FILED
United States Court of Appeals
Tenth Circuit

July 22, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES E. FRANTZ,

Petitioner - Appellant,

v.

ANDRE STANCIL, Executive Director Colorado Department of Corrections; THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents - Appellees.

No. 24-1471
(D.C. No. 1:24-CV-00799-LTB-RTG)
(D. Colo.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before **MATHESON**, **CARSON**, and **FEDERICO**, Circuit Judges.

James Frantz, a Colorado prisoner proceeding pro se,[1] requests a certificate of appealability ("COA") to appeal the district court's dismissal of his petition under 28 U.S.C. § 2254. We deny a COA and dismiss this matter.

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Because Mr. Frantz proceeds pro se, we construe his arguments liberally, but we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

I. BACKGROUND

A jury convicted Mr. Frantz of sexual assault on a child and of child abuse resulting in serious bodily injury. The victim, Mr. Frantz's son, testified that his father sexually and physically abused him multiple times. The child abuse conviction stemmed from Mr. Frantz, then a licensed physician, "using an inverted can of readily available keyboard cleaner (instead of liquid nitrogen) to freeze a wart on his son's wrist, causing a second degree burn, swelling, blistering, and scarring." R. at 175–76.

The state district court sentenced Mr. Frantz to concurrent prison terms of 12 years to life on the sexual assault conviction and 10 years to life on the child abuse conviction. The Colorado Court of Appeals affirmed on direct appeal, and the Colorado Supreme Court denied certiorari. The state district court denied Mr. Frantz's petitions for postconviction relief, the Colorado Court of Appeals affirmed the denials, and the Colorado Supreme Court denied certiorari.

Mr. Frantz next filed a § 2254 petition. A magistrate judge recommended dismissal of the petition as untimely under 28 U.S.C. § 2244(d)(1)'s one-year statute of limitations, which runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." § 2241(d)(1)(A). The magistrate judge calculated that Mr. Franz's "conviction became final on March 5, 2018." R. at 293. Accounting for periods in which the limitations period was tolled due to sentence reconsideration motions and appeals, the magistrate judge calculated the filing deadline had finally expired on August 12, 2019, making the petition over four years late. *See id.*

Mr. Frantz sought to overcome his late filing by alleging "Actual Innocence," R. at 8. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) ("[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* . . ., or . . . expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare[.]"). But he did not support his claim with "new reliable evidence—whether it be exculpatory . . . scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," which is required for an actual innocence claim "[t]o be credible." *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *see also Beavers v. Saffle*, 216 F.3d 918, 923 (10th Cir. 2000) (rejecting actual innocence claim based on "arguments [that] go to legal innocence, as opposed to factual innocence"). The magistrate judge therefore concluded Mr. Frantz had not excused the petition's untimeliness.

The district court adopted the magistrate judge's recommendation, overruled Mr. Frantz's objections, and dismissed the petition as untimely. This COA application followed.

II. DISCUSSION

Because the district court dismissed Mr. Frantz's petition as untimely, to obtain a COA he must show "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). He has not done the latter. *See id.* at 485 (stating a court may deny a COA on a procedural ground without reaching the constitutional issue).

Mr. Frantz has not argued he is actually innocent of sexual abuse. On child abuse, he argues that using keyboard cleaner for the wart removal was lawful under the Colorado Medical Practice Act, *see* Colo. Rev. Stat. § 12-240-117. But as the magistrate judge said, "[H]ow to properly apply the Colorado Medical Practice Act is a legal argument, not a factual showing." R. at 297. A claim of actual innocence must be based on new evidence suggesting "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, (1998). And without new evidence, "even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Schlup*, 513 U.S. at 316.

III. CONCLUSION

Reasonable jurists would not debate the district court's dismissal of Mr. Frantz's § 2254 petition as untimely. We deny a COA.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Denver, Colorado 80257
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

July 22, 2025

Mr. James E. Frantz
BCCF - Bent County Correctional Facility
11560 Road FF75
Las Animas, CO 81054
#158702

RE: 24-1471, Frantz v. Stancil, et al
Dist/Ag docket: 1:24-CV-00799-LTB-RTG

Dear Appellant:

Enclosed is a copy the court's final order issued today in this matter.

Prisoners are reminded that to invoke the prison mailbox rule they must file with each pleading a declaration in compliance with 28 U.S.C. Section 1746 or a notarized statement, either of which must set forth the date of deposit with prison officials and must also state that first-class postage has been prepaid. *See* Fed. R. App. P. 4(c) and *United States v. Ceballos-Martinez*, 358 F.3d 732, *revised and superseded*, 371 F.3d 713 (10th Cir.), *reh'g denied en banc*, 387 F.3d 1140 (10th Cir.), *cert. denied*, 125 S. Ct. 624 (2004). Prisoners should also review carefully Federal Rule of Appellate Procedure 4(c)(1), which was amended December 1, 2023.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Patrick Aloysius Withers

CMW/klp

FILED
United States Court of Appeals
Tenth Circuit

September 8, 2025

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JAMES E. FRANTZ,

Petitioner - Appellant,

v.

ANDRE STANCIL, Executive Director Colorado Department of Corrections, et al.,

Respondents - Appellees.

No. 24-1471
(D.C. No. 1:24-CV-00799-LTB-RTG)
(D. Colo.)

ORDER

Before **MATHESON**, **CARSON**, and **FEDERICO**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-00799-LTB-RTG

JAMES E. FRANTZ,

Applicant,

v.

ANDRE STANCIL, EXEC. DIR. COLO. DEP'T OF CO. and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER

This matter is before the Court on the Recommendation of United States Magistrate Judge filed on September 5, 2024. (ECF No. 18). Applicant has filed timely written objections to the Recommendation. (ECF No. 21). The Court has therefore reviewed the Recommendation *de novo* in light of the file and record in this case. On *de novo* review the Court concludes that the Recommendation is correct. To the extent that Applicant also attempts to present an "Alternative Motion for Summary Judgment" within his objections (*see* ECF No. 21 at 1), the motion is denied since this action is dismissed as untimely during initial review under D.C.COLO.LCivR 8.1(b). Further, any such motion fails to comply with D.C.COLO.LCivR 7.1(d) ("a motion shall be filed as a separate document").

Accordingly, for the foregoing reasons, it is

ORDERED that Applicant's objections (ECF No. 21) are overruled. It is

FURTHER ORDERED that the Recommendation of United States Magistrate Judge (ECF No. 18) is accepted and adopted. It is

FURTHER ORDERED that the "Alternative Motion for Summary Judgment" within Applicant's objections (ECF No. 21) is denied. It is

FURTHER ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. 1) is denied and the action is dismissed as untimely. It is

FURTHER ORDERED that no certificate of appealability will issue because Applicant has not made a substantial showing of the denial of a constitutional right. It is

FURTHER ORDERED that leave to proceed *in forma pauperis* on appeal is denied without prejudice to the filing of a motion seeking leave to proceed *in forma pauperis* on appeal in the United States Court of Appeals for the Tenth Circuit. The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this dismissal would not be taken in good faith.

