1 November 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	USCA Dkt. No. 17-0392/AF
Technical Sergeant (E-6), ROBERT A. CONDON, USAF, *Appellant.*	)	Crim. App. No. 38765

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

ISSUES PRESENTED

I.

UPON REQUEST BY THE DEFENSE COUNSEL AND UTILIZING A DEFENSE PROPOSED INSTRUCTION, SHOULD THE MILITARY JUDGE HAVE PROVIDED THE MEMBERS WITH AN EXPLANATION OF THE TERM "INCAPABLE."

II.

WHETHER THE MILITARY JUDGE ERRED IN ADMITTING APPELLANT'S INVOCATION OF HIS RIGHT TO COUNSEL IN HIS AFOSI INTERVIEW AT TRIAL OVER DEFENSE OBJECTION, AND, IF SO, WHETHER THAT ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66, UCMJ. This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

Appellant's Statement of the Case is generally correct.

STATEMENT OF FACTS

a. Facts related to Issue I

Appellant was charged with and ultimately convicted of sexually assaulting Special Agent (SA) A.D. when she was incapable of consenting because she was impaired by an intoxicant. (J.A. at 54.)

Prior to individual voir dire, the military judge instructed the members:

> I'll have to talk as well, particularly in relation to consent. If you've been to a SAPR[1] down day, likely this is an area where there may be, not necessarily is, but there may be some discrepancy between what the law is and then what people teach in relation to consent as it relates to alcohol. I say that only because I too am required to attend SAPR training, so I had the opportunity to see some of it recently. And it's possible that you've heard that alcohol as little as a drink or some number more than that lead to a lack of consent. And so, when you ultimately start to deliberate, the instruction I talk about is one of the elements -- I'm not going to go through all of them -- but it is that the individual in the allegation, the alleged victim, was incapable of consenting to these sexual acts due to

[1] SAPR is the acronym for Sexual Assault Prevention and Response.

> impairment by drug, intoxicant, or similar substance. And that condition was known, or reasonably should have been known, by the person charged with the offense.
>
> So, the law does define consent. "Consent" means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission, resulting from the use of force, threat of force, or placing another person in fear does not make consent. A current or previous dating or social or sexual relationship by itself shall not constitute consent. A sleeping, unconscious, or incompetent person cannot consent to a sexual act. The government has the burden to prove beyond a reasonable doubt that consent did not exist. And then likely I would give you some factors to consider. The important thing is alcohol, of course, can be a factor in play in a lack of consent. However, the government, if you have any problem with this, let me know, a single drink likely does not obviate consent. I mean, a lack of consent is where a person is not capable of understanding their actions and doesn't understand what they're consenting to. That can differ of course from person to person and situation to situation. So, I want you to understand that.

(J.A. at 89-90.)

On the merits, SA A.D. testified she began dating Appellant in February 2013. (J.A. at 203-04.) On 31 August 2013, SA A.D. went to a bar and consumed an Angry Orchard hard cider, a mixed drink and approximately 6-7 shots of liquor. (J.A. at 225-26, 228, 250.) SA A.D. vaguely remembered leaving the bar, being escorted to the car by her friends because she was stumbling around, and napping while lying down in the backseat on the way home. (J.A. at 229, 231, 251.) Upon

arriving home, SA A.D.'s memory became very fuzzy, but she recalled falling on her stairs and her friend laughing at her. (J.A. at 231.)

SA A.D. sent a text message to Appellant inviting him over to her apartment, but she only vaguely recalled doing so. (J.A. at 252.) Then she remembered Appellant calling, and Appellant being angry because he was at the door. (J.A. at 231.) SA A.D. implied that many of her "memories" came from reviewing the text messages the next morning. (J.A. at 252.)

SA A.D. testified that she must have gone downstairs to let Appellant in the house, but did not remember. (J.A. at 257.) The text messages records show Appellant texted SA A.D. to indicate he had arrived at 12:51 a.m. (J.A. at 438, 554) He texted again almost three minutes later, "You've got to be kidding me." (Id.) SA A.D. finally responded, "Here," a few seconds thereafter. (Id.) This suggests Appellant sat outside SA A.D.'s house for almost three minutes waiting for a response.

SA A.D. remembered laying her head on Appellant's shoulder on the couch and then "two small snippets of being in the bedroom with Appellant: seeing her legs with her pajamas sliding down and Appellant being on top of her and feeling his penis inside her. (J.A. at 231, 258, 292.) SA A.D. woke up naked in her bed at approximately 4 a.m. with no covers on her. (J.A. at 233.) Appellant was gone

and she knew she had had sex because there was semen residue on her stomach. (Id.)

Although SA A.D. did not remember how long Appellant was at her house, the text message records from that night indicated that Appellant entered into the house no earlier than 12:54 a.m., and then left no later than 1:34 a.m., only 40 minutes later. (J.A. at 554.) The text message records showed that Appellant texted SA A.D. at 1:34 a.m. to inform her that he had left. (Id.)

SA A.D. talked to Appellant about the incident the next day over the phone, and he did not deny having sex with her and asked her if she felt sexually assaulted. (J.A. at 237.) SA A.D. did not remember if she told Appellant she wanted to have sex, or if she told Appellant she did not want sex, or if she consented to sex. (J.A. at 262, 274-75.)

During discussion of instructions after the presentation of evidence, the military judge noted that trial defense counsel had emailed him a request for an instruction on the issue of impairment. (J.A. at 402.) Trial defense counsel asked the military judge to include language that "'impaired' means any intoxication which is sufficient to impair the rational and full exercise of mental or physical faculties," and "a person is capable of consenting to an act of sexual intercourse unless he is incapable of understanding that act, its motive, and its possible consequences. A person may exhibit signs of impairment, yet still be capable of

understanding the act, its motives, and its possible consequences." (J.A. at 400, 402.)

In an initial draft of the instructions, the military judge left in the first two requested sentences, but omitted the third sentence. Trial counsel objected to the inclusion of this instruction saying, "it adds three elements of proof to my case, and I don't believe that is accurate under the law." (J.A. at 398.) Trial defense counsel did not object or request any other instruction with regard to Charge II, Specification 4. (J.A. at 404.)

In the military judge's final instructions, he decided not give the Defense's requested instruction, "a person is capable of consenting to an act of sexual intercourse unless he is incapable of understanding that act, its motive, and its possible consequences." (J.A. at 405.) He decided only to include the instruction, "'impaired' means any intoxication sufficient to impair the rational and full exercise of the mental or physical faculties," which was requested by the Defense and mirrored the instruction on impairment found elsewhere in the Manual for Courts-Martial. (Id.) Trial defense counsel lodged a continuing objection to the lack of further instruction, and asked that if the military judge did not give their requested instruction, that he repeat the instruction given to the members before *voir dire*. (Id.)

The military judge explained his reasoning:

> I spent a lot of time last night, again, reading through the Congressional record. All I am doing is straight statutory construction. Congress didn't give me a definition of impairment in this particular statute and so what I have to do is figure out what Congress meant. So the first place I look, of course, is to the statute. It's not there. So then I looked at other statutes Congress has passed. In the MCM, they have defined impairment in the past. That is the definition I started to use. Then I went through the appellate record because since it is not clear from the statute, the next place you look is can you figure out Congressional intent. If I give the instruction that Congress intended, it might be what they are training people, which is one drink impairs your ability to consent. I disagree. I cannot envision that Congress meant that. But if you sit and listen and read through the Congressional record, it is clear to me what their intent was, and their intent is to set the bar incredibly low. Since they didn't put it in the statute, and since they have defined impairment in the past and they have yet to change that definition in the MCM that is the definition I'm going to use.

(J.A. at 406.)

The military judge also stated he would not repeat his instructions from *voir dire* because they were not "legal definitions," but rather were instructions to ensure the members understood that you could consume alcohol and still consent to sex, and that they would have to use the specific definitions he gave them later. (Id.)

b. Facts related to Issue II.

Appellant was also convicted of assaulting, raping, and committing forcible sodomy against A1C M.L. (J.A. at 53-55.) A1C M.L and Appellant met when she

answered a Craigslist ad, and the two had a sexual relationship that lasted about a month. (J.A. at 120, 122.) On 4 September 2013, A1C M.L. went to Appellant's house. (J.A. at 125-26.) After watching movies, A1C M.L. got up to leave, and Appellant said, "That's it? You're not going to have sex with me?" (J.A. at 128.)

A1C M.L. turned to leave, and Appellant pushed her against the wall and began choking her around her throat with both his hands. (J.A. at 130, 132-33.) While Appellant choked A1C M.L, she started scratching at Appellant's wrist and forearms. (J.A. at 133) Appellant also yelled, pushed, shoved and slapped A1C M.L. (J.A. at 135.)

Appellant told A1C M.L. that she had no choice but to do what he said, and demanded her keys and phone, eventually grabbing them from her. (J.A. at 137-38.) Appellant told A1C M.L. to get undressed, and she complied because she did not want to upset or anger him or get attacked again. (J.A. at 139.) Appellant told A1C M.L. to perform oral sex on him, and she obeyed so that he would not hurt her. (J.A. at 140.) Appellant had A1C M.L. lick his testicles, and forced her head down to lick his anus when she would not do it willingly. (Id.)

Appellant told A1C M.L. to go upstairs to his bedroom, and once there, bent A1C M.L over the bed and started spanking her with a paddle. (J.A. at 140, 142.) Appellant then had vaginal intercourse with A1C M.L., and Appellant also told her to perform oral sex on him again. (J.A. at 143.) A1C M.L. felt as if she did not

have any other choice but to do what Appellant said, or else she would be choked again, possibly fatally. (J.A. at 144.) Appellant "started to have sex with [A1C M.L.'s] mouth," so she couldn't breathe, and then went back to having vaginal intercourse with her. (Id.) Appellant eventually told A1C M.L. to get on her knees and ejaculated in her mouth. (J.A. at 145.) During the course of the rape, Appellant also bit A1C M.L. on her left shoulder and left multiple bite marks. (J.A. at 148.)

When Appellant turned on his television, A1C M.L. tried to get dressed, but Appellant told her she was going to stay the night. (J.A. at 145.) A1C M.L. was finally able to take the opportunity to get dressed and leave at approximately 2 a.m. when Appellant got up and took his gun to explore a noise A1C M.L. heard downstairs. (J.A. at 146-47.)

After leaving Appellant's house A1C M.L. called the Sexual Assault Response Coordinator hotline and went to a civilian hospital to have a forensic examination kit taken. (J.A. at 148.) However, at the civilian hospital, A1C M.L. was told that the police would have to be called. (J.A. at 149.) A1C M.L. wanted to make a restricted report due to her fear of Appellant who was an Air Force Office of Special Investigations (AFOSI) agent, and so she left the civilian hospital and went to the Eglin Air Force Base emergency room where she had a sexual assault forensic exam completed. (J.A. at 149-50.) The next day A1C M.L.

decided to change her report from restricted to unrestricted in the hope that her leadership would protect her from Appellant. (J.A. at 152.)

On 9 September 2013, five days after the encounter between Appellant and A1C M.L., AFOSI agents interviewed Appellant. (J.A. at 524.) Prior to the agents reading Appellant his rights, Appellant said, "Look, I'll talk to you, it's fine, you can read me my rights, you don't need to rapport me . . . I not going to get a lawyer, I just want to get this squared away. So what's up?" (Id.) One of the agents, SA Paradis then read Appellant his Article 31 rights, and Appellant waived those rights. (Id.) Appellant then stated, "I'm fine talking to you guys, I didn't do anything wrong with anybody." Appellant stated that everything between him and A1C M.L. was consensual, but denied "hooking up" with A1C M.L. on 4 September 2013. (Id.)

Appellant became agitated during the questioning, and SA Paradis encouraged Appellant to keep a calm head because getting agitated was not going to help him. (Id.) SA Paradis commented that the video of the interview was going to be shown to General Jacobsen, the AFOSI commander. (Id.) Soon after, Appellant lamented that the video of the interview would be shown to "everybody and their brother," and that no matter the result of the investigation, "I look like a hotheaded asshole, and that's all that matters." (Id.)

Appellant continued to profess that he had not done anything wrong, then stated, "I'm not going to do this anymore. Put it this way, I want a lawyer and I don't want to answer any more questions." (Id.) A few minutes later, Appellant indicated that he wanted to "reapproach" and to continue talking to the agents. The agents re-advised Appellant of his Article 31 rights, Appellant waived his rights, and the interview resumed. Appellant continued to maintain that he had done nothing wrong and that he had not had sex with A1C M.L. on 4 September 2013. (Id.)

Prior to trial, trial defense counsel filed a motion to suppress certain statements made by Appellant during his subject interview with AFOSI. (J.A. at 624-33.) Specifically, the Defense requested that the trial court "suppress all statements made by [Appellant] to AFOSI *after* his initial invocation of his Article 31 rights, and any derivative evidence of these statements." (J.A. at 624, 633.) (emphasis added.) The motion did not make reference to suppressing or excluding Appellant's actual statements invoking his right to counsel. The military judge denied the motion to suppress on the grounds that Appellant had voluntarily re-initiated contact with the agents after initially invoking his right to counsel. (J.A. at 81, 684-85.)

Before opening statements, the Government offered Appellant's subject interview into evidence as Prosecution Exhibit 6 for identification. (J.A. at 118.)

Civilian trial defense counsel responded, "We don't have any objection. We do wish to -- we obviously litigated that issue as well. So, subject to our previous objection." (Id.) Civilian trial defense counsel then clarified he was referring to the Defense's motion to suppress. The military judge further clarified, "You're not objecting, based on my ruling?" and civilian trial defense counsel responded, "Correct." (Id.) At that time, trial defense counsel did not argue that any other portion of the video was inadmissible, or request that any portion of the video be redacted. The military judge admitted Prosecution Exhibit 6 into evidence. (Id.)

