

TO BE PUBLISHED  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION

DONALD L. BOSS, JR.,

Petitioner,

vs.

NICK LUDWICK

Respondent.

No. C11-4014-MWB

**REPORT AND RECOMMENDATION  
ON PETITION FOR WRIT OF  
HABEAS CORPUS PURSUANT TO  
28 U.S.C. § 2254**

---

***I. FACTUAL AND PROCEDURAL BACKGROUND***

Donald L. Boss, Jr. was convicted of first-degree murder of his adopted son and sentenced to life imprisonment without parole. He appealed to the Iowa Court of Appeals, which upheld his conviction. *State v. Boss*, 796 N.W.2d 458, at \*1-2 (Iowa Ct. App. Jan. 28, 2004) (unpublished table decision). The Iowa Supreme Court denied further review.

Boss then filed a state action for post-conviction relief (PCR), which was denied. Boss appealed, and the Iowa Court of Appeals affirmed. *Boss v. State*, 789 N.W.2d 165, at \*2 (Iowa Ct. App. Aug. 11, 2010) (unpublished table decision). The Iowa Supreme Court denied further review.

On March 8, 2011, Boss' *pro se* petition for writ of habeas corpus was filed in this court after being transferred from the Southern District of Iowa. (Doc. No. 9). Attorney Rockne Cole was appointed to represent Boss and he filed a motion to stay due to unexhausted claims. (Doc. No. 29). His motion was denied. (Doc. No. 41). Grounds Two and Five of the petition were dismissed with prejudice, leaving three

remaining grounds in his petition. Boss filed his merits brief on June 15, 2012, and indicated he was only seeking relief on Ground One—ineffective assistance of counsel based on the facts surrounding his counsel’s advice to disclose the location of the deceased’s body during a pretrial bond hearing. (Doc No. 44-1 at 9, 34). The respondent filed its merits brief on September 5, 2012. (Doc. No. 51). Boss filed a pro se “response” to respondent’s brief on September 18, 2012, and filed a reply brief through counsel on November 6, 2012. (Doc. Nos. 55, 60). The matter is fully submitted.

The factual background for Boss’ trial was summarized by the Iowa Court of Appeals in its opinion on Boss’ direct appeal. Absent rebuttal by clear and convincing evidence, I must presume that any factual determinations made by the Iowa courts were correct. 28 U.S.C. § 2254(e)(1); *see Bell v. Norris*, 586 F.3d 624, 630 (8th Cir. 2009) (a federal court must deem factual findings by the state court to be presumptively correct, subject to disturbance only if proven incorrect by clear and convincing evidence). As no such rebuttal has been made, I adopt the following facts as determined by the Iowa Court of Appeals:

Donald and Lisa Boss adopted Timothy in Michigan before moving to Remsen, Iowa. Timothy was a special needs child, and the Bosses received subsidies from the State of Michigan for his care.

On January 2, 2002, the Plymouth County Sheriff’s Department received a request from authorities in the State of Michigan to check on Timothy’s welfare. Deputies Bartolozzi and TeBrink went to the Boss residence where Lisa Boss told them Timothy was living in Kentucky with her sister. Lisa Boss’s sister revealed Timothy was not with her and she had not seen him in a year and a half.

Sheriff’s deputies returned to the Boss home that night and found Lisa and the children were gone. Donald Boss was at the residence and agreed to speak with the deputies. Boss informed them Timothy had caused a great deal of trouble in the family and his wife had decided to return to Michigan

with Timothy. At the end of the interview, Boss stated, "Guess I bought a year and a half and it's over. My life's over now." Boss agreed to return to the sheriff's office with the deputies.

On the trip to the sheriff's office, Boss made several incriminating statements. He admitted the version of events he had given at his home was not the truth. He said Timothy had fallen and hit his head, but the fall had not killed him. He said Timothy's death was not accidental. Boss admitted to beating Timothy and stated he thought he may have given Timothy an overdose of Doxil, a drug used for the treatment of Attention Deficit Disorder. Boss was later charged with murder.

On February 25, 2002, a hearing was held on Boss's request for a reduction in bond. Boss's counsel presented to the State's attorneys a typewritten statement signed by Donald Boss. It said Timothy's body was under the floor in the basement of the Boss family home and it granted the State permission to take whatever steps were necessary to retrieve the body. State authorities broke through the concrete flooring and discovered Timothy's decomposed body wrapped in a blanket. Because there was very little soft tissue on the body, no specific cause of death could be determined. There were, however, signs of prior injuries to the bones of the arms and teeth. A small bone in Timothy's left hand had been broken.