DATED at Denver, Colorado, this 9th day of October, 2024.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

Orders on Motions

1:24-cv-00799-LTB-RTG Frantz (PS) v. Stancil et al

2254,ALLMTN,CDOC Other,JD4,MAGR,PS8

U.S. District Court - District of Colorado

District of Colorado

Notice of Electronic Filing

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Case Name: Frantz (PS) v. Stancil et al
Case Number: 1:24-cv-00799-LTB-RTG
Filer:
Document Number: 22

Docket Text:
ORDER by Judge Lewis T. Babcock on 10/09/2024. ORDERED that Applicant's objections (ECF No. [21]) are overruled. FURTHER ORDERED that the Recommendation of United States Magistrate Judge (ECF No. [18]) is accepted and adopted. FURTHER ORDERED that the "Alternative Motion for Summary Judgment" within Applicant's objections (ECF No. [21]) is denied. FURTHER ORDERED that the Application for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 (ECF No. [1]) is denied and the action is dismissed as untimely. FURTHER ORDERED that no certificate of appealability will issue. FURTHER ORDERED that leave to proceed in forma pauperis on appeal is denied without prejudice.(pklin,)

1:24-cv-00799-LTB-RTG Notice has been electronically mailed to:

Patrick Aloysius Withers patrick.withers@coag.gov

1:24-cv-00799-LTB-RTG Notice has been mailed by the filer to:

James E. Frantz
#158702
Bent County Correctional Facility (BCCF)
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Las Animas, CO 81054-9573

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-00799-LTB-RTG

JAMES E. FRANTZ,

Applicant,

v.

ANDRE STANCIL, EXEC. DIR. COLO. DEP'T OF CO. and
THE ATTORNEY GENERAL OF THE STATE OF COLORADO,

Respondents.

ORDER DENYING RECONSIDERATION

Before the Court is Applicant's "Motion to Amend and Make Additional Findings Pursuant to F.R.C.P. Rules 52(b) and 59" (ECF No. 25), filed on November 1, 2024. On October 9, 2024, the Court overruled Applicant's objections to the September 5, 2024 Recommendation of United States Magistrate Judge, accepted and adopted the Recommendation, and dismissed this 28 U.S.C. § 2254 habeas corpus action as untimely. (*See* ECF No. 22). Judgment entered the same day. (*See* ECF No. 23). In his present motion, Applicant requests that the Court "rescind" the order of dismissal because it "incorporates errors of fact and law" and that the Court "recharacterize my motion Objecting to the magistrate's report and recommendation as a Motion for Summary Judgment as Amended and proceed accordingly. (ECF No. 25 at 1, 19). For the reasons set forth below, Applicant's motion to reconsider will be denied.

A litigant subject to an adverse judgment, and who seeks reconsideration by the district court of that adverse judgment, may "file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). A motion to alter or amend the judgment must be filed within twenty-eight days after the judgment is entered. *See* Fed. R. Civ. P. 59(e). The Court will consider Applicant's motion as being made pursuant to Rule 59(e) because it was filed within twenty-eight days after judgment was entered. *See Van Skiver*, 952 F.2d at 1243 (stating that motion to reconsider filed within time limit for filing a Rule 59(e) motion under prior version of that rule should be construed as a Rule 59(e) motion).

A Rule 59(e) motion may be granted "to correct manifest errors of law or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (internal quotation marks omitted). Relief under Rule 59(e) is appropriate when "the court has misapprehended the facts, a party's position, or the controlling law." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (explaining that a Rule 59(e) motion should not revisit issues already addressed or advance arguments that could have been raised previously). Applicant has not met this standard.

Nothing in Applicant's motion demonstrates the need to correct a clear error of law, a misapprehension of the facts or a party's position, or that the action should be reinstated based on new evidence previously unavailable. The Court dismissed this action as barred by the applicable one-year limitation period. (*See* ECF No. 22). In the Recommendation, the Magistrate Judge explained that a credible showing of actual

innocence provides a gateway to consideration of an otherwise untimely habeas claim, but that, to be credible, a claim of actual innocence requires a petitioner "to support his allegations of constitutional error with new reliable evidence." (*See* ECF No. 18 at 9-10 (citing *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013) and *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). The Magistrate Judge found no basis for an equitable exception to the limitation period based on actual innocence because Applicant had failed to clearly identify any new evidence, not presented at trial, which could support a credible claim of actual innocence. (*Id.* at 10-13).

In his motion, Applicant appears to argue that because the Court "failed to address the legal merits" of his claim that his removal of his son's warts was not a criminal act because it was authorized by the Colorado Medical Practice Act, the Court's conclusion that he "failed to meet the 'miscarriage of justice' or 'actual innocence' exceptions" is "incomplete." (ECF No. 25 at 2). However, because the Court concluded that Applicant's claims were procedurally barred by the statute of limitations and that no "actual innocence" equitable exception applied because Applicant had failed to present new evidence, the Court was not required to reach the merits of Applicant's claims. Applicant has failed to identify a manifest error of law or present newly discovered evidence which could warrant reconsideration under Rule 59(e). The Rule 59(e) motion therefore will be denied.

Because the Rule 59(e) motion will be denied, the Court also will deny Plaintiff's motion brought under Fed. R. Civ. P. 52(b). On a party's motion filed no later than twenty-eight days after the entry of judgment, Rule 52(b) may be used to ask the Court

to amend its findings, or make additional findings, and amend the judgment accordingly. The Court is without a basis to amend or make additional findings. Therefore, the motion pursuant to Fed. R. Civ. P. 52(b) also will be denied.

Accordingly, it is

ORDERED that Applicant's "Motion to Amend and Make Additional Findings Pursuant to F.R.C.P. Rules 52(b) and 59" (ECF No. 25) is DENIED.

DATED at Denver, Colorado, this 7th day of November, 2024.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, Senior Judge
United States District Court

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-1866	DATE FILED: February 1, 2021
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES FRANTZ**	**▲ COURT USE ONLY ▲**
	Case Number: **2010CR1900** Division: 4 Courtroom: L

ORDER RE: PETITION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM. P. 35(c)

BACKGROUND

On August 9, 2012, Defendant was sentenced to an indeterminate sentence of twelve years to life in the Department of Corrections for a violation of C.R.S. §18-3-405.3(1),(2)(b), sexual assault on a child – position of trust – and a concurrent sentence of ten years for a violation of C.R.S. §18-6-401(1)(a),(7)(a)(III), child abuse resulting in serious bodily injury.

On October 6, 2016, the Colorado Court of Appeals issued an opinion denying Defendant's appeal and affirming the judgment of conviction. The Colorado Supreme Court subsequently denied review on December 7, 2017.

On April 11, 2018, Defendant filed a *Motion for Sentence Reconsideration*, arguing that, while incarcerated, his behavior has been commendable, he presents with the minimum risk to re-offend, and he was unlikely to receive treatment or gain the opportunity for supervised release. The Court denied this motion on April 25, 2018.

On October 28, 2019, Defendant filed a *Petition for Writ of Habeas Corpus by a Person in State Custody*, requesting his case be dismissed, the judgment rendered void, and his invalid confinement relieved on the grounds that he was improperly convicted of a crime for a legal medical intervention. On November 5, 2019, the Court denied this petition.

On November 27, 2019, Defendant filed a *Motion for Reconsideration and New Trial as Provided for in C.R.C.P. Rule 59, and Motion for Enlargement of Time as Provided for in C.R.C.P. Rule 5*. On December 4, 2019, the Court denied this motion as well.

DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF PURSUANT TO CRIM. P. 35(C)

On December 8, 2020 Defendant filed a new motion for postconviction relief, under Crim. P. 35(c)(2)(I-III, VI), alleging that the conviction was obtained and sentence imposed in violation of the Constitution or laws of the United States and the Constitution or laws of Colorado, that Defendant was convicted and prosecuted for conduct which is statutorily and constitutionally a protected activity, that the court rendering judgment exceeded its jurisdiction by rendering judgment over the applicant and the subject matter of the conduct of this protected activity, and ineffective assistance of counsel.