The next day, during the trial on the merits, the Government intended to play the previously admitted Prosecution Exhibit 6 in open court for the members. (J.A. at 195.) Just minutes before trial counsel played the video for the court members, civilian trial defense counsel stated:

> . . . this video and the interview was subject to a prior motion to suppress that the court had ruled upon. Our issue under a separate analysis under just the 403 would be; we would prefer the members not hear the portion, the very narrow portion where there is the indication of counsel. The gap -- the small gap in time there before there was some continuing discuss and the re-approach. We had no problem with that part of it. It's just the indication that we would object to the 403 and in the alternative would just ask the court to fashion an instruction to the members that they . . . are not to either infer any positive or negative inference from the invocation by [Appellant] of this right to counsel or his subsequent decision to re-approach.

(J.A. at 195.)

Trial counsel responded, "due to the nature of the interview and kind of actual no real gap in discussion between the accused and agents, I think an instruction is certainly appropriate that the members are to draw no inference from the accused's invocation and re-approach and disregard that." (J.A. at 196.) He continued, "But to excise certain portions or mute certain portions would lead us to a spot where it would be more confusing to the members to excise those portions and have them understand the re-rights advisement than just to leave that in there and give them a curing instruction." (Id.)

The military judge voiced concern that "if we start cutting the video up, then I have to give the members an instruction telling them parts of the video are out. Don't anticipate what's in there." (Id.) The judge then stated, "And so, under 403, under 401 is it relevant, yes, I mean marginally. But the important part is, it's not prejudicial because we presume members can follow instructions and I think it's cleaner to tell the members, do not draw any adverse inferences." (Id.)

The military judge said he would allow the parties to give him suggestions for instructions. (J.A. at 197.) He then stated he overruled the objection in part, and granted it in part, in that he would give a curative instruction before the video was played. (Id.) The military judge mentioned that it would not be the final instruction, and that he would tell the members that there would be "more instructions to follow." (Id.)

Prior to the Government playing the video, the military judge told the court members:

> Additionally, one small limiting instruction, and you'll see it in my written instructions in better form, but during the initial part of the interview at one point there is mention of an attorney. You know, probably you all know this from Article 31, there's the time when you read people their rights. And there's discussion about the attorney early on in the video and then it comes up a couple of times and at one point there is a statement . . . But if there's a request for an attorney by somebody, I just need to tell you, don't draw any adverse inference from that. That's why we give people Article 31 rights. Anybody, of course, can ask for an attorney at any point during the interview. That's the point of those rights and it's no indication of anything. So I just need you to not draw any negative inference from that. But you can consider everything in the video and pay attention to everything in the video for how it relates to this case. And again, you'll see more of that in my written instructions.

(J.A. at 199.)

The military judge's findings instructions did not mention Appellant's invocation of the right to counsel. The parties reviewed the military judge's final findings instructions in an Article 39(a) session. (J.A. at 405-07.) When given the opportunity to request additional findings instructions, trial defense counsel declined. (J.A. at 407.) The findings instructions did instruct the members that Appellant had the absolute right to remain silent, and that they must not draw any adverse inference from the fact that Appellant did not testify. (J.A. at 441.)

Additional facts relevant to the resolution of the granted and specified issues are set forth in Argument below.

SUMMARY OF THE ARGUMENT

The military judge did not abuse his discretion by declining to give the Defense's proposed instruction regarding the term "incapable" of consenting. The requested instruction was not a correct statement of law. Further, the term "incapable of consenting" is readily understood by people of common intelligence and does not require further definition. The military judge's main instructions on "consent" combined with the common sense understanding of the word "incapable" adequately instructed the court members. Lastly, the lack of a definition for the term "incapable" did not hamper the Defense's ability to advance their theory of the case. Even if the military judge abused his discretion in failing to provide a definition of "incapable," Appellant suffered no prejudice. There is no evidence in the record that the members used an erroneously low standard to conclude that SA A.D. was incapable of consenting.

The military judge also did not abuse his discretion in admitting evidence that Appellant invoked his right to counsel during his interview with AFOSI. First, Appellant waived this issue by failing to raise it when the video was offered into evidence, and by stating that he had "we don't have any objection" to the

admission of the video, other than what he had previously raised in a written motion.

Assuming Appellant did not waive this issue, admission of Appellant's request for counsel was not error. The request for counsel was not offered as substantive evidence of Appellant guilt, the military judge gave a proper limiting instruction, and trial counsel made no attempt to draw the forbidden inference that because Appellant requested counsel, he must be guilty.

Even if the military judge abused his discretion, the admission of Appellant's request for counsel was harmless, and even harmless beyond a reasonable doubt. The military judge's timely limiting instruction ensured that the members would not use Appellant's request for counsel to infer his guilt. Trial counsel did not elicit evidence of Appellant's invocation in any other context or argue that the members should use the invocation to infer Appellant guilt. Moreover, the entire context of the video, where Appellant eventually withdrew his request for counsel and talked to investigators, significantly diminished the chance that the members would draw a forbidden inference. Finally, the Government presented strong evidence of Appellant's guilt, and the Defense's theory of the case was disjointed and weak.

ARGUMENT

I.

THE MILITARY JUDGE DID NOT ERR BY DECLINING TO PROVIDE THE DEFENSE PROPOSED INSTRUCTION OF INCAPABLE OF CONSENTING.

Standard of Review

This Court reviews a military judge's denial of a requested instruction for an abuse of discretion. United States v. Carruthers, 64 M.J. 340, 345-46 (C.A.A.F. 2007). The "abuse of discretion standard is a strict one . . . To reverse for an abuse of discretion involves far more than a difference in opinion. The challenged action must be found to be arbitrary, fanciful, clearly unreasonable, or clearly erroneous to be invalidated on appeal." United States v. Travers, 25 M.J. 61, 62 (C.M.A. 1987). If this Court finds instructional error, it reviews de novo whether the error was harmless. United States v. Gibson, 58 M.J. 1, 7 (C.A.A.F. 2003).

Law and Analysis

"While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give. United States v. Damatta-Olivera, 37 M.J. 474, 478 (C.M.A. 1993). This Court applies a three-pronged test to determine whether the military judge erred in failing to give a requested instruction: "(1) the requested instruction is correct; (2) it is not substantially covered in the main instruction; and (3) it is on such a vital point in

the case that failure to give it deprived the accused of a defense or seriously impaired its effective presentation." Carruthers, 64 M.J. at 346 (internal citations and quotations omitted).

Article 120(b)(3), UCMJ prohibits committing "a sexual act upon another person when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonable should be known by the person." Article 120(g)(8) defines consent as a "freely given agreement to the conduct at issue by a competent person," and states that "[a] sleeping, unconscious, or incompetent person cannot consent." Article 120 does not define the terms "competent" or "incapable."

Appellant alleges that the military judge erred by not providing the members with a definition of "incapable" of consenting. Since Appellant cannot meet the requirements of the test set forth in Carruthers, he is not entitled to relief.

a. The requested instruction was not correct.[2]

Appellant himself concedes that "[t]he requested instruction may not have been the best example of what the instruction should look like." (App. Br. at 11.) The language requested by trial defense counsel, "a person is capable of consenting

[2] It should be noted that trial defense counsel specifically requested the definition of "impairment" that the military judge ultimately used. Thus, this Court should decline to consider any argument that that definition was incorrect or confusing. "Invited error does not provide a basis for relief." United States v. Raya, 45 M.J. 251, 254 (C.A.A.F. 1996).

. . . unless he is incapable of understanding that act, its motive, and its possible consequences," is found nowhere in the statutory language of the relevant version of Article 120, UCMJ. Indeed, as trial counsel pointed out, based on the use of the word "and," the definition essentially created three new elements, all of which the government would have to prove beyond a reasonable doubt. Based on the requested definition, the members would been required to acquit Appellant if the government proved that SA A.D. did not understand the motive or consequences of the act, but if the evidence showed she had understood that the act itself was occurring.

The requested definition was also too narrow. It only focused on the individual's understanding of the act, and not on the individual's ability to make a "freely given agreement," which is an essential part of the definition of consent. Thus, the member would have had to acquit Appellant under this definition if SA A.D. was able to realize that the act was occurring, even if she had no ability to stop the act or to verbally say "no," due to her level of impairment.

Moreover, such a formulation of the law does not comport with the definition of "incapable of consenting" that this Court deemed correct in United States v. Pease, 75 M.J. 180 (C.A.A.F. 2016). In Pease, this Court found no error in the Navy-Marine Corps Court of Criminal Appeals' use of the following definition: "A person is incapable of consenting when she lack[s] the cognitive

ability to appreciate the sexual conduct in question or the physical or mental ability to make [or] to communicate a decision about whether [she] agree[s] to the conduct." Id. at 183, 186. By ratifying this definition, this Court acknowledged that the government can show incapacity to consent by several different means: through inability to appreciate the conduct, inability to make a decision, *or* inability to communicate a decision. This Court recognized that the government did not have to prove all three conditions. Id. at 186. As discussed above, the proposed defense instruction did not account for situations where a person is unable to make a decision or unable to communicate a decision.

In sum, the requested definition was inconsistent with the statutory definitions in Article 120, UCMJ and inconsistent with Pease. The military judge properly declined to provide it.

b. The requested instruction was substantially covered by the main instruction.

The military judge's instructions gave the members a thorough definition of consent. The military judge was not required to give an additional definition for the term incapable, because the panel members could simply apply the commonly understood meaning of that term. The Court of Appeals of Kansas has held in a sexual assault case that "[t]he term 'incapable of giving consent' is one which people of common intelligence and understanding can comprehend and is not a term that requires definition." State v. Requena, 41 P.3d 862, 866 (Kan. Ct. App.

2001). In an unpublished opinion, the Court of Appeals for the Tenth Circuit found the Court of Appeals of Kansas' decision to be reasonable. Requena v. Roberts, 278 Fed. Appx. 842, 849 (10th Cir. 2008) (unpub. op.) The Court of Appeals of Arizona also reached a similar conclusion in another sexual assault case. State v. Causbie, 241 Ariz. 173, 180 (Ariz. Ct. App. 2016). Following the reasoning of these courts, the members in this case were readily able to understand the term "incapable," and the military judge was not required to provide any further definition. The common sense meaning of "incapable" coupled with the military judge's definition of consent adequately instructed the panel.

Appellant argues that the military judge should have given instructions similar to those that this Court affirmed in Pease. (App. Br. at 15.) However, nothing about this Court's opinion in Pease mandated that all military courts adopt or use these definitions or implied that it would be error for a military judge not to use these definitions at trial. While it would have been correct for the military judge to provide these instructions, he was not obligated to do so.

c. Failure to give the instruction did not deprive Appellant of a defense or impair his effective presentation of his defense.

The lack of instruction on the definition of "incapable of consenting" did not impair Appellant's ability to effectively present his defense. Appellant was still able to argue that SA A.D. consented despite her state of intoxication, or that Appellant had a reasonable mistake of fact as to her consent. Trial defense counsel

was able to elicit testimony from the Government's expert that people who are drunk can still consent to sex and argued that fact without objection. (J.A. at 504, 509.) There was no instruction given to the members that contradicted the defense theory of the case. In fact, the members were properly instructed that evidence that SA A.D. actually consented could raise a reasonable doubt as to whether the government had proved every element of the offense, and properly instructed on the affirmative defense of mistake of fact as to consent. (J.A. at 419.)

The instructions given to the court members did not lower the United States' burden at trial. The United States still had to prove beyond a reasonable doubt that "the intoxication sufficient to impair the rational and full exercise of [SA A.D.'s] mental or physical faculties" also actually prevented her from consenting. In other words, the *level* of impairment still had to be great enough that SA A.D. was unable to make a freely given agreement to the conduct at issue. The military judge openly put the members on notice early in the trial that minor levels of impairment, such as consuming one alcoholic beverage, likely would not obviate consent.

In short, Appellant has not met any prong of the three-part test for instructional error articulated in Carruthers. Therefore, the military judge did not abuse his discretion in declining to provide the members a definition of incapable of consenting.

d. Even if the military judge erred by failing to provide a definition of "incapable of consenting," that error was harmless.

The erroneous failure to give an instruction is nonconstitutional error. Gibson, 58 M.J. at 7. The test for harmlessness is whether the instructional error had substantial influence on the findings. Id.

In this case, the military judge's failure to define "incapable of consenting" had no impact on the findings with respect of SA A.D. Despite Appellant's extensive discussion about SAPR training in his brief (App. Br. 11-12), there is no indication on the record that the members actually applied the standard that *any* level of intoxication renders a person incapable of consenting to sexual activity. There is no indication on the record that the members used any other improper standard. During group voir dire, all of the members agreed that they could disregard what they had learned in SAPR training if it conflicted with the military judge's instructions. (J.A. at 86.) Each of the members, except for Captain Miller denied that they had ever been "told that someone cannot consent to sexual activity if they've had just one drink of alcohol." (J.A. at 87.) All of the members, except Captain Miller, agreed that two people might be able to consent to sex even if they had been consuming alcohol. (Id.) Except for Captain Miller, all members who eventually sat on the panel agreed that "two people can consent to sex if they're intoxicated." (J.A. at 87, 117.) Captain Miller clarified in individual voir dire that whether someone could consent after consuming alcohol depended on the specific

circumstances, and the defense did not challenge him for cause. (J.A. at 101, R. at 455.) Moreover, the military judge specifically instructed the members during group voir dire that the law may differ from what they learned in SAPR training, and that "a single drink likely does not obviate consent." In sum, the evidence in the record supports that the members understood that merely being intoxicated is not equivalent to being incapable of consenting.

Significantly, trial counsel did not argue that SA A.D. could not consent simply because she was intoxicated. Instead, during findings argument trial counsel focused on evidence that SA A.D. had, at the most conservative estimate, a .22 blood alcohol content, that she was passed out when Appellant arrived, and that she was passed out 40 minutes later when Appellant left her "naked on top of her bed with nothing but his ejaculate on her stomach." (J.A. 471, 521.)

This was not case where the victim was minimally intoxicated or her behavior otherwise demonstrated that she could make competent decisions. The facts of this case establish (1) that SA A.D could not answer her door for several minutes when Appellant arrived because she was passed out or asleep; (2) that she could not clean off her body after Appellant ejaculated on her stomach during the sexual act; (3) that she did not have the presence of mind to put on clothes or covers after the sexual act; and (4) that she was completely unaware of Appellant leaving her house a mere 40 minutes after his arrival until she woke up later in the

night. Given the egregious set of facts in this case, further definition of the word incapable would have had no impact on the court members' verdict.

Since Appellant has not established error and suffered no prejudice from the lack of an instruction defining "incapable of consenting," he is not entitled to any relief.

II.

THE MILITARY JUDGE DID NOT ERR IN ADMITTING EVIDENCE THAT APPELLANT INVOKED HIS RIGHT TO COUNSEL DURING AN INTERVIEW WITH AFOSI WHERE THE EVIDENCE WAS NOT ADMITTED AS SUBSTANTIVE EVIDENCE OF APPELLANT'S GUILT, AND THE MILITARY JUDGE GAVE A PROPER LIMITING INSTRUCTION.

Standard of Review

This Court reviews a military judge's decision to admit evidence for an abuse of discretion. United States v. Fetrow, 76 M.J. 181, 185 (C.A.A.F. 2017). Questions involving the construction or interpretation of rules of evidence are reviewed de novo. Id.

Law and Analysis

a. Appellant waived this issue by stating he had no objection to the admission of Prosecution Exhibit 6.

Arguably, Appellant waived this issue by failing to object to the evidence of Appellant's request for counsel before the video of the interview was admitted into

evidence. Mil. R. Evid. 103(a)(1) requires that a party "timely object" to the admission of evidence in order to preserve a claim of error on appeal. Furthermore, the grounds for the objection must be specific. United States v. Datz, 61 M.J. 37, 42 (C.A.A.F. 2005).

In this case, trial defense counsel did not object to the evidence of Appellant's request for counsel before or immediately after Prosecution Exhibit 6 was admitted into evidence. Although Appellant filed a motion to suppress Appellant's statements made *after* the invocation of right to counsel, the motion made no mention of excluding the request for counsel itself. When trial counsel offered Prosecution Exhibit 6 into evidence, the Defense objected only on the grounds previously stated in their motion. The defense did not request that any other portion of the video be redacted and affirmatively stated that otherwise "we don't have any objection." By the time trial defense counsel asked for portions of the video to be omitted, the objection was no longer timely. The time to ask for such redactions would have been before it was admitted into evidence, not the next day, and mere minutes before the Government published the exhibit to the members by playing it in open court.

As this Court held in United States v. Ahern, 76 M.J. 194, 198 (C.A.A.F. 2017), a statement of "no objection" amounts to affirmative waiver of the admission of evidence. Applying Ahern to this case, Appellant affirmatively

waived his right to complain on appeal of any error in admitting Appellant's request for counsel. Because waiver leaves no error to correct on appeal, this Court should decline to review this issue. *See* United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009).

b. Even if the issue was not waived, it was not error for the military judge to admit evidence that Appellant requested counsel because that evidence was not offered or admitted as substantive evidence of Appellant's guilt.

"It is well settled that the Government may not use a defendant's assertion of his *Fifth Amendment* rights as substantive evidence against him." United States v. Gilley, 56 M.J. 113, 120 (C.A.A.F. 2001) (citing Griffin v. California, 380 U.S. 609, 614 (1965)). Furthermore, Mil. R. Evid. 301(f)(2) states, "[t]he fact that the accused during official questioning and in exercise of rights under the Fifth Amendment to the United States Constitution or Article 31 . . . requested counsel . . . is not admissible against the accused."[3]

The issue specified by this Court raises the question of whether Mil. R. Evid. 301(f)(2) is intended to be a bright-line, *per se* rule that forbids any and all reference at trial to the invocation of an accused's Fifth Amendment or Article 31 rights, or if there are situations where such evidence would be admissible, provided it was not used "against the accused." To begin this analysis, it is important to

[3] Prior to the 2013 amendments to the Military Rules of Evidence, this rule was enumerated under Mil. R. Evid. 301(f)(3).

review the impetus for the Rule in the drafter's analysis. As this Court noted in Gilley, the Drafters' Analysis of the Military Rules of Evidence explains that Rule 301 "follows the decisions of the United States Supreme Court in United States v. Hale, 422 U.S. 171 (1975) and Doyle v. Ohio, 426 U.S. 610 (1976)." Gilley, 56 M.J. at 120; Drafter's Analysis, Manual for Courts-Martial, A22-7 (2012 ed).

In Hale, the Supreme Court ruled that an attempt to impeach an accused at trial with his prior silence at the time of arrest had little probative value and, under the facts of the case, was sufficiently prejudicial to entitle the accused to a new trial. 422 U.S. at 180-81. A year later, in Doyle, the Supreme Court held that impeaching an accused on his silence at the time of his arrest and after he received Miranda warnings violated due process. 426 U.S. at 619. The Supreme Court subsequently explained that the Doyle rule "rests on the fundamental unfairness of implicitly assuring a suspect that his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial." Wainwright v. Greenfield, 474 U.S. 284, 291 (1986).

Although Hale and Doyle involved the accused's invocation of the right to remain silent, this Court has explained that those cases apply equally to situations where an Accused has invoked the right to counsel, because "both rights flow from the Fifth Amendment." Gilley, 56 M.J. at 120.

Federal circuit courts have rejected a *per se* rule that would prohibit introducing evidence of the invocation of Fifth Amendment rights in all circumstances. The Seventh Circuit Court of Appeals has stated, "Hale and Doyle do not forbid all mention at trial of Miranda warnings and the defendant's response to them. They establish instead that silence following the receipt of Miranda warnings may not be used against a defendant." Splunge v. Parke, 160 F.3d 369, 373 (7th Cir. 1998) (quoting United States v. Higgins, 75 F.3d 332, 333 (7th Cir. 1996)). According to the Seventh Circuit, the "forbidden inference" is "asking the jury to infer guilt from silence." Id. at 372. In Splunge, the prosecutor elicited testimony that the accused had at first requested an attorney, but then later changed his mind and decided to speak with detectives. Id. at 371. The Court found this testimony permissible because it "showed the jury that the police scrupulously honored Splunge's rights," and "did not use the defendant's refusal to talk to police as evidence of guilt."[4] Id. at 372 (internal citations omitted). *See also* Lindgren v. Lane, 925 F.2d 198, 202 (7th Cir. 1991) ("Doyle does not impose a prima facie bar against any mention whatsoever of a defendant's right to request counsel, but instead guards against the exploitation of that constitutional right by the prosecutor.")

[4] The Court did note that the prosecutor in the case had "walked up to the brink," and questioned why he would have chosen to take that risk. Id. at 373.

Similarly, in Noland v. French, 134 F.3d 208, 216 (4th Cir. 1998), the Fourth Circuit Court of Appeals considered whether it was error[5] for the prosecutor to elicit testimony from police officers that the accused understood his Miranda rights and invoked his right to counsel. The Fourth Circuit noted that the comments in question "were in the context of the officers' narratives regarding Noland's apprehension and arrest," and that the prosecutor only mentioned Miranda "to remind the jurors of the timing of the events." Id. The Court concluded there was no error, "[b]ecause trial testimony only made passing reference to Miranda, and the prosecutor did not specifically exploit Noland's exercise of his Miranda rights." Id. at 216-17. *See also* Grieco v. Hall, 641 F.2d 1029, 1033 (1st Cir. 1981) (Doyle "does not establish a rule which gives rise to constitutional error in every case in which the prosecutor refers to the defendant's post-arrest silence.") Jones v. Stotts, 59 F.3d 143, 146 (10th Cir. 1995) ("mere mention of a defendant's request for counsel is not per se prohibited; rather, it is the prosecutor's exploitation of a defendant's exercise of his right to silence which is prohibited"); United States v. Stubbs, 944 F.2d 828, 835 (11th Cir. 1991) (a single mention of the invocation of Miranda rights does not violate a defendant's rights

[5] The Court considered whether the testimony was error under Doyle and under Wainwright v. Greenfield, 474 U.S. 284 (1986), a case which extended Doyle to say that the prosecution may not use the invocation of Miranda rights to rebut a defendant's affirmative defense of insanity.

where the prosecution made no "specific inquiry or argument" about defendant's post-arrest silence).[6]

In denying a habeas petition, the United States District Court for the Southern District of Illinois has addressed facts comparable to those in Appellant's case. Morrison v. Gaetz, 2010 U.S. Dist. LEXIS 7173 (S.D. Ill. 2010) (order). In Morrison, the prosecution played a videotaped interview with law enforcement in which the accused invoked his Miranda rights at the end of the tape. Id. at 14. The Court commented that "[t]he admission of the video tape did not ask the jury to make a forbidden inference from Morrison's silence, and therefore did not violate his due process rights." Id. at 15-16. Further, the record revealed no suggestion by the prosecution that the jury should infer Morrison's guilt from his silence. Id. at 16.

Consistent with case law from the federal circuit and district courts, this Court's own prior rulings indicate that Mil. R. Evid. 301 should not be read as a *per se* ban on any mention of invocation of a suspect's rights. Rather, there may be circumstances where such evidence is admissible, so long as it is not used as

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[6] *See also* Haberek v. Maloney, 81 F.Supp. 2d 202, 210 n.1 (D. Mass. 2000) (collecting cases). In Haberek, the United States District Court for the District of Massachusetts "conducted an exhaustive review of approximately fifty circuit courts cases." The Court stated that its "[e]xtensive research reveals that direct testimony by a police officer (as part of the prosecution's case-in-chief) which refers to a defendant's silence or invocation of the Fifth Amendment, is often not considered a violation of Doyle."

substantive evidence of an accused's guilt. *See* United States v. Moran, 65 M.J. 178, 186 (C.A.A.F. 2007) ("A trial counsel's statement implicating an accused's assertion of his rights is not per se impermissible.")

Historically, this Court has not found error in every circumstance where an invocation of rights was brought to the attention of the court members. In a 1959 case predating Mil. R. Evid. 301, this Court found no error in the failure to *sua sponte* strike the testimony of a witness who, in an unresponsive answer to the prosecutor, revealed that the accused had invoked his Article 31 right to remain silent. United States v. Hickman, 10 U.S.C.M.A. 568, 570 (C.M.A. 1959). This Court recognized that the testimony was "not affirmatively offered by the Government," and was "presented simply as part of a general recital of the events that transpired in [the witness's] office." Id. *See also* United States v. Kavula, 16 U.S.C.M.A. 468, 472 (C.M.A. 1966) (contrasting a situation where an accused's pretrial silence was "affirmatively and purposefully offered by the prosecution" to Hickman, where such evidence was "admitted only incidentally as part of a general description of events").

More recently, this Court has suggested, without specifically deciding, that evidence of a suspect's invocation of the right to counsel might be admissible as "testimonial res gestae" that is "necessary to complete the chronological sequence

of [an] agent's story." Moran, 65 M.J. at 183 (*citing* United States v. Ross, 7 M.J. 174, 175-76 (C.M.A. 1979)).

In Gilley, this Court indicated that an accused's request for counsel could be admissible to rebut a claim made or a theory presented by trial defense counsel. Gilley, 56 M.J. at 120-22 (citing United States v. Robinson, 485 U.S. 25, 32 (1988)). The determinative factor in the analysis in both Gilley and Robinson, appeared to be that the accused's exercise of his Fifth Amendment rights "was not used as *substantive evidence of guilt* against him." Id. at 122 (emphasis added). Likewise, in United States v. Clark, 69 M.J. 438, 447 (C.A.A.F. 2011), this Court asserted, "Trial counsel may use the fact of post-arrest silence to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest, thus acting *not as substantive evidence of guilt* but rather as a challenge to the defendant's testimony as to his behavior following arrest." (internal citations omitted) (emphasis added).

In sum, Mil. R. Evid. 301(f)(2) should not be interpreted as a *per se* prohibition on any and all references at trial to an accused's invocation of his Fifth Amendment or Article 31 rights. Given that the drafters intended the Rule to "follow" the Supreme Court precedents of Hale and Doyle, the language "against the accused" in Mil. R. Evid. 301(f)(2) should be interpreted as referring to the use of such evidence as substantive evidence of the accused's guilt. In other words,

Rule 301(f)(2) prohibits the government from using such evidence to suggest that because the accused invoked his rights, he must be guilty.[7]

In this case, the Government did not offer evidence of Appellant's invocation of the right to counsel as substantive evidence of his guilt. Trial counsel evidenced the lack of such an intent by conceding that an instruction telling the members not to draw any inference from Appellant's request for counsel was "certainly appropriate." (J.A. at 196.) Trial counsel explained his reasoning for playing the entire video: he feared that excising certain portions of the video would confuse the members. The military judge also expressed the fear that the members would speculate as to what had been excised from the video. In light of these concerns, the portions of the video involving the request for counsel were offered as "res gestae" that explained the entire sequence of events that occurred during the interview. As described above, the Fourth Circuit found such a purpose for admission to be permissible in Noland, and this Court has indicated or suggested the same in Hickman and Moran. *Cf.* United States v. Brooks, 12 U.S.C.M.A. 423 (1961) (finding reversible error where "the *sole inference* which

[7] There is no suggestion in the Analysis to Rule 301(f)(2) that the President intended the Rule to confer greater rights upon a military accused than those rights guaranteed by the Due Process Clause of the Constitution, as articulated in Hale, Doyle and their progeny.

could be drawn" from cross-examination concerning the accused's silence was that the accused was guilty) (emphasis added).

