court opinions have since referred to Petitioner's conviction as "statutory sodomy in the first degree." *See, e.g.*, Doc. 4-10, p. 3; Doc. 4-20, p. 3.

In June 2017, Schachtner entered the bedroom of Victim (a 7-year-old girl) at night while Victim was sleeping. He pushed Victim's pants and underwear aside, and touched Victim's genitals with his hands and mouth. Victim woke up, and Schachtner terminated the assault at that time. Schachtner made Victim pinky swear not to tell anyone and told her that if she told her mom, he would be in very big trouble.

Victim reported the abuse. Mother confronted Schachtner regarding his sexual assault of Victim, at which time "[h]e stood up and he began pacing back and forth saying that he made a mistake, he didn't mean to do that." Schachtner told Mother he wanted to fix the issue and "would get help for himself." Mother prevailed upon Schachtner to apologize to Victim, and Schachtner admitted to Victim "what he did was not okay[.]" and it was "something that adults shouldn't do to children[.]" Victim and Mother contacted law enforcement about the incident. Victim's underwear was DNA tested, and the two DNA profiles developed were consistent with Schachtner and Victim.

Schachtner was subsequently apprehended and charged by amended information, as a prior offender, with statutory sodomy in the first degree, pursuant to section 566.062. Schachtner was questioned by police and admitted he "licked [Victim] near her privates."

A jury trial commenced in January 2019. In addition to Victim and Mother's testimony, Schachtner's younger sister ("Sister") testified. Sister testified that when she was nine or ten years old and Schachtner was thirteen or fourteen, on ten or more occasions, he entered her bedroom at night while she and other members of the household were sleeping and touched her genitals with his hands. Sister reported Schachtner's abuse and a member of the household installed a lock on Sister's bedroom door. Undeterred, Schachtner then gained access to Sister's bedroom through a window.

During Mother's testimony, she was asked if she found something on Schachtner's cellphone that "should have raised bigger flags[.]" Defense counsel objected that this violated the best evidence rule, and the trial court overruled the objection. Mother then testified she found a pornographic website in a search history on Schachtner's cellphone. She clicked on the website and found a video of an "underdeveloped" female who appeared prepubescent. Mother confronted Schachtner. He claimed the website allowed him to find younger looking girls, but that everyone on the website was at least eighteen years old. Schachtner then locked his phone so Mother could not access it in the future.

Schachtner testified in his own defense. He admitted to "lick[ing] [Victim]'s leg," but claimed he obtained no "sexual gratification from this action at all. It's discussing [sic]." He stated he did not know why he did it, but denied it was for sexual gratification. Schachtner also testified regarding the alleged "child porn on [his] phone[.]" stating he only accessed the pornographic website to see "a girl from

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Joplin . . . [who] does porn[.]" and whom he and another friend "recognized . . . from Facebook." Schachtner claimed the girl was a petite 23- year-old. According to Schachtner, the female's breasts were underdeveloped such that someone could think she was potentially under the legal age.

The jury found Schachtner guilty of statutory sodomy in the first degree. The court sentenced Schachtner as a prior offender to life imprisonment in the Department of Corrections

Doc. 4-20, pp. 2-3 (footnotes omitted, ellipses added, other alterations in original).

Before the state court findings may be set aside, a federal court must conclude that the state court's findings of fact lack even fair support in the record. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). Credibility determinations are left for the state court to decide. *Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. en banc), *cert. denied*, 469 U.S. 842 (1984). It is Petitioner's burden to establish by clear and convincing evidence that the state court findings are erroneous. 28 U.S.C. § 2254(e)(1).² 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.

II. Discussion

In his petition, Petitioner raises the following twenty-three grounds for relief: (1) the trial court plainly erred in accepting the jury's guilty verdict on first-degree statutory sodomy on a child under twelve years old; (2) the trial court erred in denying Petitioner's motion for dismissal of conviction based on an alleged *Brady*³ violation for not disclosing the victim's trauma narrative; (3) the trial court erred in allowing the victim's mother to testify concerning pornography on Petitioner's phone; (4) the trial court erred in allowing testimony of Petitioner's prior misconduct involving Petitioner's sister; (5) the trial court plainly erred in not granting a new trial on the conviction for attempted first-degree statutory sodomy; (6) trial counsel was ineffective for failing to argue that the "propensity evidence" regarding his juvenile conduct "was too prejudicial;" (7) trial counsel was ineffective in arguing in pretrial motions that he should be allowed to question the thoroughness of the police investigation; (8) trial counsel was ineffective for failing to properly

²In a proceeding instituted by an application for writ of habeas corpus by a person in custody pursuant to a judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

³*Brady v. Maryland*, 373 U.S. 83 (1963).

litigate the DNA evidence; (9) trial counsel was ineffective for not objecting to testimony about pornography on Petitioner's phone; (10) trial counsel was ineffective for failing "to request further redaction" of Petitioner's interview with a detective; (11) trial counsel was ineffective for failing to sufficiently cross-examine the victim regarding a prior incident where she had "claimed someone had touched her privates, when it was determined that it was her midriff;" (12) trial counsel was ineffective for failing to request a mistrial when a venireperson said he worked at the jail and had seen Petitioner "a few times;" (13) trial counsel was ineffective, in that, but for the cumulative effects of Grounds 6-12, Petitioner would not have testified at trial; (14) trial counsel was ineffective for calling a particular witness; (15) trial counsel was ineffective for calling a witness and then using the witness to admit "the children's advocacy interview in its entirety;" (16) trial counsel was ineffective for failing to investigate and cross-examine a witness about extorting Petitioner; (17) trial counsel was ineffective for referring to the victim as a "victim" in spite of his own motion in limine; (18) appellate counsel was ineffective for failing to raise a claim of prosecutorial misconduct regarding the state's handling of the DNA evidence; (19) appellate counsel was ineffective for failing "to raise [a] sufficient cumulative claim;" (20) the trial court unduly influenced the jury by saying, "Hopefully we will wrap everything up tomorrow;" (21) the state "intentionally misconstrued the DNA evidence to the jury;" (22) the State of Missouri "is claiming and affirming a different conviction than was made by the jury at trial and pronounced by the judge at sentencing;" (23) the trial court plainly erred in failing to correct the record when Petitioner "challenged the accuracy of the information in the presentence report." Doc. 1, pp. 5-51.

Respondent contends that Grounds 1, 6-7, 10-21, and 23 are procedurally defaulted; Grounds 2-5, 8, and 9 are without merit; and that Ground 22 is not cognizable in the present proceeding. Doc. 4, pp. 17-38. In reply, Petitioner restates his grounds for relief, reincorporates and reasserts his prior arguments in support thereof, and argues in each ground that the trial court's "sentence and judgment and oral pronouncement . . . was for one count of attempted statutory sodomy" and not one count of first-degree statutory sodomy, as stated throughout the state court record. Doc. 8. This Court reviews Petitioner's grounds for relief below and finds that Petitioner is not entitled to habeas corpus relief.

A. Grounds 1, 6-7, 10-21, and 23 are procedurally defaulted.

Respondent argues that Grounds 1, 6-7, 10-21, and 23 are procedurally defaulted. Doc. 4, pp. 17-18, 21-38. Petitioner argues throughout his petition that the decision not to raise certain issues in the above grounds for relief was his “attorney’s decision” and that the failure to preserve Grounds 23 was due to “ineffective assistance of counsel.” See Doc. 1, pp. 16-18, 24-46, 50.

“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.

Ground 1 was not properly preserved at trial through objection, and the Missouri Court of Appeals, at its discretion, declined to review Ground 1 for plain error after finding that Petitioner failed “to facially establish substantial grounds for believing that manifest injustice or miscarriage of justice has resulted.” Doc. 4-10, pp. 5-7. Even if the state court had conducted plain error review, a state court’s discretionary review for plain error does not excuse the procedural default of an unpreserved claim. *Clark v. Bertsch*, 780 F.3d 873, 875-77 (8th Cir. 2015) (citing *Hayes v. Lockhart*, 766 F.2d 1247, 1253 (8th Cir. 1985)).

Petitioner raised Grounds 6-7, and 10-19 in his initial post-conviction proceedings but did not reassert the grounds in his post-conviction appeal. Doc. 4-15, pp. 11-13, 43-61; Doc. 4-17, pp. 15-17. Petitioner attempted to raise Grounds 20 and 21 in his initial post-conviction proceedings, but because they are claims of trial court error, they were found to not be cognizable in Petitioner’s state post-conviction proceedings. Doc. 4-15, pp. 38-40; Doc. 4-15, pp. 58-59. Petitioner then did not raise the issue on appeal from the denial of post-conviction relief. Doc. 4-17, pp. 15-17. Petitioner admits that he did not raise Ground 23 on appeal and claims that he did not do so due to “ineffective counsel.” Doc. 1, p. 50.

Because Grounds 1, 6-7, 10-21, and 23 were not raised at every appropriate stage in Petitioner’s state criminal and post-conviction proceedings, they are procedurally defaulted. *Sweet v. Delo*, 125 F.3d 1144, 1149 (8th Cir. 1997) (recognizing that failure to present claims in the

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Missouri Courts at any stage of direct appeal or post-conviction proceedings is a procedural default), *cert. denied*, 523 U.S. 1010 (1998). 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).

Insofar as Petitioner argues that the procedural default of any of his grounds for relief are due to the ineffective assistance of post-conviction counsel, in *Coleman, supra*, the United States Supreme Court held that, because there is no constitutional right to counsel in a state post-conviction proceeding, an attorney’s ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default. *Coleman*, 501 U.S. at 752-54. In *Martinez v. Ryan*, 566 U.S. 1 (2012), however, the Court recognized a “narrow exception” to *Coleman* by holding that “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” *Martinez*, 566 U.S. at 9.

Initially, the Court notes that *Martinez* cannot excuse the procedural default of Petitioner’s claim of trial court error or ineffective assistance of appellate counsel in Grounds 1, 18, 19, 20, 21, and 23. The United States Court of Appeals for the Eighth Circuit has specifically declined to extend the narrow exception in *Martinez* to claims alleging ineffective assistance of appellate counsel or trial court error. *See Dansby v. Hobbs*, 766 F.3d 809, 833-34 (8th Cir. 2014). The *Dansby* Court reasoned that “there is no logical necessity to expand *Martinez* from the ineffectiveness claim itself to the underlying claims” because “[a]s a practical matter, a petitioner in federal habeas needs only one winning claim to gain relief – if he’s got a winning ineffectiveness claim he doesn’t need another.” *Id.* at 833-34 (internal quotation omitted).

Although Petitioner asserts claims of ineffective assistance of trial counsel in Ground 6-7 and 10-17, *Martinez* remains inapplicable, because these grounds were raised in Petitioner’s amended post-conviction motion and defaulted in his post-conviction appeal. The *Martinez* Court held that its holding did not “concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings . . .” *Martinez*, 566 U.S. at 16. Accordingly, “*Martinez* offers no support . . . for the contention that the failure to preserve claims on appeal

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from a postconviction proceeding can constitute cause.” *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012). The *Arnold* Court explained that, because “Arnold’s multiple ineffective assistance claims were litigated in his initial-review collateral proceeding, but not preserved on appeal . . . Arnold has already had his day in court; deprivation of a second day does not constitute cause.” *Id.*

Insofar as Petitioner argues that Ground 23 was procedurally defaulted in his initial post-conviction proceeding due to the ineffective assistance of counsel or otherwise takes issue with how any of his grounds were presented and reviewed in his initial post-conviction proceeding, to excuse the procedural default of a claim of ineffective assistance of trial counsel under *Martinez*, Petitioner must establish that either (1) “the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial,” or (2) “appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).” *Martinez*, 566 U.S. at 14. To satisfy the second circumstance, “the assistance rendered must have been constitutionally substandard and prejudice must have resulted therefrom.” *Evans v. Luebbbers*, 371 F.3d 438, 445 (8th Cir. 2004) (citing *Strickland*, 466 U.S. at 687). Furthermore, “[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the [underlying] claim has some merit.” *Martinez*, 566 U.S. at 14.

Petitioner fails to establish that post-conviction counsel’s alleged failures meet the *Strickland* standard of ineffective assistance. Instead, the record of Petitioner’s post-conviction proceedings, including Petitioner’s amended post-conviction motion and the evidentiary hearing transcript, illustrates that Petitioner’s post-conviction counsel performed a full review of Petitioner’s case and was familiar with the evidence presented at trial and the relevant legal issues. Doc. 4-13; Doc. 4-15, pp. 10- 42. Accordingly, Petitioner fails to establish that post-conviction counsel’s decision to raise certain issues in the amended post-conviction motion and omit others was not a reasonable exercise of professional judgment. See *Gee v. Groose*, 110 F.3d 1346, 1352 (8th Cir.1997) (“Reasonable appellate strategy requires an attorney to limit the appeal to those issues counsel determines have the highest likelihood of success.”). In light of the presumption that post-conviction counsel acted reasonably, Petitioner fails to show that post-conviction counsel provided substandard assistance by failing to adequately raise any of Petitioner’s procedurally

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defaulted grounds. Furthermore, based upon this Court's review of the record, this Court also finds that Petitioner fails to establish that he was prejudiced by post-conviction counsel's alleged failures. Petitioner likewise fails to show the underlying claims in his grounds for relief have "some merit" that would render the claims sufficiently "substantial" for purposes of the *Martinez* "narrow exception." Therefore, the conduct of post-conviction counsel does not excuse the procedural default of Grounds 1, 6-7, 10-21, and 23. None of Petitioner's ancillary arguments or claims otherwise establish cause and prejudice for the procedural defaults of Grounds 1, 6-7, 10-21, and 23.

Petitioner fails also to show that a fundamental miscarriage of justice will result if his defaulted claims are not considered. *See Abdi v. Hatch*, 450 F.3d 334, 338 (8th Cir. 2006) (a petitioner must present new evidence that affirmatively demonstrates that he is actually innocent of the crime for which he was convicted in order to fit within the fundamental miscarriage of justice exception), *cert. denied*, 549 U.S. 1036 (2006). As a result, Grounds 1, 6-7, 10-21, and 23 are procedurally defaulted and are denied. Therefore Grounds 1, 6-7, 10-21, and 23 are procedurally defaulted and are denied.⁴

B. Grounds 2-5, 8, and 9 are without merit.

The Court next reviews the grounds that Petitioner properly exhausted in his state court proceedings. In Grounds 2-5, Petitioner raises a series of claims of trial court error, alleging that the trial court erred in denying Petitioner's motion for dismissal of conviction based on an alleged *Brady* violation for not disclosing a trauma narrative (Ground 2); allowing the victim's mother to testify concerning pornography on Petitioner's phone (Ground 3); allowing testimony of Petitioner's prior misconduct involving Petitioner's sister (Ground 4); and not granting a new trial based on the cumulative errors previously raised (Ground 5). Doc. 1, pp. 6-9, 14.

As to the *Brady* claim raised in Ground 2, the state appellate court reasonably found that the victim's trauma narrative would not have assisted in Petitioner's defense and, in fact, "would have likely made the jury more inclined to convict him." Doc. 4-10, pp. 10-11 (internal quotation omitted). Notably, the trauma narrative suggested that Petitioner "did not stop [the] sexual assault

⁴ The Court alternatively finds that the state appellate court's findings regarding the alleged trial court error in Ground 1 (Doc. 4-10, pp. 5-7) and the post-conviction motion court's denial of the claims of ineffective assistance of trial and appellate counsel in Ground 6-7 and 10-19 (Doc. 4-15, pp. 43-61) were not decisions that were contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" and were not "decision[s] that [were] based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *see* 28 U.S.C. §2254(d)(1) and (2).

when Victim woke up, but rather ignored Victim's protest for him to stop and persisted in his assault of [an] awake Victim" and also suggested that Petitioner "initiated the act while Victim was naked." *Id.* at 8-10 (alterations in original, emphasis omitted). Accordingly, the state court reasonably denied Ground 2, as the undisclosed evidence was not material for purposes of *Brady*.⁵

As to Petitioner's other grounds of trial court error, "[q]uestions regarding admissibility of evidence are matters of state law, and they are reviewed in federal habeas inquiries only to determine whether an alleged error infringes upon a specific constitutional protection or is so prejudicial as to be a denial of due process." *Rousan v. Roper*, 436 F.3d 951, 958 (8th Cir.), *cert. denied*, 549 U.S. 835 (2006) (quoting *Logan v. Lockhart*, 994 F.2d 1324, 1330 (8th Cir.1993)). Petitioner must show that "the alleged improprieties were so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair." *Id.*

Petitioner fails to make such a showing. As to Ground 3, the state appellate court reasonably found that testimony from the victim's mother concerning the pornography on Petitioner's phone was cumulative to Petitioner's own "detailed testimony on this matter at trial," and, therefore, was harmless beyond a reasonable doubt. Doc. 4-10, p. 12. As to the challenged propensity evidence in Ground 4, the state appellate court reasonably found that some of the challenged evidence was adduced by defense counsel during cross-examination of the propensity witness and that Petitioner "may not take advantage of self-invited error or error of his own making." *Id.* at 13 (internal quotation omitted). As to the claim of cumulative error in Ground 5, the state appellate court reasonably found that, because Petitioner failed to demonstrate error in his other claims, "no prejudice (cumulative or otherwise) is applicable thereto." *Id.* Each of these findings are reasonable and entitled to deference pursuant to 28 U.S.C. § 2254(d)(1) and (2).

In Grounds 8 and 9, Petitioner claims that trial counsel was ineffective for failing to properly litigate the DNA evidence and for not objecting to testimony about pornography on Petitioner's phone, respectively. Doc. 1, pp. 20-22. In order for Petitioner to successfully assert a claim of ineffective assistance of trial counsel, petitioner must demonstrate that his attorney's performance "fell below an objective standard of reasonableness" and that "the deficient performance" actually prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

⁵ Evidence is material for purposes of *Brady*, if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263, 280 (1999).

“A court considering a claim of ineffective assistance of counsel must apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.” *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 689). Petitioner must show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687.

To satisfy the prejudice prong, a petitioner must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Id.* at 694. Moreover, this Court may not grant habeas relief unless the state appellate court’s decision “was contrary to, or an unreasonable application of, the standard articulated by the [United States] Supreme Court in *Strickland*.” *Owens v. Dormire*, 198 F.3d 679, 681 (8th Cir. 1999), *cert. denied*, 530 U.S. 1265 (2000).

In affirming the denial of post-conviction relief, the Missouri Court of Appeals highlighted the relevant facts in the record, articulated the *Strickland* standard, and reasonably denied Grounds 8 and 9. As to Ground 8, the state appellate court found that trial counsel made a reasonably strategic decision “to get the criminalist on and off the stand as quickly as possible” and to not highlight the DNA evidence. Doc. 4-20, p.8. The state court further found that Petitioner failed to present evidence establishing “what a more extensive cross-examination would have disclosed,” as Petitioner did not call the criminalist as a witness at his evidentiary hearing or submit any evidence as to what his answers to further questioning would have been. *Id.* As to Ground 9, the state appellate court found that, in light of Petitioner’s defense that he licked the victim’s upper leg because he was drunk and not for sexual gratification, under Missouri state law, “evidence of the pornographic video of a young-looking female was admissible to show [Petitioner’s] motive was sexual gratification.” *Id.* at 6. Therefore, trial counsel was not ineffective for failing a meritless objection. *Id.* at 6-7. The state appellate court further noted that Petitioner could not establish prejudice on any of his grounds of ineffective assistance of counsel “because the evidence of his guilt was overwhelming.” *Id.* at 8, n. 8.

It was not unreasonable for the state appellate court to find that trial counsel made reasonably strategic decisions regarding the DNA evidence. See *Blackmon v. White*, 825 F.2d 1263, 1265 (8th Cir. 1987) (“[T]he courts must resist the temptation to second-guess a lawyer’s trial strategy; the lawyer makes choices based on the law as it appears at the time, the facts as disclosed . . . and his best judgment as to the attitudes and sympathies of judge and jury.”); *Shaw*

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v. U.S., 24 F.3d 1040, 1042 (8th Cir. 1994) (trial counsel's reasonable trial strategies cannot constitute ineffective assistance, even if they are unsuccessful). Insofar as the state court's decision rested on credibility determinations regarding testimony presented at Petitioner's evidentiary hearing, credibility determinations are left for the state courts to decide. *Graham*, 728 F.2d at 1540. Insofar as the state courts' decisions relied on interpretations of state law, "[a] federal court may not re-examine a state court's interpretation and application of state law." *Schleeper v. Goose*, 36 F.3d 735, 737 (8th Cir. 1994) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991)). It was also not unreasonable for the state courts to find that Petitioner did not suffer prejudice from trial counsel's actions, particularly in light of the overwhelming inculpatory evidence presented at trial.

Ultimately, the state courts' determinations as to Grounds 2-5, 8, and 9 did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," see 28 U.S.C. § 2254(d)(1) and (2). Therefore, Grounds 2-5, 8, and 9 are denied.

C. Ground 22 is not cognizable and, alternatively, is without merit.

Finally, in Ground 22, Petitioner argues that the State of Missouri "is claiming and affirming a different conviction than was made by the jury at trial and pronounced by the judge at sentencing." Doc. 1, p. 48. Insofar as Petitioner intended Ground 22 as a claim of error occurring in his post-conviction proceedings, such a claim is not be cognizable in the present proceeding. See *Gee*, 110 F.3d at 1351-52 ("[A]n infirmity in a state post-conviction proceeding does not raise a constitutional issue cognizable in a federal habeas petition." (internal quotation omitted)). Petitioner fails otherwise to establish that the error in Ground 22 supports his claims of error in his other claims, as he appears to argue in his reply. See generally Doc. 8. Rather, the state courts' resolutions of Petitioner's preserved grounds for relief are entitled to deference for the reasons set forth above regardless of any alleged discrepancy in the specific articulation of the charge of which Petitioner was convicted, which this Court explained above. See note 1, *supra*. Insofar as Petitioner intended Ground 22 to assert an error in any other manner, it is procedurally defaulted for the same reasons set forth above regarding Petitioner's other procedurally defaulted grounds for relief. As a result, Ground 22 is not cognizable and, alternatively is without merit.

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III. 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, a petitioner must show that a “reasonable jurist” would find the district court ruling on the constitutional claim(s) “debatable or wrong.” *Tennard v. Dretke*, 542 U.S. 274, 276 (2004). Because Petitioner has not met this standard, a certificate of appealability will be denied.

IV. 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
UNITED STATES DISTRICT JUDGE

Dated: November 28, 2023.

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

No: 23-3707

David R. Schachtner

Appellant

v.

Chris Brewer, Warden, CRCC

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Joplin
(3:23-cv-05084-MDH)

ORDER

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

May 13, 2024

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

/s/ Stephanie N. O'Banion

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