Defendant states that all of these grounds for relief apply to the charge of child abuse resulting in bodily injury while only Crim. P. 35(c)(2)(VI) regarding ineffective assistance of counsel applies to the second charge of sexual assault on a child – position of trust. Aside from the new claims regarding the ineffective assistance of counsel related to both charges, the grounds for relief claimed by Defendant for his conviction of child abuse resulting in serious bodily injury are virtually identical to those proffered in his October 28, 2019 *Petition for Writ of Habeas Corpus*, which was summarily denied by the Court at the time, both as analyzed under C.R.S §13-45-101 as well as under Crim. P. 35(c). The Court, once again, finds these claims to be without merit, but for the sake of clarity and to preclude further litigation of these issues, will elaborate upon its reasoning. Because many of the Defendant's arguments are cumulative and build upon his previous conclusions, the most efficient way to demonstrate that the Defendant's overall argument is without merit is to analyze his various "assertions" sequentially.

ANALYSIS

I. Crim. P. 35(c) Arguable Merit

Colorado Rule of Criminal Procedure 35(c)(3)(IV) details the standards for the Court to consider a petition for postconviction relief under the rule: "The court shall promptly review all motions that substantially comply with Form 4, Petition for Postconviction Relief Pursuant to Crim. P. 35(c). In conducting this review, the court should consider, among other things, whether the motion is timely pursuant to § 16-5-402, ***whether it fails to state adequate factual or legal grounds for relief, whether it states legal grounds for relief that are not meritorious, whether it states factual grounds that, even if true, do not entitle the party to relief, and whether it states factual grounds that, if true, entitle the party to relief, but the files and records of the case show to the satisfaction of the court that the factual allegations are untrue.*** If the motion and the files and record of the case show to the satisfaction of the court that the defendant is not entitled to relief, the court shall enter written findings of fact and conclusions of law in denying the motion. The court shall complete its review within 63 days (9 weeks) of filing or set a new date for completing its review and notify the parties of that date." (emphasis added)

The Court has already conceded the timeliness of the filing of the December 9, 2020 *Petition for Postconviction Relief Pursuant to Crim. P. 35(c)* in its order from December 22, 2020.

II. First Assertion: For licensed physicians, the authorized practice of medicine which complies with the Medical Practice Act cannot be a crime.

Defendant argues that he was a duly licensed physician at the time that the "medical intervention at issue was alleged to be the crime of child abuse," referring to an incident that

occurred in May 2008, when he performed "cryosurgery" on his 14-year-old son for the treatment of warts, "successfully eradicating the warts with a cosmetically acceptable result." He alleges that the "cure of a pathological condition (i.e. the wart) cannot be an 'injury to the life and health of a child' as the required element in the charging statute," and that the "well-known medical procedure of cryosurgery" that resulted in the alleged criminal injury was an expected and necessary outcome of "this routine lawful medical procedure," disputing the People's characterization of the activity as a "non-bona fide medical procedure." Predictably, Defendant characterizes the inciting incident in highly favorable and professional terms for the purposes of his petition, but his previous description of the event during his deposition for his divorce proceeding highlights its more haphazard application and its painful outcome. In the deposition, Defendant says that he attempted to freeze off a wart "by using this cleaning device stuff, and it was much more potent than either one of us recognized," inflicting second-degree, partial thickness freeze burns to his son's wrist that caused the skin to blister and peel off. *Deposition of James E. Frantz on May 19, 2008*, page 114. His contention that this was a "well-known, common medical procedure" is disputed and his generalization of the procedure as simply "freezing warts" is misleadingly vague. His own explanation of using "this cleaning device stuff" that was not intended for medical purposes is evidence of the non-conventional and informal nature of the action that he is trying to dress up as a typical medical procedure.

At times, it appears that the Defendant's legal arguments are based solely on skimming a case's headnotes, misunderstanding the summarizations of law contained there, and boldly asserting these misunderstood legal conclusions as a defense in his case. One such example is Defendant's repeated assertion that the Colorado Board of Medical Examiners ("BME") is the only authority on what falls within the broad scope of "medicine," quoting a number of different cases to support this theory. Defendant argues that *Colorado State Bd. of Med. Examiners v. Boyle*, 924 P.2d 1113 (Colo. App. 1996) ruled that only the BME can determine conformity with the Medical Practice Act ("MPA"), and thus the BME has exclusive jurisdiction over the practice of medicine and only they can decide whether an action is a protected medical procedure or not – but this is not what the case is even about. The Court ruled in *BME v. Boyle* that the Colorado Board of Medical Examiners did in fact have jurisdiction over defendant Boyle's lapsed license to practice medicine in Colorado, but it did not say that it has exclusive jurisdiction to decide what is or isn't a medical procedure regardless of context. The BME has exclusive jurisdiction over disputes arising out of Title 12 Section 240, otherwise known as the Medical Practice Act (see *State Bd. of Med. Examiners v. McCroskey*, 880 P.2d 1188 (Colo. 1994)), but that is not at issue here. Only the BME has jurisdiction to determine what is the "unauthorized practice of medicine" under the terms of Title 12, but the Court does not need specific permission from the BME to prosecute criminal behavior it deems to be a "non-bona fide medical intervention," and thus not a protected rendering of medical services under the MPA. If a man commits an unlawful act, his mere assertion that it was a medical procedure does not automatically divest the Court of jurisdiction to prosecute the unlawful act. Despite Defendant's assertion that his dangerous application of a non-medical device to his child, ultimately inflicting second-degree burns, was intended for legitimate medical purposes, if the act in question is deemed to not be a protected rendering of medical services, the Court can still charge him with child abuse for behavior that recklessly caused serious bodily injury.

Defendant argues that *BME v. District Court of El Paso County* supports his assertion that a "determination of a 'bona fide medical intervention' by the BME must prevail over any proposed by the prosecutor or collaborated by the court," but the case actually ruled that the District Court simply couldn't prohibit the BME from carrying out its statutory functions and the BME has sole original jurisdiction to grant or revoke medical licenses, not that anything and everything related to

the medical profession has to be delegated to the BME. The characterization of behavior as a "non-bona fide medical intervention" is a classification of the action as not protected under the MPA, that the action is not a protected rendering of medical services, and so the resulting injury from the behavior would be evidence of harm under the child abuse statute. His assertion that this is lawful behavior rests upon the lack of a specific condemnation from the BME, which he construes as a tacit condonation that effectively authorized the procedure. He argues that only the office of the Attorney General can prosecute those in violation of the MPA, as determined by the BME, but he was not prosecuted under the MPA, he was prosecuted under the child abuse statutes.

Defendant argues that because the "term or concept of a 'non-bona fide medical intervention' is not articulated by the general assembly as an element in the charging statute… [and] as there is also no other penal statute which prohibits the performance of a "non-bona fide medical intervention" as a criminal offense in and of itself, this must also be the intent of the general assembly." Defendant's argument here is incorrect. There are, in fact, penal statutes that consider penalties resulting from the rendering of "non-bona fide" medical services. *People v. Terry* analyzed how to interpret just such a statute – CRS §§18–3–403(1)(h); Sexual Assault in the Second Degree – that contained language regarding "bona fide medical purposes" (emphasis added):

(1) Any actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits sexual assault in the second degree if:

(h) The actor engages in treatment or examination of a victim *for other than bona fide medical purposes* or in a manner substantially inconsistent with reasonable medical practices.

The *Terry* court discussed the potential vagueness of the statute and how to interpret the term "bona fide medical purposes":

> "In claiming that the phrase 'bona fide medical purposes' is unconstitutionally vague, the defendant correctly asserts that the terms 'bona fide' and 'medical purpose' are not defined in the criminal code. However, failure by the legislature to define these terms is by no means fatal to the validity of the statute. We have often stated that the legislature is not constitutionally required to specifically define the readily comprehensible and every day terms used in statutes. Further, we have often referred to dictionaries and to the case law to determine the probable legislative intent in using a particular word. *People v. Blue*, 190 Colo. 95, 100–01, 544 P.2d 385, 388–89 (1975). Black's Law Dictionary (5th ed. 1979), defines 'bona fide' as follows: 'In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine, and not feigned.' *Id.* at 160 (citations omitted); cf. *People v. Pal*, 56 A.D.2d 640, 391 N.Y.S.2d 702, 703 (1977) ("In the context of the physician-patient relationship, 'good faith' means 'for a bona fide medical purpose.'")… The phrase 'bona fide medical purposes' provides a sufficiently clear and practical guide for law-abiding behavior for a person of ordinary intelligence."

People v. Terry, 720 P.2d 125, 127 (Colo. 1986).

Clearly, the legislature has expressed the intent that a jury can be permitted to be the trier of fact for what does or does not qualify as a "bona fide medical purpose" without first consulting the opinion of the BME, so the BME is not the only one permitted to determine what is a bona fide medical procedure. CRS §18-3-403 was later repealed years after the decision in *People v. Terry*

and incorporated into CRS §18-3-402 as CRS §18-3-402(1)(g), but the language of "engag[ing] in treatment or examination of a victim *for other than a bona fide medical purpose*" remained intact, so the legislative intent for a jury to act as a trier of fact to determine the "bona fide" nature of a purported medical service without the need to outsource this decision to the BME also remains.

Defendant argues that "It is incontrovertible that nowhere in the Colorado Revised Statutes does there exist a standalone crime of engaging in prohibited 'non-bona fide medical interventions,' either in general or specific to cryosurgery… it is clear that the probable cause for the crime of child abuse is utterly dependent upon the medical procedure of the defendant being 'not bona fide' or not a 'valid medical intervention.'" There is no need for a statute specifically prohibiting "non-bona fide medical interventions." In fact, as Defendant has pointed out multiple times in his petition, such a statute would overlap with that of the MPA's prohibition against the unauthorized practice of medicine or unprofessional conduct while practicing medicine. The determination of an action as "a non-bona fide medical intervention" is merely a necessary step to determine that the action is not protected or under the statutory jurisdiction of the MPA prior to prosecuting the action as an injurious offense under criminal law. Defendant's insistence on characterizing the behavior as a proper medical procedure is not one that the Court, the prosecution, or the jury are obligated to co-sign. This is an important distinction that Defendant either fails to understand or willfully ignores. The determination of Defendant's behavior being a "non-bona fide medical intervention" is not what made the act criminal, it merely established the behavior as unprotected by the MPA. Defendant was not prosecuted for the act of committing a "non-bona fide medical intervention," he was prosecuted for committing child abuse that caused serious bodily injury via an unprotected, non-bona fide medical procedure. He was not charged with child abuse for "curing the alleged victim's warts," he was charged with child abuse for inflicting second-degree burns on his teenage son. This was not a determination made "ad hoc by the prosecutor with the willing collusion of the district court." This was an argument made by the prosecution, endorsed by the trier of fact (the jury), and validated as appropriate by the Court. Defendant's claim that he was improperly convicted for "the authorized practice of medicine" is without merit.

III. Second Assertion: The prosecution of lawful conduct is prima facie vindictive prosecution and violates due process.

Despite Defendant's arguments to the contrary, he was not prosecuted for lawful conduct, he was prosecuted for the unlawful abuse of a child. His claims that his activity was shielded as the protected rendering of medical care, thus making it intrinsically lawful behavior, serve as the foundation for this entire section of his petition. Defendant's argument that CRS §12-240-117(3), the statute that broadly authorizes holders of a medical license to practice medicine in the state of Colorado under the terms of article 240, and that CRS §12-240-107, the statute defining the lawful practice of medicine, are "statutory exceptions" that "negate the elements of the offense" of child abuse are unpersuasive. A statute permitting the lawful practice medicine does not excuse any and all behavior that is ostensibly under the thin guise of "medical care" to be protected behavior regardless of context.

Defendant's assertion that *Berges v. County Court of Douglas County* ruled that the district attorney has no statutory or constitutional authority to nullify or abridge the substantive right to the practice of medicine for any medical conduct not specifically prohibited by statute has no relation to the actual judgment from that case. That case ruled that district attorneys have the authority to prosecute mandatory reporters for misdemeanor offenses of failing to report under Title 19, the Children's Code. It has nothing to do with abridging someone's substantive right to practice

medicine and the case never mentions the "right to practice" once. Defendant's argument rests upon language that he views as favorable to his claim (but taken out of context), such as "However, when the General Assembly authorizes a different body to prosecute a particular type of action, then the district attorney is without authority to act." *Berges v. Cty. Court of Douglas Cty.*, 2016 COA 146, ¶ 11, 409 P.3d 592, 595 quoting *Harris v. Jefferson Cty. Court*, 808 P.2d 364, 365 (Colo. App. 1991). This does not support Defendant's argument. At best, it supports the argument that a district attorney cannot prosecute a doctor under the authority of the MPA because the General Assembly has given jurisdiction for that portion of the law to the BME; but this has no effect on the district attorney's ability to prosecute someone under the child abuse statute that was the basis for the charges of which Defendant was convicted. Quite to the contrary, the Court directly contradicted the argument that the defendant's criminal prosecution was improper because he believed his behavior was underneath the umbrella of the BME's jurisdiction under Title 12: "Contrary to plaintiffs' view, the fact that this offense is defined in the Children's Code, rather than in the Criminal Code, does not meaningfully distinguish it from any other offense or transform a criminal prosecution of this offense into an article 3 proceeding. See § 18-1-103(1), C.R.S. 2016 (Absent exceptions inapplicable here, "the provisions of this [criminal] code govern the construction of and punishment for any offense defined in any statute of this state, whether in this title or elsewhere[.]")" *Berges v. Cty. Court of Douglas Cty.*, 2016 COA 146, ¶ 17, 409 P.3d 592, 596.

Defendant argues that "the medical procedure of cryosurgery is not a crime" and so his prosecution was an unlawful prosecution of lawful activity. He fails to understand that he was not prosecuted simply for performing a medical procedure, but for an unlawful act that is not protected as a bona fide medical intervention. If a doctor cuts off someone's hand, simply claiming that this behavior is a protected medical intervention doesn't automatically shield him from any possible liability. If a doctor is prosecuted for cutting off somebody's hand against their will, he is not being prosecuted for "performing the medical procedure of amputation," he is being prosecuted for assault. Similarly, despite Defendant's insistence, he was not prosecuted for "performing the legal act of cryotherapy" or for "the curing of a pathological condition," he was prosecuted for child abuse that resulted in injury – in this case, second degree burns. The idea that medical doctors are exempt from any criminal liability if they simply characterize their behavior in terms of medical procedures is truly absurd and without merit. The Court need not ask for an advisory opinion from the BME to definitively rule out a medical procedure as improper in order to pierce the veil of protection provided by the MPA. Defendant's claim that he was prosecuted for lawful conduct and had his due process rights violated is without merit.

IV. Third Assertion: The conviction was obtained in violation of the laws and Constitution of the United States and Colorado.

Defendant argues that *US v. Goodwin*, *Prouty v. Heron*, and *People v. Valdez* provide the legal basis for this claim, that an individual may not be punished for exercising a protected right, and that the right to practice medicine is protected. However, the entirety of this argument is dependent upon the acceptance of his first two assertions, that his prosecution and conviction for "the authorized practice of medicine" was illegal and a violation of his constitutionally protected right to practice medicine and that his due process rights were violated as a result. As detailed above, he was not prosecuted for the act of practicing medicine, he was prosecuted for the harm he caused as a result of a non-bona fide medical intervention that was not protected. *People v. Prophet*, 42 P.3d 61, 62 (Colo. App. 2001) and *Theobald v. District Court*, 148 Colo. 466, 471, 366 P.2d 563, 565 (1961), incorrectly cited by Defendant, have nothing to do with the practice of medicine being a substantive

right. Defendant's claim that his conviction was obtained in violation of the laws of the Constitution of the United States and Colorado is without merit.

V. Fourth Assertion: Ineffective Assistance of Counsel

Defendant argues that his counsel's failure to raise the above enumerated claims, failure to call any additional medical expert witnesses, and failure to present the finding of the BME's investigation is evidence of his counsel's ineffectiveness. Defendant argues that it is his counsel's fault for being "utterly and willfully ignorant of the Colorado Medical Practice Act and the constitutional implications of Article III section 9 of the Colorado Constitution. Indeed their own understanding of jurisdiction was incomplete and limited. They did not understand the meaning and the exculpatory implications of 'the authorized practice of medicine as defined in this act in all its branches…' The arguments raised in this pleading and the absence in the record of any related arguments by defense counsel is prima facie evidence of both willful ignorance and a failure to synthesize known facts." However, as detailed extensively above, these are not meritorious arguments, so the defense's "failure" to raise these ineffective arguments is not valid proof of ineffective counsel and his claim is without merit. what about no med xplo?

VI. Fifth Assertion: The Court exceeded its jurisdiction.

This assertion readdressed Defendant's argument that the Court had no jurisdiction over the matter because authority was vested solely in the BME to determine the authorized practice of medicine. Defendant requested the Court show that it has the right to make a determination of "bona fide medical interventions" by quoting *People v. Jachnik*: "Hence, we conclude that, if the court's jurisdiction is put at issue, the burden is on the People to show that the court, whether district or county, has jurisdiction to hear the case." *People v. Jachnik*, 116 P.3d 1276, 1277 (Colo. App. 2005). See discussion above regarding *People v. Terry*. "Bona fide medical intervention" is not an ultimate determination made by the Court, but rather a factual determination of an individual, negative element (that the behavior in question is not protected by the MPA) made by the trier of fact in connection to the larger question of characterizing the behavior at issue in the criminal case. Defendant's insistence that the BME must first adjudicate the specific conduct of a doctor before any other Court can have jurisdiction over said doctor's actions remains without merit.

VII. Collateral Attack Upon Sexual Assault Conviction

The final part of Defendant's petition focuses on a claim of ineffective assistance of counsel with regard to his sexual assault conviction, alleging that his attorneys were incompetent, failed to fully investigate the evidence, and were inadequately prepared for trial. Defendant gave a 7-page recap of the factual background surrounding the charges of sexual assault, including information regarding the case history from both the register of actions and his own personal recollections. Of particular concern to Defendant was that there were no allegations of abusive conduct outside of the family home and that, during the alleged victim's multiple psychiatric hospitalizations and time in outpatient therapy, none of the personnel who were mandatory reporters reported any suspicions of abuse to social services.

The Supreme Court has laid out a clear set of standards for establishing ineffective assistance of counsel: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct.

2052, 2064, 80 L. Ed. 2d 674 (1984). "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687. The Defendant's claim for ineffective assistance of counsel does not properly allege that his counsel failed to provide the minimum standard of competence described in *Strickland* and so the claim is without merit.

Defendant asserts that his case almost exactly parallels that of *People v. Cole*, 293 P.3d 604, 607 (Colo. O.P.D.J. 2011), but other than the defendant in that case being charged with the same statutory violation of sexual assault of a child – position of trust, the comparison is not valid. The attorney in *Cole* missed the preliminary hearing because it conflicted with a planned vacation before subsequently suffering a stroke that hospitalized him for over a month, causing the attorney to miss another motions hearing and to personally (but only temporarily) question his own capacity before eventually convincing his client to plea guilty to the most serious charge levied against him at the next opportunity. There were no such misfortunes with the attorneys in Defendant's case. Instead, Defendant claims that his attorneys' ineffectiveness was exemplified by their inadequate preparation and failure to investigate the evidence, though this largely seems to stem from a disagreement with their trial strategy, described as "less is best."

The crux of Defendant's argument seems to be that "[defense attorneys] failed to thoroughly investigate the case… the evidence presented to the attorney and in the historical facts above would have constituted a devastating impeachment of the alleged victim. Had the witnesses provided to the defense attorney been called, their testimony would have crumbled the alleged victim's credibility. The indisputable history is that from September 2007 through October 2010, [the alleged victim's] actions and words to multiple professionals acutely attuned for allegations of abuse, revealed no abuse." However, arguing that the defense didn't call all of Defendant's suggested witnesses, many of whom were simply family friends, to the stand to testify as character witnesses is not convincing as evidence of incompetent representation and failure to prepare or investigate. "Defense counsel stands as captain of the ship in ascertaining what evidence should be offered and what strategy should be employed in the defense of the case." *Steward v. People*, 179 Colo. 31, 34, 498 P.2d 933, 934 (1972). "We have stated that decisions committed to counsel include what witnesses to call (excepting the defendant), whether and how to conduct cross-examination, what jurors to accept or strike, and what trial motions to make." *People v. Curtis*, 681 P.2d 504, 511 (Colo. 1984). Defendant additionally claims incompetence due to the failure to call an expert witness, such as another medical doctor, to the stand to testify about the alleged medical procedure's defensibility – but these claims of failure to call specific witnesses at Defendant's request fail to live up to the *Strickland* standard. "Mere disagreement as to trial strategy, however, will not support a claim of ineffectiveness… Whether to call a particular witness is a tactical decision, and, thus, a matter of discretion for trial counsel." *Davis v. People*, 871 P.2d 769, 773 (Colo. 1994).

Defendant argues: "Had the defense attorneys interviewed the defendant's 'persons of interest' and obtained the various records and reports supporting their testimony and the defendant's innocence, the defense could have given not only the alleged victim but all of the People's witnesses a withering cross-examination and certainly destroyed the alleged victim's credibility." Defendant

asserts that his defense attorneys' incompetence stems not just from their failure to investigate and find some kind of missing exculpatory evidence, but rather from their failure to thoroughly question and investigate all of the people who had previously found no evidence of abuse in the years prior to the allegations. Unfortunately for Defendant's argument, an investigator's report not finding abuse is not evidence that no abuse occurred, merely that this previous investigator never found any evidence, particularly when the investigation in question was simply connected to a divorce proceeding and not a criminal investigation of abuse allegations that would have warranted a heightened level of scrutiny. The absence of prior evidence of abuse being noted by psychiatric professionals is not a good reason to have them called to testify either. It is the equivalent of arguing that you are innocent because, prior to any incriminating evidence becoming apparent, there was no incriminating evidence found. Defendant's primary complaint is that his attorneys did not call to the stand a number of people that had no evidence or knowledge of the alleged crimes to state on the record that they had no such knowledge, but a lack of evidence supporting a position is not the same as evidence supporting the antithesis. Similarly, the judges who presided over Defendant's divorce proceedings and talked privately with the alleged victim in their chambers weren't disqualified as witnesses but that doesn't make them helpful witnesses and it certainly doesn't suggest that their testimony "would have had a persuasive effect upon the jury and would have affected the outcome of the trial." The level of persuasiveness required in the *Strickland* context is greater than a mere possibility. In order to show ineffectiveness of counsel in the *Strickland* context, "a reasonable probability means a probability sufficient to undermine confidence in the outcome," and there is no reasonable way to establish in this case that if they had called these other witnesses there would have been a different result. *Ardolino v. People*, 69 P.3d 73, 76 (Colo. 2003).

Defendant's argument that defense counsel's trial strategy of "less is best" amounted to incompetence fails to be persuasive. In a criminal trial with no physical evidence and no direct witnesses other than the alleged victim, minimizing the amount of evidence with which to potentially convict Defendant is a viable defense strategy, not evidence of incompetence. The exculpatory evidence that Defendant claims his attorneys ignored was not exonerating but would be more akin to presenting "evidence" about there being a lack of evidence to convict their client with – a less efficient method of the very same "less is best" strategy that Defendant claims to be evidence of incompetence. A similar example of this disagreement with trial strategy can once again be found in the case of *Davis v. People*. In *Davis*, the defendant tried to argue ineffectiveness of counsel because they chose not to call an expert witness to the stand to testify to the defendant's alcoholism as a mitigating factor. The defendant's counsel argued against using this strategy because "in his experience as a criminal defense attorney, there was a likelihood that using the intoxication evidence in fact would have offended at least some members of the jury," having the exact opposite of the desired effect. *Davis v. People*, 871 P.2d 769, 775 (Colo. 1994). Counsel's avoidance of offering arguments with the high probability of back-firing can also be seen with Defendant's later argument that, given there are 1,460 days in a four-year period and that the alleged victim claimed that his abuse happened nearly every day (or sometimes twice a day), the victim's testimony was "preposterous and extremely implausible." This is a terrible trial argument with a high probability of backfiring because it is entirely dependent upon the jury finding Defendant more credible than the alleged victim. The argument that the alleged victim must be lying because the Defendant "couldn't possibly have assaulted him that many times" could very likely accomplish the opposite of attacking the alleged victim's credibility and make the alleged victim even more sympathetic by putting a spotlight on the full extent of the alleged abuse and quantifying the damage done. None of the witnesses Defendant wished to be called or further investigated would have had a significant impact on his trial and the failure to call them does not undermine confidence

in the trial's outcome. Defendant's disagreement with his counsel's strategic decisions and overall trial strategy is not evidence of ineffective assistance of counsel and his claim is without merit.

VIII. Defendant's Motion Does Not Warrant a Hearing

A motion for postconviction relief may be denied without an evidentiary hearing only where the motion, files, and record in the case clearly establish that the allegations presented in the defendant's motion are without merit and do not warrant postconviction relief. *People v. Montoya*, 251 P.3d 35 Colo. App. 2010

A hearing is not required on motion under Crim. P. 35(c), governing postconviction remedies, if motion presents only issues of law, or issues which are clearly without merit. *People v. Middleton*, 704P.2d 326 Colo. App. 1985

The Court FINDS the Defendant's Motion for Postconviction Relief based on alleged statutory and constitutional violations, jurisdictional violations, and ineffective assistance of counsel is clearly without merit. The Court declines to grant a hearing on this matter. The Court declines to appoint counsel to the Defendant.

For all the reasons set forth above the Court DENIES Defendant's Motion for Postconviction Relief.

SO ORDERED this 1st day of February 2021.

BY THE COURT:

Thomas Mulvahill
District Court Judge

APPENDIX B

21CA0395 Peo v Frantz 12-15-2022

COLORADO COURT OF APPEALS

DATE FILED: December 15, 2022
CASE NUMBER: 2021CA395

Court of Appeals No. 21CA0395
Boulder County District Court No. 10CR1900
Honorable Thomas F. Mulvahill, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

James E. Frantz,

Defendant-Appellant.

ORDER AFFIRMED

Division I
Opinion by JUDGE DAILEY
Furman and Schock, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced December 15, 2022

Philip J. Weiser, Attorney General, Grant R. Fevurly, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

James E. Frantz, Pro Se

¶ 1 Defendant, James E. Frantz, appeals pro se the postconviction court's order denying his Crim. P. 35(c) petition for postconviction relief. We affirm.

I. Background

¶ 2 Frantz, a physician, was convicted in 2012 of sexual assault on a child by one in a position of trust (pattern of abuse) and child abuse resulting in serious bodily injury. He was sentenced to concurrent terms of imprisonment in the custody of the Department of Corrections of twelve years to life on the former count and ten years on the latter one.

¶ 3 Frantz's convictions were affirmed on direct appeal in *People v. Frantz*, (Colo. App. No. 12CA1968, Oct. 6, 2016) (not published pursuant to C.A.R. 35(e)).

¶ 4 In October 2019, Frantz filed a pro se petition for writ of habeas corpus attacking the validity only of his conviction for child abuse. Frantz had been convicted of this charge based on using an inverted can of readily available keyboard cleaner (instead of liquid

nitrogen) to freeze a wart on his son's wrist, causing a second degree burn, swelling, blistering, and scarring.[1]

¶ 5 In his petition, Frantz asserted that as a licensed physician, he could not be criminally prosecuted for the lawful practice of medicine in removing his son's wart. In this regard, he asserted that the Board of Medical Examiners (BME) had exclusive jurisdiction to determine the propriety of his medical actions. Treating Frantz's petition, as pertinent here, as a Crim P. 35(c) motion,[2] the court denied Frantz relief. Frantz unsuccessfully

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[1] Frantz's son testified that, although he had initially requested that Frantz remove the warts, he felt that "someone with [Frantz's] educational level would have thought it out better and have thought of using the proper equipment." According to him, he told Frantz to "stop throughout it like after a while because like it was getting really painful," but Frantz continued anyway.

[2] "A habeas corpus petition [that seeks relief available under Crim. P. 35] should be treated as a Crim. P. 35 motion based upon the substantive constitutional issues raised therein, rather than [upon] the label placed on the pleading." *DePineda v. Price*, 915 P.2d 1278, 1280 (Colo. 1996) (alterations in original) (quoting *White v. Denver Dist. Ct.*, 766 P.2d 632, 634 (Colo. 1988)); *cf. Graham v. Gunter*, 855 P.2d 1384, 1385 (Colo. 1993) (rather than dismissing an improper habeas corpus petition, the court should convert such petition into a motion under Crim. P. 35(c) where the petitioner is acting pro se, the petitioner raises issues in the habeas corpus petition that should have been raised in a Crim. P. 35(c) motion, and the petitioner's claims are not barred by the statute of limitations).

sought, first, (1) reconsideration and a new trial in district court, and then, (2) certiorari review in the supreme court.

¶ 6 In October 2020 and December 2020, Frantz filed a pair of motions pursuant to "Crim. P. 35(a)" and "Crim. P. 35(c)," respectively.

¶ 7 In his so-called "Crim. P. 35(a)" motion, Frantz sought to vacate his child abuse conviction based, again, on the contention that only the BME had jurisdiction to determine what, if any, discipline or punishment should be meted out in connection with a medical procedure he performed on his son. The postconviction court summarily denied the motion on the ground that it failed to state adequate or meritorious grounds for relief. The court's order is the subject of the appeal in *People v. Frantz*, (Colo. App. No. 21CA0059, Dec. 15, 2022) (not published pursuant to C.A.R. 35(e)).

¶ 8 As pertinent here, in his December 2020 Crim. P. 35(c) "petition" for postconviction relief, Frantz challenged the validity of his child abuse conviction and his sex assault conviction. He challenged the former conviction on the grounds that (1) he had a legal right to practice medicine; (2) the authorized practice of medicine under the Colorado Medical Practice Act (MPA), §§ 12-240-

101 to -145, C.R.S. 2022, is not a crime; (3) the district court exceeded its jurisdiction by, in effect, determining what was, or was not, the authorized practice of medicine; and (4) because his conduct was lawful, the prosecution was prima facie vindictive and violated his due process rights. Additionally, he challenged his child abuse conviction, as well as his sexual assault conviction, on the ground that he received ineffective assistance from trial counsel.

¶ 9 Without holding a hearing, the postconviction court denied Frantz's Crim P. 35(c) motion in a lengthy written order. At the outset of the order, the postconviction court observed that,

> [a]side from the new claims regarding the ineffective assistance of counsel related to both charges, the grounds for relief claimed by [Frantz] for his conviction of child abuse . . . are virtually identical to those proffered in his [October 2019] *Petition for Writ of Habeas Corpus*, which was summarily denied by the court at the time, both as analyzed under § 13-45-101 as well as under Crim. P. 35(c).[3] The Court once again, finds these claims to be without merit, but for the sake of clarity and to

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[3] The court must've used the term "summarily denied" only in the sense of ruling on the petition without holding a hearing. The court's order denying the petition for habeas corpus was lengthy and detailed.

preclude further litigation of these issues, will elaborate upon its reasoning.

¶ 10 Frantz now appeals, contending that the postconviction court erred by concluding that (1) Frantz was not, in fact, prosecuted for the authorized practice of medicine, and consequently his prosecution was not vindictive; (2) the BME does not have exclusive jurisdiction over all issues involving so-called medical interventions; and (3) his ineffective assistance of counsel arguments lacked merit.[4]

II. The Postconviction Court Properly Denied Frantz's Claims

¶ 11 We review de novo a postconviction court's summary denial of a Crim. P. 35(c) motion. *People v. Joslin*, 2018 COA 24, ¶ 5. A court may deny the motion without a hearing if "the motion, the files, and the record clearly establish that the defendant is not entitled to relief." *People v. Osorio*, 170 P.3d 796, 799 (Colo. App.

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[4] Frantz also raises on appeal, for the very first time, a contention that he was convicted on insufficient evidence. Because he did not raise it in his Crim. P. 35(c) petition, however, we will not address it. *See People v. Cali*, 2020 CO 20, ¶ 34 ("[W]e will not consider issues not raised before the district court in a motion for postconviction relief."); *DePineda*, 915 P.2d at 1280 ("Issues not raised before the district court in a motion for postconviction relief will not be considered on appeal of the denial of that motion.").

2007). And the postconviction court's ruling may be affirmed on any ground supported by the record, regardless of whether that ground was relied upon by the court. *People v. Scott*, 116 P.3d 1231, 1233 (Colo. App. 2004).

¶ 12 A postconviction court shall summarily deny a Crim. P. 35(c) motion if the motion was successive. *See People v. Taylor*, 2018 COA 175, ¶ 17; Crim. P. 35(c)(3)(VII). With some exceptions not applicable here, a motion will be denied as successive if its claims (1) were raised or resolved in a prior appeal or postconviction proceeding, Crim. P. 35(c)(3)(VI); or (2) could have been raised in an "appeal previously brought" or a "postconviction proceeding previously brought," Crim. P. 35(c)(3)(VII).

¶ 13 For the most part, Frantz presented in this Rule 35(c) action the same — or closely related — issues as those that were presented to, and rejected by, the postconviction court in Frantz's October 2019 so-called "habeas" action and, again, in his so-called "Crim. P. 35(a)" action that is the subject of the appeal in *Frantz*, No. 21CA59. Both actions were, in reality, Crim. P. 35(c) proceedings. *See DePineda v. Price*, 915 P.2d 1278, 1280 (Colo. 1996) (motion purporting to seek habeas relief); *People v. Collier*,

151 P.3d 668, 670 (Colo. App. 2006) (motion purporting to seek relief under Crim. P. 35(a)). And because Frantz brought the same or closely related claims here that he did in those earlier Rule 35(c) actions, he is not entitled to a review of those claims at this time. *Cf. People v. Hubbard*, 184 Colo. 243, 247, 519 P.2d 945, 947 (1974) (Predecessor provision to Crim. P. 35(c) did not authorize filing of "successive motions based upon the same or similar allegations in the hope that a sympathetic judicial ear may eventually be found.").

¶ 14 Frantz did raise two claims that, on their face at least, appeared somewhat different from those he had presented in his earlier Crim. P. 35(c) actions: (1) vindictive prosecution; and (2) ineffective assistance of counsel.

¶ 15 But as Frantz admits in his motion, his vindictive prosecution claim is "derivative" (and not in any way independent) of the arguments and claims he'd raised related to the propriety of adjudicating questions pertaining to medical practice in a criminal case. Because those "other arguments and claims" had been raised in earlier Rule 35(c) actions, Frantz's so-called vindictive prosecution claim was not subject to review in this action either.

See People v. Turley, 18 P.3d 802, 805 (Colo. App. 2000) (For successive motions purposes, "[a]n issue is essentially the same issue as one previously raised if review 'would be nothing more than a second appeal addressing the same issues on some recently contrived constitutional theory.'" (quoting *People v. Bastardo*, 646 P.2d 382, 383 (Colo. 1982))).

¶ 16 Finally, Frantz's ineffective assistance of counsel claims are also barred on successiveness grounds. "Claims that could have been brought in a previous postconviction motion are barred because they are successive." *People v. Thompson*, 2020 COA 117, ¶ 43. Frantz's Rule 35(c) motion in the present case was, in actuality, his third motion[5] seeking Crim. P. 35(c) relief. Because Frantz could have raised his ineffective assistance claims in his first postconviction motion, he cannot raise them now. *See id.* at ¶ 44.

¶ 17 Consequently, Frantz is not entitled to relief on appeal.

III. Disposition

¶ 18 The order is affirmed.

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[5] The others are his mislabeled motions for "habeas" and "Crim.P. 35(a)" relief.

JUDGE FURMAN and JUDGE SCHOCK concur.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 26, 2023 CASE NUMBER: 2023SC78
Certiorari to the Court of Appeals, 2021CA395 District Court, Boulder County, 2010CR1900	
Petitioner: James E. Frantz, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2023SC78
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 26, 2023.
JUSTICE BERKENKOTTER does not participate.

APPENDIX C

Orders on Motions

1:24-cv-00799-LTB-RTG Frantz (PS) v. Stancil et al **CASE CLOSED on 10/09/2024**

2254,ALLMTN,CDOC Other,JD4,PS8,TERMED

U.S. District Court - District of Colorado

District of Colorado

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APPENDIX E

Medical Practice Act (MPA); 12-240-101, et seq. C.R.S.

§ 12-240-102 Legislative declaration: The general assembly declares it to be in the interests of public health, safety, and welfare to **enact laws regulating and controlling the practice of the healing arts** to the end that the people shall be properly protected against unauthorized, unqualified, and improper practice of the healing arts in this state, and this article 240 shall be construed in conformity with this declaration of purpose. (emphasis added)

§ 12-240-107. Practice of medicine defined - exemptions from licensing requirements - unauthorized practice by physician assistants and anesthesiologist assistants - penalties - definitions - rules.
(1) As used in this article 240, "practice of medicine" means:
(a) Holding out one's self to the public within this state as being able to diagnose, treat, prescribe for, palliate, or prevent any human disease; ailment; pain; injury; deformity; physical condition; or behavioral, mental health, or substance use disorder, whether by the use of drugs, surgery, manipulation, electricity, telemedicine, the interpretation of tests, including primary diagnosis of pathology specimens, images, or photographs, or any physical, mechanical, or other means whatsoever;
(b) Suggesting, recommending, prescribing, or administering any form of treatment, operation, or healing for the intended palliation, relief, or cure of a person's physical disease; ailment; injury; condition; or behavioral, mental health, or substance use disorder;
(c) The maintenance of an office or other place for the purpose of examining or treating persons afflicted with disease; injury; or a behavioral, mental health, or substance use disorder;
(d) Using the title "M.D.", "D.O.", "physician", "surgeon", or any word or abbreviation to indicate or induce others to believe that one is licensed to practice medicine in this state and engaged in the diagnosis or treatment of persons afflicted with disease; injury; or a behavioral, mental health, or substance use disorder, except as otherwise expressly permitted by the laws of this state enacted relating to the practice of any limited field of the healing arts;
(e) Performing any kind of surgical operation upon a human being;

§ 12-240-106. Powers and duties of board - limitation on authority - rules.
(1) In addition to all other powers and duties conferred and imposed upon the

board by this article 240, the board has the following powers and duties to:
(a) Promulgate rules pursuant to section 12-20-204 that are fair, impartial, and nondiscriminatory;
(b) Make investigations, hold hearings, and take evidence in accordance with section 12-20-403 in all matters relating to the exercise and performance of the powers and duties vested in the board;

§ 12-240-117(3) All holders of a license to practice medicine granted by the board … shall be authorized to practice medicine, as defined by this article 240 in all its branches.

§ 12-240-121. Unprofessional conduct - definitions.

§ 12-240-125. Disciplinary action by board - rules. (c) All matters referred to one panel for investigation shall be heard, if referred for formal hearing, by the other panel or a committee of that panel. [Any person may complain to the BME re physician medical conduct, including the District attorney.]

§ 12-240-135. Unauthorized practice - penalties - injunctive relief.

OTHER ATTACHMENTS

1) People's Notice of 6-24-11

2) Minute Order-district court of 8-12-11

DISTRICT COURT, BOULDER COUNTY, COLORADO Court Address: Boulder County Justice Center 1777 Sixth St Boulder, Colorado 80302 Court Phone: (303) 441-3750	11 JUN 27 PM 12:47
PEOPLE OF THE STATE OF COLORADO vs. JAMES EARL FRANTZ, Defendant	COURT USE ONLY
Attorney Name: Adrian Van Nice, Reg. #33239 Deputy District Attorney Boulder County Justice Center 1777 Sixth St Boulder, CO 80302 Attorney Phone: (303) 441-3844 Attorney Fax: (303) 441-4703 Attorney E-Mail: avannice@bouldercounty.org	Case No: 10CR1900 Division: 6

PEOPLE'S NOTICE OF INTENT TO INTRODUCE EVIDENCE PURSUANT TO C.R.E. 404(B)

The People, through District Attorney Stanley L. Garnett, respectfully submit the following notice of intent to introduce evidence.

1. The Defendant is charged with Sexual Assault on a Child by one in a position of trust and Child Abuse resulting in serious bodily injury. With respect to the Child Abuse charge it is alleged that the Defendant "burned" the victim's wrist, causing scaring.

2. Counsel for the defendant has that the incident was the result of a valid medical procedure conducted by the defendant on the child victim . Counsel has also alluded to the fact that the child has in the past engaged in cutting behaviors.

3. The victim, and have all detailed previous instances of physical abuse perpetrated by the defendant against the victim throughout . Including incidents in which the defendant has strangled the victim, suffocated the victim with a pillow, punched the victim causing a bloody nose, and attacked the victim as attempted to protect when and would argue and would back in to a corner. The victim further relates an incident in which the defendant grabbed by the hair and pulled from the top bunk of bunk bed when as elementary aged. further details significant verbal abuse by throughout and years.

4. The Defendant has acknowledged some of the incidents but indicates that he was acting in self defense or in an attempt to control the victim.

5. Evidence of Prior transactions is admissible so long as it is not utilized to prove a specific trait of character. Rule 404(b) allows for the admission of evidence to show intent, plan, knowledge, identity, or absence of mistake or accident, or to rebut any affirmative defenses, or an assertion of recent fabrication.

6. The Colorado Supreme Court set forth the analysis to be utilized in determining admissibility in the case of People v. Spoto, 795 P.2d 1314 (Colo. 1990). Under the Spoto analysis the evidence must relate to a material fact at issue, it must be logically relevant, the logical relevance of the evidence must be independent of the intermediate inference of bad character, and the probative value of the evidence must outweigh the prejudicial effect of its admission.

7. In this case the People believe that the proffered evidence would tend to rebut affirmative defenses such as self defense should the Defendant choose to assert them, additionally, the evidence would tend to disprove any allegations of fabrication, and would assist in demonstrating a lack of accident or mistake, rebut the defendant's potential defense that the injury was not the result of abuse but rather a bona fide medical intervention, may help demonstrate identity, and be probative as to the intent, plan, or knowledge of the defendant. The logical relevance is independent of the inference of bad character, and the probative value is not outweighed by the prejudicial effect.

Respectfully submitted,

By: _____

STANLEY L. GARNETT
DISTRICT ATTORNEY

Adrian Van Nice, Reg. #33239
Deputy District Attorney
June 24, 2011

IT IS SO ORDERED. Done this _____ day of _____, _____.

_____
Judge

Court Minute Order: Summary of Motions Hearing

clothed in a towel after bathing herself. Kofu further testified about a specific incident in which Defendant pulled her out of bed by her hair and an investigation by the Department of Social Services because of bruises on ? (Shelan) arms that she claimed were caused by Defendant squeezing her arms too tightly.

The Court finds that the alleged other acts of sexual and physical abuse to fail to satisfy the third and fourth prongs of the *Spoto* test. Specifically, the Court finds that the introduction of this testimony would result in the jury making an improper inference of bad character on the part of Defendant. The Court finds that whatever probative value the evidence may have, if any, is substantially outweighed by the danger of unfair prejudice. Therefore, the other acts evidence related to s inadmissible at trial.

As to ? testimony regarding various acts of physical abuse perpetrated against Kegan by Defendant, the Court finds this evidence to be relevant to the sex assault charge because it pertains to the "power and control" dynamics of Defendant's relationship with the named victim, and also can be offered to rebut the defense of a valid medical intervention. The evidence is also relevant to the child abuse charge because it goes to Defendant's motive and pattern, and may be asserted to rebut Defendant's general denial defense. The Court further finds that the probative value of this evidence is not substantially outweighed by the danger of unfair prejudice, and that the jury will be able to follow the Court's limiting instructions without making improper inferences of bad character. Therefore, the other acts evidence that relates to prior physical abuse of will be admissible at trial.

3. **People's Motion to Move Trial** – The Court denied the motion because the Court will be in scheduling during most of September, and speedy trial expires on October 29, 2011.

THIS CASE REMAINS SET FOR A 5-DAY JURY TRIAL ON THE TRAILING DOCKET THE WEEK OF OCTOBER 17, 2011.

Dated this 23 day of August, 2011, *nunc pro tunc*, August 12, 2011.

BY THE COURT

M. Gwyneth Whalen
District Court Judge

E-MAILED
DATE 8/24/11