

No. 25-1184

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**

May 19, 2026

KELLY L. STEPHENS, Clerk

DANI RAY MALM,

Petitioner-Appellant,

v.

DONALD CURLEY, Warden,

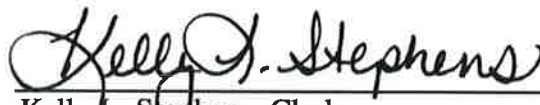
Respondent-Appellee.

)
)
)
)
)
)
)
)
)
)
)ORDER

Before: BATCHELDER, MURPHY, and RITZ, Circuit Judges.

Dani Ray Malm, a pro se Michigan prisoner, moves for reconsideration of this court's August 6, 2025, order denying his application for a certificate of appealability. We have reviewed the motion and conclude that the court did not overlook or misapprehend any point of law or fact in denying Malm's application for a certificate of appealability. *See* Fed. R. App. P. 40(b)(1)(A). The motion for reconsideration is therefore **DENIED**.

ENTERED BY ORDER OF THE COURT



 Kelly L. Stephens, Clerk

No. 25-1184

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 6, 2025
KELLY L. STEPHENS, Clerk

DANI RAY MALM,	)	
	)	
Petitioner-Appellant,	)	
	)	
v,	)	<u>ORDER</u>
	)	
DONALD CURLEY, Warden,	)	
	)	
Respondent-Appellee.	)	

Before: DAVIS, Circuit Judge.

Dani Ray Malm, a pro se Michigan prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254 and moves this court for a certificate of appealability (COA). As discussed below, the court denies a COA.

Procedural History

In 2012, a jury found Malm guilty of three counts of first-degree criminal sexual conduct for sexually abusing his step-daughter. He was sentenced to 18 to 40 years in prison for each conviction. The Michigan Court of Appeals affirmed Malm's conviction and sentence. *People v. Malm*, No. 312486, 2014 WL 1320237 (Mich. Ct. App. Apr. 1, 2014) (per curiam).¹ The Michigan Supreme Court reversed in part and remanded the case for the trial court "to determine whether [it] would have imposed a materially different sentence under the sentencing procedure described in [*People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015)]." *People v. Malm*, 870 N.W.2d 705, 705 (Mich. 2015) (mem.). The court otherwise denied leave to appeal. *Id.*

¹ The Michigan Court of Appeals, however, vacated the trial court's "amended order to remit prisoner funds." *Id.* at *1, *6.

No. 25-1184

- 2 -

The trial court resentenced Malm to 22 to 40 years for each conviction. The Michigan Court of Appeals vacated this sentence and remanded for further proceedings, finding that the trial court failed to comply with the Michigan Supreme Court's 2015 remand order, as well as *Lockridge. People v. Malm*, No. 357503, 2023 WL 2051349, at *1 (Mich. Ct. App. Feb. 16, 2023) (per curiam). On remand, the trial court imposed the original prison sentence of 18 to 40 years for each conviction.

Malm then filed his § 2254 petition, claiming that (1) trial counsel was ineffective for failing to impeach witnesses, (2) he was denied his right to confront witnesses, (3) trial counsel was ineffective for failing to protect his right to confront witnesses and for failing to object to introduction of the examining physician's notes, and (4) appellate counsel was ineffective.

The district court denied the petition and declined to issue a COA, reasoning that Malm's claims were procedurally defaulted and, alternatively, meritless.

Malm seeks a COA as to grounds two and three only. Because Malm fails to raise grounds one and four in his COA motion, they are forfeited on appeal. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

Standard of Review

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), when a state court adjudicates the petitioner's claims on the merits, the district court may not grant habeas relief unless the state court's adjudication resulted in "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011). When AEDPA deference applies, a reviewing court, in the COA context, must evaluate the district court's application of § 2254(d) and determine "whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

Preliminary Matter

As an initial matter, because examining Malm's arguments in support of cause to excuse the procedural default of his preserved claims would "mirror[] the analysis implicated by the merits" of the claims, this court bypasses the procedural-default analysis and addresses those claims on their merits. *Akrawi v. Booker*, 572 F.3d 252, 261 (6th Cir. 2009); see *Linscott v. Rose*, 436 F.3d 587, 592 (6th Cir. 2006).

Ground Two—Confrontation Clause

Malm claims that his rights to confront witnesses and to due process were violated when the prosecutor "breach[ed] an authorized pretrial agreement" that would have allowed him to confront Dr. Cynthia Smith, the victim's examining physician, in a video deposition. According to Malm, the prosecutor never subpoenaed Dr. Smith for the deposition and, at trial, introduced a "fraudulent stipulation" that allowed Dr. Smith's notes and a letter she authored to be considered by the jury as substantive evidence of guilt. Dr. Smith's notes and letter, in relevant part, stated that the victim's physical exam was "unremarkable" and "normal, which is consistent with her verbal statements. In cases of sexual abuse, a normal physical exam can neither confirm abuse nor disprove abuse." Defense counsel stipulated to the admission of these documents when Dr. Smith failed to appear at a video deposition after being subpoenaed by the prosecution. In light of this stipulation, the Michigan Court of Appeals rejected Malm's Confrontation Clause claim on direct appeal. See *Malm*, 2014 WL 1320237, at *7 (stating that Malm "stipulated to the admission of the [notes]" and reiterating that "[a] party cannot stipulate to a matter and then argue on appeal that there was error").

To the extent that Malm claims that admission of Dr. Smith's notes and letter pursuant to the stipulation violated state evidentiary rules, reasonable jurists would agree that he is not entitled to federal habeas relief. See *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam).

"A state court evidentiary ruling will be reviewed by a federal habeas court only if it were so fundamentally unfair as to violate the petitioner's due process rights." *Wilson v. Sheldon*, 874

F.3d 470, 475 (6th Cir. 2017) (quoting *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001)). Even then, a petitioner cannot show that the state court’s evidentiary ruling is “contrary to, or [based on] an unreasonable application of, clearly established Federal law,” 28 U.S.C. § 2254(d)(1), unless he “identifies ‘a Supreme Court case establishing a due process right with regard to [the] *specific kind of evidence*’ at issue,” *Stewart v. Winn*, 967 F.3d 534, 538 (6th Cir. 2020) (quoting *Moreland v. Bradshaw*, 699 F.3d 908, 923 (6th Cir. 2012)).

Malm points to his rights under the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny. The Confrontation Clause generally prohibits admission only of out-of-court *testimonial* statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Id.* at 38. The Supreme Court has stated, albeit in dicta, that “medical reports created for treatment purposes” are not “testimonial.” *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2 (2009); *see also Bullcoming v. New Mexico*, 564 U.S. 647, 672 (2011) (suggesting that reports “necessary to provide . . . medical treatment” are not testimonial). It is “presume[d] that ‘physicians and nurses’ primary concern is the treatment of their patients’”—“not to further an investigation”—and thus medical notes that record a physician’s observations of potential sexual assault are considered nontestimonial. *Wilson v. Boughton*, 41 F.4th 803, 810-11 (7th Cir. 2022) (citations omitted); *see also Dorsey v. Cook*, 677 F. App’x 265, 267 (6th Cir. 2017).

Here, reasonable jurists would agree that Dr. Smith’s notes are not testimonial because their primary purpose was to memorialize her observations made during her examination of the victim. As for the letter, although Dr. Smith wrote it after having “been asked to detail how [the victim’s] normal physical exam can be consistent with the allegations of sexual abuse,” it nonetheless was a “follow up on the physical exam” and it simply reiterated the observations detailed in Dr. Smith’s notes. And the letter is favorable to Malm insofar as it states that Dr. Smith’s examination of the victim could neither prove nor disprove that abuse occurred. Because Dr. Smith’s notes and letter are nontestimonial, no reasonable jurist could debate the

district court's conclusion that their admission did not violate Malm's rights under the Confrontation Clause.

Even if Dr. Smith's notes and letter were testimonial and should have been excluded in view of his unavailability to testify at trial, reasonable jurists would agree that any error was harmless. *See Bullcoming*, 564 U.S. at 668 n.11. Putting aside that Dr. Smith's notes and letter did not opine that the victim had been sexually abused, the victim herself testified that Malm sexually abused her, and she was subject to cross-examination. Insofar as other evidence—most critically, the victim's own testimony—showed that Malm sexually abused the victim, Malm cannot show that admission of Dr. Smith's notes and letters had a “substantial and injurious effect or influence in determining the jury's verdict.” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Brown v. Davenport*, 596 U.S. 118, 138 (2022).

Malm also claims that admission of Dr. Smith's notes and letters pursuant to the “fraudulent” stipulation after failing to subpoena her was the result of prosecutorial misconduct, in violation of his due process rights.

When considering a claim of prosecutorial misconduct, this court asks whether the prosecutor's actions “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

As an initial matter, Malm's assertion that the prosecutor failed to subpoena Dr. Smith is defied by the record. So, too, is Malm's argument that the stipulation to admit Dr. Smith's notes and letter was “fraudulent.” Malm thus has not made a substantial showing that the prosecutor committed misconduct, much less that the conduct tainted his trial with such unfairness as to deprive him of due process. A COA therefore is denied on this claim.

Ground Three – Ineffective Assistance of Trial Counsel

Malm claims that trial counsel failed to protect his Confrontation Clause rights and failed to object to the introduction of Dr. Smith's notes and letter.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “The standards created by *Strickland* and § 2254(d) are both ‘highly deferential,’ and when the two apply in tandem, review is ‘doubly’ so.” *Richter*, 562 U.S. at 105 (first quoting *Strickland*, 466 U.S. at 689; then quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). Thus, on habeas review, “[w]hen § 2254(d) applies, the question is not whether counsel’s actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*’s deferential standard.” *Id.*

In rejecting this claim on direct appeal, the Michigan Court of Appeals reasoned that Malm failed to “overcome the strong presumption that sound strategy motivated counsel’s decision to stipulate to the admission of the [notes and letter] rather than require live testimony” from Dr. Smith insofar as the documents “contained information that was favorable to [Malm].” *Malm*, 2014 WL 1320237, at *8. The court added that counsel used the notes and letter to argue that Dr. Smith’s findings were partially inconsistent with the victim’s allegations. *Id.* The district court found this decision reasonable, adding that any argument that counsel should have objected to introduction of Dr. Smith’s notes and letter would have been meritless because, as discussed above, their admission did not violate Malm’s Confrontation Clause or due process rights. *See Tackett v. Trierweiler*, 956 F.3d 358, 375 (6th Cir. 2020) (noting that trial counsel is not ineffective for failing to raise a meritless issue). On this record and in light of the double deference due under *Strickland* and § 2254(d), no reasonable jurist could debate the district court’s conclusion that the Michigan Court of Appeals reasonably rejected this ineffective-assistance claim.

Malm also claims in ground three that trial counsel failed to ensure the presence of two witnesses at trial: Ted Moore and Angela Steinhouse. According to Malm, (1) Moore, the father of the victim’s best friend, would have testified that the victim never mentioned the sexual abuse to him and “had a history of lying to get what she wanted,” and (2) Steinhouse, the mother of the victim’s “new best friend,” would have testified that her daughter is a habitual liar and is prone to concoct stories to get what she wants.

No. 25-1184

- 7 -

The Michigan Court of Appeals rejected this claim² on direct appeal, reasoning that it was speculative insofar as Malm “provided no affidavit or anything else from any of these people to indicate that they would have testified.” *Malm*, 2014 WL 1320237, at *7. Malm did, though, attach an affidavit from Moore to his brief in support of his habeas petition. In it, Moore averred that he knew the victim well and that, if called as a trial witness, he would have testified that the victim “never mentioned anything to [him] about her father allegedly abusing her” and often “lie[s] in order to get what she wants.”

One problem for Malm’s claim of ineffective assistance is that counsel *did* try to secure Moore’s presence at trial. Counsel subpoenaed Moore for trial, and when Moore told counsel that he could not appear at that time because he would be out of state, counsel requested a continuance. The trial court denied the request. “Counsel is not ineffective merely for failing to obtain a desired ruling from the court.” *Hodge v. Haeblerlin*, 579 F.3d 627, 645 (6th Cir. 2009).

Another problem is that Malm failed to show that Moore’s proffered testimony—set forth in an affidavit authored over three years after Malm was convicted—would likely have changed the outcome of trial. As aptly stated by the district court, the belated testimony proposed by Moore “would not foreclose the truth of the victim’s testimony at trial, or even challenge it in any specific way, particularly in light of the overwhelming testimony from the prosecution’s witnesses.” Indeed, the trial court even stated that the proposed testimony (as set forth by Malm at that time) was not “particularly relevant” and in fact may have even supported the prosecution’s case insofar as it would have shown that the victim’s behavior “may [have been] more consistent with sexual abuse occurring than it not occurring.” And after counsel tried but failed to secure Moore’s presence at trial, he “effectively cross-examined the victim in an attempt to suggest that she was fabricating the allegations against” Malm. The district court explained that any testimony from Moore would have been “less direct and cumulative of that cross-examination.” On this record,

² The claim was not, however, presented as an ineffective-assistance claim, but as a due process claim. See *Malm*, 2014 WL 1320237, at *6-7.

No. 25-1184

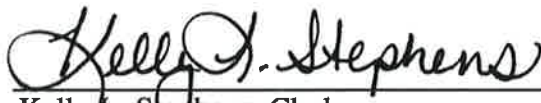
- 8 -

no reasonable jurist could debate the district court's rejection of Malm's claim that counsel was ineffective for failing to present Moore at trial.

As for Steinhouse, Malm provided no affidavit detailing her proffered testimony or indicating that she would have appeared at trial. Because a claim of ineffective assistance for failing to call witnesses cannot be based on mere speculation, reasonable jurists could not debate the district court's conclusion that counsel was not ineffective for failing to secure Steinhouse as a witness at trial. *See Tinsley v. Million*, 399 F.3d 796, 810 (6th Cir. 2005).

The court therefore **DENIES** the motion for a COA.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk