APPENDIX A

No. 23-1772

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAKE PAUL HEINEY,

Petitioner-Appellant,

v.

HEIDI E. WASHINGTON,

Respondent-Appellee.

ORDER

Before: MURPHY, Circuit Judge.

Jake Paul Heiney, a former Michigan prisoner[1] proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254 and moves this court for a certificate of appealability (COA). As discussed below, the court denies Heiney a COA and denies his motions for the appointment of counsel and for leave to file an amended motion for a COA through appointed counsel.

In 2016, following a bench trial, the trial court found Heiney guilty of two counts of fourth-degree criminal sexual conduct (CSC), in violation of Michigan Compiled Laws § 750.520e(1)(b). The conviction arose after Christy Gray, Shawna Earnest, and two other women revealed that Heiney, a physician, inappropriately touched their breasts during orthopedic examinations; the trial court found Heiney guilty with respect to his conduct with Gray but granted Heiney a directed verdict of acquittal as to his conduct with Earnest. The trial court sentenced Heiney to 90 days in jail and five years of probation. The Michigan Court of Appeals affirmed, *People v. Heiney*, No.

[1] Heiney's probationary status at the time he filed his habeas petition satisfied the "in custody" requirement of 28 U.S.C. § 2254, *see Miskel v. Karnes*, 397 F.3d 446, 450 (6th Cir. 2005), and although he has since completed his term of probation, that fact does not render his petition moot under our caselaw, *see DePompei v. Ohio Adult Parole Auth.*, 999 F.2d 138, 139-40 (6th Cir. 1993).

333363, 2017 WL 6624110 (Mich. Ct. App. Dec. 28, 2017) (per curiam), and the Michigan Supreme Court denied leave to appeal, *People v. Heiney*, 911 N.W. 2d 708 (Mich. 2018) (mem.).

Heiney then filed a § 2254 petition. Upon Heiney's motion, the district court held the petition in abeyance so that he could exhaust his claims in the state courts. Accordingly, Heiney filed a state-court motion for relief from judgment. The trial court denied the motion for lack of merit and for failure to show entitlement to relief under Michigan Court Rule 6.508(D)(3, and the Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal.

Heiney then filed a second motion for relief from judgment, which the trial court denied as successive under Michigan Court Rule 6.502(G)(2). The Michigan Court of Appeals and the Michigan Supreme Court denied leave to appeal.

The district court then lifted the stay and allowed Heiney to file an amended petition and then a second amended petition. Heiney raised seven claims: (1) the evidence was insufficient to support his conviction; (2) he was deprived of his Confrontation Clause rights; (3) trial counsel was ineffective for failing to call an expert witness; (4) appellate counsel was ineffective for failing to raise ground three on appeal; (5) the State violated its disclosure obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and committed misconduct, his conviction is based on insufficient evidence, counsel was ineffective, and the trial court committed various errors; (6) he would not have been found guilty but for his sex and thus his conviction must be vacated based on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); and (7) he was deprived of his First Amendment free exercise rights.

The district court denied the petition and declined to issue a COA, reasoning that Heiney's claims were reasonably adjudicated on the merits by the state court or procedurally defaulted. Thereafter, the district court denied Heiney's motion to alter or amend the judgment.

A COA may be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), when a state court adjudicates the petitioner's claims on the merits, the district court may not grant habeas relief

unless the state court's adjudication 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 "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011). When AEDPA deference applies, a reviewing court, in the COA context, must evaluate the district court's application of § 2254(d) and determine "whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336. When the district court's denial is based on a procedural ruling, the movant must demonstrate that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Claim One – Sufficiency of the Evidence

Heiney first claims that the evidence was insufficient to support his conviction.

In reviewing the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reviewing court considers this question "with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16. In a federal habeas proceeding, review of a sufficiency claim is doubly deferential: "First, deference should be given to the trier-of-fact's verdict, as contemplated by *Jackson*; second, deference should be given to the Michigan Court of Appeals' consideration of the trier-of-fact's verdict, as dictated by AEDPA." *Tucker v. Palmer*, 541 F.3d 652, 656 (6th Cir. 2008).

For the trial court to find Heiney guilty of fourth-degree CSC, the prosecution had to prove beyond a reasonable doubt that he engaged in sexual contact with another through "[f]orce or coercion," which includes "engag[ing] in medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable." Mich. Comp. Laws § 750.520e(1)(b).

On direct appeal, the Michigan Court of Appeals first rejected Heiney's argument that expert medical testimony is required to show that his examination of Gray—during which he "squeezed" her breast—was medically unethical or unacceptable, reasoning that the Michigan Supreme Court does not require such expert testimony in CSC cases and that other evidence—lay witness testimony—allowed the trial court to reach that conclusion. *Heiney*, 2017 WL 6624110, at *2. In particular: (1) Gray testified that it seemed unusual for Heiney to have touched her breasts during the examination and that the examination confused her because she had not complained of any chest pain; (2) Earnest and two other women testified that Heiney had touched their bare breasts while examining them for non-chest-related pain and that Heiney's breast examinations were different from other physicians' because he did not have them lie down, palpate their breasts, explain what he was doing, or examine both breasts consistently or at all; and (3) Detective Laura Bliss testified that Heiney himself told her that a breast examination is not a routine part of his assessment and that he would examine breasts only if the patient complained of shoulder pain or pain or discharge from the breast, at which point he would palpate the muscle tissue of *both* breasts for comparison. *Id.* But here, Gray testified that she did not tell Heiney that she had any chest pain or breast discharge and—through a demonstration—explained that Heiney repeatedly squeezed her breasts. *Id.*

While this evidence is not overwhelming, the Michigan Court of Appeals determined that, when viewing it most favorably to the prosecution, *see Jackson*, 443 U.S. at 319, a rational trier of fact could have found that Heiney's touching of Gray's breasts "was a medical examination done in a manner that was medically recognized as unethical or unacceptable." *Heiney*, 2017 WL 6624110, at *2. Although Heiney maintains that he could not be convicted without expert testimony, the Michigan Supreme Court—as the state appellate court aptly explained—has held that expert testimony is *not* required in all CSC prosecutions and that a CSC conviction can be based on "common knowledge" that the defendant's conduct "constitutes an unethical and unacceptable method of 'medical treatment.'" *People v. Baisden*, 756 N.W. 2d 73, 73 (Mich. 2008). In this case, the Michigan Court of Appeals determined that the trial court could have

inferred, as a matter of common knowledge, that squeezing breasts during an orthopedic examination in which the patient does not complain of chest pain is not an ethical or acceptable method of medical treatment. *See Heiney*, 2017 WL 6624110, at *2. In any event, the appellate court observed that, by Heiney's own standards—as relayed to Detective Bliss—the breast touching described by Gray would not be medically appropriate. *Id.* This federal habeas court is bound by the state courts' interpretation of its own laws. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). And although Heiney maintains that the evidence, including Gray's demonstrative testimony and Detective Bliss's testimony, was insufficient to convict him, a federal habeas court cannot "reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the [trier of fact]." *Smith v. Nagy*, 962 F.3d 192, 205 (6th Cir. 2020) (quoting *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009)).[2] No reasonable jurist therefore could debate the district court's conclusion that the Michigan Court of Appeals did not unreasonably apply *Jackson* in rejecting Heiney's insufficiency-of-the-evidence claim.

Claim Two – Confrontation Clause

Heiney claims that the trial court violated his Confrontation Clause rights by limiting his ability to cross-examine Earnest about her financial difficulties, which would have highlighted her motives and undermined her credibility.

The Michigan Court of Appeals rejected this claim on direct appeal, reasoning that Heiney was able to elicit testimony on cross-examination that Earnest was not planning to file a civil lawsuit; thus, "there would be no financial motivation to testify in a criminal trial against" Heiney and any additional questions about Earnest's financial difficulties were not relevant. *Heiney*, 2017 WL 6624110, at *3. Any error was harmless, the Michigan Court of Appeals added, because the

[2] Heiney specifically challenges the trial court's finding that his touching of Gray's breasts "was done for [a] sexual purpose or could be reasonably construed as having been done for a sexual purpose." *See* Mich. Comp. Laws § 750.520a(q). But the trial court made this finding after hearing Gray's "definitive" testimony about her examinations with Heiney and seeing her demonstrate how Heiney "grabbed" and "squeezed" her breasts. Heiney's argument that there was "no evidence" that his touching of Gray's breasts was done for a sexual purpose therefore is defied by the record. And this court is bound by the trial court's weighing of that evidence. *See Smith*, 962 F.3d at 205.

trial court granted Heiney's motion for a directed verdict of acquittal regarding his conduct with Earnest. *Id.*

When a state court determines that a constitutional error at trial is harmless beyond a reasonable doubt, a federal court cannot grant habeas relief without applying both the test outlined in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and the deferential review required by AEDPA. *Brown v. Davenport*, 142 S. Ct. 1510, 1517 (2022). *Brecht* requires a state prisoner seeking to challenge his conviction in collateral federal proceedings to show that the error had a "substantial and injurious effect or influence" on the outcome of his trial. 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). A "substantial or injurious effect or influence" means "actual prejudice." *See id.* at 637-38. In short, a "federal court must *deny* relief to a state habeas petitioner who fails to satisfy either [*Brecht*] or AEDPA. But to *grant* relief, a court must find that the petition has cleared both tests." *Brown*, 142 S. Ct. at 1524.

The district court concluded that Heiney failed to show that any error in limiting his cross-examination of Earnest had a substantial and injurious influence on the outcome of his case because, as the state appellate court noted, the trial court directed a verdict in his favor with respect to Earnest's allegations, which did not bear on the charges that arose from Gray's allegations against him (i.e., the charges of which he was convicted). Although Earnest's allegation that Heiney touched her breast in "various ways" despite having not complained about breast pain was relevant to show that squeezing a breast is not part of a standard examination for non-breast pain, *Heiney*, 2017 WL 6624110, at *2, Heiney has neither argued nor shown that he was limited in cross-examining Earnest about this allegation. No reasonable jurist therefore could debate the district court's rejection of Heiney's Confrontation Clause claim.

Claims Three and Four – Ineffective Assistance of Counsel

In this third claim, Heiney argues that trial counsel was ineffective for failing to present an expert witness to opine about the appropriateness of his medical examinations. Heiney points to an affidavit from a potential expert, Dr. Robert C. Corn, who averred that, had he been called as a witness, he would have testified that "none of the treatment or examination described by Gray at

trial in this case was medically recognized as unethical or unacceptable" and that it is "medically acceptable and ethical to examine the breast and chest area during an orthopedic examination without a complaint of pain or discharge in the area."

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "The standards created by *Strickland* and § 2254(d) are both 'highly deferential' and when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (quoting *Strickland*, 466 U.S. at 689 and *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). Thus, on habeas review, "[w]hen § 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.*

The state post-conviction court rejected this claim for failure to show prejudice. The district court agreed that Heiney failed to show prejudice, finding it reasonable for the post-conviction court—which was also the trier of fact—to be unpersuaded that the proffered expert testimony would have altered the outcome of Heiney's trial. It explained that Dr. Corn's proffered opinion did not assert that it is medically acceptable to touch a patient's breasts without explanation (as Heiney had done with Gray), did not address the other women's testimony about the way Heiney touched their breasts, did not speak to Gray's testimony that Heiney's examination was unusual and confusing, and—critically—was not based on Gray's in-court demonstration of how Heiney squeezed her breasts. To the district court, "[t]he fact that the trial court saw Gray testify taken together with the fact that it served as the fact finder at trial put it in a unique position to determine whether [Heiney] was prejudiced by counsel's failure to present a defense expert." *See Dunham v. Travis*, 313 F.3d 724, 732 (2d Cir. 2002) (agreeing that the petitioner failed to show prejudice where the same trial judge who convicted him at a bench trial found, on post-conviction review, that additional evidence would not have changed the verdict). On this record and authority, no reasonable jurist could debate the district court's conclusion that the post-conviction court's

rejection of this ineffective-assistance-of-trial claim was not contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts.

In his fourth claim, Heiney argues that appellate counsel was ineffective for failing to raise the foregoing claim in a motion for a new trial or motion to remand. Because reasonable jurists could not debate the district court's rejection of Heiney's underlying ineffective-assistance-of-trial-counsel claim, it follows that reasonable jurists also could not debate the district court's conclusion that the post-conviction court's rejection of this ineffective-assistance-of-appellate claim was not contrary to or an unreasonable application of *Strickland* or based on an unreasonable determination of the facts. *See Kelly v. Lazaroff*, 846 F.3d 819, 830-31 (6th Cir. 2017).

Claims Five, Six, and Seven

The district court determined that Heiney's remaining claims were procedurally defaulted. Indeed, Heiney did not raise these claims until his second motion for relief from judgment,[3] which the trial court denied on the basis of Michigan's general prohibition against successive motions set forth in Rule 6.502(G)(2). That rule permits a Michigan defendant to file a successive motion for relief only when it is based on either a retroactive change in law or new evidence that post-dates the first motion.[4] *See* Mich. Ct. R. 6.502(G)(2). Because Rule 6.502(G)(2) is an independent and adequate ground for precluding relief, *see Ingram v. Prelesnik*, 730 F. App'x 304, 311 (6th Cir. 2018), reasonable jurists would agree that Heiney procedurally defaulted these claims.

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[3] To the extent that Heiney's fifth ground for relief raises claims of insufficiency of the evidence and ineffective assistance of counsel that are duplicative of his first, third, and fourth grounds for relief, those claims are discussed above.

[4] Heiney maintains that his *Brady* claim in ground five is based on new evidence (e.g., deposition testimony that post-dates the filing of his first motion for relief from judgment), but the trial court rejected this argument because none of the evidence, even if new, likely would have changed the outcome of Heiney's trial. In view of that ruling, which this court deems reasonable, Heiney cannot make a substantial showing of the denial of a constitutional right with respect to his *Brady* claim. 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336; *Slack*, 529 U.S. at 484. And although Heiney's sixth claim relies on *Bostock*, 140 S. Ct. at 1731, which post-dates his first motion for relief from judgment, reasonable jurists would agree that *Bostock* is "an employment discrimination case [that] has no application to [Heiney's] criminal case" and thus can afford him no habeas relief.

A federal habeas court is barred from reviewing a procedurally defaulted claim unless the petitioner can show either cause for the default and actual prejudice from the alleged constitutional violation, or that failure to consider the claim would result in a "fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991), which can be demonstrated only by presenting new evidence showing one's actual innocence, *Hodges v. Colson*, 727 F.3d 517, 530 (6th Cir. 2013).

Heiney argues that the ineffective assistance of appellate counsel serves as cause for his procedural default. Reasonable jurists would agree that the argument fails. Ineffective assistance of appellate counsel can serve as cause for a procedural default only if that claim is not itself procedurally defaulted. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *Burroughs v. Makowski*, 411 F.3d 665, 667-68 (6th Cir. 2005) (per curiam). Heiney did not, at any point, raise an independent claim that his appellate counsel was ineffective for failing to raise Claims Five, Six, and Seven on direct appeal; therefore, he cannot rely on ineffective assistance of appellate counsel to excuse the default of those claims.

Heiney also argues that, pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), ineffective assistance of his post-conviction counsel excuses the default. Again, reasonable jurists would agree that the argument fails. *Martinez* and *Trevino* can be invoked to excuse default of only ineffective-assistance-of-trial-counsel claims, *see Davila v. Davis*, 582 U.S. 521, 526 (2017), so the alleged ineffectiveness of post-conviction counsel cannot constitute cause to overcome the procedural default of Heiney's remaining claims—except for his ineffective-assistance-of-trial-counsel subclaims raised in ground five. In order for post-conviction counsel's failure to raise those trial-counsel subclaims to excuse their procedural default, Heiney must show that the subclaims are "substantial." *Martinez*, 566 U.S. at 14; *Trevino*, 569 U.S. at 423. A substantial claim of ineffective assistance is a claim that "has some merit." *Martinez*, 566 U.S. at 14.

None do. Heiney claims that trial counsel failed to properly advise him about the risks of choosing a bench trial, challenge inadmissible and prejudicial testimony, adequately cross-

examine witnesses, call other patients, move for sanctions after witnesses violated sequestration orders, argue that the trial court erred in finding that he acted with a sexual purpose, raise an "obvious defense," or object to the charges, conviction, and sentence. Putting aside that Heiney's § 2254 petition only cursorily raised these claims with minimal facts in support, he cannot show that they are "substantial" enough for procedural-default purposes because he cannot show prejudice. For example, there is no reasonable probability that Heiney would have been acquitted of CSC with Gray if trial counsel had called as witnesses "other patients, including males, who had orthopedic chest examinations like Gray's" because those patients' testimony about their interactions with Heiney would not alter Gray's testimony and demonstration about her interactions with Heiney. Because this and all other ineffective-assistance-of-trial-counsel claims are not substantial, the purported ineffective assistance of post-conviction counsel in failing to raise them cannot overcome their procedural default.

Heiney also argues that his actual innocence excuses the procedural default. To excuse a procedural default on this basis, the petitioner must show that "it is more likely than not that no reasonable juror would have convicted him" in view of "new reliable evidence . . . that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 327 (1995).

In support of his actual-innocence argument, Heiney points to post-trial civil deposition testimony, medical literature on breast examination techniques, and affidavits from two physicians, all of which he claims supports his position that his examination of Gray was not medically recognized as unethical or unacceptable. The district court determined that none of this evidence or the fact that civil suits against Heiney did not result in a judgment against him "speak[s] to Gray's demonstration of how [Heiney] squeezed her breasts and how the trial court distinguished her description from Earnest's case in finding that it was done for purposes of sexual gratification." No reasonable jurist could disagree. Indeed, none of the proffered new evidence would have made a difference: as set forth above, a CSC conviction can be based on "common knowledge" that the conduct was not medically ethical or acceptable and, based on the non-expert testimony here—including Gray's testimony and demonstration—jurists of reason would agree

that the trial court reasonably found that Heiney's examination of Gray was not medically ethical or acceptable. Although Heiney argues that Gray testified at a post-trial civil deposition that "the examination was not sexual," as the trial court had found, that is *not* her testimony. Rather, when asked if Heiney "did something inappropriate with you sexually," Gray replied that, although "I never used the word 'sexually,' ever, in any of my testimony[,] I was felt *I was touched inappropriately, yes.*" (emphasis added.) In the end, Heiney's argument, even if based on "new" evidence, does not meet the actual-innocence standard. *See Bousley v. United States*, 523 U.S. 614, 624 (1998) (holding that "'actual innocence' means factual innocence, not mere legal insufficiency"). Reasonable jurists therefore could not debate the district court's conclusion that Heiney's procedural default of Claims Five, Six, and Seven is not excused by a credible showing of actual innocence.

The court therefore **DENIES** the motion for a COA and **DENIES** as moot the motions for the appointment of counsel and for leave to file an amended motion for a COA through appointed counsel.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 02/09/2024.

Case Name: Jake Heiney v. Heidi Washington
Case Number: 23-1772

Docket Text:
ORDER filed: The court therefore DENIES the motion for a COA [7077520-2] and DENIES as moot the motions for the appointment of counsel [7077522-2] and for leave to file an amended motion for a COA through appointed counsel [7077524-2]. Eric E. Murphy, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Jake Paul Heiney
3374 Quail Hollow Drive
Lambertville, MI 48144

A copy of this notice will be issued to:

Ms. Kinikia D. Essix
Mr. John S. Pallas

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAKE PAUL HEINEY,

Petitioner,

Case No. 2:19-cv-12474
Hon. Sean F. Cox

v.

HEIDI E. WASHINGTON,

Respondent.
_____/

OPINION DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DENYING CERTIFICATE OF APPEALABILITY

Jake Paul Heiney filed this petition for writ of habeas corpus under 28 U.S.C. § 2254. Petitioner was convicted following a bench trial in the Monroe Circuit Court of two counts of fourth-degree criminal sexual conduct. The trial court sentenced Petitioner to ninety days in jail and five years of probation. Because none of Petitioner's claims merit habeas relief, the petition will be denied.

I

Petitioner, a physician, was charged in connection with physical examinations he performed on two of his patients. The prosecution asserted that Petitioner fondled the patients' breasts for the purposes of sexual arousal or gratification and in a manner that was medically recognized as unethical or unacceptable. *See* MICH. COMP. LAWS § 750.520(q); 520e(1)(b)(iv).

At trial, the first patient, Ms. Earnest, testified that during an April 2015 medical examination for shoulder pain, Petitioner touched her bare breast and nipple. (ECF No. 17-9, at 23-24.) Earnest did not go to the police until she saw an article in the Toledo Blade about another woman making a similar complaint against Petitioner in Ohio. (*Id.* 32.) Due to the nature of her medical complaints, however, which included complaints about her breast, and her description of how Petitioner contacted her breasts, the trial court directed a verdict in favor of Petitioner with respect to the charges involving Earnest. The court found there was reasonably doubt as to whether the contact was medically unethical or unacceptable (*Id.* 233-34.)

The second patient, Ms. Gray, testified that she grew up with Petitioner and they had attended the same high school. (*Id.* 69.) At an April 2015 appointment with Petitioner, Gray complained of lower back pain and stiffness in her neck. (*Id.* 76, 79.) Gray never told Petitioner that she had pain in her chest or breast area, and she never described pain radiating to her chest or breast. (*Id.* 75, 80, 97, 103.)

Petitioner started by examining Gray's lower extremities (*Id.* 76, 102). He then examined her upper body. He pulled her gown and bra off her shoulder and grabbed her breast and squeezed it twice. (*Id.* 77-78). Petitioner did not explain to Gray why he was touching her breasts. (*Id.* 105.)

Gray demonstrated for the court the manner in which Petitioner squeezed her breasts: "The bra came down, grab, squeeze, whatever you call this motion. This. It

was not this. It was this type of motion." (*Id.* 78.) The exam was not the same as a breast exam conducted at a gynecologist's office (*Id.* 106.) Because the court thought it to be "the critical part of everything that we've been listening to," it had Gray demonstrate the motion used by Petitioner on her breasts again on redirect examination. (*Id.* 118-19.)

After the appointment, Gray felt confused. About an hour later she called her friend and told her that, "I just went and saw Jake. You're not going to believe this; I had my exam. He touched my boobs." (*Id.* 85.) She felt uncomfortable enough about the exam that she also told her mother, her sister, and a few friends who were nurses. (*Id.* 85-87.)

Nevertheless, about a week later Gray allowed Petitioner to perform an injection procedure under anesthesia at the hospital. (*Id.* 82, 87.) She tried to convince herself that Petitioner's actions were just a normal part of the examination. (*Id.* 87.)

Several months later, Gray saw a news article about allegations made by women in Ohio against Petitioner, and she called the police. (*Id.* 89, 151.) Petitioner later texted Gray and asked her to speak on his behalf regarding the allegations that were being made against him. (*Id.* 92.) He tried to explain that that part of the examination, while uncomfortable, was necessary. (*Id.*)

Ms. Stone testified at trial as a similar-acts witness. Stone testified that she saw Petitioner in November 2014 for pain in her shoulder. He administered several injections. (*Id.* 127.) At a follow up appointment, Petitioner asked Stone to remove her arm from her bra and tank top. He told her that pain from the breast can cause or radiate to the arm and cause pain in the arm. (*Id.* 143.) He asked if he could do an exam of her breast and she consented. (*Id.* 143.) He exposed her left breast, pushed on it with one or two fingers and then pushed and squeezed the entire breast with his thumb and fingers. (*Id.* 145, 163-164.)

The breast exam was not like the breast exams Stone had experienced at the gynecologist. (*Id.* 152-53.) Stone told several others about her experience. She called another orthopedic surgeon's office, and she contacted the state medical board. (*Id.* 157.)

Ms. Okulski testified as another similar-acts witness. Okulski saw Petitioner in Ohio for shoulder pain. (*Id.* 169.) She told Petitioner that she did not have any breast discharge or any breast pain. (*Id.* 170.) Petitioner had Okulski remove her left arm from her tank top and bra strap and gave her "like a breast exam and asked me if that hurt." (*Id.* 171.) He pressed around her breast area with his fingers. He held her arm up and conducted a second breast exam. Petitioner performed a third breast exam and cupped her breast for a few seconds. (*Id.* 185.) Okulski did not understand

why he was doing the breast exam. The exam was not like any breast exam that Okulski had experienced with her gynecologist. (*Id.* 176.)

Petitioner then had Okulski stand up so that he could look at her lower back. He was behind her and asked her to touch her toes. (*Id.* 178.) He pulled her pants and underwear to her knees. (*Id.* 178.) He pressed on her hips and buttocks and touched her inner thigh, and his fingers brushed her vagina. (*Id.* 188.) After the appointment she called the police.

Detective Laura Bliss testified that she was employed with the Sylvania Police Department in Ohio. (*Id.* 192.) She investigated the case against Petitioner. During the investigation, she spoke with Petitioner. Bliss asked him about his examination of Okulski. She asked Petitioner how he conducted shoulder evaluations and asked if it would include a breast examination. Petitioner indicated that he would not perform a breast examination unless there was a complaint "about pain radiating or something of that nature." (*Id.* 195.) He indicated that if he were to conduct a breast examination that he would use his fingers to palpate the area including the pectoral muscle. (*Id.* 196.)

Brian Kinsella testified that he was employed by an independent orthopedic organization and was assigned to work at Petitioner's clinics. (*Id.* 206.) Kinsella wrote out prescriptions and set up injections. (*Id.* 212.) Kinsella had seen Petitioner

conduct many shoulder examinations. He observed Petitioner conduct breast exams as a part of shoulder evaluations. (*Id.* 209.)

Kinsella recalled Christy Gray's visit to the office in April 2015. Kinsella was in the room with Petitioner and Gray during the entire appointment. He did not see Petitioner do anything inappropriate during that exam. (*Id.* 221.) He did not know whether Petitioner touched Gray's breast because he was standing behind her. He did see that Petitioner was examining her in that area beneath the gown. (*Id.*)

Dana Lefever testified for the defense that she was a medical assistant and had worked with Petitioner. Petitioner always wanted someone in the room with him during examinations. (*Id.* 238.) Lefever recalled Gray's appointment in April 2015. Lefever had observed Petitioner conduct physical examinations. She observed him palpate breast tissue. The breast examination was not the same as a gynecological breast exam. (*Id.* 243.)

Nicole Vernon testified that she worked with Petitioner checking patients in and out and scheduling procedures. Gray never complained about any of the examinations at the office.

The trial court found Petitioner guilty of two counts of fourth-degree criminal sexual conduct relating to Gray:

> The defendant is charged in this matter of two counts of criminal sexual conduct on [Ms.] Gray. The elements of those offenses are that the defendant did intentionally touch Ms. Gray's breasts. Said touching was done for sexual purpose or could be reasonably construed as having

been done for a sexual purpose. The defendant engaged in medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

It's clear the prosecutor has the burden of proof to show all of these elements beyond a reasonable doubt. The Court heard the testimony of a number of witnesses. Four women testified, two who are victims in this matter and two who were 404(b) witnesses. Many things were consistent about the women's testimony. Not one of the women said they had pain in her breast, discharge, or complained of any pain radiating to or from the breast. They all said that they were alone with the defendant except for check in and check out. None recalled the defendant wearing gloves. None, other than Ms. Stone, received any explanation as to the nature of the exam that they were receiving. All of them discussed it with friends, parents, other medical professionals almost immediately after it happened.

Now, perhaps now is a good time to say that I don't disbelieve Ms. Earnest just because I dismissed those claims but she struggled with memory issues and there was a significant medical issue-- medical issue pertaining to cysts and a mass removal as well as the testimony that Dr. Heiney palpa-- or palpated her breasts.

Now, I don't quite see the connection between the women as the defense does. I don't find it unusual for there to be confusion. I mean there was testimony did that happen? Perhaps I'm missing something. You know, there's the issue of physical authority. I really-- I don't see that as an unusual reaction here. I also don't think it's unusual that one of the 404(b) witnesses consulted with an attorney. [I] mean that happened multiple times to me when I was an attorney. People would come and talk to me about that. That's why we're called attorneys and counselors at law.

Detective Bliss testified that she spoke to the defendant in May of 2015. Dr. Heiney said breast exams only happen if pain is rad-- radiating from the breasts or discharge. The patient would have to raise it and then I would palpate the breast and the pectoral muscle.

Christy Gray is the only one out of all of these women who didn't have shoulder pain. She went to a seminar, I think at Quimby's she said,

the defendant was giving with respect to sacroiliac surgery. Defendant's exhibit B is her progress notes, her medical records. In there the chief complaint is bilateral knee pain and weakness, bilateral hand numbness, right sacroiliac joint disease, right lower back pain and weakness, right lower extremity numbness and pain.

Her testimony was that the defendant was on both sides of her. On each time he grabbed the gown and the bra and pulled it down and then squeezed the breasts twice. He did that on both sides of her. She did not, as previously stated, complain about any pain radiating to or from the breast. Her testimony was quite definitive. He didn't palpate her breasts but he grabbed it and squeezed. She used her hands to kind of show how that happened.

It's true she didn't call the police right away. She did tell her mom, her friends, and her sister almost immediately. She testified she didn't want to believe it but she definitively testified that within 15 minutes of reading the Toledo Blade article she called first the Sylvania Police and then the Monroe County Sheriffs. I don't really know what to make of the phone call one way or the other. I mean that could--could go either way and for me to comment any further on the phone call would be just speculation.

I do find, however, after review of all the evidence, the testimony of the four women who I mentioned as well as Detective Bliss, Brian Kinsella, Dawn Lefevers, and Nicole Vernon that the prosecutor has proven beyond a reasonable doubt that the defendant is guilty of criminal sexual conduct in the fourth degree as detailed in counts one and two of the complaint.

I find that the defendant is guilty of criminal sexual conduct in the fourth degree as counts one and two that occurred in the county of Monroe, state of Michigan on or about April 14th, 2015.

(ECF No. 17-10, at 27-30.)

Following his conviction and sentence, Petitioner filed a claim of appeal. His appellate counsel filed a brief in the Michigan Court of Appeals that raised two claims:

> I. Defendant's convictions for criminal sexual conduct in the fourth degree must be vacated where the trial court failed to make findings of fact and conclusions of law consistent with a verdict of guilt where the prosecution failed to present sufficient evidence that defendant's actions were medically recognized as unethical or unacceptable.
>
> II. The trial court violated defendant's right to confront the witnesses against him by prohibiting him from cross-examining one of those witnesses for motive and bias. U.S. Const. Am VI, XIV.

The Michigan Court of Appeals affirmed in an unpublished opinion. *People v. Heiney*, No. 333363, 2017 WL 6624110, at *1 (Mich. Ct. App. Dec. 28, 2017). Petitioner appealed to the Michigan Supreme Court, but his application for leave to appeal was denied. *People v. Heiney*, 911 N.W.2d 708 (Mich. 2018)(Table).

Petitioner then returned to the trial court and through new counsel he filed a motion for relief from judgment that raised the following claims:

> I. Defendant was deprived of Michigan and federal constitutional rights to the effective assistance of trial counsel due to counsel's failure to file a timely notice of a proposed defense expert and consequent failure to call an expert at trial.
>
> II. Defendant was deprived of the effective assistance of appellate counsel in the appeal of right for the failure of appellate counsel to file a timely motion for new trial, or a motion to remand in the Court of Appeals, raising an ineffective assistance of trial counsel claim.

The trial court denied the motion for relief from judgment by opinion dated November 5, 2019. (ECF No. 17-19). Though the trial court cited Michigan Court Rule 6.50-8(D)(3), outlining the procedural limitations for raising claims on post-conviction review, the court found that the claims were without merit because Petitioner failed to demonstrate prejudice. (*Id.*, PageID.804-09.)

Petitioner filed an application for leave to appeal in the Michigan Court of Appeals. The court denied leave to appeal because Petitioner failed to establish that the trial court erred in denying the motion for relief from judgment. (ECF No. 17-23, PageID.968.) Petitioner filed an application for leave to appeal in the Michigan Supreme Court, but it was denied by standard form order. *People v. Heiney*, 957 N.W.2d 774 (Mich. 2021)(Table).

Heiney returned to the trial court again and filed a second motion for relief from judgment that raised the following claims:

> I. Petitioner was deprived of his right to a fair trial, due process, and equal protection provided in the United States and the State of Michigan Constitutions as established in *Bostock v. Clayton County*, Georgia 140 S. Ct. 1731 (2020).
>
> II. New exculpatory evidence makes a probable different result on retrial for petitioner; also new evidence demonstrates petitioner was deprived of his right to a fair trial, due process, and equal protection provided in the United State and the State of Michigan Constitutions; also new evidence provides petitioner a claim of actual innocence.
>
> III. Petitioner was deprived of his first amendment right to freedom of religion and has a significant possibility of being innocent.

The trial court denied the motion for relief from judgment because Petitioner failed to demonstrate under Michigan Court Rule 6.508(G)(2) that he was permitted to file a second post-conviction motion. (ECF No. 17-21, PageID.877-80.)

Petitioner appealed, and the Michigan Court of Appeals denied his application for leave to appeal because Petitioner "failed to establish that the trial court erred in denying the successive motion for relief from judgment. MCR 6.502(G)." (ECF No. 17-24, PageID.1320.) The Michigan Supreme Court likewise denied relief under Rule 6.502(G). (ECF No. 17-29, PageID.2966.)[1]

II

A § 2254 habeas petition is governed by the heightened standard of review set forth in the Anti-Terrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. § 2254. To obtain relief, habeas petitioners who raise claims adjudicated by state courts must "show that the relevant state-court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence

[1] Petitioner filed a motion for leave to file portions of the state court record that were omitted from the Rule 5 materials by Respondent. (ECF No. 32.) Respondent's answer to the motion conceded that portions of the record relevant to Petitioner's claims were omitted, and it contended that other materials submitted by Petitioner were duplicative to what Respondent has already filed. (ECF No. 40.) The Court will therefore accept Petitioner's supplemental filings and grant Petitioner's motion, as it appears Petitioner has not attempted to present the Court with any document that was not made part of the state court record.

presented in the State court proceedings.'" *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018)(quoting 28 U.S.C. § 2254(d)).

The focus of this standard "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). "AEDPA thus imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773 (2010)(internal citations and quotation marks omitted).

Ultimately, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011)(quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Additionally, a state court's factual determinations are presumed correct on federal habeas review, 28 U.S.C. § 2254(e)(1), and review is "limited to the record that was before the state court." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

III

A

Petitioner first asserts that insufficient evidence was presented at trial to sustain his convictions. Specifically, he asserts that no evidence admitted at trial

indicated that the way he touched Gray's breasts was medically unethical or unacceptable, a necessary element to sustain a conviction under § 750.520e(1)(b)(iv). He asserts expert testimony or other medical evidence is the only way to establish that element. (ECF No. 13, PageID.97-98.)

The Michigan Court of Appeals, after reciting the constitutional standard governing sufficiency of the evidence claims and the elements of the offense, rejected the claim on the merits:

> The trial court concluded that defendant touched CG's breasts for a sexual purpose and engaged in a medical examination of CG that was medically recognized as unethical or unacceptable. More specifically, the trial court found that (1) CG did not complain of breast pain or discharge and (2) according to defendant the patient would have to complain of pain radiating from the breast or discharge from the breast in order to perform a breast examination. The trial court also noted the similar testimony of other witnesses.
>
> Defendant argues that the trial court's legal conclusion was erroneous and the verdict was not based on the evidence produced at trial because the prosecution offered no evidence that defendant "engaged in unethical or unacceptable medical practices," a required element under the statute. Defendant notes that no witness provided testimony regarding what constituted an unethical or unacceptable orthopedic physical examination for a patient with CG's symptoms.
>
> The Supreme Court in *People v. Baisden*, 482 Mich. 1000 (2008), held that medical testimony is not required in all prosecutions involving CSC in the medical context because "it is common knowledge that" some actions, such as "penile penetration constitute[] an unethical and unacceptable method of 'medical treatment.'" There is no case law determining whether it is common knowledge that squeezing breasts during an orthopedic examination for neck, back, and leg pain is an unethical and unacceptable method of medical treatment. However, in *People v. Hallak*, 310 Mich. App. 555, 565 (2015), rev'd

in part on other grounds 499 Mich. 879 (2016), the Court upheld the trial court's determination, based in part on expert testimony, that a physician touching the breast of a patient during an examination for a throat problem was "sufficient for the jury to conclude that the touching was not for a legitimate medical purpose."

Despite the lack of any expert testimony on the issue, there was some testimony from which the trial court could have inferred that squeezing CG's breasts was not an acceptable medical practice. First, CG testified that including her breasts in the examination seemed unusual and she was confused by the examination, which defendant did not explain. Second, three other women testified that defendant touched their bare breasts in various ways while purportedly examining them for pain. That all the women claimed to have pain, but not chest-related pain, and defendant accessed and manipulated their breasts in various inconsistent ways, is some evidence that squeezing CG's breasts was not a part of a standard examination for her pain. Third, and most significantly, there was medical testimony that examining a breast during an orthopedic examination without a complaint of pain or discharge in the area was not medically acceptable. According to Detective Bliss, defendant stated that he would only examine a breast when the presenting complaint was shoulder pain and there was a complaint such as pain radiating or discharge from the breast. Defendant denied that a breast exam was a normal part of his investigation. CG testified that she never complained of pain in her chest and, thus, by defendant's standards, a breast examination would not be a medically appropriate part of his examination.

Additionally, Bliss testified that defendant reported that he would examine both breasts for comparison, and that the examination would consist of palpitating the muscle above the breast tissue. Further, the chest palpitation of the muscles of both sides of the chest that defendant described as medically appropriate was not the examination that CG described. The trial court found, consistent with the testimony, that CG was "quite definitive" in stating that she did not complain of breast pain or discharge and that defendant did not palpitate her breasts, but grabbed and squeezed.

Additionally, CG had interactions with three physicians for possible back surgeries after seeing defendant, and they performed

> MRIs, a nerve study, and a bone study, rather than physical examinations. MS, KO, and SE all testified that they were familiar with breast examinations and noted that defendant's breast examinations were much different from other examinations because he did not have any of the women lay down with an arm behind the head, did not move in slow small circles (palpitate), did not explain what he was doing or always ask questions, and did not always examine both breasts or use the same examination on both breasts. Thus, there was evidence, when viewed in a light most favorable to the prosecutor, that defendant's touching of CG's breasts was a medical examination done in a manner that was medically recognized as unethical or unacceptable.

Heiney, 2017 WL 6624110, at *1-2 (footnote omitted).

Under clearly established Supreme Court law, the standard governing sufficiency of the evidence claims is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

A habeas court's "review of a state-court conviction for sufficiency of the evidence is very limited," *Thomas v. Stephenson*, 898 F.3d 693, 698 (6th Cir. 2018), because *Jackson* claims are "subject to two layers of judicial deference." *Coleman v. Johnson*, 566 U.S. 650, 651 (2012)(per curiam). First, it is the responsibility of the fact finder at trial to decide what conclusions should be drawn from the evidence admitted. *Johnson*, 566 U.S. at 651 (quoting *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam)). "And second, on habeas review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because

the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Id.* (quoting *Smith*, 565 U.S. at 2). The question under this standard is whether the state court determination that sufficient evidence was presented "was so insupportable as to fall below the threshold of bare rationality." *Johnson*, 566 U.S. 650, 656 (2012).

Petitioner asserts that without expert testimony, there was no basis for the trial court to conclude beyond a reasonable doubt that his conduct was medically unethical or unacceptable. There is no such categorical requirement under Michigan law. In interpreting § 520e(1)(b)(iv), the Michigan Supreme Court held that there are situations where a fact finder may refer to common knowledge that some actions are medically unethical or unacceptable without the aid of medical testimony. *See People v. Baisden*, 482 Mich. 1000 (2008)(expert testimony unnecessary for fact-finder to determine that physician's penile penetration of victim was unethical and unacceptable for purposes of medical treatment).

Petitioner asserts that *Baisden* created a limited exception that has no application to the facts presented here, where there is room for debate whether the conduct amounted to medically acceptable palpitation or medically unacceptable fondling for a sexual purpose. That sort of argument, however, has no place in a federal habeas proceeding. The United States Supreme Court has "repeatedly held that a state court's interpretation of state law, including one announced on direct

appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). State courts are the "ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). "'What is essential to establish an element, like the question whether a given element is necessary, is a question of state law.'" *Sanford v. Yukins*, 288 F.3d 855, 861 (6th Cir. 2002)(quoting *Bates v. McCaughtry*, 934 F.2d 99, 103 (7th Cir. 1991).

Here, the Michigan Court of Appeals determined—as a matter of state law—that expert medical testimony was not necessary to establish the disputed element under the statute of conviction and the facts of this case. The state court's ruling essentially extended the rationale of *Baisden* to the situation presented here. Common knowledge can provide a sufficient basis for determining beyond a reasonable doubt that certain types of sexual contact are medically unethical or unacceptable. Certainly, that is true of penile penetration, and the state court found here that a certain manner of grabbing and squeezing of a woman's breasts may be too.

Given that expert testimony is not required under state law to establish the disputed element, the state court's finding that sufficient evidence was presented does not fall below the "threshold of bare rationality." *Johnson*, 566 U.S. at 656.

Both complainants demonstrated for the trial court, sitting as finding of fact, how Petitioner touched their breasts. With respect to Earnest, the court noted that

Petitioner used a palpating motion, and in light of her particular condition and complaints, the court directed a verdict in Petitioner's favor. The court contrasted that incident with what Gray described. She twice demonstrated for the court how Petitioner grabbed and squeezed her breasts. The court found: "Her testimony was quite definitive. He didn't palpate her breasts, but he grabbed it and squeezed. She used her hands to kind of show how that happened." (ECF No. 17-10, at 27-30.)

While perhaps not as obviously unacceptable as the facts in *Baisden*, it did not fall below the level of bare rationality for the court to rely on Gray's demonstration, her reaction in telling friends and family about what happened, and the similar-acts witnesses' testimony to determine that Petitioner touched Gray's breasts for purposes of sexual gratification in a way that was medically unethical or unacceptable. The state adjudication of this claim did not unreasonably apply the *Jackson* standard.

B

Petitioner's second claim asserts that he was denied the right to confront witnesses under the Sixth Amendment. Specifically, he asserts that he was prohibited from cross-examining Earnest about her finances, which he argues incentivized her to falsely accuse him to support a possible civil action.

The Michigan Court of Appeals rejected the claim on the merits. It found that Petitioner's confrontation rights were not violated because Petitioner was allowed to

ask Earnest whether she intended to file a civil action. When Earnest denied that she intended to file suit, it rendered any personal financial difficulties irrelevant. *Heiney*, 2017 WL 6624110, at *3.

The Court of Appeals went on to find that any alleged error was nevertheless harmless:

> Moreover, even where a defendant is denied his constitutional rights under the Sixth Amendment, reversal is not required if the error is harmless beyond a reasonable doubt. *People v. McPherson*, 263 Mich. App. 124, 131-132 (2004). An error is harmless beyond a reasonable doubt when it has had no effect on the verdict. *Morton*, 213 Mich. App. at 335–336. Here, the trial court granted defendant's motion for a directed verdict of acquittal regarding his actions with SE because it found a reasonable doubt that his actions were medically recognized as unethical or unacceptable based on her history of having a cyst removed from her breast. Thus, SE's testimony did not contribute to defendant's conviction.

Id.

Under established federal law, "[u]nconstitutional limitations on cross-examination are normally subject to harmless-error analysis." *Hargrave v. McKee*, 248 F. App'x 718, 728 (6th Cir. 2007)(citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). Where, as here, a state court determines that a constitutional error at trial is harmless beyond a reasonable doubt, a federal court cannot grant habeas relief without first applying both the test outlined in *Brecht v. Abrahamson*, 507 U.S. 619 (1993), and the test that Congress prescribed in AEDPA. *Brown v. Davenport*, 142 S. Ct. 1510, 1517 (2022).

Brecht requires a state prisoner in a federal habeas proceeding to show that the error had a "substantial and injurious effect or influence" on the outcome of his trial. 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946). A "substantial and injurious effect or influence" means "actual prejudice." *Id.* at 637-38. Meanwhile, "AEDPA asks whether every fairminded jurist would agree that an error was prejudicial." *Brown*, 142 S. Ct. at 1525.

Petitioner has not shown that any error in limiting the cross-examination of Earnest had a substantial and injurious influence on the outcome of his case. As indicated, the trial court directed a verdict in favor of Petitioner with respect to Earnest. Meanwhile, the prohibited cross-examination had no connection to Gray, the charges that resulted in the conviction. Therefore, not every fairminded jurist would agree that the limitations placed on cross-examining Earnest about her finances resulted in prejudice. Petitioner fails to demonstrate entitlement to relief with respect to his claim.

C

Petitioner's third and fourth claims assert that he was denied the effective assistance of counsel. He asserts that his trial attorney failed to call an expert witness to testify that his conduct was not medically unethical or unacceptable. He also asserts that his appellate counsel was ineffective for failing to raise the issue on direct appeal.

This claim was presented to the trial court in Petitioner's first motion for relief from judgment. The motion was supported with an affidavit from a physician, Dr. Corn. (ECF No. 17-13, PageID.717-20.) After reciting Michigan's procedural rules regarding entitlement to post-conviction review,[2] and the controlling constitutional standard governing claims of ineffective assistance of counsel, the trial court rejected the claims on the merits:

> The first assignment of error alleged by the Defendant is that he was deprived of his right to the effective assistance of counsel due to counsel's failure to file a timely notice of a proposed witness at trial. Defendant alleges he was prejudiced because there was a favorable expert witness with who counsel had conferred with and who was ready and available to testify. The case was tried without any expert testimony from either side regarding whether the examinations Defendant performed were medically proper or not. The expert witness Defendant alleges was ready and available to testify was not contacted for the Michigan trial, but only for the Ohio trial.
>
> Even if counsel's failure to file a timely notice of a proposed expert witness could be deemed an unreasonable performance, it did not cause prejudice to the Defendant. To show prejudice, the Defendant must show that counsel's errors "are so serious as to deprive him of a trial whose results is fair and reliable." *Lockhart v. Fretwell*, 506 U.S. 364 (1993). The Supreme Court in *People v. Baisden*, 482 Mich. 1000 (2008), held that medical testimony is not required in all prosecutions involving CSC in the medical context because "it is common knowledge that" some actions, such as "penile penetration constitute [] an unethical and unacceptable method of 'medical treatment.'" Despite

[2] Contrary to Respondent's assertion, the claim is not defaulted under Michigan Court Rule 6.508(D)(3). Though the trial court cited this procedural rule, it did not clearly and expressly rely on it as a basis for denying relief. Instead, the trial court's opinion suggests that it found Petitioner's claim lacked merit because he failed to demonstrate *Strickland* prejudice. *See Guilmette v. Howes*, 624 F.3d 286 (6th Cir. 2010).

the lack of any expert testimony on the issue, there was some testimony from which the trial court inferred that squeezing CG's breasts was not an acceptable medical practice. First, CG testified that including her breasts in the examination seemed unusual and she was confused by the examination, which defendant did not explain. Second, three other women testified that defendant touched their bare breasts in various ways while purportedly examining them for pain. That all the women claimed to have pain, but no chest related pain, and defendant accessed and manipulated their breasts in various inconsistent ways, is some evidence that squeezing CG's breasts was not a part of a standard examination for her pain. Third, and most significantly, there was medical testimony that examining a breast during an orthopedic examination without a complaint of pain or discharge in the area was not medically acceptable. According to Detective Bliss, defendant stated that he would only examine a breast when the presenting complaint was shoulder pain and there was a complaint such as pain radiating or discharge from the breast. Defendant denied that a breast exam was a normal part of his investigation. CG testified that she never complained of pain in her chest and thus, by defendant's standards, a breast examination would not be a medically appropriate part of his examination.

The second assignment of error alleged by Defendant is that he was deprived of the effective assistance of appellate counsel due to counsel's failure to raise a claim on direct appeal that he was deprived of the effective assistance of trial counsel. The principal issue raised on appeal was that the evidence was insufficient to convict without expert testimony. Defendant claims appellate counsel should have filed a timely motion for a new trial or a motion to remand in the Court of Appeals for a claim that trial counsel was ineffective for failure to call an expert witness. An appellate attorney is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). The decision to withhold issues on appeal must be done as a tactical choice made in sound professional judgment. Defendant has not shown a reasonable probability that, but for appellate counsel's mistake, the result would have been different. Defendant has failed to demonstrate actual prejudice, i.e., that the result would have been different had appellate attorney filed a motion for a new trial or a motion to remand claiming trial counsel was ineffective for the failure to call an expert witness.

(ECF No. 17-19, PageID.807-09.)

To show that he was denied the effective assistance of counsel under federal constitutional standards, a defendant must satisfy a two-prong test. First, the defendant must demonstrate that, considering all of the circumstances, counsel's performance was so deficient that the attorney was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In so doing, the defendant must overcome a strong presumption that counsel's behavior lies within the wide range of reasonable professional assistance. *Id.*

Second, the defendant must show that such performance prejudiced his defense. *Id.* To demonstrate prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "'The likelihood of a different result must be substantial, not just conceivable.'" *Storey v. Vasbinder*, 657 F.3d 372, 379 (6th Cir. 2011)(quoting *Harrington*, 562 U.S. at 112). The habeas petitioner bears the burden of demonstrating prejudice under this standard. *See Wong v. Belmontes*, 558 U.S. 15, 27 (2009).

The trial court reasonably decided that Petitioner failed to establish *Strickland* prejudice. The trial court, who also sat as trier of fact during the trial, was unpersuaded that the presentation of the proffered expert testimony would have

made a difference in the outcome. Though the court parroted much of the language used by the Court of Appeals in its decision on direct appeal, a reasonable basis exited for the trial court to find that Petitioner did not demonstrate *Strickland* prejudice.

Dr. Corn, a board-certified orthopedic surgeon, states in his affidavit that he was retained by Petitioner's Ohio attorney, and he reviewed materials for that case. He states that he was never contacted by Petitioner's Michigan trial counsel. In pertinent part, Corn asserts that with respect to the Michigan case, he "reviewed the testimony of both complainants," and that "[n]one of the treatment or examinations described by the complainant[s] at trial is medically recognized as unethical or unacceptable." He also asserts that it is "medically acceptable and ethical to examine the breast and chest area during an orthopedic examination without a complaint of pain or discharge in the area." (ECF No. 17-13, PageID.717-20.)

The trial court was unpersuaded that Corn's testimony would have made a difference. First, the trial court noted that Gray testified that including her breasts in the examination seemed unusual, it confused her, and Petitioner did not explain what he was doing. Corn's affidavit did not speak to this feature of her testimony. He did not assert that it is medially acceptable and ethical to touch a patient's breasts without explaining to her why he is doing so or that he is about to do so. Furthermore, while an examination of breasts may sometimes be acceptable as Corn describes as

a general proposition, Gray's particular description and demonstration of the episode with Petitioner persuaded the trial court to find that it was specifically performed for purposes of sexual gratification.

Next, the fact that Petitioner manipulated various other women's breasts in inconsistent ways, and without any complaint of referred pain, was also evidence persuading the trial court that the squeezing described by Gray was not a bone fide part of an examination for her pain. Corn did not address the testimony from the women about the variety of manners in which Petitioner touched their breasts.

Third, Petitioner's own statements to police in relation to the Ohio case was inconsistent with his examination of Gray. Corn did not address or explain this apparent inconsistency in his affidavit.

Now, whether the trial court was correct or not, and whether another judge confronted with the same issue would necessarily reach the same result, is not the question on federal habeas review. Here, the scope of review is significantly narrowed by AEDPA. The features relied upon by the trial court allowed it to reject Petitioner's claim without objectively unreasonably applying the *Strickland* prejudice standard.

Perhaps more significantly, there is another feature of the case that makes it especially difficult for a reviewing court to second-guess the trial court's no-prejudice finding. Though Corn stated that he reviewed the trial testimony, the fact

remains that he could not have seen Gray demonstrate the manner in which Petitioner grabbed and squeezed her breasts. It is unclear how Corn could determine from reading the transcripts that what Petitioner did was medically acceptable without seeing the demonstrations. The trial court, on the other hand, saw the demonstrations, and it stated during Gray's re-direct examination that the demonstrations were critical to resolving the issue presented by the case.

The fact that the trial court saw Gray testify taken together with the fact that it served as the fact finder at trial put it in a unique position to determine whether Petitioner was prejudiced by counsel's failure to present a defense expert. *See, e.g., Dunham v. Travis*, 313 F.3d 724, 732 (2nd Cir. 2002)(lack of prejudice confirmed when same trial judge who convicted petitioner at bench trial was unpersuaded by evidence later raised in post-conviction motion); *Price v. Romanowski*, 2008 U.S. Dist. LEXIS 4216, 2008 WL 186361 (E.D. Mich Jan. 22, 2008)(petitioner unable to show prejudice where same trial judge who convicted petitioner at bench trial reviewed petitioner's proposed evidence in a post-conviction motion, and indicated it would not have changed the outcome); *Robinson v. Wolfenbarger*, 2006 U.S. Dist. LEXIS 16452, 2006 WL 897333 at *3 (E.D. Mich. April 5, 2006)("petitioner is unable to show that he was prejudiced by counsel's alleged ineffectiveness in light of the fact that the same trial judge that convicted petitioner at his bench trial was 'unmoved' by this additional evidence when it was presented to him in petitioner's

post-trial motion."). Given the trial court's vantage point here, it would be difficult to characterize its determination that Petitioner was not prejudiced as involving an objectively unreasonable application of *Strickland.*

Petitioner also asserts that he was denied the effective assistance of appellate counsel for the failure to raise his trial counsel claim on direct review. Appellate counsel, however, cannot be ineffective for a failure to raise an issue on appeal that lacks merit. *Greer v. Mitchell*, 264 F.3d 663, 676 (6th Cir. 2001); *Mahdi v. Bagley*, 522 F.3d 631, 638 (6th Cir. 2008)("No prejudice flows from the failure to raise a meritless claim.").

Petitioner therefore fails to demonstrate entitlement to relief based on this claim.

D

Petitioner's remaining claims are comprised of the claims he raised in his second motion for relief from judgment. Petitioner's fifth habeas claim is made up of several distinct arguments. He asserts that the prosecutor committed misconduct, that his trial and appellate counsel were ineffective, that prior-acts evidence was improperly admitted, that the result of civil suits related to his conduct proves that he is innocent, and that the opinions of additional medical experts and medical literature indicate that his examination of Gray was medically appropriate. Petitioner's sixth claim asserts that his rights were violated under the Supreme

Court's recent ruling in *Bostic v. Clayton County*, 140 S.Ct. 1731 (2020). Finally, Petitioner's seventh claim asserts that his First Amendment right to the free exercise of religion was violated by his prosecution.

Michigan Court Rule 6.502(G)(1) provides that except as outlined in subrule (G)(2) "one and only one motion for relief from judgment may be filed with regard to a conviction." Rule 6.502(G)(2) allows a defendant to file a second or subsequent motion in only two situations: if the motion is based on a retroactive change in law that occurred after the first motion for relief from judgment was filed, or if evidence discovered after the first such motion supports the claim. The court may waive the provisions of Rule 6.502(G) if it concludes that there is a significant possibility that the defendant is innocent of the crime. Rule 6.502(G)(2).

The Michigan courts rejected Petitioner's second motion for relief from judgment under Rule 6.502(G)(2), a valid state procedural rule at the time Petitioner filed his motion. *See Maslonka v. Hoffner*, 900 F.3d 269, 276 (6th Cir. 2018) (rejecting habeas relief for ineffective assistance of counsel claim procedurally defaulted under MCR 6.502(G)). (ECF No. 17-21, PageID.877-80.)

When a state court clearly and expressly relies on a state procedural rule to reject a claim, federal habeas review is barred unless the petitioner can demonstrate cause for the default and actual prejudice, or he can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. *Hodges v.*

Colson, 727 F.3d 517, 530 (6th Cir. 2013)(citing *Coleman v. Thompson*, 501 U.S. 722, 750-51 (1991)). If a petitioner fails to show cause for his procedural default, it is unnecessary for the court to reach the prejudice issue. *See Hargrave-Thomas v. Yukins*, 374 F.3d 383, 389 (6th Cir. 2004)(citing *Smith v. Murray*, 477 U.S. 527, 533 (1986)).

Petitioner cannot demonstrate good cause to excuse his default. To the extent that Petitioner is asserting ineffective assistance of appellate counsel as cause, the argument is meritless. Because there is no constitutional right to counsel on collateral review, ineffective assistance of appellate counsel does not excuse Petitioner's failure to fully present these claims in his first motion for relief from judgment. *Hannah v. Conley*, 49 F.3d 1193, 1196 (1995). Thus, Petitioner cannot blame his direct appeal counsel or his first post-conviction counsel for failing to raise these claims previously.

Petitioner does not adequately explain why his new claims were not presented in his first post-conviction review proceeding. While it is true that *Bostick* was not decided until 2020, after the first post-conviction motion was filed, that employment discrimination case has no application to Petitioner's criminal case. Petitioner does not explain how his sexual orientation as a heterosexual male was a factor in his prosecution. With respect to his eighth claim, Petitioner similarly fails to explain how his religious belief insulted him from a criminal sexual conduct prosecution.

Nor does he explain how such a theory was previously unavailable. Similarly, Petitioner does not demonstrate that the other trial errors complained of concern facts that were not available or through the exercise of due diligence could have been discovered by Petitioner when he filed his first motion for relief from judgment.

The claims raised in the second motion for relief from judgment are therefore procedurally defaulted and barred from review unless Petitioner can establish that a constitutional error resulted in a fundamental miscarriage of justice. *See Schlup v. Delo*, 513 U.S. 298, 321 (1995). The narrow exception for fundamental miscarriages of justice is reserved for the extraordinary case in which the alleged constitutional error probably resulted in the conviction of one who is actually innocent of the underlying offense. *Dretke v. Haley*, 541 U.S. 386, 388 (2004). A prisoner asserting actual innocence to excuse a procedural default "must establish that, in light of new evidence, 'it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.'" *House v. Bell*, 547 U.S. 518, 536-37 (2006)(quoting *Schlup*, 513 U.S. at 327). This standard is "demanding and permits review only in the 'extraordinary' case." *Id.* at 538 (quoting *Schlup*, 513 U.S. at 327). A credible actual-innocence claim "requires [the] petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324.

In support of his actual innocence claim, Petitioner submitted to the state court medical literature regarding breast examinations (ECF No. 18-1), the affidavits of two additional physicians (ECF No.18-4, PageID.4399-4411), and records related to civil lawsuits that did not result in a judgment against him. None of these materials demonstrate the existence of an extraordinary case showing that it is more likely than not that no reasonable juror would have found Petitioner guilty. *House*, 547 U.S. at 536-37.

Neither the voluminous medical texts nor the new affidavits speak to Gray's demonstration of how Petitioner squeezed her breasts and how the trial court distinguished her description from Earnest's case in finding that it was done for purposes of sexual gratification. The fact that civil suits against Petitioner did not result in a judgment against him is not evidence showing that it is more likely than not that no reasonable juror would have found Petitioner guilty beyond a reasonable doubt. The standard for demonstrating a fundamental miscarriage of justice is high. Nothing in Petitioner's submissions undermines Gray's relatively straight-forward testimony about how Petitioner grabbed and squeezed her breasts and the trial court's specific factual finding that Petitioner did so for the purposes of sexual gratification. Review of these claims is therefore inexcusably barred.

IV

For the reasons stated, the Court concludes that Petitioner fails to establish entitlement to habeas relief with respect to any of his claims. Accordingly, the Court **DENIES WITH PREJUDICE** the petition for a writ of habeas corpus.

Before Petitioner may appeal this decision, the Court must determine whether to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b). A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy § 2253(c)(2), 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)(citation and internal quotation marks omitted). Petitioner has failed to make this showing. Accordingly, the Court **DENIES** a certificate of appealability.

IT IS SO ORDERED.

Dated: August 21, 2023

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

I hereby certify that on August 21, 2023, the document above was served on counsel and/or the parties of record via electronic means and/or First Class Mail.

s/J. McCoy
Case Manager

APPENDIX C

No. 23-1772

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAKE PAUL HEINEY,

Petitioner-Appellant,

v.

HEIDI E. WASHINGTON,

Respondent-Appellee.

ORDER

Before: BOGGS, WHITE, and THAPAR, Circuit Judges.

Jake Paul Heiney, a former Michigan prisoner proceeding pro se, petitions for rehearing of this court's February 9, 2024, order denying his motion for a certificate of appealability. We have reviewed the petition and conclude that the court did not overlook or misapprehend any point of law or fact in denying Heiney's motion for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2). The petition for rehearing is therefore **DENIED**.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 03/29/2024.

Case Name: Jake Heiney v. Heidi Washington
Case Number: 23-1772

Docket Text:
ORDER filed DENYING petition for panel rehearing [7123346-2] filed by Jake Paul Heiney. Danny J. Boggs, Circuit Judge; Helene N. White, Circuit Judge and Amul R. Thapar, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Jake Paul Heiney
3374 Quail Hollow Drive
Lambertville, MI 48144

A copy of this notice will be issued to:

Ms. Kinikia D. Essix
Mr. John S. Pallas

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAKE PAUL HEINEY,

Petitioner,

Case No. 2:19-cv-12474
Hon. Sean F. Cox

v.

HEIDI E. WASHINGTON,

Respondent.
_____/

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT [ECF No. 44] AND GRANTING LEAVE TO APPEAL IN FORMA PAUPERIS [ECF Nos. 47 and 48]

This matter is before the Court on petitioner Jake Paul Heiney's motion to alter or amend judgment. On August 21, 2023, the Court issued an opinion and order denying Heiney's 28 U.S.C. § 2254 habeas corpus petition, finding that his claims were without merit or barred by his state court procedural defaults. (ECF No. 42). Heiney's motion to alter or amend judgment seeks a certificate of appealabilty on all seven of his habeas claims. (ECF No. 44). Heiney also seeks to proceed on appeal to the Sixth Circuit in forma pauperis. (ECF Nos. 47 and 48).

The decision to grant a motion to alter or amend judgment under Fed. R. Civ. P. 59 is discretionary with the district court. *Davis by Davis v. Jellico Cmty. Hosp., Inc.*, 912 F.2d 129, 132 (6th Cir. 1990). A motion to alter or amend judgment will

generally be granted if the district court made a clear error of law, if there is an intervening change in the controlling law, or if granting the motion will prevent manifest injustice. *GenCorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). "A Rule 59 motion 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Brumley v. United Parcel Serv., Inc.*, 909 F.3d 834, 841 (6th Cir. 2018) (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486, n. 5 (2008) (additional quotation omitted)). A Rule 59(e) motion to alter or amend judgment is not a substitute for an appeal. *See Johnson v. Henderson*, 229 F. Supp. 2d 793, 796 (N.D. Ohio 2002).

Heiney asserts that he is entitled to a certificate of appealability on all seven of his claims to prevent manifest injustice. He notes generally that district courts have erred in denying habeas relief and might be reversed on appeal. He also asserts that Respondent's failure to provide all the Rule 5 material resulted in a decision based on an incomplete record. But as far as the Court can discern, the bulk of the motion to amend reiterates the arguments presented in the habeas petition and assert that they at least have some arguable merit.

With respect to Heiney's first through fourth claims, the Court explained in detail in its opinion denying the petition why the claims were without merit. To be entitled to a certificate of appealability, Heiney 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) (citation and internal quotation marks omitted). Heiney's motion simply restates the arguments he presented in his habeas petition. Those arguments have already been rejected by the Court, and there is nothing new presented in Heiney's motion indicating that reasonable jurists might debate the Court's resolution of the claims.

Heiney also asserts that the Court adjudicated his claims on an incomplete record. Not so. The Court granted Heiney's motion for leave to file portions of the state court record that were omitted from the Rule 5 materials by Respondent and considered the materials relevant to the resolution of his claims. (ECF No. 42, PageID.11858, n. 1).

With respect to Heiney's fifth through seventh habeas claims, the Court found the claims were procedurally barred. When a federal district court denies a habeas claim on procedural grounds, a certificate of appealability should be issued if the petitioner shows that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484–85. Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the matter, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed. *Id.* In

such a case, no appeal is warranted. *Id.* For the reasons explained in the opinion denying the petition, Heiney's last three claims are clearly barred, and Heiney failed to demonstrate cause to excuse the default or that a fundamental miscarriage of justice would result. Reasonable jurists would not disagree.

Accordingly, Heiney is not entitled to a certificate of appealability with respect to any of his claims. His motion to amend will be denied.

Heiney also moves to proceed on appeal in forma pauperis. (ECF Nos. 47 and 48). He submits an affidavit indicating that his only source of income is social security disability, that his living expenses exceed his income, that his only asset is a vehicle worth less than a thousand dollars, and that he has debts exceeding $80,000.

A court may grant IFP status if the inmate is unable to pay the fee and the appeal is being taken in good faith. 28 U.S.C. § 1915(a); Fed. R. App. 24(a). "Good faith" requires a showing that the issues raised are not frivolous. *Foster v. Ludwick*, 208 F. Supp. 2d 750, 765 (E.D. Mich. 2002). Though the Court denied the habeas petition and finds that Heiney fails to meet the standard for a certificate of appealability, an appeal can nevertheless be taken in good faith. *Id.*

IT IS HEREBY ORDERED that Petitioner's motion to alter or amend judgment is therefore **DENIED.**

IT IS FURHTER ORDERED that leave to appeal in forma pauperis is **GRANTED.**

Dated: October 13, 2023

s/Sean F. Cox
Sean F. Cox
U. S. District Judge

I hereby certify that on October 13, 2023, the document above was served on counsel and/or the parties of record via electronic means and/or First Class Mail.

s/J. McCoy
Case Manager

APPENDIX E

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAKE PAUL HEINEY,

Defendant-Appellant.

UNPUBLISHED
December 28, 2017

No. 333363
Monroe Circuit Court
LC No. 15-242361-FH

Before: MURRAY, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of criminal sexual conduct, fourth degree (CSC-IV), MCL 750.520e(1)(b) (sexual contact by force or coercion). We affirm.

Defendant was a physician and his convictions resulted from his touching the breasts of one of his patients, CG, during an orthopedic examination. The trial court granted defendant a directed verdict on two other counts of CSC-IV related to similar allegations regarding another patient, SE. Two other women also provided testimony of defendant touching them during examinations.

For his first argument, defendant asserts that the evidence was insufficient to convict him because there was no medical testimony that his examination was medically "unethical or unacceptable." This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Ventura*, 316 Mich App 671, 678; 894 NW2d 108 (2016). This Court also reviews questions of law de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006).

The federal Due Process Clause[1] requires that evidence of every element of a crime be proved beyond a reasonable doubt in order to sustain a criminal conviction. *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979), citing *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). To determine if the prosecutor produced evidence in a bench trial

[1] US Const, Am XIV.

sufficient to support a conviction, this Court considers the evidence "in a light most favorable to the prosecution" to ascertain "whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39 (2002). Direct and circumstantial evidence, as well as all reasonable inferences that may be drawn by the trial court, are considered to determine whether the evidence was sufficient to sustain the defendant's conviction. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992).

Defendant was convicted of two counts of CSC-IV for his touching of CG. MCL 750.520e(1)(b) provides, in relevant part:

> (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:
>
> * * *
>
> (b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:
>
> * * *
>
> (*iv*) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes which are medically recognized as unethical or unacceptable.

The trial court concluded that defendant touched CG's breasts for a sexual purpose and engaged in a medical examination of CG that was medically recognized as unethical or unacceptable. More specifically, the trial court found that (1) CG did not complain of breast pain or discharge and (2) according to defendant the patient would have to complain of pain radiating from the breast or discharge from the breast in order to perform a breast examination. The trial court also noted the similar testimony of other witnesses.

Defendant argues that the trial court's legal conclusion was erroneous and the verdict was not based on the evidence produced at trial because the prosecution offered no evidence that defendant "engaged in unethical or unacceptable medical practices," a required element under the statute. Defendant notes that no witness provided testimony regarding what constituted an unethical or unacceptable orthopedic physical examination for a patient with CG's symptoms.

The Supreme Court in *People v Baisden*, 482 Mich 1000 (2008), held that medical testimony is not required in all prosecutions involving CSC in the medical context because "it is common knowledge that" some actions, such as "penile penetration constitute[] an unethical and unacceptable method of 'medical treatment.' " There is no case law determining whether it is common knowledge that squeezing breasts during an orthopedic examination for neck, back, and leg pain is an unethical and unacceptable method of medical treatment. However, in *People v Hallak*, 310 Mich App 555, 565; 873 NW2d 811 (2015), rev'd in part on other grounds 499 Mich 879 (2016), the Court upheld the trial court's determination, based in part on expert testimony,

that a physician touching the breast of a patient during an examination for a throat problem was "sufficient for the jury to conclude that the touching was not for a legitimate medical purpose."

Despite the lack of any expert testimony on the issue, there was some testimony from which the trial court could have inferred that squeezing CG's breasts was not an acceptable medical practice. First, CG testified that including her breasts in the examination seemed unusual and she was confused by the examination, which defendant did not explain. Second, three other women testified that defendant touched their bare breasts in various ways while purportedly examining them for pain. That all the women claimed to have pain, but not chest-related pain, and defendant accessed and manipulated their breasts in various inconsistent ways, is some evidence that squeezing CG's breasts was not a part of a standard examination for her pain. Third, and most significantly, there was medical testimony that examining a breast during an orthopedic examination without a complaint of pain or discharge in the area was not medically acceptable. According to Detective Bliss, defendant stated that he would only examine a breast when the presenting complaint was shoulder pain and there was a complaint such as pain radiating or discharge from the breast. Defendant denied that a breast exam was a normal part of his investigation. CG testified that she never complained of pain in her chest and, thus, by defendant's standards, a breast examination would not be a medically appropriate part of his examination.

Additionally, Bliss testified that defendant reported that he would examine both breasts for comparison, and that the examination would consist of palpitating the muscle above the breast tissue. Further, the chest palpitation of the muscles of both sides of the chest that defendant described as medically appropriate was not the examination that CG described. The trial court found, consistent with the testimony, that CG was "quite definitive" in stating that she did not complain of breast pain or discharge and that defendant did not palpitate her breasts, but grabbed and squeezed.

Additionally, CG had interactions with three physicians for possible back surgeries after seeing defendant, and they performed MRIs, a nerve study, and a bone study, rather than physical examinations. MS, KO, and SE all testified that they were familiar with breast examinations and noted that defendant's breast examinations were much different from other examinations because he did not have any of the women lay down with an arm behind the head, did not move in slow small circles (palpitate), did not explain what he was doing or always ask questions, and did not always examine both breasts or use the same examination on both breasts. Thus, there was evidence, when viewed in a light most favorable to the prosecutor, that defendant's touching of CG's breasts was a medical examination done in a manner that was medically recognized as unethical or unacceptable.

Next, defendant argues that the trial court violated his right to confront SE by sustaining plaintiff's objection to questions on cross-examination about her financial difficulties. We review de novo the legal question of whether the admission or exclusion of evidence would violate a defendant's constitutional right of confrontation. *People v Nunley*, 491 Mich 686, 696-697; 821 NW2d 642 (2012).

In all criminal prosecutions, the accused shall enjoy the right "to be confronted with the witnesses against him . . . ." US Const, Am VI. The central protection offered by the

Confrontation Clause is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *People v Sammons*, 191 Mich App 351, 356; 478 NW2d 901 (1991). Such testing is at the heart of the right of cross-examination. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Defendants are "guaranteed a reasonable opportunity to test the truth of a witness' testimony," *id.*, and "a broad range of evidence may be elicited on cross-examination for the purpose of discrediting a witness," *Wischmeyer v Schanz*, 449 Mich 469, 474; 536 NW2d 760 (1995). However, the Confrontation Clause does not include the right to cross-examine on any subject, and there is no "right to cross-examine on irrelevant issues." *Adamski*, 198 Mich App at 138.

Defendant argues that the evidence of SE's financial condition should have been admitted as tending to establish SE's financial motivation to testify against him because his conviction could assist in any civil lawsuit that she may have intended to file.[2] Issues regarding the credibility of a witness by exposing "possible biases, prejudices, or ulterior motives" are always relevant on cross-examination. *Davis v Alaska*, 415 US 308, 316-317; 94 S Ct 1105; 39 L Ed 2d 347 (1974). Defendant analogizes this case to *People v Morton*, 213 Mich App 331, 334-336; 539 NW2d 771 (1995), where the Court held that it was error to limit the defendant's cross-examination of a witness regarding any civil lawsuit she was contemplating against the defendant. The Court stated that "whether a witness has filed or is contemplating filing a civil lawsuit, the prospects for which may be affected by the outcome of a criminal action, is always relevant to a witness' credibility." *Id.* at 334-335.

Consistent with *Morton*, defendant was permitted to ask SE about any civil lawsuit that she intended to file, but although SE testified that she had contacted a friend who was an attorney, she ultimately was not planning to file a civil lawsuit. Because SE testified that she was not filing a civil lawsuit, her financial difficulties were not relevant. Without a civil lawsuit, there would be no financial motivation to testify in a criminal trial against defendant. Because defendant had the opportunity to cross-examine SE regarding her contact with an attorney and her consideration of a civil lawsuit, he was not denied his right to confront SE regarding her motivation for testifying.

Moreover, even where a defendant is denied his constitutional rights under the Sixth Amendment, reversal is not required if the error is harmless beyond a reasonable doubt. *People v McPherson*, 263 Mich App 124, 131-132; 687 NW2d 370 (2004). An error is harmless beyond a reasonable doubt when it has had no effect on the verdict. *Morton*, 213 Mich App at 335-336. Here, the trial court granted defendant's motion for a directed verdict of acquittal regarding his actions with SE because it found a reasonable doubt that his actions were medically recognized as unethical or unacceptable based on her history of having a cyst removed from her breast. Thus, SE's testimony did not contribute to defendant's conviction.

---

[2] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MONROE

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, Case No. 15-242361-FH

v. Hon. Daniel S. White

JAKE PAUL HEINEY,

Defendant.
_____/

MONROE COUNTY PROSECUTING ATTORNEY
Attorney for Appellee
125 East Second Street
Monroe, MI 48161
(734) 240-7600

JOHN MINOCK (P24626)
Cramer, Minock, & Sweeney, PLC
Attorney for Appellant
339 E. Liberty
Ann Arbor, MI 48104
(734) 668-2200
_____/

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

"At a session of said Court in the Courthouse in the
City of Monroe, in said County, on the
_____ day of November, 2019"

PRESENT: HON. DANIEL S. WHITE, Circuit Court Judge

The matter having come on to be heard upon the Defendant's Motion for Relief from Judgment, and the Court being otherwise fully advised in the premises;

Defendant Jake Paul Heiney brings forth this motion through his attorney, John Minock, for Relief from Judgment under Michigan Court Rule 6.500. Defendant brings two assignments of error in his motion. The first assignment of error alleges that Defendant was deprived of his

right to the effective assistance of counsel due to counsel's failure to file a timely notice of a proposed defense expert and the failure to call an expert witness at trial. In the second assignment of error, Defendant alleges that he was deprived of effective assistance of appellate counsel due to counsel's failure to raise a claim on direct appeal that he was deprived of the effective assistance of trial counsel.

STATEMENT OF FACTS

Defendant was charged in this case with two counts of criminal sexual conduct, fourth degree, MCL 750.520e(1)(b). Defendant was also charged in another case with two counts of criminal sexual conduct, fourth degree, MCL 750.520e(1)(b). The cases were tried jointly. A direct verdict was declared in the second case. On April 19, 2016, Defendant was convicted in this case after a bench trial. Defendant was sentenced to five years probation, including 90 days in Monroe County Jail.

On December 28, 2017, the Court of Appeals affirmed in an unpublished opinion, *People v. Jake Paul Heiney*, Docket No. 333363. Defendant then filed an Application for Leave to Appeal in the Michigan Supreme Court, which was denied on May 28, 2018, for they were "not persuaded that the questions presented should be reviewed by [the] Court." *People v. Heiney*, 501 Mich. 2083 (2018). The Defendant now moves for Relief from Judgment.

LAW AND ARGUMENTS

Michigan Court Rule 6.502, Motion for Relief from Judgment states:

(A) Nature of Motion. The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment. The motion must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

(B) Limitations on Motion. A motion may seek relief from one judgment only. If the defendant desires to challenge the validity of additional judgments, the defendant must do so by separate motions. For the purpose of this rule, multiple convictions resulting from a single trial or plea proceeding shall be treated as a single judgment.

(C) Form of Motion. The motion may not be noticed for hearing, and must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 2.114. Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 50 pages double-spaced, exclusive of attachments and exhibits. If the court enters an order increasing the page limit for the motion, the same order shall indicate that the page limit for the prosecutor's response provided for in MCR 6.506(A) is increased by the same amount. The motion must be substantially in the form approved by the State Court Administrative Office, and must include:

(1) The name of the defendant;

(2) The name of the court in which the defendant was convicted and the file number of the defendant's case;

(3) The place where the defendant is confined, or, if not confined, the defendant's current address;

(4) The offenses for which the defendant was convicted and sentenced;

(5) The date on which the defendant was sentenced;

(6) Whether the defendant was convicted by a jury, by a judge without jury, or on a plea of guilty, guilty but mentally ill, or nolo contendere;

(7) The sentence imposed (probation, fine, and/or imprisonment), the length of the sentence imposed, and whether the defendant is now serving that sentence;

(8) The name of the judge who presided at trial and imposed sentence;

(9) The court, title, and file number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;

(10) The name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;

(11) The relief requested;

(12) The grounds for the relief requested;

(13) The facts supporting each ground, stated in summary form;

(14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised;

(15) Whether the defendant requests the appointment of counsel, and, if so, information necessary for the court to determine whether the defendant is entitled to appointment of counsel at public expense.

Generally, a defendant seeking post appellate relief from judgment under this rule must initiate proceedings by filing a correct motion and listing all grounds for relief upon which the defendant has knowledge. MCR 6.502(A)(1). Defendant must show actual prejudice from the alleged irregularities that support his claim for relief. MCR 6.508(D)(3)(b). The Court Rule states "Defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief if the motion ... alleges grounds for relief other than jurisdictional defects which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter unless the defendant demonstrates ... actual prejudice from the alleged irregularities that support the claim for relief.

Michigan follows the federal rules put forth by *Strickland v. Washington*, 466 U.S. 688 (1984), where the essential test is "whether counsel's conduct was so deficient that he or she cannot be said to have been functioning as the 'counsel' required by the Sixth Amendment." Gillespie Mich. Crim. L. & Proc. Prac. Deskbook § 4:23. The two part test includes (1) unreasonable performance by the attorney and (2) that the deficient performance caused prejudice to the Defendant. *Id.* at 24. To properly show prejudice under *Strickland*, the Defendant must demonstrate that counsel's errors "are so serious as to deprive him of a trial whose result is fair and reliable, not merely that the outcome would have been different." *Lockhart v. Fretwell*, 506 U.S. 364 (1993). "Any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *People v. Pickens*, 446 Mich. 298, 312 (1994), quoting *Strickland*, 466 U.S. at 691-92. In order to find prejudice, "a court must conclude that there is a 'reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt.'" *Id.*

The first assignment of error alleged by the Defendant is that he was deprived of his right to the effective assistance of counsel due to counsel's failure to file a timely notice of a proposed witness at trial. Defendant alleges he was prejudiced because there was a favorable expert witness with who counsel had conferred with and who was ready and available to testify. The case was tried without any expert testimony from either side regarding whether the examinations Defendant performed were medically proper or not. The expert witness Defendant alleges was ready and available to testify was not contacted for the Michigan trial, but only for the Ohio trial.

Even if counsel's failure to file a timely notice of a proposed expert witness could be deemed an unreasonable performance, it did not cause prejudice to the Defendant. To show prejudice, the Defendant must show that counsel's errors "are so serious as to deprive him of a

trial whose results is fair and reliable." *Lockhart v. Fretwell*, 506 U.S. 364 (1993). The Supreme Court in *People v Baisden*, 482 Mich 1000 (2008), held that medical testimony is not required in all prosecutions involving CSC in the medical context because "it is common knowledge that" some actions, such as "penile penetration constitute [] an unethical and unacceptable method of 'medical treatment.'" Despite the lack of any expert testimony on the issue, there was some testimony from which the trial court inferred that squeezing CG's breasts was not an acceptable medical practice. First, CG testified that including her breasts in the examination seemed unusual and she was confused by the examination, which defendant did not explain. Second, three other women testified that defendant touched their bare breasts in various ways while purportedly examining them for pain. That all the women claimed to have pain, but no chest-related pain, and defendant accessed and manipulated their breasts in various inconsistent ways, is some evidence that squeezing CG's breasts was not a part of a standard examination for her pain. Third, and most significantly, there was medical testimony that examining a breast during an orthopedic examination without a complaint of pain or discharge in the area was not medically acceptable. According to Detective Bliss, defendant stated that he would only examine a breast when the presenting complaint was shoulder pain and there was a complaint such as pain radiating or discharge from the breast. Defendant denied that a breast exam was a normal part of his investigation. CG testified that she never complained of pain in her chest and thus, by defendant's standards, a breast examination would not be a medically appropriate part of his examination.

The second assignment of error alleged by Defendant is that he was deprived of the effective assistance of appellate counsel due to counsel's failure to raise a claim on direct appeal that he was deprived of the effective assistance of trial counsel. The principal issue raised on

appeal was that the evidence was insufficient to convict without expert testimony. Defendant claims appellate counsel should have filed a timely motion for a new trial or a motion to remand in the Court of Appeals for a claim that trial counsel was ineffective for failure to call an expert witness. An appellate attorney is not required to raise every non-frivolous issue on appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). The decision to withhold issues on appeal must be done as a tactical choice made in sound professional judgment. Defendant has not shown a reasonable probability that, but for appellate counsel's mistake, the result would have been different. Defendant has failed to demonstrate actual prejudice, i.e., that the result would have been different had appellate attorney filed a motion for a new trial or a motion to remand claiming trial counsel was ineffective for the failure to call an expert witness.

For the reasons set forth above, the Defendant's Motion for Relief from Judgment is DENIED.

Date: 11/4/15

Hon. Daniel S. White (P 33070)
Circuit Court Judge

Copies to:

Michael Roehrig
Monroe County Prosecuting Attorney
Personal delivery

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339 E. Liberty
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I certify that on this date, copies of the above were served upon the parties or their attorneys indicated above by ordinary mail addressed to the address shown unless otherwise indicated.

Date: 11/5/19

Germayn E. Gorman
Secretary to Hon. Daniel S. White

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MONROE

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, **Case No. 15-242361-FH**

v **Hon. Daniel S. White**

JAKE PAUL HEINEY,

Defendant.
_____/

MICHAEL G. ROEHRIG (P 47639)
Monroe County Prosecuting Attorney
125 E. Second St.
Monroe, MI 48161
(734) 240-7600

JAKE HEINEY
In Pro Per
3374 Quail Hollow Dr.
Lambertville, MI 48144
_____/

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT

"At a session of said Court in the Courthouse in the
City of Monroe, in said County, on the
___ day of November, 2021"

PRESENT: HON. DANIEL S. WHITE, Circuit Court Judge

The matter having come on to be heard upon the Defendant's second Motion for Relief from Judgement, and the Court being otherwise fully advised in the premises;

STATEMENT OF FACTS

The Defendant was charged with four counts of criminal sexual conduct, fourth degree, MCL 750.520(e)1(b). A bench trial was held on April 19, 2016 wherein the Defendant was convicted of two of the four counts of CSC4th. The conviction was affirmed by the Court of

Appeals in an unpublished decision, *People v Jake Paul Heiney*, Docket No. 333363. Defendant then filed an Application for Leave to Appeal in the Michigan Supreme Court which was denied on May 29, 2018.

The Defendant filed a Motion for Relief from Judgment with this Court on August 23, 2019 which was denied on November 4, 2019. The Michigan Court of Appeals denied the Defendant's Application for Leave to Appeal because the Defendant had failed to establish that the trial court erred in denying the Motion for Relief from Judgment. The Michigan Supreme Court denied Leave to Appeal the Order of the Court of Appeals on April 27, 2021 because the Defendant had failed to meet the burden of established entitlement to relief under MCR 6.508(D).

In July of 2021 the Defendant filed a second Motion for Relief from Judgment arguing as follows:

I. Defendant was deprived of his right to a fair trial, due process and equal protection as established in *Bostock v Clayton County Georgia*, 590 US __ (2020).

II. New exculpatory evidence makes a probable different result on retrial for Defendant.

III. Defendant was deprived of his First Amendment Right of Freedom of Religion.

ANALYSIS

Pursuant to MCR 6.502(G)(2) a Defendant may file a second or subsequent based on a retroactive change in law that occurred after the first motion or a claim of new evidence that was not discovered before the first motion. The Defendant must make a threshold showing that the motion is brought on the basis of a retroactive change in law, that there was new evidence that

was not discovered before the first motion or that there is a significant possibility that the Defendant is actually innocent. MCR 6.508(D) is the Court Rule that addresses the Defendant's burden to establish entitlement to relief and only becomes relevant after the Defendant has made a preliminary showing under MCR 6.502(G).

The Defendant argues both a retroactive change in law and newly discovered evidence. Defendant asserts that *Bostock v Clayton County, Georgia* 590 US __ (2020) has an impact on this case. On the contrary, *Bostock* was a landmark civil rights case in which the Supreme Court held that Title VII of the Civil Rights Act of 1964 protects employees from discrimination because they are gay or transgender. The Court ruled in a 6-3 decision that discrimination on the basis of sexual orientation or gender identity is necessarily discrimination because of sex as prohibited by Title VII.

The Defendant maintains this case applies and "if the same evidence the state presented in Heiney's case was applied to a homosexual male, heterosexual female or an intersex physician, then there could be no conviction." He further asserts that "the state created and relied on an anti-heterosexual male agenda for conviction."

First, the *Bostock* decision has no application to the case at bar and is not a retroactive change in the law which would affect this conviction. Secondly, the Defendant did not testify at trial nor was there any testimony from other witnesses that he was a heterosexual, homosexual or intersex physician. Most importantly, MCL 750.520(e) states as follows:

> (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person (emphasis added).... The NP statute does not limit or discriminate by sex or orientation. Any person can be guilty of criminal sexual conduct fourth by having contact with any person.

The Defendant next argues that there is newly discovered evidence not available at the time of filing the first motion that makes a different result at trial probable. Defendant asserts a multitude of facts as newly discovered evidence, as follows:

1.) Testimony from several medical experts is raised many times. This matter was addressed directly by the Court of Appeals and cannot be readdressed in this Motion.

2.) Civil suits failed to get a judgment. While this may have happened subsequently, it is not evidence which would be admissible nor would it add to or change testimony heard at trial.

3.) Defendant's male patients and female patients had exams that included touching of breast tissue. This is clearly evidence that existed at trial and the subsequent Motion for Relief from Judgment.

4.) Witnesses violated sequestration order by being outside together and Detective Bliss sat in on the Ohio trial. The Ohio trial was before the trial before this Court. No witnesses were allowed to hear the testimony of other witnesses. There is no allegation made that any witness discussed their testimony with any other witness.

5.) Improper information was provided to the media by the "adversarial actors". It is not alleged as to the timing of the articles but to have "biased Heiney" they must have been before the trial.

6.) There are a multitude of allegations that can be generally characterized as things the prosecutor should have done and did not do. Defendant cannot dictate the charges brought against him (overcharged because "skin is a single system"), medical experts, discovery, forcing Defendant to sit in an interrogation room, didn't interview any male patients, police reports filled with inaccuracies. These issues do not constitute

evidence, most would not be admissible and have no bearing on Defendant's guilt or innocence.

7.) Defendant alleges improper use of 404(B) testimony. This happened at trial, was not reversed on appeal or the first Motion for Relief from Judgment, and is clearly not new evidence.

8.) Defendant alleges ineffectiveness of counsel for failure to object to 404(B) testimony and "improperly advising" the Defendant to have a bench trial. Neither issue is new nor do they constitute newly discovered evidence.

The Defendant's final argument is that he was deprived his First Amendment right to Freedom of Religion. The Court is hard pressed to understand this argument or to see even a minute causal connection. Defendant's argument makes no sense and there is no connection between the instant case and any religious beliefs Defendant claims. This is not newly discovered evidence nor is it covered by a retroactive change in the law.

For the reasons set forth herein, Defendant's Motion is DENIED.

Dated: 11/3/21

Hon. Daniel S. White (P 33070)
Circuit Court Judge