IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD J. EDWARDS,

Petitioner,

v.

JOHN BETT, Warden,
Dodge Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

04-C-781-C

REPORT

Before the court for report and recommendation is petitioner Edward J. Edwards's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. I am recommending that the petition be denied.

In late 2001, in the Circuit Court for Jefferson County, a jury tried and convicted Edwards of first degree sexual assault of his twelve year old adopted daughter and felony bail jumping. Edwards contends that he did not get a fair trial because:

> 1) The trial court erred in joining the sexual assault and bail jumping charges because the "other acts" evidence admissible as the sexual assault charge was inadmissible as to the bail jumping charge;
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> 2) The trial court improperly admitted evidence of bond conditions that petitioner had not been accused of violating;
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> 3) The trial court improperly excluded an out-of-court statement that Edwards had made to Kai Halverson; and
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> 4) During closing argument the prosecutor referred improperly to facts outside the record and appealed to the jury's religious beliefs.

The state has filed a response in which it concedes that Edwards properly exhausted his state court remedies and that his petition is timely. The state contends that Edwards has defaulted his first three claims by failing to raise them or by failing to assert the claims in constitutional terms in his petition for review with the Wisconsin Supreme Court. Alternatively, the state contends that the errors of which Edwards complains were at most errors of state law that do not implicate his constitutional rights. As a second fallback, the state asserts that even if the errors were of constitutional magnitude, they were harmless.

The state is correct. Edwards has defaulted his first three claims and that the state appellate court decided his prosecutorial misconduct claim in a manner that was neither contrary to nor involved an unreasonable application of federal law.

Facts

On September 13, 2000, in the Circuit Court for Jefferson County, the state charge Edward J. Edwards with having sexual intercourse with his adopted daughter, Heather, in August 1998, when Heather was 12 years old. Edward posted a $50,000 cash bail and agreed to a number of bond conditions, including that he not leave the State of Wisconsin. On December 19, 2000, Edward left Wisconsin without permission and was arrested in Arizona on April 11, 2001. Edward was charged with felony bail jumping. Over Edward's objection, the trial court granted the prosecutor's motion to join the sexual assault and bail jumping charges for trial.

In 1998, prior to Heather's allegation of sexual intercourse with Edwards, she accused him of grabbing her breasts. Edwards pled no contest to misdemeanor sexual assault. At Edwards's subsequent felony trial on Heather's sexual intercourse allegation, the court ruled that the acts underlying Edwards's 1998 conviction were admissible to show his intent and motive on both the sexual assault and bail jumping charges.

The trial court also ruled that the state could present evidence of all of Edwards's other bond conditions, even those irrelevant to the charges. These conditions included that Edwards have no direct or indirect contact with any child under the age of eighteen years, including Heather; that Edwards not possess any "adult material"; and that Edwards not be present in any adult entertainment establishment.

The following summary of the evidence presented at trial is adopted verbatim from the state court of appeals' unpublished opinion:

Heather testified that when she was about ten years old, and for the following two years, Edward often walked in on her while she was dressing. She told the jury she began leaning against her bedroom door to keep Edward out. In the spring of 1998, Bonnie observed Edward around Heather's bedroom door while Heather was changing and instructed Heather to change in the bathroom because there was a lock on the bathroom door.

Heather testified that Edward had been fondling her breasts regularly since she was ten years old and that, on nearly a daily basis, she had to tell him to stop. Typically Edward would come up from behind Heather while she was working in the kitchen or doing homework and reach over her shoulder and fondle one of her breasts. Once in December 1998 and once in January 1999, Bonnie observed Edward fondling Heather's breasts. In

February of 1999, Bonnie filed for a legal separation from Edward and secured a restraining order preventing Edward from having contact with Heather. On February 18, Edward moved out and did not return. The breast fondling was reported to authorities, Edward was charged, and he eventually admitted the fondling behavior and entered a plea to a charge of fourth-degree sexual assault.[1] He was given two years of probation and four months of jail time with work release privileges.

Bonnie testified against Edward at trial. On cross-examination, she agreed that she had helped authorities locate Edward in Arizona, the state to which Edward fled, that she was angry with him over divorce issues, and that she thought his punishment for fondling Heather was "a slap on the wrist." Bonnie agreed that she would do anything to help the prosecution.

Regarding the charged sexual intercourse incident, Heather testified that she was alone in her bedroom sitting on her bed reading one evening when Edward entered the room, pulled his pants and underwear to his ankles, pulled Heather's pants and underwear to her ankles, and had sexual intercourse with her. Heather testified that initially she pulled her pants up and Edward pulled them down again and that this happened two or three times. She said Edward got on the bed and put his penis inside her. On cross-examination, after Heather agreed that Edward got on the bed and put his penis inside her, she agreed with a series of statements suggesting that, during intercourse, Edward did not touch Heather with any part of his body except his penis.

