

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No: 25-3136

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David Paul Timmons

Plaintiff - Appellant

v.

Warden Alejandro Reyes; Attorney General for the State of South Dakota

Defendants - Appellees

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Appeal from U.S. District Court for the District of South Dakota - Central  
(3:24-cv-03017-RAL)

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JUDGMENT

Before LOKEN, BENTON, 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 motion to dismiss the Attorney General as a party is denied as moot.

December 30, 2025

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

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/s/ Susan E. Bindler

Appx: A

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

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| DAVID PAUL TIMMONS,<br><br>Petitioner,<br><br>vs.<br><br>WARDEN ALEJANDRO REYES, AND<br>MARTY JACKLEY, ATTORNEY GENERAL<br>OF THE STATE OF SOUTH DAKOTA,<br><br>Respondents. | 3:24-CV-03017-RAL<br><br>OPINION AND ORDER ADOPTING<br>REPORT AND RECOMMENDATION AND<br>GRANTING JUDGMENT ON THE<br>PLEADINGS |
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A South Dakota jury found Petitioner David Paul Timmons guilty of domestic aggravated assault by strangulation. The state trial court sentenced Timmons to 15 years' imprisonment with three of those being suspended on conditions. The Supreme Court of South Dakota affirmed his conviction on direct appeal. State v. Timmons, 974 N.W.2d 881 (S.D. 2022). Timmons filed a state habeas petition, but the Supreme Court of South Dakota never reviewed it because Timmons did not timely file his motion for a probable cause certificate. Timmons petitioned for a Writ of Habeas Corpus under 28 U.S.C. § 2254 in this Court, seeking to vacate his conviction and have his case remanded for a new trial. Doc. 1. Respondents, South Dakota Attorney General Marty Jackley and Warden Alejandro Reyes, moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Doc. 11. Magistrate Judge Mark A. Moreno issued a Report and Recommendation that Respondents' Motion for Judgment on the Pleadings be granted. Doc. 18. Timmons has now objected to the Report and Recommendation. Docs. 24, 26. Having reviewed

the record de novo in light of Timmons's objections, this Court adopts the Report and Recommendation, Doc. 18, and grants Respondents' Motion for Judgment on the Pleadings, Doc. 11.

**I. Facts**

The facts from Timmons's trial are laid out more fully in Timmons, 974 N.W.2d 881. In short, Timmons and K.C. were in a relationship resulting in K.C. becoming pregnant and were living together. Timmons, 974 N.W.2d at 884; CR at 783, 945–46, 954.<sup>1</sup> On April 9, 2020, K.C. was at Timmons's residence on her phone watching television in the living room while Timmons was sleeping. Timmons, 974 N.W.2d at 884; CR at 764, 946. Timmons awakened and became upset about the television being too loud and began arguing with K.C. Timmons, 974 N.W.2d at 884; CR at 764–65, 946–47. The argument escalated, an altercation ensued, and Timmons took K.C. to the floor on her stomach. Timmons, 974 N.W.2d at 884; CR at 947–49. K.C. testified that while on the floor, Timmons restrained her by putting his arm around her neck causing her to feel like she could not breathe and was going to pass out. Timmons, 974 N.W.2d at 884; CR at 949–50.

K.C. called 911 one hour after the incident. Timmons, 974 N.W.2d at 884; CR at 309. Officers observed that K.C. was shaken up both on the phone and when they arrived. Timmons, 974 N.W.2d at 884; CR at 744, 752. K.C. told Officer Jonathan Brill, a reporting officer, "that Timmons hit her face on the floor, held her down with her arms behind her back, and pulled her hair." Timmons, 974 N.W.2d at 884–85; CR at 949. K.C. described to Officer Brill that she felt

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<sup>1</sup> Judge Moreno took judicial notice of the state court records in Timmons's criminal and habeas cases, and this Court does as well. This Court cites the records from Timmons's criminal record as "CR," the records from his direct appeal as "AR," the records from his habeas case as "HR," and the record from his habeas appeal as "HAR."

like she could not breathe while Timmons had his arm around her neck and then told an emergency medical services responder that Timmons strangled her. Timmons, 974 N.W.2d at 885; CR at 328, 792–93.

Timmons told Officer Brill that K.C. had started the altercation and tried to bite his thumb off. Timmons, 974 N.W.2d at 885; CR at 764–65. Timmons contended that K.C. sustained her injuries from rough sex the night before. Timmons, 974 N.W.2d at 885; CR at 765. Timmons said that K.C. would ask to be choked and have her hair pulled during their sexual encounters. Timmons, 974 N.W.2d at 885; CR at 765–66, 789.

Timmons was arrested and indicted for domestic aggravated assault. Timmons, 974 N.W.2d at 885; CR at 9, 769. A two-day jury trial began on March 11, 2021. Timmons, 974 N.W.2d at 885. The State introduced the statements made to Officer Brill by K.C. and Timmons, the recording of K.C.'s 911 call, and photographs of their injuries. Timmons, 974 N.W.2d at 885; CR at 309–58, 743–95. K.C. testified at trial that Timmons had “choked her while she was pinned to the floor and that she was frightened during the altercation.” Timmons, 974 N.W.2d at 885; CR at 949–50. K.C. told the jury that she felt like she could not breathe and was going to pass out “a little bit.” Timmons, 974 N.W.2d at 885; CR at 950. K.C. admitted that she could have caused bruising on Timmons by trying to push him away and that there was a “mutual physical confrontation.” Timmons, 974 N.W.2d at 885; CR at 948–49, 972. The prosecutor introduced photographs of and presented testimony from a nurse who charted an observation of bruising around K.C.'s neck after the incident. Timmons, 974 N.W.2d at 885; CR at 312–16, 931–35.

At the close of the State's case, Timmons moved for a judgment of acquittal. Timmons, 974 N.W.2d at 886; CR at 1010–11. He argued that there was insufficient evidence to establish that he intended to strangle K.C. or place her in fear of death or imminent bodily harm but was

only trying to restrain her. Timmons, 974 N.W.2d at 886; CR at 1010–11. The court denied the motion concluding that there was evidence from which the jury could find Timmons guilty beyond a reasonable doubt. Timmons, 974 N.W.2d at 886; CR at 1012–13. The jury found Timmons guilty of domestic aggravated assault. Timmons, 974 N.W.2d at 886; CR at 1054.

Timmons admitted to a part II information, which alleged he previously had been convicted of attempted fourth-degree rape. Timmons, 974 N.W.2d at 885–86; CR at 1062–63. This admission enhanced Timmons's potential maximum punishment to the level of a class 2 felony under South Dakota law. Timmons, 974 N.W.2d at 886; CR at 1059. The state trial court ordered a presentence investigation report. Timmons, 974 N.W.2d at 886; CR at 1065. K.C. submitted a letter of support for Timmons in which she stated that she felt like she was lied to, manipulated, and threatened by the prosecutor to testify against Timmons. Timmons, 974 N.W.2d at 886; Doc. 24-2 at 1. K.C. in the letter wrote that she was coming down from methamphetamine use at the time of the altercation and did not want to call the cops. Timmons, 974 N.W.2d at 886; Doc. 24-2 at 1. K.C. wrote that Timmons did not deserve a heavy sentence and that Timmons's intentions were not to hurt her. Timmons, 974 N.W.2d at 886; Doc. 24-2 at 1. On April 26, 2021, Timmons received fifteen years' imprisonment with three years suspended. Timmons, 974 N.W.2d at 886; CR at 1046–47.

Timmons filed a motion for a new trial asserting that K.C.'s letter constituted newly discovered evidence and a surprise. Timmons, 974 N.W.2d at 886. The trial court denied the motion reasoning that Timmons could have discovered the information in the letter before trial based upon his extensive pretrial contact with K.C. Id. The court also added that the information in the letter could only be used to impeach K.C. and was cumulative of what was used to impeach her. Id.

Timmons appealed his conviction to the Supreme Court of South Dakota asserting that the trial court erred in denying his motion for judgment of acquittal and that the trial court abused its discretion in denying his motion for a new trial. Timmons, 974 N.W.2d at 886; AR at 7. The Supreme Court of South Dakota upheld his conviction affirming the trial court's denial of his motion for judgment of acquittal and finding no abuse of discretion in denying his motion for a new trial. Timmons, 974 N.W.2d at 887, 889–90.

Timmons filed a habeas petition in state court. HR at 4–41. Timmons raised a total of twenty-two grounds for relief, all of which he repeats in his federal petition before this Court. Docs. 1, 2; HR at 5–37. After dismissal of the petition at the trial court level, HR at 183, Timmons filed a motion for certificate of probable cause to the Supreme Court of South Dakota but was one day late of his deadline. HAR at 1–17, 25. The Supreme Court of South Dakota entered an order requiring Timmons to show cause for his untimeliness. HAR at 25. Timmons blamed the delay on his Unit Manager not timely delivering mail to him and sending his mail out. HAR at 40. The Supreme Court of South Dakota considered Timmons's contention but ultimately dismissed the motion “on the grounds that it was not timely taken.” HAR at 56.

Timmons then filed his 28 U.S.C. § 2254 petition in this Court alleging that there was insufficient trial evidence (Ground I); that the denial of his motion for a new trial violated his due process rights (Ground II); and that his attorney was ineffective in multiple ways (Ground III). Doc. 1; Doc. 2 at 1.

## **II. Legal Standard**

This Court reviews a report and recommendation under the statutory standards found in 28 U.S.C. § 636(b)(1), which provides in relevant part that “[a] judge of the [district] court shall make a de novo determination of those portions of the report or specified proposed findings or

recommendations to which objection is made.” The district court judge “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” *Id.* However, “[i]n the absence of an objection, the district court is not required ‘to give any more consideration to the magistrate’s report than the court considers appropriate.’” United States v. Murrillo-Figueroa, 862 F. Supp. 2d 863, 866 (N.D. Iowa 2012) (quoting Thomas v. Arn, 474 U.S. 140, 150 (1985)). This Court has conducted a de novo review of the record and Timmons’s objections.

### III. Analysis

#### A. AEDPA Standard

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) makes succeeding on a federal habeas petition difficult, even when prisoners follow all state procedural rules and properly exhaust their claims in state court. Section 2254(d) bars federal courts from granting relief on any claim “that was adjudicated on the merits in State court” unless the state court’s decision (1) “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States” or (2) “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)(1)–(2). This “difficult to meet and highly deferential standard for evaluating state-court rulings” requires “that state-court decisions be given the benefit of the doubt.” Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (cleaned up and citations omitted).

A state court decision is contrary to federal law under AEDPA “if it (1) contradicts a rule set forth in the Supreme Court’s cases or (2) confronts a set of materially indistinguishable facts and arrives at a different result.” Dansby v. Payne, 47 F.4th 647, 655 (8th Cir. 2022) (cleaned up and citation omitted). And a “decision unreasonably applies federal law if the state court correctly

identifies the governing legal standard but either unreasonably applies it to the facts of the particular case or unreasonably extends or refuses to extend the legal standard to a new context.” Id. at 656 (cleaned up and citation omitted). Prisoners claiming an unreasonable application of federal law “must show that a state court’s adjudication was not only wrong, but also objectively unreasonable, such that fairminded jurists could not disagree about the proper resolution.” Id. (citation omitted). This Court evaluates “the reasonableness of the state court’s ultimate conclusion, not necessarily the reasoning used to justify the decision.” Zornes v. Bolin, 37 F.4th 1411, 1415 (8th Cir. 2022); see also Springs v. Payne, 95 F.4th 596, 600–01 (8th Cir. 2024) (citing Zornes and Wilson v. Sellers, 584 U.S. 122 (2018)). AEDPA also demands that a state court’s factual determinations “shall be presumed to be correct,” and gives the petitioner the “burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

#### **B. Ground I: Insufficient Trial Evidence**

Ground I of Timmons’s petition alleges that the trial judge violated his due process rights by denying his motion for judgment of acquittal based on insufficient evidence. Doc. 1 at 6. Timmons challenged the denial of his motion for judgment of acquittal on direct appeal. Timmons, 974 N.W.2d at 886. The Supreme Court of South Dakota affirmed the conviction, holding there was sufficient evidence for the jury to find him guilty beyond a reasonable doubt. Id. at 887–88. Timmons argued in his state habeas petition that the trial judge’s denial of his motion for judgment of acquittal was erroneous based on his interpretation of the facts—much like he does here. HR at 5–10.

Since Timmons appealed his conviction to the Supreme Court of South Dakota and raised this issue on appeal, Timmons has exhausted his state court remedies and not procedurally



defaulted on this claim. See Timmons, 974 N.W.2d at 886. Since this claim was adjudicated on the merits in state court, however, Timmons must show the state court's decision renders him "in custody in violation of the Constitution or laws or treaties of the United States" under AEDPA's deferential standard of review. 28 U.S.C. § 2254(a). To do so Timmons must meet the high standard set in Jackson v. Virginia for insufficient evidence supporting his conviction to be an error of constitutional dimension. 443 U.S. 307 (1979). "Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." Id. at 319. The Supreme Court has emphasized how difficult it is to succeed on a sufficiency-of-the-evidence-claim in a § 2254 proceeding:

We have made clear that Jackson claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury. And second, on habeas review, a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was objectively unreasonable.

Coleman v. Johnson, 566 U.S. 650, 651 (2012) (per curiam) (cleaned up and citations omitted).

Judge Moreno found reasonable the Supreme Court of South Dakota's decision affirming the trial court's denial of judgment of acquittal. Doc. 18 at 6. Timmons objects to Judge Moreno's finding that K.C. "feeling" like she could not breathe was sufficient alone to support a finding that Timmons choked her. Doc. 24 at 4. Timmons further objects to Judge Moreno's interpretation of supporting facts arguing that they do not support his conviction because K.C. only stated that she "felt" like she could not breathe, not that she could not breathe. Id. at 4–5.

Timmons's objections are overruled. There was enough evidence to support the jury's verdict based on K.C.'s testimony, Officer Brill's testimony, and the photographs of and testimony about K.C.'s injuries. Timmons's argument overlooks much of the evidence against him. K.C. testified that Timmons became angry at her because she had the TV too loud and was always on her phone. CR at 946–47. She described that he grabbed her phone, she took it back and tried to walk away, but Timmons seized her arm. Id. at 947–49. K.C. recounted that the confrontation escalated, Timmons pulled K.C. to the floor, got her on her stomach and hit her face on the floor. Id. at 317–19, 947–49. K.C. testified that Timmons attempted to restrain her by pulling her arms behind her back and then by wrapping his arm around her neck, making her unable to breathe such that she felt like she might pass out. Id. at 949–50. K.C. called 911 within an hour and her injuries, depicted in photographs, included a cut to her lower lip, scratches to her neck and bruises on her legs, neck and arms. Id. at 309–16. A nurse later observed those same injuries. Id. at 931–35. Timmons's own statements confirmed that they had caused each other's injuries, although he attributed her injuries to rough sex and his injuries to K.C. attacking him. Id. at 765. Timmons has failed to show the Supreme Court of South Dakota's decision affirming the trial court was "objectively unreasonable," or that there was constitutionally insufficient evidence to support his conviction.