Timothy's brothers, Claxton and Roman, testified at Donald Boss's murder trial. They stated Timothy was disciplined for attempting to escape a locked room through a hole he had punched in the wall. Timothy was then tied to an orange folding chair with plastic ties. A plastic tie was also placed around Timothy's neck and attached to a shelf. Timothy was then beaten with a wooden paddle or board. Timothy was then left tied to the chair. When Donald Boss cut Timothy from the chair hours later, Timothy slumped to the floor. Attempts to revive Timothy failed. Timothy was then taken upstairs and placed in a bathtub of cold water.

The evidence also revealed Donald Boss rented a cement saw, cut a hole in the basement floor, and buried Timothy.

He then poured a concrete slab and covered it with carpet. Boss told the members of the family he had taken Timothy back to Michigan. He filed a report with the State of Michigan to continue to receive subsidies for his adoption.

*State v. Boss*, 796 N.W.2d at \*1-2.

As noted above, Boss seeks habeas relief based solely on a claim of ineffective assistance of counsel. The factual background arises from a bond review hearing conducted on February 25, 2002. Boss was represented by Michael Williams, an assistant public defender. Transcript of Bond Hearing (Bond Tr.) 2. At the hearing, Boss' mother and father testified about their ability to pay his bond. Bond Tr. 2-6. Boss testified about his current living situation and his employment history. The hearing then took a drastic turn:

Williams: Do you have a pretty steady employment history?

Boss: I've never been without a job.

Williams: Did you sign this document directing the authorities to the location of the body of Timothy Boss?

Boss: Yes, I did.

Williams: Thank you. That's all I have.

Bond Tr. 8. After taking a moment, Charles Thoman, assistant attorney general, proceeded with cross-examination.

Thoman: Mr. Boss, I've just been handed a statement from your lawyer that says, in the middle of the floor of the basement room at 602 Fulton Street, Remsen, Iowa, with the door that leads outside, that's where the body of Timothy Boss is located. Is that what this statement says?

Boss: Yes, it is.

Thoman: And this is your signature on it dated 2-25-02?

Boss: Yes, it is.

Thoman: Did you put him under the floor in that location?

Bond Tr. 8-9. Williams objected on grounds that the question was beyond the scope of direct examination. Bond Tr. 9. The judge then suggested that Boss could decide not to answer based on his right against self-incrimination. Boss ultimately invoked his Fifth Amendment right after his attorney advised him to do so. Bond Tr. 9-10. Thoman then raised the issues of whether Boss waived that right by testifying and whether the court would consider his invocation of the Fifth Amendment in deciding whether to reduce his bond. Bond Tr. 11. The judge stated: “The defendant’s decision to invoke his Fifth Amendment right is a factor the court is going to consider in determining whether or not the bond should be reduced or modified.” *Id.* Williams responded by stating: “Your Honor, I will take exception to the court’s ruling. The Fifth Amendment is to protect the guilty as well as the innocent.” *Id.*

Thoman then asked Boss if he intended to invoke his Fifth Amendment right to any and all questions he would ask. Bond Tr. 12. Boss responded that he would answer questions that would not incriminate him. Thoman then asked Boss if he killed Timothy Boss. Williams objected but Boss answered “No, I didn’t.” *Id.* Thoman asked: “Did you hide his body in the middle of the floor in the basement room at 602 Fulton Street, Remsen, Iowa[?]” *Id.* Boss responded by invoking the Fifth Amendment. Bond Tr. 13. Thoman ultimately moved to continue the hearing to allow briefing of the Fifth Amendment issue. Williams did not object and the court granted the motion. Bond Tr. 13-14.

Boss alleges ineffective assistance of counsel based on his attorney’s advice to disclose the location of the body and allegedly-inadequate consultation by his attorney

prior to Boss giving consent.<sup>1</sup> Boss argues the Iowa Court of Appeals decision on post-conviction relief was “contrary to” and an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984) and requests this court grant him a new trial.

## **II. STANDARD OF REVIEW**

Boss brings this petition pursuant to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Section 2254(a) provides that “a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

Under AEDPA, federal courts apply a “deferential standard of review” to the state court’s determinations of law and fact if the state court adjudicated the claim on the merits. *Taylor v. Bowersox*, 329 F.3d 963, 967-68 (8th Cir. 2003). Section 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

---

<sup>1</sup> In his briefing, Boss is also critical of his trial counsel for (a) stating during the bond hearing that “the Fifth Amendment is to protect the guilty as well as the innocent” and (b) failing to advance the “blame Lisa” theory during that hearing. Boss did not raise these as separate grounds for relief, instead briefing only Ground One, entitled “Ineffective Counsel Based Upon Trial Counsel’s Recommendation To Disclose Location Of Body During A Bond Hearing.” Doc. No. 44-1 at 3, 34-35. In any event, I find that these other alleged errors are not so “egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair” or “so prejudicial as to amount to a denial of due process.” *Garcia v. Mathes*, 474 F.3d 1014, 1017 (8th Cir. 2007). As such, I will not address them separately.

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Boss brings his petition under section 2254(d)(1). There are two categories of cases under this section that may provide a state prisoner with grounds for federal habeas relief: (1) if the relevant state-court decision was “*contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,*” or (2) if the relevant state-court decision “involved an *unreasonable application* of . . . clearly established Federal law, as determined by the Supreme Court of the United States.” *Williams v. Taylor*, 529 U.S. 362, 404-05, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (quoting 28 U.S.C. § 2254(d)(1)) [emphasis added]. Boss brings his claim under both prongs.

A state court’s decision is contrary to the Supreme Court’s clearly established precedent when it applies a rule that contradicts the governing law set forth by the Court. *Williams*, 529 U.S. at 405. A “habeas petition might be granted on one of two grounds under the ‘contrary to’ clause of § 2254(d)(1): ‘if the state court arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law’ or if it ‘decide[d] a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.’” *Losh v. Fabian*, 592 F.3d 820, 823 (8th Cir. 2010) (quoting *Williams*, 529 U.S. at 412-13).

A state court can violate the “unreasonable application” clause of section 2254(d)(1) in two ways: (a) where “the state court identifies the correct governing legal rule from the [Supreme] Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case”; or (b) where “the State court either unreasonably extends a legal principle from [Supreme] Court precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Williams*, 529 U.S. at 407. Under this prong, if a

state court's application of clearly established federal law was not unreasonable, the court may not grant habeas relief even if in its judgment, the state court's application was incorrect. *See id.* at 411. "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332, n.5, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (Stevens, J., concurring in judgment)).

The state court reviews a post-conviction relief petition based on ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the person challenging a conviction must show both (1) that counsel provided deficient assistance to the extent that "counsel's representation fell below an objective standard of reasonableness" and (2) that there was prejudice as a result. *Id.* at 688. The errors must be "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and the defendant was deprived of a fair trial. *Id.* at 687. The court applies a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

### ***III. DISCUSSION***

Boss argues that the state court decision is both contrary to, and an unreasonable application of, *Strickland*. On the issue of prejudice, Boss asserts that both state court decisions are contrary to clearly established federal law because the courts applied a "preponderance of the evidence" standard to determine whether there was prejudice instead of the "reasonable probability" standard articulated in *Strickland*. On the issue of deficient performance by counsel, Boss alleges that the Iowa Court of Appeals applied *Strickland* unreasonably.

## A. *Prejudice*

Both state courts either found, or at least assumed, that Boss established the prejudice element,<sup>2</sup> instead denying Boss' petition on the issue of deficient performance. It is this holding that Boss must show is contrary to or an unreasonable application of federal law to prevail on his habeas petition in federal court. Nevertheless, Boss devotes much of his merits brief to the issue of prejudice, making arguments that are somewhat contradictory. He argues that the Iowa Court of Appeals allegedly applied an incorrect legal standard to the question of prejudice and asks me to review prejudice *de novo*. At the same time, he repeatedly states that both the Iowa District Court and the Iowa Court of Appeals found *in his favor* with regard to prejudice. See Doc. No. 44-1 at 18, 20, 25, 34.

Whether the state courts found prejudice or I review the issue *de novo*,<sup>3</sup> Boss has satisfied this element. Thus, it is not necessary for me to conduct a full analysis of

---

<sup>2</sup> The Iowa District Court stated:

Unlike most of Boss' other arguments, it is clear the lack of a body may have resulted in significant prejudice at trial. However it also clear that the test for ineffective assistance of counsel is a two-prong test. Prejudice is the second factor to be weighed and it only needs to be addressed if counsel's conduct essentially resulted in the failure of an essential duty by failing to act as a reasonable attorney would.

PCR Ruling, Respondent's Habeas Appendix, Doc. No. 51-1 at 29-30. The Iowa Court of Appeals noted that the district court had "observed the disclosure 'may have resulted in significant prejudice at trial.'" *Boss v. State*, 789 N.W.2d at \*3. It then acknowledged that "the ultimate effect of revealing the location of Timothy's body may have been prejudicial to Boss's defense . . . ." *Id.*

<sup>3</sup> By stating Boss would be able to establish prejudice on *de novo* review, I do not adopt Boss' argument that the Iowa Court of Appeals applied a legal standard that was contrary to federal law. Even if I did accept that argument, the result would simply be a *de novo* review of the prejudice element, see *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1239 (9th Cir. 2005); *Romine v. Head*, 253 F.3d 1349, 1364-65 (11th Cir. 2001); *Dyer v. Bowlen*, 465 F.3d 280, 284 (6th Cir. 2006), and Boss would still have to prove that the Iowa Court of Appeals unreasonably applied *Strickland* with regard to deficient performance. Boss would also be

Boss' arguments about prejudice. His habeas petition turns on whether the Iowa Court of Appeals unreasonably applied *Strickland* in finding there was no deficient performance.

**B. *Deficiency of Performance***

To prove deficient performance under *Strickland*, the petitioner must show that “counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. Both state courts expressly rejected Boss’ ineffective assistance of counsel claim based on this prong. Therefore, the Iowa Court of Appeals decision will be reviewed with AEDPA deference to determine if it unreasonably applied *Strickland*.

Boss makes three separate arguments with regard to whether the state courts unreasonably applied *Strickland* in deciding Boss’ counsel’s representation did not fall below an objective standard of reasonableness. First, he argues the district court created an impermissible “affirmative defense” in finding that the State had proven that the decision to disclose the body was tactical. Second, he argues the Iowa Court of Appeals unreasonably applied *Strickland* by deciding his counsel’s advice to disclose the body did not constitute representation that fell below an objective standard of reasonableness. Finally, he argues the Iowa Court of Appeals unreasonably applied *Strickland* because it primarily focused on the fact that Boss consented to the disclosure and it should have also considered whether his counsel provided adequate consultation on the potential risks of disclosing the body. I will address each argument separately below.

---

entitled to *de novo* review if I found that the Iowa Court of Appeals did not adjudicate the issue of prejudice. Regardless of the reason for *de novo* review, I would find there is a reasonable probability the result of the proceeding would have been different but for Boss’ disclosure of the body’s location. Indeed, *de novo* review would be inappropriate on the issue of prejudice only if the Iowa Court of Appeals applied the correct legal standard in finding prejudice. Of course, Boss would not challenge that finding, so it would not be reviewed. In short, all possible analyses lead to the same result: Boss has established prejudice.

### 1. *The Alleged “Affirmative Defense”*

Boss argues the Iowa Court of Appeals, through adoption of the district court’s opinion,<sup>4</sup> impermissibly created an affirmative defense for the State that is not available through *Strickland*. He argues the courts allowed the State to affirmatively prove that the attorneys’ alleged ineffectiveness was justified by stating: “The Court believes that under a preponderance of the evidence standard, Williams and Jones have shown enough evidence that they made a tactical decision in support of a legal strategy that could have been aided by the disclosure of the body.” PCR Ruling, Respondent’s Habeas Appendix, Doc. No. 51-1 at 34. Boss believes the correct standard is for the petitioner to prove by a preponderance of the evidence that his counsel’s representation fell below an objective standard of reasonableness. Therefore, he argues the state courts unreasonably applied *Strickland v. Washington*. The respondent argues the district court’s finding that the defense attorneys “have shown enough evidence that they made a tactical decision” to disclose the body’s location is another way of stating that Boss failed to establish a breach of duty and the court did not shift the burden of proof in phrasing it this way.

Under *Strickland*, the defendant must show that “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” 466 U.S. at 687. This requires a showing that counsel’s representation fell below an objective standard of reasonableness. *Id.* at 688. “Judicial scrutiny of counsel’s performance must be highly deferential” and “the defendant must overcome

---

<sup>4</sup> Boss suggests the rulings of the Iowa District Court and the Iowa Court of Appeals should be considered together based on the “look through” doctrine. *See Winfield v. Roper*, 460 F.3d 1026, 1037-38 (8th Cir. 2006) (noting in some circumstances, federal courts may “look through” a state supreme court decision to the last reasoned decision of the lower state court on that issue). In support, Boss points out the Court of Appeals quoted large parts of the District Court’s opinion with approval and did not disavow the District Court opinion. He also argues its silence on certain issues should imply consent. I find that the Iowa Court of Appeals sufficiently conducted its own analysis on this issue and should be considered the last reasoned decision, but I will nonetheless consider the District Court decision in conjunction with the Court of Appeals decision to address Boss’ specific arguments.

the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.” *Id.* at 689.

The Iowa District Court held:

Trial counsel is only ineffective when their conduct is so egregious that they failed an essential duty. The Court does not believe this is such a case. The legal defense team had a strategy, though admittedly a novel one, to disclose the body to help with their overall strategy of placing the blame on parties or events other than Boss. The Court, after hearing the defense team's rationale for their actions believes they had a legitimate strategy in mind, though it also believes such a strategy may have been misguided. A trial strategy that is reasonable, though imperfect and ultimately unsuccessful is not ineffective assistance of counsel. *State v. Johnson*, 604 N.W.2d 669, 673 (Iowa Ct. App. 1999). "Improvident trial strategy or miscalculated tactics do not necessarily constitute ineffective assistance of counsel." *Wemark v. State*, 602 N.W.2d 810, 814 (quoting *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981)).

The Court realizes this piece of evidence could have significantly changed the trial at numerous stages, but prejudice only becomes a factor when the legal strategy is so misguided that it cannot be truly be [sic] called a legitimate legal strategy. The Court believes that under a preponderance of the evidence standard, Williams and Jones have shown enough evidence that they made a tactical decision in support of a legal strategy that could have been aided by the disclosure of the body. The fact that this legal strategy may have backfired does not render their assistance ineffective.

PCR Ruling, Respondent's Habeas Appendix, Doc. No. 51-1 at 34. On the same issue, the Iowa Court of Appeals held:

It is clear from the record that defense counsel was concerned that Lisa would reveal the location of the body. Counsel also was concerned about the media coverage of the case and Lisa's statements in the media. We conclude there was a rational explanation for disclosing the location of the

body as quickly as possible to "beat [Lisa] to the punch." While the ultimate effect of revealing the location of Timothy's body may have been prejudicial to Boss's defense, we agree with the postconviction court that defense counsel had a "legitimate strategy in mind" that was based on extensive experience, considered deliberation, discussion with the defendant, and the unfolding circumstances as the case proceeded. This is not a failure in an essential duty. Boss has not overcome the strong presumption that his counsel's performance fell within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689-90, 104 S. Ct. at 2065-66, 80 L. Ed. 2d at 693-94.

*Boss v. State*, 789 N.W.2d at \*3. Neither court created an "affirmative defense" in finding that the attorneys made a tactical decision and their performance constituted legitimate legal strategy. Although the district court decision could have been better phrased, the court essentially concluded that Boss was not able to rebut the presumption or the evidence that his counsels' performance was within the wide range of reasonable professional assistance. Nothing in the state court opinions suggests the courts found that Boss had actually proved deficient performance, but then relied on an "affirmative defense" of legal strategy to conclude there was no ineffective assistance of counsel. The courts found that there was no deficient performance *because* there was evidence that the attorneys made a tactical decision which constituted legitimate legal strategy. This is more clearly stated in the Iowa Court of Appeals' decision. Neither court created an "affirmative defense" or unreasonably applied *Strickland* in the manner Boss suggests.

## **2. *Counsel's Advice to Disclose Location of Body***

Boss also argues the Iowa Court of Appeals unreasonably applied *Strickland* based on the facts surrounding his decision to disclose the location of the body. First, he argues it was unreasonable for the Iowa Court of Appeals to find that counsel's advice to disclose the location of the body reflected legitimate legal strategy. Because

the Iowa Court of Appeals decided Boss' ineffective assistance of counsel claim based on Boss' inability to prove deficient performance, I must determine whether its decision was an unreasonable application of *Strickland*. This is a highly deferential inquiry because "[a] state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Harrington v. Richter*, \_\_ U.S. \_\_, 131 S. Ct. 770, 785-86, 178 L. Ed. 2d 624 (2011). "Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Id.* Therefore, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, 131 S. Ct. at 786 (citing *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003)).

For a claim to be successful under section 2254(d)(1), "[i]t is not enough that the state court applied clearly established federal law erroneously or incorrectly—the application must additionally be unreasonable." *Jones v. Wilder-Tomlinson*, 577 F. Supp. 2d 1064, 1073 (N.D. Iowa 2008) (Bennett, J.) (citing *Williams*, 529 U.S. at 411; *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) ("an unreasonable application is different from an incorrect one.")). See *Ringo v. Roper*, 472 F.3d 1001, 1003 (8th Cir. 2007) (same). "[A] federal court may not grant the petition unless the state court decision, viewed objectively and on the merits, cannot be justified under existing Supreme Court precedent." *Jones*, 577 F. Supp. 2d at 74 (citing *James v. Bowersox*, 187 F.3d 866, 869 (8th Cir. 1999)); see *Collier v. Norris*, 485 F.3d 415, 421 (8th Cir. 2007) (to be overturned, the state court's application of federal law must have been "objectively unreasonable") (citing *Lyons v. Luebbers*, 403 F.3d 585, 592 (8th Cir. 2005)).

As summarized above, both state courts concluded that there was a legitimate strategy behind counsel's decision to have Boss consent to disclose the location of the

body. I find that the Iowa Court of Appeals did not unreasonably apply *Strickland* in reaching this conclusion. At the evidentiary hearing on Boss' PCR action, Boss testified that initially his attorney, Williams, did not want to know the location of the body. PCR Tr. 83. Boss said Williams asked about the location of the body because he thought it could help Boss' case. Boss said Williams convinced him that it was in his best interest to disclose the location of the body and Boss followed Williams' instructions. *Id.*

Boss testified Williams did not tell him his reasoning and he was unaware of what it was. *Id.* However, he went on to state:

The only thing I remember him saying – and at this time Lisa was making several statements to the media – or maybe not to the media, but they were ending up the media – and, you know, none of them were true. And Mike [Williams] knew from our conversations that Lisa was fully aware of where Timothy was and her involvement in Timothy's death. And he wanted Lisa – well, he wanted Lisa to shut up, quit talking; and he felt that once this information was presented that, ultimately, she would back off and she did.

PCR Tr. 85. Boss said he thought the letter disclosing the body that was presented at the bond hearing was going to be used to negotiate a possible bond reduction. PCR Tr. 89-90. Boss was aware that Williams had consulted with someone as to whether there would be any evidence from the body that would support a theory that Timothy had been overmedicated. PCR Tr. 90. However, Boss testified that Williams told him there would be no way that any evidence could be gained from disclosing the body to show a drug overdose. PCR Tr. 122. Boss denied that he had discussed with his attorney the possibility that cigarette butts with Lisa Boss' DNA could be recovered from the location or that they were worried Lisa Boss might disclose the location of the body first. PCR Tr. 122-23.

Williams also testified at the post-conviction relief hearing and said his defense strategy was to "Blame Lisa." PCR Tr. 160. Williams explained:

Somehow this kid died. Kids don't just die. It's either one of the other kids, Donald, Lisa or somebody that came in the house and did something. Based on the information I had – based on the information I had, the reasonable explanation that I thought would be the most palatable and the most persuasive would have been to blame Lisa.

PCR Tr. 160. Williams stated that prior to disclosing the body, he learned whatever information he could from Boss about the nature of where Timothy had been buried.

PCR Tr. 161. He said he learned from Boss that there were cigarette butts underneath the body that would have been traceable to Lisa Boss, putting her at the scene. *Id.* Williams elaborated on his reasoning for giving up this information to the prosecution.

PCR Tr. 165.

The overriding consideration, of course, was the Lisa factor. She was someone that, in my opinion, would do anything she had to to manipulate the system, to lie to the authorities. Her level of fidelity to Mr. Boss was questionable given, I think, information that we had. I believe that at the time Ms. Moss [Lisa's attorney] was more than willing to talk to the press, that Lisa was going to cooperate with only the authorities and not with us, which seemed to be a bit of a shot over the bow.

Lisa – we knew, from my understanding of things, Lisa knew exactly where that body was. And my primary goal was to make sure that we did not get sunk by that torpedo from her. It was a very important issue.

Another issue was Donald's presence in the community, in the press, was abysmal. And one issue that we could help, obviously, would be if he would take what appeared to be a moral high ground and disclose where the body was even if there was no direct benefit to him that it could play out later on with the jury. Who knows? But it would certainly – although obviously an out-of-the-box kind of thinking, it certainly could have some benefits.

PCR Tr. 165-66. Williams also testified that he thought the discovery of the body by investigators was inevitable. He said he was concerned about potential DNA evidence

being recovered from the body, but thought it was unlikely, due to the length of time and the nature of the internment. This was based on Williams' previous experience with DNA cases and although he was not sure, he thought he had also consulted an expert on the matter. PCR Tr. 167. Williams said he and Boss discussed whether there would be any artifacts of injury to the child. Boss told him there might be noticeable injury to Timothy's hand, but Williams thought that could be explained with evidence that the Boss children would break through the wall and were generally aggressive with each other, other people and objects. PCR Tr. 168. Williams said they also took into account the fact that Lisa Boss was the primary caretaker who gave the children their medications and could have possibly overmedicated Timothy. *Id.*

When asked if the key reason for giving up the location of Timothy's body was to "beat Lisa Boss to the punch," Williams answered, "I wouldn't put it that way." PCR Tr. 171. He explained, "[T]hey all combined together to form a gestalt to lead to a decision – obviously with the approval of Mr. Boss – to the decision to disclose. So certainly the Lisa factor was a major part of that but I hazard to say a key part." PCR 171-72. Significantly, Williams testified the decision to disclose the body was not a rushed decision, as he had discussed it with co-counsel and the state public defender. PCR 210-11.

I find the state courts did not unreasonably apply *Strickland* in concluding that Boss' attorney had a legitimate strategy in mind when he advised Boss to disclose the location of the body. Boss acknowledged part of that strategy as wanting to dissuade Lisa Boss from communicating with the media. Boss also admitted that Williams had convinced him that disclosing the location of the body was in his best interest. Boss' and Williams' testimony provided a sufficient foundation for the state courts to reasonably conclude that Williams' representation did not fall below an objective standard of reasonableness under *Strickland*.

### 3. *Adequate Consultation Before Consent*

Even if Boss' counsel had a legitimate strategy in mind, Boss argues the Iowa Court of Appeals unreasonably applied *Strickland* because it failed to consider whether his counsel adequately consulted with him about the significant risks associated with disclosure.<sup>5</sup> The respondent relies on the presumption afforded to the state court's factual findings on this issue and argues Boss has failed to rebut those findings by clear and convincing evidence.

The Iowa District Court made the following finding concerning Boss' informed consent to this disclosure:

Boss gave his consent to Williams for disclosure of the body though he now thinks such consent was unwise. He states he communicated to his counsel that he believed Lisa would never disclose the location of the body, but knew that one of the reasons for Williams' proposed action was to get Lisa to "quit talking" and that this tactic worked "for a while."

PCR Ruling, Respondent's Habeas Appendix, Doc. No. 51-1 at 33. The Iowa Court of Appeals found:

The record shows that defense counsel had Boss disclose the location of the body only with his informed consent. There was discussion about the disclosure but there was no disclosure until the final agreement by Boss. Boss acknowledged considerable discussion and acknowledged eventually being convinced. He conceded consenting to the disclosure based on the advice of counsel, even though he now claims to have doubted the rationale.

---

<sup>5</sup> I have some doubt as to whether Boss preserved this issue for federal review. His amended state court PCR petition did not raise inadequate consultation as a separate issue and it was not addressed in the Iowa District Court's PCR ruling. Boss did raise the issue on appeal from the PCR decision and the Iowa Court of Appeals addressed it while analyzing counsel's advice to disclose the body. 789 N.W.2d at \*3. "A claim is not fairly presented to the state courts unless the same factual grounds and legal theories asserted in the applicant's federal habeas corpus application have been properly raised in his or her state court proceedings" *Keithley v. Hopkins*, 43 F.3d 1216, 1217 (8th Cir. 1995). Because the Iowa Court of Appeals addressed the issue, and rejected it, I will proceed with my analysis.

*Boss v. State*, 789 N.W.2d at \*3 [emphasis added]. These factual findings are presumed to be correct unless Boss rebuts the presumption with clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). Such “presumption of correctness applies to all factual determinations made by state courts of competent jurisdiction, including trial courts and appellate courts.” *Tunstall v. Hopkins*, 306 F.3d 601, 605 (8th Cir. 2002) (quoting *Pruett v. Norris*, 153 F.3d 579, 584 (8th Cir. 1998)).

Boss cites *McClure v. Thompson*, in which the Ninth Circuit Court of Appeals analyzed whether an attorney had breached the duty of confidentiality by anonymously revealing the location of two children’s bodies to the authorities. His client was a suspect in the investigation of their disappearance. In that case, the court recognized that the duty of confidentiality is not absolute and a lawyer may reveal confidential information if “the client consents after consultation.” *McClure v. Thompson*, 323 F.3d 1233, 1242 (9th Cir. 2003) (quoting ABA Model Rule of Professional Conduct 1.6(b)(1) (1983))<sup>6</sup>. The court undertook an analysis of whether both consent and consultation were present in deciding whether McClure’s attorney had breached the duty of confidentiality. The state and federal district court had found McClure’s attorney did not advise McClure of the potential harmful consequences of disclosure, but the district court reasoned this was not unreasonable because McClure was “fully engaged” in his defense and he did not dissuade his attorney from revealing the location of the bodies. The Ninth Circuit concluded that McClure’s attorney had not adequately consulted with his client in explaining the potential harmful consequences of disclosure. *McClure*, 323 F.3d at 1244. It stated, “It is precisely because the stakes were so high that [McClure’s attorney] had an obligation to consult carefully with his client. In the absence of some other exception to the duty of confidentiality, his failure to obtain

---

<sup>6</sup> The current version of Rule 1.6 now uses the term “informed consent” which “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Model Rules of Prof’l Conduct R. 1.0 cmt. (2002).

informed consent would demonstrate constitutionally deficient performance under the Sixth Amendment.” *Id.* at 1245. Ultimately, there was another exception at issue because McClure’s attorney had reasonable grounds to believe the two children were not dead and that disclosure could save their lives. *Id.* at 1247.

The only evidence Boss offers to demonstrate there was not informed consent is the bond hearing transcript. He argues the seemingly-chaotic nature of that hearing demonstrates there was not adequate consultation. Boss points out that he had to be advised to invoke the Fifth Amendment while he was on the witness stand and was instructed to do so by Williams only after the presiding judge suggested it. Bond Tr. 9.

I find that Boss has not rebutted the presumption given to the state court findings which concluded Boss provided informed consent to the disclosure after considerable discussion with his attorney. As the Iowa Court of Appeals recognized, Boss stated that his attorney “convinced” him that disclosure was in his best interest, indicating that Boss knew of the risks and weighed the options with the help of his attorney. The chaotic nature of the bond review hearing can be explained by many other factors unrelated to whether Williams adequately consulted with Boss on the issue of whether to disclose the location of the body. This was likely unexpected evidence to everyone but Boss and Williams. Also, the issue of whether Williams adequately prepared Boss for cross-examination and explained his Fifth Amendment right is entirely different than whether Williams adequately discussed the pros and cons of disclosing the body with Boss before he provided consent. Because Boss has not presented clear and convincing evidence to suggest Williams did not adequately consult with him prior to his decision to disclose the body, the state courts’ findings on these facts are presumed correct.

The state courts did not unreasonably apply *Strickland* in deciding Williams’ representation did not fall below an objective standard of reasonableness. The state courts made factual findings that Boss acknowledged considerable discussion and acknowledged that he was eventually convinced by his attorney to disclose the location of the body. Boss has not provided clear and convincing evidence to rebut this or

otherwise show his attorney did not adequately consult with him. I find that the Iowa Court of Appeals did not unreasonably apply *Strickland* in deciding Boss had provided informed consent to disclose the location of the body.

#### ***IV. CONCLUSION***

Boss has not been able to show that the state court decisions were contrary to or involved an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). I find in Boss' favor on the issue of prejudice, both because (a) I believe that state courts found prejudice and, in any event, (b) a *de novo* review of Boss' prejudice claim would demonstrate a "reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. However, on the issue of deficient performance I find that the Iowa courts did not unreasonably apply clearly established federal law in deciding Boss' counsels' representation did not fall "below an objective standard of reasonableness." *Id.* Because *Strickland* requires a petitioner to demonstrate both prejudice and deficient performance to prevail on an ineffective assistance of counsel claim, the Iowa Court of Appeals reasonably applied federal law in denying Boss' petition for post-conviction relief on the basis of his inability to prove deficient performance.

For the reasons set forth above, **IT IS RESPECTFULLY RECOMMENDED** that Donald Boss Jr.'s petition pursuant to 28 U.S.C. § 2254 (Doc. No. 9) be **denied**.

Objections to this Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b) must be filed within fourteen (14) days of the service of a copy of this Report and Recommendation. Objections must specify the parts of the Report and Recommendation to which objections are made, as well as the parts of the record forming the basis for the objections. *See* Fed. R. Civ. P. 72. Failure to object to the Report and Recommendation waives the right to *de novo* review

by the district court of any portion of the Report and Recommendation as well as the right to appeal from the findings of fact contained therein. *United States v. Wise*, 588 F.3d 531, 537 (8th Cir. 2009).

**IT IS SO ORDERED.**

**DATED** this 19th day of February, 2013.



---

LEONARD T. STRAND  
UNITED STATES MAGISTRATE JUDGE  
NORTHERN DISTRICT OF IOWA