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

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SEBASTIAN MOLINA,

Petitioner,

v.

PHIL KINGSTON, Warden,
Waupun Correctional Institution,

Respondent.

REPORT AND
RECOMMENDATION

05-C-0282-C

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REPORT

This case presents a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Petitioner Sebastian Molina is in custody following his conviction in the Circuit Court for Dane County for repeatedly sexually assaulting a ten year old girl. Petitioner claims that his attorney committed three trial errors that deprived him of his Sixth Amendment right to the effective assistance of counsel. Because the Wisconsin Court of Appeals' adjudication of these claims was not clearly erroneous, I am recommending that this court deny the petition.

FACTS

Following up on a tip, on April 23, 2001, Dane County social worker Jennifer Suttin conducted a videotaped interview of S.E.M., a ten year old girl, regarding sexual assault by petitioner Sebastian Molina. S.E.M. told Suttin that from November 1, 1999 through April

18, 2001, petitioner repeatedly had sexually assaulted her. At the time of the assaults, petitioner lived in S.E.M.'s home along with S.E.M.'s mother, father and brother. S.E.M. detailed the most recent assault, an act of anal intercourse that had occurred on April 18, 2001. She also reported that on one occasion, petitioner had shown her a condom which he kept in his dresser drawer, and that on another occasion he had used a lubricant during the assault. S.E.M. further reported that petitioner had shown her images of nude adults on his computer.

The police searched petitioner's bedroom and found a tube of lubricant, massage oil and a condom in a dresser drawer. They also seized a computer and bedding. The computer's hard drive contained images of adult pornography. The bedding contained DNA belonging to petitioner and to S.E.M.'s mother, but not S.E.M.

The state charged petitioner with two counts of repeated sexual assault of the same child and one count of first degree sexual assault of a child under the age of 13. At trial, the state called Suttin and S.E.M. as witnesses and played the videotape of Suttin interviewing S.E.M. A detective testified about the physical evidence found in petitioner's bedroom and the adult pornography found on his computer.

The state also called Stacy Laufenberg, a Sexual Assault Nurse Examiner who had examined S.E.M. on April 23, 2001. Laufenberg testified that she observed no signs of injury or damage to S.E.M.'s genitals or anus during the exam. Nurse Laufenberg also offered some unexpected testimony regarding the victim's hymen and her estrogen levels:

Q. Did you examine her hymen to determine if it was intact?

A. Yes.

Q. What were you able to tell, if anything, on that?

A. It was difficult to assess her hymen because of the shape and the estrogen around her hymen, so I wasn't able to determine if the hymen was intact or not.

Q. You mentioned estrogen. Is that common in a ten year old like [S.E.M.]?

A. Not very common.

Q. How high were her levels of estrogen?

A. There was some estrogen there. It's hard to determine how much, but there was more than what I'm used to seeing in a ten year old.

Q. What's the significance of that, if any?

A. That she was able to tolerate penetration or that with the estrogen there you're not always able to notice if there is any injury because of the folds and that the hymen is like plump.

* * *

Q. The level of estrogen was unusual for a ten year old. Would that be consistent with repeated penetrations vaginally?

A. Could.

Q. How did [S.E.M.] tolerate the exam? Doesn't sound like it's very much fun for kids to go through? She tolerated it?

A. She tolerated it well.

Q. Is that unusual?

A. Yes.

Q. How so?

A. Basically because of the level of estrogen or the estrogen that she had. Typically on ten year olds or that age group, there isn't a lot of estrogen, so most of the time it burns or stings on a child when you do the scope or check for sexually transmitted diseases, and through the evaluation and assessment I even put a Foley catheter and inflated a balloon to see if I could make out the side of the hymen, and even with that procedure she tolerated it well without any pain or discomfort.

* * *

Q. In your opinion is that consistent with her having been penetrated anally and vaginally before by something?

A. Yes.

Transcript of Oct. 16, 2001 trial, dkt. 8 (vol. II), Exh. O at 44-46.

On cross-examination, Laufenberg testified that estrogen is a hormone and that it appears in young women in increasing amounts as they near the onset of menstruation. She confirmed that from her examination of S.E.M.'s hymen, she could not tell whether there ever had been vaginal penetration.

As part of his defense, petitioner testified on his own behalf. He admitted that he had been involved sexually with S.E.M.'s *mother*, but proclaimed that he had not had any sexual contact with S.E.M. He testified that when S.E.M. first accused him, he and her mother talked to her about it and then S.E.M.'s mother allowed her to speak alone with petitioner. Petitioner testified that S.E.M. then admitted to him that she had lied. On cross-examination, the prosecutor asked petitioner why S.E.M. would lie about the sexual assaults:

Q. Why would she say something like this then?

A. Don't ask me, ask her. You're asking me to assume something I cannot. I cannot think for somebody else.

Q. People lie for a reason, true?

A. I don't know.

Q. Well, have you ever lied?

A. I lie for my own reasons, but that's not -- I cannot judge other people.

Q. You lie for your own reasons, correct?

A. That's right.

Q. No further questions.

Transcript of Oct. 16, 2001 trial, dkt. 8 (vol. II), Exh. O at 135.

Redirect by petitioner's attorney followed immediately, and this is it in its entirely:

Q: Are you lying about having not had sex with [S.E.M.]?

A: I am not lying that I had sex with [S.E.M.] I did not touch her improperly or have sex with her.

Q: You tell white lies to spare people's feelings?

A: Yes.

Q: You know what a lie is?

A: Yes.

Q:You're not lying now?

A: No.

Q: About [S.E.M.]?

A: No.

*Id.* at 135-36.

The jury found petitioner guilty of all three counts and the court subsequently sentenced him to 44 years in prison.

Petitioner filed a post-conviction motion alleging that his trial counsel had been ineffective in three ways: 1) He failed to object when the prosecutor asked petitioner if he had ever lied; 2) He failed to object to Laufenberg's testimony about S.E.M.'s estrogen levels; and, 3) He failed to move *in limine* to exclude mention of the images found on petitioner's computer.

At an evidentiary hearing on this motion, petitioner's trial lawyer explained his strategy. As to the prosecutor's question to petitioner whether he ever lied, trial counsel explained that he did not object to the question because he believed it did not have much impact on petitioner's credibility. He reasoned that everybody tells insignificant lies sometimes:

> I knew that [the prosecutor] was about finished questioning [Molina] and I was just going to follow up, and said--well, in fact, I did that, are you lying about having--not having sex with [the victim], and [Molina] answered I'm not lying about that. So I didn't see that the question was harmful because I followed up on this directly, and I knew I was going to do that.

Transcript of Jan. 3. 2003 motion hearing, dkt. 8 (vol. II), Exh. R at 8-9.

As for Nurse Laufenberg's unexpected testimony about S.E.M.'s estrogen levels, counsel admitted that this testimony came as a surprise, because none of the exam reports or police reports had made any reference to estrogen levels or laboratory reports.[1] He also acknowledged that he did not know how Laufenberg could have offered an opinion about S.E.M.'s estrogen level simply from a visual inspection. However, counsel explained that he did not think this testimony was very harmful because the jury would understand that estrogen is a hormone produced by glands in the body and was not caused by penetration. He testified that he considered Laufenberg's testimony *helpful* because she established that there was no evidence that the victim's hymen was damaged or absent.

As for introduction of the fact that petitioner had adult pornography on his computer, counsel testified that he did not object because

> I didn't consider it especially damning about anything, but as soon as I make a big deal out of it, then it just registers more in the jury's mind. . . . I didn't consider it as indicative of anything but that there was some kind of adult images on the hard drive.

*Id.* at 27-28.

The trial court denied petitioner's request for a new trial, finding that petitioner had failed to establish that his trial lawyer was ineffective under the two-part test of *Strickland v. Washington*, 466 U.S. 668, 690 (1984). The court found that although it had been

[1] Petitioner conceded that the state possessed no information on this point that it had failed to disclose.

improper for the prosecutor to ask petitioner if he ever lied, defense counsel's failure to object could not have affected the outcome of the trial: the state's witnesses, particularly the child victim, were "extremely credible," compared to petitioner, who was "substantially less credible in his portrayal of the events." Jan. 22, 2003 Order, dkt. 8 (vol. I), Exh. B at 8. The court also found counsel's strategy regarding the estrogen evidence and the pornography evidence defensible, and found that none of these alleged errors undermined the court's confidence in the jury's verdict.

The Wisconsin Court of Appeals agreed. With respect to the cross-examination of petitioner, the appellate court found that it was reasonable for petitioner's lawyer to refrain from objecting to the question "have you ever lied?" and instead to rehabilitate petitioner's credibility on redirect. The court also found that this single question "was not as critical to Molina's credibility as he contends." *State v. Molina*, 2004 WI App 88, ¶ 6, 272 Wis. 2d 854, 679 N.W. 2d 926. (Reproduced at dkt. 8 (vol. I), Exh. F).

The court also found that trial counsel had employed a reasonable strategy when reacting to Nurse Laufenberg's unexpected testimony about S.E.C.'s estrogen levels. It agreed that Laufenberg's testimony was helpful to petitioner in that she testified that "she did not observe any damage or injury to the victim's genitals or anus and was unable to determine if the hymen was intact." *Id*. at ¶ 10. The court also found that petitioner had failed to establish that he had been prejudiced by admission of her testimony. As for petitioner's claim that his lawyer should have moved for adjournment or mistrial so he could have retained his own expert witness to rebut Laufenberg, the court noted that petitioner

had not demonstrated that trial counsel could have produced such expert testimony. The court found equally unsupported petitioner's contention that Laufenberg's testimony lacked foundation, noting that petitioner had not shown that Laufenberg's testimony actually lacked foundation. *Id*. The court denied petitioner's motion for remand to the trial court for a supplementary evidentiary hearing addressing the foundation for Laufenberg's testimony, concluding that it was mere speculation for petitioner to claim that another hearing would produce relevant evidence. *Id*. at ¶ 16.

Finally, the court rejected petitioner's claim that his lawyer erred by failing to seek exclusion of the fact that petitioner kept adult pornography on his computer.[2] The court noted that such evidence was relevant because it corroborated S.E.M.'s testimony that petitioner had shown her pornographic images on his computer. *Id*. at ¶ 14. It also found that this evidence actually supported Molina's assertion that he considered only adults sexually attractive, not children. *Id*. Accordingly, the court found that admission of the this evidence was not unfairly prejudicial. *Id*.

The state supreme court denied petitioner's petition for review, making the court of appeals's decision the last reasoned state court decision on petitioner's claims.

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[2] The appellate court's word choice implies that the jurors actually saw the images. They did not: a detective simply testified that petitioner's computer contained "pictures of naked adults in different positions, male and female." He admitted on cross examination that there was no child pornography in petitioner's computer. Exh. 0 at 89, 96.

## ANALYSIS

In his petition to this court, petitioner reasserts his three claims of ineffective assistance of counsel. Title 28 U.S.C. § 2254(d) provides that habeas relief may be granted only if the adjudication of these claims by the state courts resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or if it resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

As a starting point, the state courts' adjudication of petitioner's claims was not "contrary" to federal law: the trial and appellate courts both employed the test for ineffective assistance claims laid out by the Supreme Court in *Strickland*. (The court of appeals cited *State v. Pitsch*, 124 Wis.2d 628, 633-34, 369 N.W.2d 711 (1985), which adopted *Strickland* test). Therefore, the question is whether the courts' application of *Strickland*'s two-part test was unreasonable.

The Supreme Court explained in *Williams v. Taylor*, 529 U.S. 362, 410 (2000), that an unreasonable application of federal law is different from an incorrect application of federal law:

> [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

*Id*. at 411.

In a case involving a flexible constitutional standard, a state court determination is not unreasonable if the court "takes the rule seriously and produces an answer within the range of defensible positions." *Mendiola v. Schomig*, 224 F.3d 589, 591 (7th Cir. 2000). The reasonableness inquiry focuses on the outcome and not the reasoning provided by the state court. *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997). A decision that is at least minimally consistent with the facts and circumstances of the case is not unreasonable. *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002). *See also Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir.2002) (decision is "unreasonable" if it lies "well outside the boundaries of permissible differences of opinion"); *Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir. 2003) ("for a given set of facts there exists the possibility of several equally plausible outcomes. Our task is to uphold those outcomes which comport with recognized conventions of legal reasoning and set aside those which do not").

Petitioners who have received a reasoned state court decision applying *Strickland* to their claims of attorney ineffectiveness face an even tougher battle. As the court explained in *Holman v. Gilmore*, 126 F.3d 876 (7th Cir. 1997):

> *Strickland* builds in an element of deference to counsel's choices in conducting the litigation; § 2254(d)(1) adds a layer of respect for a state court's application of the legal standard. As we put it in *Lindh*, "when the constitutional question is a matter of degree, rather than of concrete entitlements, a 'reasonable' decision by the state court must be honored." 96 F.3d at 871. *Strickland* calls for inquiry into degrees; it is a balancing rather than a bright-line approach, just like the question about confrontation rights we addressed in *Lindh*. This means that

> only a clear error in applying *Strickland*'s standard would support a writ of habeas corpus.

*Id*. at 881-882.

Having read the trial and postconviction motion hearing transcripts, petitioner's briefs, the trial court's order denying post-conviction relief and the court of appeals's decision, I conclude that the state courts did not commit "clear error" when they rejected all three of petitioner's claims of ineffective assistance of counsel. Indeed, if this court were to review the matter *de novo*, it would reach the same result.

In this case, *Strickland's* second prong is a good place to start: following petitioner's post-conviction motion hearing, the circuit court concluded that the evidence against petitioner was so strong that petitioner could not have been prejudiced by his attorney's challenged acts and omissions, even if they were characterized as deficiencies rather than defensible tactical choices. The trial judge, who saw and heard every witness testify, deemed S.E.M. "extremely credible," and deemed petitioner "substantially less credible in his portrayal of the events." This conclusion could end this court's inquiry, since a habeas court need not analyze both prongs of the *Strickland* test if it determines that the petitioner has failed to establish either deficient performance or resulting prejudice. *Pisciotti v. Washington*, 143 F.3d 296, 301 (7th Cir. 1998). It would not be unreasonable for the trial court, which had sat through the trial along with the jury, to conclude that the evidence of petitioner's guilt was so clear that the alleged errors could not have prejudiced him.

Backing up to the first prong of *Strickland*, it was not clearly erroneous for the court of appeals to conclude that the three challenged acts and omissions by counsel were defensible tactical decisions that did not amount, singly or jointly, to deficient performance. Even if a different court could have reached different conclusions on any or all of counsel's alleged missteps, the state court's analysis is inside the boundaries of permissible differences of opinion and its outcome comports with recognized conventions of legal reasoning.

There is not much heft to petitioner's contention that trial counsel should have objected to Laufenberg's unexpected testimony about S.E.M.'s high estrogen levels. Counsel testified that he did not object to this testimony because he didn't think the jury would connect estrogen levels to sexual activity and because Laufenberg's testimony was helpful insofar as she testified that she did not observe any physical injuries and could not tell if the hymen was intact. The court of appeals agreed with counsel's assessment that Laufenberg's testimony was helpful, not detrimental to petitioner; perforce, it concluded that counsel's strategic decision at trial was sound.

Even if Laufenberg's testimony had been harmful to petitioner and his lawyer should have objected to it, petitioner cannot succeed on his ineffective assistance claim unless he can show that a timely objection would have blocked the evidence. How could Laufenberg offer an opinion from visual inspection alone that there was "some" estrogen in the area of S.E.M.'s hymen? Maybe there's a logical explanation, maybe not, but no one ever asked her. Petitioner contends that an objection for lack of foundation would have been sustained, but

petitioner has not established that Laufenberg would have been unable to lay the necessary foundation if she was challenged. Absent a showing that Laufenberg's testimony *in fact* lacked foundation, petitioner cannot establish that his attorney actually could have prevented its admission, or that he could have obtained expert testimony to rebut it.

In his submissions to the appellate court petitioner merely raised questions about the basis of Laufenberg's estrogen testimony. But under *Strickland*, petitioner had the burden to "affirmatively prove prejudice." 466 U.S. at 693. It was not unreasonable for the court of appeals to conclude that petitioner had not met his burden under *Strickland* merely by questioning the basis for Laufenberg's testimony without showing that those questions would have been answered in petitioner's favor. Accordingly, the court of appeals reasonably applied *Strickland* when it concluded that petitioner had failed to show that Laufenberg's testimony prejudiced him. Therefore, petitioner is not entitled to habeas relief on this claim.

Petitioner's two remaining claims require less discussion. As for the prosecutor's improper "have you ever lied" question, defense counsel articulated non-specious reasons for refraining from objecting: 1) He did not deem the question particularly harmful because "everybody lies at one time or another" and, 2) He was able to follow up with immediate redirect. The court of appeals found that this was a reasonable tactical approach, noting that an objection would have drawn the jury's attention to the question. As the Supreme Court made clear in *Strickland*, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466

U.S. at 690. The court of appeals reasonably applied this rule when it concluded that counsel took a reasonable approach to a difficult situation.

Finally, the court reasonably concluded that counsel did not perform deficiently when he failed to seek to exclude the pornography evidence. First, as the court noted, the evidence likely was admissible even in the face of objection because it corroborated S.E.M.'s testimony that petitioner had shown her pictures of nude adults that were displayed on his computer, and it was relevant to prove petitioner's alleged intent to "groom" S.E.M. for assault. Any prejudice to petitioner was slight: the jury did not see the images, they were mentioned almost in passing, there was no suggestion that the images were obscene, and the jury learned that there were no images of minors, which helped corroborate petitioner's subsequent testimony that he was sexually interested in adults, not children. A motion *in limine* would have had little chance of success; therefore, it was not clear error for the court of appeals to conclude that a decision not to file one did not equal deficient performance.

## CONCLUSION

Petitioner has failed to show that the state courts committed clear error in their evaluation of his ineffectiveness claims under *Strickland*. Indeed, counsel's challenged decisions all were reasonable strategic choices, and there is no showing that petitioner was prejudiced by the acts and omissions of which he complains. There are no grounds on which to grant relief.

## RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B), I recommend that Sebastian Molina's petition for a writ of habeas corpus be DENIED.

Entered this 3rd day of November, 2005.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WISCONSIN**
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November 4, 2005

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Re: Molina v. Kingston
Case No. 05-C-282-C

Dear Mr. Molina and Ms. Tripp:

The attached Report and Recommendation has been filed with the court by the United States Magistrate Judge.

The court will delay consideration of the Report in order to give the parties an opportunity to comment on the magistrate judge's recommendations.

In accordance with the provisions set forth in the memorandum of the Clerk of Court for this district which is also enclosed, objections to any portion of the report may be raised by either party on or before November 23, 2005, by filing a memorandum with the court with a copy to opposing counsel.

If no memorandum is received by November 23, 2005, the court will proceed to consider the magistrate judge's Report and Recommendation.

Sincerely,
/s/ S. Vogel for
Connie A. Korth
Secretary to Magistrate Judge Crocker

Enclosures
cc: Honorable Barbara B. Crabb, District Judge