One dispute at trial concerned inconsistencies in Heather's various statements of when the intercourse occurred. Heather tied the timing of the assault to a day in August 1998 when she attended an auto auction with Edwards, without specifying on which date

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[1] [Noting that the trial evidence only explicitly showed Edwards's guilty plea, the court of appeals found it “apparent” that Edwards admitted fondling Heather for purposes of trial. Among other things, the court noted that during closing arguments Edwards’s trial attorney characterized Edwards's plea as an admission.]

the assault occurred. It was undisputed that Edwards attended auto auctions on both August 4 and August 18 and that Heather attended only one auction with Edward. When Heather testified at the preliminary hearing in September 2000, she said the sexual intercourse occurred during "[t]he first part of August," but other parts of Heather's testimony suggested that the intercourse occurred on August 18. At trial, a police officer testified that, in July of 2000, Heather said the incident occurred on a Tuesday near the end of August 1998 before school started. Some of the relevant testimony on that point follows.

Heather stated that the intercourse occurred after she attended an auto auction with Edwards. Edwards was an auto dealer and frequently attended auto auctions on Tuesdays. Heather attended only one auto auction with Edwards. According to Heather, on the day of the assault, she and Edwards left the auto auction before 6:00 p.m. in a black truck with a manual transmission, drove about forty-five minutes, arrived home at a time when it was still light out and no one else was home, and shortly thereafter Edwards sexually assaulted her. Heather admitted that she has difficulty distinguishing black from purple, but her difficulty has not been diagnosed as a medical condition.

The prosecution sought to buttress the proposition that the intercourse occurred on August 18 by introducing evidence demonstrating that Edward attended an auto auction on Tuesday, August 18, 1998, and bid on two pick-up trucks that day: one maroon and one black, both with manual transmissions. The defense elicited the following contradictory information: only the maroon truck was actually purchased on August 18, 1998; the black truck was not purchased until August 24, 1998. On August 18, Edward entered his last bid for the day at 6:55 p.m. Edward also attended an auction two weeks earlier, on August 4, 1998, which was Edward's birthday. After the defense presented testimony suggesting that Heather attended the August 4 auto auction, Heather was re-called to the stand and testified that the sexual assault did not occur on August 3, her birthday, or on August 4, Edwards's birthday. She was not asked to explain why she remembered this or how certain she was.

Bonnie testified that Edward frequently attended the Tuesday auto auctions and usually returned home between 8:30 and 9:00 p.m. Bonnie recalled that on the day Heather went to the auto auction with Edward, Bonnie was out shopping in the evening and returned home to find Heather and Edward in the house alone.

Edward introduced testimony from a fellow car dealer named Kai Halverson. Halverson regularly attended the Tuesday evening auctions. Halverson testified that she met Heather at a car auction in August 1998, and recalled that it was August 4, 1998, because she remembered that her parents' anniversary was the same week she met Heather. The defense attempted to introduce testimony from Halverson that, on the day she met Heather at the auction, Edward invited Halverson to his house for a birthday party. The trial court sustained the prosecutor's objection to the offered testimony, concluding that it was inadmissible hearsay.

The trial court instructed the jury that the information alleged that Edward had intercourse with a person who was under age thirteen "on or about the end of August, 1998." The trial court further instructed the jury that the prosecutor need not "prove that the [sexual assault] was committed on the precise date alleged in the Information. If the evidence shows beyond a reasonable doubt that the offense was committed on a date near the date alleged, that is sufficient."

> *State v. Edward J.E.*, 2003 WI App 188, ¶¶ 5-14, 266 Wis. 2d 1060, 668 N.W.2d 562 (unpublished opinion).

The jury found Edward guilty of both first-degree sexual assault of a child and felony bail jumping. On appeal, Edwards presented the following four claims: 1) the joinder of the sexual assault and bail jumping charges for trial was unduly prejudicial because the evidence showing he fondled Heather's breasts and intruding on her while she was changing clothes

would not have been admissible against him in a separate bail jumping trial; 2) the trial court erred in preventing him from eliciting testimony from Halverson that Edwards invited Halverson to his house to celebrate his birthday on the day Halverson met Heather at the auto auction, in violation of his right to present a defense as guaranteed by the Sixth Amendment of the United States Constitution and *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); 3) the trial court erred when it admitted evidence of certain bond conditions other than the one he violated; and 4) the prosecutor made unduly prejudicial remarks during his closing arguments.

The court of appeals found that joinder of the two charges for trial was not unduly prejudicial because evidence that Edwards had previously fondled Heather's breasts would have been admissible in a separate bail jumping trial. The appellate court found that such evidence would be relevant to show motive to flee because a reasonable person in Edwards's position would "assume that jurors are informed of the entire relevant sexual history between an accused sex offender and the alleged victim." *Id*. at ¶ 18.

The court agreed with Edwards that the trial court had erred in excluding Halverson's testimony that, on the day Halverson met Heather, Edwards had invited Halverson to his house to celebrate his birthday. Nonetheless, the court concluded that the error was harmless, finding from its review of the evidence that "the specific date of the incident would not have been a significant factor in the jury's appraisal of Heather's credibility." *Id*. at ¶ 28. The court noted that "this particular attack on Heather's credibility was one small part of

a much larger, multi-pronged attack," *id*. at ¶ 26, which included the evidence that 1) Heather did not disclose the sexual intercourse at the time she disclosed the fondling incidents; 2) Heather was very close to her mother, Bonnie, who had a motive to inflict punishment on Edward and who may have used her influence over Heather to encourage Heather to present false charges; 3) Heather's description of the sexual intercourse was physically implausible; 4) and it was unlikely that Edward and Heather were home alone after any auction, given the time Heather alleged they arrived home.

