IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANTHONY M. COLLINS,

:

Petitioner, Case No. 3:09-cv-411

:

-vs- Magistrate Judge Michael R. Merz

WARDEN, Ross Correctional Institution,

:

Respondent.

DECISION AND ORDER

This is a habeas corpus case brought pursuant to 28 U.S.C. § 2254. Petitioner seeks relief from a sentence of life plus five years on his convictions for rape of a child under ten years of age and child endangering where serious physical harm was inflicted.

The Ohio Attorney General reports that Petitioner is now confined at London Correctional Institution. The Warden of that institution, Deb Timmerman-Cooper, is ordered substituted for the original Respondent, Mike Sheets, Warden of the Ross Correctional Institution.

The parties unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. § 636(c) and the case has been referred on that basis (Doc. No. 15).

Procedural History

Petitioner was indicted by the Montgomery County Grand Jury on one count of child

endangering with serious physical harm inflicted and one count of rape of a child under ten years of age. He was convicted by a jury and sentenced to life without the possibility of parole on the rape charge and five years consecutive on the child endangering charge. The conviction was affirmed on appeal, except that the rape sentence was modified from life without the possibility of parole to life imprisonment. *State v. Collins,* 2008 Ohio 2590, 2008 Ohio App. LEXIS 2184 (2nd Dist. May 30, 2008). Petitioner sought to appeal to the Ohio Supreme Court which declined to exercise jurisdiction. *State v. Collins*, 2008 Ohio 5467, 2008 Ohio LEXIS 2991 (Oct. 29, 2008). Petitioner filed an application for delayed reopening of his appeal to assert a claim of ineffective assistance of appellate counsel, but the application was denied.

Petitioner then filed the instant Petition, raising the following Grounds for Relief:

> **Ground One:** It is prosecutorial misconduct for the State to make misleading statements during closing argument about the petitioner's substantial right to a fair trial as guaranteed by the Fourteenth Amendment of the United States Constitution
>
> **Ground Two:** A trial court must act as a "gatekeeper" to insure that expert testimony, whether opinion or otherwise, is based on reliable scientific, technical or other specialized information so as to insure that the Petitioner's Fourteenth Amendment is not violated.
>
> **Ground Three:** A trial court should give a requested instruction on a lesser-included offense when, under a reasonable view of the evidence, a jury could find a defendant not guilty of the greater offense and guilty of the lesser offense, or it violates Petitioner's right to a fair trial under the Fourteenth Amendment to the United States Constitution.
>
> **Ground Four:** Petitioner was denied his right to counsel under the Sixth Amendment by defense counsel [sic] failure to object to State's expert evidence and request an evidentiary hearing on the admissibility of DNA evidence.

(Petition, Doc. No. 1, quoted in Return of Writ, Doc. No. 8, PageID[1] 128.)

Before Respondent has answered, Petitioner filed an Amendment in which he essentially adds as a fifth ground for relief that his life sentence is not authorized by Ohio law (Doc. No. 7). After Respondent answered, Petitioner retained counsel who has filed a Reply and Brief on his behalf (Doc. Nos. 16, 17)[2] along with a number of supporting exhibits (Doc. Nos. 19-28).

Analysis

Ground One: Prosecutorial Misconduct

In Ground One, Petitioner asserts the prosecutor committed unconstitutional misconduct in his closing argument, thereby depriving Petitioner of a fair trial. Respondent concedes that this claim is preserved for merit review, that it was not procedurally defaulted by failing to fairly present it to the state courts.

The Supreme Court has recently elaborated on the standard of review of state court decisions on claims later raised in federal habeas corpus:

> The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas "retrials" and to ensure that

[1]Effective with the installation of version 4.1.1 of the software, the Court's CM/ECF system automatically affixes a distinctive page number (shown in the upper right-hand corner as PageID) to each page of each filed document.

[2]These two documents, each labeled "Petitioner's Traverse" and each consisting of 36 unnumbered pages, were filed simultaneously, but one was docketed as "Reply" and one as "Brief."

state-court convictions are given effect to the extent possible under law. See *Williams v. Taylor*, 529 U.S. 362, 403-404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). To these ends, § 2254(d)(1) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
> "(1) 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."

> As we stated in *Williams*, § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. 529 U.S., at 404-405, 120 S.Ct. 1495. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. *Id..*, at 405-406, 120 S. Ct. 1495. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. *Id..*, at 407-408, 120 S.Ct. 1495. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. *Id..*, at 409- 410, 120 S.Ct. 1495. See also *Id..*, at 411, 120 S.Ct. 1495 (a federal habeas court may not issue a writ under the unreasonable application clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

Bell v. Cone, 535 U.S. 685, 693-94 (2002).

> AEDPA [the Antiterrorism and Effective Death Penalty Act of 1996] provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "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." 28 U.S.C. § 2254(d)(1). A state-court

> decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams v. Taylor, supra,* at 405; *Early v. Packer,* 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) *(per curiam).* A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams v. Taylor, supra,* at 405; *Woodford v. Visciotti,* 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) *(per curiam).*

Brown v. Payton, 544 U.S. 133, 134 (2005).

On the standard of review of state court decisions on federal questions after adoption of the AEDPA, Petitioner recognizes that Justice O'Connor's opinion in *Terry Williams v. Taylor, supra*, is the controlling opinion, but invites this Court to "use its independent judgment in this analysis as suggested by Justice Stevens" in his opinion in *Williams* (Traverse, Doc. No. 16, PageID 979). That is not an option; trial courts are obliged to follow precedent set by Supreme Court. "Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982).

Judge Donovan's opinion for the Court of Appeals in this case treats this claim as follows:

> [*P15] "THE TRIAL COURT ERRED IN OVERRULING COLLINS' MOTION FOR A MISTRIAL BASED ON PROSECUTORIAL MISCONDUCT DURING THE STATE'S REBUTTAL CLOSING ARGUMENT."
>
> [*P16] Collins argues that the prosecutor "made an assertion which was clearly intended to mislead the jury as to application of a legal presumption which could not be corrected by an instruction from the trial court." Collins further argues, the prosecutor "insinuated that Collins had lost the presumption of innocence because he did not testify or present evidence."

[*P17] The State responds, "the prosecutor was arguing the State presented evidence that was more than sufficient to prove Collins' guilt * * * [and] to overcome the presumption of innocence." The State also argues that a "prosecutor may comment upon the failure of the defense to offer evidence in support of its case."

[*P18] "The decision whether to grant a mistrial lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. (Internal citation omitted). An abuse of discretion means more than an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court." (Internal citation omitted). *State v. Williams*, Montgomery App. No. 22126, 2008 Ohio 2069.

[*P19] "Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution." R.C. 2901.05(A).

[*P20] "The Fifth Amendment forbids either unfavorable comment by the prosecutor on a defendant's failure to testify or the drawing of unfavorable inferences from his silence." (Internal citation omitted).

[*P21] "We have held unfavorable direct comment upon an accused's failure to testify to be prejudicial error." (Internal citation omitted). *State v. Zimmerman* (May 3, 1984), Greene App. No. 83CA22, 1984 Ohio App. LEXIS 9781.

[*P22] Collins objects to the following remarks during the prosecutor's brief rebuttal argument in closing:

[*P23] "The presumption of innocence, we've talked about that at the beginning of this trial. The presumption that this defendant had is gone. He no longer enjoys that presumption because now you have heard more than sufficient evidence, credible evidence from all the witnesses that the State presented that have not been disputed in any way, shape or form."

[*P24] In overruling Collins' motion for mistrial, the trial court stated, "the Court's going to make a finding that the instructions given to the jury is that the defendant * * * is to be presumed innocent until his guilt is established beyond a reasonable doubt * * *.

> [*P25] "The government's argument was that proof beyond a reasonable doubt has been presented, therefore, the presumption of innocence is removed. That's the way the Court heard it, * * *."
>
> [*P26] Having thoroughly reviewed the record, we conclude that the prosecutor's comments herein were meant to direct the jury's attention to the strength of the State's evidence, and they were not a direct comment on Collins' silence. Arguing that the State's evidence stands unrebutted does not implicate Collins' Fifth Amendment rights, and the remarks were not improper. Further, the trial court properly instructed the jury, "a defendant is presumed innocent until his guilt is established beyond a reasonable doubt." There being no abuse of discretion, Collins' first assignment of error is overruled.

State v. Collins, 2008 Ohio 2590, ¶¶ 15-P26, 2008 Ohio App. LEXIS 2184(2nd Dist. May 30, 2008).

On direct appeal, Petitioner argued there were two acts of misconduct of the prosecutor: (1) stating that the presumption of innocence was gone because of the strength of the evidence, and (2) indirectly commenting on Petitioner's failure to testify. In his Traverse, Petitioner argues only the first of these two acts (Traverse, Doc. No. 16, PageID 979-984).

The question for this Court on Ground One is whether the Court of Appeals decision is contrary to or an objectively unreasonable application of clearly established Supreme Court law. On habeas corpus review, the standard to be applied to claims of prosecutorial misconduct is whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process," *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974); *Darden v. Wainwright*, 477 U.S. 168 (1986); *Bates v. Bell*, 402 F.3d 635, 640-41 (6th Cir. 2005); *Kincade v. Sparkman*, 175 F.3d 444 (6th Cir. 1999) or whether it was "so egregious as to render the entire trial fundamentally unfair." *Cook v. Bordenkircher*, 602 F.2d 117 (6th Cir. 1979); accord *Summitt v. Bordenkircher*, 608 F.2d 247 (6th Cir. 1979), *aff'd sub nom, Watkins v. Sowders*, 449 U.S. 341 (1981); *Stumbo v. Seabold*, 704 F.2d 910 (6th Cir. 1983). The court must first decide whether the

complained-of conduct was in fact improper. *Frazier v. Huffman,* 343 F.3d 780 (6th Cir. 2003), *citing United States v. Carter,* 236 F.3d 777, 783 (6th Cir. 2001). A four-factor test is then applicable to any conduct the Court finds inappropriate: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." *Id.* The court must decide whether the prosecutor's statement likely had a bearing on the outcome of the trial in light of the strength of the competent proof of guilt. *Angel v. Overberg,* 682 F.2d 605, 608 (6th Cir. 1982). The court must examine the fairness of the trial, not the culpability of the prosecutor. *Serra v. Michigan Department of Corrections,* 4 F.3d 1348, 1355 (6th Cir. 1993)(*quoting Smith v. Phillips,* 455 U.S. 209, 219 (1982). In *Serra,* the Sixth Circuit identified factors to be weighed in considering prosecutorial misconduct:

> In every case, we consider the degree to which the remarks complained of have a tendency to mislead the jury and to prejudice the accused; whether they are isolated or extensive; whether they were deliberately or accidentally placed before the jury, and the strength of the competent proof to establish the guilt of the accused.

Id.., at 1355-56 (*quoting Angel,* 682 F.2d at 608.) The misconduct must be so gross as probably to prejudice the defendant. *Prichett v. Pitcher,* 117 F.3d 959, 964 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 572 (1997); *United States v. Ashworth,* 836 F.2d 260, 267 (6th Cir. 1988). Claims of prosecutorial misconduct are reviewed deferentially on habeas review. *Thompkins v. Berghuis,* 547 F.3d 572 (6th Cir. 2008), *citing Millender v. Adams,* 376 F.3d 520, 528 (6th Cir. 2004).

The Sixth Circuit has recently articulated the relevant standard for habeas claims of prosecutorial misconduct as follows:

> On habeas review, claims of prosecutorial misconduct are reviewed deferentially. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). To be cognizable, the misconduct must have "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.*. (citation omitted). Even if the prosecutor's conduct was improper or even "universally condemned," *Id.*., we can provide relief only if the statements were so flagrant as to render the entire trial fundamentally unfair. Once we find that a statement is improper, four factors are considered in determining whether the impropriety is flagrant: (1) the likelihood that the remarks would mislead the jury or prejudice the accused, (2) whether the remarks were isolated or extensive, (3) whether the remarks were deliberately or accidentally presented to the jury, and (4) whether other evidence against the defendant was substantial. *See Boyle v. Million*, 201 F.3d 711, 717 (6th Cir. 2000). Under [the] AEDPA, this bar is heightened by the deference we give to the . . . [Ohio] Supreme Court's determination of . . . [Petitioner's] prosecutorial-misconduct claims. *See Macias v. Makowski*, 291 F.3d 447, 453-54 (6th Cir. 2002)("If this court were hearing the case on direct appeal, we might have concluded that the prosecutor's comments violated Macias's due process rights. But this case is before us on a petition for a writ of habeas corpus. So the relevant question is not whether the state court's decision was wrong, but whether it was an unreasonable application of clearly established federal law.").

Bowling v. Parker, 344 F.3d 487, 512-13 (6th Cir. 2003).

> The relevant question in analyzing a claim for prosecutorial misconduct on habeas review is "whether the prosecutors' comments '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, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (internal quotation marks omitted). To satisfy this standard, the conduct must be both improper and flagrant. *Broom v. Mitchell*, 441 F.3d 392, 412 (6th Cir. 2006); *see also Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997) (noting that reversal is required if the prosecutor's misconduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial or so gross as probably to prejudice the defendant") (internal citation omitted). If conduct is found to be improper, four factors are then considered to determine whether the conduct was flagrant and therefore warrants reversal: "(1) the likelihood that the remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the remarks were isolated

> or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) the total strength of the evidence against the defendant." *Bates v. Bell*, 402 F.3d 635, 641 (6th Cir. 2005).
> If a comment is determined not to be flagrant, we will reverse only when: (1) the proof against the defendant was not overwhelming; (2) opposing counsel objected to the conduct; and (3) the district court failed to give a curative instruction. *United States v. Cobleigh*, 75 F.3d 242, 247 (6th Cir. 1996).

Johnson v. Bell, 525 F.3d 466, 482 (6th Cir. 2008).

Applying this standard, the Court finds the prosecutor's comment was incorrect – the presumption of innocence remains until the jury concludes that there has been proof beyond a reasonable doubt. Nevertheless, the Court of Appeals conclusion that the comment could easily have been understood by the jury as a comment on the strength of the State's case is a reasonable understanding of the words used and their likely effect on the jury. The Court of Appeals' conclusion is therefore not an unreasonable determination in light of the facts presented.

Furthermore, this comment by the prosecutor was isolated and not repeated during the course of argument. Nor is it combined with any other instances of misconduct during the trial. Shortly after the comment, the jury was given a correct instruction on the law in lieu of a mistrial. Finally, there was very strong physical evidence against the Petitioner.

Petitioner has not shown that prosecutorial misconduct resulted in an unfair trial. The First Ground for Relief will therefore be denied on the merits.

Ground Two: Unconstitutional Admission of Purported Expert Evidence

In Ground Two Petitioner asserts that the trial court did not properly perform the "gatekeeper" role assigned to trial courts by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), when it allowed the purportedly expert testimony of Dr. Vavul-Roediger.

Respondent argues that this claim is procedurally defaulted by Petitioner's failure to present it as a federal constitutional claim to the state courts (Return of Writ, Doc. No. 8, PageID 131-132). Petitioner makes no reply to this claim in the Traverse. To the extent this claim was presented on direct appeal, it was as follows:

> **Second Assignment of Error:** Collins was denied effective assistance of counsel by defense counsel's failure to object to the expert testimony of Dr. Lori Vavul-Roediger.
>
> **Third Assignment of Error:** It was plain error for the trial court to allow Dr. VavulRoediger to testify without disclosing the facts or data underlying her opinion.

(Appellant's Brief, Doc. No. 22-2, PageID 1231.) The Second Assignment of Error is a constitutional claim under the Sixth Amendment and was decided on that basis by the Court of Appeals. Neither of these two assignments of error argues that it was unconstitutional to admit the evidence. (See Appellant's Brief at PageID 1238-1241.)

A petitioner who fails to present a federal constitutional claim to the state courts has procedurally defaulted on that claim and cannot be heard on the merits of the claim in habeas corpus. A petitioner fairly presents a federal habeas claim to the state courts only if he "asserted both the factual and legal basis for his claim. *Hicks v. Straub*, 377 F.3d 538, (6th Cir. 2004), *citing McMeans*

v. Brigano, 228 F.3d 674, 681 (6th Cir. 2000); and *Picard v. Connor*, 404 U.S. 270, 276, 277-78 (1971).

> In determining whether a petitioner "fairly presented" a federal constitutional claim to the state courts, we consider whether: 1) the petitioner phrased the federal claim in terms of the pertinent constitutional law or in terms sufficiently particular to allege a denial of the specific constitutional right in question; 2) the petitioner relied upon federal cases employing the constitutional analysis in question; 3) the petitioner relied upon state cases employing the federal constitutional analysis in question; or 4) the petitioner alleged "facts well within the mainstream of [the pertinent] constitutional law."

Hicks at 552-53, *citing McMeans*, 228 F.3d at 681. *See also Fulcher v. Motley*, 444 F.3d 791 (6th Cir. 2006). If a petitioner's claims in federal habeas rest on different theories than those presented to the state courts, they are procedurally defaulted. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006); *Lorraine v. Coyle*, 291 F.3d 416 (6th Cir. 2002), *citing Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998); *Lott v. Coyle*, 261 F.3d 594, 607, 619 (6th Cir. 2001)("relatedness" of a claim will not save it).

Petitioner's constitutional claim related to Dr. Vavul-Roediger's testimony in the state court was that he received ineffective assistance of trial counsel when counsel did not object to that testimony. His claim that the testimony itself was improperly admitted was not in any way made as a federal constitutional claim. Therefore Ground Two for Relief is procedurally defaulted.

In addition, Ground Two is without merit. Federal habeas corpus is available only to correct federal constitutional violations. 28 U.S.C. §2254(a); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Smith v. Phillips*, 455 U.S. 209 (1982), *Barclay v. Florida*, 463 U.S. 939 (1983). In the Traverse Petitioner argues this claim in terms of the failure of this testimony to satisfy the *Daubert* standard.

(Traverse, Doc. No. 16, PageID 986-989.) However, the *Daubert* decision involved an interpretation of Fed. R. Evid. 702 and is applicable only to trial in federal courts. Petitioner points to no law – the Court is aware of none – which mandates the *Daubert* standard as a matter of Fourteenth Amendment law.

It is certainly possible to imagine purported expert testimony which would be so unscientific as to be unconstitutional, e.g., if an expert astrologer were called to testify that Leos are more likely to commit child abuse than persons born under other signs. But there is nothing like that here. As the Court of Appeals noted,

> [*P48] "There are certain things that an expert, by reason of his expertise, knows.* * * When providing background information, * * * we cannot expect an expert to footnote every statement with a recitation of his direct observation of the phenomenon, or a bibliography explaining how he knows his statement to be true. * * * When testifying as to broad patterns rather than specific opinions, the same level of foundation is not required." *Wightman v. Consolidated Rail Corp.*, 86 Ohio St.3d 431, 715 N.E.2d 546, 1999 Ohio 119. ("A distinction can be made between background information and an opinion about causation. A doctor testifying in a medical malpractice case regarding a failed heart surgery, for instance, need not set forth the underlying facts regarding his knowledge of the basic makeup of the thoracic cavity.")
>
> [*P49] As in *Wightman*, Vavul-Roediger was "merely testifying as to facts in [her] area of expertise."

Dr. Vavul-Roediger was well-credentialed and was testifying, in the place objected to, about background facts, not a specific opinion formed for this particular case. The trial court committed no constitutional error in permitting the testimony.[3]

[3]This claim is probably also procedurally defaulted by Petitioner's trial counsel's failure to contemporaneously object to this testimony. However, Respondent does not claim procedural default on this basis and the Court declines to raise that issue *sua sponte*.

Ground Two will be dismissed with prejudice.

Ground Three: Lesser Included Offense

In his Third Ground for Relief, Petitioner asserts he was constitutionally entitled to an instruction on gross sexual imposition which he asserts is a lesser included offense of the charge of rape.

Respondent also asserts this Ground for Relief is procedurally defaulted because Petitioner never fairly presented it to the state courts as a constitutional claim (Return of Writ, Doc. No. 8, PageID 132-133). Petitioner's Sixth Assignment of Error in the Court of Appeals was "[t]he trial court erred by not instructing the jury on the lesser-included offense of gross sexual imposition." (Appellant's Brief, Doc. No. 22-2, PageID 1245.) Petitioner argued this assignment of error purely as a claim of Ohio law, relying exclusively on *State v. Johnson*, 36 Ohio St. 3d 224, 522 N.E. 2d 1082 (1988). Johnson, in turn, relies entirely on Ohio Revised Code § 2945.74 and Ohio R. Crim. P. 31(C). As with the Second Ground for Relief, Petitioner makes no response to this argument. The Third Ground for Relief is therefore procedurally defaulted for failure to fairly present it to the state courts.

Alternatively and on the merits, Petitioner presents no federal constitutional case law supporting his claim that failure to give the lesser included instruction on gross sexual imposition rendered the trial fundamentally unfair. The Constitution does not require a lesser-included offense instruction in non-capital cases. *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990)(en banc). In

deciding Petitioner's Sixth Assignment of Error, the Court of Appeals held he was not entitled under state law to an instruction on gross sexual imposition because on the evidence presented he could not have been found not guilty on the element in question (the anal penetration necessary to prove sexual conduct) but guilty of having sexual contact (the element needed for gross sexual imposition) because his semen was found inside the victim's rectum. Moreover, the evidence on which he relied for his argument – the victim's statement that he tried to have sex with her – supported a lesser included charge of attempted rape which the trial judge gave. Petitioner has presented no authority for the proposition that this resolution of the claim offends the federal Constitution.

Ground Three will be dismissed with prejudice.

Ground Four: Ineffective Assistance of Trial Counsel

In his Fourth Ground for Relief, Petitioner asserts he received ineffective assistance of trial counsel insofar as his trial counsel:

1. Failed to object to the purported expert testimony of Dr. Vavul-Roediger;
2. Failed to obtain a pretrial hearing with respect to the testimony of Mary Cicco; and
3. Failed to object to the admission of notations in medical records by Dr. Susan Henry.

Respondent asserts that the third of these claims is procedurally defaulted by Petitioner's failure to raise it as a federal constitutional claim in the state courts. Petitioner makes no response to this assertion in the Traverse. Petitioner's Brief on appeal did not argue such a claim. Indeed, he summarized his ineffective assistance of trial counsel claims as follows:

> Collins was denied effective assistance of counsel by defense counsel's failure to: (1) object to the qualifications and testimony of

> Dr. LoriVavul-Roediger; (2) object to the testimony of Mary J. Cicco of the Miami Valley Regional Crime Laboratory; and (3) timely request a hearing on the admissibility of proposed evidence of Collins' sexual activity.

(Brief, Doc. No. 22-2, PageID 1253.) Thus the third sub-claim is procedurally defaulted and will be denied on that basis.

As to sub-claim one, the Montgomery County Court of Appeals considered this claim on the merits. Judge Donovan wrote for the court:

> [*P32] Collins argues, citing Evidence Rules 702 and 705, that he was denied effective assistance of counsel based upon his counsel's failure to object to Vavul-Roediger's qualifications and opinion testimony. According to Collins, "Defense counsel allowed Dr. Vavul-Roediger to opine that 90 to 95 percent of children believed to be sexually abused have normal genital or anal examinations. Counsel allowed her to quote these percentages without elaborating on her qualifications to render such an opinion or the source of her data." He further argues that it was plain error for the court to allow Vavul-Roediger to "render this opinion without disclosing the facts or data upon which she relied."
>
> [*P33] The State responds that "Collins has failed to demonstrate either prong of the test for ineffective assistance of counsel." According to the State, "Vavul-Roediger's testimony was not opinion evidence at all" but rather "was personal knowledge evidence."
>
> [*P34] Collins replies, "Her opinion would be irrelevant and misleading if grounded on facts ultimately discounted by the jury. The jury could not adequately assess the validity of expert testimony without knowing the particular facts which supported her testimony," in reliance upon *Wells v. Miami Valley Hospital* (1990), 90 App. 3d 840, 857, 631 N.E.2d 642.
>
> [*P35] In determining whether a defendant has received the effective assistance of trial counsel, we apply the standards set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction * * * resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687.

[*P36] "The Ohio Supreme Court has enunciated a similar test for determining claims for ineffective assistance of counsel:

[*P37] "'2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard or reasonable representation and, in addition, prejudice arises from counsel's performance.' (Internal citations omitted).

[*P38] "'3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.' (Internal citations omitted).

[*P39] "In *Strickland, supra*, the Supreme Court instructed:

[*P40] "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. (Internal citations omitted). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent

in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' (Internal citations omitted). There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'" (Internal citations omitted). *State v. Lloyd* (March 31, 1999), Montgomery App. No. 15927, 1999 Ohio App. LEXIS 1256.

[*P41] "The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

[*P42] "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland, supra*, at 689-690.

[*P43] "Evid.R. 703 states:

[*P44] 'The facts or data in the particular case upon which an expert

bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.'

[*P45] "Evid.R. 705 provides:

[*P46] 'The expert may testify in terms of opinion or inference and give his reasons therefor after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise.'

[*P47] "Additionally, Evid.R. 702 permits expert testimony in situations where 'the testimony will aid the trier of fact in understanding the evidence or in determining a fact in issue.'" (Internal citation omitted). State *v. Woodruff* (Apr. 27, 2001), Montgomery App. No. 18164, 2001 Ohio App. LEXIS 1897 (holding counsel was not ineffective for failing to object when three of the State's expert witnesses testified, based on their own personal experience, that it was not unusual for a criminal investigation to yield no physical evidence, and determining that the testimony was admissible "because it related to matters beyond the knowledge or experience possessed by lay persons.")

[*P48] "There are certain things that an expert, by reason of his expertise, knows.* * * When providing background information, * * * we cannot expect an expert to footnote every statement with a recitation of his direct observation of the phenomenon, or a bibliography explaining how he knows his statement to be true. * * * When testifying as to broad patterns rather than specific opinions, the same level of foundation is not required." *Wightman v. Consolidated Rail Corp.*, 86 Ohio St.3d 431, 715 N.E.2d 546, 1999 Ohio 119. ("A distinction can be made between background information and an opinion about causation. A doctor testifying in a medical malpractice case regarding a failed heart surgery, for instance, need not set forth the underlying facts regarding his knowledge of the basic makeup of the thoracic cavity.")

[*P49] As in *Wightman*, Vavul-Roediger was "merely testifying as to facts in [her] area of expertise." The average lay juror does not know how seldom the sexual abuse of a child results in an observable injury and therefore has no means to determine how much importance to place on the absence of such injury. In the course of

her testimony, Vavul-Roediger provided multiple reasons for the low incidence of physical injury in sexual abuse cases involving children, based upon her experience as a physician who, on a day to day basis, performs inpatient and outpatient evaluations on children who may have been physically and or sexually abused.

[*P50] We note that Collins' reliance upon *Wells v. Miami Valley Hospital* is misplaced. Wells, a pregnant woman with preeclampsia, died after undergoing a caesarean section that included the insertion of a central venous pressure ("CVP") catheter. The trial court determined that the testimony of two doctors, on the issue of liability, was inadmissable under Evid.R. 705 for lack of a factual foundation. We found no Evid.R. 705 violation, however, and determined that the doctor's testimony was based upon "specific data" in the medical records relating to Wells' cause of death. The physicians' testimony in Wells was specific to Wells' individual treatment and was directed to causation and liability. The portion of Vavul-Roediger's testimony to which Collins objects, however, was not specific to the victim herein but was merely provided to assist the trier of fact in understanding the manifestation or lack thereof of injuries in the context of childhood sexual abuse. We see no plain error in its admission.

[*P51] Further, given Vavul-Roediger's strong qualifications, in declining to object to them, counsel for Collins avoided the likelihood that the State would then ask follow-up questions on redirect that would further enhance Vavul-Roediger's expertise in the eyes of the jury, a tactical decision that does not amount to ineffective assistance of counsel. Presuming that counsel for Collins rendered adequate assistance, and in light of all the circumstances, we cannot say that Collins' counsel's failure to object to Vavul-Roediger's testimony was outside the wide range of professionally competent assistance. Finally, we do not find that if Collins' counsel had objected to Vavul-Roediger's testimony, given the overwhelming evidence of Collins' guilt, that the outcome of the trial would have been different; the victim was left in Collins' care and identified him as her attacker, the rape kit yielded samples matching Collins' DNA, medication matching that described by the victim and found in her system was located in Collins' living quarters, and Collins left the victim alone at the scene and was later found hiding there by deputies.

[*P52] Collins' second and third assignments of error are overruled.

State v. Collins, 2008 Ohio 2590, ¶¶ 28-52, 2008 Ohio App. LEXIS 2184(2 Dist. May 30, 2008).

Petitioner agrees that the Court of Appeals applied the correct constitutional standard under *Strickland*. He argues, however, that the Court of Appeals is not correct because it "relies on a conclusion to request that this Court make another conclusion from the first," to wit, that there was no prejudice from admission of the Vavul-Roediger testimony because it was not inadmissible (Traverse, Doc. No. 16, PageID 995). Actually, the holding of the Court of Appeals is that counsel did not perform deficiently in not objecting to the Vavul-Roediger testimony because the objection would not have been well-founded and presumably would not have been granted. And that conclusion is not an objectively unreasonable application of *Strickland*. Therefore the first sub-claim for relief is without merit.

