No. 21-3985

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL FETHEROLF,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, Circuit Judge.

Michael Fetherolf, an Ohio prisoner proceeding pro se, appeals the district court's denial of his third motion for relief from judgment filed pursuant to Rule 60(b)(1) of the Federal Rules of Civil Procedure. His most recent Rule 60(b) motion sought relief from the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Fetherolf has applied for a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b), and moves to proceed in forma pauperis on appeal, *see* Fed. R. App. P. 24(a)(5).

In 2016, an Ohio jury convicted Fetherolf of rape, in violation of Ohio Revised Code § 2907.02(A)(1)(b); gross sexual imposition, in violation of Ohio Revised Code § 2907.05; and intimidation of a witness, in violation of Ohio Revised Code § 2921.04(B). Those convictions stem from Fetherolf digitally penetrating the vagina of his seven-year-old daughter, A.C., in 2013, and threatening A.C. that she would be in trouble if she told anyone about the incident. The trial court sentenced Fetherolf to an aggregate term of 25 years to life in prison. The trial court thereafter denied Fetherolf's motion for a new trial, in which he raised 14 claims. The Ohio Court of Appeals affirmed Fetherolf's convictions on direct appeal. *State v. Fetherolf*, Nos. 14-16-10, 14-16-11, 2017 WL 1316207, at *13 (Ohio Ct. App. Apr. 10, 2017), *perm. app. denied*, 87 N.E.3d 224 (Ohio 2017).

Fetherolf subsequently filed a state petition for post-conviction relief under Ohio Revised Code § 2953.21, in which he advanced several ineffective-assistance-of-trial-counsel ("IATC") claims. The trial court dismissed Fetherolf's petition, concluding that the doctrine of res judicata barred review of his IATC claims that were based on facts apparent from the record because those claims could have been raised on direct appeal, and that his remaining IATC claims—that is, those claims based on facts that were not a part of the trial record—were without merit. Fetherolf did not appeal that ruling, although he did file several other unsuccessful state post-conviction actions, including an application to reopen his direct appeal under Rule 26(B) of the Ohio Rules of Appellate Procedure (claiming that appellate counsel was ineffective for not raising "viable and obvious" claims on direct appeal).

In January 2019, Fetherolf filed a § 2254 petition raising nine claims, including claims that he was denied a fair trial due to admission of "other acts" evidence (Claim 1), that the presentation of false evidence, perjury, and prosecutorial misconduct violated his rights to due process and to an impartial jury (Claim 5), that trial counsel rendered ineffective assistance in several ways (Claim 7), and that appellate counsel rendered ineffective assistance (Claim 8). The district court dismissed the habeas petition and declined to issue a COA after concluding that Fetherolf's claims were either procedurally defaulted or meritless. This court likewise declined to issue a COA. *Fetherolf v. Warden*, No. 20-3565 (6th Cir. Sept. 17, 2020).

In December 2020, Fetherolf filed a motion for relief from judgment under Rule 60(b)(1) and (b)(6),[1] arguing that the district court had erroneously concluded that he did not show cause and prejudice to overcome the procedural default of several of his habeas claims. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The district court denied Fetherolf's Rule 60(b) motion and declined to issue a COA. Fetherolf then unsuccessfully applied to this court for a COA. *Fetherolf v. Warden*, No. 20-4323 (6th Cir. June 15, 2021).

[1] Fetherolf initially filed a motion for relief from judgment under Rule 60(b)(1) on September 22, 2020, which the district court denied on November 23, 2020. Fetherolf did not appeal that order.

Meanwhile, in January 2021, Fetherolf filed another motion under Rule 60(b)(1), which is at issue here. In his most recent Rule 60(b) motion, Fetherolf advanced two arguments. First, he argued that his IATC subclaims in Claim 7 that were dependent on facts that were not a part of the trial record should be considered on the merits because (1) the Ohio Court of Appeals never considered those subclaims, and (2) the absence of counsel in his initial state post-conviction proceeding is cause to excuse any procedural default of those subclaims, pursuant to the Supreme Court's decisions in *Martinez v. Ryan*, 566 U.S. 1, 17 (2012), and *Trevino v. Thaler*, 569 U.S. 413, 423 (2013). Second, Fetherolf argued that his claims concerning the admission of "other acts" evidence and prosecutorial misconduct (Claims 1 & 5) "should be considered on [their] merits upon a showing of cause and prejudice from the arguments [m]ade in" Claim 8 (ineffective assistance of appellate counsel). The district court considered Fetherolf's filing as a "true" Rule 60(b) motion (as opposed to a second or successive § 2254 petition) and determined that Fetherolf was not entitled to relief under Rule 60(b)(1). The district court again declined to issue a COA. This appeal followed.

As a preliminary matter, the district court properly considered Fetherolf's filing as a true Rule 60(b) motion because the arguments raised therein—which challenged the district court's previous ruling that Fetherolf had procedurally defaulted several of his federal habeas claims—"attack[ed], not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005).

Fetherolf now seeks a COA from this court to challenge the district court's rejection of the first argument advanced in his Rule 60(b) motion—that his non-record-based IATC subclaims should be considered on the merits. His failure to raise his second Rule 60(b) argument in his COA application means that that argument is effectively abandoned. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam). "[T]his court will not entertain an appeal from the denial of a Rule 60(b) motion in [a § 2254] proceeding unless the petitioner first obtains a COA." *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010). A COA may be issued "only if the

applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). In the context of a Rule 60 motion, "the COA question is . . . whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Buck v. Davis*, 137 S. Ct. 759, 777 (2017).

A district court may vacate a final judgment under Rule 60(b)(1) due to "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Rule 60(b)(1) "is intended to provide relief in only two situations: (1) when a party has made an excusable mistake or an attorney has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order." *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002). Fetherolf goes the second route, arguing in his COA application that, contrary to the district court's ruling, his lack of counsel during his initial state post-conviction proceeding was cause for any default of his non-record-based IATC subclaims, pursuant to the Supreme Court's decisions in *Martinez* and *Trevino*, and this court's decision in *White v. Warden*, 940 F.3d 270 (6th Cir. 2019).

The Supreme Court traditionally has held that a prisoner has no constitutional right to an attorney in state post-conviction proceedings and, consequently, any inadequate assistance by state post-conviction counsel cannot constitute cause to excuse a habeas petitioner's procedural default of his claims in state court. *Coleman*, 501 U.S. at 752, 757. In *Martinez*, however, the Supreme Court carved out a "narrow exception" to *Coleman*, holding that ineffective assistance or absence of counsel during initial-review state collateral proceedings can establish cause for a petitioner's procedural default of an IATC claim. 566 U.S. at 9, 17. The petitioner's procedural default will not bar a federal habeas court from hearing a "substantial" IATC claim if state law required that the IATC claim be raised first in an initial-review post-conviction proceeding and no counsel assisted the petitioner during that proceeding or counsel's assistance in that proceeding was ineffective. *Id.* at 17.

The following year, the Supreme Court decided *Trevino*, which clarified and expanded *Martinez* to hold that a federal habeas court can find cause to excuse a petitioner's procedural default where (1) the IATC claim is "substantial," (2) the "cause" consists of a lack of counsel or

ineffective counsel during the state collateral review proceeding, (3) the state collateral review proceeding was the initial review proceeding for the petitioner's IATC claim, and (4) state law requires that the IATC claim be raised in the initial review post-conviction proceeding. 569 U.S. at 423. But the *Trevino* court modified the fourth element to situations where state law does not provide most defendants with a "meaningful opportunity" to present IATC claims on direct appeal. *Id.* at 428-29.

This court has "held that *Martinez* does not apply in Ohio because Ohio permits ineffective-assistance-of-trial-counsel claims on direct appeal," and, until recently, had questioned whether *Trevino* applies to Ohio prisoners. *Williams v. Mitchell*, 792 F.3d 606, 615 (6th Cir. 2015); *see also Hill v. Mitchell*, 842 F.3d 910, 937 (6th Cir. 2016). But in 2019, this court applied the *Martinez-Trevino* exception to excuse the procedural default of an Ohio prisoner's IATC claim. *White*, 940 F.3d at 277-78. In that case, the petitioner's appellate counsel had advised him that the IATC claim at issue could be adequately addressed on direct appeal, but the Ohio Court of Appeals ultimately determined that that claim required factual development beyond the record and suggested that it should be raised instead in post-conviction proceedings. *Id.* at 272-74. By the time that the state appellate court issued its decision, however, the deadline to file a post-conviction petition had passed, and the petitioner had no post-conviction counsel. *Id.* This court held that *Trevino* applied to the petitioner's claim because these circumstances, coupled with "the tight procedural timeline imposed by Ohio's post-conviction-relief statute[,] left [the pro se prisoner] without a 'meaningful opportunity' to obtain review of his substantial ineffective-assistance claim." *Id.* at 278 (citing *Trevino*, 569 U.S. at 428).

Although the *Martinez-Trevino* exception may apply to some Ohio prisoners, *see id.* at 277-78, it does not apply to Fetherolf's case. As this court explained in its order denying Fetherolf's COA application to appeal of the denial of his § 2254 petition, all of Fetherolf's IATC subclaims are procedurally defaulted as a result of his failure to exhaust them in the Ohio appellate courts. *Fetherolf*, No. 20-3565, slip op. at 8; *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). That procedural default occurred when Fetherolf failed to *appeal* the state trial court's

denial of his post-conviction petition, rather than from his failure to present the IATC subclaims in his initial post-conviction proceeding. *Boerckel*, 526 U.S. at 845. And the Supreme Court explained in *Martinez* that the procedural-default exception does not extend to errors in any proceeding beyond initial-review state collateral proceedings. 566 U.S. at 16. Therefore, Fetherolf cannot establish cause and prejudice to excuse the procedural default of his IATC subclaims. *See West v. Carpenter*, 790 F.3d 693, 698 (6th Cir. 2015).

In any event, even if the *Martinez-Trevino* exception did apply to this case, it would not assist Fetherolf because reasonable jurists could not debate the district court's determination that his non-record-based IATC subclaims are not strong enough to satisfy that exception's first requirement—that they qualify as "substantial." To be "substantial," an IATC claim must have "some merit" under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Martinez*, 566 U.S. at 14. To prevail on an IATC claim, a petitioner must establish that counsel's performance was deficient and that he suffered prejudice as a result. *Strickland*, 466 U.S. at 687. The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Fetherolf raised no less than 18 IATC subclaims in his federal habeas petition, only three of which were based on facts not apparent from the trial record. Those three non-record-based IATC subclaims all concerned counsel's alleged failure to investigate or put on a defense of any kind. But Fetherolf did not make a substantial showing that he was prejudiced by counsel's alleged deficient performance in light of the overwhelming evidence of his guilt that was presented at trial. That evidence included, among other things, testimony from a social worker that A.C. had told her that Fetherolf "swirl[ed] his finger on her" vagina, testimony from the physician who physically examined A.C. that she believed that A.C. had been sexually abused, DNA testing showing that male DNA that was discovered in the crotch area of A.C.'s underwear was consistent with a sample of Fetherolf's DNA (the estimated frequency of the DNA profile was 1 in every 4,167 male individuals), and testimony from a DNA analyst that the DNA present in A.C.'s underwear was more than what she would usually find with simple touching or handling of underwear. *See*

Fetherolf, 2017 WL 1316207, at *3. And although Fetherolf faulted counsel for not retaining an expert to rebut the State's medical and scientific evidence, he failed to specifically identify an expert who could have supported his defense and was reasonably available at the time of trial. *See Tinsley v. Million*, 399 F.3d 796, 808 (6th Cir. 2005).

Based on the foregoing, no reasonable jurist could conclude that the district court abused its discretion in denying Fetherolf's motion for relief from judgment. *See Buck*, 137 S. Ct. at 777. Accordingly, Fetherolf's COA application is **DENIED** and his motion for pauper status is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL FETHEROLF,

Petitioner,

:

v. **Case No. 2:19-cv-168**

Judge Sarah D. Morrison

Magistrate Judge Elizabeth P.

WARDEN, CHILLICOTHE Deavers CORRECTIONAL INSTITUTION,

:

Respondent.

OPINION AND ORDER

This matter is before the Court for consideration of Petitioner Michael Fetherolf's Motion for Certificate of Appealability ("COA"). (ECF No. 104.) The time for filing a response has passed, and none was filed. Accordingly, Petitioner's Motion is ripe for consideration. For the reasons set forth below, the Motion is **DENIED.**

I. BACKGROUND

This Court entered judgment dismissing Petitioner's petition for writ of habeas corpus on April 22, 2020. (ECF No. 75.) On September 17, 2020, the United

States Court of Appeals for the Sixth Circuit denied his applications for certificate of appealability. (ECF No. 83.) Petitioner then filed two motions to set aside judgment under Rule 60(b). (ECF Nos. 84, 91.) This Court denied each. (ECF Nos. 86, 92.) The United States Supreme Court denied Petitioner's petition for writ of

certiorari on March 22, 2021. (ECF No. 100.) Petitioner then filed, and this Court denied, a third motion to set aside judgment. (ECF Nos. 98, 102.) Petitioner now seeks a COA from the third denial.

II. LEGAL STANDARD

A habeas petitioner seeking appellate review of a denial of a Rule 60(b) motion for relief from judgment may only proceed if he or she obtains a COA. *United States v. Hardin,* 481 F.3d 924, 926 (6th Cir. 2007). A COA will issue only if the petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). To do so, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 n.4 (1983)). In *Moody v. United States,* the United States Court of Appeals for the Sixth Circuit cautioned that "a court should not grant a certificate without some substantial reason to think that the denial of relief might be incorrect," and "[t]o put it simply, a claim does not

merit a certificate unless *every independent reason to deny the claim is reasonably debatable.*" 958 F.3d 485, 488 (6th Cir. 2020) (emphasis in original).

III. ANALYSIS

Although not a model of clarity, Petitioner advances several arguments in support of his Motion. Each is unavailing.

First, Petitioner argues that the Court erred by using the standard under Rule 60(b)(6), rather than Rule 60(b)(1), in denying his third Rule 60(b) Motion. (ECF No. 104, PageID # 4168.) But the Court expressly held that "Petitioner provides no grounds for relief under Rule 60(b)(1) **or** 60(b)(6)." (ECF No. 102, PageID # 4158 (emphasis added).)

Second, he argues that the Court erred in deciding that he did not meet the "*Martinez-Trevino*" exception to procedural default because the Court concluded that Petitioner's claims were not substantial. (ECF No. 104, PageID # 4169.) In Petitioner's view, the substantiality determination was premature as, in both *Martinez* and *Trevino*, the Supreme Court first found that petitioners had demonstrated cause to excuse to the procedural default and then remanded to the lower court for substantiality determination. (*Id.* at PageID # 4173 (citing *Trevino v. Thaler*, 569 U.S. 413, 429 (2013); *Martinez v. Ryan*, 566 U.S. 1, 18 (2012)).) Yet, in neither of those cases did the Supreme Court hold that the cause determination must precede the substantiality determination. Moreover, Petitioner's argument reaffirms that it is the province of the district court to make that substantiality determination.

Third, Petitioner argues that the Court improperly ignores that the ineffective assistance claim was not raised on his initial postconviction, which was not exhausted, but in a subsequent motion for new trial, which was exhausted. (ECF No. 104, PageID # 4169–70.) Petitioner ignores that the Sixth Circuit upheld the dismissal of the ineffective assistance of trial counsel as procedurally defaulted

by holding "that reasonable jurists could not debate the dismissal." (*See* ECF No. 102, PageID # 4158.) Petitioner has not demonstrated why the Court is not bound by the Sixth Circuit's decision and by the law of the case doctrine. *United States v. Anglin*, 601 F.3d 523, 527 (6th Cir. 2010) (internal citation omitted). Further, the Court's *dicta* regarding exhaustion was merely an alternative explanation as to why Petitioner does not come within the *Martinez-Trevino* exception. (ECF No. 102, PageID # 4158.) It is not grounds for reasonable disagreement as to the Court's Order denying Petitioner's third Rule 60(b) motion.

Fourth, Petitioner argues that trial counsel fell well below the standard for competent representation and that the ineffective assistance prejudiced him, claiming: "Fetherolf has satisfied all required showings, and the district court should have granted the motion. Jurists of reason could and would disagree with the district court's decision." (ECF No. 104, PageID # 4175, 4178.) This is nothing more than a rehashing off his ineffective assistance claim that this Court has already dismissed as procedurally defaulted, and the Sixth Circuit has held that

reasonable jurists could *not* disagree with that decision. The argument is no more persuasive now than it was previously.

Finally, Petitioner argues that jurists could reasonably debate whether the district court applied the correct standard in finding he had not met the requirements of Rule 60(b)(1)—specifically, that the Court's conclusion that all arguments had been raised and rejected is not the relevant standard for Rule 60(b)(1) challenge. (*See id.*) This was not a misapplication of the standard, but a

recognition that Petitioner had failed to meet his burden of showing "mistake, inadvertence, surprise, or excusable neglect[.]" Fed.R.Civ.P. 60(b)(1). Absent such a showing, reasonable jurists could not disagree with the Court's denial of his third Rule 60(b) motion.

IV. CONCLUSION

For the reasons set forth above, Petitioner's Motion for Certificate of Appealability (ECF No. 104) is **DENIED.** Because reasonable jurists would not disagree with the Court's conclusions, a certificate of appealability shall not issue.

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL FETHEROLF,

Petitioner,

:

v. **Case No. 2:19-cv-168**

Judge Sarah D. Morrison

Chief Magistrate Judge Elizabeth

WARDEN, CHILLICOTHE P. Deavers CORRECTIONAL INSTITUTION,

:

Respondent.

OPINION AND ORDER

This matter is before the Court for consideration of Petitioner Michael Fetherolf's Motion to Set Aside Default Judgment Pursuant to Civ. R. 60(b)(1)–(6). (ECF No. 98.) The time for filing a response has passed, and none was filed. Accordingly, Petitioner's Motion is ripe for consideration. For the reasons set forth below, the Motion is **DENIED**.

I. BACKGROUND

As the Motion *sub judice* is Petitioner's **third** seeking relief from final judgment dismissing his claims (*see* ECF Nos. 84, 91), the history of this case is worn thin from re-telling. The Court will be brief in discussing it here.

This Court entered judgment dismissing Petitioner's petition for writ of habeas corpus on April 22, 2020. (ECF No. 75.) On September 17, 2020, the United States Court of Appeals for the Sixth Circuit denied his applications for certificate of appealability. (ECF No. 83.) Petitioner then filed two motions to set aside

judgment under Rule 60(b). (ECF Nos. 84, 91.) This Court denied each. (ECF Nos. 86, 92.) Most recently, the United States Supreme Court denied Petitioner's petition for writ of certiorari on March 22, 2021 (ECF No. 100.)

Petitioner now—again—seeks reconsideration of the April 22, 2020 judgment dismissing his claims.

II. LEGAL STANDARD

Rules 60(b)(1) and 60(b)(6) provide that a court "may relieve a party. . . from a final judgment, order, or proceeding" based on "mistake, inadvertence, surprise, or excusable neglect;" or "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(1), (6). However, public policy favoring finality of judgments and termination of litigation limits application of the rule. *Tyler v. Anderson*, 749 F.3d 499, 509 (6th Cir. 2014) (citing *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009)).

"[R]elief under Rule 60(b) is . . . extraordinary." *Zucker v. City of Farmington Hills*, 643 F. App'x 555, 562 (6th Cir. 2016). A Rule 60(b) motion is neither a substitute for, nor a supplement to, an appeal. *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007). "For this reason, arguments that were, or should have been, presented on appeal are generally unreviewable on a Rule 60(b)(6) motion." *Id.* "Relief under Rule 60(b) is not appropriate where. . . a party unhappy

with the Court's ruling simply reargues her case." *Bonds v. Barker*, No. 1:18-cv1149, 2019 WL 168326, at *2 (N.D. Ohio Jan. 11, 2019) (citing *GenCorp, Inc.*, 477 F.3d at 368). "Rule 60(b)(6) applies only in exceptional or extraordinary circumstances where principles of equity mandate relief." *West v. Carpenter*, 790

F.3d 693, 696-97 (6th Cir. 2015) (citing *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013)). "In other words, Rule 60(b) is to be used rarely—especially in habeas corpus." *Hand v. Houk*, No. 2:07-cv-846, 2020 WL 1149843, at *3 (S.D. Ohio Mar. 10, 2020) (Watson, J.) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)).

Further, Rule 60(b)(6) "does not grant a defeated litigant 'a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof.'" *Johnson v. Merlak*, No. 4:18-cv-1062, 2019 WL 1300215, at *2 (N.D. Ohio Mar. 21, 2019) (quoting *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001)). Finally, "a party seeking relief under Rule 60(b) bears the burden of establishing the grounds for such relief by clear and convincing evidence." *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008).

III. ANALYSIS

Petitioner's Motion focuses on the Court's application of procedural default, which may be properly addressed under Rule 60(b). *See Gonzalez*, 545 U.S. at 532 n.4. Accordingly, this Court has jurisdiction to adjudicate the Motion.

Petitioner raises two arguments. Each is unavailing. First, Petitioner argues that Claims Seven (ineffective assistance of trial counsel) and Eight (ineffective assistance of appellate counsel) should be heard because the state appellate court did not consider those claims. (ECF No. 98, PageID # 4071.) He further argues that any procedural default should be excused under the *MartinezTrevino* exception for claims that must first be raised in postconviction proceedings.

(*Id.* (citing *Trevino v. Thaler*, 569 U.S. 413 (2013); *Martinez v. Ryan*, 566 U.S. 1 (2012)).) This Court dismissed Claims Seven and Eight as procedurally defaulted (ECF No. 75, PageID # 3779), and the Sixth Circuit concluded that reasonable jurists could not debate the dismissal (ECF No. 83, PageID # 3844–46). Further, *Martinez-Trevino* applies only when there has been a *substantial* claim of ineffective assistance. *See Trevino*, 569 U.S. at 429 (quoting *Martinez*, 566 U.S. at 17). Petitioner's ineffective assistance claim is not substantial (*see, e.g.*, ECF No. 75, PageID # 3778–79, 3781–82)—accordingly, the *Martinez-Trevino* exception cannot excuse the procedural default. Moreover, the Court is unaware of any caselaw suggesting that *Martinez-Trevino* extends to the facts at hand, where Petitioner raised the ineffective assistance claims in a postconviction petition but failed to appeal from its denial, thus depriving the state courts of a "full opportunity" to resolve the issue. (*Id.*, PageID # 3778 (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).)

Second, Petitioner argues that that Claims One (improper admission of other acts evidence) and Five (prosecutorial misconduct) should be considered upon a

showing of cause and prejudice, and that Claim Eight should be considered as to appellate counsel's failure to raise certain arguments. (ECF No. 98, PageID # 4103.) Each of these arguments has been made and rejected. (*See, e.g.*, ECF No. 83, PAGEID # 3840–43.)

Petitioner provides no grounds for relief under Rule 60(b)(1) or 60(b)(6).

IV. CONCLUSION

For the reasons set forth above, Petitioner's Motion to Set Aside Default Judgment Pursuant to Civ. R. 60(b)(1)–(6) (ECF No. 98) is **DENIED.**

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL FETHEROLF,

Petitioner,

v.

Case No. 2:19-cv-168
Judge Sarah D. Morrison
Chief Magistrate Judge Elizabeth A. Preston Deavers

WARDEN, CHILLICOTHE CORRECTIONAL INSTITUTION,

Respondent.

OPINION AND ORDER

On April 22, 2020, Judgment was entered dismissing the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 76.) The United States Court of Appeals for the Sixth Circuit denied Petitioner's request for a certificate of appealability. (ECF No. 83.) On October 1, 2020, the Court denied Petitioner's motion for reconsideration. (ECF No. 86.) On November 23, 2020, the Court denied Petitioner's Petition for Rehearing and Rehearing en Banc and Motion to Stay. (ECF No. 90.) Petitioner now has filed a Motion to Set Aside Default Judgment and Re-Open Habeas Proceedings Pursuant to Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure. (ECF No. 91.) For the reasons that follow, this most recent motion for reconsideration (ECF No. 91) is **DENIED**.

Petitioner again seeks reconsideration of the final judgment of dismissal of his claims as procedurally defaulted. He again asserts that he has established cause and prejudice for his failure to raise on appeal a claim of insufficiency of the

evidence based on the ineffective assistance of appellate counsel. He contends that this Court, and the Ohio Court of Appeals, failed to consider the entire record and ignored inconsistent, ambiguous, and conflicting evidence regarding digital penetration of the alleged victim in rejecting this claim. (ECF No. 91, PAGEID # 3948–52.) Additionally, Petitioner now argues that the trial court issued improper jury instructions on the issue, in violation of Ohio law. (PAGEID # 3952–57.) He further complains that the state appellate court improperly addressed arguments not raised in his motion for a new trial, without providing him notice, denying him due process and establishing cause for any procedural defaults. (PAGEID # 3958–65.) These arguments do not assist him.

As previously discussed, Rules 60(b)(1) and 60(b)(6) provide that a court "may relieve a party. . . from a final judgment, order, or proceeding" based on "mistake, inadvertence, surprise, or excusable neglect" or "any other reason that justifies relief." *Id.* However, public policy favoring finality of judgments and termination of litigation limits application of the rule. *Tyler v. Anderson*, 749 F.3d 499, 509 (6th Cir. 2014) (citing *Thompson v. Bell*, 580 F.3d 423, 442 (6th Cir. 2009)). In short, "'relief under Rule 60(b) is . . . extraordinary." *Moore v. United States*, No. 14-114-DLB-HAI, 2018 WL 5046065, at *1 (E.D. Ky. Oct. 17, 2018) (citing *Zucker v. City of Farmington Hills*, 643 F. App'x 555, 562 (6th Cir. 2016). A Rule 60(b) motion should not serve as a substitute for, or supplement to, an appeal. *Johnson v. Collins*, No. 19-3616, 2019 WL 7187355, at *2 (6th Cir. 2019) (quoting *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 373 (6th Cir. 2007)). Thus, arguments that have or

should have been presented on appeal generally are not reviewable under Rule 60(b). *Id.* "Relief under Rule 60(b) is not appropriate where. . . a party unhappy with the Court's ruling simply reargues her case." *Bonds v. Barker*, No. 1:18-cv-1149, 2019 WL 168326, at *2 (N.D. Ohio Jan. 11, 2019) (citing *GenCorp, Inc.*, 477 F.3d at 368). "Rule 60(b)(6) applies only in exceptional or extraordinary circumstances where principles of equity mandate relief." *West v. Carpenter*, 790 F.3d 693, 696–97 (6th Cir. 2015) (citing *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 750 (6th Cir. 2013)). It should rarely be used—especially in habeas corpus. *Hand v. Houk*, No. 2:07-cv-846, 2020 WL 1149849, at *3 (S.D. Ohio Mar. 10, 2020) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)). Further, Rule 60(b)(6) "does not grant a defeated litigant 'a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof.'" *Johnson v. Merlak*, No. 4:18-cv-1062, 2019 WL 1300215, at *2 (N.D. Ohio Mar. 21, 2019) (citing *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001)). A claim of legal error, unaccompanied by facts establishing extraordinary and exceptional circumstances, will not provide a basis for relief under Rule 60(b)(6). *West v. Bell*, No. 3:01-cv-91, 2010 WL 4363402, at *4 (citing *Gonzalez*, 545 U.S. at 535). "[A] party seeking relief under Rule 60(b) bears the burden of establishing the grounds for such relief by clear and convincing evidence." *Moore*, 2018 WL 5046065, at *1 (quoting *Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008)). Petitioner's challenge to the Court's application of procedural default may be addressed under Rule 60(b) and will not be construed as a successive § 2255 motion

subject to authorization for filing from the United States Court of Appeals for the Sixth Circuit. *Gonzalez v. Crosby*, 545 U.S. 524, 532 n.4. (2005).

The record reflects no basis for relief. This Court already has rejected Petitioner's arguments that his appellate counsel performed in a constitutionally ineffective manner by failing to raise on appeal a claim of insufficiency of the evidence. (*Opinion and Order*, ECF No. 75, PAGEID # 3781–82.) The Court will not now again address this same issue here. Moreover, Petitioner did not previously raise a claim regarding the trial court's allegedly improper jury instructions on the elements of the rape charge in the Ohio courts. This same issue therefore cannot serve as cause for his procedural default. *See Teitelbaum* v. *Turner*, No. 2:17-cv-583, 2018 WL 2046456, at *22 (S.D. Ohio May 2, 2018) (citing *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000)). The record does not support Petitioner's argument that the Ohio courts failed to provide him adequate notice of its decisions denying his motion(s) for a new trial or improperly addressed issues he did not raise in those proceedings or that any purported error in those proceedings serves as cause for his procedural defaults. As previously noted, the Sixth Circuit also has concluded that reasonable jurists would not debate the dismissal of Petitioner's claims as procedurally defaulted. (ECF No. 83, PAGEID # 3844.) Again, Petitioner has provided no grounds to conclude otherwise.

DISPOSITION

Petitioner's Motion to Set Aside Default Judgment and Re-Open Habeas Proceedings Pursuant to Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure (ECF No. 91) is **DENIED.**

IT IS SO ORDERED.

/s/ Sarah D. Morrison
SARAH D. MORRISON
UNITED STATES DISTRICT JUDGE