The court of appeals also agreed with Edwards that the trial court had erred in admitting evidence that Edwards's bond conditions included those prohibiting him from possessing "adult material" and from being present "in any 'adult entertainment' establishment." The court found that the challenged conditions carried no probative value as to the charged crimes and at the same time carried some danger that the jury would construe them as evidence that Edwards had a propensity to view adult material and patronize adult entertainment establishments. However, the court found that this error did not undermine confidence in the verdict, finding that "[a]t worst, the disputed conditions were vague evidence of prior acts with no clear tie to the allegation that Edward had intercourse with his twelve-year-old daughter," there was nothing to suggest that a reasonable juror would have found the conditions "particularly noteworthy," and the conditions were relatively insignificant in light of the other admissible evidence introduced by the state. *Id*. at 57.

Finally, the court found that certain remarks by the prosecutor were not so prejudicial as to have denied Edwards a fair trial. Edwards first challenged the following remark by the prosecutor: "And do you think that during all of that time in between those episodes of squeezing her breasts that the defendant never fantasized about having sex with his daughter, never masturbated thinking about having sex with his daughter?" The court of appeals rejected Edwards's argument that the comment suggested the prosecutor had knowledge in addition to the evidence, concluding that it would have been "readily apparent to any reasonable juror that the prosecutor was simply speculating that Edward fantasized about his daughter." *Id*. at 15.

Edwards also argued that the prosecutor improperly invoked moral and religious sensibilities when he argued:

> Sex is fleshable[2] and, when it's healthy and good, that's a beautiful thing, that is the thing that God gave us, and it's fine. But this was not what was intended. When [Edward] had his opportunity in August of 1998, he took advantage of it, and he took advantage of Heather.

Although the court of appeals concluded that it was "unwise and possibly improper for prosecutors to appeal to religious beliefs during closing argument," *id*. at ¶ 61, it concluded that the comment was not so inflammatory as to require reversal. The court noted that "[r]egardless of the jurors' particular religious viewpoints, they would have believed that

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[2] I do not know what "fleshable" means. It is not in any dictionary that I have consulted, "Google" cannot find it, and it does not appear the King James Version of the Bible. Counsel made it up, misspoke. or was misquoted by the court reporter. The only substitute I can think of that makes sense in context is "pleasurable."

sexual contact between an adoptive father and a twelve-year-old girl was despicable behavior by the father. Further, the jurors would have understood that they were not being asked to contemplate the depravity of the conduct, but rather to determine whether the prosecutor proved that Edward had engaged in the conduct." *Id*. at ¶ 60.

Edwards filed a petition for review with the Wisconsin Supreme Court. In it, he argued that the court of appeals had erred in concluding that the trial court's erroneous evidentiary rulings were harmless and that the prosecutor's comments were not unduly prejudicial. In addition, he contended that the court of appeals should have considered the aggregate effect of the errors when determining whether they were harmless. Edwards did not renew his challenge to the joinder of the sexual assault and bail jumping charges.

The state supreme court denied Edwards petition for review on October 21, 2003.

Analysis

I. Fair Presentment of Claims 1, 2 and 3

The state argues that Edwards procedurally defaulted all but his prosecutorial misconduct claim by failing fairly to present the constitutional bases of these claims to the state supreme court in his petition for review. Before seeking a writ of habeas corpus in federal court, a petitioner first must exhaust the remedies available to him in state court. 28 U.S.C. § 2254(b)(1)(A). "Exhaustion serves an interest in federal-state comity by giving state courts the first opportunity to address and correct potential violations of a prisoner's

federal rights." *Perruquet v. Briley*, 390 F.3d 505, 513 (7th Cir. 2004) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)). To exhaust state court remedies, a prisoner "must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

Moreover, for that opportunity to be meaningful, the petitioner must "fairly present" to each appropriate state court his constitutional claims before seeking relief in federal court. *Baldwin v. Reese*, 541 U.S. 27, __, 124 S.Ct. 1347, 1349 (2004). To satisfy this requirement, a petitioner must alert the state court that he is relying on a provision of the federal constitution for relief. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). Failure to satisfy the fair presentment requirement constitutes a procedural default that precludes a federal court from reaching the merits of a petitioner's claim. *Perruquet*, 390 F.3d at 514.

A petitioner "fairly presents" a federal claim to the state courts when he articulates both the operative facts and the controlling legal principles on which his claim is based. *Sweeney v. Carter*, 361 F.3d 327, 332 (7th Cir. 2004). Although he need not "cite book and verse on the federal constitution," *Picard*, 404 U.S. at 278, he must, in some manner, alert the state courts to the federal underpinnings of his claim. *Duncan*, 513 U.S. at 365-66. In deciding whether the state courts were so alerted, we consider a number of factors, including: "(1) whether the petitioner relied on federal cases that engage in constitutional analysis; (2) whether the petitioner relied on state cases which apply a constitutional analysis to similar

facts; (3) whether the petitioner framed the claim in terms so particular as to call to mind a specific constitutional right; and (4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation." *Wilson v. Briley*, 243 F.3d 325, 327 (7th Cir. 2001). "[T]he presence of any one of these factors . . . does not automatically avoid a waiver; the court must consider the facts of each case." *Verdin v. O'Leary*, 972 F.2d 1467, 1474 (7th Cir. 1992).

Edwards procedurally defaulted his claims by failing to present them in constitutional terms to the state supreme court. First, Edwards did not raise his improper joinder claim at all in his petition for review with the state supreme court. Under *Boerckel*, that omission constitutes a clear procedural default that requires no further analysis.

Second, when challenging the exclusion of Halverson's testimony, Edwards did not reassert in the state supreme court his claim that the exclusion of the testimony violated his right to present a defense as guaranteed by the Sixth Amendment of the United States Constitution and *Chambers*. Instead, he merely debated the reasonableness of the appellate court's conclusion that the exclusion of the evidence did not reasonably contribute to the conviction. Edwards's approach made sense at the time because he had no practical reason to reassert his constitutional challenge: the state appellate court had found that the exclusion of Halverson's testimony was erroneous under state law, and Wisconsin applies the same harmless error standard whether or not the error is constitutional. *State v. Dyess,* 124 wis. 2d 525, 543, 370 N.W. 2d 222, 231-32 (1985). Having already obtained a favorable

appellate ruling on his claim of error, all Edwards need to obtain reversal of his conviction was to convince the supreme court that the court of appeals had botched the harmless error analysis.

Nonetheless, the fact that Edwards might have had a discernable reason for not pursuing his constitutional claim in his petition for review does not excuse procedural default. *See Moore v. Casperson*, 345 F.3d 474, 486-87 (7th Cir. 2003). To properly his claim properly for *federal* habeas purposes, Edwards was required to give the state supreme court a fair opportunity to pass on his claim that the exclusion of Halverson's testimony amounted to *constitutional* error. This required him explicitly to reassert the claim to the state supreme court. *Baldwin*, 124 S. Ct. at 1350-51 (fair presentment not satisfied by fact that prisoner had raised claim in lower court whose opinion state supreme court could read). By failing to do this, Edwards defaulted his challenge to the exclusion of Halverson's testimony.

So too with Edwards's current challenge to the trial court's admission of the bond conditions: Edwards's appellate brief to the court of appeals and his petition for review both were devoid of any mention of due process or the Fourteenth Amendment, devoid of any citation to any federal cases and devoid of any citation to any state cases that employed a constitutional analysis. Instead, Edwards argued that the trial court had erred by admitting the evidence under state law, and that this error was not harmless. Admittedly, Edwards presented the echo of a federal claim when he argued that the admission of the evidence was so prejudicial as to deny him a fair trial. However, the Supreme Court has stated that a

litigant wishing to present a federal claim must make that clear in his state court submissions:

> A litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'

Baldwin, 124 S. Ct. at 1351.

This is particularly true with respect to procedural due process claims. *See Wilson v. Briley*, 243 F.3d 325, 328 (7th Cir. 2001) ("[A]buse-of-discretion arguments are ubiquitous, and most often they have little or nothing to do with constitutional safeguards."); *Verdin*, 972 F.2d at 1475 (because due process claims are "particularly indistinct" and overlap with state claims, defendant must do more than refer vaguely to "due process" or "denial of fair trial" to fairly present constitutional due process claim to state court). It was not sufficient for Edwards merely to argue that he had been denied the right to a fair trial without somehow making clear that he was raising a federal constitutional claim. Therefore, Edwards has procedurally defaulted his challenge to the admission of the bond conditions.

A. Cause

The conclusion that Edwards has procedurally defaulted all but his prosecutorial misconduct claim does not automatically mean that this court is barred from granting him federal relief on those claims. This court can consider those claims on the merits if Edwards

demonstrates cause for the default and prejudice resulting therefrom, *Wainwright v. Sykes*, 433 U.S. 72, 87-88 (1977), or, alternatively, convinces the court that a miscarriage of justice would result if his claim were not entertained on the merits. *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). To establish cause for his default, a petitioner ordinarily must show that some external impediment blocked him from asserting his federal claim in state court. *Carrier*, 477 U.S. at 488, 492. To establish prejudice, he "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Perruquet v. Briley*, 390 F.3d 505, 516 (7th Cir. 2004) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original)).

In a December 17, 2004 submission to this court, Edwards questioned whether his failure fairly to present his federal claims to the state courts was the fault of his appellate lawyer. Given Edwards's pro se status, I construe this statement liberally as an assertion that the cause for his default was the ineffective assistance of appellate counsel. However, this court cannot consider the merits of Edwards's ineffective assistance claim because he has never presented that claim to the state courts. *Edwards v. Carpenter*, 529 U.S. 446, 452-54 (2000) (claim of ineffectiveness must have been presented fairly to state courts before it can establish cause for procedural default of another claim).