Petitioner's second sub-claim under Ground Four was his Fifth Assignment of Error on direct appeal. On that assignment of error, Judge Donovan's opinion reads:

> [*P61] "COLLINS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BY DEFENSE COUNSEL'S FAILURE TO REQUEST AN IN-CHAMBERS HEARING REGARDING THE ADMISSIBILITY OF THE STATE'S PROPOSED EVIDENCE OF COLLINS' SEXUAL ACTIVITY."
>
> [*P62] According to Collins, his counsel was deficient for not filing a motion in limine requesting a hearing pursuant to R.C. 2907.02(E) to address the admissibility of Cicco's testimony regarding the semen she found matching Collins' DNA profile on the victim's anal swab and clothing, as well as the unidentifiable semen on the oral and vaginal swabs.
>
> [*P63] The State responds that R.C. 2907.02(D), the rape shield law, specifically allowed for Cicco's testimony, and so counsel had no reason to request an admissibility hearing under R.C. 2907.02(E).

> [*P64] Collins replies that his counsel's failure to request a hearing prejudiced Collins and usurped his right to a fair trial.
>
> [*P65] R.C. 2907.02(E) provides, "Prior to taking testimony or receiving evidence of any sexual activity of the * * * defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers * * *." R.C. 2907.02(D) provides: "Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section *unless it involves evidence of the origin of semen* * * *." (Emphasis added).
>
> [*P66] Cicco's testimony clearly involved the origin of the semen contained in the victim's rape kit, which is the heart of the case. Collins' counsel was not ineffective for failing to request a hearing on its admissibility, and Collins has not demonstrated that the outcome of the trial would have been different but for the alleged error. Collins' fifth assignment of error is overruled.

State v. Collins, 2008 Ohio 2590, ¶¶ 61-66, 2008 Ohio App. LEXIS 2184(2nd Dist. May 30, 2008). The logic here is the same as with the Vavul-Roediger testimony: it cannot be ineffective assistance of trial counsel to fail to move for a hearing to which one is not entitled. The Court of Appeals conclusion on this point is not objectively unreasonable; indeed, it appears to be quite correct. This sub-claim will also be denied on the merits.

Ground Four will be dismissed with prejudice.

Ground Five: Unlawful Sentence

In his Fifth Ground for Relief, Petitioner argues that his sentence of life imprisonment for rape of a child under ten years of age is not authorized by Ohio law. Petitioner made this argument in his *pro se* amendment to the Petition (Doc. No. 7) and his counsel merely incorporates that argument by reference in the Traverse (Doc. No. 16, PageID 998).

The State argues that Petitioner has misread Ohio law and the sentence in question is indeed authorized by Ohio law. On appeal Petitioner complained of his original life without parole sentence as part of his Ninth Assignment of Error. In dealing with this assignment, the Ohio Court of Appeals expressly held

> [*P105] The version of R.C. 2907.02(B) in effect at the time of the offense provided, in relevant part, "if the victim under division (A)(1)(b) of this section is less than ten years of age, whoever violates division (A)(1)(b) of this section shall be imprisoned for life." Collins' life sentence was mandatory and is not contrary to law.

State v. Collins, 2008 Ohio 2590, ¶ 105, 2008 Ohio App. LEXIS 2184(2nd Dist. May 30, 2008). On Petitioner's post-judgment motion for reconsideration, the Court of Appeals agreed with him that the prohibition of parole was not authorized and changed the sentence to life imprisonment.

In his Motion to Amend, Petitioner makes an extended argument about what the Ohio sentencing statutes provide, concluding that he could not be sentenced to life imprisonment because the indictment did not include the required specification that he be found to be a sexually violent predator (Doc. No. 7 at 4). However, that is an argument about the interpretation of Ohio law on which the Ohio Court of Appeals rendered an explicit decision in this case. Federal courts sitting in habeas corpus are bound by the state courts' interpretations of state law. *Vroman v. Brigano*, 346

F.3d 598 (6th Cir. 2003).

Ground Five will be dismissed with prejudice.

Conclusion

All Grounds for Relief having been found to be procedurally defaulted or without merit, the Clerk will enter judgment dismissing the Petition with prejudice.

July 2, 2010.

s/ **Michael R. Merz**
United States Magistrate Judge