### **C. Ground II: Denial of Motion for New Trial**

Timmons next disputes the trial court's denial of his motion for a new trial based on the post-verdict letter K.C. provided seeking leniency at Timmons's sentencing hearing. Doc. 1 at 8. Timmons raises three arguments: (1) the letter reveals for the first time that K.C. was high on methamphetamine, which if known, would have "shattered" her credibility; (2) her admission to being on drugs shows motive for lying to the police and bolsters his self-defense claim; and (3)

the judge failed to do the necessary probing on K.C.'s claim of prosecutorial intimidation. Doc. 2 at 13–15. Timmons raised this argument on direct appeal to the Supreme Court of South Dakota. Timmons, 974 N.W.2d at 888. The Supreme Court of South Dakota affirmed his conviction holding that the trial court did not abuse its discretion in denying Timmons's motion for a new trial. Timmons, 974 N.W.2d at 889–90. Timmons then asserted this claim in his state habeas petition. HR at 10–13.

Since Timmons properly raised this issue on direct appeal to the Supreme Court of South Dakota, Timmons has exhausted his state court remedies on this claim. Timmons has not procedurally defaulted this claim. However, to the extent that Timmons argues that the trial court misapplied state law in not granting his motion for a new trial, there is nothing this Court can do. “[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” Estelle v. McGuire, 502 U.S. 62, 67–68 (1991). State law governed the ruling on the motion for a new trial here and the propriety of that ruling is thus outside the scope of federal habeas review.

Judge Moreno, liberally construing the petition, deemed Timmons to be asserting a denial of his constitutional right to present a full defense because of the discovery of new evidence. Doc. 18 at 7–8. “[A] ‘claim of newly discovered evidence relevant to the guilt of a state prisoner is generally not a ground for relief on federal habeas corpus[.]’” Cornell v. Nix, 921 F.2d 769, 771 (8th Cir. 1990) (quoting Mastrian v. McManus, 554 F.2d 813, 822 (8th Cir. 1977)). A petitioner to be afforded relief must show “that the [newly discovered] evidence would probably produce an acquittal on retrial.” Cornell, 921 F.2d at 771 (alteration in original) (quoting Dumond v. Lockhart, 885 F.2d 419, 421 (8th Cir. 1989)). Judge Moreno found that Timmons could not show that the

“evidence would probably produce an acquittal on retrial.” Doc. 18 at 8. Judge Moreno reasoned that the evidence was not new to Timmons, and that there was other evidence at trial that presented K.C.’s motive to lie and alleged prosecutorial intimidation. Doc. 18 at 7–8.

Timmons objects for various reasons. First, he objects to Judge Moreno’s “speculation that Timmons cannot show the ‘evidence would probably produce an acquittal on retrial’ to get Habeas relief.” Doc. 24 at 5 (citing Doc. 18 at 7–8). Timmons next objects that he knew K.C. was high at the time of the altercation, by stating that he only believed her to be, not that he actually knew. Id. at 6. Timmons then objects that Judge Moreno understated the impact of drug use, asserting that K.C.’s drug use would have discredited her testimony and provided an additional theory to support his defense. Id. at 6–7. Timmons also objects to Judge Moreno’s finding that Timmons could have found out about the prosecutorial intimidation during “his several rendezvous with K.C. despite a no-contact order.” Id. at 7. Finally, Timmons objects to the finding that defense counsel “suggested that prosecution used K.C. to manufacture a crime.” Id. at 7–8 (citing Doc. 18 at 9–10).

Timmons’s objections are overruled. First, Timmons admitted that he believed K.C. was high on methamphetamine due to her past use and informed counsel of this fact. Doc. 2 at 21. Regardless of whether he actually knew she was high on methamphetamine that morning, he was aware of her drug use and informed counsel of it. Timmons had the ability to investigate this matter and present evidence at his trial based on his awareness of drug use. This information was not new. Further, K.C.’s motive to lie was explored through other evidence showing that external influences were pressuring her to call the police and testify for the State. Plus, Timmons’s counsel insinuated at trial that K.C. felt pressure from the prosecutor, including asking how many times K.C. met with the State leading up to trial and about the prosecutor’s concern of how K.C. might

testify. Timmons's counsel elicited from K.C. at trial that she had met with the prosecutor five or six times about her testimony, that she regretted calling the police because she loves Timmons and they share a child together, and that she felt "kind of" manipulated by family and friends to testify against Timmons though she was telling the truth still. CR at 968–70, 974–75. Timmons overstates K.C.'s letter, written after the conviction, as some revelation of newly discovered evidence, but Timmons has not shown that anything in it would probably produce an acquittal on retrial. Therefore, this ground does not warrant habeas relief.

#### **D. Ground III: Ineffective Assistance of Counsel**

Ground III of Timmons's petition alleges that his trial attorney was ineffective in twenty different ways. Doc. 1 at 9. These grounds include various failures to provide effective assistance of counsel in post-trial matters, investigate the case further, object to the admission of evidence, and provide additional evidence. Doc. 2 at 5–6.

Timmons presented these ineffective assistance of counsel claims in his state habeas petition. HR at 13–37. Timmons, however, failed to timely appeal his habeas petition to the Supreme Court of South Dakota, missing his filing deadline by one day. HAR 56. The Supreme Court of the United States has stated in regard to failing to follow state procedural rules:

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred 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). Timmons's failure to timely appeal his petition to the Supreme Court of South Dakota, and its dismissal of his petition on an independent and adequate state procedural rule renders Timmons's ineffective assistance of counsel claims procedurally defaulted. Nevertheless, as Judge Moreno did, this Court will still consider each

claim of ineffective assistance of counsel on their merits to determine whether Timmons can show cause and prejudice.

A petitioner claiming ineffective assistance must show both that counsel's performance was constitutionally deficient and that he was prejudiced by this deficiency. Strickland v. Washington, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, Timmons must show that "counsel's representation fell below an objective standard of reasonableness" given "all the circumstances." Id. at 688. This standard is "highly deferential," and courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. Timmons has the burden of showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." Id. at 687.

To establish prejudice, Timmons must show a "reasonable probability" that, but for his attorneys' deficient performance, the outcome of his trial would have been different. Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "That requires a substantial, not just conceivable, likelihood of a different result." Cullen, 563 U.S. at 189 (cleaned up and citation omitted). Petitioners must meet both Strickland prongs to succeed on an ineffectiveness claim, and courts can begin (and perhaps end) with either prong. Williams v. Norris, 576 F.3d 850, 858 (8th Cir. 2009). Federal habeas courts reviewing a state court's application of Strickland must take "a highly deferential look at counsel's performance" under Strickland "through the deferential lens of § 2254(d)." Cullen, 563 U.S. at 190 (cleaned up and citation omitted).

### 1. Failure to Raise Issues in Post-Trial Motions

Timmons lists numerous issues counsel should have raised during post-trial motions. Doc. 2 at 17–18. Judge Moreno found none of these issues to be incompetently omitted by counsel or unreasonably rejected by the state habeas court. Doc. 18 at 11. Judge Moreno, therefore, concluded that this subsidiary ground of ineffective assistance of counsel claim did not plausibly allege grounds for habeas relief. Id. at 12.

Timmons objects in two ways. First, Timmons objects to Judge Moreno's finding that "[n]one of these issues are ones that counsel incompetently omitted or that the state habeas court unreasonably rejected." Doc. 26 at 8. Timmons argues his counsel's performance was deficient because "no competent lawyer could have overlooked all of them." Id. Timmons similarly objects to Judge Moreno's finding that "the state court's rejection of these points was reasonable" and that none alleged grounds for habeas relief. Id.

Timmons's objections are overruled. Timmons's objections do not overcome the deferential standard of Strickland and the AEDPA. This Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," Strickland, 466 U.S. at 689, and give the state court "the benefit of the doubt," Cullen, 563 U.S. at 181 (citation omitted). Timmons cannot show prejudice because the issues Timmons asserts his counsel did not raise were developed in the testimony at trial. For example, Timmons argues that his attorney failed to raise the history of no violence between K.C. and Timmons to the trial judge. K.C. testified at trial that this was the first physical altercation between her and Timmons. CR at 639. The trial judge knew this evidence when ruling on the motions. Similarly, the trial judge heard evidence on the issues Timmons asserts his counsel failed to raise on his motion for a new

trial. Timmons cannot show prejudice nor that the state habeas court's dismissal was objectively unreasonable.

## 2. Glossy Photos

Timmons's next ineffective assistance argument is that his attorney failed to introduce into evidence glossy photos like those used by the State. Doc. 2 at 18. Timmons argued in his state habeas petition that the State's glossy photos were unduly suggestive, raising the State's narrative above his own, because K.C.'s bruises were shown on higher quality photo paper, as opposed to his bruises which were shown on standard print paper. HR at 14. The state habeas court dismissed this contention. *Id.* at 111, 113. Judge Moreno likewise rejected these arguments stating that "[j]urors are not moths, irresistibly drawn to the flashiest pictures and incapable of overcoming their appeal." Doc. 18 at 13.

Timmons objects to Judge Moreno's analysis that the State's narrative was not elevated above his own. Doc. 26 at 9–10. Timmons argues that the State was much more effective in their presentation of evidence by having numerous pictures from different angles, with better lighting, and taken at different intervals making his defense counsel ineffective. *Id.* at 9. Timmons argues that the jury was unable to evaluate the evidence because they could not see the minor details of his injuries that glossy photo paper would have provided. *Id.* Timmons asserts that counsel's failure to "spend a few extra dollars" on the photo paper was ineffective. *Id.* at 10.

Timmons's objection is overruled. Timmons cannot show prejudice under the Strickland standard, nor how his attorney's actions fell outside the "wide range of reasonable professional assistance." 466 U.S. at 689. An attorney is not required to always provide the highest quality and eye-catching photos. Timmons's counsel was well within the wide range of reasonable professional assistance by introducing photos even though they were not printed on glossy photo



paper. Timmons cannot show prejudice because it is unlikely that the pictures on glossy photo paper would have produced a different result because the jury was able to see Timmons's injuries on the non-glossy photos introduced. Timmons has not shown that his counsel was deficient, that he was prejudiced, or that the state habeas court's decision was objectively unreasonable.

### 3. Medical Expert

Timmons contends that his attorney's failure to hire a medical expert constitutes ineffective assistance of counsel. Doc. 2 at 18–19. Timmons argued in his state habeas petition that a medical expert could have provided alternate theories on why K.C. felt like she could not breathe. HR at 15. The state habeas court was not persuaded. *Id.* at 111, 113. Judge Moreno found this argument to be too speculative and the choice not to hire such an expert to be well within the deference due to strategic decisions. Doc. 18 at 13–14.

Timmons objects to Judge Moreno's finding that "counsel was within his authority to weigh the use of a medical expert and recognize the little good it would do" and that what the medical expert may have testified to was purely speculative. Doc. 26 at 10 (citing Doc. 18 at 13–14). Timmons argues that the alternate theories may have been presented if counsel had hired a medical expert. *Id.* Timmons posits that counsel's failure to call any witness on his behalf amounts to ineffective assistance of counsel. *Id.* at 10–11.

Timmons's objection is overruled. As the Eighth Circuit has emphasized: "An attorney is not incompetent in exercising reasonable professional judgment even when, in hindsight, the decision may have been a mistake." *Thomas v. United States*, 737 F.3d 1202, 1207 (8th Cir. 2013) (citing *Brown v. United States*, 656 F.2d 361, 363 (8th Cir. 1981)). "The attorney . . . has the responsibility of making tactical decisions of trial strategy." *Id.* (citing *Strickland*, 466 U.S. at 689). This responsibility includes whether to call a certain witness. Timmons's counsel was

within the “wide range of reasonable professional assistance” in deciding to not seek out a medical expert to testify. Strickland, 466 U.S. at 689. Indeed, Timmons’s entire argument is based on a supposition unsupported in the record that some medical professional would give useful testimony to explain that K.C.’s difficulty breathing was not related to the cause she identified—Timmons choking off her air supply. Timmons has failed to show the state habeas court’s decision was objectively unreasonable.

#### 4. Failure to Inquire into K.C.’s Meetings with the State

Timmons petitions that counsel’s failure to delve further into why the prosecution met with K.C. numerous times leading up to trial amounts to ineffective assistance of counsel. Doc. 2 at 19–20. Timmons alleged in his state habeas petition that further inquiry would have shattered K.C.’s credibility and shown the State had a weak case against him. HR at 15–16. The state habeas court rejected this argument. Id. at 111, 113. Judge Moreno similarly observed that K.C. could not speculate about why the prosecution was concerned how she would testify, the cross-examination by Timmons’s trial counsel showed that K.C. met with the prosecution numerous times with the State being concerned how she would testify, and the jury was able to connect those dots without counsel explicitly stating the prosecution coerced K.C. Doc. 18 at 15–16.

Timmons objects in three ways. First, Timmons objects to Judge Moreno’s finding that counsel could not have inquired into why K.C. thought the prosecution was concerned about her testimony because that would require her to speculate. Doc. 26 at 11. Second, Timmons objects to the finding that the jury believed K.C. despite knowing that she met with the prosecution multiple times leading into trial. Id. Timmons argues that K.C. was not able to testify how she wanted to at trial due to prosecutorial intimidation. Id. Third, Timmons objects that K.C. did not contradict the prosecution because she was not asked what the prosecutor said. Id. at 12. He

argues that Judge Moreno is speculating that K.C. would not have changed her story if asked directly. Id.

Timmons's objections are overruled. Even if Timmons's counsel would have inquired into why K.C. thought the prosecution was concerned about her testimony, this line of inquiry likely would have drawn a well-founded objection as calling for speculation. It is Timmons who is speculating on how K.C. may have testified if asked directly what the prosecution told her in the days leading up to trial. Timmons's counsel on cross-examination fleshed out that K.C. met with the prosecution multiple times leading into trial and that her story was not always consistent. Timmons has not shown how his counsel's cross examination was not "within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Timmons fails to show how the state habeas court's dismissal of this ground was objectively unreasonable.

#### **5. Methamphetamine and Medication**

Timmons asserts that his counsel's failure to inquire into K.C.'s methamphetamine use and whether she was on her prescribed medication the morning of the altercation constitutes ineffective assistance of counsel. Doc. 2 at 20–23. Timmons argued in his state habeas petition that had the jury been privy to this information, his reason that she attacked him first would have been more plausible. HR at 16–18. Both the state habeas court and Judge Moreno rejected these arguments. Id. at 111, 113; Doc. 18 at 16–20. Judge Moreno reasoned that this claim could not overcome the barriers to make a viable ineffective assistance of counsel claim because this decision was within counsel's trial strategy; counsel was unable to prove K.C.'s methamphetamine use during trial; counsel did elicit from Officer Brill that he believed K.C. was not on any drug although he was not a drug recognition expert; and counsel did inquire into K.C.'s use of her prescribed medication.

Doc. 18 at 16–20. Judge Moreno concluded that “Timmons has not generated the necessary doubt in his conviction to merit habeas relief on the issue.” Id. at 20.

Timmons objects in numerous ways. First, Timmons objects to Judge Moreno’s finding that Timmons did not offer exceptional circumstances to require a deposition. Doc. 26 at 12–13. Timmons argues K.C.’s past methamphetamine use and K.C. telling a private investigator that she was the one who attacked Timmons constitutes exceptional circumstances requiring a deposition. Id. Timmons objects to Judge Moreno’s finding that counsel’s failure to inquire further into drug use was trial strategy and argues that it was counsel’s lack of preparedness instead. Id. at 13. Timmons then reasserts his same arguments for the denial of a new trial, which this Court has already addressed above in Ground II. Timmons objects to Judge Moreno’s finding that the jury could have found that K.C. was not on her prescribed medication and thus prone to mood swings. Id. at 17. Timmons argues that mood swings from prescribed medication and coming down from methamphetamine are not comparable. Id. Further, the combination of K.C. not taking her medications, coming down from methamphetamine, and being pregnant all led to her attacking him. Id. at 17–18. Lastly, Timmons objects to Judge Moreno’s conclusion that Timmons has not met his burden to warrant habeas relief. Id. at 18.

Timmons’s objections are overruled. South Dakota Codified Law chapter 23A-12 discusses the procedures for depositions in criminal cases, which provides that “depositions are to be taken in ‘exceptional circumstances’ for purposes of preserving testimony for use at trial.” Warfield v. Weber, No. 07-5026, 2009 WL 234386, at \*11 (D.S.D. Jan. 29, 2009) (citing S.D.C.L. § 23A-12-1). Timmons has not shown how his counsel’s assistance falls outside the “wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689. Rather, Timmons continues to reassert the same factual allegations that the jury, the Supreme Court of South Dakota,

and the state habeas court all found unavailing. Timmons has not demonstrated how the state court's decision was objectively unreasonable by reasserting his interpretation of the facts.

#### **6. Investigating Officer**

Timmons argues that his counsel's performance was ineffective in handling Officer Brill's testimony at trial. Timmons asserts that counsel should have objected to the admission of the edited body camera footage; inquired into Officer Brill's domestic abuse training, medical training, and education; queried whether Officer Brill asked K.C. about other causes for her headache and bruising; pursued a hypothetical line of questioning during cross-examination of Officer Brill; and pointed out Officer Brill's inconsistent statements and bias toward Timmons. Doc. 2 at 23–29. Judge Moreno found none of these arguments availing. Doc. 18 at 20. Judge Moreno determined that most of the alleged “failures” fell within counsel's authority over trial strategy and that there was plenty of other evidence to support the conviction even if counsel would have done everything Timmons now claims he should have done. Id. at 20–23.

Timmons objects. Timmons argues that if the full body camera footage was played, the jury would not have believed that he choked K.C. Doc. 26 at 19. Timmons further argues that Officer Brill's lack of domestic abuse training was critical for the jury to know to assess credibility. Id. at 20. Timmons lastly argues that his counsel's joke to build rapport discredited everything counsel said after that and “was so irresponsible it amounted to Timmons not even having an attorney.” Id. at 21.

Timmons's objections are overruled. Timmons's trial counsel was exercising his decision-making authority as part of his trial strategy “within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689; see also Thomas, 737 F.3d at 1207 (citing Strickland, 466 U.S. at 689). Officer Brill's domestic abuse training, or lack thereof, was a collateral matter and

had an inconsequential effect on the trial. Further, counsel's quick-witted joke in response to Officer Brill's answer likely built rapport and likability with jury and did not discredit everything counsel said after that. Even so, Timmons cannot show that counsel's failure to inquire into these various topics would have changed the result of his trial. Therefore, Timmons cannot show that the state habeas court's dismissal was objectively unreasonable.

#### **7. Failure to Subpoena Disciplinary Report**

Timmons contends that his attorney's failure to request Brady and Giglio material constitutes ineffective assistance of counsel. Doc. 2 at 29–30. Judge Moreno rejected this argument as “if the state had such materials, it needed to produce them regardless of whether a request has been made.” Doc. 18 at 23. Timmons does not object to that specific statement but maintains that the prosecution failed to disclose one of the body camera recordings. Doc. 26 at 21–22. Since Timmons's counsel was not required to request the documents and cannot be considered deficient in this regard, Timmons's objection is overruled.

#### **8. Failure to Object to State's Leading K.C. as a Witness**

Timmons asserts that the prosecution re-asking K.C. questions in a different way constituted leading the witness to manufacture her testimony, which his counsel should have objected to. Doc. 2 at 30. Timmons argues that K.C. was being coerced and the rewording of questions is how the State manufactured her testimony. Id. Judge Moreno rejected this argument reasoning that the jury is not blind to social cues and that the questions were permissible by the State. Doc. 18 at 24. Timmons's objection is merely a recitation of his original petition arguing that K.C. could not testify how she wanted. Doc. 26 at 22. Timmons's objection is overruled. Timmons has not provided any basis to find that his counsel's conduct was deficient in not objecting more or that the state habeas court's determination was objectively unreasonable.

**9. Failure to Object to State's Recess During Direct Examination of K.C.**

Timmons's only objection here is purely speculative. Timmons objects that the recess during K.C.'s direct examination allowed the prosecution to "coach" K.C. over the recess. Doc. 26 at 22. There is nothing in the record that indicates K.C. was coached on her testimony during the recess, and this supposition does not render his counsel's performance to be deficient. Therefore, Timmons's objection is overruled.

**10. Failure to Object to Inflammatory Comments Made during State's Closing**

Timmons asserts that the prosecutor made inflammatory comments during closing arguments by interposing her opinions and misstating evidence. Doc. 2 at 32–35. He argues that counsel's failure to object during closing arguments amounts to ineffective assistance of counsel. Id. Judge Moreno found these arguments unavailing. Doc. 18 at 26. "To obtain a reversal for prosecutorial misconduct, a defendant must show both that the prosecutor's remarks were improper and that the remarks prejudiced his right to a fair trial." United States v. Patterson, 68 F.4th 402, 419 (8th Cir. 2023) (citing United States v. Bentley, 561 F.3d 803, 809 (8th Cir. 2009)). Judge Moreno found that none of Timmons's assertions "rise to that level." Doc. 18 at 26.

Timmons objects. First, Timmons objects to Judge Moreno's finding that the prosecutor's interjections of her personal opinion were slight and that they were not inappropriate to refer to and summarize the evidence of the case. Doc. 26 at 22–23. Timmons objects to Judge Moreno's conclusion that a jury could have found that Timmons both restrained and choked K.C. Id. at 23. Timmons also objects to Judge Moreno's determination that context shows the prosecution's statement was not used to appeal to the jury's emotion but rather to explain K.C.'s struggles in testifying and changing her story. Id. at 24.

Timmons's objections are overruled. Timmons's counsel did object to one of the interjections of personal opinion, which was sustained. Doc. 18 at 27. Timmons's counsel let another opportunity to object pass, as Judge Moreno recounted. Doc. 18 at 27–28. “Whether to object during opposing counsel’s summation to the jury is a matter of trial strategy . . . .” Dansby v. Hobbs, 766 F.3d 809, 836 (8th Cir. 2014). Counsel was not required to object to every minor interjection of personal opinion. Timmons’s assertion that if the jury found he restrained K.C., he could not have also choked her is objectively false; the two acts are not exclusive. Timmons’s counsel’s performance fell “within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689.

#### 11. Failure to Investigate K.C.’s History of Self-Harm and Attention Seeking

Timmons contends K.C. has a knack for distorting the truth to seek attention. Doc. 2 at 36. Timmons believes his counsel’s failure to investigate this character trait amounts to ineffective assistance of counsel. Id. Judge Moreno found that Timmons’s counsel’s performance was reasonable, that counsel’s determination not to investigate further was reasonable, and that counsel portrayed this to the jury by questioning K.C. about making others happy. Doc. 18 at 30–31.

Timmons objects. Timmons asserts that his counsel was required to investigate K.C.’s attention seeking behavior. Doc. 26 at 24. Timmons argues that the jury was somehow misled because it was only allowed to hear her version of what happened, which “blows everything out of proportion for attention.” Id. at 24–25. Timmons also objects to Judge Moreno’s finding that K.C.’s testimony regarding wanting to make others happy is equivalent to lying. Id. at 25.

Timmons’s objections are overruled. Counsel is not required to make a complete investigation so long as “reasonable professional judgments support the limitations on [it].” Strickland, 466 U.S. at 691. Here, counsel’s limitation was supported by reasonable professional



judgments as other avenues of investigation would be more fruitful. Counsel's performance was "within the wide range of reasonable professional assistance." Id. at 689. Timmons's other objections do not go toward how his counsel was deficient. Timmons has not shown the state court's determination was objectively unreasonable.

## **12. Denial of Petitioner's Right to Testify**

Timmons contends that his counsel denied him the right to testify at trial, which amounted to ineffective assistance of counsel. Doc. 2 at 37. Judge Moreno noted the lack of a state court record to develop this issue. Doc. 18 at 32. Timmons had an absolute right to testify in his own defense. But Judge Moreno reasoned that Timmons could not show prejudice under the Strickland standard. Id. at 33. After all, Timmons's proposed testimony could have strengthened the State's case because he had admitted to putting "force[] against [K.C.'s] neck," and had given two incongruent stories—the bruises coming from "rough sex" or from when he tried to pull K.C. off of him. Id. at 33–34.

Timmons objects to Judge Moreno's supposed finding that Timmons never alleged coercion, Doc. 26 at 25, but that is not how Judge Moreno ruled. See Doc. 18 at 33. Judge Moreno concluded that Timmons could not show prejudice, not that he failed to show coercion. Id. at 33–34. Timmons further contends that he was not allowed to testify because his counsel and the prosecution made a deal, or that he was lied to by his counsel. Doc. 26 at 25. The notions of some deal or being lied to are not supported by any evidence. Timmons further objects to Judge Moreno's finding that Timmons cannot show prejudice. Id. at 26–27. Timmons is now asserting that K.C. never had any bruises from either "rough sex" or from the altercation to challenge Judge Moreno's finding that Timmons's proposed testimony would have been detrimental. Id. at 27. Timmons's changing stories—especially ones contradicted by testimony and photographs—do not

help his case. Timmons's proposed testimony was inconsistent and would have helped the State's case by acknowledging he may have forced himself against K.C.'s neck. Timmons cannot show prejudice nor that the state habeas court's decision was objectively unreasonable.

### **13. Failure to Provide Private Investigator as Witness at Trial**

Timmons's counsel hired a private investigator to assist in Timmons's case; Timmons claims his counsel was ineffective for failing to call the private investigator as a witness at trial. Doc. 2 at 38. Timmons relies on Stouffer v. Reynolds, 214 F.3d 1231 (10th Cir. 2000) to make this argument. Judge Moreno distinguished that case by concluding that the investigator in Stouffer had "independent discoveries of crucial facts that only he could speak to[;]" Timmons's investigator's testimony, on the other hand, would have mirrored what K.C. testified to on cross-examination. Doc. 18 at 35.

Timmons objects to Judge Moreno's analysis of Stouffer arguing that the private investigator would have testified that K.C. attacked Timmons first. Doc. 26 at 27. Timmons's objection is overruled. First, Timmons's hypothesis as to what the private investigator would have testified to is speculative. Separately, Officer Brill testified that K.C. told him she bit Timmons's thumb. CR at 793–94. Timmons's counsel's decision to not call the private investigator was within his purview of trial strategy to which this Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. Timmons has not shown that the state habeas court's dismissal of his petition was objectively unreasonable.

### **14. Failure to Conduct Full Investigation and Discovery Request**

Timmons contends that his counsel failed to request Brady and other materials and failed to interview K.C. Doc. 2 at 39–44. Judge Moreno agreed with the state habeas court that these

assertions did not entitle him to habeas relief. Doc. 18 at 35. Judge Moreno reasoned that the requests were not necessary based on the State's pretrial representations regarding disclosed material, and that blaming Timmons's counsel for failing to interview K.C. is inconsistent with his prior argument acknowledging that the private investigator interviewed K.C. Id. at 36.

Timmons objects. Timmons argues again that his counsel failed to conduct any investigation. Doc. 26 at 28. Timmons further rebukes Judge Moreno's analysis of Officer Brill's testimony about observing K.C.'s bruises on her neck and recycles an earlier objection including the failure to call the investigator as a witness. Id.

Timmons's objections are overruled. The materials Timmons's counsel supposedly failed to request were disclosed to counsel as a part of pretrial discovery. Doc. 18 at 36. "Under Brady, '[t]he government has an obligation to disclose evidence that is favorable to the accused and material to either guilt or punishment.' Evidence favorable to the defendant includes not only exculpatory evidence but also evidence that tends to impeach government witnesses." United States v. Baez, 983 F.3d 1029, 1044 (8th Cir. 2020) (alteration in original) (citations omitted). Timmons's counsel was not required to request that which was required to be disclosed. Timmons cannot show that his counsel's performance was deficient in this regard. Further, Timmons cannot on one hand blame his counsel for not interviewing K.C. while acknowledging on the other hand that his counsel had a private investigator interview K.C. Timmons has not shown the state habeas court's dismissal was objectively unreasonable.

#### **15. Failure to Object to a Conflict of Interest with the Law Clerk**

The trial judge's law clerk<sup>2</sup> had accepted employment with the South Dakota Attorney General's Office appellate division, a fact which was disclosed to both parties prior to trial and

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<sup>2</sup> The four trial judges within South Dakota's Sixth Judicial Circuit share a single law clerk.

drew no objection from either side. CR at 731–32. Timmons now asserts that his counsel’s failure to object amounted to ineffective assistance of counsel. Doc. 2 at 44. Judge Moreno concluded that Timmons could not show prejudice on this ground because the judge, not her law clerk, was responsible for each ruling and the conduct of trial. Doc. 18 at 37.

Timmons argues that he never acquiesced to this. Doc. 26 at 29. Timmons argues that the conflict “looks bad” and cites to Wilson v. Midland County, 116 F.4th 384 (5th Cir. 2024), to claim that it is “utterly bonkers.” Id. (citing Wilson, 116 F.4th at 387). Wilson, however, is distinguishable. In Wilson, the law clerk “was working *both* as a Midland County prosecutor and as a law clerk for the Midland County district judges” at the same time. 116 F.4th at 387. Here, there was no overlap in employment by the law clerk. Law clerks commonly secure future employment during their clerkship with firms or government entities that handle cases before judges; the judge then bears the responsibility to screen the law clerk from work on cases involving the future employer or, as here, alert the parties to mitigate any appearance of impropriety and assure that the judge and not the law clerk is the one making the decisions. Wilson, where a law clerk was working simultaneously for both the court and the prosecutor, differs from the situation here. Timmons cannot show prejudice.

#### **16. Juror(s) Access to Legal Pad**

During a chamber’s conference to settle jury instructions, a legal pad was left behind on the prosecutor’s table in the courtroom, which also doubled as the jury room, allowing jurors to potentially access it. See CR at 899. Timmons argues that his counsel’s failure to object or do anything else regarding this incident amounts to ineffective assistance of counsel. Doc. 2 at 45. Judge Moreno found the state habeas court’s decision that the situation did not call for an objection to be reasonable. Doc. 18 at 38. Timmons objects and claims the entire trial was manipulated

against him. Doc. 26 at 30. Timmons's argument is purely speculative and does not show how his counsel's performance was deficient, nor how the state habeas court's decision was objectively unreasonable. Timmons's objection is overruled.

#### **17. Doctor's Assessment**

Timmons argues that his counsel was deficient for failing to introduce the doctor's assessment of K.C. from her visit after the altercation. Doc. 2 at 46. Timmons asserts that the assessment showed the "[d]octor did not find any bruising on K.C.'s neck." Id. Timmons believes that counsel was deficient for failing to introduce this evidence through the nurse, who had "the credentials to give an opinion or explanation of what the [d]octor found." Id. Judge Moreno found the state habeas court's decision that the nurse was not able to be a competent witness to opine about the doctor's assessment was reasonable. Doc. 18 at 39. Judge Moreno concluded, even if the doctor's assessment were introduced, it "is not the wholesale contradiction that Timmons represents." Id.

Timmons objects in four ways. His first objection is to Judge Moreno's noting that the nurse "charted her observations." Doc. 26 at 30 (citing Doc. 18 at 38). Timmons argues that the nurse could not remember seeing bruising, but then was given a document, "what she charted that day," to refresh her recollection. Id. Timmons objects to the finding that the nurse charted her observations but then states that the document contained what she charted that day in the next sentence. Id. This objection is overruled.

Timmons next objects to Judge Moreno's finding that the state habeas court's decision was reasonable that the nurse could not opine about the doctor's assessment. Id. at 31. Timmons argues that his counsel should have asked "when the [d]octor did his assessment [and] why did he chart no bruising on the neck." Id. The first question does Timmons little good as it was already

established that the visit took place the morning after the altercation. CR at 931–32. The second question would have been met with an objection as calling for speculation. Timmons’s proposed line of questioning is unavailing and does not show how his counsel’s performance was deficient.

Timmons further objects that Judge Moreno’s finding that the doctor’s assessment “is simply silent on whether bruising is visible” is “merely speculative or a biased guess.” Doc. 26 at 31 (citing Doc. 18 at 39). Timmons argues that the assessment does chart bruising on her upper arms, which to Timmons, means there was no bruising on her neck. Timmons also objects to Judge Moreno’s finding that the assessment logged K.C. feeling “[m]ild diffuse pain” in her neck. Id. (alteration in original) (citing Doc. 18 at 39). Timmons argues that “feeling mild pain is not physical evidence that [K.C.] was choked or strangled.” Id. Here, Timmons is simply arguing what he hopes the evidence might have been. Timmons does not, however, contend that his counsel’s performance was deficient with either of these objections. Timmons’s objections are overruled.

#### **18. Domestic Violence Expert**

Timmons alleges multiple failures by his counsel during the State’s domestic violence expert’s testimony. See Doc. 2 at 47–49. Timmons notes the absence of any pretrial Daubert hearing. Id. at 47. Timmons argues that counsel should have objected to the introduction of the “Duluth Model” and the “Power and Control Wheel.” Id. Timmons also criticizes his counsel’s failure to object to the State using the term “victim” during its direct examination of the expert witness and that his counsel was “perhaps maybe” sleeping. Id. at 48–49. Judge Moreno found that Timmons could not show deficient performance because Timmons’s counsel did object to the

introduction of the “Duluth Model” and the “Power and Control Wheel,”<sup>3</sup> and Timmons could not show how he was prejudiced by the State’s one-time use of the word victim or counsel’s alleged drowsiness. Doc. 18 at 40–41.

Timmons objects to Judge Moreno’s finding that the use of the term “victim” was not prejudicial. Doc. 26 at 32. Timmons argues that the jury likely gave this testimony “serious weight” because she was an expert. *Id.* Timmons also argues that the expert witness’s testimony was argumentative and violated his presumption of innocence. *Id.*

Timmons’s objections are overruled. As another district court has found:

[C]ounsel’s performance was not deficient as the use of the [term] “victim” did not cause prejudice sufficient to undermine confidence in the result of the proceeding as the “term ‘victim’ is relatively mild and non-prejudicial especially given that courts have held invocation of far stronger terms did not result to reversible error.”

Cueva v. Stephens, No. 14-CV-417, 2016 WL 4014088, at \*9 (S.D. Tex. Feb. 19, 2016) (citation omitted). See also Kidd v. Reilly, No. 11-cv-350, 2012 WL 5874321, at \*8 (D.N.H. Oct. 15, 2012). Timmons cannot show the one-time use of the word “victim” caused enough prejudice to warrant habeas relief.

#### 19. Discovered Transcript

Timmons argues that his counsel’s failure to object to juror access during deliberations to a transcript of one of the video recordings presented by the State amounted to ineffective assistance of counsel. Doc. 2 at 49–50. Judge Moreno found that jurors having access to this transcript could not have prejudiced Timmons because the jury could rewatch the videos. Doc. 18 at 42. Timmons objects that only one transcript made its way into the jury room, but he does not demonstrate how

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<sup>3</sup> The Eighth Circuit has found admission of such testimony not to be reversible error. United States v. Johnson, 860 F.3d 1133, 1138–41 (8th Cir. 2017) (holding trial court did not abuse its discretion in allowing expert witness to testify about the “Duluth Model” and the “power-and-control wheel”).

this prejudiced him. See Doc. 26 at 33. Since Timmons concedes that he cannot show prejudice, his objection is overruled. The state habeas court's determination was reasonable.

## **20. The Cumulative Effect of Counsel's Failures**

Lastly, Timmons contends that the cumulative effect of counsel's failures amounted to ineffective assistance of counsel. Doc. 2 at 50–51. Judge Moreno found this argument to be barred by Eighth Circuit precedent. Doc. 18 at 42. Timmons objects to this analysis. Doc. 26 at 33. The Eighth Circuit, however, has stated “[h]abeas relief will not be granted based on the cumulative effect of attorney errors.” McLaughlin v. Precythe, 9 F.4th 819, 830–31 (8th Cir. 2021) (alteration in original) (quoting Shelton v. Mapes, 821 F.3d 941, 951 (8th Cir. 2016)). See also Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) (“Errors that are not unconstitutional individually cannot be added together to create a constitutional violation.”); United States v. Stewart, 20 F.3d 911, 917–18 (8th Cir. 1994). Being bound to this long line of precedent, Timmons's objections are overruled, and this theory cannot be considered.

### **E. Certificate of Appealability (COA)**

A prisoner needs a COA to appeal a final order denying a § 2254 petition. 28 U.S.C. § 2253(c). A COA may issue “only if the applicant has made a substantial showing of the denial of a constitutional right.” Id. § 2253(c)(2). A COA is claim specific, meaning that each claim individually must meet the substantial showing standard. See id. § 2253(c)(3) (“The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).”). To meet this standard, the “petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (cleaned up and citation



omitted). Because reasonable jurists would not find this Court's rejection of Timmons's claims wrong or debatable, this Court will not issue a certificate of appealability.

**IV. Conclusion**

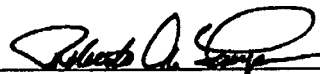
For the reasons stated above, it is

ORDERED that Timmons's Objections, Docs. 24, 26, to the Report and Recommendation are overruled. It is further

ORDERED that the Report and Recommendation, Doc. 18, is adopted and that Respondents' Motion for Judgment on the Pleadings, Doc. 11, is granted.

DATED this 30<sup>th</sup> day of September, 2025.

BY THE COURT:

  
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ROBERTO A. LANGE  
CHIEF JUDGE

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
CENTRAL DIVISION

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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|
| <b>DAVID PAUL TIMMONS,</b><br><br><b>Petitioner,</b><br><br><b>vs.</b><br><br><b>WARDEN ALEJANDRO REYES,</b><br><b>ATTORNEY GENERAL FOR THE STATE</b><br><b>OF SOUTH DAKOTA,</b><br><br><b>Respondents.</b> | <b>3:24-CV-03017-RAL</b><br><br><b>REPORT AND RECOMMENDATION</b><br><b>GRANTING MOTION FOR</b><br><b>JUDGMENT ON THE PLEADINGS</b> |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|

David Paul Timmons petitioned pro se for a writ of habeas corpus under 28 U.S.C. § 2254. Respondents now move for judgment on the pleadings. Finding no material issues of fact and that Respondents are entitled to judgment in their favor, the Court recommends granting the motion and dismissing the petition.

**BACKGROUND**

A South Dakota state jury convicted Timmons of domestic aggravated assault by strangulation.<sup>1</sup> With his admission to being a habitual offender in a part II information,<sup>2</sup> the trial court sentenced him to 15 years' imprisonment, suspending three of those on conditions.<sup>3</sup> After sentencing, Timmons moved for a new trial based on a letter that the

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<sup>1</sup> Docket No. 12-1, at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 2.

victim, K.C., had sent to the trial court describing feeling lied to, manipulated, and threatened into testifying for the State.<sup>4</sup> His motion was denied.<sup>5</sup>

On direct appeal, Timmons argued that the trial court erred in denying his motions for a judgment of acquittal and for a new trial.<sup>6</sup> The South Dakota Supreme Court disagreed, affirming his conviction.<sup>7</sup>

Timmons then sought habeas review in state court.<sup>8</sup> His petition re-raised how his motions for a judgment of acquittal and for a new trial were improperly denied,<sup>9</sup> and added 20 claims of ineffective assistance of counsel.<sup>10</sup> The habeas court rejected his collateral attack on the merits<sup>11</sup> and denied his motion for a certificate of probable cause.<sup>12</sup> Timmons's later motion to the supreme court for a probable cause certificate was similarly denied—but for being a day overdue.<sup>13</sup>

Having exhausted his collateral attack in state court, Timmons turned to federal court.<sup>14</sup> His petition carried over the same claims raised in state court.<sup>15</sup> The petition

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<sup>4</sup> *Timmons*, 974 N.W.2d at 884.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 884, 890.

<sup>8</sup> Docket No. 12-3.

<sup>9</sup> *Id.* at 2-5.

<sup>10</sup> *Id.* at 5-34.

<sup>11</sup> Docket No. 12-4, at 6.

<sup>12</sup> Docket No. 12-5.

<sup>13</sup> Docket No. 12-6; *see also* Order to Show Cause, *Timmons v. Fluke*, No. 30706 (S.D. May 22, 2024) (explaining Timmons's motion was due May 16, 2024, but that he did not file until May 17, 2024).

<sup>14</sup> Docket No. 1.

<sup>15</sup> Docket No. 10, at 8.

passed preliminary review.<sup>16</sup> So Respondents filed the underlying state court records, an answer, and move for judgment on the pleadings.<sup>17</sup>

### STANDARD OF REVIEW

A motion for judgment on the pleadings can be granted “only when there is no dispute as to any material facts and the moving party is entitled to judgment as a matter of law.”<sup>18</sup> A federal court’s review of such a motion is limited to “the pleadings themselves, materials embraced by the pleadings, exhibits attached to the pleadings, and matters of public record.”<sup>19</sup> When the action is for habeas relief, however, the scope of review includes the underlying state court records.<sup>20</sup> The Court will therefore oblige Respondents’ request to take judicial notice of Timmons’s state court files.<sup>21</sup>

### DISCUSSION

When a federal court reviews a state prisoner’s application for a writ of habeas corpus, it does not do so on a blank slate. The state’s factual findings are presumed correct,<sup>22</sup> and its decisions are “given the benefit of the doubt.”<sup>23</sup> A state’s ruling then

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<sup>16</sup> See generally Docket No. 9.

<sup>17</sup> Docket Nos. 10–11.

<sup>18</sup> *Montin v. Moore*, 846 F.3d 289, 293 (8th Cir. 2017).

<sup>19</sup> *Am. Zurich Ins. v. Palmer*, 529 F. Supp. 3d 1023, 1027 (D.S.D. 2021) (quoting *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir. 2010)).

<sup>20</sup> See Rules Governing § 2254 Cases, Rule 8(a) (requiring judges review the state court records); *Cullen v. Pinholster*, 563 U.S. 170, 182–83 (2011) (review of habeas proceeding limited to the record before the state court).

<sup>21</sup> Docket No. 11, at 3 (citing Fed. R. Evid. 201).

<sup>22</sup> 28 U.S.C. § 2254(e).

<sup>23</sup> *Pinholster*, 563 U.S. at 181 (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

cannot just be wrong, it must be “diametrically different” than Supreme Court precedent or “objectively unreasonable.”<sup>24</sup>

#### **A. Ground One – Insufficient Trial Evidence**

A state prisoner is entitled to habeas relief when he is convicted on a record that “no rational trier of fact could have found proof of guilt beyond a reasonable doubt.”<sup>25</sup> The standard “leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial.”<sup>26</sup> As long as “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,” the conviction will stand.<sup>27</sup>

Timmons was convicted of having “[a]ttempt[ed] to induce a fear of death or imminent serious bodily harm by impeding the normal breathing or circulation of another person by applying pressure on the throat or neck, or by blocking the nose and mouth.”<sup>28</sup> He attacks the sufficiency of the prosecution’s evidence in two ways. First, he zeros in on how K.C. never testified that “she was in a choke hold” or specified “the

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<sup>24</sup> *Williams v. Taylor*, 529 U.S. 362, 406–10 (2000); see also *Lockyer v. Andrade*, 538 U.S. 63, 73–75 (2003) (explaining that habeas relief for state prisoners is “exceedingly rare” and even clear error is not always unreasonable error).

<sup>25</sup> *Jackson v. Virginia*, 443 U.S. 307, 324 (1979).

<sup>26</sup> *Coleman v. Johnson*, 566 U.S. 650, 655 (2012).

<sup>27</sup> *Jackson*, 443 U.S. at 319.

<sup>28</sup> S.D. Codified Laws § 22-18-1.1(8) (2025); see also Indictment, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. Apr. 14, 2020).

position of his arm [around her neck]; . . . the tightness, [or] the amount of pressure.”<sup>29</sup>

Said another way, there was insufficient evidence to prove K.C. “was actually choked.”<sup>30</sup>

To evaluate Timmons’s contention, however, would require re-weighing the evidence to find reasonable doubt. And such “fine-grained factual parsing[s]” are improper.<sup>31</sup> So long as reasonable inferences from the trial record sustain a conviction, the verdict will not be disturbed.<sup>32</sup>

K.C. testified that during a fight, Timmons put his arm around her neck and she “felt like [she] couldn’t breathe.”<sup>33</sup> This alone is enough to support a finding that Timmons choked her. Yet more evidence exists. A 9-1-1 call recorded K.C. telling the operator that Timmons choked her.<sup>34</sup> An officer took pictures of scratches on K.C.’s neck the day of the result and recorded her describing the assault.<sup>35</sup> A nurse, who saw K.C. the next day, charted bruising around her neck attributable to Timmons.<sup>36</sup> Trial evidence corroborates his conviction.

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<sup>29</sup> Docket No. 2, at 12.

<sup>30</sup> *Id.*

<sup>31</sup> *Coleman*, 566 U.S. at 655.

<sup>32</sup> *Id.* at 656–57.

<sup>33</sup> Transcript of Jury Trial at 138:8–21, 139:19–22, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. Sept. 24, 2021).

<sup>34</sup> Hughes Cnty. Trial Rec. Ex. 1A at 2:37–39, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. Mar. 16, 2021) (“Um, he choke, oh, he choked me, he pull, he had me on the ground pulling my hair, and then he was grabbing me, my arms, and there’s bruises all over my legs and (inaudible).”).

<sup>35</sup> Transcript of Jury Trial at 25:24, 28:6–8; *see also* Hughes Cnty. Trial Rec. Ex. 6 (depicting neck injuries); *id.* Ex. 7A, at 2:38 (“[Timmons] hit my face pretty hard on the ground and then he choked me.”); *id.* at 12:43–13:9 (“EMS: You weren’t strangled or knocked out? KC: Oh, I was strangled. . . . EMS: Did you lose consciousness like fall asleep or anything? KC: I felt like I was about too [sic], but I couldn’t breathe at all.”).

<sup>36</sup> Transcript of Jury Trial at 122:19–21, 124:8–12, 16–22.

Timmons posits alternative explanations to what happened: that he was just “trying to restrain” K.C.—not choke her—and argues contradictions from the investigating officer imbue doubt.<sup>37</sup> But it is not the Court’s role to make credibility findings or weigh conflicts in the record.<sup>38</sup> The verdict deserves deference. And trial evidence supports Timmons’s conviction, even if he prefers a different narrative.

Timmons’s second challenge fares no better. He alleges that no evidence shows he attempted to induce fear of death or imminent serious bodily injury because K.C. never testified that she was “actually” in fear of death or injury.<sup>39</sup> But *attempts*, for purposes of aggravated assault by strangulation, means “any act toward the commission of the crime [that] is prevented or intercepted in the perpetration thereof.”<sup>40</sup> Aggravated assault by strangulation, therefore, does not require that the victim be in *actual* fear of death or injury.<sup>41</sup> The jury could find from the trial evidence that Timmons tried to induce fear of death or serious imminent injury when he wrapped his arm around K.C.’s neck, causing her to struggle to breath. The state did not convict Timmons on constitutionally infirm evidence.

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<sup>37</sup> Docket No. 2, at 12–13.

<sup>38</sup> *McDaniel v. Brown*, 558 U.S. 120, 133 (2010) (quoting *Jackson*, 443 U.S. at 326); see also *Schlup v. Delo*, 513 U.S. 298, 330 (1995) (habeas review on the sufficiency of the evidence asks only if “there is sufficient evidence which, if credited, could support the conviction”).

<sup>39</sup> *Id.* at 11.

<sup>40</sup> *State v. Timmons*, 974 N.W.2d 881, 887 (S.D. 2022) (quoting *State v. Scott*, 927 N.W.2d 120, 127 (S.D. 2019)).

<sup>41</sup> *Id.*

## **B. Ground Two – Denial of Motion for New Trial**

Timmons next challenges the trial court's denial of his motion for a new trial based on a post-verdict, pre-sentencing letter that K.C. wrote to the trial judge about feeling coerced by the prosecution into testifying.<sup>42</sup> He objects on three grounds: (1) the letter reveals for the first time that K.C. was high on methamphetamine, which if known, would have "shattered" her credibility; (2) her admission to being on drugs shows motive for lying to the police and bolsters his self-defense claim; and (3) the judge failed to do the necessary probing on her claim of prosecutorial intimidation.<sup>43</sup>

To the extent that Timmons argues the trial court misapplied state law in not granting his motion for a new trial, there is nothing the Court can do. A federal habeas court may only evaluate federal matters; it may not "reexamine state-court determinations on state-law questions."<sup>44</sup> Motions for a new trial are dictated by state rules untethered to a federal constitutional corollary and are thus outside the bounds of federal review.<sup>45</sup>

Reading the pro se petition liberally though<sup>46</sup>—and in what may be a stretch—Timmons might be understood as claiming the "surprise"<sup>47</sup> revelations in the letter

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<sup>42</sup> Docket No. 12-2, at 2–3,

<sup>43</sup> Docket No. 2, at 13–15.

<sup>44</sup> *Estelle v. McGuire*, 502 U.S. 62, 68 (1991).

<sup>45</sup> S.D. Codified Laws § 15-6-59(a) (2025).

<sup>46</sup> See *Meador v. Branson*, 688 F.3d 433, 436 (8th Cir. 2012) (pro se habeas petitions are generally liberally construed to not require specific legal theories so long as the petitioner outlines the relevant facts and alleged constitutional violation).

<sup>47</sup> Docket No. 2, at 13.



require a new trial lest he be denied his constitutional right to present a full defense. Even so, Timmons must show that the “evidence would probably produce an acquittal on retrial” to get habeas relief.<sup>48</sup> He cannot.

*Drug use.* Timmons overstates his shock at K.C.’s drug use. He later admits to knowing that she was high at the time as well as telling counsel about her drug problems.<sup>49</sup> K.C.’s declaration in her letter was nothing new.

Timmons insinuates that the declaration, because it came from K.C., it would have inflated impeachment value and corroborated his version of events. Even so, Timmons cannot establish that such testimony, if elicited, would probably have produced an acquittal.<sup>50</sup>

Timmons also harps on counsel’s failure to cross-examine K.C. on her drug use as one of his subsidiary ineffective-assistance-of-counsel claims. The Court will explain later why that argument is unavailing.

*Motive to Lie.* Timmons raises his second objection to fuel why the jury should have discounted the rendition K.C. gave to the investigating officer: a panicked woman high on meth might lie to law enforcement. But the jury already had reason to question K.C.’s story to the officer. She had testified that (1) Timmons was not trying to hurt her,<sup>51</sup> (2) she

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<sup>48</sup> *Cornell v. Nix*, 921 F.2d 769, 771 (8th Cir. 1990).

<sup>49</sup> Docket No. 2, at 21 (“Petitioner believed K.C. was high on meth at the time; because [she] had a history of meth use . . . . Her actions that morning and the nights prior, demonstrated to Petitioner that she was clearly under the influence of something.”).

<sup>50</sup> *Cf. United States v. Chappell*, 990 F.3d 673, 677–78 (8th Cir. 2021).

<sup>51</sup> Transcript of Jury Trial at 162:18–23, 169:3–7, 170:23–171:4.

had called law enforcement because she was mad at him,<sup>52</sup> (3) she felt her friends and family were urging her to testify against him,<sup>53</sup> and (4) she was probably being manipulated.<sup>54</sup> Counsel painted K.C.'s motive for lying: she was angry with him when she reported the assault and that external influences were pressing her forward with the case. Reshaping that motive to conceal her drug use does not demand a new trial.

*Prosecutorial intimidation.* Timmons finally notes how the prosecutor met with K.C. several times and was concerned about how she might testify at trial. Borne from this concern, Timmons argues that the prosecutor both coerced K.C. into testifying against him and hid the frequency of their meetings to suppress exculpatory evidence.<sup>55</sup> The state courts rejected this argument because, if there had been coercion, Timmons could have discovered it during his several rendezvous with K.C. despite a no-contact order,<sup>56</sup> and the information was cumulative in any event.<sup>57</sup>

Its cumulative effect is the fastest way to dispel of the argument. K.C. admitted in cross-examination that she met with the prosecutor "five or six times" and that the prosecutor was concerned how she would testify.<sup>58</sup> Counsel suggested that the

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<sup>52</sup> *Id.* at 163:6–14, 169:12–14.

<sup>53</sup> *Id.* at 163:19–24, 169:18.

<sup>54</sup> *Id.* at 164:3–8.

<sup>55</sup> Docket No. 2, at 16.

<sup>56</sup> Findings & Order Denying Motion for New Trial at 4–5, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. July 25, 2021).

<sup>57</sup> *Id.*

<sup>58</sup> Transcript of Jury Trial at 159:2–7.

prosecution used K.C. to manufacture a crime. The jury did not bite. K.C.'s letter does not sow enough doubt to require a new trial.

### C. Ineffective Assistance of Counsel

Timmons's remaining claims allege that trial counsel was so ineffective that it stripped him of his right to a fair trial. The Sixth Amendment guarantees effective assistance of counsel.<sup>59</sup> When counsel performs deficiently, that constitutional error is imputed to the state.<sup>60</sup> To prevail on an ineffective assistance of counsel claim, Timmons must point to a specific instance of counsel's performance being objectively unreasonable and show how he was prejudiced by that error.<sup>61</sup> This is hard.<sup>62</sup> Respecting deficient performance, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."<sup>63</sup> To be prejudiced, Timmons must show a reasonable probability that but for the deficiency, the result would have been different.<sup>64</sup> And when a federal habeas court reviews a state court's application of an ineffective assistance of counsel claim, it is "doubly deferential" by giving "both the state court and the defense attorney the benefit of the doubt."<sup>65</sup>

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<sup>59</sup> *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984); see also *Quevedo v. Sullivan*, 641 F. Supp. 3d 620, 634 (D.S.D. 2022) ("The Sixth Amendment right to counsel functions to ensure that defendants receive a fair trial, not a perfect one." (quoting *Willis v. United States*, 87 F.3d 1004, 1008 (8th Cir. 1996))).

<sup>60</sup> *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986).

<sup>61</sup> *Strickland*, 466 U.S. at 687.

<sup>62</sup> See *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

<sup>63</sup> *Strickland*, 466 U.S. at 689.

<sup>64</sup> *Id.* at 694.

<sup>65</sup> *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011)); see also *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) (noting how a state court deserves "even more latitude" in rejecting an ineffective assistance of counsel claim in habeas proceedings since it is a general rule); *Dunn v. Reeves*,

**i. Ground Three – Failing to Raise Issues in Post-Trial Motions and on Direct Appeal**

Timmons cites a litany of supposed failures by counsel to raise issues in his motion for a judgment of acquittal and on direct appeal. He maintains that counsel should have included these issues when seeking a judgment of acquittal:

(1) The unlikelihood that K.C. could have bit [Timmons's] thumb had his arm been around her neck. (2) There was no discussion about someone feeling like compared to they did. There is a significant difference between someone saying I feel like going to the store or I did go to the store. (3) The record shows no proof that K.C. could not breathe or did pass out at any time. (4) K.C. had medical issues that affected her and [she] needed to be on a number of medications. (5) History of no violence towards K.C. (6) [Timmons] was never found to be in violation of his "No Contact Order." (7) K.C. never stated that she was in a chokehold. K.C. described on "arm around me." She did not state which arm (left or right). K.C. did not state how the arm was positioned. Right side only; left side only; right side and front; left side and front; or all the way around left, front, and right. K.C. also did not state if there was any pressure on the back of the neck. (8) [The investigating officer's] conflicting testimony about there being marks on K.C.'s neck but then completely contradicting himself by testifying that the alleged technique [Timmons] used does not leave any marks.<sup>66</sup>

None of these issues are ones that counsel incompetently omitted or that the state habeas court unreasonably rejected.

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594 U.S. 731, 739 (2021) (even counsel performance that is "far from exemplary" permits relief only if "no competent lawyer" would have chosen the path).

<sup>66</sup> Docket No. 2, at 17.

Timmons also grieves counsel's failure to make the following points in the new trial motion:

(1) K.C. admitted for the first time being on meth. (2) K.C. did not want to call the cops. (3) K.C. had motive to lie to the cops. (4) Court records shows [Timmons] never had violated his "No Contact Order." (5) Counsel failed to add SDCL 15-6-59(a)(5) and (6). These paragraphs were necessary to add into the Motion for New Trial. Five because there were not marks on K.C.'s neck and with six, the lack of evidence supporting the petitioner's arm was never around K.C.'s neck.<sup>67</sup>

Much like the judgment of acquittal issues, the state court's rejection of these points was reasonable. Most retread his objections to the sufficiency of the evidence; they get no more traction here. What are new points do not pass muster either. In sum, none of the points Timmons raises plausibly allege grounds for habeas relief.

**ii. Ground Four – Glossy vs. Print Photos**

Both Timmons and K.C. came out bruised after their altercation. Pictures captured those marks.<sup>68</sup> But to Timmons's dismay, counsel showed the jury his injuries on standard print paper—a far cry from the glitz of the "glossy photo paper" that the prosecution used to display K.C.'s.<sup>69</sup> Timmons contends that counsel's failure to shell out "a few extra dollars to have the same quality photos" so far elevated the State's narrative over his own that it resulted in ineffective assistance.<sup>70</sup>

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<sup>67</sup> *Id.* at 18.

<sup>68</sup> Hughes Cnty. Trial Rec. Exs. 2–6, A–M.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

He is mistaken. Jurors are not moths, irresistibly drawn to the flashiest pictures and incapable of overcoming their appeal. In fact, jurors are presumed to have evaluated all the evidence presented.<sup>71</sup> Even if the glossy photo paper at first attracted the jury's attention more—which by no means is a given—Timmons has failed to show how the different paper types led the jurors to disavow their duty and “focus more on [K.C.’s] photos . . . because of the quality of the photos not the content.”<sup>72</sup>

### iii. Ground Five – Medical Expert

Counsel never called a medical expert to testify. Timmons claims that the failure constitutes ineffective assistance because it kept him from posing alternative theories for why K.C. felt she could not breathe, or “the unlikelihood that [he] caused any impediment to [her] normal breathing.”<sup>73</sup>

When a defendant receives the assistance of counsel, it becomes counsel's prerogative to make trial decisions.<sup>74</sup> That responsibility encompasses whether to call a certain witness or what trial narrative to pursue.

Counsel was within his authority to weigh the use of a medical expert and recognize the little good it would do.<sup>75</sup> Timmons's imagination of what this expert would

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<sup>71</sup> *Schlup*, 513 U.S. at 299–300.

<sup>72</sup> Docket No. 2, at 18.

<sup>73</sup> *Id.* at 18–19; accord Docket No. 16, at 8.

<sup>74</sup> *Wainwright v. Sykes*, 433 U.S. 72, 91 n.14 (1977); *Thomas v. United States*, 737 F.3d 1202, 1207 (8th Cir. 2013).

<sup>75</sup> Cf. *Harrington v. Richter*, 562 U.S. 86, 107 (2011) (noting how, in preparation for trial, “there were any number of hypothetical experts . . . whose insight might possibly have been useful” yet leaving to the counsel's discretion on how “to balance limited resources in accord with effective trial tactics and strategies”).

testify to is rank with speculation. And it is questionable whether such an expert would even have, and willingly offer, the opinions that Timmons envisions.

In any case, counsel need not present every conceivable theory to the jury to effectively represent their client.<sup>76</sup> What was lost by counsel's failure to call a medical expert at Timmons's trial is conjectural; it was neither deficient nor prejudicial for counsel to forgo using such an expert.

**iv. Ground Six – Shortcoming in Cross-Examination**

During K.C.'s cross-examination, counsel touched on her meeting with the prosecutor several times before trial.

Q. ... you've told several different stories about what happened, haven't you?

A. Yes.

Q. Okay. How many times have you met with the prosecutor's office about your testimony today?

A. Like, five or six times.

Q. Yeah. You've talked to them quite a bit, haven't you?

A. Yeah.

Q. They've been concerned about what you were going to testify to today, haven't they?

A. Yeah.

Q. Okay. Did you meet with them yesterday?

A. Yeah.

Q. Okay. Went over what your testimony was going to be?

A. Yeah.<sup>77</sup>

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<sup>76</sup> *Knowles*, 556 U.S. at 127.

<sup>77</sup> Transcript of Jury Trial at 158:22–159:11.

Timmons faults counsel for not delving into why the prosecution was so concerned, or if the prosecutor had coerced K.C. into falsifying her testimony at those meetings.<sup>78</sup> He refers to K.C.'s penned letter to the trial judge about feeling "threatened" as evidence of prosecutorial coercion—and that counsel's failure to follow up with more pointed questions prejudiced his case.

Timmons's theory is flawed for many reasons. For starters, K.C. could not answer for the prosecution why it was worried—only speculate. Counsel could not, therefore, have acted unreasonably in not pursuing this line of inquiry.

Besides, what counsel had asked conveyed the point. The prosecution met with K.C. five or six times because she kept changing her story. The frequency of these meetings with K.C. indicates the State had its concerns about her testimony. The jurors could connect the dots. Counsel effectively cross-examined K.C. to draw out her changing stories and gave the jury a reason to doubt her testimony. That the jury still believed K.C. is not attributable to poor lawyering, but the facts of the case.

Granted, counsel never explicitly accused the prosecution of coercion. But an attorney need not make baseless claims to be effective. K.C. confirmed that she told the truth when asked at trial.<sup>79</sup> The prosecutor supported that testimony at the sentencing hearing, explaining that she had never threatened K.C., but had warned her about perjury

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<sup>78</sup> Docket No. 2, at 20.

<sup>79</sup> Transcript of Jury Trial at 142:10–12 ("Q: Okay. Now, if I asked you today, and I did, what happened, have you told the truth today? A: Yes.").



and “insisted that [K.C.] tell the truth.”<sup>80</sup> Even though K.C. immediately had an opportunity to contradict what the prosecutor said, she did not.<sup>81</sup>

K.C.’s actions at Timmons’s sentencing pose two possibilities. The prosecutor told the truth, meaning K.C. would have denied prosecutorial coercion. Or to fit Timmons’s theory, K.C. was so afraid of being charged by an unprincipled prosecutor that she lied on the stand and then again at the sentencing hearing. Even if the theory were true, every indication suggests K.C. would have maintained the rouse out of fear when counsel asked her about prosecutorial coercion. In either scenario nothing would have changed. Timmons cannot demonstrate his entitlement to habeas relief.

**v. Ground Seven – Meth and Medication**

Timmons recounts his observations “[a] few days prior to the incident”<sup>82</sup> that made him think that K.C. may have been high on meth during the altercation.<sup>83</sup> He adds the caveat that he “did not actually witness or see K.C. using meth,” but felt confident given K.C.’s history of meth use.<sup>84</sup> Yet counsel never elicited testimony from K.C. that she was high on drugs at trial. And his suspicions were confirmed in K.C.’s letter to the trial judge for Timmons’s sentencing in which she admitted to coming down from meth when the fight occurred.<sup>85</sup>

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<sup>80</sup> Transcript of Sentencing at 19:6–9, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. Sept. 24, 2021).

<sup>81</sup> *Id.* at 19:10–20:2.

<sup>82</sup> Docket No. 2, at 20.

<sup>83</sup> *Id.* at 21.

<sup>84</sup> *Id.*

<sup>85</sup> *Timmons*, 974 N.W.2d at 886.

Timmons thinks that, given the competing narratives of what happened, K.C.'s doped-up state was a critical consideration for the jury. He poses how someone high on drugs may become violent, which supports his contention that he only placed his hand or arm around K.C.'s neck to restrain her. So Timmons challenges counsel's failure "to ask K.C. if she was under the influence of any drugs like meth" during the struggle.<sup>86</sup> An error he attributes to counsel's lack of preparation by not deposing K.C. before trial.<sup>87</sup>

The denouncement of counsel's preparedness can be summarily rejected. While there are avenues to depose a witness in a criminal case,<sup>88</sup> the chance is rare and limited to "exceptional circumstances" necessary for preserving testimony at trial.<sup>89</sup> Timmons does not offer any exceptional circumstance to have justified a deposition. In the same way, his generalized references to counsel's unpreparedness cannot carry the heavy burden he bears to succeed on this claim.

More consideration is due to the substance of Timmons's claim. At the least, the question and answer may have helped his cause. Still, it does not surmount the barriers to make out a viable ineffective assistance of counsel claim.

One difficulty mirrors the trouble Timmons has with his medical-expert challenge. The evidence that counsel presented boils down to trial strategy, for which there is a

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<sup>86</sup> *Id.* at 23.

<sup>87</sup> *Id.* at 22.

<sup>88</sup> S.D. Codified Laws § 23A-12-1 (2025).

<sup>89</sup> See *Warfield v. Weber*, No. 07-cv-05026, 2009 WL 234386, at \*11 (D.S.D. Jan. 29, 2009).

“strong presumption” that counsel acted reasonably.<sup>90</sup> Counsel’s decision to avoid discussing the victim’s history of drug use could be considered strategic—counsel may have been uneasy putting K.C.’s drug usage before the jury. This type of evidence may have shaped the relationship as predatory, an issue when counsel was trying to portray Timmons as a family man.<sup>91</sup> Would the defense then have to devote time to dispel questions such as whether Timmons was also on drugs, or feeding K.C.’s addiction? The questions pose a minefield of possibilities that counsel could reasonably have thought better left untraveled.

And what if K.C. denied being on drugs while on the stand? Timmons alludes to his interaction with K.C. a few days before their fray to justify his believing that she was using. But other than propensity reasoning, Timmons had no concrete basis for knowing K.C. was high that morning. When preparing lines of questioning for trial, it is good practice for counsel to consider not just what is known, but what is provable. As Timmons describes it, counsel had neither—only Timmons’s belief based on K.C.’s history of drug use. A belief that, from what Timmons offers, only he could testify to—carrying its own perils.<sup>92</sup> True, K.C. did admit to coming down from meth in her letter. But that

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<sup>90</sup> *Dunn*, 594 U.S. at 739 (quoting *Harrington*, 562 U.S. at 104).

<sup>91</sup> *E.g.*, Transcript of Jury Trial at 160:18–161:15 (characterizing Timmons as a caregiver); *id.* at 165:14–166:3 (eliciting testimony that K.C. believed Timmons could make a good husband and father).

<sup>92</sup> *Cf. Mathews v. United States*, 485 U.S. 58, 65 (“When [a defendant] takes the stand, [he] forfeits his right to remain silent, subjects himself to all the rigors of cross-examination, including impeachment, and exposes himself to prosecution for perjury.”).

information was unavailable to counsel during trial. Counsel was not objectively deficient in refusing to take up the line of questioning that Timmons now wishes.

Besides, counsel touched on what Timmons wanted earlier in the trial anyway. In his cross-examination of the investigating officer, counsel probed whether K.C. may have been under the influence of any prescription medication.<sup>93</sup> What he received was not promising—the officer did not suspect that “she was under the influence of any drug *or* narcotic.”<sup>94</sup> Though counsel clarified that the officer never ran—nor was trained to run—drug recognition tests, the lay-answer could not have inspired counsel to pursue the issue further. In that respect, it was not unreasonable for counsel to make the decision to home in on other narratives.

Still, counsel tried an analogous type of questioning while K.C. was on the stand. There, she admitted being on medication to help with her mood.<sup>95</sup> Adding also that she could be inconsistent in taking her medications.<sup>96</sup> By implication, counsel showed that K.C. may not have taken her prescriptions that day, causing her to suffer from mood swings. If the jury had followed that logic, then K.C. would have been prone to the same erraticism and aggression as if she were high on meth. This is not meant to say that counsel could not have developed his questions further or emphasized their import. But

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<sup>93</sup> Transcript of Jury Trial at 48:16–18.

<sup>94</sup> *Id.* at 48:19–22 (emphasis added).

<sup>95</sup> *Id.* at 142:24–25.

<sup>96</sup> *Id.* at 161:1–9.

counsel did present the necessary facts to allow the jury to make its deductions. Timmons has not generated the necessary doubt in his conviction to merit habeas relief on the issue.

**vi. Ground Eight – Investigating Officer**

Timmons resents how counsel handled the investigating officer at trial, as shown by his lodging no fewer than seven objections to counsel's alleged failings with the officer. None succeed.

The same officer who met with K.C. after she reported the assault had also interviewed Timmons. The officer recorded the interview by body camera; the prosecution played an edited version of the recording to the jury. Timmons dislikes that version, insisting that counsel should have objected and required the entire recording be played. But the missing segments he alleges were removed do not go to the substance of his conviction, and it is for counsel to decide what evidence to present to the jury.

One cut portion that Timmons centers on is an exchange when Timmons stated he and K.C. "had banging sex a couple of nights prior."<sup>97</sup> He thinks that this omitted piece "would have opened the door for the jury to infer that rough sex [from nights earlier] could have been the cause of any alleged injuries," or at least required the prosecution to meet the testimony.<sup>98</sup> What Timmons leaves out is the significant record developed of his potential witness tampering by trying to get K.C. to testify that she had received her

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<sup>97</sup> Docket No. 2, at 24.

<sup>98</sup> *Id.*

bruises from aggressive lovemaking.<sup>99</sup> And that K.C. had rejected the idea her injuries came from rough sex—not just the night before, but at all.<sup>100</sup> It was not prejudicial for that piece of the recording to be omitted.

Separately, the officer talked to K.C. both the day of the incident and the day after. Though the State played the same-day recording, the jury never saw the body camera footage from the later interview. Timmons believes that counsel should have played the next-day recording to show K.C.'s bruises around her neck had gone away. He is convinced that the bruises healing would have established that there "was no[ ] evidence of choking or strangulation."<sup>101</sup> But Timmons discounts K.C.'s bruising from the day of the incident,<sup>102</sup> and that a nurse who saw K.C. the following day noted bruising on K.C.'s neck.<sup>103</sup> The next-day recording does not cast any doubt on Timmons's conviction.

Counsel also never asked if the investigating officer had received his statutory-mandated domestic abuse training.<sup>104</sup> To Timmons, this failure left open whether the officer had any domestic violence training or struggled to complete it. And in Timmons's mind the officer had problems because he had concluded K.C. was the

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<sup>99</sup> Transcript of Jury Trial at 36:3–8, 100:10–101:16, 113:6–114:9, 141:8–15, 155:21–157:1.

<sup>100</sup> *Id.* at 170:5–6 ("Q: Were your injuries from rough sex? A: No.").

<sup>101</sup> Docket No. 2, at 26.

<sup>102</sup> Hughes Cnty. Trial Rec. Ex. 6.

<sup>103</sup> Transcript of Jury Trial at 124:12–13.

<sup>104</sup> See S.D. Codified Laws § 23-3-39.4 (2025).

victim before getting both sides of the story.<sup>105</sup> Yet the information is collateral to the case and would have done little regardless of the answer.

The officer also testified to his observations of K.C.'s injuries, a section of the cross-examination that Timmons now objects to because counsel never disqualified the apparent expert opinion.<sup>106</sup> But most of the officer's statements were what he saw, and what might teeter into the expert realm did not prejudice Timmons.

When counsel questioned the officer whether he had suspected K.C. was under the influence, the officer commented he was not a drug recognition expert, so any expert opinion he would give defense counsel would have been quashed.<sup>107</sup> Counsel responded with a self-deprecating quip that he was "not that good,"<sup>108</sup> a galling joke to Timmons who took it as both an admission that counsel could not effectively represent him and undermined counsel's credibility with the jury.<sup>109</sup> But counsel's statement must be taken for what it was: a joke bringing levity and building rapport with the witness and jury.

Timmons finally makes much of a professed contradiction in the officer's testimony—that the type of stranglehold the officer understood Timmons to have placed K.C. in does not leave marks, but that K.C. had bruising.<sup>110</sup> For Timmons, this contradiction kills the State's case, and he lays out a hypothetical cross-examination to

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<sup>105</sup> Docket No. 2, at 24.

<sup>106</sup> See generally *id.* at 25–27.

<sup>107</sup> Transcript of Jury Trial at 49:6–9.

<sup>108</sup> *Id.* at 49:10.

<sup>109</sup> Docket No. 2, at 25 & n.8.

<sup>110</sup> *Id.* at 27–28, 27 n.9.

show why.<sup>111</sup> The Court disagrees. Despite his protests to the contrary, Timmons's conviction is supported by more than the officer's singular contradiction. Counsel's failure to seize on the discrepancy Timmons recites does not engender doubt in the legitimacy of the verdict.

**vii. Ground Nine – Failure to Subpoena Disciplinary Reports**

Timmons believes that counsel should have proactively sought out *Brady*<sup>112</sup> and *Giglio*<sup>113</sup> materials.<sup>114</sup> But if the State had such materials, it needed to produce them regardless of whether a request had been made.<sup>115</sup> Counsel was not deficient for not making the request.

**viii. Ground Ten – Leading K.C. on Direct**

At times during the trial, the prosecutor would ask K.C. a question, K.C. would answer one way, the prosecutor would reword the question, and K.C. would change her answer. Timmons believes that counsel should have objected to the prosecutor's rephrasings because they led the witness.<sup>116</sup>

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<sup>111</sup> *Id.* at 27–29.

<sup>112</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>113</sup> *Giglio v. United States*, 405 U.S. 150 (1972).

<sup>114</sup> Docket No. 2, at 29–30; Docket No. 16, at 9.

<sup>115</sup> *United States v. Agurs*, 427 U.S. 97, 107 (1976); *see also* State's Response to Defendant's Motion for Discovery at 1–2, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. July 31, 2020) (prosecution acknowledging it has a duty to turn over *Brady* materials).

<sup>116</sup> Docket No. 2, at 29.



But questions of this kind are permissible on direct examination when “necessary to develop the witness’s testimony.”<sup>117</sup> That rule applies in every context that Timmons mentions.

At any rate, the prosecutor’s rephrasings were done openly and after the jury had heard K.C.’s initial answer. Jurors are not so blind to social cues that they could not have picked up on what Timmons characterizes as a brazen and open attempt by the prosecutor to manufacture testimony, if that were what happened.

**ix. Ground Eleven – Sequestration**

A raunchy text message K.C. purportedly sent to Timmons suggested the pair engaged in rough sex at times.<sup>118</sup> Timmons wanted to use the text to bolster his defense that K.C. sustained her bruises outside of any assault. But the trial court had ruled that the text was inadmissible in a pre-trial order, finding its relevance suspect when the date it was sent could not be established.<sup>119</sup>

At trial, during a break after the State had finished its direct of K.C. and she had been sequestered,<sup>120</sup> Timmons’s counsel persuaded the trial court to reconsider its pre-trial ruling.<sup>121</sup> Even so, the court said that the text message would not come in as substantive evidence without first laying foundation for when it was sent.<sup>122</sup> And because

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<sup>117</sup> S.D. Codified Laws § 19-19-611 (2025).

<sup>118</sup> See Hughes Cnty. Trial Rec. Ex. O.

<sup>119</sup> Second Order on Pre-Trial Motions at 1, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. Mar. 8, 2021).

<sup>120</sup> Transcript of Jury Trial at 144:16–145:5.

<sup>121</sup> *Id.* at 145:20–154:14.

<sup>122</sup> *Id.* at 151:9–23.

of its change in ruling, the court expressly allowed the prosecutor to talk to K.C. and re-open her direct examination.<sup>123</sup>

Timmons now claims counsel was ineffective in failing to object to what the trial court authorized.<sup>124</sup> Timmons argues that the constraints to admit the exhibit—needing K.C. or someone else to provide foundation—meant the prosecutor could coach K.C. over the recess to foil any attempt to enter the exhibit. He says that counsel should have demanded to cross-examine K.C. before the prosecutor could speak to her or renew the direct examination. Counsel's failure to do so, Timmons maintains, robbed him of the ability "to introduce the pertinent [e]xhibit[ ] for [its] intended effect."<sup>125</sup>

Even though counsel never moved to admit the exhibit, the record suggests it was not because the prosecutor thwarted the chance. Rather, counsel's success in getting the trial court to change its ruling prompted the prosecutor to ask K.C. about her unsanctioned rendezvous with Timmons. Those questions developed Timmons having contact with K.C. despite a no-contact order,<sup>126</sup> and how the two had hatched "some plans to make the[ ] charges go away."<sup>127</sup> One plan was that K.C. would send Timmons a text message describing her wanting rough sex, which he allegedly dictated and watched her send.<sup>128</sup> All inferences suggest that text is what Timmons wanted admitted. But the

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<sup>123</sup> *Id.* at 151:25–152:7.

<sup>124</sup> Docket No. 2, at 31.

<sup>125</sup> *Id.* at 32.

<sup>126</sup> Transcript of Jury Trial at 155:14–20, 166:13–16.

<sup>127</sup> *Id.* at 155:22.

<sup>128</sup> *Id.* at 156:6–157:1.

message, if introduced, posed serious concerns for Timmons should any jurors have believed he was behind its sending.

Understanding the risk, counsel apparently abandoned any efforts to offer the text message as an exhibit. Instead, counsel elicited K.C.'s sexual proclivities through questioning,<sup>129</sup> drawing an inference for the jury without spotlighting Timmons's alleged subornation or controlling nature. Counsel was not ineffective for not insisting on leapfrogging the prosecutor's renewed direct examination after the trial court reconsidered the admissibility of the text message Timmons wanted in.

**x. Ground Twelve – Prejudicial Closing**

Timmons asserts that the prosecutor interposed her opinions into closing arguments, misstated evidence in a last-ditch bid to wrongfully convict him, and committed prosecutorial misconduct by asking that the jurors show sympathy for K.C.<sup>130</sup> He says that counsel's silence despite these transgressions was ineffective assistance.

Statements made in closing, when viewed in the context of the entire trial, must be so offensive as to deprive the defendant of a fair trial.<sup>131</sup> Otherwise, judicial intervention and a new trial are unwarranted. None of Timmons's objections rise to that level.

*Personal Opinions.* Timmons first complains about the prosecutor's use of "I propose," "I think," "I know," and "I believe" in some of her remarks during closing

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<sup>129</sup> *Id.* at 164:12–165:13.

<sup>130</sup> Docket No. 2, at 33–34; Docket No. 16, at 9–10.

<sup>131</sup> *United States v. Patterson*, 68 F.4th 402, 419 (8th Cir. 2023).

argument.<sup>132</sup> He sees these prefacings as interjecting beliefs where they do not belong. Phrases of this kind are often criticized for the reason Timmons explains, yet they are not inappropriate when used to refer to the evidence and summarize the case.<sup>133</sup> Most of the prosecutor's prefacings simply alluded back to the record and were not improper.

Two instances may have crossed the line. Counsel did, however, object to one of them, which was sustained.<sup>134</sup> So counsel was not ineffective there.

But moments later, the prosecutor commented: "When you look at [K.C.]'s differing testimony, please take into consideration the circumstances that this young lady was faced with. I know I definitely do."<sup>135</sup> In saying this, the prosecutor may have gone beyond framing the evidence and expressed her opinion—at least arguably so. And this time, counsel did not object. He did, however, take curative action soon after.<sup>136</sup> And a jury instruction had already emphasized that closing arguments were not evidence.<sup>137</sup> Both actions minimized whatever prejudice may have occurred. Even without counsel's

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<sup>132</sup> Docket No. 2, at 33–34.

<sup>133</sup> *E.g., United States v. Bentley*, 561 F.3d 803, 811–14 (8th Cir. 2009) ("I submit" and "we know" not grounds for mistrial, and collecting cases on similar phrasings that reached the same conclusion); *United States v. Papajohn*, 212 F.3d 1112, 1120 (8th Cir. 2000) ("I believe" not improper when used to describe sufficiency of the evidence, and despite "I have nothing personal to gain" being a "problematic" remark, it did not influence the outcome of the case); *Bass v. United States*, 655 F.3d 758, 761 (8th Cir. 2011) (saying that the government's witnesses "came before you and told you the truth about [the defendant]" argued the credibility of the witnesses without putting the prosecutor's personal reputation behind the witness's testimony).

<sup>134</sup> *Id.* at 223:10–14.

<sup>135</sup> *Id.* at 223:24–224:1.

<sup>136</sup> *See id.* at 225:4–7 ("I want to make one thing absolutely clear. What [the prosecutor] and I think about this case is totally irrelevant. Totally irrelevant. It's what you think about the evidence.").

<sup>137</sup> Final Jury Instructions at 29, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. Mar. 12, 2021).

admonishment or the instruction though, any prejudice from the comment was slight and counsel's objection would not have changed the result.<sup>138</sup>

*Misstatement of the record.* At the beginning of the State's closing, the prosecutor summed up the evidence she had presented:

Now, you heard a lot of testimony throughout the course of this. You heard [K.C.] say that she was scared. You heard [K.C.] tell the 9-1-1 operator she couldn't breathe. You heard [K.C.] tell [the investigating officer] he choked me. I couldn't breathe.<sup>139</sup>

Timmons contends that the prosecutor misstated the record evidence twice. First, that K.C. never said that she could not breathe, only that "she felt like she couldn't breathe."<sup>140</sup> That contention is hyper-technical and ineffective. If the two are not synonymous, they are at least close enough to be a proper recitation of the evidence. A more concerning situation would be if counsel had objected to emphasize Timmons only made K.C. *feel* like she could not breathe when he had his arm around her neck.

Second, Timmons belabors how K.C. only testified that he tried to restrain her, not strangle her.<sup>141</sup> But the two are not exclusive; Timmons could have restrained K.C. by

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<sup>138</sup> Cf. *Bass*, 655 F.3d at 761.

<sup>139</sup> Transcript of Jury Trial at 216:6-10.

<sup>140</sup> Docket No. 2, at 33; *see also* Transcript of Jury Trial at 138:20.

<sup>141</sup> Docket No. 2, at 33; *see also* Transcript of Jury Trial at 169:5.

choking her. Reasonable inferences from the evidence supported what the prosecutor said. Counsel acted within reasonable trial strategy to not object.<sup>142</sup>

*Inflammatory comment.* Timmons finally questions the tail-end of the prosecutor's closing.

I think [K.C.]'s in a bad spot. [K.C.] told you two days after this assault, she found out she was pregnant.

When you look at [K.C.]'s differing testimony, please take into consideration the circumstances that this young lady was faced with. I know I definitely do. And that's why I think it's important to look at it's not the individual who's pressing charges, it's the State that's bringing these charges because it puts people in a bind and in a hard time and I think we can all – **we can all have sympathy for that.**<sup>143</sup>

Timmons believes that the prosecutor's last remark was a calculated appeal to the jury's emotions.<sup>144</sup> But context shows it was not. Counsel had pressed K.C. on her changing stories and her regret in reporting the domestic assault.<sup>145</sup> The prosecutor's statement only sought to explain K.C.'s struggles on that front.<sup>146</sup> No matter, the statement was innocuous and did not create the specter of an unfair trial where counsel's decision to not object undermined confidence in the trial's outcome.

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<sup>142</sup> See *Dansby v. Hobbs*, 766 F.3d 809, 836 (8th Cir. 2014) ("Whether to object during opposing counsel's summation to the jury is a matter of trial strategy . . ."); *Shockley v. Crews*, 696 F. Supp. 3d 589, 637 (E.D. Mo. 2023) ("[O]bjecting always and everywhere . . . violates fundamental tenets of wise trial strategy.").

<sup>143</sup> Transcript of Jury Trial at 223:22–224:6 (emphasis added).

<sup>144</sup> Docket No. 2, at 34.

<sup>145</sup> See generally Transcript of Jury Trial at 157:13–164:11.

<sup>146</sup> Cf. *United States v. Obi*, 25 F.4th 574, 580 (8th Cir. 2022) (prosecutors call for justice to the city, community, and witnesses in closing not improper because the statements stressed the facts of the case).

**xi. Ground Thirteen – K.C.’s Attention Seeking**

Timmons believes K.C. has a propensity to lie or distort the truth for attention, sometimes at the expense of others. In his mind, counsel did not sufficiently investigate this proclivity, which would have hammered home how a little white lie K.C. told her family for sympathy was blown out of proportion. As Timmons relates it, K.C. never wanted to report the incident to police, but after she told family members an exaggerated version of what took place, they compelled her to go to the police.<sup>147</sup>

Even a less than complete investigation is reasonable so long as “reasonable professional judgments support the limitations on [it].”<sup>148</sup> And regardless of the depth of counsel’s investigation, he acted reasonably and within his professional judgment in deciding not to pursue the loose end. There is always a feeling that more can be done; but realism must eventually take hold when facing limited time and resources. Counsel may well have determined that other matters were more important. That was counsel’s prerogative to decide; it was reasonable for counsel to have triaged out K.C.’s supposed knack for embellishment from further investigation.

What’s more, the perceived shortfall did not prejudice Timmons. At best, what he expects the investigation would unearth is that K.C. was prone to stretch the truth for attention. The inference being K.C. manipulated her family about Timmons beating her

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<sup>147</sup> Docket No. 2, at 36.

<sup>148</sup> *Strickland*, 466 U.S. at 691.

up, which led the family to push her into reporting the incident. Propensity reasoning aside, counsel drew out the spirit of Timmons's logic. K.C. testified that she would do things to make others happy and felt pressured by her family to go against Timmons.<sup>149</sup> Timmons's demanded investigation would have yielded little more than cumulative impeachment to the case.

**xii. Ground Fourteen – Testifying**

Timmons never took the stand in his defense. No record was built on that decision. He reveals now that counsel denied him his request to testify.<sup>150</sup> Timmons believes that, if called to the stand, he could have cleared up some inaccuracies the State propounded in its case-and-chief and explain what actually happened. That includes how he "may have grazed [K.C.'s] neck or been forced against her neck" amid their scuffle, and that he contacted K.C. over a no-contact order to urge her to "tell the truth" (that "they had rough sex a couple of nights ago"), apparently to respond to testimony suggesting he tried to suborn perjury.<sup>151</sup> Denied the right to speak his truth, Timmons alleges counsel was ineffective.

Defendants have a right to testify in their defense, qualified only by the evidentiary and procedural rules of the tribunal.<sup>152</sup> So important is the right that, although counsel is

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<sup>149</sup> Transcript of Jury Trial at 163:19–164:11.

<sup>150</sup> Docket No. 2, at 37; Docket No. 16, at 10.

<sup>151</sup> Docket No. 2, at 37–38.

<sup>152</sup> *Rock v. Arkansas*, 483 U.S. 44, 54–56 (1986).



responsible for trial strategy, the defendant retains the “ultimate authority” to decide whether to take the stand.<sup>153</sup> The attending respect for the defendant’s autonomy seemingly places the denial of the right in a unique category of trial errors that “affect the framework within which the trial proceeds, rather than being simply an error in the trial process itself”—otherwise known as structural error.<sup>154</sup> Structural errors bypass harmless-error review, even if exercising the right would “usually increase[ ] the likelihood of a trial outcome unfavorable to the defendant.”<sup>155</sup>

That however is the standard on direct review. Seeking habeas relief, Timmons properly classifies his claim as ineffective assistance of counsel.<sup>156</sup> Thus, *Strickland* prejudice takes center stage.<sup>157</sup>

The trial court record is mum on whether Timmons wanted to testify.<sup>158</sup> Still, the state habeas court dismissed the allegation as being insufficiently plead without holding an evidentiary hearing. Because, as the habeas court reasoned, caselaw such as *Ice v. Weber*<sup>159</sup> required Timmons to explain how counsel coerced his silence to establish

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<sup>153</sup> *Jones v. Barnes*, 463 U.S. 745, 751 (1982).

<sup>154</sup> *Weaver v. Massachusetts*, 582 U.S. 286, 295 (2017) (citation modified); accord *Carter v. Clarke*, 667 F. Supp. 3d 163, 201 (W.D. Va. 2023) (finding structural error when counsel had failed to tell the defendant about his constitutional right to testify).

<sup>155</sup> *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1983).

<sup>156</sup> See *Winfield v. Roper*, 460 F.3d 1026, 1035 n.3 (8th Cir. 2006) (denial of right to testify on habeas review is a claim under ineffective assistance of counsel).

<sup>157</sup> *Weaver*, 582 U.S. at 303, 305; see also *Evans v. Sullivan*, 9 N.W.3d 490, 504 (S.D. 2024) (evaluating denial of a defendant’s right to testify on collateral review under the *Strickland* standard).

<sup>158</sup> See *Evans*, 9 N.W.3d at 503 n.10 (South Dakota circuit courts are “not obligated to establish on the record that a defendant has knowingly and voluntarily waived his right to testify”).

<sup>159</sup> 638 N.W.2d 557 (S.D. 2002).

prejudice. So since Timmons never alleged coercion, he could not show any resulting prejudice.<sup>160</sup>

The Court agrees that Timmons has not shown the required prejudice to obtain habeas relief but is unsure about the state habeas court's reasoning. No other state cases appear to link coercion to prejudice in the right-to-testify context, and neither does *Ice*. In *Ice*, the habeas court had conducted an evidentiary hearing and found that the petitioner and counsel "reached a mutual agreement that [the petitioner] would not testify."<sup>161</sup> Based on that court's finding, the supreme court held that the petitioner "failed to make a showing . . . that his failure to testify at trial was [not] a mutual agreement between attorney and client."<sup>162</sup> The *Ice* court decided that the petitioner had waived his right to testify; absent from its ruling was any connection between coercion and prejudice.<sup>163</sup>

The Court does not have a record to evaluate Timmons's supposed desire to testify. But one is unnecessary for Timmons's petition. That is because his proffered testimony casts no doubts on his conviction. Timmons's recitation of what happened includes him putting "force[ ] against [K.C.'s] neck," (which would strengthen the finding he choked her) and admitting to violating the no-contact order.<sup>164</sup> Not only would

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<sup>160</sup> Docket No. 12-4, at 5.

<sup>161</sup> *Ice*, 638 N.W.2d at 562.

<sup>162</sup> *Id.*

<sup>163</sup> *Cf. Wilcox v. Leapley*, 488 N.W.2d 654, 659 (S.D. 1992) (absent coercion, counsel's advise not to testify at trial is not *deficient performance*).

<sup>164</sup> Docket No. 2, at 37–38.

the testimony have hurt Timmons's case, it may have also exposed him to more criminal charges.

Worse yet, two incongruous stories take shape. Timmons first appears to admit to causing the bruises around K.C.'s neck during their fight, but then attributes the bruising to "rough sex" a few nights before.<sup>165</sup> Difficult to reconcile, his testimony would not have helped his case.

Very little could have been gained from the proposed testimony. That Timmons never took the stand did not prejudice him.

**xiii. Ground Fifteen – Private Investigator**

Counsel hired an investigator to dig into the case. Timmons claims the investigator had spoken to K.C., and "discovered . . . that all of her alleged bruises, marks or scratches were from her attacking [Timmons]." <sup>166</sup> Yet the investigator was never called to testify, which Timmons contends was prejudicial error.

Timmons's draws support for his contention from the Tenth Circuit's decision in *Stouffer v. Reynolds*.<sup>167</sup> There, the defendant's trial counsel committed nine significant errors so bad that they "sp[oke] for themselves" and showed "such a total lack of preparedness and ability."<sup>168</sup> One of those errors was that the counsel had not called "a

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<sup>165</sup> *Id.* at 38.

<sup>166</sup> *Id.* at 38; Docket No. 16, at 11.

<sup>167</sup> 214 F.3d 1231 (10th Cir. 2000).

<sup>168</sup> *Id.* at 1234.

defense investigator [who had] viewed the crime scene 'and discovered numerous [factual] inconsistencies with the State's theory of the case,' " which were "crucial" to the defendant's innocence.<sup>169</sup>

Suffice it to say, the investigative error in *Stouffer* is different from what Timmons alleges here. The extent of the investigator's knowledge was K.C.'s hearsay statements about what happened. She could testify to the same information. And what K.C. confirmed on cross-examination is not too far off from what Timmons purports the investigator would have testified to either—that she bit and bruised Timmons during their fight.<sup>170</sup> Not so in *Stouffer*, where the investigator made independent discoveries of crucial facts that only he could speak to. Whatever Timmons lost by his investigator not testifying does not call for habeas relief.

**xiv. Ground Sixteen – Failure to Request Discovery and Investigate**

Beyond counsel's supposed failure to request *Brady* materials, Timmons rattles off several other subjects he thinks counsel fell short of adequately investigating.<sup>171</sup> The state habeas court characterized these allegations as "unspecific, conclusory, or speculative."<sup>172</sup> The Court agrees they do not entitle him to habeas relief.

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<sup>169</sup> *Id.*

<sup>170</sup> Transcript of Jury Trial at 161:19–162:5.

<sup>171</sup> Docket No. 2, at 39–44.

<sup>172</sup> Docket No. 12-4, at 4.

Much of what Timmons maintains that counsel failed to request seems superfluous considering the State's pretrial representations of what it would turn over.<sup>173</sup> Nor does he relate how any of the proposed discovery requests would have prevented a surprise at trial. That is, other than him saying that there was no notice of the investigating officer having conducted "a medical examination[ ] on K.C."<sup>174</sup> But that mischaracterizes the officer's testimony, who only testified to what he observed when interviewing her.

Timmons also alleges that counsel failed to fully investigate the crime scene, consult a medical expert for assistance on making strategic decisions, or interview K.C.<sup>175</sup> What would have been found at the scene or what an expert could have offered seems minimal; reasonable trial strategy excuses both challenges. And Timmons's allegation that counsel failed to interview K.C. is contradicted by his earlier representation that a private investigator *had* spoken with her.<sup>176</sup> Habeas relief is inappropriate on this claim.

**xv. Ground Seventeen – Conflict of Interest**

The trial judge had a law clerk assist her throughout the trial. Disclosed to both sides, the clerk had accepted a post-clerkship position with the South Dakota Attorney General's Office—which was prosecuting Timmons. Neither party objected to the

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<sup>173</sup> See State's Response to Defendant's Motion for Discovery at 1–3.

<sup>174</sup> Docket No. 2, at 39–40.

<sup>175</sup> *Id.* at 43–44.

<sup>176</sup> *Id.* at 38.

arrangement.<sup>177</sup> But now Timmons has had a change of heart, believing counsel's acquiescence was ineffective lawyering.<sup>178</sup>

Timmons's belief that this purported conflict-of-interest prejudiced him is speculative, and wrong. It is speculative because all Timmons can muster is that the clerk would have felt "some kind of loyalty" to the prosecution,<sup>179</sup> yet cannot even guess how the clerk exercised his supposed fidelity to the State. It is wrong because, even if the clerk were partial, he had no authority to act on his bias. Whatever assistance the clerk offered still had to be filtered through the trial judge's independent decision-making; the judge, not the clerk, was responsible for each ruling and the conduct of the trial. Admittedly, law clerk misconduct, when egregious, may afford habeas relief in rare cases.<sup>180</sup> But this case is not one of them. Timmons has pleaded nothing to suggest that the clerk's participation prejudiced him.

**xvi. Ground Eighteen – Juror Access to Legal Pad**

For whatever reason, the parties were at one point settling jury instructions in what doubled as the jury room.<sup>181</sup> While doing so, a juror had entered the room, prompting the trial judge and parties to relocate.<sup>182</sup> Left behind however was the

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<sup>177</sup> Transcript of Jury Trial at 4:24–5:14.

<sup>178</sup> Docket No. 2, at 44; Docket No. 16, at 11.

<sup>179</sup> Docket No. 2, at 44.

<sup>180</sup> See, e.g., *Wilson v. Midland Cnty.*, 116 F.4th 384, 387 (5th Cir. 2024) (en banc) (detailing fallout from situation described by the Fifth Circuit as "utterly bonkers," where a man worked on cases as both a county prosecutor and law clerk).

<sup>181</sup> *Id.* at 81:11–14.

<sup>182</sup> *Id.* at 81:16–19.

prosecutor's legal pad, which she referenced later as she lamented missing the "brilliant argument" she had crafted on whether domestic aggravated assault by strangulation was a general or a specific intent crime.<sup>183</sup> Timmons chides how counsel apparently took no issue with a juror having "unfettered access" to that legal pad and its "brilliant argument" inside, claiming that counsel should have objected or done something.<sup>184</sup>

The state habeas court concluded that the situation did not call for an objection and that Timmons's alleged prejudice was speculative.<sup>185</sup> The Court cannot say that the habeas court's conclusion is unreasonable.

xvii. **Ground Nineteen – Doctor's Assessment**

The State called the nurse who met with K.C. the morning after the assault and charted her observations. She testified to her assessment of K.C., at one point refreshing her recollection having seen bruising on K.C.'s body by referring to her chart.<sup>186</sup> During cross-examination, counsel handed the nurse the examining doctor's assessment plan from the same visit and asked her about it.<sup>187</sup> The State objected, saying she could not speak for the doctor.<sup>188</sup> After an off-the-record bench conference, counsel dropped the matter.<sup>189</sup>

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<sup>183</sup> *Id.* at 88:3–4.

<sup>184</sup> Docket No. 2, at 45; Docket No. 16, at 11.

<sup>185</sup> Docket No. 12-4, at 5.

<sup>186</sup> *See* Transcript of Jury Trial at 121:3–124:22.

<sup>187</sup> *Id.* at 128:17.

<sup>188</sup> *Id.* at 129:2–3.

<sup>189</sup> *Id.* at 129:6–10.

Timmons represents that the assessment shows the doctor “did not find any bruising on K.C.’s neck,” evidence that would contradict the nurse’s and officer’s testimony.<sup>190</sup> He condemns counsel as ineffective for not introducing the doctor’s assessment into evidence through the nurse, who had “the credentials to give an opinion or explanation of what the [d]octor found.”<sup>191</sup>

The nurse would not have been a competent witness to opine on the doctor’s assessment. The state habeas court’s decision to that effect is reasonable.

And even if Timmons were to more broadly maintain that counsel was ineffective for failing to introduce the doctor’s assessment at some point, he still cannot prevail. The assessment is the not the wholesale contradiction that Timmons represents; it is simply silent on whether bruising is visible.<sup>192</sup> And yet it logs K.C. feeling “[m]ild diffuse pain” in her neck, as well as other signs of a fight such as her having a “tender” jaw, “[m]ultiple large bruises on her upper arms,” and “evidence of soft tissue injury.”<sup>193</sup> At best, the evidence is equivocal. It is not grounds for habeas relief.

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<sup>190</sup> Docket No. 2, at 46.

<sup>191</sup> *Id.*; Docket No. 16, at 11.

<sup>192</sup> *See* Docket No. 15-1.

<sup>193</sup> *Id.*



xviii. Ground Twenty – Expert Witness

The State’s final witness was a domestic violence expert who spoke about power dynamics in abusive relationships. It is not altogether clear what Timmons challenges, but the Court gleans a few things.

First, Timmons claims that there was no pre-trial *Daubert* hearing. He is wrong.<sup>194</sup>

Next, that counsel did not object to the expert testifying to the “Duluth Model” and “Power and Control Wheel.”<sup>195</sup> Timmons cites an unpublished opinion from the District of Minnesota that barred the same subjects from being discussed.<sup>196</sup> But counsel *did* object and was overruled.<sup>197</sup> Timmons cannot now complain that counsel acted deficiently when counsel objected as Timmons wishes. Besides, the case Timmons cites never created a per se rule barring testimony related to either model. After all, the Eighth Circuit has sanctioned such testimony when it fits the case.<sup>198</sup>

Timmons also protests the State’s expert using the term “victim” in her testimony; specifically, her response agreeing that she “kn[e]w what gender the victim was.”<sup>199</sup> He supposes that the answer improperly bolstered the prosecution’s case that an assault had

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<sup>194</sup> Transcript of Motion Hearing, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. Feb. 26, 2021).

<sup>195</sup> Docket No. 2, at 47.

<sup>196</sup> *Id.* (citing *United States v. Lussier*, No. 18-cr-281, 2019 WL 2489906, at \*5 (D. Minn. June 15, 2019)).

<sup>197</sup> See generally *Daubert* Hearing on the State’s Notice of Expert Findings of Fact, Conclusions of Law, and Order, *State v. Timmons*, No. 32CRI20-174 (S.D. Cir. Ct. Mar. 8, 2021).

<sup>198</sup> E.g., *United States v. Johnson*, 860 F.3d 1133, 1140 (8th Cir. 2017) (district court did not err in admitting testimony about the Duluth Model and the cycle of violence without a *Daubert* hearing).

<sup>199</sup> Docket No. 2, at 47–48 (citing Transcript of Jury Trial at 192:16–18); see also Docket No. 16, at 12.

occurred by saying there was a victim. While the Court does not condone using the term, it was not prejudicial. The statement offers nothing worthy of habeas relief.<sup>200</sup>

Timmons finally makes a stray comment that counsel was “perhaps maybe” sleeping during the expert’s testimony.<sup>201</sup> The Court is not sure what to make of the comment since he offers nothing to support it. Without context, there is no way of knowing whether counsel was dozing or how Timmons was prejudiced by it.<sup>202</sup>

**xix. Ground Twenty-One – Video Transcript Brought to Deliberations**

The State introduced audio recordings into evidence during trial. Accompanying their presentment were transcripts and the trial court’s admonition that the transcripts were “not evidence,” and meant “for the limited purpose of helping [the jurors] follow the conversation as [they] listen.”<sup>203</sup> It further instructed that the audio would govern should there be any inconsistencies between the two.<sup>204</sup> The transcripts were not intended for the jury to have during deliberations, but one transcript slipped through the cracks.<sup>205</sup>

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<sup>200</sup> Cf. *Cueva v. Stephens*, No. 14-cv-00417, 2016 WL 4014088, at \*9 (S.D. Tex. Feb. 19, 2016) (rejecting similar contention); *Kidd v. Reilly*, No. 11-cv-00350, 2012 WL 5874321, at \*8 (D.N.H. Oct. 15, 2012) (same); *Romano v. Baker*, No. 14-cv-00187, 2018 WL 4643127, at \*16 (D. Nev. Sept. 27, 2018) (rejecting contention when raised as a due process violation).

<sup>201</sup> Docket No. 2, at 49.

<sup>202</sup> See *United States v. Ragin*, 820 F.3d 609, 619 & n.3 (4th Cir. 2016) (collecting cases suggesting attorney’s slumber must be through a substantial portion or critical phase in the trial to receive habeas relief).

<sup>203</sup> Transcript of Jury Trial at 19:11-20:11.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 258:25-259:24.

Timmons objects to counsel not requesting for a mistrial based on the jurors access to the transcript during their deliberation.<sup>206</sup>

But Timmons does not explain how the transcript prejudiced him. He fails to even mention whether it differed from the paired recording. So how was Timmons harmed? It seems all he can muster is that the jurors may have read the transcript during deliberations rather than replaying the audio.<sup>207</sup> But that is not prejudice.

**xx. Ground Twenty-Two – Cumulative Effect**

Timmons lastly asserts that the cumulative effect of counsel's failures amounted to ineffective assistance.<sup>208</sup> But the Eighth Circuit has long rejected the notion that a court may aggregate attorney errors.<sup>209</sup> And that is the law the Court must follow. Other circuits may have different rules, but they have no effect when facing binding precedent. Timmons's cumulative-effect theory cannot be considered.

**CONCLUSION**

Timmons raises 22 grounds for habeas relief. None of them are meritorious. There are no issues of material fact that call for an evidentiary hearing. And because Respondents are entitled to judgment as a matter of law, Timmons's habeas petition should be dismissed.

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<sup>206</sup> Docket No. 2, at 50.

<sup>207</sup> *Id.* at 49–50; Docket No. 16, at 12–13.

<sup>208</sup> Docket No. 2, at 50–51; Docket No. 16, at 13.

<sup>209</sup> *McLaughlin v. Precythe*, 9 F.4th 819, 830–31 (8th Cir. 2021); *United States v. Stewart*, 20 F.3d 911, 917–18 (8th Cir. 1994).

### RECOMMENDATION

Based on the record now before the Court and for the reasons stated in this report, it is

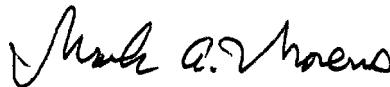
RECOMMENDED that Respondents' motion for judgment of the pleadings<sup>210</sup> be granted, and Timmons's petition for a writ of habeas corpus<sup>211</sup> be dismissed.

### NOTICE

The parties have 14 calendar days after service of this report and recommendation to object.<sup>212</sup> Unless an extension of time for cause is later obtained, failure to timely object will result in the waiver of the rights to appeal questions of fact.<sup>213</sup> Objections must "identify[ ] those issues on which further review is desired."<sup>214</sup>

DATED this 28th day of July, 2025.

BY THE COURT:



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MARK A. MORENO  
UNITED STATES MAGISTRATE JUDGE

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<sup>210</sup> Docket No. 11.

<sup>211</sup> Docket No. 1.

<sup>212</sup> 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59(b)(2).

<sup>213</sup> *Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990) (per curiam); *Nash v. Black*, 781 F.2d 665, 667 & n.3 (8th Cir. 1986).

<sup>214</sup> *Nash*, 781 F.2d at 667 (quoting *Thomas v. Arn*, 474 U.S. 140, 155 (1985)).

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