Because there is no statutory time limit in Wisconsin for bringing claims of ineffective assistance of appellate counsel and because Edwards has not yet attempted to obtain

collateral relief from the state courts, he probably still could pursue an ineffective assistance of appellate counsel claim in state court. *See State v. Knight*, 168 Wis. 2d 509, 484 N.W. 2d 540 (1992) (petitioner claiming ineffective assistance of appellate counsel can present claim by filing petition for writ of habeas corpus in appellate court that heard appeal); *but see State ex rel. Smalley v. Morgan*, 211 Wis. 2d 75, 565 N.W. 2d 805 (Ct. App. 1997) (because habeas corpus is equitable remedy, petitioner must file petition within reasonable time or risk dismissal under doctrine of laches). In theory, this court could stay this federal habeas proceeding to allow Edwards to return to state court to attempt to exhaust his claim of ineffective assistance of appellate counsel. However, it is not necessary to do so because Edwards cannot satisfy the prejudice prong of the cause-and-prejudice test. As previously noted, to overcome his procedural default, Edwards must show that the trial court's erroneous rulings actually and substantially prejudiced him. For the reasons that follow, I conclude that Edwards cannot show actual and substantial prejudice with respect to any of his claims.[3]

B. Prejudice

1. Improper Joinder

Edwards argues that joining the sexual assault and bail jumping charges for trial prejudiced his ability to obtain a fair trial on the bail jumping charge because it allowed the

[3] Because Edwards is pro se, I have not limited my consideration of his arguments to those raised in his response to the state's answer. I also have considered the arguments made his lawyer made in the state courts.

jury to hear "other acts" evidence that it would not have heard if the court had severed the charges. Specifically, he contends that the evidence concerning his prior conduct of intruding on his daughter and fondling her breasts would not have been relevant to show motive in a separate bail jumping trial. Edwards argues that it is unreasonable to think he was knowledgeable enough about the rules of evidence to realize that his prior bad acts toward his daughter might be used as "other acts" evidence to strengthen the pending sexual assault case. The admission of this irrelevant evidence prejudiced him, he argues, because there was sufficient evidence from which a reasonable jury could find that he left the state in reasonable fear of his own safety. He argues that joinder created a risk that the jurors voted to convict him on the bail jumping charge "not because they believed [his] departure was not motivated by fear, but because they believed his pattern of conduct with his daughter deserved more punishment."

The fondling and the intruding evidence had marginal, if any, relevance to Edwards's motive to jump bail on the sexual assault charge. Even so, I am not convinced that admission of this evidence actually prejudiced him. Having carefully reviewed the record, I conclude that the jury did not convict Edwards of bail jumping on the basis of his "pattern of conduct" with his daughter, but rather on the basis of the other evidence presented by the state at trial.

First, the trial court instructed the jury that if it found that the alleged fondling or intruding had occurred, then the jury

> should consider it only regarding whether Mr. Edwards had a motive or a plan to have sexual intercourse with Heather, or motive to jump bail. You may not consider this evidence to conclude that Mr. Edwards has a certain character or a certain character trait and that he acted in conformity with that trait or character with respect to the offenses charged in either Case 269, sexual assault of a child, or Case 496, bail jumping.

Further, at the defense's request, the court instructed the jury that the acts of touching Heather were disposed of in another case that was concluded with a criminal conviction. The trial court further instructed the jury that it was to "make a finding as to each Count or charge in the Informations. Each Count charges a separate crime, and you must consider each one separately. Your Verdict for the crime charged in one Count must not affect your Verdict on the other count." These instructions minimized any possible prejudice from the other acts evidence.

Second, the evidence of Edwards's guilt on the bail jumping charge was overwhelming. There was no dispute at trial that he had fled Wisconsin on December 19, 2000 and that he was aware that this violated his bond on the sexual assault case. At trial Edwards sought to convince the jury that his flight was justified by his fear that his life was in danger. To support this justification defense, he called a witness named Harry Shephard who testified that at some point during November or December 2000, Edwards reported being afraid. On December 15, 2000, Shephard observed Edwards in pain with a wrap around the center part of his body. According to Shephard, on December 17, 2000, Edwards informed Shephard that he had been shot and displayed wounds to his side that appeared to be consistent with

gunshot wounds. Edwards also presented evidence that during a subsequent search of Edwards's apartment, officers found medical supplies, bloody rags and two shirts that each had a hole on the right lower side with blood around it. In addition to this evidence, defense counsel pointed out that Edwards had fled to Arizona to be with his son, arguing that if he had truly intended to flee prosecution, he would have traveled to an unknown location rather than a place where he could be found so easily.

Even if the jury bought off on Edwards's claim to have been shot–which itself is a stretch–the evidence did not actually establish a legal justification for flight. To establish "justification" it was Edwards's burden to prove that he reasonably believed interstate flight was the only means available to prevent his imminent death or great bodily harm. Edwards could not possibly establish this because he failed to report the alleged shooting to the police and seek protection. Defense counsel suggested during closing argument that Edwards did not contact authorities because he suspected that his wife had shot him and he did not want her to lose custody of Heather, but Edwards did not present any evidence to support this rather unbelievably magnanimous suggestion.

In light of the trial court's cautionary instructions and the overwhelming evidence presented by the state on the bail jumping charge, Edwards cannot show that he was so prejudiced by the joinder of the charges as to excuse his procedural default.

2. Admission of Bond Conditions

Edwards contends that he suffered prejudice when the court allowed the state to apprise the jury of his bond conditions for the sexual assault charge, including inflammatory conditions that he was not accused of violating in the bail jumping charge. Specifically, Edwards objects to the disclosure of these conditions: 1) No direct or indirect contact with any child under the age of eighteen years, including Heather; 2) Do not possess any "adult material;" and 3) Do not visit any adult entertainment establishment. Edwards argues that these conditions were irrelevant and their admission substantially prejudiced him by "paint[ing] the dark character picture of a sexual deviant whom jurors may have concluded had previously demonstrated the propensity to engage in the type of deviant conduct charged." Edwards notes that because the bond conditions were imposed by a court, the jury might infer that they represented a judicial finding that Edwards previously had engaged in the prohibited acts. Edwards also noted that the prosecutor displayed the bond conditions on a large poster and referred explicitly to each of them in his opening and closing arguments.

I agree with the state court of appeals that the bond conditions were irrelevant and should not have been admitted. However, my independent review of the record leads me to agree with the court of appeals' conclusion that any danger of prejudice from the admission of the conditions was minimal. As that court observed, the prosecutor did not place undue emphasis on the conditions, but, consistent with the trial court's ruling, pointed

to them in the context of arguing that the conditions would have conveyed to Edwards that "he was in very serious trouble." In light of the fact that Edwards was charged with sexually assaulting his minor adopted daughter, reasonable jurors would not find it particularly noteworthy that he was not to have contact with her or other children during the pendency of his case.

As for the other conditions, I also agree with the court of appeals that, when viewed in the context of the entire trial, the conditions were "[a]t worst . . . vague evidence of prior acts with no clear tie to the allegation that Edward had intercourse with his twelve-year-old daughter." From my review of the record, I am unable to conclude that the jury rushed to convict Edwards on the basis of bond conditions that arguably bore little relationship to the offenses charged as opposed to relying on the other substantial, relevant evidence in the case.

True, the evidence against Edwards was not overwhelming: there were no third party witnesses to the sexual assault and no physical evidence to prove the assault. However, the victim's testimony was unwavering. The only weakness in her testimony was her description of the assault–a weakness exploited by the defense–but her account was not so implausible as to diminish her otherwise credible testimony. Moreover, reasonable jurors could accept Edwards's argument that the assault could not have occurred in the manner that Heather described but still conclude that Edwards had intercourse with her. The jury reasonably could have concluded that, given the traumatic nature of the event and Heather's young age at the time, she might not accurately recall how the assault occurred. The jury also had little

reason to question Heather's motive. The defense's attempt to show that Heather had manufactured the story to please her mother, who sought revenge and financial gain from Edwards, was weak. Furthermore, the jury heard the very damaging evidence that Edwards had for several months before the assault attempted to intrude on Heather while she was undressing and that he had fondled her breasts, even while others were present in the home and even after Heather protested. Finally, the jury heard that Edwards had fled to Arizona while his case was pending. Combined with Heather's testimony, this evidence pointed strongly to Edwards's guilt on the sexual assault charge.

Because Edwards cannot show that the erroneous admission of the bond conditions worked to create actual and substantial prejudice against him at trial, his due process challenge to the admission of this evidence is procedurally defaulted.

3. Exclusion of Kai Halverson's Testimony

Next, Edwards contends that he was denied a fair trial as a result of the trial court's refusal to allow him to elicit testimony from Kai Halverson that Edwards had invited Halverson to his house to celebrate his birthday on the day Halverson met Heather at the auto auction. Edwards sought to introduce the testimony to attack evidence introduced by the state that suggested that the date on which Heather attended the auction with Edwards was August 16, not August 4, which was Edwards's birthday.

The state court of appeals agreed that the proffered testimony was not hearsay and that Edwards should have been allowed to introduce it. Nonetheless, the court concluded that the exclusion of the evidence was harmless because the defense's attempt to show that August 4, not August 16, was the date on which Heather attended the auction was just one small part of a much larger, multi-pronged attack on Heather's credibility. Moreover, found the court, the excluded testimony was itself subject to attack and was cumulative to other evidence showing that Heather might have been mistaken when she testified that the assault occurred after she attended an auto auction and rode home in a black truck. In addition, noted the court, the defense's attempt to attack Heather's credibility as to the date of the auction conflicted with its attempt to portray Bonnie as an angry wife who concocted Heather's story based on her knowledge of Edward's activities and the business records at her disposal. Finally, the court noted that the information specified only that the assault occurred "on or about the end of August, 1998." Overall, the court concluded that the specific date of the incident would not have been a significant factor in the jury's appraisal of Heather's credibility.

I have little to add to the court of appeals' prejudice analysis. Having reviewed the record independently and having compared it to the court of appeals' detailed description of the evidence, I agree not only with its characterization of the defense and the evidence presented at trial but also with its reasons for concluding that the exclusion of the Halverson testimony did not affect the outcome at trial. For the same reasons found by the court of

appeals at paragraphs 29-41 of its decision, I conclude that Edwards has failed to show that he was actually prejudiced by the exclusion of the Halverson testimony.[4] Accordingly, he has failed to satisfy the cause-and-prejudice exception to the procedural default rule.

B. Miscarriage of Justice

Having failed to show that any of his procedurally defaulted claims should be excused under the cause-and-prejudice exception, Edwards's last chance to obtain habeas relief on his defaulted claims is to show that the failure to consider the claims will result in a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish a fundamental miscarriage of justice, a petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Id*. at 496. More specifically, a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of newly discovered evidence of innocence. *Schlup v. Delo*, 513 U.S. 298, 325-327 (1995).

Edwards cannot satisfy this exception. He has not adduced new evidence of innocence. Even if new evidence of innocence was not required, I cannot conclude on this

[4] In adopting the court of appeals' analysis on this issue, I am not "deferring" to that court's decision as would be required if § 2254(d) governed the instant analysis. To determine prejudice from procedural default this court must conduct its own analysis and draw its own conclusions. Having conducted an independent analysis, I conclude that Edwards cannot show prejudice to overcome his default for the same reasons the court of appeals concluded that Edwards could not show prejudice to require reversal of his conviction. There is no reason to detail those reasons in this report when the court of appeals already has set them forth cogently in its opinion.

record that no reasonable juror would have convicted him in the absence of the errors of which he complains. Accordingly, Edwards has defaulted his claims that he was denied due process as a result of the joinder of the charges and the court's erroneous evidentiary rulings.

By virtue of this prejudice analysis Edwards essentially just obtained federal habeas review of the merits of his claims. There is no material difference between the analysis used to decide whether a petitioner has shown prejudice sufficient to overcome his procedural default and the analysis this court would apply to the merits of Edwards's claim. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (to obtain federal habeas relief for constitutional errors of the trial type, petitioner must show that error resulted in "actual prejudice"); *Milone v. Camp*, 22 F.3d 693, 702 (7th Cir. 1994) (test for whether state court committed constitutional error in admitting certain evidence is "whether the probative value of the state's evidence was so *greatly outweighed* by its prejudice to [petitioner] that its admission denied him a fundamentally fair trial") (emphasis added); *Thompkins v. Cohen*, 965 F.2d 330, 333 -334 (7th Cir. 1992) (to show error of constitutional magnitude resulting from erroneous evidentiary ruling that does not implicate specific constitutional right, petitioner must show "severe prejudice"); *Leach v. Kolb*, 911 F. 2d 1249, 1258 (7th Cir. 1990) ("misjoinder ... rise[s] to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his . . . right to a fair trial.") (quoting *United States v. Lane*, 474 U.S. 438, 446 n. 8 (1986)). The pivotal question in each of these habeas inquiries is whether a petitioner actually was prejudiced by the errors so as to be denied his

constitutional right to a fundamentally fair trial. Edwards has not shown actual prejudice. Therefore, he could not obtain to relief on his first three claims even if he had not defaulted them.

II. Prosecutor's Closing Argument

The sole claim that Edwards properly exhausted in the state courts is that the prosecutor made comments during closing argument so egregious that they deprived Edwards's of a fair trial. In *Darden v. Wainwright*, 477 U.S. 168 (1986), the Supreme Court set forth the test for claims of prosecutorial misconduct at trial: First, the court must look at the comments in isolation to determine if they were improper. If not, then the analysis ends. If the court finds the comments improper, then it must examine them in light of the record as a whole to determine whether they deprived the defendant of a fair trial. *Whitehead v. Cowan*, 263 F.3d 708, 728 (7th Cir. 2001) (quoting *United States v. Whitaker*, 127 F.3d 595, 606 (7th Cir. 1997)). If the comments were improper, then the court must decide whether they deprived the defendant of a fair trial by considering these factors: 1) whether the prosecutor misstated the evidence; 2) whether the remarks implicated specific rights of the accused; 3) whether the defense invited the response; 4) the trial court's instructions; 5) the weight of the evidence against the defendant; and 6) the defendant's opportunity to rebut. *Id*.

> In making this determination, 'it is not enough that the prosecutors' remarks were undesirable or even universally

> condemned . . . . The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.'

Id. at 728-29 (quoting *Darden*, 477 U.S. at 181 (citation and quotation omitted)).

Although the court of appeals did not directly cite *Darden*, it properly identified and employed its test. *State v. Edward J.E.*, 2003 WI App at ¶ 58 (citing *State v. Wolff*, 171 Wis. 2d 161, 167, 491 N.W. 2d 498 (Ct. App. 1992) (in turn citing *Darden*, 477 U.S. at 181)). Therefore, to obtain habeas relief on this claim, Edwards must show that the court of appeals decided his prosecutorial misconduct claim in a manner that was contrary to or involved an unreasonable application of *Darden*. 28 U.S.C. § 2254(d)(1).

Edwards objects to two of the prosecutor's remarks during closing argument:

> And, when you are looking at motive and the defendant's motive, think about squeezing those breasts. That's not just an action. It's not like handling a microphone or a pen or your glasses. That's his daughter's body–and not her elbow or her knee or the small of her back, or a hug–squeezing her developing breasts. He didn't persist in that because he didn't like it, because it turned him off, because he hated how it felt. No. He did it because he liked how her breasts felt in his hand. He liked the feel of her flesh on his fingertips, and it made him only want it more, because that's what his actions tell you.
>
> And do you think that during all of that time in between those episodes of squeezing her breasts that the defendant never fantasized about having sex with his daughter, never masturbated thinking about having sex with his daughter? When you look at his actions, what do we know about actions? There's an old saying: Even their actions speak louder than words. And you have the defendant's actions squarely before you, and those actions tell you that he wanted and did gratify

> himself with Heather's body. He used his daughter for his purposes and his pleasures. There isn't any way around it.
>
> Sex is fleshable and, when it's healthy and good, that's a beautiful thing, that is the thing that God gave us, and it's fine. But this was not what was intended. When that defendant had his opportunity in August of 1998, he took advantage of it, and he took advantage of Heather.

Tr. of Trial, Nov. 8, 2001, at 87-88, attached to state's response, dkt. # 5 at exh. M.

Edwards first objects to the prosecutor's comment that Edwards fantasized about having sex with his daughter and masturbated while during these fantasies. The court of appeals rejected Edwards's contention that this comment suggested the prosecutor had knowledge in addition to the evidence presented at trial. The court concluded that when the remark was considered in context, "[i]t would have been readily apparent to any reasonable juror that the prosecutor was simply speculating that Edward fantasized about his daughter." Although the court of appeals did not say whether it thought the prosecutor's comment was proper, it clearly found that the remark did not prejudice Edwards's right to a fair trial.

Second, Edwards objects to the prosecutor's "sex is fleshable..." remark, arguing that it improperly appealed to the jury's moral and religious sensibilities. As noted above, "fleshable" is not a word, but the sanctimonious implication of the prosecutor's statement is clear from the rest of the words he employed. The court of appeals found that this comment might be improper but it was not so prejudicial as to deny Edwards a fair trial:

> [r]egardless of the jurors' particular religious viewpoints, they would have believed that sexual contact between an adoptive father and a twelve-year-old girl was despicable behavior by the father. Further, the jurors would have understood that they were not being asked to contemplate the depravity of the conduct, but rather to determine whether the prosecutor proved that Edward had engaged in the conduct.
>
> *Id*. at ¶ 60.

This conclusion is not an unreasonable application of clearly established federal law. To find a state court decision is "unreasonable" under § 2254(d), it is not enough for a federal court to conclude that the state court decision was incorrect; rather, the court must find that the state court's decision was not "minimally consistent with the facts and circumstances of the case." *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002). The evidence adduced at trial against Edwards substantial. The court instructed the jury that the lawyer's closing arguments were not evidence. The prosecutor's objectionable comments were a small part of a lengthy closing argument that focused on many other aspects of both the sexual assault and bail jumping cases, including the credibility of Heather's and Bonnie Edwards's testimony and the incredibility of Edwards's justification defense. In light of these factors and the flexible nature of the *Darden* test, It was not "unreasonable" for the court of appeals to conclude that the prosecutor's comments did not deprive Edwards of his right to a fair trial. *See Yarborough v. Alvarado*, 541 U.S. 652, __, 124 S. Ct. 2140, 2149 (2004) (the more flexible the rule at issue, "the more leeway [state] courts have in reaching outcomes in case by case determinations").

V. Cumulative Error

Finally, I must determine whether the aggregate effect of the above-noted trial errors might have altered the course of the trial so as to violate Edwards's right to due process of law. *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000). When conducting a cumulative error analysis, the court must examine the entire record, "paying particular attention to the nature and number of alleged errors committed; their interrelationship, if any, and their combined effect; how the trial court dealt with the errors, including the efficacy of any remedial measures; and the strength of the prosecution's case." *Id*. at 825. The court must be "careful not to magnify the significance of errors which had little importance in the trial setting." *Id*. To warrant relief, the court must be "firmly convinced that but for the errors, the outcome of the trial probably would have been different." *Id*.

Even when all of the alleged errors are considered as a group, Edwards does not pass this test. As discussed above, the trial court's exclusion of Halverson's testimony had little, if any, practical effect on Edwards's ability to mount a full-scale attack on Heather's credibility. In spite of being virtually unfettered in that attack, Edwards failed to make a persuasive case that Heather was being manipulated by her mother to sow vengeance and reap money. In contrast, the state had, in addition to Heather's testimony, the damaging evidence of Edwards's past behavior toward Heather and the evidence that Edwards had fled to avoid prosecution. Finally, Edwards's incredible justification defense to the bail jumping probably cost him more points than it scored. In light of the substantial, properly-admitted

evidence supporting the convictions on both counts, the cumulative effect of the erroneously-admitted evidence was insignificant. Edwards received what the Constitution guaranteed him: a fair trial, not a perfect one. *Rose v. Clark*, 478 U.S. 570, 579 (1986). He is not entitled to habeas relief from this court.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that the petition of Edward J. Edwards for a writ of habeas corpus be denied.

Entered this 18th day of March , 2005.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge