No. _____

IN THE SUPREME COURT OF THE UNITED STATES

****

Joanthony Johnson,

Petitioner,

v.

Michael Shewmaker,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI TO
THE EIGHTH CIRCUIT COURT OF APPEALS

****

APPENDIX A

Joanthony Johnson, 1313353
South Central Correctional Center
255 West Highway 32
Licking, Missouri 65542

Pro se

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1779

Joanthony Johnson

Plaintiff - Appellant

v.

Michele Buckner, Warden, SCCC

Defendant - Appellee

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:23-cv-04215-SRB)

JUDGMENT

Before BENTON, KELLY, and GRASZ, 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 to proceed in forma pauperis are denied as moot.

September 27, 2024

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

/s/ Maureen W. Gornik

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION

JOANTHONY JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 23-4215-CV-C-SRB-P
	)	
MICHELE BUCKNER,	)	
	)	
Respondent.	)	

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 South Central Correctional Center in Licking, Missouri, has filed pro se a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his 2017 conviction for two counts of first-degree sodomy, two counts of first-degree rape, and one count of attempted first-degree sexual abuse, which was entered in the Circuit Court of Boone County, Missouri. Doc. 1, p. 1. Petitioner's conviction was affirmed on direct appeal. Doc. 8-7. Petitioner's motion for post-conviction relief filed pursuant to Mo. Sup. Ct. R. 29.15 was denied following an evidentiary hearing (Doc. 8-12, pp. 176-192; Doc. 8-14) and that denial was affirmed on appeal therefrom (Doc. 8-17). 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 on direct appeal, the Missouri Court of Appeals, Western District, set forth the following facts:

> On the night of August 21, 2015, C.N., a college student, went with her roommates to The FieldHouse bar in Columbia. C.N. got separated from her friends. The next memory she had was of smoking "dabs," which are a condensed form of THC more potent than leaf marijuana, in the kitchen of Johnson's apartment. C.N. remembered feeling sick to her stomach afterwards and holding onto the toilet in Johnson's bathroom. Her head was spinning, and she thought she was going to vomit. Johnson came into the bathroom, grabbed C.N.'s arm, told her she was fine, and tried to get her out of the bathroom. She repeatedly told him that she did not feel well and wanted to be left alone, but he continued to grab her. Johnson took C.N. into the bedroom. C.N.'s next memory was of waking up, face

down, on the bed the next morning. Johnson was behind her, and she was unsure of what was happening. After this, C.N. occasionally saw Johnson out at The FieldHouse and Roxy's, another Columbia bar. She did not confront Johnson or report the incident to the police because she was unsure whether Johnson had done anything to her that night.

A few weeks later, on September 13, 2015, K.B., then nineteen years old, went to Willie's bar in Columbia with her friends, S.C. and J.L. K.B. and S.C. met Johnson while sitting at the bar, and they drank shots with him. They decided to accompany Johnson and his friend back to Johnson's apartment so they could buy some Xanax and continue drinking. At the apartment, Johnson offered K.B. and S.C. cocaine. After the two women each snorted a line, they went to the bathroom together and questioned whether the substance Johnson had given them was actually cocaine.

Johnson, K.B., and S.C. went to another apartment to buy the Xanax. On the way to the apartment, S.C. started experiencing "really weird visuals." S.C. saw a rainbow grid, her vision became blurry, and she felt groggy. After buying the Xanax, Johnson gave K.B. and S.C. each a pill. K.B. took her pill, but S.C. did not take hers. The three went back to Johnson's apartment, where S.C. retrieved K.B.'s shoes and purse. When K.B. and S.C. announced their intention to leave at that time, Johnson insisted on accompanying them to the entrance of the apartment building. As they walked down the hallway, K.B. started "freaking out." She began crying, screaming, and crawling back down the hallway toward Johnson's apartment. Johnson took K.B. into his apartment, while S.C. went downstairs to try to find their friend J.L., who was attempting to call her.

By the time S.C. arrived in the lobby of Johnson's apartment building, her memory was getting fuzzy, and she felt like she was losing control of her muscles. She tried to go back upstairs to Johnson's apartment to find K.B., but she could not find the door to the stairwell. S.C. began rehearsing facts like her name and birthday and K.B.'s name and birthday. Finally, S.C. decided to sit in the lobby, where a couple found her. She gave her phone to the couple and asked them to call J.L. and direct him to the building. The couple did so and also called the police.

When J.L. arrived, he went upstairs and began knocking on apartment doors before he was eventually directed to Johnson's apartment. J.L. knocked loudly and "assertively" on Johnson's door for ten to fifteen minutes. Johnson did not answer the door, even though J.L. could hear music or a television inside the apartment. J.L. explained who he was and said that he was looking for his friend, K.B. Johnson still did not answer the door. J.L. went downstairs and gave the police Johnson's apartment number. When the police went to Johnson's apartment, the police had to knock on his door for "a very long time" before Johnson finally came to the door.

When the police entered the apartment, Johnson unlocked the door to his bedroom. K.B. was lying on Johnson's bed. Because K.B. did not respond to the

officers and appeared "heavily intoxicated" and "high on something," they called for an ambulance. K.B. was wearing camo pants and a baggy white T-shirt. The T-shirt was not on her properly, as only one arm was through a sleeve. The other arm was draped over the shirt, which caused K.B.'s armpit and the underside of her breast to be exposed when she tried to sit up. K.B.'s clothes were piled in a corner and appeared to have been peeled off of her, because her underwear was still inside of her pants. Johnson told the officer that he had removed K.B.'s clothes because she had vomited "everywhere" on them, but the officer did not see any vomit on her clothes. The officers found a jar of Vaseline on the table next to the bed.

The officers recovered a baggie from Johnson's living room that was labeled "4-ACO-DMT fumarate," which is a substance associated with hallucinogenic mushrooms. The baggie was also marked, "Not for human consumption." Residue from white powder was nearby and appeared to have been lined up with a credit card. The officers collected the powder, but the powder blew away when it was taken outside for testing. Due to an officer's mistakenly coding his report of the incident as a non-criminal matter, the police did not follow up or investigate the incident as a criminal matter.

A couple of months later, on November 19, 2015, T.T., then twenty-one years old, went to Roxy's bar and saw Johnson there. T.T. had first met Johnson in late 2014 or early 2015. When T.T. encountered Johnson again at Roxy's on the evening of November 19, 2015, Johnson went to the bar multiple times and bought a shot and mixed drinks for her. T.T. was not with Johnson when he got the drinks and could not see if he put anything in them. Johnson invited T.T. and her friends to a party at his place after the bar closed. After having three drinks, T.T. went outside the bar to smoke a cigarette. T.T.'s next memory was tripping while walking with Johnson near a parking garage. Johnson held on to T.T. and told her, "Come on." The next thing T.T. remembered was waking up at around 6:30 or 7:00 a.m. in Johnson's bed. She was lying on her stomach and wearing nothing but her bra and underwear. T.T. had no memory of taking off her clothes. T.T. asked Johnson if there had been a party, and he said no one but her had come to the apartment. T.T. felt "very weird, weird and groggy," but she did not feel hungover. Although she had consumed alcohol in the past, she had never before blacked out from drinking. Her body was sore, and her neck felt as though someone had choked her. T.T. found a bruise on the back of her thigh that looked like the imprint of three fingers. T.T. did not report the incident to the police because she was not sure what had happened.

Two and a half months later, in the early morning hours of February 4, 2016, M.V., then seventeen years old, met Johnson outside of The FieldHouse. M.V. and her friend, H.J., had been drinking at the bar using fake IDs. M.V. had also snorted cocaine while inside the bar. Outside the bar, Johnson offered to provide M.V. and H.J. some dabs at his apartment. They agreed to go and went with him and two other women to Johnson's apartment.

Once inside the apartment, M.V. and H.J. smoked the dabs that Johnson gave them. Johnson also mixed drinks for M.V. The two other women eventually left, and M.V. and H. J. fell asleep on Johnson's couch. M.V. got up during the night and tried to find something to eat. She ate three chocolate peanut butter balls from a bag that she found in Johnson's refrigerator. M.V.'s next memory was of waking up and feeling hazy. She thought someone had spiked her drink, and she tried to get H.J. to wake up but was unsuccessful. M.V. passed out again. When she woke up, she felt lethargic and totally out of it.

At that point, Johnson came out of his bedroom. M.V. told him that she wanted to go to the doctor. She repeatedly told him that someone had put something in her drink. Johnson told her she was fine, grabbed her by her waist, and walked her into his bedroom. M.V. knew that Johnson was going to take advantage of her because she was not in control of her body.

Johnson laid M.V. down on his bed and removed her spandex shorts. He then climbed on top of her and had vaginal intercourse with her. M.V. had no ability to resist him because she felt so weak and could not do anything other than make unhappy grunting noises. Johnson appeared to be turned on by those noises and went faster. According to M.V., the effects that she was feeling were worse than she had experienced when she had taken acid on prior occasions. She seized, twitched, and hit herself, and she also kept passing out and regaining consciousness. M.V. passed out after Johnson had finished raping her the first time. When she woke up, Johnson grabbed her, put her face down on the bed, and had intercourse with her again. This time, M.V. was able to tell him to stop and was crying. Johnson seemed to enjoy her crying and went faster. M.V. continued to seize, twitch, and pass in and out of consciousness.

M.V. and H.J. left Johnson's apartment sometime after 7:00 a.m. M.V. told H.J. that she thought Johnson had raped her. As H.J. drove her home, M.V. felt lethargic and was still seizing, twitching, and hitting herself. H.J. called M.V.'s father and told him that someone had raped M.V. M.V.'s father took her to a hospital as soon as she got home. At the hospital, M.V. was disoriented, had trouble concentrating during the examination, and frequently lost her train of thought mid-sentence. She was groggy and swaying back and forth, her speech was slurred, and she fell asleep in the middle of a conversation with a sheriff's deputy.

Johnson's DNA was found in semen recovered from M.V.'s cervix and anus. Testing of M.V.'s blood showed the presence of alcohol, THC, cocaine, and Psilocin, which is a substance commonly found in hallucinogenic mushrooms.

The court issued a search warrant for Johnson's apartment on February 19, 2016. The warrant was executed on February 22, 2016, and an iPhone was then seized from the apartment. The iPhone could not be searched at that time because it was locked.

Meanwhile, the State charged Johnson with one count of first-degree rape for knowingly having sexual intercourse with M.V., a person who was incapable of consent. The State also charged him with two counts of felony possession of a controlled substance, specifically, more than five grams of marijuana and hallucinogenic candies or dabs, with the intent to distribute.

While the charges against Johnson for the incident involving M.V. were pending, the police were able to search Johnson's iPhone on October 28, 2016. On Johnson's phone, the police found three videos showing him having anal intercourse with C.N. and two videos showing Johnson having oral sex and vaginal intercourse with T.T. Neither C.N. nor T.T. made any sounds during the videotaped sexual encounters. The police showed C.N. and T.T. the videos, and the two women said that they did not consent to any sexual contact with Johnson on those occasions. Johnson's phone also contained texts that Johnson sent to friends during and after the incident with M.V. and H.J. In one of the texts, which Johnson sent when he first arrived at his apartment with M.V. and H.J., Johnson stated that he was "about to finally get some pussy." In another text that Johnson sent a few hours after M.V. left his apartment, Johnson said that he "[m]ade a porno." Additionally, Johnson's phone contained a brief video of M.V. and H.J. sleeping in his apartment.

The State subsequently filed a five-count amended indictment against Johnson. Count I alleged that Johnson committed first-degree sodomy on August 22, 2015, by knowingly having deviate sexual intercourse with C.N. Count II alleged that Johnson committed attempted first-degree sexual abuse on September 14, 2015, by removing K.B.'s clothing, which was a substantial step toward the commission of the crime of first-degree sexual abuse and was done for the purpose of committing such abuse. Count III alleged that Johnson committed first-degree sodomy on November 20, 2015, by knowingly having deviate sexual intercourse with T.T. Count IV alleged that Johnson committed first-degree rape on November 20, 2015, by knowingly having sexual intercourse with T.T. Lastly, Count V alleged that Johnson committed first-degree rape on February 4, 2016, by knowingly having sexual intercourse with M.V. Counts I, III, IV, and V alleged that the victims were incapable of consent because they were in a drug-induced state and were known by Johnson to be unable to make a reasonable judgment as to the nature or harmfulness of the sexual acts.

Trial was held in April 2017. Johnson testified in his defense that C.N., T.T., and M.V. were conscious during the sexual acts and that all of the sexual encounters were consensual. Johnson admitted that, in addition to videotaping himself having sex with C.N. and T.T., he videotaped himself having sex with M.V. He did not save the video of M.V. to his phone, however, but instead sent it to a friend via Snapchat. Johnson admitted that none of the women were aware he was videotaping them. Johnson denied attempting to sexually abuse K.B. He first testified on direct examination that he helped K.B. take off her clothes and put on his clothes because she had urinated on herself. On cross-examination, however, he acknowledged that he told the police that he had taken off K.B.'s clothing by himself because she had

> vomited on them. Johnson also testified that he was "very knowledgeable" about the different forms of hallucinogenic mushrooms and their effects. He admitted that he had mixed cocaine with the 4-ACO-DMT fumarate in the plastic bag that police found in his apartment on the night of the incident with K.B.
>
> The jury found Johnson guilty on all charges. The court sentenced him as a persistent misdemeanor offender to four years in prison for attempted sexual abuse and twenty-five years in prison for each of the two rape and two sodomy counts. The sentences on the rape and sodomy counts were ordered to run consecutively to each other and concurrently to the attempted sexual abuse sentence, for a total of 100 years . . .

State v. Johnson, 576 S.W.3d 205, 212-16 (Mo. Ct. App. 2019) (footnote omitted); Doc. 8-7, pp. 2-11.

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).[1] 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

Petitioner raises two grounds for relief, wherein Petitioner argues that (1) the trial court erred in denying Petitioner's motion to suppress the evidence obtained from his cell phone, as it was obtained in violation of his Fifth Amendment right against self-incrimination; and (2) trial counsel was ineffective in failing to argue in her suppression motion regarding the cell phone evidence that the execution of the search warrant violated Petitioner's Fourth Amendment rights against unlawful search and seizure. Doc. 1, pp. 5-7. Respondent contends that both of Petitioner's grounds for relief are without merit, as they were reasonably denied by the state courts. Doc. 8,

[1]In 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).

pp. 11-17. This Court reviews Petitioner's grounds for relief below and finds that Petitioner is not entitled to habeas corpus relief.

A. Ground 1 is without merit.

In Ground 1, Petitioner contends that the trial court erred in denying Petitioner's motion to suppress the evidence obtained from his cell phone. Doc. 1, p. 5. Specifically, Petitioner argues that the trial court ordered him to use his passcode to unlock his phone so that it could be searched pursuant to a search warrant, in violation of his Fifth Amendment rights against self-incrimination. *Id.*

"'Questions 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. Instead, the state appellate court reasonably found that, although most courts addressing the issue had determined that "entering a passcode to unlock an electronic device seized by the government is a testimonial communication triggering Fifth Amendment protection," the compelled act of production in Petitioner's case was not testimonial pursuant to the "foregone conclusion exception." Doc. 8-7, pp. 2-11. That exception provides that "[t]he production of documents the existence of which is a foregone conclusion is not testimony for purposes of the Fifth Amendment." *U.S. v. Norwood*, 420 F.3d 888, 895 (8th Cir. 2005) (citing *Fisher v. United States*, 425 U.S. 391, 408 (1976)).

After citing to *Fisher* and other related cases, the state appellate court explained the following:

> In this case, before the State sought the order compelling Johnson to enter his passcode to unlock the phone so the State's expert could examine it, the police observed Johnson enter his passcode into the phone and unlock it so that his expert could examine it first. The evidence in the light most favorable to the court's suppression order shows that, despite Johnson's current arguments to the contrary, he entered his passcode knowingly and voluntarily in the presence of both defense counsel and law enforcement for the purpose of having his expert examine the phone for exculpatory evidence. This action satisfied the elements of the foregone

> conclusion exception, because the implicit facts that were conveyed through his act of entering the passcode the second time pursuant to the order to compel -- the existence of the passcode, its possession or control by him, and the passcode's authenticity -- were already known to the State and, therefore, were a foregone conclusion . . . .

Doc. 8-7, p. 33. The state appellate court found that the State was not also required to show that it was a foregone conclusion that certain files were on the phone, as Petitioner insisted. *Johnson*, 576 S.W.3d at 226-28; Doc. 8-7, pp. 33-36. Specifically, the court explained the following:

> The focus of the foregone conclusion exception is the extent of the State's knowledge of the existence of the facts conveyed through the compelled act of production. Here, Johnson was ordered to produce the passcode to his phone. The facts conveyed through his act of producing the passcode were the existence of the passcode, his possession and control of the phone's passcode, and the passcode's authenticity. The State showed that it had prior knowledge of those facts because Johnson knowingly and voluntarily entered the passcode the first time in the presence of law enforcement and defense counsel for the purpose of having his expert examine the phone; hence, their disclosure a second time pursuant to the order to compel was a foregone conclusion. Therefore, the compelled act of production was not testimonial and not protected by the Fifth Amendment privilege against self-incrimination, and it could not become so simply because it led to incriminating evidence. . . .

Johnson, 576 S.W.3d at 227-28; Doc. 8-7, pp. 35-36.

These findings are reasonable and are entitled to deference under 28 U.S.C. § 2254(d). Petitioner contends that the state appellate court unreasonably extended the foregone conclusion exception to a new context by permitting the "production of an unlocked phone" as opposed to "specific business documents." Doc. 12, p. 11. However, such an argument conflates that which Petitioner was specifically compelled to produce (a passcode), with the propriety of the subsequent search and the admissibility of the evidence obtained therefrom. Whereas the former invokes a claim under the Fifth Amendment (which was reasonably denied by the state appellate court), the latter invokes the Fourth Amendment. *See United States v. Spencer*, No. 17-cr-00259-CRB-1, 2018 WL 1964588 at *2 (N.D. Cal. April 26, 2018) ("[T]he government need only show it is a foregone conclusion that Spencer has the ability to decrypt the devices . . . To the extent Spencer contends that the government has not adequately identified the files it seeks, that is an issue properly raised under the Fourth Amendment, not the Fifth."); *see also United States v. Apple MacPro Computer*, 851 F.3d 238, 248 n. 7 (3rd Cir. 2017) (explaining that "a very sound argument

can be made that the foregone conclusion doctrine properly focuses on whether the Government already knows the testimony that is implicit in the act of production. In this case, the fact known to the government that is implicit in the act of providing the password for the devices is 'I, John Doe, know the password for these devices.'"). Notably, the Missouri Court of Appeals reasonably found elsewhere in their decisions that the search warrant issued for the cell phone was valid and that the phone was otherwise searched pursuant to an agreement between the parties. Doc. 8-7, pp. 19-29; Doc. 8-17, pp. 9-14, 17. Trial counsel did not raise a Fourth Amendment objection to the execution of the cell phone search. Insofar as Petitioner contends that trial counsel should have done so, that alleged failure is addressed in Ground 2, below. Therefore, the state court's determinations as to Ground 1 did not result in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or in "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *see* 28 U.S.C. § 2254(d)(1) and (2). Ground 1 is denied.

B. Ground 2 is without merit.

In Ground 2, Petitioner argues that trial counsel was ineffective in failing to argue in her suppression motion that the execution of the cell phone search warrant violated Petitioner's Fourth Amendment rights against unlawful search and seizure. Doc. 1, p 7. 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). "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 articulated the relevant *Strickland* standard and denied Ground 2 as follows:

> Here, Johnson fails to raise a cognizable claim for post-conviction relief because he does not allege that trial counsel's failure to move to suppress the execution of the search warrant denied him a fair trial. Rather, Johnson argues that trial counsel's failure to raise this issue denied appellate counsel the opportunity to argue the execution of the search warrant on direct appeal. Further, even if a cognizable claim existed, Johnson was not prejudiced because the argument that the execution of the search warrant violated his Fourth Amendment rights is meritless. As the motion court correctly noted, the search of the phone's content did not occur because of the search warrant. Rather, as explained above, Johnson knowingly and voluntarily consented to the search of the data on his phone through the extraction agreement that trial counsel made with the State.
>
> Even if the search of the cell phone occurred pursuant to the search warrant, the discovery of additional rape victims would not have violated Johnson's Fourth Amendment rights. As we explained in *Johnson*:
>
> > The warrant in this case constrained the search of Johnson's phone to evidence of the specific crimes of distribution, deliver, and manufacture of a controlled substance and first-degree rape. The affidavit that was incorporated into the warrant described in detail the offenses that Johnson was suspected of committing and how cell phones could be used in the commission of those offenses. At the time the cell phone was seized, the officers could not have known where such evidence was located in the phone or in what format, such as texts, videos, photos, emails, or applications.
>
> *Johnson*, 576 S.W.3d at 223. Therefore, in holding that the scope of the warrant was sufficiently particular and not overbroad, this Court made clear that had the search of the phone occurred pursuant to the search warrant, it would not have exceeded the scope of the warrant because, "by necessity government efforts to locate particular files will require examining many other files to exclude the possibility that the sought after data are concealed there." *Id.* Accordingly, Johnson was not prejudiced by trial counsel's failure to move to suppress the execution of the search warrant.

Johnson v. State, 674 S.W.3d 22, 35 (Mo. Ct. App. 2023); Doc. 8-17, pp. 17-21. Elsewhere in the opinion, the state appellate court found that trial counsel was not ineffective in arranging the cell phone extraction agreement and that the agreement was made with Petitioner's knowing and voluntary consent. Doc. 8-17, pp. 12-14.

It was not unreasonable for the state courts to find that the search was conducted pursuant an extraction agreement to which Petitioner knowingly and voluntarily consented and that the scope of the search warrant would not have been exceeded even if the search was conducted pursuant to the warrant. It was also reasonable for the state courts to find that trial counsel had a reasonable trial strategy in proceeding with the extraction agreement. *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 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). In addressing another one of Petitioner's grounds for relief, the state court explained that the extraction agreement was pursued by trial counsel after Petitioner represented that the cell phone contained potentially exculpatory evidence. Doc. 8-17, p. 12. As the court explained, "The fact that the cell phone revealed additional videos of Johnson raping other incoherent or unconscious victims cannot be blamed on trial counsel." *Id.* Insofar as the state courts' decisions 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. Groose*, 36 F.3d 735, 737 (8th Cir. 1994) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

Ultimately, the state courts' determinations as to Ground 2 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, Ground 2 is denied.

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 is 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 of appealability is DENIED, and this case is DISMISSED.

It is so **ORDERED**.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: April 4, 2024.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 24-1779

Joanthony Johnson

Appellant

v.

Michele Buckner, Warden, SCCC

Appellee

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:23-cv-04215-SRB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel and the motion to take judicial notice are also denied.

December 12, 2024

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

/s/ Maureen W. Gornik

Additional material from this filing is available in the Clerk's Office.