The timing of the military judge's limiting instruction further confirms that Appellant's invocation was not admitted as substantive evidence of his guilt. The military judge provided the limiting instruction *before* the members were exposed to the evidence. The express purpose of the instruction was to ensure that when the members heard the evidence for the first time, they would consider it in its proper context and not use it to infer Appellant's guilt.

Trial counsel did not draw attention to Appellant's request for counsel during the examination of any witness called at trial. Further, as Appellant concedes, trial counsel did not argue any negative inference be drawn from the fact Appellant invoked his right to counsel. (App. Br. at 30.) In fact, trial counsel made no mention of Appellant's invocation of the right to counsel in argument at all. Since trial counsel did not exploit or attempt to exploit Appellant's request for counsel, neither Doyle nor Mil. R. Evid. 301(f)(2) was violated. Although it may have been more prudent for the Government to have avoided the issue all together by redacting out the invocation of the right to counsel, ultimately admission of the entire video was not for an improper purpose. Therefore, the military judge's decision to allow the entire video to be played for the court members with an

appropriate limiting instruction was not arbitrary, fanciful, clearly unreasonable, or clearly erroneous. It did not rise to the level of an abuse of discretion.

c. Even if it was error to admit Appellant's request for counsel, Appellant suffered no prejudice.

Assuming *arguendo* that this Court were to conclude that Mil. R. Evid. 301(f)(2) is a *per se* rule that creates greater rights for a military accused than Doyle and that the military judge violated that rule in this case, then the error would be nonconstitutional evidentiary error. "Nonconstitutional errors are reviewed for prejudice under Article 59(a), UCMJ.[8] The burden is on the Government to demonstrate that the error did not have a substantial influence on the findings." United States v. Diaz, 69 M.J. 127, 137 (C.A.A.F. 2010).

However, even under the stricter, constitutional "harmless beyond a reasonable doubt" standard used for Doyle error,[9] Appellant still would not prevail. In deciding whether a Doyle error was harmless beyond a reasonable doubt, this Court should consider (1) the extent of the reference to the rights invocation made during trial, (2) whether an inference of guilt from silence was stressed to the members and (3) the extent of other evidence suggesting the accused's guilt. *See* United States v. Ramirez-Estrada, 749 F.3d 1129, 1137 (9th Cir. 2014). Given the

[8] Article 59(a) states "A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused."
[9] *See* Brecht v. Abrahamson, 507 U.S.619, 630 (1993).

facts and circumstances of this case, there was no reasonable possibility that the members' knowledge of Appellant's request for counsel contributed to the verdict. *See* Moran, 65 M.J. at 187.

1. The military judge's timely limiting instruction cured any error.

First, the military judge gave an appropriate curative instruction before the trial counsel played the interview video in open court. This curative instruction ensured that the members made no inference of guilt. The instruction admonished the members twice not to draw any "adverse" or "negative" inference from a request for counsel. (J.A. at 199.) The military judge reminded the members that the point of Article 31 rights is to allow an individual to request an attorney at any time during an interview and that requesting an attorney is "no indication of anything." (Id.) Thus, the members had no opportunity to hear that Appellant had requested counsel and infer his guilt, because the military judge had already prophylactically instructed them that they could not draw that inference. *Cf.* United States v. Daoud, 741 F.2d 478, 482 (1st Cir. 1984) (indicating that erroneous reference to an accused's request for counsel could have been remedied by a curative instruction.)[10]

[10] Notably, in two prominent cases where this Court overturned convictions based on the improper admission of evidence that an accused invoked his rights, no curative instructions were given. *See* United States v. Riley, 47 M.J. 276 (C.A.A.F. 1997); United States v. Moore, 1 M.J. 390 (C.M.A. 1976).

Absent evidence to the contrary, this Court will presume that members follow a military judge's instructions. United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2008). *See also* United States v. Robbins, 197 F.3d 829, 836 (7th Cir. 1999) ("Errors that are the subject of curative instructions are presumed harmless"); United States v. Turner, 674 F.3d 420, 440 (5th Cir. 2012) (The Court presumes that curative "instructions are followed unless there is an overwhelming probability that the jury will be unable to follow the instructions and there is a strong probability that the effect . . . is devastating.")

Given the timing of the military judge's instruction – before the members heard the evidence – this is not a situation where there was an overwhelming or strong *probability* that the members would be unable to follow it. In addition, the Government did not otherwise stress or highlight the request for counsel in their case-in-chief or mention it in argument.[11] The evidence did not permeate the trial in such a way that it would be difficult for the members to disregard. Since there is no evidence on the record that the members ignored the instruction, this Court should presume that the members drew no adverse inference from Appellant's request for counsel.

[11] These facts stand in stark contrast to United States v. Carter, 61 M.J. 30, 35 (C.A.A.F. 2005), where this Court found that a limiting instruction did not cure trial counsel's references to the accused's silence. In Carter, immediately after the instruction, trial counsel repeatedly continued to draw attention to this issue in rebuttal, which "vitiated any curative effect." Id.

Appellant highlights that the military judge initially told the members that he would give them further instructions on Appellant's request for counsel as part of his final instructions, but that he did not ultimately do so. (App. Br. at 28.) However, having seen a draft of the final findings instructions, trial defense counsel was given the opportunity to request further instructions, but declined to do so. This could have been a strategic decision on the part of trial defense counsel to avoid drawing further attention to the request for counsel. In any event, the military judge's initial instruction was adequate to ensure the members did not draw a forbidden inference from the request for counsel.

2. Trial counsel did not otherwise bring Appellant's request for counsel to the attention of the court members.

Second, there was no further reference to Appellant's rights invocation during the trial. Other than the playing of the video, trial counsel did not elicit any evidence during trial from any witness that Appellant had requested an attorney during his AFOSI interview. Trial counsel did not argue or insinuate during any other part of the trial that the members should use Appellant's request for counsel to infer his guilt. Therefore, there was nothing during the trial that undermined the military judge's instruction the members to draw no negative inference from Appellant's request for counsel.

3. Upon reviewing the entire video, the members were unlikely to conclude that Appellant requested counsel because he knew he was guilty.

Third, the unique circumstances surrounding the interview did not support an inference that Appellant requested counsel because he knew he was guilty or had something to hide. After all, Appellant ultimately *did* decide to speak with the investigators and to answer all their questions. Instead, the evidence strongly supports that Appellant requested counsel because he was concerned about his AFOSI leadership watching an interview where he looked like a "hothead." (J.A. at 524.) Appellant revealed as much later in the interview when he explicitly said, "the reason I asked for a lawyer was because you're freaking me out about the fact that General Jacobsen is going to watch this, man. This is my career!" (Id.)

Appellant began the interview by telling the other AFOSI agents that he wanted to talk to them and was not going to request a lawyer. Only after SA Paradis suggested that Appellant should remain calm because General Jacobsen would be reviewing the video did Appellant appear to change his mind about continuing the interview. Appellant claims that "[t]he member could quite easily have concluded Appellant was guilty and therefore invoked his rights, but then he changed his mind and lied." (App. Br. at 31.) But, such a conclusion would not have been logical based on the facts of the interview. Appellant adhered to the same story both before and after his request for counsel; he consistently asserted he had done nothing wrong and had not even had sex with A1C M.L. on 4 September

2013. Thus, in that context, Appellant's momentary desire to discontinue the interview had nothing to do with any unwillingness to incriminate himself or any guilt about being dishonest. Rather, Appellant demonstrated he was completely comfortable maintaining his innocence throughout the entire course of the interview. The entire context of the video diminished any chance that the members would use Appellant's request for counsel to infer his guilt.

4. The Government's case was strong; Appellant's was weak.

Finally, the Government's case against Appellant was strong. Appellant's interview corroborated several aspects of A1C M.L's testimony. Appellant confirmed A1C M.L.'s account that she had initially wanted to leave his house earlier in the night after watching movies, but that he objected. (J.A. at 524.) He admitted to owning a paddle. (Id.) He also corroborated that A1C M.L. had left his house suddenly around 2 a.m. after she heard a noise downstairs, that he had taken his gun with him to explore the noise downstairs, and that when he returned upstairs A1C M.L. was "fully dressed." (Id.)

A1C M.L.'s testimony that she scratched Appellant on the forearms during his attack was corroborated by scratches observed by AFOSI agents on Appellant's forearms and by Appellant's DNA found under A1C M.L.'s fingernails. (J.A. at 7, 524.) Her assertion that Appellant had bit her shoulder during the attack was supported by red marks found on her shoulder, and Appellant's DNA and the

presence of saliva found on the shoulder swabs taken from A1C M.L. (J.A. at 7, 456.)

Moreover, the members did not need to use Appellant's request for counsel to conclude that he was lying during his interview, because the interview itself contained much more compelling evidence of his dishonesty. Appellant made multiple contradictory statements throughout his interview. Initially, Appellant claimed that he told A1C M.L not to contact him several times, but that she had "re-contacted" him six or seven times after he said their relationship was over. (J.A. at 524.) Later, Appellant admitted that *he* had tried to contact A1C M.L. shortly after 4 September, but she had changed her number. (Id.)

Appellant also first described that A1C M.L had tried to leave the house, but had he asked her why she was not going to spend the night and work things out. Then, later in the interview, Appellant claimed that A1C M.L. had *asked* to spend the night, and he let her stay because he had just ended the relationship and had concerns about her being depressed and that she would start drinking. Shortly thereafter, Appellant changed his story again and stated he let A1C M.L. stay because he was worried she would go to another man's house. (Id.)

At one point, Appellant said he and A1C M.L. did not have sex on the night in question because he had just found out that she had cheated on him, and to him, the relationship was over. At another point, however, Appellant claimed the two

did not have sex because he had just had sex with someone else and was not "hard up for sex that day." (Id.) Similarly, Appellant first asserted A1C M.L. was crying and upset and "pissed" because she had admitted to cheating on him and he had ended their relationship. (Id.) Then Appellant claimed that A1C M.L. became angry when she found a used condom in his trashcan, saying, "that's what she got mad about that night." Appellant then posited that A1C M.L. had left at 2 a.m. because she was mad about finding the used condom, even though about an hour earlier in the interview he had stated he had "no idea" why she left at that hour. (Id.)

Appellant's inability to adhere to a coherent story about the events of 4 September 2013 created the strong inference that he was lying to the AFOSI agents. Having viewed the entire video and Appellant's multiple contradictory statements, the members would have concluded that Appellant was lying independent of any knowledge that he had invoked his rights.

In contrast to the Government's case, the Defense case was weak. Trial defense counsel was only able to impeach A1C M.L. on minor prior inconsistent statements, such as A1C M.L. lack of memory as to whether she and Appellant had a "safe word." (J.A. at 175-77.) The defense attempted to highlight the fact that A1C M.L. had few visible signs of the attack, but, as AFCCA recognized in its opinion below, the Government produced testimony that "it would not be unusual

for there to be to no visible signs of trauma" and that "the absence of bruising was not a reliable way to judge the extent of trauma to her body." (J.A. at 7.)

The defense did not have a coherent theory of the case. At one point during closing argument, trial defense counsel argued that A1C M.L. had fabricated the allegations. (J.A. at 489-90.) Later, trial defense counsel asserted that if sex had occurred – which would have meant Appellant lied to AFOSI – then either A1C M.L. consented or Appellant had a mistake of fact as to consent. (J.A. at 491, 496-97.) The defense also could not articulate a plausible motive for A1C M.L. to fabricate her allegations against Appellant. Trial defense counsel suggested that A1C M.L. lied about the allegations because she was angry that Appellant cheated on her. However, this theory does not explain why A1C M.L. drove to two different hospitals in the middle of the night in order to guarantee she could file a restricted, rather than unrestricted, report of the rape, so that no one would find out.

Based on all of the factors described above, there is no reasonable possibility that the members' knowledge of Appellant's request for counsel contributed to their verdict.[12] If the military judge abused his discretion by admitting the

[12] Appellant claims that the erroneous admission of Appellant's invocation of the right to counsel also prejudiced him with respect to the charges involving SA A.D. (App. Br. at 28-30.) This argument is unpersuasive. At the time Appellant invoked his right to counsel, it had become apparent that the agents were questioning him about events with A1C M.L. There was no reference to SA A.D. by any party at any time during the interview. Since there was no discussion about

evidence that Appellant requested counsel during his AFOSI interview, that error was harmless, and even harmless beyond a reasonable doubt. Since Appellant suffered no prejudice from the admission of this evidence, he is not entitled to any relief.

CONCLUSION

WHEREFORE the United States respectfully requests that this Honorable Court affirm the findings and sentence in this case.

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SA A.D., there was no inference to be drawn that Appellant requested counsel because he knew he was guilty of an offense against SA A.D.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 1 November 2017.

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/s/_____

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Date: 1 November 2017

APPENDIX

ADRIAN M. REQUENA, Petitioner-Appellant, v. RAY ROBERTS, Warden, El Dorado Correctional Facility; ATTORNEY GENERAL OF KANSAS, Respondents-Appellees.

No. 07-3282

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

278 Fed. Appx. 842*; *2008 U.S. App. LEXIS 11204

May 23, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: [**1]
(D. of Kan.). (D.C. No.07-CV-3058-JWL).
Requena v. Roberts, 2007 U.S. Dist. LEXIS 63103 (D. Kan., Aug. 24, 2007)

COUNSEL: ADRIAN M. REQUENA, Petitioner - Appellant, Pro se, El Dorado, KS.

For RAY ROBERTS, Warden, El Dorado Correctional Facility, Respondent - Appellee: Kristafer R. Ailslieger, Attorney General for the State of Kansas, Topeka, KS.

For ATTORNEY GENERAL OF KANSAS, Respondent - Appellee: Kristafer R. Ailslieger, Attorney General for the State of Kansas, Topeka, KS.

JUDGES: Before LUCERO, TYMKOVICH, and HOLMES, Circuit Judges. **

** After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

OPINION BY: Timothy M. Tymkovich

OPINION

[*843] **ORDER DENYING PETITION FOR HABEAS RELIEF AND CERTIFICATE OF APPEALABILITY** *

* This order is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with *Fed. R. App. P. 32.1* and *10th Cir. R. 32.1*.

Adrian M. Requena appeals a district court order denying his petition for habeas [*844] relief from a conviction of rape [**2] under Kansas state law. The federal district court denied him relief on all of his claims, but granted him a certificate of appealability (COA) on an ineffective assistance of counsel claim. We review the district court's orders pursuant to *28 U.S.C. §§ 1291* and *2253*, and AFFIRM the district court's denial of habeas relief on the ineffective assistance claim. We also DENY Requena's request for a COA on the remaining issues and DISMISS his appeal as it relates to these issues.

I. Background

J.C., the victim in this case, suffers from various serious ailments such as multiple sclerosis and takes numerous medications to help alleviate her symptoms. At the time of the crime, her friend, Susan Andrey, lived in the same house as J.C. and helped her with daily activities such as driving, bathing, and housework that she was not able to do as a result of her condition.

On March 26, 1999, J.C. and Andrey were playing bingo at the American Legion. While playing bingo, J.C. took a Remeron tablet so that she would be able to sleep when she returned home. The pill took effect sooner than expected, however, because she fell asleep at the bingo table. Andrey took J.C. home and helped her get to bed. [**3] Andrey testified that J.C. was "pretty helpless," and

Andrey was unable to help her take her clothes off. Andrey left J.C. in her bedroom wearing a t-shirt, sweatshirt, jeans, and socks. Andrey went to sleep around midnight, but later awoke when she heard J.C.'s cat meow. Andrey walked over to J.C.'s room to investigate why the cat was not in the room with J.C. Andrey noticed that J.C.'s door was open. When she looked in, she saw a naked man lying next to J.C. She recognized the man as the petitioner Requena. Both J.C. and Andrey knew Requena because they met him at an Alcoholics Anonymous meeting. J.C. considered Requena a friend, but there was no prior sexual relationship between them.

When J.C. awoke the next morning, Andrey asked her why Requena had been naked in J.C.'s bed. J.C. replied, "Are you sure you don't mean Robert?" R., Vol. VII at 55. Robert was a man J.C. had previously been attracted to. The man J.C. had thought was in her bed could not have been Robert, however, because Robert was living in a halfway house. After this conversation, J.C. went back to sleep. J.C. awoke again later in the day and further discussed the incident with Andrey. J.C. decided to report what happened [**4] to the police and have a rape examination conducted at the hospital.

Requena was charged with one count of rape in violation of *K.S.A. § 21-3502(a)(1)(C)* and one count of aggravated burglary in violation of *K.S.A. § 21-3716*. A Kansas jury convicted Requena of the rape charge but acquitted him of the aggravated burglary charge. Requena appealed his conviction and sentence. The Kansas Court of Appeals affirmed, and the Kansas Supreme Court denied review.

Requena then brought a motion for post-conviction relief pursuant to *K.S.A. § 60-1507*. The trial court dismissed his claim, the Kansas Court of Appeals affirmed, and the Kansas Supreme Court denied review. Requena filed a habeas petition in the United States District Court for the District of Kansas. In his petition, Requena raised the following issues: (1) insufficient evidence supported his conviction for rape; (2) the district court erred in failing to instruct the jury on the meaning of "incapable of giving consent"; (3) the district court erred in refusing to consider Requena's motion for a new trial; (4) the district court erred in failing to conduct an [*845] evidentiary hearing on his claim of ineffective assistance of counsel; and (5) [**5] he received ineffective assistance of counsel. The court denied relief on all of these claims, but granted Requena a COA for one of his ineffective assistance of counsel claims. This pro se appeal follows. [1]

1 Because Requena proceeds pro se, we review his pleadings and filings liberally. *See Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652-21 (1972)*; *Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)*.

II. Discussion

On appeal, we review the district court's denial of federal habeas relief on Requena's ineffective assistance of counsel claim and the district court's denial of a COA on the remaining issues.

A. Ineffective Assistance of Counsel

We review the denial of federal habeas relief de novo, applying the same standards used by the district court. *Jackson v. Ray, 390 F.3d 1254, 1259 (10th Cir. 2004)*. Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), a federal court may not grant habeas relief on a claim adjudicated on the merits in state court, unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," *28 U.S.C. § 2254(d)(1)*, or "was based on an unreasonable determination [**6] of the facts in light of the evidence presented in the State court proceeding," *id. § 2254(d)(2)*.

To prevail on an ineffective assistance of counsel claim, a petitioner must show (1) counsel's performance fell below an objective standard of reasonableness, and

(2) petitioner was prejudiced by the deficient representation. *E.g., Hill v. Lockhart, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)*. To establish that defendant was prejudiced by counsel's assistance during plea negotiations, the defendant must show there was "a reasonable probability that but for incompetent counsel [the] defendant would have accepted the plea offer and pleaded guilty." *United States v. Carter, 130 F.3d 1432, 1442 (10th Cir. 1997)*.

Requena argues his trial counsel mistakenly told him the maximum sentence he could face for a rape conviction was 205 months in prison, when in fact Kansas's guidelines indicated he faced a sentence of between 242 and 270 months. [2] The government made a plea bargain offer of 27 months, but Requena rejected it. After a jury convicted him of rape, he was sentenced to 256 months in prison. Requena argues but for his counsel's inaccurate advice about his maximum exposure, he would have accepted the plea bargain [**7] offer of 27 months.

> 2 The criminal complaint against Requena mistakenly stated he was charged with a level 2 offense, when in fact his conduct supported a charge of a level 1 offense. The guidelines indicated a sentence for a level 2 offense was between 242 and 270 months, while a sentence for a level 1 offense was between 322 and 356 months. Over the government's objection, the trial court subsequently sentenced Requena as if he had been convicted of a level 2 offense and gave him 256 months in prison. Therefore, Requena never faced a maximum exposure greater than 270 months.

The Kansas Court of Appeals reasonably concluded Requena failed to demonstrate prejudice in this case. It denied post-conviction relief for three reasons:

> First, to satisfy the prejudice prong of the analysis, Requena must show a reasonable probability that, but for counsel's errors, he would have accepted the State's plea bargain offer. We consider de novo whether this would have been so. *See State v. Mathis, 281 Kan. 99, 110,* [*846] *130 P.3d 14 (2006)*. Requena was facing a presumptive sentence of as much as 270 months. In the face of this prospect, he asserts that he rejected a plea bargain offer of 27 months' imprisonment. [**8] Requena has the burden of showing us that a different outcome was a reasonable probability, not merely a possibility. Given the substantial sentence Requena was facing under the original charges and the generosity of the proposal he rejected, we are not convinced that there was a reasonable probability he would have accepted the offer had it been made to the more serious charge.
>
> Second, there is nothing to suggest that the State would have extended the same offer to Requena for a level 1 person felony.
>
> Third, at the time the charging and sentencing error was realized, Requena had ample opportunity to raise the issue in his direct appeal. Though his direct appeal had already been docketed, his brief on appeal had not yet been submitted. The docketing statement form that is required asks for a concise statement of the issues proposed to be raised, but states: "You will not be bound by this statement, but should include issues now contemplated." *Supreme Court Rule 2.041* (2005 Kan. Ct. R. Annot. 13, 17). He had until the submission of his appellate brief to raise this issue regarding the improper charge.

*Requena v. State, 147 P.3d 1095, 2006 WL 3740879, at *2-*3 (Kan. Ct. App. 2006)*. [3]

> 3 The district [**9] court found this explanation compelling under *Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. The court also noted that Requena refused a sentence that was approximately 13 percent of the purported maximum (27/205 months) compared to a sentence of 10 percent of the actual maximum (27/270 months).

In sum, the record supports the Kansas Court of Appeal's conclusion that Requena, who turned down a 27-month offer in the face of a lengthy--albeit mistaken--205 month sentence, has shown no prejudice

even if he could overcome a procedural bar. Since Requena turned down a generous plea agreement in the face of an already potentially lengthy sentence, we agree there is no "reasonable probability that but for incompetent counsel," *Carter, 130 F.3d at 1442*, he would have accepted the offer if he knew his actual exposure was 270 months rather than 205 months.

Because the Kansas Court of Appeals properly decided Requena failed to establish prejudice, it is unnecessary for us to evaluate the first prong of the *Strickland* test. *Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)* ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be [**10] followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.").

Applying AEDPA deference, we agree with the district court that the Kansas Court of Appeal's application of *Strickland* was reasonable and therefore deny Requena's petition for federal habeas relief.

B. Certificate of Appealability

The federal district court denied Requena a COA on nine additional ineffective assistance of counsel claims, which we discuss below. The court also denied him a COA on his claims that (1) there was insufficient evidence to support his conviction for rape; (2) the district court erred in failing to instruct the jury on the meaning of "incapable of giving consent"; (3) the district court erred in refusing to consider [*847] Requena's motion for a new trial; and (4) the district court erred in failing to conduct an evidentiary hearing on his claim of ineffective assistance of counsel.

To obtain a COA, Requena must make "a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253(c)(2)*. To do so, Requena "must show that reasonable jurists could debate whether . . . the petition [**11] 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, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)* (internal quotation marks omitted). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail." *Id. at 338*.

1. Ineffective Assistance of Counsel

Requena argues his attorney provided ineffective assistance of counsel by (1) asking Requena to write an affidavit of the night in question but never using it; (2) explaining to Requena that he had just won a case and did not think the district attorney would let him win another; (3) failing to provide Requena any information about the rape shield law; (4) failing to present the jury evidence of the Kansas Bureau of Investigation (KBI) lab report and failing to call a forensic scientist witness to discuss the report; (5) failing to object to testimony about J.C.'s alleged prior theft of narcotics during her employment; (6) telling Requena he would subpoena an independent physician but failing to do so; (7) failing to excuse the [**12] jury due to one potential juror's outburst; (8) failing to request an evaluation of J.C.'s mental capacity; and (9) failing to let Requena testify.

We have conducted a complete review of the state court record. For substantially the same reasons as set forth in the federal district court's order, we reject Requena's claims. First, the district court properly concluded that Requena failed to provide any evidence or analysis in allegations 1, 2, 3, 5, 8, and 9 demonstrating his attorney's conduct was deficient. With respect to arguments 1, 2, 3, 5, and 8, Requena also failed to provide any evidence or explanation for why counsel's conduct prejudiced the defendant.

We address allegations numbered 4, 6, and 7 in greater detail.

(Allegation #4). Requena claims his counsel was ineffective for failing to introduce a lab report as evidence and failing to call a forensic scientist with the KBI to discuss the findings of the report. Requena implies the report may have contained DNA evidence that would have exonerated him. While the report may have contained DNA evidence, identity was not a reasonable defense in this case. Requena had admitted he was present at J.C.'s house and in her bed the night [**13] the alleged rape occurred. The primary issue for the jury, instead, was whether J.C. consented to the sexual encounter. Because it is unlikely the DNA evidence would have altered the outcome of the trial, the Kansas Court of Appeals properly concluded the attorney's performance was not deficient and Requena was not prejudiced by the attorney's conduct.

(Allegation #6). Requena also alleges his attorney falsely told him that he would subpoena a doctor, and this doctor would testify that a lay person is not capable of recognizing the effects of certain medications. Requena suggests this testimony would show that Requena reasonably believed J.C. consented to the sexual encounter. As an initial matter, Requena failed to provide an affidavit or any [*848] other proof suggesting a doctor would provide such testimony. Even if Requena provided such evidence, he would not be able to establish prejudice under *Strickland*. As the district court convincingly explained, sufficient evidence existed from which the jury could reasonably infer that Requena knew J.C. was incapable of consenting. In particular, Requena admitted he was aware of J.C.'s serious medical condition and symptoms. Because he was aware [**14] of these severe symptoms, the jury could reasonably infer that Requena knew these symptoms would prevent J.C. from consenting to sexual intercourse, even if Requena was not aware of the effects of J.C.'s medication.

Therefore, the federal district court properly denied Requena a COA on this issue.

(Allegation #7). Requena alleges that during voir dire, one potential juror said in the presence of the other jurors, "I have been raped," and began crying. The judge excused her for cause. Requena claims his counsel was ineffective for not asking each remaining juror if the outburst would affect their judgment.

"[A]n attorney's actions during voir dire are considered to be matters of trial strategy, which cannot be the basis of an ineffective assistance claim unless counsel's decision is . . . so ill chosen that it permeates the entire trial with obvious unfairness." *Neill v. Gibson, 278 F.3d 1044, 1055 (10th Cir. 2001)* (internal quotation marks omitted). A statement by an excused juror about a past experience generally does not permeate a trial with obvious unfairness, unless the statement is related to the guilt of the defendant or the veracity of a witness. *Cf. United States v. Buchanan, 787 F.2d 477 (10th Cir. 1986)*. [**15] In *Buchanan*, the district court asked a potential juror whether he knew of any reason he couldn't be fair and impartial in a case involving arson. *Id. at 480*. The juror responded, "yes, . . . [i]n the last five years my mobile home has been vandalized three times and I have had real estate burned." *Id.* The court excused the juror and denied the defendant's motion for a mistrial. On appeal, the Tenth Circuit concluded the trial court did not err in refusing to grant a mistrial because the juror's "remark did not constitute an opinion on the defendant's guilt or the veracity of anyone involved in the case." *Id.*

The attorney's failure in the present case to question the remaining jurors about the excused juror's statement did not permeate the trial with obvious unfairness. Like the excused juror in *Buchanan*, the juror did not express an opinion about the guilt of Requena or the veracity of anyone involved in the case. Because the attorney's conduct did not constitute ineffective assistance, we conclude Requena is not entitled to a COA on this basis.

2. Sufficiency of Evidence

The Kansas Court of Appeals rejected Requena's claim that there was insufficient evidence supporting his rape [**16] conviction. In reaching this conclusion, it applied a standard of review nearly identical to the one required under *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*. *See State v. Requena, 30 Kan. App. 2d 200, 41 P.3d 862, 865 (Kan. Ct. App. 2001)* (citing *State v. Mason, 268 Kan. 37, 986 P.2d 387 (Kan. 1999)*). Because the court reasonably applied the correct standard to the facts of the case, *see 28 U.S.C. § 2254*, we conclude Requena is not entitled to a COA on this ground.

3. Jury Instruction

Requena argues the trial court erred by not instructing the jury on the meaning of "incapable of giving consent." A defendant in a habeas proceeding has a substantial [*849] burden to overcome when attacking a state court judgment based on an erroneous jury instruction. *Maes v. Thomas, 46 F.3d 979, 984 (10th Cir. 1995)*. "A state conviction may only be set aside in a habeas proceeding on the basis of erroneous jury instructions when the errors had the effect of rendering the trial so fundamentally unfair as to cause a denial of a fair trial." *Id.* This burden, in fact, "is even greater than the showing required to establish plain error on direct appeal." *Id.*

We conclude Requena failed to overcome this substantial burden. The Kansas Court [**17] of Appeals reasonably rejected Requena's argument because the term "'incapable of giving consent' is one which people of common intelligence and understanding can comprehend and is not a term that requires definition." *Requena, 41 P.3d at 866*. Furthermore, nothing in the record indicates

that the instructions were improper or the fundamental fairness of the trial was undermined by the court's failure to define this phrase.

Because the Kansas Court of Appeals's resolution of this issue was a reasonable application of Supreme Court precedent or federal law, we deny Requena's request for a COA on this basis.

4. Motion for a New Trial

Requena argues that the trial court erred in refusing to consider his untimely motion for a new trial. In the motion, he only alleged ineffective assistance of counsel. The Kansas Court of Appeals concluded the trial court did not abuse its discretion in denying the motion. Furthermore, it concluded even if it abused its discretion, it was not reversible error because Requena did not demonstrate that he received ineffective assistance of counsel. Because we agree Requena failed to establish that his attorney was deficient, we deny Requena's request for a COA. [**18]

5. Post-Conviction Evidentiary Hearing

Finally, Requena argues he is entitled to a COA because the state trial court erroneously denied his request for an evidentiary hearing in connection with his post-conviction motion alleging ineffective assistance of counsel. We have previously held that challenges to a state's post-conviction procedures are generally not cognizable in federal habeas proceedings. *E.g. Sellers v. Ward, 135 F.3d 1333, 1339 (10th Cir. 1998)* (holding petitioner may not challenge state court's denial of post-conviction evidentiary hearing because "federal habeas corpus relief does not lie for errors of state law").

Because Requena's claim is not cognizable in a federal habeas proceeding, we deny his request for a COA.

III. Conclusion

Based on our review of the record, we are not persuaded that the Kansas Court of Appeals's denial of Requena's ineffective assistance of counsel claim was based on an unreasonable application of clearly established federal law or based on an unreasonable determination of the facts. Likewise, we are not persuaded jurists of reason would disagree with the federal district court's disposition of Requena's petition. Accordingly, we AFFIRM the [**19] district court's denial of habeas relief on the ineffective assistance claim. We also DENY Requena's request for a COA on the remaining issues and DISMISS his appeal as it relates to these issues.

Entered for the Court,

Timothy M. Tymkovich

Circuit Judge

JEFFERY MORRISON, Petitioner, v. DONALD GAETZ, [1] Respondent.

1 Originally Morrison filed his petition against Alan Uchtman, who is no longer the Warden of Menard Correctional Center. Gaetz is the current warden and is substituted as the respondent. See Rules Governing Section 2254 Cases R. 11 (applying the Federal Rules of Civil Procedure to habeas proceedings where there is no conflict with habeas rules); Fed. R. Civ. P. 25(d) (providing for the automatic substitution of successors to official parties).

Case No. 06-CV-0183-MJR

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

2010 U.S. Dist. LEXIS 7173

January 28, 2010, Decided
January 28, 2010, Filed

SUBSEQUENT HISTORY: Certificate of appealability denied, Motion granted by *Morrison v. Gaetz, 2010 U.S. Dist. LEXIS 34891 (S.D. Ill., Apr. 8, 2010)*

PRIOR HISTORY: *Morrison v. Gaetz, 2009 U.S. Dist. LEXIS 124214 (S.D. Ill., Feb. 26, 2009)*

COUNSEL: [*1] Jeffery Morrison, Petitioner, Pro se, Menard, IL.

For Alan Uchtman, Respondent: Michael R. Blankenheim, LEAD ATTORNEY, Illinois Attorney General's Office - Chicago 2, Chicago, IL.

JUDGES: MICHAEL J. REAGAN, United States District Judge.

OPINION BY: MICHAEL J. REAGAN

OPINION

MEMORANDUM AND ORDER

REAGAN, District Judge:

A. Introduction and Procedural Background

A Massac County jury convicted petitioner Jeffery Morrison on November 17, 1999 of the first-degree murder of Roxanne Colley, two counts of aggravated kidnaping of Colley's twin sons, one count of armed violence and one count of unlawful possession of a stolen motor vehicle. [2] (Resp., Ex. A.) The court sentenced Morrison to forty years imprisonment for first degree murder, ten years for each kidnapping count, and twelve years for armed violence. Six-and-a-half years later, Morrison petitioned the Court for a writ of habeas corpus pursuant to *28 U.S.C. § 2254*, seeking a new trial. United States District Judge William Stiehl promptly referred the case to Magistrate Judge Clifford J. Proud (Doc. 4), who reported and recommended on February 26, 2009 that the Court deny Morrison's petition (Doc. 43).

2 The trial court vacated Morrison's conviction

for possession of a [*2] stolen motor vehicle after determining it was a lesser included offense of armed violence.

Donald Gaetz, the warden of the facility incarcerating Morrison, timely objected to Judge Frazier's report and recommendation. (Doc. 43.) Morrison filed his objections late (Doc. 47) along with a motion for an extension of time (Doc. 46). The Court granted him leave to file late, and in accordance with the order he filed amended objections. (Doc. 54.) Because timely objections were filed, the Court must review de novo those portions of the Report to which specific objections have been made. ***28 U.S.C. § 636(b)(1)(B) (2006); Fed. R. Civ. P. 72(b); S.D. Ill. R. 73.1(b); Govas v. Chalmers, 965 F.2d 298, 301 (7th Cir. 1992).*** The Court may accept, reject, or modify the recommended decisions, or recommit the matter to the Magistrate Judge with instructions. ***Fed. R. Civ. P. 72(b); S.D. Ill. R. 73.1(b); Willis v. Caterpillar, Inc., 199 F.3d 902, 904 (7th Cir. 1999).*** Finding the objections of Morrison without merit and that of Gaetz moot, the Court will overrule both Gaetz's objection and Morrison's objections and adopt Judge Proud's report and recommendation.

B. History

1. Evidence Before the Illinois Courts

The [*3] relevant evidence from the record before the Illinois courts is as follows. On October 23, 1998, Roxanne Colley died at her home in Brookport, Illinois, from a gunshot wound to her back. Roxanne was the girlfriend of Morrison's brother, Glen Morrison. At the time of the murder, Glen had been staying at Colley's home with Roxanne and her twin sons for about a month.

R.D. Riley, one of Colley's friends, testified that he lived near Hickory, Kentucky. He said that he had helped Colley care for her twin sons for approximately two years after their birth. Riley testified that on October 22, 2009, the day before the murder, Morrison, Glen, Colley, and her twin sons Alex and Eugene arrived at his home in Colley's vehicle to pick up a heating stove Riley had given to Colley. According to Riley, it was the first time Glen had been inside his home, though Morrison had spent the night there two or three times (Trial Tr. C289, C293). Because the stove would not fit in the car, Colley drove Riley's pickup truck with the stove in the bed. Riley said he rode with Colley, while the others followed in Colley's car. Riley and Glen spent the night at Colley's house, but Morrison did not. Riley said that [*4] early the next morning they picked up Morrison, then drove Riley home. After arriving home, Riley fed his dogs and hogs. He said that as he came around the corner of his house, he saw Morrison jumping into Colley's car very quickly with something wrapped up in a red shirt or towel, which he placed in the back seat or on the floorboard.

Riley kept a deer rifle in his bedroom closet behind some clothes. He testified that he noticed the rifle was missing a few days later. Riley did not give anyone permission to take his gun. Riley would later identify the murder weapon as his gun.

Glen testified that Colley was his girlfriend and that he had been staying at her home for approximately one month. Glen admitted that he drank a vast amount of beer and a fifth of whiskey the day before the murder. Glen's account of the day before the murder generally mirrors Riley's account with the following exceptions: Glen testified that defendant did not accompany them on the first trip to Riley's home to pick up the stove. In Glen's version, the party consisted of Colley, Glen, Colley's mother, Colley's mother's boyfriend, and the boys (Trial Tr. C445). Glen also admitted that the night before the murder [*5] he passed out drunk at Colley's kitchen table, got into an argument with Colley, and beat her up after she slapped him. He testified that Riley and the boys were not in the kitchen during the fight.

Glen testified that the morning of the murder he and Colley went to a store to purchase more beer, then picked up Morrison and returned to Colley's house. By this time, Glen had already consumed a "couple six packs." Glen said that he and defendant continued drinking beer and whiskey, but Colley and Riley did not drink anything. Glen testified that Colley then drove Riley home in his truck, while Morrison drove Colley's car with Glen and the boys. After dropping off Riley, Colley drove the rest of the group to Paducah. Glen went to a bar and then walked to Colley's mother's boyfriend's house.

Glen testified that Colley drove everyone back to her home that afternoon. Glen said he passed out from his drinking for a while after arriving at Colley's home. Glen recalled that he awoke and heard Colley accuse Morrison of stealing Riley's gun. He said he then heard Morrison threaten to shoot her, to which she replied he did not have the nerve to shoot her. Glen says Morrison was in the middle of [*6] the living room when he shot Colley, who

was walking out the front door at the time. Colley was shot in the back. Glen said she fell outside. Glen testified that Morrison then wiped the gun off, pointed it at him, and told him he would blow his head off too. Glen said he and Morrison picked up Colley and placed her inside the house. Glen claims no more than two minutes passed between the beginning of the argument and the time they carried Colley's body inside.

Glen said both of the twins were in position to see Morrison with the gun, as one was in the hallway and the other was in the living room. Glen testified he suggested that they take the boys to Colley's mother's house. He said Morrison said they were taking the boys as hostages. Glen testified that when they went outside, one of the boys yelled that Morrison shot his mother and that she was dead.

Glen further testified that they left in Colley's car with the boys in the back seat. He said the gun, which he had never seen before, was between the front seats. Glen said he saw a sheriff's car near Paducah, Kentucky, and hit the steering wheel causing the car to swerve so that the sheriff's car would stop them. Glen testified that [*7] he told police at the scene of the traffic stop that Morrison had shot Roxanne.

During questioning in Paducah after the traffic stop, Glen told police that Morrison must have purchased the gun at a pawn shop in Paducah. Glen claims that because everything was "hazy" that night due to his drinking, he did not remember until later that Roxanne had accused Morrison of taking Riley's rifle.

Glen was initially charged with Colley's murder, but the state dismissed all charges against Glen regarding the murder and the kidnapping of Colley's children. Glen agreed to plead guilty to domestic battery for hitting Colley and to testify against Morrison.

Douglas McDonald testified that on October 23, 1998, he lived across the street from the victim. At about six o'clock p.m. that evening, Douglas heard a gunshot from the direction of Roxanne's home. Douglas testified that when he looked toward the source of the sound of the gunshot, he saw Morrison and his Brother Glen pick up Roxanne's body and carry her inside her home. Douglas testified that he got on his bicycle and rode to the front of Roxanne's house. Once there, he witnessed the Morrison brothers getting into Roxanne's vehicle. Douglas testified [*8] that one of the brothers got out of the vehicle, went back into the house, and returned with Colley's four-year-old twin sons. Douglas interpreted the behavior of the boys as indicating that they did not want to go with the Morrison brothers. Before the brothers drove away with the boys, Douglas said he heard one of the boys say "Jeff shot my mommy -- shot her dead." Douglas testified that he went inside Colley's house and found her dead.

Douglas admitted that although he had met Morrison and Glen, he did not know them well enough to tell them apart. Douglas stated that he takes medication three times a day for pain and a nervous condition, but claimed that he had not taken any medication the day Colley was murdered. Douglas admitted he had convictions for burglary.

Andrea McDonald, Douglas's niece, testified that she thought she heard a door slam around the time Colley was murdered. Andrea said she saw Colley "flying" out the door. Initially she approached Colley's yard to help her. A passerby told Andrea that what she heard was a gunshot. Andrea testified that she saw Morrison wiping his hands off with a white rag and pulling Colley back inside her home. Although Andrea admitted she [*9] should not tell Morrison and Glen apart, she agreed that she was "absolutely certain" that it was Morrison that came out of the front door of the house.

Eric Augustus was a McCracken County sheriff's department special deputy on October 23, 1998. He and Deputy Kevin Garland pulled over Colley's car after it swerved into their lane, crossed the center line, and "went off the corner of the street." Augustus testified that Morrison was driving the vehicle, Colley's boys were in the back seat, and Glen was sitting in the passenger seat. Augustus saw the rifle next to Glen on the passenger side of the vehicle.

Illinois State Police Sergeant Alan R. Burton testified that he interviewed Glen the evening of October 23, 1998. Burton agreed that Glen did not tell him about an argument between Morrison and Colley over Riley's gun immediately before the shooting. Glen told Burton that Morrison might have purchased the gun from a pawn shop in Paducah. Burton said that Glen told him that Morrison said he and Colley had been seeing each other while Glen was out of town working. Glen claimed he did not believe Morrison. Burton said Glen also mentioned to Burton that various members of his family were [*10] angry with each other because Morrison's girlfriend, Rose Ulmer, had called the police on Glen.

Burton testified that Glen appeared to have consumed a lot of alcohol the night Burton took his statement. Burton said Glen seemed very angry with Morrison over Colley's death and made several threatening remarks about what he would do to him.

Bruce Warren, a forensic scientist with the Illinois State Police, testified that he found no fingerprints on the rifle or a spent shell found in the car.

Dr. Mark LaVaughn performed an autopsy on Roxanne. He determined that she died from a single gunshot wound to the back, and estimated that she died one to two minutes after she was shot. He estimated the barrel of the gun was about three feet from her back. Roxanne had no drugs or alcohol in her system when she died.

2. Affidavit of Shawn Hollowell

In addition to the evidence before the Illinois courts, Morrison files with his amended petition the affidavit of Shawn Hollowell (Doc. 42, Ex. 1). The Hollowell affidavit bears a signature reading "Shawn Hollowell," but is not notarized although it is made "under penalty of perjury." Hollowell was apparently incarcerated with Morrison at the Menard Correctional [*11] Center. Hollowell has multiple felony convictions, including convictions for forgery. *(See* Doc. 56 at 9; Doc. 50 at 6.) The Hollowell affidavit claims that Hollowell spoke with Glen multiple times while they were incarcerated in the Massac County Jail. Glen said he had nothing to worry about since he had set it up to blame his brother. According to the affidavit, Glen revealed that his motive was to get even with Morrison and Colley, Glen's girlfriend, for sleeping together.

The Hollowell affidavit indicates that Glen said he stole the gun, and was concerned that the police would discover the gun was not from a pawn shop as he had initially told the police. The affidavit indicates that Glen bragged about covering up his mistake by telling police that Morrison stole the gun and falsely claiming he wrote a letter as soon as he remembered. The affidavit also indicates that Glen expressed concern about beating up Colley the night before he shot her. Finally, the affidavit says that Hollowell suggested to Glen that it sounds like Glen was going to get away with murder, to which Glen responded "it's not the first time."

C. Analysis

The Court begins its analysis by noting that the role of federal [*12] habeas relief to state prisoners is not to give state prisoners an opportunity to retry their case or to reargue appeals in federal court. ***Bell v. Cone, 535 U.S. 685, 693, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).*** With respect to any claim adjudicated on the merits by a state court, habeas relief is only available to cases wherein the state court determination "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 to decisions "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).***

With that in mind, the Court proceeds to the parties' objections.

1. Morrison's Objection to the Facts

Morrison objects to Magistrate Judge Proud's use of the facts as determined by the Illinois appellate court in pages 2-5 of the report (Pet'r's Objections P 8). While Morrison admits that the state court's factual findings are presumed correct, he argues that the affidavit of Shawn Hollowell rebuts the presumption by clear and convincing evidence as required by *§ 2254(e)(1)* and so Judge Proud should not have included the different [*13] facts in his report.

Morrison, however, misreads the Report and Recommendation. The part about which he complains simply recites the evidence presented at trial and the developments in Morrison's case. Judge Proud properly noted and considered the Hollowell affidavit when evaluating Morrison's claim of actual innocence, which the Court will evaluate later. His objection on this point is without merit.

He notes in the same objection and a later one (P 16) that both Judge Proud and the Fifth District characterized the evidence against him as "overwhelming" and objects that Judge Proud relied on this label. This objection assumes that Judge Proud did not undertake an independent evaluation of the facts and simply adopted the Fifth District's label. The Court disagrees with petitioner in that assumption. It is readily apparent that Judge Proud's findings are not simply an adoption of the State Court's facts without reference to those properly brought to him in this Court. To the extent that the

petitioner is disagreeing with Judge Proud's evaluation of the facts, the Court will address that part of those objections when it examines the claim of actual innocence and ineffective assistance [*14] in later objections.

2. Morrison's Objections Regarding the Video Tape

During Morrison's trial, the prosecution played a video tape of Morrison being interrogated by law enforcement officers (Trial Tr. C471-83, C774-84). At the end of the tape Morrison invoked his Miranda rights after being advised he was a suspect in a murder. Defense counsel did not specifically object to the playing of the end of the tape, though counsel tried both during trial and in pretrial hearings to exclude the tape. Morrison argued that the admission of the end of the tape violated his Due Process rights and that his trial counsel was ineffective in relation to the admission of the video tape. Judge Proud disagreed to both.

Morrison objects to Judge Proud's finding that the prosecution made no evidentiary use of Morrison's silence (Pet'r's Objections PP 16-18). Use of a defendant's silence at the time of arrest and after receiving Miranda warnings for impeachment purposes violates the *Due process Clause of the Fourteenth Amendment*. ***Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); see also United States v. Hale, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975).*** Later cases made clear that it is the evidentiary use of a defendant's silence which is [*15] prohibited. The admission of evidence of an accused's silence, without more, does not violate the *Due Process clause*. ***See, e.g., Greer v. Miller, 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); Wainwright v. Greenfield, 474 U.S. 284, 106 S. Ct. 634, 88 L. Ed. 2d 623 (1986).*** *"Hale* and *Doyle* do not forbid all mention at trial of *Miranda* warnings and the defendant's response to them. They establish instead that silence following the receipt of *Miranda* warnings may not be used against a defendant." ***United States v. Higgins, 75 F.3d 332, 333 (7th Cir. 1996).*** Testimony that the defendant was advised of his rights and thereafter decided to remain silent does not ask the jury to infer guilt. ***Id.*** Use of an accused's silence against him is prohibited when his silence was induced by Miranda warnings because telling the accused he has a right to remain silent destroys the probative value of the accused's silence. ***Fletcher v. Weir, 455 U.S. 603, 604-07, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982).*** There is no problem if a defendant speaks after receiving Miranda warnings, since such a defendant was not induced to remain silent. ***Splunge v. Parke, 160 F.3d 369, 372-73 (7th Cir. 1998).***

The admission of the video tape did not ask the jury to make a forbidden inference from Morrison's silence, and [*16] therefore did not violate his due process rights. At the very least, most of the video tape was admissible. Morrison's arguments and this Court's review of the record did not reveal any suggestion by the prosecution that the jury should infer Morrison's guilt from his silence or make some other forbidden inference over which this Court could grant relief. The closest the prosecution came to a violation was apparently during closing, when the prosecutor described the contents of the video tape. In summary, the prosecution described the tape as showing that Morrison lied about driving Colley's car, did not respond immediately to the officer's accusations, and then claimed he knew nothing about the shooting (Trial Tr. C544-45). The prosecution was not asking the jury to infer guilt from silence; it was asking the jury to infer guilt from Morrison's taped assertions that he was not driving the car he was arrested in, was not present at Colley's residence, and knew nothing about the shooting. It would not be unreasonable for the Illinois courts to determine that a prosecutor mentioning a period of silence between statements by a defendant while discussing the surrounding statements was [*17] not the sort of evidentiary use of silence forbidden by *Doyle* and its progeny.

Morrison also objects to Judge Proud's recommendations with respect to ineffective assistance of counsel. The first objection that the Court will examine is Judge Proud's supposed reliance on the facts of ***Allen v. Chandler, 555 F.3d 596 (7th Cir. 2009)*** (Pet'r's Objections P 13). Morrison, again, misreads the Report and Recommendation. The facts of *Allen* were included only for the purpose of comparing that case to this one. Morrison misreads the Report and Recommendation as though it treated the facts of *Allen* as the facts of this case. Morrison also contends that *Allen* is not applicable to his case because the two are factually distinguishable (Pet'r's Objections P 14), but does not explain why they are distinguishable. Cases are *always* factually distinguishable from one another in some way or another. Without some sort of explanation as to (1) which of the many ways in which they are distinguishable are important, and (2) how those differences change the

outcome in this case, Morrison's objection is incomplete and meaningless.

Morrison's next objection is to "the R&R failing to consider trial counsel's failure [*18] to object to the prosecutor's reference to the videotape in opening statement" (Pet'r's Objections 3), but petitioner stated in an earlier filing that "he has not assert[ed] any separate [i]neffective assistance of counsel claim[]s regarding the prosecution's opening statement[]s." (Pet'r's Reply 1.) Accordingly, Judge Proud did not address that ground. Morrison states on objection, though, that he was arguing in the response that separate claims for ineffective assistance of counsel for each error in his petition were unnecessary and that the Court was not barred in examining the opening statement on procedural default grounds. He claims he was not arguing that the failure to object during the opening statement was not part of his counsel's ineffective assistance. He argues that the Court should therefore consider the opening statement as part of its ineffective assistance evaluation. (Pet'r's Objections PP 9-12).

The Court will assume that Morrison did not concede his argument with respect to opening statements, but that will not help him. As Morrison suggests, ineffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed. [*19] ***Pole v. Randolph, 570 F.3d 922, 934 (7th Cir. 2009)*** **(citing *Peoples v. United States, 403 F.3d 844, 848 (7th Cir. 2005))**. However, evidence and arguments supporting an ineffective assistance of counsel claim are procedurally defaulted if they are not presented to the state courts. ***See Bradshaw v. Richey, 546 U.S. 74, 79, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005)*** **("The Sixth Circuit also held that respondent was entitled to relief on the ground that the state courts' denial of his *Strickland* claim was unreasonable. . . . [T]he Sixth Circuit erred in relying on certain grounds that were apparent from the trial record but not raised on direct appeal.").**

Morrison did not raise any issues regarding opening statements during state post-conviction proceedings or on direct appeal, so the opening statement argument is procedurally defaulted even if Judge Proud misinterpreted Morrison's concession. Although procedurally defaulted claims can be revived if the petitioner shows prejudice from the alleged error and appropriate cause, ***House v. Bell, 547 U.S. 518, 536, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2004),*** and claim of ineffective assistance of counsel can provide appropriate cause to excuse a procedural default, ***Franklin v. Gilmore, 188 F.3d 877, 883 (7th Cir. 1999)*** [*20] **(explaining that ineffective assistance of counsel excuses procedural default),** Morrison also is not arguing that his post-conviction or his appeal counsel were ineffective, which if true would excuse this default.

Morrison next objects to the application of *Strickland v. Washington*, ***466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)***, to his case and argues that it instead falls under ***United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)***. (Pet'r's Objections P 15). *Cronic* allows a *sixth amendment* claim to succeed without inquiring into counsel's actual performance or the actual effect on the trial in very limited circumstances. ***Wright v. Van Patten, 552 U.S. 120, 124, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008)***. *Cronic* applies when (1) the defendant is denied counsel at a critical stage; (2) counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; or (3) counsel is called upon to represent a client in circumstances under which no lawyer could render effective assistance. ***Miller v. Martin, 481 F.3d 468, 472 (7th Cir. 2007)***. Morrison does not allege he was denied counsel, nor does he allege a situation under which a competent lawyer would be unable to provide effective assistance. Morrison does not allege facts to support a claim [*21] that counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, and this Court's review of the record shows significant adversarial testing. Defense counsel even objected to the admission of the video tape. *Strickland*, not *Cronic*, applies here.

The standard set by *Strickland* determines whether counsel was ineffective. Under *Strickland*, a petitioner must demonstrate that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. ***Id. at 687***. In order to prove prejudice, petitioner must show that but for counsel's unprofessional errors there is a reasonable probability that the result of the proceeding would have been different. ***Id. at 694***. Demonstrating counsel's deficient performance requires a showing that counsel's performance was not reasonably effective. ***Id. at 687-90***. A court need not examine both prejudice and the performance of counsel before rejecting a claim of ineffective assistance of counsel. ***Id. at 697***.

A constitutional error is harmless when it appears beyond a reasonable doubt that the error had no impact on the outcome of the trial. ***Mitchell v. Esparza, 540 U.S. 12, 17-18, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003).*** However, the Court [*22] does not undertake harmless review itself; instead, "habeas relief is appropriate only if the [state appellate court] applied harmless-error review in an 'objectively unreasonable' manner." ***Id. at 18*** **(quoting** ***Lockyer v. Andrade, 538 U.S. 63, 75-77, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)).*** The Fifth District's application was hardly unreasonable. Removing Morrison's silence from the video tape or using a transcript with the offending silences removed would not significantly change the impact of the tape. In the portion of the tape around the parts showing Morrison's silence, Morrison claimed he wasn't at Colley's home, did not know anything about a shooting, and was not driving Colley's car. Testimony of other witnesses showed he was at Colley's home and carried her body, and that he was arrested driving her car with her kids in the back seat. In other words, the prosecution used the tape to show Morrison lied during his interrogation. Considering its surroundings, Morrison's silence was unimportant filler. The Fifth District could reasonably conclude beyond a reasonable doubt that removing Morrison's silence from the tape would not have changed the outcome of his trial. Even if counsel should have objected, it was [*23] reasonable for the Fifth District to conclude that there was not a reasonable probability that the outcome of the trial would have been different.

3. Morrison's *Sixth Amendment* Ground

Morrison argues his conviction violates the *Confrontation Clause of the Sixth Amendment to the United States Constitution* (Pet. 10). Glen and Douglas testified that shortly after the shooting one of Colley's sons, probably Alex, said that Jeff shot his mother. His statement was admitted to evidence under the spontaneous declaration hearsay exception (Resp., Ex. A 11-12). Morrison contends that the admission of the statement was improper because the boys did not witness the shooting and Colley's son was merely repeating what Glen told them.

On April 16, 2002, the Fifth District decided Morrison's direct appeal (Resp., Ex. A). On October 2, 2002, the Illinois Supreme Court denied his petition for leave to appeal (Resp., Ex. G). At the time, the relevant Supreme Court precedents were ***Idaho v. Wright, 497 U.S. 805, 816, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990),*** and ***Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).*** While the Supreme Court abrogated *Ohio v. Roberts* and its progeny in ***Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004),*** *Crawford* does not apply retroactively, [*24] ***Whorton v. Bockting, 549 U.S. 406, 416-21, 127 S. Ct. 1173, 167 L. Ed. 2d 1 (2007).***

The *confrontation clause* does not always prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements may apparently violate the literal terms of the *confrontation clause*. ***Wright, 497 U.S. at 813-14.*** In *Roberts*, the Court set out a two step general approach for determining if a hearsay exception violates the *confrontation clause*. ***Id. at 814-15.*** First, the prosecution must either produce, or demonstrate the unavailability of the witness who made the out of court statement. After unavailability has been shown, the statement is admissible only if it bears adequate "indicia of reliability." ***Wright, 497 U.S. at 815-16*** **(*citing Roberts, 448 U.S. at 66*).** "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." ***Id.*** The Illinois spontaneous declaration exception is a firmly rooted hearsay exception, and satisfies the "indicia of reliability" requirement. ***Smith v. Fairman, 862 F.2d 630, 636 (7th Cir. 1988).*** [*25] The Fifth District determined that in order for a hearsay statement to be admissible under the spontaneous declaration exception, "(1) there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, (2) there must be an absence of time for the declarant to fabricate the statement, and (3) the statement must relate to the circumstances of the occurrence." (Resp., Ex. A 22) **(citing** ***Smith v. Williams, 193 Ill. 2d 306, 739 N.E.2d 455, 479-80, 250 Ill. Dec. 692 (2000)).***

The Fifth District examined the record and determined that the hearsay in question was properly admitted as a spontaneous declaration (Resp., Ex. A 12). Morrison objects to Judge Proud's finding that the hearsay statement was a spontaneous declaration and was properly admitted at trial (Pet'r's Objections P 23). Morrison does not contest that a child witnessing the shooting of his mother is not sufficiently startling, or that the hearsay statement testified to by Glen and Douglas

related to Colley's shooting. He does not suggest that the if the boys did see their mother shot then admitting the hearsay in question is proper. Morrison asserts that Colley's son did not see his mother shot, and that he heard that Morrison [*26] shot her from Glen rather than seeing it for himself.

The Court cannot provide relief from the Illinois appellate court's decision unless it was an unreasonable application of clearly established federal law as determined by the United States Supreme Court or an unreasonable determination of the facts based on the evidence before it. ***28 U.S.C. § 2254(d).*** Because the Illinois spontaneous declaration exception is firmly rooted, admission of hearsay under that exception is a reasonable application of *Roberts* and *Wright,* so Morrison's only remaining ground for objecting is that the Fifth District unreasonably determined the circumstances surrounding the admission of the evidence. He does so, pointing to the affidavit of Shawn Hollowell that he included with his supplemental claim of actual innocence. Shawn Hollowell was incarcerated at Menard at the same time as Morrison and also, purportedly, shared a cell with Glen.

There is a significant difference between an unreasonable decision and an incorrect decision. Morrison must show that the state court not only committed an error, but that it committed an unreasonable error. ***Ward v. Sternes, 334 F.3d 696, 703-04 (7th Cir. 2003).*** *Section 2254(e)(1)* [*27] provides a mechanism for proving unreasonableness by allowing a petitioner to rebut the factual findings of a state court by clear and convincing evidence. ***Id.*** In evaluating the state court's performance, the prosecution's burden involved in the admission of evidence must be considered. There was no need for the Illinois court to find that Glen's testimony was true before admitting his testimony regarding the hearsay statement. The task of deciding if testimony is true, whether a witness is lying, and assigning weight to the evidence is the province of the jury. ***See, e.g., People v. Tenney, 205 Ill. 2d 411, 793 N.E.2d 571, 582, 275 Ill. Dec. 800 (Ill. 2002).***

The problem with this approach is that on the question of admissibility, the Illinois courts never determined that Colley's son saw the shooting beyond reasonable doubt. All it decided was that there was enough evidence in support of that proposition to support admitting the hearsay statement and letting the jury decide if it was true. This makes Morrison's burden on what he is attempting to disprove astronomical: proof by clear and convincing evidence that no reasonable fact-finder on admissibility (i.e. a judge) would find the evidence that the boys saw the shooting [*28] was so weak as to render the hearsay statement inadmissible. This is a heavier burden than proof by clear and convincing evidence that Glen's statement was untrue. Adding the statements of the Hollowell affidavit to the rest of the record, the evidence is far from clear and convincing that Glen lied about where the boys were, and certainly not clear and convincing that Glen's testimony was so inaccurate to make the boys' statements inadmissible. As all we have is Glen's statement plus someone else seven years after the fact saying "he lied," the evidence barely, if at all, preponderates in Morrison's favor on this issue, let alone meets the higher standard of clear and convincing.

4. Morrison's Actual Innocence

Morrison raised a claim of actual innocence, centered on the affidavit of Shawn Hollowell. New evidence may excuse procedural default if in light of the new evidence "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." ***House v. Bell, 547 U.S. 518, 536-37, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006)*** **(citing *Schlup v. Delo, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)).*** This formulation ensures that a petitioner's case is "extraordinary." ***Id. at 537.*** The court may consider [*29] how the timing of the submission and the likely credibility of the affiant affects the reliability of new evidence. ***Id.*** An actual innocence claim does not evade the statutory timeliness rules. ***Escamilla v. Jungwirth, 426 F.3d 868, 871-72 (7th Cir. 2005).***

As Judge Proud properly noted, whether Morrison's claim of actual innocence could excuse any procedural default by Morrison has no impact on this case as Morrison's petition contains no procedurally defaulted claims (Doc. 43 at 17). Nonetheless, Morrison objects to Judge Proud's finding and suggests that a hearing is necessary (Pet'r's Objections P 25). This is a strange argument. Even if the Court were to hold an evidentiary hearing, it would not change the fact that of the three other grounds listed in the amended petition for habeas corpus (ineffective assistance, *Sixth Amendment*, and Illinois unconstitutionality), not one is procedurally defaulted. Actual innocence "is not itself a constitutional

claim, but instead a gateway through which a habeas petitioner must pass in order to have his otherwise barred constitutional claim considered on the merits." ***Herrera v. Collins, 506 U.S. 390, 404, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).***

Nevertheless, Morrison continues [*30] and tries to get time-barred claims in as the basis for raising his actual innocence claim. Judge Proud noted in a footnote that actual innocence is unrelated to statutory timeliness rules (Doc. 43 at 17 n.2). Morrison objects, arguing that Judge Proud misread *Escamilla v. Jungwirth*, ***426 F.3d 868 (7th Cir. 2005),*** and suggests that the Court's decision denying his motion for leave to amend was in error (Pet'r's Objections P 27). Judge Proud's reading of *Escamilla* was correct. Actual innocence does not excuse failure to raise a claim in a timely manner. ***Id. at 871-72.*** This objection is moot because Morrison's petition contains no time barred claims and this Court will not revisit the denial of Morrison's motion for leave to amend his petition to add time barred claims again. (*See* Docs. 41, 57.)

Morrison also objects to Judge Proud's finding that it is "doubtful" that Morrison's new evidence, the Hollowell affidavit, satisfied the standard set out in ***Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).*** (Pet'r's Objections P 24). The Hollowell affidavit is dated more than seven years after Morrison's conviction and is not notarized, though "submitted under penalty of purjury." (Hollowell Affid. 3.) Hollowell [*31] was apparently incarcerated with Morrison in the Menard Correctional Center. (Hollowell Affid. 1.) Hollowell has multiple felony convictions including convictions for forgery. (*See* Doc. 56 at 9; Doc. 50 at 6.) Hollowell's status as a felon, the timing of his affidavit, and his failure to come forward until after meeting Morrison in prison all impact Hollowell's credibility negatively. Hollowell's testimony would not be credible enough to prevent a reasonable juror from finding Morrison guilty beyond a reasonable doubt in light of the other evidence.

Finally, Morrison suggests that actual innocence is a free standing ground upon which a federal court may grant a writ of habeas corpus and objects that Judge Proud did not consider it as such (Pet'r's Objections P 26). [3] The Supreme Court has never held that a freestanding claim of actual innocence constitutes a ground for federal habeas relief. Only a decision "that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "that was based on an unreasonable determination of the facts in light of the evidence *presented in the State court proceeding*" provide a basis for habeas relief from a state court [*32] judgment. ***28 U.S.C. § 2254(d)*** **(emphasis added).** While the issue has been raised before the Court several times, each time the Court declined to decide it. ***See House, 547 U.S. at 554-55.*** Additionally, the Court noted that if it did eventually recognize a freestanding claim of actual innocence, the burden of proof required would almost certainly be higher than the burden established for excuse of procedural default in *Schlup*. ***House,*** *547 U.S. at 554-55.* Since petitioner's present evidence does not satisfy the *Schlup* standard, it almost certainly cannot satisfy the requirements of a freestanding actual innocence claim that could, but does not at present, exist.

> 3 An Illinois court's refusal to provide post-conviction relief in the face of compelling evidence of actual innocence violates the due process guarantee of the *Illinois* constitution. ***People v. Washington, 171 Ill. 2d 475, 665 N.E.2d 1330, 1336-37, 216 Ill. Dec. 773 (Ill. 1996).*** While actual innocence is not a freestanding ground for post-conviction relief available to state prisoners in federal court, it is available to Illinois prisoners in Illinois courts.

Even if actual innocence was allowed as a free-standing ground for relief in federal habeas, Morrison's claim [*33] must also fail as he as not exhausted his state remedies. ***28 U.S.C. § 2254(b).*** Illinois waives time limits for post-conviction petitions advancing claims of actual innocence in Illinois state courts and permits additional petitions for post-conviction relief in certain circumstances, which proof of actual innocence could satisfy. ***725 Ill. Comp. Stat 5/122-1(c), (f)*** **(2008).** Because Morrison could advance his actual innocence claim in Illinois court but has not done so, his state remedies are unexhausted. Even if relief under a freestanding claim of actual innocence were available under federal law, Morrison would have to present it to the Illinois courts first.

5. Remainder of Morrison's Objections

The remainder of Morrison's objections fault Judge Proud for not considering the following grounds for habeas relief. First, that the Illinois legislature violated the single subject requirement of the Illinois constitution when altering the penalties for aggravated kidnaping, and

that this amounts to a violation of his federal due process rights. Secondly, with respect to his *Sixth Amendment* challenge, he objects to the lack of analysis of the unavailability prong of the analysis under ***Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980),*** [*34] in the Report and Recommendation. (Pet'r's Objections PP 20-22.) Morrison contends that the boys were available since they appeared in court, so the hearsay statement should not have been admitted.

Judge Proud committed no error by not considering those grounds for relief. Morrison's petition for relief did not ask for habeas corpus on due process grounds. It asked for relief on Illinois law grounds, that the Illinois constitution was violated (Pet. 10), but Judge Proud correctly noted that federal courts "may not review state-court interpretations of state law." ***Curtis v. Montgomery, 552 F.3d 578, 582 (7th Cir. 2009).*** Morrison never raised the Due Process challenge until after Judge Proud's report. Similarly, although Morrison raised the *Sixth Amendment* challenge, he did not complain about the actual availability of the boys but instead, as noted above, complained that "it was unclear that the child actually saw his mother shot, as opposed to merely repeating what another suspect in the murder had told him." (Pet. 10.) The complaint about availability, again, surfaces after the report issued.

Morrison included none of these grounds in any way, shape or form, in original or amended petitions, [*35] so Judge Proud had no opportunity to consider them. Because Judge Proud could not have considered those grounds, the Court cannot either. The Court cannot make a de novo determination of matters not properly presented to the magistrate judge. These objections, accordingly, are not before the Court.

6. Gaetz's Objection

Gaetz, the warden/respondent in this case, objects to Magistrate Judge Proud's finding that Morrison did not procedurally default his *Sixth Amendment* challenge to the admission of Colley's four-year-old son's out of court statement as a spontaneous declaration. At this point, though, Gaetz's objection is academic. Judge Proud denied the *Sixth Amendment* challenge to Morrison's conviction, and the Court agrees. If Gaetz's objection were upheld, it would result in the exact same conclusion: Morrison's *Sixth Amendment* challenge fails. There is no need for the Court to consider it.

D. Conclusion

Morrison's objections are without merit, and Gaetz's objection is moot. The Court accordingly **OVERRULES** both Gaetz's objections and Morrison's objections (Docs. 44, 47, 54) and **ADOPTS** Judge Clifford J. Proud's Report and Recommendation (Doc. 43). Accordingly, Morrison's Petition for Writ [*36] of Habeas Corpus, as amended, is **DENIED.** The Court **DIRECTS** the Clerk of Court to enter judgment denying Morrison's petition and to close the case.

IT IS SO ORDERED.

Dated January 28, 2010.

/s/ Michael J. Reagan

MICHAEL J. REAGAN

United States District Judge