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Nos. 23-3309/3365

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARK HARTMAN,

Petitioner-Appellee/Cross-Appellant,

v.

OHIO ATTORNEY GENERAL DAVE YOST,

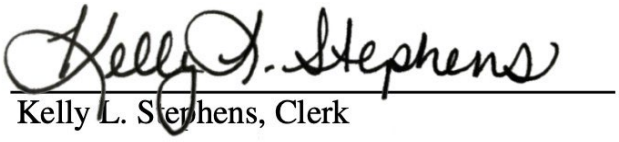
Respondent-Appellant/Cross-Appellee.

ORDER

Before: GIBBONS, McKEAGUE, and STRANCH, Circuit Judges.

Upon careful consideration of the petitioner's motion for reconsideration, which we here construe as a timely petition for panel rehearing, Fed. R. App. P. 40(a), (d)(1); *see also Brown v. Local 58*, 76 F.3d 762, 768 (6th Cir. 1996) ("The substance of the motion, rather than its form, controls our inquiry."), the panel concludes that the court did not misapprehend or overlook any point of law or fact in its September 15, 2023 order. Accordingly, the court declines to reconsider the matter. Fed. R. App. P. 40(b)(1)(A). In light of our construction of the petitioner's motion to reconsider, his motion to extend time is DENIED as unnecessary.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

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UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARK HARTMAN,

Petitioner-Appellee/Cross-Appellant,

v.

OHIO ATTORNEY GENERAL DAVE YOST,

Respondent-Appellant/Cross-Appellee.

Appeal from the United States District Court for the Southern District of Ohio at Dayton.
No. 3:19-cv-00003—Walter H. Rice, District Judge.
Argued: May 2, 2024
Decided and Filed: July 24, 2025
Before: GIBBONS, McKEAGUE, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Stephanie L. Watson, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Dave Yost. S. Adele Shank, LAW OFFICE OF S. ADELE SHANK, Columbus, Ohio, for Mark Hartman. **ON BRIEF:** Stephanie L. Watson, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Dave Yost. S. Adele Shank, LAW OFFICE OF S. ADELE SHANK, Columbus, Ohio, for Mark Hartman.

OPINION

McKEAGUE, Circuit Judge. A grand jury in Montgomery County, Ohio, indicted Mark Hartman for three counts of rape that occurred during a late-night sexual encounter. After a bench trial, a state judge convicted him of all three counts. Hartman now petitions for habeas relief under 28 U.S.C. § 2254, alleging that his two trial counsel provided constitutionally ineffective assistance by improperly cross-examining witnesses during the trial. He also alleges his counsel provided ineffective assistance by misstating material facts about bench and jury trials and inducing him to waive his right to a jury. Ohio courts rejected his claims on the merits. Hartman argues that the state courts unreasonably applied *Strickland v. Washington* when they did so.

Those state-court decisions were not unreasonable. The district court erred by granting Hartman relief on his cross-examination claim. But the court properly denied relief on Hartman's jury-waiver claim. We **REVERSE** the district court's grant of a habeas writ on Hartman's cross-examination claim, **AFFIRM** the district court's denial of relief on his jury-waiver claim, and **REMAND** with instructions to deny Hartman's petition for a writ of habeas corpus.[1]

[1] After oral argument, Hartman filed (1) a motion for relief from judgment under Fed. R. Civ. P. 60(b) in the district court, and (2) a motion asking this Court to remand the case after the district court indicated how it would rule on his Rule 60(b) motion. *See* Fed. R. Civ. P. 62.1(a); Fed. R. App. P. 12.1(b). Both motions argued that a then-recent Supreme Court decision,

I.

Late in the evening of December 30, 2013, Mark Hartman—home from college for winter break—and some of his friends hosted a small party. *State v. Hartman*, 64 N.E.3d 519, 527 (Ohio Ct. App. 2016). One of Hartman's friends invited a woman with the initials M.W. to the house. Early the next morning, Hartman raped M.W. three times by force or threat of force.

See Ohio Rev. Code § 2907.02(A)(2).[2]

Smith v. Arizona, 602 U.S. 779 (2024), applied to two of his original claims for habeas relief that were not before this Court on appeal. Hartman's Rule 60(b) motion was pending before the district court for more than eight months. Without reaching the merits of the motion, the district court ultimately concluded that it was a "second or successive" habeas petition because it relied on "a subsequent change in substantive law" to justify relief. *Gonzalez v. Crosby*, 545 U.S. 524, 530–32 (2005); 28 U.S.C. § 2244(b)(2). Because the motion constituted a second or successive habeas petition, the district court transferred it to this Court for authorization. *See* 28 U.S.C. § 2244(b)(3); *In re Hartman*, No. 25-3453 (6th Cir. 2025). This Court informed Hartman that he must apply for authorization to file a second or successive habeas petition by July 23, 2025. *See* 6 Cir. R. 22(b). This opinion does not decide whether Hartman's Rule 60(b) motion is a second or successive habeas petition, nor does it address whether he is authorized to file second or successive habeas petition; the Court will consider those questions in due course.

[2] The provision makes it a first-degree felony to "engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." Ohio Rev. Code § 2907.02(A)(2). Victims

A. Criminal Trial and Conviction in State Court

In July 2014, a grand jury indicted Hartman. After his case was assigned to a judge, Hartman waived his right to a jury trial. Hartman argues that he did so because of several statements counsel made to him during a pretrial meeting. Those statements included that (1) the trial judge was one of a small number of judges before whom counsel would suggest choosing a bench trial; (2) trial counsel had a good relationship with the judge; (3) the judge had "all sons and would understand from a male's point of view" (the judge actually had only daughters); and (4) media coverage at the time would make it hard to get "all twelve jurors to side with" Hartman. State Ct. Docs., R.5-2 at PageID 641. Hartman says that trial counsel never told him that a judge "could overturn a jury's verdict," that a bench trial was "very hard to reverse," that "just one juror" who disagreed with a guilty verdict could "save" him, or that "evidentiary questions would be severely limited if not eliminated" on direct appeal. *Id.* at PageID 569, 641.

The bench trial began on September 29, 2014. The evidence at trial revealed the following events. On a late-December evening, Hartman went to a friend's house. Hartman and two friends began drinking. Hartman also smoked some marijuana.

"need not prove physical resistance to the offender." *Id.* § 2907.02(C).

Later, one friend invited a group of three women to join the party. The group included M.W. The party continued into the early morning hours. Hartman drank enough alcohol that he vomited; one of the women began to feel sick, so M.W. and the third female friend took her home. M.W. and the friend then rejoined the group. At that point, M.W. began drinking, although she testified that she never became intoxicated. Testimony conflicted as to the amount she drank.

During M.W.'s direct examination, she testified that the group ordered food and began playing a card game. Eventually, everyone but Hartman and M.W. left the room where they had all been sitting. Hartman and M.W. sat and talked, and then M.W. decided to go to bed. Hartman offered to show her to her room. Hartman then kissed M.W. She testified that she consented to the kiss, but he then "tried to go up" her shirt. Trial Tr., R.7-1 at PageID 1217. She told him not to, and he stopped. He "pushed" her "onto the bed," then went up her shirt again. *Id.* Again, she said no. They kissed again. But then Hartman continued to touch her. And she testified that she "kept saying no" and "didn't want" him to put his hands down her pants. *Id.* at PageID 1218. She described how Hartman took off her shirt, bra, and leggings. And she said Hartman roughly kissed her neck, bruising her; grabbed her chest; and penetrated her vagina with his finger. In his testimony, Hartman disputed many of these details, claiming that she explicitly agreed to have sex with him.

M.W. further testified that, with her clothes off and Hartman roughly touching her, she became scared. She knew she wasn't "as strong as he was," and she grew worried that she didn't know where any of her other friends were. *Id.* at PageID 1220–21. She feared that she would not be able to get out and that Hartman might hit her. So while Hartman was penetrating her with his finger, she just "sat there." *Id.* at PageID 1223. She resolved "a few times" to "go along with it" in the hopes that he might let her go or she could "escape." *Id.* She reiterated to him that she didn't want to continue, but he then began having sex with her. She says he told her not to worry—that it would be "fun" and "fine" and she "shouldn't be too worried about it." *Id.* at PageID 1224. She continued to say "no." *Id.* Hartman took a "brief" break lasting "a minute or two," but then he started to have sex with her again. *Id.* at PageID 1225.

Still on direct examination, M.W. testified that she got up to go to the bathroom, hoping that she could "get away from the situation." *Id.* at PageID 1225–26. Hartman followed her. He got into the shower, then "grabbed" her arm and "pulled" her in with him. *Id.* at PageID 1226–27. She began to cry while in the shower with him. *Id.* at PageID 1228. While in the shower, Hartman again groped and kissed M.W. She told him she didn't "want this" and got out of the shower. *Id.* Hartman followed her to the bedroom, "pushe[d]" her "back onto the bed," and had sex with her again. *Id.* at PageID 1228–29. When Hartman was finished, M.W. attempted to leave, but he pulled her back into

the bed where she stayed until one of her friends found her. M.W. left visibly upset. M.W.'s friend took her home. After M.W.'s parents saw marks on her neck, she told them about the assault. The family went to the hospital, where M.W. spoke to an emergency-room doctor, a detective, and a sexual-assault nurse-examiner.

During M.W.'s cross-examination, Hartman's counsel asked her questions about the force that Hartman had used during the assault. For instance, counsel confirmed that Hartman had pushed her on the bed when they first entered the bedroom. Counsel then asked M.W. to "demonstrate" how he had done so. *Id.* at PageID 1261. Counsel also asked about Hartman's efforts to pull off M.W.'s clothing, wondering whether Hartman was "restraining" M.W. in some way. Counsel followed up by asking, "But when he was on top, you managed to get up in an effort to try and get away?" *Id.* at PageID 1263. Counsel then asked about the statement M.W. had submitted to the detective, clarifying that M.W. had "indicated" that Hartman had "pinned down" her arms. *Id.* Counsel further asked about a statement M.W. made to the nurse-examiner that Hartman had "held" her down by her "wrists." *Id.* at PageID 1268. Counsel followed up by remarking that M.W. had testified he held her down by her "arms," but that she was "pointing to [her] shoulders." *Id.* at PageID 1269. Counsel also confirmed that M.W. claimed she was "kicking" and resisting Hartman's efforts to pull off her clothes, but that she wasn't "yelling," even though she had earlier told the nurse-

examiner that she *had* been yelling while the assault occurred. *Id.* at PageID 1270–71.

Testimony from two other witnesses is also relevant to this appeal. The state called one of M.W.'s friends—the one who took her home the morning after the assaults—and the police detective who took M.W.'s report.

On direct examination, M.W.'s friend testified that it was "unexpected" that M.W. and Hartman were "going to bed together," because there were no indications the two had been flirting with each other. *Id.* at PageID 1299–1300. She said she was confused because that wasn't M.W.'s "typical behavior." *Id.* at PageID 1305. On cross-examination, Hartman's counsel confirmed with the friend that it was a "surprise because it's out of character" for M.W. *Id.* at PageID 1328. Counsel then questioned M.W.'s friend on whether M.W. had at all hinted that she was uncomfortable with Hartman's advances. The friend said no. Counsel further asked whether the friend was confused because M.W. was acting "out of character." *Id.* at PageID 1337. The friend agreed. Counsel then responded, "Except that you had believed that [M.W.] was going to hook up with [Hartman] the night before[,] right?" *Id.* at PageID 1338. To that, M.W.'s friend responded, "I never believed that." *Id.* Counsel then asked about the friend's knowledge of M.W.'s prior sexual activity—a line of questioning that the trial judge ended because of Ohio's rape shield rule.[3]

[3] Ohio's rape shield rule prohibits admission of "opinion evidence of the victim's sexual activity" unless it involves

When the detective took the stand, the state asked him to recount his observations of M.W. while she made her report. The detective described her as tearful and struggling to regain her composure. He described injuries to both sides of M.W.'s neck, her breast, and her back. The detective further testified about the statement he had taken from Hartman. On cross-examination, Hartman's counsel sought to rebut the detective's implication that Hartman had lied to him in the statement. And trial counsel also explored what he contended were a "number of inconsistencies" in M.W.'s statement. *Id.* at PageID 1480. For instance, he asked about M.W.'s claim that she had been yelling, the amount of wine M.W. had consumed, and whether any of the marks on M.W.'s body resulted from the sexual assault that had occurred while Hartman grabbed M.W. and pulled her into the shower. Counsel also tried to elicit an acknowledgment that M.W. had described the level of force used during the assault in several different ways.

The judge returned a guilty verdict on all counts. The judge specifically found that Hartman lacked credibility. He then sentenced Hartman to four concurrent years on each count. After his release, Hartman's conviction subjected him to five years of "post-release control," a period of supervision by a parole board. Hartman also has an ongoing duty to register in a state sex-offender

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"evidence of the origin of semen, pregnancy, or sexually transmitted disease or infection, or the victim's past sexual activity with the offender." Ohio Rev. Code § 2907.02(D).

database for the rest of his life. *See* Ohio Rev. Code §§ 2950.04, 2950.13.

B. Direct Appeal in State Court

Hartman timely appealed the judgment. He raised a claim that his trial counsel improperly cross-examined several trial witnesses ("cross-examination claim"). Hartman argued that his trial counsel were ineffective because they introduced evidence of force during M.W.'s cross-examination that the state had failed to prove. He also argued that counsel "bolstered" the state's case against Hartman with inadmissible hearsay and character evidence from cross-examinations of M.W.'s friend and the police detective.

The Ohio Court of Appeals rejected this claim. The court "agree[d] with Hartman's assertion that defense counsel, on cross-examination of the victim, brought up factual matters not presented during the direct examination of the victim" that may have helped the state's case. *Hartman*, 64 N.E.3d at 542. But the court noted that it was "at least arguable" that the state had sufficiently proven force for, at a minimum, the final rape count. *Id.* The court found that trial counsel could reasonably have concluded that Hartman's best strategy was to "attack" M.W.'s "credibility" about "facts relevant to the issue of force" on cross-examination. *Id.* The court also found that the evidence elicited from M.W.'s friend was admissible under Ohio law because it helped the trial judge assess her veracity. *Id.* at 542–43. And the court concluded that Hartman was not prejudiced by counsel's failure to object to the detective's hearsay testimony. *Id.* at 543. The court

said it was reasonable "to allow the admission of the victim's various statements of the incident" in order to point out inconsistencies between M.W.'s pre-trial statements and her testimony during trial. *Id.* at 544.

Hartman then sought review in the Ohio Supreme Court. The court declined to accept his appeal. *State v. Hartman*, 60 N.E.3d 7 (Ohio 2016) (table). The Ohio appellate court's opinion on direct appeal is the last reasoned state court decision on Hartman's cross-examination claim.

C. State Post-Conviction Proceedings

Hartman also petitioned for post-conviction relief in state trial court. Relevant here, he claimed that he was denied effective assistance of counsel when his attorney made misleading statements about bench trials and failed to obtain his informed consent to the waiver of a jury trial ("jury-waiver claim").

The trial judge granted the state's motion for summary judgment. The court of appeals affirmed. *State v. Hartman*, 2017-Ohio-7933 (Ohio Ct. App. 2017). The appellate court agreed that defense counsel's advice "to a client to waive his right to a jury trial has been considered sound trial strategy in the absence of" other record evidence. *Id.* at ¶ 77 (quoting *State v. Neitzel*, No. 98 CA 11, 1998 WL 735942, at *6 (Ohio Ct. App. Oct. 23, 1998)). And it emphasized that, without "supporting evidence, the mere claim that a jury would have believed" Hartman falls "far short of establishing a reasonable probability" of a different outcome. *Id.* (quoting *State*

v. Aaron, No. 00AP-268, 2000 WL 1753151, at *4 (Ohio Ct. App. Nov. 30, 2000)). Because Hartman had failed to establish that he was prejudiced, the court determined that counsel had not been ineffective in advising him to opt for a bench trial. Id. at ¶ 78.

Hartman again sought review by the Ohio Supreme Court, which again declined to hear his appeal. State v. Hartman, 93 N.E.3d 1005 (Ohio 2018) (table). The Ohio appellate court's post-conviction opinion is the last reasoned state decision on Hartman's jury-waiver claim.

D. Federal Habeas Proceedings

Hartman petitioned a federal district court for habeas relief. He raised his cross-examination claim and his jury-waiver claim. The district court granted relief on the cross-examination claim. The court reasoned that trial counsel had introduced evidence of force that hadn't been proven during direct examination. Counsel's failure to object to statements from M.W.'s friend and the detective had a similar prejudicial effect. Because the trial was "fundamentally unfair" in the court's view, Hartman had succeeded under *Strickland*'s ineffective-assistance standard. Order, R.45 at PageID 2613–14.

The district court denied Hartman's jury-waiver claim. It held that the strategy to advise a bench trial was sound. It also found that the Ohio appellate court's holding that Hartman had failed to show prejudice was reasonable. But the court further concluded that reasonable jurists could disagree with its finding and certified the claim for appeal.

The state—at the time, the Ohio Adult Parole Authority—timely appealed the district court's writ on Hartman's cross-examination claim. Hartman timely cross-appealed the district court's denial of his jury-waiver claim. Hartman moved this Court to expand the certificate of appealability. Motion, D.8 at 1–12. In a single-judge order, the Court denied the motion. *Hartman v. Ohio Adult Parole Auth.*, Nos. 23-3309/3365 (6th Cir. Sept. 15, 2023).

II.

Before moving to the merits of these cross-appeals, we briefly address an earlier justiciability argument. In May 2023, Hartman moved this Court to dismiss the state's appeal. He argued that because he had completed a full term of post-release control, the Parole Authority no longer had custody over him and could not comply with a habeas writ. In response, the Parole Authority proposed substituting the Ohio attorney general. Hartman agreed. He then moved to substitute the attorney general. This Court granted the motion. *Id.*

Hartman's completion of post-release control does not moot his appeal. For the case to continue, there must be an "actual injury traceable to" the attorney general that would likely "be redressed by a favorable judicial decision." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). Because Hartman has been released from custody, he must face some "collateral consequence" of his conviction that causes him a "concrete and continuing" injury. *Id.* We must make a similar finding for the attorney general.

Hartman's lifetime registration requirement is a collateral consequence that prevents his appeal from becoming moot. *See United States v. Juv. Male*, 560 U.S. 558, 560–61 (2011) (describing a continuing sex-offender registration requirement as a "likely potential 'collateral consequence'" of a state conviction); *Kittka v. Franks*, 539 F. App'x 668, 670–71 (6th Cir. 2013) (holding that sex-offender registration and notification requirements constituted collateral consequences of the petitioner's state sentence). A favorable decision for Hartman on either claim would require the state to vacate Hartman's conviction and retry him. The attorney general would need to absolve Hartman—at least until a new conviction and sentence—of his reporting obligations. That keeps Hartman's appeal alive.

Similarly, if the attorney general obtains a reversal of the habeas writ, he will not be required to vacate Hartman's conviction and retry him. The attorney general seeks redress for the interest he has in preserving Hartman's conviction and sentence from vacatur. A decision in his favor would release him and the State of Ohio from the "burden" of a "new trial," so his appeal is also not moot. *Calderon v. Moore*, 518 U.S. 149, 150 (1996).

III.

There are two appeals here. First, the attorney general argues that the district court erred by granting Hartman relief on his cross-examination claim. Second, Hartman argues the court erred by denying his jury-waiver claim. We review de novo both the grant and denial of habeas relief. *See Hodge*

v. Jordan, 95 F.4th 393, 398 (6th Cir. 2024); *Upshaw v. Stephenson*, 97 F.4th 365, 370 (6th Cir. 2024). We review a district court's fact findings for clear error. Upshaw, 97 F.4th at 370.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), state courts' findings of fact and law are entitled to deference. We presume factual findings are correct unless "clear and convincing evidence" rebuts the presumption." *Id.* (quoting *Ferensic v. Birkett*, 501 F.3d 469, 473 (6th Cir. 2007)). For claims adjudicated on the merits in state court, federal courts may not grant relief unless the state decisions were "contrary to" or "involved an unreasonable application" of "clearly established" Supreme Court decisions. *See* 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). So under § 2254(d)(1), we may grant relief only where (1) the state court arrived at an opposite conclusion as the Supreme Court or decided a case differently on "materially indistinguishable facts" or (2), relevant here, where the state court identified "the correct governing legal principle" from Supreme Court caselaw but "unreasonably" applied the principle to the petitioner's case. *Williams*, 529 U.S. at 413.

Where a petitioner raises ineffective-assistance-of-counsel claims that a state court has already rejected, our review is "doubly" deferential to counsel's strategic choices during the trial. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). Hartman must satisfy *Strickland v. Washington*'s two-pronged test to show that he did

not receive the legal assistance the Constitution guarantees him. 466 U.S. 668 (1984). But he must also overcome AEDPA's robust deference to the state courts' application of *Strickland*.

Ineffective-assistance claims. The first inquiry under *Strickland* requires that Hartman show that his counsels' performance was deficient, meaning they made such serious errors that they were not "functioning" as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. Our scrutiny is "highly deferential," given the benefit of hindsight. *Id.* at 689. Indeed, we afford trial counsel a "strong presumption" that their conduct "falls within the wide range of reasonable professional assistance" and "sound trial strategy." *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). We may "affirmatively consider the range of possible reasons behind counsel's decisions," even if counsel did not invoke those reasons at trial. *Woodburn v. Morrison*, No. 22-2084, 2024 WL 51317, at *4 (6th Cir. Jan. 4, 2024); *Cullen v. Pinholster*, 563 U.S. 170, 196

(2011).

Next, Hartman must show that counsel's constitutionally deficient performance prejudiced Hartman's defense during the trial. *Strickland*, 466 U.S. at 691–92. The prejudice must be so severe as to deprive the defendant of a fair trial with a reliable result. *Id.* at 687. Without the actual or constructive denial of counsel, the state's interference with counsel's performance, or some kind of actual conflict of interest, we do not presume that any deficiencies in counsel's performance resulted in prejudice. *See id.* at 692. Hartman must affirmatively show that he

was prejudiced. *See id.* at 693. In sum, he must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding" would be different. *Id.* at 694.

Habeas review of ineffective-assistance claims. AEDPA magnifies Hartman's burden. Hartman can prevail only if the state court's application of clearly established federal law was "objectively unreasonable." *Williams*, 529 U.S. at 409. That's a higher burden than showing the state-court decision was merely "incorrect." *Id.* at 410. An incorrect decision still stands under federal habeas review unless it was *also* objectively unreasonable. *See Hodge v. Plappert*, 136 F.4th 648, 661 (6th Cir. 2025) (en banc). So the decision stands as long as "fairminded jurists could disagree" about its "correctness." *Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). A state court's rejection of a claim *precludes* federal habeas relief unless no fairminded jurist could agree with the state court. *Id.* It's not enough that the petitioner might succeed in federal court on a de novo application of Supreme Court caselaw. "AEDPA demands more." *Id.* at 102.

When the last state court to review the case issued a summary ruling without reasoning, our review of state-court decisions "look[s] through" the unreasoned state-court orders to the last reasoned state-court opinions addressing the claims. *See Ylst v. Nunnemaker*, 501 U.S. 797, 806 (1991). Here, we look through the Ohio Supreme Court's denials of Hartman's petitions to the Ohio appellate court decisions.

To succeed on his claims, then, Hartman must clear AEDPA's doubly deferential standard: he must show the *Ohio courts'* application of *Strickland* was objectively unreasonable. *Harrington*, 562 U.S. at 105; *Hodge*, 136 F.4th at 661. The range of reasonable conduct under *Strickland* is "substantial." *Harrington*, 562 U.S. at 105. The additional burden to show that there is no reasonable argument that the state court unreasonably applied "Strickland's deferential standard" leaves Hartman little room for success. Id. In short, he must show that "every fairminded jurist would agree that every reasonable lawyer" would have pursued a different strategy. Dunn v. Reeves, 594 U.S. 731, 740 (2021) (cleaned up).

We need not look far to find reasonable strategies that might justify counsel's actions in Hartman's case. Indeed, the Ohio courts identified several—and in the context of this case, those strategies were not unreasonable. As a result, Hartman cannot succeed on his habeas claims.

A. Ineffective Assistance of Counsel in Cross-Examination

The attorney general's appeal concerns Hartman's claim that his counsel rendered ineffective assistance through deficient cross-examination of the victim and two other witnesses during trial.[4]

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[4] Hartman also argues that the state courts made unreasonable fact determinations about the use of "force" and merely "substitute[d]" the victim's "own explanation of what caused her fear." Second Br. at 35–36; *see* 28 U.S.C. § 2254(d)(2). But this argument is indistinguishable from the first claim in the habeas petition he filed, which alleged the state had failed to

Hartman's brief focuses in large part on trial counsel's cross-examination of M.W., although he suggests briefly that trial counsel improperly cross-examined M.W.'s friend and the police detective as well. The attorney general argues that counsel's cross-examination tactics aimed to uncover inconsistencies in M.W.'s testimony, tending to discredit the truthfulness of her account. The district

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introduce sufficient evidence. The district court rejected that claim and declined to certify it for appeal. When a state appeals a grant of habeas relief, our sister circuits are split on whether federal appellate courts have jurisdiction to hear a petitioner's arguments on cross-appeal about an alternative habeas claim that has not been certified. *Compare, e.g.*, *Sumpter v. Kansas*, 61 F.4th 729, 754 (10th Cir. 2023) (no jurisdiction absent proper certification), *and Mathias v. Superintendent Frackville SCI*, 876 F.3d 462, 474 (3d Cir. 2017) (same), *with Szabo v. Walls*, 313 F.3d 392, 397–98 (7th Cir. 2002) (certification is unnecessary). *Cf. Jennings v. Stephens*, 574 U.S. 271, 282–83 (2015) (acknowledging split but declining to decide whether a certificate is required for cross-appeals).

But we need not decide the issue here, as Hartman does not argue that he may make arguments beyond the two claims before us. So, he has abandoned any argument that we may assess his evidence-sufficiency claim. *See United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006). At any rate, on the merits, we give full deference to state court interpretations of state law. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991). Indeed, the Ohio appellate court noted several instances of force that sufficed to prove the "force" element of rape. *Hartman*, 64 N.E.3d at 536 (noting that Hartman pushed the victim onto the bed, removed her clothes, laid on top of her, and pulled her into the shower). Hartman does not argue that those specific events never occurred, which might have resulted in an unreasonable fact determination under § 2254(d)(2). He instead argues they can't qualify as force under Ohio law. That legal question is for Ohio courts to decide—and they have agreed that the evidence sufficed to prove the force element of rape.

court found that Hartman's counsel was constitutionally ineffective and that the Ohio appellate court had misapplied Strickland. We disagree and reverse the district court's grant of habeas relief on the cross-examination claim.

Hartman claims that his trial counsel was unreasonable in introducing evidence of force during the cross examination of M.W. He claims that, by doing so, his counsel helped the state satisfy its burden of proof. The Ohio Court of Appeals determined that the state had introduced evidence of force during M.W.'s direct testimony. It further determined that counsel had reasonably pursued an impeachment strategy during the cross-examinations.

The district court erred by failing to give AEDPA deference to those determinations. Not only is an impeachment strategy reasonable, but it's often advisable when the trier-of-fact must assess competing witness testimony. See Harris v. New York, 401 U.S. 222, 225 (1971) (characterizing impeachment as a "traditional truth-testing" device because it can provide "valuable aid" in assessing credibility). The strategy's ubiquity underscores why not every fairminded jurist would agree that every reasonable lawyer would have acted differently. See id.; Dunn, 594 U.S. at 740. Counsel reasonably attempted to reveal inconsistencies and biases during cross-examination to help the judge assess M.W.'s credibility. See Strickland, 466 U.S. at 690; Harris, 401 U.S. at 225. Given the nature of the evidence—the judge had to weigh competing testimony in a "he said, she said" scenario—cross-

examining a victim to call her credibility into question was not unreasonable even if it revealed new instances in which M.W. claimed Hartman used force. A fairminded jurist could believe that the Ohio court correctly found that trial counsel pursued a valid trial strategy. So AEDPA forecloses review of this claim.

In rejecting Hartman's separate sufficiency claim, the Ohio appellate court found that M.W.'s direct examination had revealed instances of force sufficient to prove each rape count. See Hartman, 64 N.E.3d at 536–38. That determination does not conflict with the trial testimony. M.W. did testify directly to the force Hartman used. She said that when they entered the bedroom, "he pushed me onto the bed." Trial Tr., R.7-1 at PageID 1217. She described how he "took off my shirt and bra," then "took my pants off." Id. at PageID 1217–18. She explained that he "grabbed" her arm and "pulled" her into the shower. Id. at PageID 1226–27. Then, she said, she went back to the bedroom, where he "pushe[d]" her "back onto the bed" and had sex with her one more time. Id. at PageID 1228.[5]

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[5] At oral argument, Hartman's counsel correctly noted the Ohio appellate court found it "at least arguable" that the state had presented evidence of force on the third count during M.W.'s direct examination. Counsel then argued the state made no such finding for the first and second counts. In fact, the Ohio court found it "at least arguable" that the state had proved force on "*at least one* of the Rape counts—the last one occurring on the bed." *Hartman*, 64 N.E.3d at 542 (emphasis added). The court did not find that the state failed to present evidence on the earlier counts. Review of the opinion's evidence-sufficiency discussion reveals that the court found M.W. had testified to

To be sure, trial counsel did elicit additional details of force—for instance, where Hartman touched or grabbed M.W. when he pushed her back on the bed—that do not appear in her direct examination. But counsel did so to emphasize inconsistencies in the statements M.W. had provided. For example, after M.W. said she felt restrained by Hartman's arm across her chest, counsel then parried with a question aimed at disproving the truth of that statement: "But when he was on top, you managed to get up in an effort to try and get away?" Id. at PageID 1263. Counsel also elicited that Hartman had held M.W. down by her wrists. But then counsel noted that she wasn't pointing to her wrists on the stand, instead pointing to her shoulders. And counsel also drew out M.W.'s statement to the nurse that she was kicking Hartman while he was taking off her clothes. But he got her to admit that she had not been yelling, as she had at first suggested in her statement. In sum, counsel's cross-examination sought to draw out certain inconsistencies in various statements and testimony M.W. had given about the assault. This strategy can help a factfinder assess truth, ulterior motives, possible biases, or prejudice. See Davis v. Alaska, 415 U.S. 308, 316 (1974).

Counsel's cross-examination of M.W., which elicited greater detail about the force Hartman used, ultimately failed. But Hartman's counsel did not introduce evidence of force out of whole cloth without

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the use of force for each of the three counts. *See id.* at 536–37. That testimony came from her direct examination. *See id.* at 536.

any precursor in M.W.'s direct testimony. Under Strickland, a reasonable strategy could have been to impeach her testimony by introducing inconsistencies in the statements she had already provided even if it ultimately added new details to her testimony. See 466 U.S. at 690 (instructing courts to assess whether counsel has functioned to "make the adversarial testing process work"). An impeachment strategy serves a fundamental purpose within the adversarial process: helping judges and juries test a witness's truth by providing them the opportunity to assess the "possible biases, prejudices, or ulterior motives of the witness." Davis, 415 U.S. at 316; see also Harris, 401 U.S. at 225. The Ohio court reasonably determined that counsel pursued exactly that strategy during M.W.'s cross-examination.

Hartman also argues that his trial counsel was unreasonable in failing to object to evidence of M.W.'s character elicited from her friend and in cross examining the friend about how out of character it would be for M.W. to have engaged in sexual conduct. The Ohio court held that the trial judge could admit the friend's testimony about M.W.'s character under caselaw allowing such statements where they provide "additional support for the truth of the facts" in the victim's testimony or assist "the fact finder in assessing" truthfulness. See Hartman, 64 N.E.3d at 543 (quoting State v. Sedgmer, 2002-Ohio-1527, at ¶ 23 (Ohio Ct. App. 2002)). We do not review state courts' application of state law. See Estelle, 502 U.S. at 67–68. Counsel cannot have been ineffective for failing to object to admissible

evidence. This determination, then, cannot provide Hartman with a basis for relief.

Further, the Ohio court determined that the friend's cross-examination advanced a valid trial strategy. During the friend's direct testimony, she said she was surprised that M.W. had spent the night with Hartman. During cross-examination, Hartman's counsel confirmed with the friend that she was surprised about M.W.'s conduct. And then counsel tried to impeach the friend's testimony by referencing a contradictory statement: "Except that you believed" that

M.W. "was going to hook up with" Hartman "the night before[,] right?" Trial Tr., R.7-1 at PageID 1338. The strategy may not have elicited a damaging response, but the strategy's failure does not mean it was deficient. See Strickland, 466 U.S. at 689 (admonishing courts to avoid second-guessing trial strategy only because it failed). The testimony supported a strategy to discredit M.W.'s testimony that her encounter with Hartman was forced and nonconsensual.

Finally, Hartman faults his trial counsel for failing to object to hearsay statements that M.W. made to the detective. The Ohio court rejected this argument. In state court, the state conceded the statements were hearsay. Hartman, 64 N.E.3d at 543. But the Ohio court held Hartman had not been prejudiced because counsel made a strategic decision to allow the admission of inconsistent statements. Id. at 544. That finding was reasonable. Indeed, left unsaid is the implicit conclusion that admission of those statements may have bolstered Hartman's

defense, making it more likely the factfinder might think M.W. had not been truthful. Counsel asked about M.W.'s contradictory statements about yelling, the amount of wine M.W. had drunk, the lack of bruising on her body from Hartman pulling her into the shower, and the "different ways" she said Hartman had held her down. Trial Tr., R.7-1 at PageID 1480, 1483, 1492. The strategy elicited "prototypical" impeachment testimony. See Blackston v. Rapelje, 780 F.3d 340, 353–54 (6th Cir. 2015); Davis, 415 U.S. at 315–16; cf. Fed. R. Evid. 608(b)(2).

Counsel used one of the "traditional truth-testing devices of the adversary process." Harris, 401 U.S. at 225. To do so was not constitutionally deficient. Thus, the Ohio court's determination that Hartman could not show a "reasonable probability" that the result of the trial would have been different was not unreasonable. See Strickland, 466 U.S. at 694.

* * *

Not only is it possible to identify reasonable strategies that Hartman's counsel pursued during cross-examination of the key witnesses, but the Ohio court has provided the primary one—impeachment of the key witness—for us. Given the potential benefits of pursuing this strategy, not every fairminded jurist would agree that every lawyer would have acted differently. *See Dunn*, 594 U.S. at 740. The Ohio court did not unreasonably apply *Strickland*, so we reverse the district court's grant of a conditional habeas writ on Hartman's cross-examination claim.

B. Ineffective Assistance of Counsel in Advice to Waive Jury Right

Next, we turn to Hartman's jury-waiver claim. Hartman argues that his counsel misinformed him about his right to a jury trial and induced him to waive that right. Hartman says his attorney gave him false information about the judge, the trial, and the review process. The attorney general responds that, except for counsel's statement about the judge's children, counsel never misstated any material fact about either a jury trial or the review process, so his conduct was not deficient. Further, the attorney general argues Hartman cannot show a reasonable probability that he would have either opted for a jury trial or been acquitted upon invoking his jury-trial right. The district court denied relief.

The Ohio Court of Appeals determined that trial counsel's performance was not deficient under *Strickland*. Hartman fails to demonstrate that this determination was contrary to, or involved an unreasonable application of, clearly established federal law or was based on unreasonable determination of facts, as he must under AEDPA. See 28 U.S.C. § 2254(d). We therefore affirm the district court.

Hartman's claim depends on the application of Strickland's ineffective-assistance standard to the context of advising Hartman to waive his right to a jury trial, a waiver that must itself be knowing, voluntary, and intelligent. See Fitzpatrick v. Robinson, 723 F.3d 624, 639 (6th Cir. 2013). But Hartman does not argue here that his waiver was unknowing, involuntary, or unintelligent. Instead,

he argues that counsel's assistance was so ineffective that it violated Strickland. The Supreme Court's decision in Hill v. Lockhart provides an analogous framework: there, the Court held that the ineffective-assistance standard applied when a habeas petitioner claimed his attorney gave him erroneous information about parole eligibility that made his guilty plea "involuntary." 474 U.S. 52, 56 (1985). We apply the same standard to ineffective-assistance claims about jury-trial waivers. See Willis v. Smith, 351 F.3d 741, 745–46 (6th Cir. 2003). And, as above, Hartman must meet AEDPA's magnified standard to show that the Ohio court applied Strickland objectively unreasonably. See 28 U.S.C. § 2254(d)(1). To succeed, he must show that the state court's determination constituted "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103. While Hartman must satisfy both the performance and prejudice prong of Strickland, we need not "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697.

Hartman has failed to show his counsel performed deficiently under Strickland. The Ohio court found that, given the absence of record evidence indicating counsel's advice was unreasonable, counsel's jury-waiver strategy was sound. See Hartman, 2017-Ohio-7933 at ¶ 77. This determination was not an unreasonable application of Strickland. Hartman argues that his counsel made a factual error in his advice to Hartman by asserting that the judge had sons rather than daughters and would understand a "male's" point of

view. While concerning, this mistake does not completely eclipse the other reasonable advice that counsel provided. For instance, counsel recognized that prevailing media coverage might tend to make members of the community less sympathetic to alleged male rapists. Counsel also believed the trial judge was "fair" and that he had a "good relationship" with the judge. State Ct. Docs., R.5-2 at PageID 641. The outcome in this trial depended on the trier-of-fact assessing directly competing testimony dealing with inflammatory issues of sexual assault, consent, and the overconsumption of alcohol. With that understanding, counsel's advice to try the case to an impartial judge—whom we typically describe as "less prone to persuasion" by misleading testimony than a jury, see United States v. Stepp, 680 F.3d 651, 669 (6th Cir. 2012)—was well within the wide range of reasonable professional conduct guaranteed under Strickland. Hartman points to no misapplication of clearly established federal law, nor unreasonable misapprehension of fact, undermining the reasonableness of the state court's conclusion that counsel's advice as a whole met the standard we expect of a reasonably competent attorney.

Even assuming that counsel misstated some of the elements of a jury trial and omitted relevant information about evidentiary review, it is not this Court's place to demand perfect technical knowledge of a jury trial to ensure that a jury-trial waiver was knowing, voluntary, and intelligent. We have never required that defendants perfectly understand every element of the jury-trial right in order to properly waive it. See United States v. Martin, 704 F.2d 267,

273 (6th Cir. 1983). Instead, we ask only whether the defendant understands that "the choice he faces is to be judged by a jury composed of people from the community as opposed to having his guilt or innocence determined by a judge." Fitzpatrick, 723 F.3d at 639. Trial counsel need not explain the minutiae of conducting a bench or jury trial to provide constitutionally sufficient advice to waive a jury-trial right. By Hartman's own admission, the attorney's advice laid out exactly what we require under our caselaw. He explained Hartman had a "right to a jury trial." State Ct. Docs., R.5-2 at PageID 641. He presented Hartman's choice as being between a "bench trial versus a jury trial." Id. He explained that the ultimate result would be up to a judge. Id. And he advised that a jury trial would depend on "twelve uneducated people" agreeing with Hartman's "side" of the story. Id. Given how well the advice tracks the key inquiry we make into whether a waiver was knowing and intelligent, the Ohio court was not unreasonable in determining that counsel's performance was not deficient. Thus, we need not address Strickland's prejudice prong. See 466 U.S. at 697.

* * *

The Ohio court determined that counsel's advice that Hartman waive his right to a jury trial was reasonable. On appeal, Hartman fails to demonstrate that this conclusion was based on an unreasonable determination of fact or an unreasonable application of federal law. Because the Ohio court did not unreasonably apply Strickland,

we affirm the district court's denial of habeas relief on Hartman's jury-waiver claim.

IV.

We **REVERSE** the district court's grant of a conditional habeas writ on Hartman's cross-examination claim and **AFFIRM** the district court's denial of Hartman's jury-waiver claim. We **REMAND** with instructions to deny Hartman's petition for a writ of habeas corpus.

Nos. 23-3309/3365

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARK HARTMAN,
Petitioner-Appellee/Cross-Appellant,

v.

OHIO ATTORNEY GENERAL DAVE YOST,
Respondent-Appellant/Cross-Appellee.

Before: GIBBONS, McKEAGUE, and STRANCH, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Dayton.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, REVERSED IN PART, and REMANDED for further proceedings consistent with the opinion and instructions of this court.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

Nos. 23-3309/3365

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARK HARTMAN,
Petitioner-Appellee/Cross-Appellant,
v.

OHIO ATTORNEY GENERAL DAVE YOST,
Respondent-Appellant/Cross-Appellee.

ORDER

Before: MOORE, Circuit Judge.

Mark Hartman, a former Ohio prisoner represented by counsel, appeals the district court's judgment granting in part and denying in part his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. Hartman applies to expand the certificate of appealability (COA) granted by the district court. *See* Fed. R. App. P. 22(b). He also moves to substitute Ohio Attorney General Dave Yost as the respondent. For the reasons explained below, the court denies the motion to expand the COA and grants the motion to substitute.

Following a bench trial in 2014, the trial court convicted Hartman of three counts of rape, in violation of Ohio Revised Code § 2907.02(A)(2). The trial court sentenced him to three concurrent terms of four years of imprisonment and five years of post-release control and imposed a lifetime sex-offender

registration requirement. At trial the state presented evidence that, after a night of heavy drinking, Hartman had a sexual encounter with a young woman. Hartman claimed that the encounter was consensual, but the victim said it was not. The Ohio Court of Appeals affirmed the convictions. *State v. Hartman*, 64 N.E.3d 519, 527 (Ohio Ct. App.), *perm. app. denied*, 60 N.E.3d 7 (Ohio 2016). Hartman sought state postconviction relief, but he was unsuccessful. *State v. Hartman*, No. 27162, 2017 WL 4334168 (Ohio Ct. App. Sept. 29, 2017), *perm. app. denied*, 93 N.E.3d 1005 (Ohio Mar. 14, 2018).

In 2019, Hartman filed a federal habeas petition raising twelve grounds for relief. Relevant to the present application, he claimed that his convictions were supported by insufficient evidence (Ground One), the Ohio Court of Appeals violated his due process rights by applying a new interpretation of rape under Ohio law to his sufficiency claim (Ground Two), trial counsel performed ineffectively during cross-examination of the victim, the victim's friend, and the investigating detective by bringing up new facts that bolstered the State's case (Ground Six), the trial court violated his right to confront witnesses against him by allowing a crime lab technician who did not personally conduct the DNA tests to testify about the results (Ground Seven), and trial counsel performed ineffectively by persuading him to waive his right to a trial by jury (Ground Twelve). A magistrate judge initially recommended denying the petition in its entirety, but after Hartman's objections and a recommitment to the

magistrate judge by the district court, the magistrate judge recommended granting relief on a portion of Ground Six and on Ground Twelve. The district court adopted the magistrate judge's recommendation concerning Ground Six but not Ground Twelve. The district court granted a COA on Ground Twelve, however.

The respondent appealed (No. 23-3309), and Hartman cross-appealed (No. 23-3365). Hartman now seeks to expand the COA granted by the district court in his cross-appeal to include Grounds One, Two, and Seven, as well the remainder of Ground Six. The parties agree that, because Hartman has completed his term of post-release control, the proper respondent is now Ohio's Attorney General. See Advisory Comm. Note to Rule 2(b), Rules Governing Section 2254 Cases.

To obtain a COA, an applicant must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). When the denial of a petition is based on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Slack v. McDaniel, 529 U.S. 473, 484 (2000). To satisfy this standard, a petitioner must demonstrate that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 327 (2003).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), when reviewing a district court's application of the standards of review of 28 U.S.C. § 2254(d) after a state court has adjudicated a claim on the merits, this court asks whether reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States nor
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
28 U.S.C. § 2254(d); see Miller-El, 537 U.S. at 336.

Hartman argued in Ground One that his convictions were supported by insufficient evidence. Relatedly, he argued in Ground Two that the Ohio Court of Appeals violated his due process rights by applying a novel definition of rape when analyzing his sufficiency claim. These two claims are intertwined and best addressed together. When evaluating the sufficiency of the evidence, the reviewing court must determine 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). On habeas review, the inquiry involves two levels of deference: one to the jury's verdict under Jackson, and the second to the state court's decision under § 2254(d). See Coleman v. Johnson,

566 U.S. 650, 651 (2012) (per curiam). When assessing the sufficiency of the evidence, this court does not weigh the evidence, assess the credibility of witnesses, or substitute [its] judgment for that of the jury. United States v. Wright, 16 F.3d 1429, 1440 (6th Cir. 1994).

The trial court found that Hartman purposely compelled the victim to submit to sexual conduct by force or threat of force. See Ohio Rev. Code § 2907.02(A)(2). Force is defined as a physical action exerted against the one compelled. Ohio Rev. Code § 2901.01(A)(1). Purpose is shown when the defendant intends to compel the other person to engage in sexual conduct by force or threat of force. See Hartman, 64 N.E.3d at 535 (citing State v. Wilkins, 415 N.E.2d 303, 306 (Ohio 1980)). The Ohio Court of Appeals concluded that the victim's will was overcome by fear because she believed that, based on Hartman's actions, he would hurt her if she did not submit to his advances. Id. at 536-37. The court must therefore evaluate whether reasonable jurists could debate the district court's conclusion that this decision was reasonable.

Hartman questions the Ohio Court of Appeals conclusion that the elements of rape could be established merely by putting the victim in fear that she would be physically harmed. He particularly criticizes the fact that the Ohio Court of Appeals noted his physique4i.e., that Hartman was much larger and stronger than his victim and that the victim's fear was influenced in part by her own personal beliefs and experiences. But the trial court

found that Hartman pushed the victim onto the bed, removed her clothes, laid on top of her, and pulled her into the shower, thus creating a belief in the victim's mind that physical force would be used if she did not submit to his actions. Id. at 536. The state court's consideration of Hartman's size and strength or the victim's own fears when considering the totality of whether he purposely put the victim in fear of the use of physical force was reasonable. It certainly was not so extreme an interpretation of prior caselaw as to amount to a violation of due process or an improper retroactive application of a new interpretation of the law. And federal habeas courts do not otherwise review state court's decisions regarding questions of state law. See Estelle v. McGuire, 502 U.S. 62, 67 (1991). Reasonable jurists therefore could not debate the district court's rejection of Grounds One and Two.

Hartman also argues in his COA application that the district court prematurely jumped to analyzing the reasonableness of the state court's decision regarding his sufficiency claim, see 28 U.S.C. § 2254(d), without first analyzing the claim in the absence of deference under AEDPA. Hartman's argument lacks merit because the district court was required to apply the doubly deferential standard of review mandated by AEDPA. See Coleman, 566 U.S. at 651. And the magistrate judge's and district court's determinations show that they engaged with the underlying sufficiency claim and properly applied AEDPA deference. Reasonable jurists could not debate the rejection of this argument.

Hartman next seeks a COA on a subclaim of Ground Six that the district court described as a lack-of-trial-strategy claim. No such bifurcation of the claim is readily apparent from his presentation of Ground Six in his habeas petition, however, and it unclear why the claim was divided in this manner in the district court. To the extent that Hartman wishes to argue on appeal specifically that counsel made a poor strategic choice by deciding to cross-examine the witnesses in the manner described in Ground Six, that argument is encompassed by the district court's grant of relief on that claim and the State's appeal. To the extent that a distinct claim that counsel lacked a coherent overall defense strategy can be gleaned from the filings below, reasonable jurists could not debate the district court's conclusion that counsel's decision to adopt a strategy of acknowledging that sex occurred4but attempting to show that it was consensual4was reasonable.

Hartman lastly requests a COA on his claim that his Confrontation Clause rights were violated when a crime lab technician testified about DNA test results although he did not personally conduct the tests. The Confrontation Clause prohibits the admission of out-of-court testimonial statements by a non-testifying witness unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53-54 (2004). Hartman primarily argues in his COA application that a harmlessness analysis should not be allowed in the context of a violation of the Confrontation Clause.

This court's caselaw clearly establishes that Confrontation Clause claims are subject to harmless-error review, however. See Reiner v. Woods, 955 F.3d 549, 555 (6th Cir. 2020). Hartman thus fails to show that the Ohio Court of Appeals9 harmlessness determination was contrary to clearly established federal law. See 28 U.S.C. § 2254(d)(1); Hartman, 64 N.E.3d at 550-52. And because Hartman acknowledged that he had sex with the victim, any claimed constitutional violation concerning the DNA evidence did not have a substantial and injurious effect or influence in determining the jury's verdict. Williams v. Bauman, 759 F.3d 630, 637 (6th Cir. 2014) (quoting Brecht v. Abrahamson, 507 U.S. 619, 631 (1993)). Reasonable jurists could not debate the denial of this claim.

This order, however, addresses only Hartman's application to expand the COA as it relates to his cross-appeal[1]. The court takes no

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[1] There is an argument that Hartman does not need a COA when submitting a cross-appeal. Compare Sumpter v. Kansas, 61 F.4th 729, 754 (10th Cir. 2023) (finding that a COA is required for habeas petitioners who file cross-appeals), with Szabo v. Walls, 313 F.3d 392, 397398 (7th Cir. 2002) (finding that a habeas petitioner is not required to file a COA for a cross-appeal because once a case is properly before the court of appeals . . . there are no remaining gates to be guarded). See also Jennings, 574 U.S. at 282 (citing Szabo for the proposition that once a State has properly noticed an appeal of the grant of habeas relief, the court of appeals must hear the case, and 8there are no remaining gates to be guarded9 but declining to decide explicitly whether a COA is required on a cross appeal). Hartman, however, does not make this argument and, therefore, the court will not address it. See United States v. Johnson, 440 F.3d 832, 845346 (6th Cir. 2006)

position on what arguments Hartman may properly make in response to the state's appeal. *See Jennings v. Stephens*, 574 U.S. 271, 283 (2015) (stating that a petitioner does not need a COA if he does not file a cross-appeal but wishes to defen[d] . . . a judgment on alternative grounds because Congress enacted § 2253(c) against the well-known, if not entirely sharp, distinction between defending a judgment on appeal and taking a cross-appeal).

For these reasons, the application to expand the COA in No. 23-3665 is **DENIED**. The motion to substitute Ohio Attorney General Dave Yost as the respondent in Nos. 23-3309 and 23-3365 is **GRANTED**. The Clerk's Office is instructed to reset the briefing schedule in both appeals.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

([A]n appellant abandons all issues not raised and argued in its initial brief on appeal. (quotation omitted)).

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

Mark Hartman, Petitioner,	)	Case No. 3:19-cv-03
v.	)	
Ohio Adult Parole Authority, Respondent.	)	Judge Walter H. Rice

DECISION AND ENTRY ADOPTING IN PART AND REJECTING IN PART UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS (DOC. #22); SUSTAINING IN PART AND OVERRULING IN PART PETITIONER'S OBJECTIONS THERETO (DOC. #27); ADOPTING IN PART AND REJECTING IN PART SUPPLEMENTAL REPORT AND RECOMMENDATIONS (DOC. #29); SUSTAINING IN PART AND OVERRULING IN PART OBJECTIONS THERETO (DOCS. #34, 35); JUDGMENT TO BE ENTERED GRANTING PETITIONER A CONDITIONAL WRIT OF HABEAS CORPUS ON GROUND SIX, SUB-ISSUE TWO, AND IN FAVOR OF RESPONDENT AND AGAINST PETITIONER ON ALL OTHER GROUNDS; GRANTING CERTIFICATE OF APPEALABILITY ON GROUND SIX, SUB-ISSUE TWO AND GROUND TWELVE; DENYING CERTIFICATE OF APPEALABILITY ON ALL OTHER GROUNDS; TERMINATION ENTRY

Petitioner, Mark Hartman ("Hartman" or "Petitioner"), was convicted on three counts of rape,

in violation of Ohio Revised Code § 2907.02(A)(2), on October 9, 2014. Doc. #1, PagelD#4. Petitioner filed his Motion for a new trial on October 23, 2014. Id. After a hearing on that Motion, Petitioner's request was denied on March 6, 2015. Id. Petitioner was sentenced to four years on each count, all to run concurrently, on March 11, 2015. Id Petitioner was also designated a Tier HI sex offender, pursuant to Ohio Revised Code§ 2950.01(G). Id at PagelD#1-2.

Petitioner timely filed his direct appeal to the Second District Court of Appeals, raising several issues. See Doc. #5-1, PagelD#317-48. He was denied relief on all grounds. See State v. Hartman, 2016-Ohio-2883, 64 N.E.3d 519 (2d Dist). He sought review in the Ohio Supreme Court, but that Court declined jurisdiction to hear the case. See Doc. #5-2, Ex. 17, PagelD#409-26; see also State v. Hartman, 2016-Ohio-7199 (Ohio 2016). Petitioner also sought post-conviction remedies in all three courts but was denied relief. See Doc. #1, PageID#5; see also State v. Hartman, 2017-Ohio-7933 (Second District opinion); 2018-Ohio-923 (Ohio 2018) (Ohio Supreme Court denial of appellate review).

Petitioner filed his Petition for Writ of Habeas Corpus, Doc. #1, with this Court on January 3, 2019. In his Petition, Petitioner raised twelve separate grounds for habeas relief. See Doc. #1. In response, Tim Shoop, as acting Warden of the Chillicothe Correctional Facility, filed a Return of Writ, Doc. #6, with this Court on April 17, 2019. Petitioner filed his Traverse, Doc. #18, on August 15, 2019.

On August 21, 2019, Magistrate Judge Michael R. Merz granted an unopposed Order Substituting Respondent, Doc. #20, thereby substituting the Ohio Adult Parole Authority ("Respondent") as Respondent in place of Warden Shoop.[1] This substitution was granted because Petitioner was "released from imprisonment in the custody of Warden Shoop to post-release control in the custody of the Ohio Adult Parole Authority." Doc. #20, PageID#2096.[2]

On April 23, 2020, Magistrate Judge Merz issued his initial Report and Recommendations, Doc. #22, recommending that Petitioner's Petition be dismissed with prejudice. Doc. #22, PagelD#2178. Petitioner, in response, filed his Objections to [the] Magistrate Judge's Report and Recommendations, Doc. #27, on September 3, 2020. Respondent did not file any reply to Petitioner's Objections. After making a preliminary examination of Petitioner's Objections, this Court, pursuant to Fed. R. Civ. P. 72(b)(3), recommitted this matter to Magistrate

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[1] The Court will not distinguish between Shoop and the Ohio Adult Parole Authority when referring to "Respondent" throughout its Decision, because that distinction does not affect the Court's thorough *de novo* review of the case or the applicable law.

[2] The Court notes, as Respondent did in its Return of Writ, that Petitioner's release from incarceration to post-release control does not moot his habeas petition. Doc. #6, PageID#1104, n.1; see also Demis v. Sniezek, 558 F.3d 508,512 (6th Cir. 2009) (quoting Spencer v. Kenna, 523 U.S. 1, 7 (1998) (stating that a petition for habeas relief, challenging the constitutional validity of a conviction, is not rendered moot simply because the petitioner is released to post-release control).

Judge Merz, requesting a supplemental report analyzing the Objections and making recommendations based on that analysis. Doc. #28.

Magistrate Judge Merz filed his Supplemental Report and Recommendations, Doc. #29, on March 22, 2021. After a thorough consideration of Petitioner's Objections, Magistrate Judge Merz altered his initial conclusion, recommending that this Court grant a conditional writ of habeas corpus on two Grounds:

> 1. Ground Six. Sub-Issue #2: That trial counsel provided ineffective assistance of counsel in cross-examining Weckesser, Potter, and Norris.[3]
> 2. Ground Twelve: That trial counsel provided ineffective assistance of counsel when Petitioner was counseled to waive his right to trial by jury.

Doc. #29, PagelD#2350-51. Magistrate Judge Merz renewed his original position regarding Petitioner's remaining claims, once again recommending that they be dismissed with prejudice. Id.

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[3] The record establishes that Petitioner was represented by two attorneys during his criminal trial, Christopher Conard and Sasha Blaine. See Doc. #7-1, PagelD#1189 (Transcript of Proceedings, Bench Trial of Mark Hartman, Case No. 2014-CR-00834). Petitioner makes several references to his trial counsel in the plural. See, e.g., Doc. #1, PagelD#32 ("Trial counsel were ineffective ... "). For purposes of this opinion, the Court will refer to trial counsel in the singular and, if necessary for its analysis, will delineate between counsel Conard and counsel Blaine.

Petitioner filed his Objections to [the] Magistrate Judge's Supplemental Report and Recommendations, Doc. #34, on June 5, 2021. Respondent also filed its Objections to [the] Supplemental Report and Recommendation[s], Doc. #35, on the same date. On July 12, 2021, the parties filed their Responses to the opposing party's Objections. Docs. #40, 41.

Based upon a thorough de novo review of this Court's file and the applicable law, the Court ADOPTS IN PART AND REJECTS IN PART the recommendations of Magistrate Merz set forth in his April 23, 2020, Report and Recommendations, Doc. #22, and his March 22, 2021, Supplemental Report and Recommendations, Doc. #29. The Court GRANTS the Petition for Writ of Habeas Corpus, Doc. #1, on Ground Six, Sub-part Two, but DISMISSES all other Grounds WITH PREJUDICE.

Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as codified as amended at 28 U.S.C. § 2254{d), limits when federal habeas courts are permitted to grant relief. Under the AEDPA, an application for habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits" unless said adjudication:

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

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

28 U.S.C. § 2254{d). The AEDPA "dictates a highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt." Bell v. Cone, 543 U.S. 447, 455 (2005). If the state court did not evaluate the merits of the claim, the habeas court will review the claim de novo. Smith v. Cook, 956 F.3d 377, 386 {6th Cir. 2020) (quoting Rice v. White, 660 F.3d 242, 252 (6th Cir. 2011)).

Legal Analysis

Due to the extensive filings in this case, the Court will analyze each Ground separately, providing a short synopsis of the procedural filings before expounding upon its reasoning and decision.

A. Ground One: Insufficient Evidence

In his First Ground for Relief, Petitioner claims that he was convicted on insufficient evidence in violation of the constitutional standard outlined in Jackson v. Virginia, 443 U.S. 307 (1979). See Doc. #1, PagelD#15-22. Respondent defended Ground One on the merits, stating that the opinion of the Second District Court of Appeals was entitled to deference under the AEDPA. See Doc. #6, PagelD#1137-50. In his initial Report and Recommendations, Magistrate Merz provided an extensive excerpt from the Second

District Court of Appeals, laying out the relevant facts in the underlying case. Doc. #22, PagelD#2102-07 (quoting State v. Hartman, 2016-Ohio-2883, 64 N.E.3d 519, ,r 2-14 (2d Dist.)). Magistrate Merz also provided an extensive section of the facts, as considered by the Second District Court of Appeals in its analysis of the sufficiency of the evidence. Doc. #22, PagelD#2107-11 (quoting Hartman, 2016-Ohio-2883 at ,r 23-33).

Magistrate Merz reasoned that "[t]hese preliminary findings of fact by Judge Tucker [were] very relevant to Weckesser's state of mind as to whether she felt compelled." Id. at PagelD#2116. After discussing how the evidence presented to the trial court was sufficient, Magistrate Merz then analyzed the reasoning of the Second District Court of Appeals. Id. at PagelD#2118-22. He concluded that this claim should be denied on the merits. Id at PagelD#2122.

In response, Petitioner raised his Objections to the Magistrate's Report and Recommendations, arguing that Magistrate Merz "misapprehended" the culpable mental state and the "force or threat of force" elements of rape. See Doc. #27, PagelD#2197-2213. Throughout his lengthy discourse, Petitioner largely reiterates the same arguments made in his initial filings. See id., Pagel0#2197-2213; see also Doc. #1, PagelD#15-22 (Petition for Writ outlining Ground One); Doc. #18, PagelD#1947-80 (Petitioner's Reply).

After reviewing Petitioner's Objections, Magistrate Merz, in his Supplemental Report and Recommendations, expounds upon his analysis by focusing on the three contentions Petitioner raised in his Objections: (1) failing to consider the victim's "initial consent, actions, and subterfuge"; (2) failing to consider the victim's alcohol consumption the night of the incident while wrongly considering the Defendant's alcohol consumption; and (3) any "misapprehension" in his analysis regarding the "force or threat of force" element of rape. See Doc. #29, PagelD#2322-28; See also Doc. #27, PagelD#2198-2206. Magistrate Merz concluded in his Supplemental Report and Recommendations that each of these contentions was without merit. See Doc. #29, PagelD#2322-28.

In his Objections to the Supplemental Report and Recommendations, Petitioner raises three points. First, that Magistrate Merz "failed to address the sufficiency of the evidence" under the proper constitutional standard. Doc. #34, PagelD#2374-77. Second, that Magistrate Merz erred in determining that "the state court decisions on the mens rea element were reasonable determinations of fact in light of the evidence and reasonable applications of United States Supreme Court precedent." Doc. #34, PagelD#2377-88. Lastly, Petitioner claims that Magistrate Merz erred in determining that "the state court decisions on the element of force were reasonable determinations of fact in light of the evidence and reasonable applications of the United States Supreme Court precedent." Id. at PageID#2388-2400. For efficiency purposes, this

court will analyze Petitioner's first objection separate from his second and third.

1) Petitioner's First Objection, that Magistrate Merz "Failed to Address the Sufficiency of the Evidence" Under the Proper Constitutional Standard. is Without Merit.

Petitioner contends that "[t]he Magistrate Judge in this matter did not assess the sufficiency of the evidence but only the reasonableness of the trial judge's decision." Doc. #34, PageID#2376. The Court disagrees. When analyzing a claim for insufficient evidence in a habeas corpus petition, the Court must apply two levels of deference:

> In an appeal from a denial of habeas relief, in which a petitioner challenges the constitutional sufficiency of the evidence used to convict him, we are thus bound by two layers of deference to groups who might view facts differently than we would. First, as in all sufficiency-of-the-evidence challenges, we must determine whether, viewing the trial testimony and exhibits 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. See Jackson v. Virginia, 443 U.S. 307,319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In doing so, we do not

> reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. See United States v. Hilliard, 11 F.3d 618, 620 (6th Cir. 1993). Thus, even though we might have not voted to convict a defendant had we participated in jury deliberations, we must uphold the jury verdict if any rational trier of fact could have found the defendant guilty after resolving all disputes in favor of the prosecution. Second, even were we to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the state appellate court's sufficiency determination as long as it is not unreasonable. See 28 U.S.C. § 2254(d)(2).

Brown v. Konteh, 567 F.3d 191, 204-205 (6th Cir. 2009).

In order to determine whether the evidence was sufficient, as required by Jackson and the AEDPA, Magistrate Merz analyzed the underlying facts, as outlined by the Second District, in its decision on direct appeal:

> [*P3] During his winter break from college, Mark Hartman agreed to spend the evening with his best friend, Gordon, who was housesitting at the home of a family friend.

Hartman, Gordon, and one other friend were drinking heavily. Gordon texted a female friend, Courtney, inviting her to the party. Courtney agreed, and brought two of her girlfriends with her, M.W. and Cassie. The women arrived at the party around 11:00 p.m. Some time during the evening, M.W. texted her parents to let them know she would not be returning home that evening. After about one hour at the party, Cassie texted her friends to silently communicate that she wanted to leave, because she was allergic to the dog in the house. Courtney and M.W left the party and took Cassie back to Courtney's house, where she had left her car. M.W. and Courtney returned to the party after 1:00 a.m. and joined the men in their drinking and card-playing.

[*P4] After the third male went to bed, Courtney and Gordon were in the bathroom together, which left M.W. and Hartman alone in the living room. M.W. testified that she wanted to go to bed, and Hartman agreed to show her to a bedroom. M.W. testified that she was a willing participant when Hartman began to kiss her. After this point, M.W.'sand Hartman's versions of the facts began to diverge.

[*P5] M.W. testified that after she and Hartman entered the bedroom, he initiated kissing, and she was okay with that. She testified that as Hartman continued to kiss

her, he put his hand up her shirt, she said no, and he stopped. M.W. testified that "then we kept kissing and he pushed me onto the bed, and then he went up my shirt again. And again I said no. Which was fine. So we kept - - we kissed again. And then that's when he started to go down my pants, and I said no. And that's when it didn't stop. He just kept saying things like, it's fine, it will be okay, it will be fun, stuff like that. So then he went ahead and took off my shirt and bra." Trial Transcript at 29.

[*P6] M.W. testified that she began to get nervous because she was not sure what was going to happen. She testified that Hartman continued to go down her pants again as he was kissing her, and she kept saying "no, that I didn't want to do that." Id. at 30. She described that he removed her shirt, bra, and leggings, and then removed his own clothes. She testified, "that's when I basically just started to get really scared about the situation and wasn't sure how to handle the situation." Id. She explained the basis of her fear by testifying:

> I was scared because I knew that I was not as strong as he was, and I knew that if he would have done anything like hit me or anything like that I would have been out and I wouldn't have really remembered what had happened. And it was more important

> to me to remember what was happening to me than not know what was happening to me. As a girl growing up in your teenage years, you hear a ton of stories about what people can do to you and what, you know, strangers do and you don't know the person and you're not sure what they're going to do. So it just really scared me to not - - like and I didn't know who was around me. I didn't know where Courtney was. I didn't know where anyone else in the house was. And I just got really scared that something bad might have happened to me. And then I kept thinking that in this situation I can outsmart the situation, and you know, I can get out the smart way.
> And I like have been told how to get out of these situations and how to be smart. So that's what I kept thinking, was how I was going to get out because I knew I wasn't strong enough. And I was worried about being hit, or something.

Id at 32.

> [*P7] M.W. testified that Hartman continued to kiss her - causing the hickeys on her neck, and he continued to touch her in different places, including penetrating her vagina with his fingers. When asked what she was doing at this point, M.W. responded:

> I was just sitting there. A few times I had started to go along with it because I thought that if I went along with some of it, he might let me go and he might think that I was like kind of into it, too, and that if he thought that, that he might let me leave or like go and do something to the point where I could try and get out and escape. But basically, the whole time I would say no before and I just kind of sat there. I wasn't really into it or doing anything back. I was just there.

Id at 35.

> [*P8] M.W. testified that Hartman proceeded to penetrate her vagina with his penis after she said no, and that he kept saying "like its okay, it will be fine, it will be fun, don't worry about it." Id. at 36. M.W. testified that she kept saying no, and was numb because she was so scared. She testified that he stopped, took a break, and then began touching her again, and again penetrated her vagina with his penis.
> Afterwards, M.W. testified that she left the room and went into the bathroom, and that Hartman followed her, and began kissing her again. She described that he grabbed her arms, using enough force to pull her into the shower with him. She again testified that she "started to go along with it, too, because I was scared it was going to happen again and I

wanted to get out of the situation, and I was like maybe -- again, I kept thinking the same thing. If I go along with this, there might be a chance that I can get out of this situation. So that's what I kept thinking the whole time was if I go along with this for a little bit, there might be a chance that I can get out and this wouldn't have happened to me." Id. at 40.

[*P9] M.W. testified that after they showered, they returned to the bedroom, and Hartman began kissing her again, pushed her back onto the bed and again he penetrated her vagina with his penis. M.W. testified that "I was just so numb and didn't really feel like fighting back because I was so scared. And I was like, you know what, I'll just let it happen and then it will be done and then I'll get out of the situation." Id. at 41. M.W. testified that when he was done, she attempted to leave the bed, but he pulled her back into the bed.
When she thought Hartman was asleep, she tried to move, but he was still awake and he asked her to stay. M.W. testified that she agreed to stay there with him "because I didn't want anything to happen again." Id. at 42.

[*P1O] Hartman's version of the facts was presented through the admission of a written statement he gave to the police the day after the event, State's Ex. 24, the testimony of the officer who interviewed him, and from Hartman's testimony at trial. Hartman

admitted that he was intoxicated earlier in the evening, but he testified that he had stopped drinking alcoholic beverages, and was drinking water before the sexual encounter. He testified that M.W. initiated intimacy by kissing him before they went to the bedroom. He testified that they engaged in a good amount of kissing, and when he began to feel her breasts, and when he slid his hand down her pants, he specifically asked if she would like to have sex, and she answered yes. He testified that she willingly participated in the sexual encounter by helping to remove her own clothes and his clothes, asked him to squeeze her breasts and guided his hand, switched positions, and upon request willingly engaged in oral sex. Hartman testified that the only time she said "No" was when he asked if "we could have sex until we finished, and she said no at that time." He stated that he stopped after she said "No," and then they conversed a bit, talking about life, relationships and school, and then he asked again "if we could finish," and she said, "Yes, go ahead." Because he did not have a second condom, he asked if she was on birth control, and she replied, "you really think I would have sex with a random 20 year[s] old without birth control?" His testimony that he pulled out and ejaculated on the bed was later corroborated by DNA testing on the bed coverings. The fact that M.W. was taking birth-control medication was reflected in hospital records.

[*P11] The victim's testimony reflects that she did have her cell phone with her that evening -- she received a text from the other female at the party that she wanted to go home, and she texted her parents to tell them she would not be coming home that evening. The text messages that M.W. and her friend Courtney sent to each other later that morning were admitted into evidence as defendant's Ex. H. In the text messages, M.W. expressed reluctance about reporting the sexual assault, in the following exchange:

> M.W.: I need to think about if I want to press charges or not. Courtney: What are you thinking?
> M.W.: I don't know. I really don't know.
> Courtney: Are you wanting to confront him?
> M.W.: No. I don't ever want to talk to him. I just don't know if I should press charges and it'll be big because "rape in the [R.] house."
> Courtney: I didn't even think of that. He needs to know what he did was wrong. Was protection used? And did you shower before or after? As far as the [Rs], oh well.
> M.W.: I know. I agree but I can't handle a big thing. I can't even remember things because I was so in shock. I'm not sure if he did it [or] not. And in between.

[*P12] After M.W. told her parents what had happened to her, she was taken to the hospital, arriving at 3:39 P.M. She was initially examined by an ER doctor, then she talked to the police detective, and then she was referred to a nurse designated as a "sexual assault nurse examiner."1 This nurse interviewed M.W., making notes, Ex. 20, which recorded the victim's allegations as follows:

> Courtney and I went back to the house that one of the guys was housesitting for. Me and Mike was taking a tour of the house when he showed me to the bedroom which was downstairs. Mike kissed me on the lips and tried to take my shirt off and I said no, I'm not doing that. He (clarified with patient that he was Mike} kept kissing me over and over again and I kept yelling at him, telling him to stop. That's when things went from bad to worse. Mike pushed me on the bed and I landed on my back. He kept trying to kiss me and this time pulled off my shirt. He held my hands down beside me and kissed all over my neck, face and chest. He (clarified with patient that he is Mike) pulled off my leggings. I kept telling him no, get off of me, but he didn't. He had sex with me and stuck his hands inside of me. I managed to get free and go to the

> bathroom, and he followed me in there, grabbing my arms trying to pull me in the shower, asking me to take a shower with him. When I wouldn't he got mad and pulled on my arms back into the bedroom. He raped me again. Clarified with patient that Mike stuck penis and hands inside of vagina. I kept trying to leave but he wouldn't let me. My friend finally came upstairs and got me out of there.

[*P13] The medical records also indicate that during the process at the hospital, the victim's parents were present, and also present were the victim witness advocate, an Oakwood police officer and an Oakwood police detective. The medical records confirm that M.W. was not physically injured during the assault, other than the neck bruising referred to as hickeys. M.W. testified that since the event, she is no longer a social person, that she is scared to do anything, and no longer goes anywhere alone.

[*P14] The day after the alleged incident, defense counsel advised Hartman to create a written description of everything about the incident, which was given to police two days after the incident.
Defense counsel accompanied his client to two police interviews. Hartman freely answered all questions asked during the interviews.

Doc. #22, PageID#2102-07 (quoting State v. Hartman, 2016-Ohio-2883 at ,i 2-14. Magistrate Merz also considered the decision of the Second District Court of Appeals:

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

> [*P24] Hartman was indicted for three counts of Rape, in violation of R.C. 2907.02(A)(2). Under this section, to obtain a conviction for Rape, the State must prove beyond a reasonable doubt that the accused engaged in sexual conduct with another by purposely compelling the other person to submit to the sexual conduct by force or threat of force. Hartman has admitted that he engaged in sexual conduct with another. The question is whether sufficient evidence was presented to prove beyond a reasonable doubt that he purposely compelled M.W. to submit to the sexual conduct by force or threat of force.
>
> [*P25) A challenge to the sufficiency of the evidence presents a question of law as to whether the State has presented adequate evidence on all elements of the offense to sustain the verdict as a matter of law. State v. Hawn, 138 Ohio App.3d 449,471, 741 N.E.2d 594 (2d Dist.2000). "An appellate court's

function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State v. Jackson, 2d Dist. Montgomery No. 26050, 2015-Ohio-5490, P 41, 63 N.E.3d 410, quoting State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

[*P26) Pursuant to R.C. 2901.22 (A), "[a) person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." Therefore, in a Rape case, to prove that the defendant acted "purposely," the State must prove that it was the defendant's intention to engage in sexual conduct by forcefully compelling the other person to submit to the sexual conduct. "A rape occurs only if the perpetrator purposely compels the other to submit by force or threat of force." State v. Wilkins, 64 Ohio St.2d 382,385,415 N.E.2d 303 (1980).

[*P27] Ohio's rape statute does not require proof of the victim's lack of consent. Ohio law does recognize certain victims incapable of giving consent, based on mental or physical incapacity. Those exceptions do not apply in the case before us. See, e.g., State v. Hillock, 7th Dist. Harrison No. 02-CA-538, 2002-Ohio-6897. Consent is not an affirmative defense, but when applicable, consent is used as a defense to challenge the State's evidence on the element of purposeful force or compulsion. State v. El-Berri, 8th Dist. Cuyahoga No. 89477, 2008-Ohio-3539, P 57. When consent is raised as a defense to a charge of Rape, the test of whether consent negates a finding of force is not whether a reasonable person confronted with similar circumstances would have understood that the victim did not consent, the test requires the trier-of-fact to find, beyond reasonable doubt, that the specific defendant's purpose or intent was to commit the crime of rape. State v. Mundy, 99 Ohio App.3d 275, 650 N.E. 2d 502 (2d Dist. 1994). As we discussed in Mundy.

> The determination of a defendant's mental state, absent some comment on his or her part, must of necessity be determined by the nature of the act when viewed in conjunction with the surrounding facts and circumstances. State v. Lotf (1990), 51 Ohio St.3d 160,168,555 N.E.2d 293,302. This is, in

> fact, the well-recognized process of inferential reasoning. This process by necessity incorporates an objective mechanism or standard in determining the defendant's state of mind by the use of circumstantial evidence. The trier of fact reviews the defendant's conduct in light of the surrounding facts and circumstances and infers a purpose or motive.

Id., 99 Ohio App.3d at 288, 650 N.E.2d 502.

> [*P28] R.C. 2901.01(A)(1) defines "force" as any "violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." In the case before us, the trial court did not find that Hartman used physical constraint or any form of violence that caused physical harm during the sexual encounter. The trial court did not find that Hartman constrained the victim in any way or that the victim exhibited physical resistance to Hartman's advances. However, the trial court did find that Hartman "pushed" M.W. onto the bed, removed her clothes, laid on top of her, and pulled her into the shower. It has been recognized that proof of physical violence or physical resistance is not required to establish Rape if the defendant creates in the mind of the victim the belief that physical force will be used if the victim does not submit. State v. Umphries, 4th Dist. Ross No. 11CA3301, 2012-Ohio-4711, P 21, and P 16,

citing State v. Schaim, 65 Ohio St. 3d 51, 55, 1992 Ohio 31,600 N.E. 2d 661 (1992). "The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other." State v. Eskridge, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988). "Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established." Umphriesat P16, quoting State v. Fowler, 27 Ohio App.3d 149, 154, 27 Ohio B. 182,500 N.E .2d 390 (8th Dist. 1985).

[*P29] In the case before us, the victim testified that her will was overcome by fear, because she believed she would be hurt if she did not submit to Hartman's advances. To find that her will was overcome by fear, the trier-of-fact must have sufficient evidence from which to infer that her fear was based on some wrongful action or conduct of the defendant that purposely compelled her to submit to the sexual conduct, against her will. In the case before us, the trial court stated, "that the force element must be viewed within the context of M.W.'s concerns regarding Mr. Hartman's size and strength, that Mr. Hartman was intoxicated, that she did not know Mr. Hartman, and that, as the sexual conduct was occurring, she did not know the location of the remaining occupants of the house." Dkt. #80, pg. 10.

[*P30] Hartman testified that he is 6'3", weighed 200 pounds, and was physically fit. Medical records reflected that M.W. is 5'3" and weighed 165 pounds. Hartman and M.W. were both 20 years old, and both were college students. The victim testified that she was scared because she was not as strong as Hartman, and she believed that he would use his superior strength to hurt her if she did not submit to his sexual advances. The victim testified that she repeatedly said "No" to Hartman during the sexual encounter. The physical force described by the victim included her testimony that Hartman "pushed" her onto the bed, removed her clothing, laid on top of her, and "pulled" her into the shower.

[*P31] Each of the cases cited by the State addressing the issue of force is distinguishable from the case before us. In Umphries, the victim felt compelled to submit out of fear when she awoke during the night to find her uncle on top of her, who had broken into the house through a window, and she begged him to stop. State v. Umphries, 4th Dist. Ross No. 11CA3301, 2012-Ohio-4711. There was no admission that the victim in Umphrieswas a willing participant to any part of the encounter, and she communicated her fear by begging him to stop. Id. The victims in Whitt Shannon, and Eskridge were minors. State v. Whitt, 8th Dist. Cuyahoga No. 82293, 2003-

Ohio-5934; State v. Shannon, 11th Dist. Lake Nos. 2002-L-007, 2002-L-008, 2004-Ohio-1669; State v. Eskridge, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988). In State v. Patel, we found sufficient evidence of force when an employer held his employee "in a locked bathroom and inserted his finger in her vagina against her will and while ignoring her plea to stop." State v. Patel, 2d Dist. Greene No. 2010CA77, 2011-Ohio-6329, P 63. Unlike in the case before us, the defendant in Patel locked the room to prevent the victim from leaving, and no part of the sexual encounter was consensual. Id. None of the cited cases present a fact pattern in which a sexual encounter between adults starts out as consensual, before changing into a non-consensual encounter.

[*P32] We agree that the elements of Rape can be established when the two participants start the sexual encounter on a consensual basis, but the consent is revoked by words, actions or conduct that clearly communicates non-consent, the defendant fails to respect the change in consent, and purposely proceeds to engage in sexual conduct through force or threat of force evidenced by violence, physical restraint, or some type of coercive or threatening conduct that creates a belief or fear that physical force will be used if the victim does not consent. In the case before us, both the defendant's physique -- he was bigger and stronger than his victim -- and his conduct of pushing the victim on the bed,

> removing her clothes, and pulling her into the shower, was evidence from which a reasonable finder of fact could find that he purposely acted in a manner that induced fear in the victim, compelling her to submit to his sexual conduct, against her will.
>
> [*P33] Based on our review of the record, we conclude that the State did present sufficient evidence from which the trier of fact could conclude that Hartman purposely compelled M.W. to submit to sexual conduct by force or threat of force. There is no dispute that it was Hartman's intention to engage in sexual conduct with M.W. Also, the testimony of the victim, if believed, supports a finding that Hartman used force to compel M.W. to submit to sexual conduct at least three times during the course of the evening. Hartman's First Assignment of Error is overruled.

Doc. #22, PagelD#2107-11 (quoting *Hartman,* 2016-Ohio-2883 at **,r** 23-33).

In his Report and Recommendations, Magistrate Merz explained how these preliminary facts were relevant to the ultimate decision made by Judge Tucker at trial. *See* Doc. #22, PagelD#2114-18. Magistrate Merz stated that:

> Petitioner discounts Weckesser's testimony about her fears which she said arose in part from what she had learned growing up about possible

> harms from 'date rape' situations. But the aggressor in a sexual situation takes his victim as he finds her. The State had to prove that Weckesser was in fear and her explanation of why she was in fear [was] appropriate.

Id at PagelD# 2116. Additionally, Magistrate Merz opined that:

> Counsel repeat many times that Weckesser came back to the Routsong house intending to stay the night, that she knew Hartman had been drinking heavily, that she had never been in the house before and did not know its layout, that this was the first time she had ever met Hartman (Reply, ECF No. 18, PagelD 1961-65). She also knew when she went back to the house that her girlfriend Courtney had been sexual partner of the other awake male present, Gordon, so that if the two of them went to bed together, she would likely be 'left' with Hartman. She also had in her head when she went back all of the accumulated 'horror' stories that she had learned in her teenage years about the dangers of date rape. Nonetheless she went back. She took a very serious risk ... [b]ut taking a risk is not the same as giving consent.

Id

Magistrate Judge Merz expounded on the sufficiency of the evidence when he addressed Petitioner's specific concerns in his Supplemental Report and Recommendations. See Doc. #29, PagelD#2321-28. Based upon the de novo review by this Court, the Court finds that Magistrate Merz adequately explained how "[when] viewing the trial testimony and exhibits 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" under the first level of deference required in this analysis. Brown, 567 F.3d at 205 (citing Jackson, 443 U.S. 319).

Based on the facts presented, coupled with Magistrate Merz's thorough analysis, this Court believes that Magistrate Merz correctly "applied the doubly deferential standard applicable to Jackson claims after enactment of the Antiterrorism and Effective Death Penalty Act of 1996." Doc. #29, PagelD#2322. As such, this objection is without merit.

2) Petitioner's Second and Third Objections Are Simply Reiterations of Petitioner's Arguments and Will Not Be Analyzed By this Court.

After examining Petitioner's Second and Third Objections to the Supplemental Report and Recommendations, this Court believes that Petitioner has not raised any new objections to Magistrate Merz's findings, but rather, simply

reiterated his initial arguments. Compare Doc. #18, PagelD#1947-80 (Petitioner's Reply); Doc. #27, PagelD#2197-2213 (Petitioner's Objections to the Report and Recommendations); and Doc. #34, PagelD#2377-2400 (Petitioner's Objections to the Supplemental Report and Recommendations). As repeatedly held by other district courts in the Sixth Circuit, a petitioner's restatement of his or her arguments does not constitute a proper objection. See, e.g., Roach v. Hoffner, Case No. 1:13-cv-42, 2016 U.S. Dist. LEXIS 11820, *3 (W.D. Mich. Feb. 2, 2016); Green v. Andrews, Case No. 07CV2093, 2010 U.S. Dist. LEXIS 47694, *17-19 (N.D. Ohio May 14, 2010). As such, the Court declines to elaborate further beyond Magistrate Merz's well-reasoned analysis on this issue. See Docs. #22, 29.

Therefore, based upon Magistrate Merz's lengthy discourse in his original Report and Recommendations, as well as the Supplemental Report and Recommendations, this Court concurs with Magistrate Merz's recommendations regarding Ground One. Further, Petitioner's Objections to [the] Magistrate's Supplemental Report and Recommendation have not persuaded this Court that Magistrate Merz erred in his analysis. Therefore, this Court ADOPTS Magistrate Merz's recommendations that Ground One should be denied on the merits. Doc. #22, PagelD#2122; see also Doc. #29, 2321-28.[4]

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[4] Any claim or Ground for Relief not procedurally defaulted and, therefore, considered on the merits that is decided against Petitioner is deemed denied. Any claim or Ground for Relief

B. Ground Two: Retroactive Application of New Judicial Interpretation of Ohio's Rape Statute

In his Second Ground for Relief, Petitioner claims that his Due Process rights, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, were violated when the Second District Court of Appeals "affirmed [his] convictions by retroactively applying new constructions of the elements of rape." Doc. #1, PageID#22-24. More specifically, Petitioner argues that the court of appeals rewrote the statutory requirement that the State prove that the defendant "purposely compels the other person to submit by force or threat of force." He maintains that the court instead required only that the defendant "purposely acted in a manner that induced fear in the victim," and eliminated the requirement that a threat has to cause the victim to believe that physical force will be used to compel submission. Doc. #18, PageID#1981-86.

The Second District Court of Appeals' discussion of Petitioner's claim was as follows:

> [*P26] Pursuant to R.C. 2901.22 (A), "[a] person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless

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which the Court deems procedurally defaulted is deemed by the Court as dismissed.

of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." Therefore, in a Rape case, to prove that the defendant acted "purposely," the State must prove that it was the defendant's intention to engage in sexual conduct by forcefully compelling the other person to submit to the sexual conduct. "A rape occurs only if the perpetrator purposely compels the other to submit by force or threat of force." State v. Wilkins, 64 Ohio St.2d 382,385,415 N.E.2d 303 (1980).

[*P27] Ohio's rape statute does not require proof of the victim's lack of consent. Ohio law does recognize certain victims incapable of giving consent, based on mental or physical incapacity. Those exceptions do not apply in the case before us. See, e.g., State v. Hillock, 7th Dist. Harrison No. 02-CA-538, 2002-Ohio-6897. Consent is not an affirmative defense, but when applicable, consent is used as a defense to challenge the State's evidence on the element of purposeful force or compulsion. State v. El-Berri, 8th Dist. Cuyahoga No. 89477, 2008-Ohio-3539, P 57. When consent is raised as a defense to a charge of Rape, the test of whether consent negates a finding of force is not whether a reasonable person confronted with similar circumstances would have understood that the victim did not consent, the test requires the trier-of-fact to

find, beyond reasonable doubt, that the specific defendant's purpose or intent was to commit the crime of rape. State v. Mundy, 99 Ohio App.3d 275,650 N.E. 2d 502 (2d Dist. 1994). As we discussed in Mundy.

> The determination of a defendant's mental state, absent some comment on his or her part, must of necessity be determined by the nature of the act when viewed in conjunction with the surrounding facts and circumstances. State v. Lotf (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293,302. This is, in fact, the well-recognized process of inferential reasoning. This process by necessity incorporates an objective mechanism or standard in determining the defendant's state of mind by the use of circumstantial evidence. The trier of fact reviews the defendant's conduct in light of the surrounding facts and circumstances and infers a purpose or motive. Id, 99 Ohio App.3d at 288, 650 N.E.2d 502.

[*P28] R.C. 2901.01(A)(1) defines "force" as any "violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." In the case before us, the trial court did not find that Hartman used physical constraint or any form of violence that caused physical harm during the sexual encounter. The trial court did not find

> that Hartman constrained the victim in any way or that the victim exhibited physical resistance to Hartman's advances. However, the trial court did find that Hartman "pushed" M.W. onto the bed, removed her clothes, laid on top of her, and pulled her into the shower. It has been recognized that proof of physical violence or physical resistance is not required to establish Rape if the defendant creates in the mind of the victim the belief that physical force will be used if the victim does not submit. State v. Umphries, 4th Dist. Ross No. 11CA3301, 2012-Ohio-4711, P 21, and P 16, citing State v. Schaim, 65 Ohio St. 3d 51, 55, 1992 Ohio 31,600 N.E. 2d 661 (1992). "The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other." State v. Eskridge, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988). "Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established." Umphriesat P16, quoting State v. Fowler, 27 Ohio App.3d 149, 154, 27 Ohio B. 182,500 N.E .2d 390 (8th Dist. 1985).

State v. Hartman, 2016-Ohio-2883, 64 N.E.3d 519, ,r,r26-28.

In his Report and Recommendations, Magistrate Merz, relying extensively on his prior

analysis as outlined under Ground One, concluded that "[when] [r]ead in the context of the facts of this case and the decision as a whole, the Second District applied the previously established meaning of the statute: a defendant must by means of force (actual physical force) have compelled the victim to submit sexually, not just to have been afraid in some inchoate fashion." Doc. #22, PageID#2125.[5]

Petitioner filed Objections, again insisting that the Second District Court of Appeals improperly affirmed Petitioner's convictions by retroactively applying new constructions of the elements of rape. See Doc. #27, PageID#2213-19. Specifically, Petitioner claims that the Court of Appeals entirely re-wrote Ohio's rape law by requiring only that the defendant have "purposely acted in a manner that induced fear in the victim." Doc. #27, PageID#2216 (citing Doc. #5-2, Appendix, App. Dec., PageID#449, ,r 32). Petitioner also disagreed with the Magistrate Judge's determination regarding the relevance of the victim's "state of mind" in determining whether Petitioner had the requisite intent. See id. at PageID#2217-19.

Magistrate Merz reaffirmed his recommendation in his Supplemental Report and Recommendations, stating that Petitioner's claim regarding Ground Two should be denied on the merits. See Doc. #29, PageID#2328-29. He noted that

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[5] For a reiteration of the underlying facts, as considered by Magistrate Merz, the Court would defer to the Second District Court of Appeals decision. *See supra* Ground One, Section One.

Petitioner failed to provide any citation to the record to support Petitioner's assertion that "Weckesser testified that she was compelled by fears from her own choices and stories from her past. Those facts, straight from the mouth of the State's primary witness - and confirmed by the State at trial - should have resulted in an acquittal." Id. at PagelD#2329 (citing Doc. #27, PagelD#2218).[6] Petitioner again filed Objections, raising similar arguments as those he previously raised. See Doc. #34, PagelD#2400-04.

The Court concurs with Magistrate Merz's recommendations on Ground Two. The cited language from State v. Mundy, 99 Ohio App.3d 275, 650 N.E. 2d 502 (2d Dist. 1994), and State v. Lott, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990), as outlined in paragraph twenty-seven of the decision of the Second District Court of Appeals, supports the conclusion reached by Magistrate Merz. Since Petitioner argued that the sexual encounter with Weckesser was consensual, the "determination of [Petitioner's] mental state ... must of necessity be determined by the nature of the act when viewed in conjunction with the surrounding facts and circumstances." Mundy, 99 Ohio App.3d at 288 (quoting Lott, 51 Ohio St.3d at 168).

Under this premise, the Second District did not retroactively apply a new construction of the

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[6] Magistrate Merz also cited S.D. Ohio Civ. R. 7.2(b)(5), which requires that "all filings in this Court that reference a prior filing must provide pinpoint citations to the PagelD number in the prior filing being referenced."

elements of rape, but rather, simply examined all the facts as required by Mundy and Lott.

> [*P29] In the case before us, the victim testified that her will was overcome by fear, because she believed she would be hurt if she did not submit to Hartman's advances. To find that her will was overcome by fear, the trier-of-fact must have sufficient evidence from which to infer that her fear was based on some wrongful action or conduct of the defendant that purposely compelled her to submit to the sexual conduct, against her will. In the case before us, the trial court stated, "that the force element must be viewed within the context of M.W.'s concerns regarding Mr. Hartman's size and strength, that Mr. Hartman was intoxicated, that she did not know Mr. Hartman, and that, as the sexual conduct was occurring, she did not know the location of the remaining occupants of the house." Dkt. #80, pg. 10.
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> (*P30] Hartman testified that he is 6'3", weighed 200 pounds, and was physically fit. Medical records reflected that M.W. is 5'3" and weighed 165 pounds. Hartman and M.W. were both 20 years old, and both were college students. The victim testified that she was scared because she was not as strong as Hartman, and she believed that he would use his superior strength to hurt her if she did not submit to his sexual advances. The victim testified that she repeatedly said

"No" to Hartman during the sexual encounter. The physical force described by the victim included her testimony that Hartman "pushed" her onto the bed, removed her clothing, laid on top of her, and "pulled" her into the shower.

(*P31] Each of the cases cited by the State addressing the issue of force is distinguishable from the case before us. In Umphries, the victim felt compelled to submit out of fear when she awoke during the night to find her uncle on top of her, who had broken into the house through a window, and she begged him to stop. State v.
Umphries, 4th Dist. Ross No. 11CA3301, 2012-Ohio-4711. There was no admission that the victim in Umphrieswas a willing participant to any part of the encounter, and she communicated her fear by begging him to stop. Id The victims in Whitt, Shannon, and Eskridge were minors. State v. Whitt, 8th Dist. Cuyahoga No. 82293, 2003-Ohio-5934; State v. Shannon, 11th Dist. Lake Nos. 2002-L-007, 2002-L-008, 2004-Ohio-1669; State v. Eskridge, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988). In State v. Patel, we found sufficient evidence of force when an employer held his employee "in a locked bathroom and inserted his finger in her vagina against her will and while ignoring her plea to stop." State v. Patel, 2d Dist. Greene No. 2010CA77, 2011-Ohio-6329, P 63. Unlike in the case before us, the defendant in Pate/locked the room to prevent

the victim from leaving, and no part of the sexual encounter was consensual. Id. None of the cited cases present a fact pattern in which a sexual encounter between adults starts out as consensual, before changing into a non-consensual encounter.

[*P32] We agree that the elements of Rape can be established when the two participants start the sexual encounter on a consensual basis, but the consent is revoked by words, actions or conduct that clearly communicates non-consent, the defendant fails to respect the change in consent, and purposely proceeds to engage in sexual conduct through force or threat of force evidenced by violence, physical restraint, or some type of coercive or threatening conduct that creates a belief or fear that physical force will be used if the victim does not consent. In the case before us, both the defendant's physique -- he was bigger and stronger than his victim -- and his conduct of pushing the victim on the bed, removing her clothes, and pulling her into the shower, was evidence from which a reasonable finder of fact could find that he purposely acted in a manner that induced fear in the victim, compelling her to submit to his sexual conduct, against her will.

[*P33] Based on our review of the record, we conclude that the State did present sufficient evidence from which the trier of fact could conclude that Hartman purposely compelled

> M.W. to submit to sexual conduct by force or threat of force. There is no dispute that it was Hartman's intention to engage in sexual conduct with M.W. Also, the testimony of the victim, if believed, supports a finding that Hartman used force to compel M.W. to submit to sexual conduct at least three times during the course of the evening. Hartman's First Assignment of Error is overruled.

Hartman, 2016-Ohio-2883 at 1f1f29-33.

The Court agrees with Magistrate Merz that, "[when] [r]ead in the context of the facts of this case and the decision as a whole, the Second District applied the previously established meaning of the statute." Doc. 22, PagelD#2125. In determining whether Petitioner purposely compelled Weckesser to submit to sexual conduct by force or threat of force, the Court appropriately considered Petitioner's conduct-- the fact that he pushed her onto the bed, removed her clothes, laid on top of her and pulled her into the shower, even though she told him "no." In determining whether her will was overcome by fear, the court appropriately considered the surrounding facts and circumstances, including Petitioner's size, strength and intoxication, and the location at an unfamiliar house. Although she may have testified that she was afraid because she had heard bad stories about date-rape situations, Petitioner's size and his physical conduct in failing to honor her requests to stop also contributed to her fear and caused her to submit to his sexual advances.

Given that the Second District's analysis is consistent with previous constructions of Ohio's rape statute, nothing implicates due process concerns. Therefore, the Court ADOPTS Magistrate Merz's recommendation that Petitioner's Second Ground for Relief be denied on the merits. Id.; Doc. #29, PagelD#2329.

C. Ground Three: Insufficient Indictment

In his Third Ground for Relief, Petitioner claims that his rights "were violated when he was tried on an indictment that is constitutionally insufficient because it failed to ensure that the trial proceeded on the basis of the Grand Jury's findings, failed to give notice of the charges, and failed and continues to fail to shield him from subsequent prosecutions for the same offenses." See Doc. #18, PagelD#1986-2001. In his Petition, Petitioner states that his indictment "alleged only that 'sexual conduct' occurred" and that this phrase "includes a number of actions that were formerly separate crimes" including "'anal intercourse, cunnilingus, and fellatio' and the components of what used to be, under R.C. § 2907.12, felonious sexual penetration." Doc. #1, PagelD#25. He claims that the absence of the specific type of conduct "let the State vary its theories of guilt throughout trial, let the trial court alter the basis of conviction at trial and in ruling on a motion for new trial, and left Hartman without notice of the charges or the assurance that the case he faced was the one presented to the grand jury." Id.

In its Return, Respondent states that Petitioner's claim is procedurally defaulted, pursuant to the holding of Wainwright v. Sykes, 433 U.S. 72 (1977), and its progeny, and cannot be considered by this Court. See Doc. #6, PagelD#1125-28.[7] Citing Ohio Criminal Rule 12(C)(2), Respondent argues that Petitioner's failure to raise any claim regarding the defective indictment prior to his initial trial should render this claim procedurally defaulted and, as such, would preclude consideration by this court.[8] See Doc. #6, PagelD#1127-28. Petitioner

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[7] Wainwright v. Sykes holds that non-compliance with a state procedural rule, when such non-compliance would preclude the state court from reaching a decision on the merits regarding the objection or claim, amounts to an adequate and independent state procedural ground and, therefore, results in that claim being procedurally defaulted and precluded from review during a habeas proceeding. See433 U.S. 72, 86-87 (1977).

When examining whether noncompliance with a state procedure precludes analysis by the court on habeas review, courts in the Sixth Circuit employ the four-part analysis outlined in Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986); accord Landrum v. Mitchell, 625 F.3d 905, 916-17 (6th Cir. 2010) (applying Maupin to claim after AEDPA enactment). First, the court must determine whether Petitioner failed to comply with a procedural rule that is applicable to Petitioner's claim. See Maupin, 785 F.2d at 138. Second, the court must determine whether the state actually enforced the procedural rule. Id. Third, the court must determine whether the state procedural rule is an "adequate and independent" state ground on which the state can rely to foreclose federal review. Id Lastly, the court considers whether Petitioner can establish "cause" to excuse the noncompliance. Id.

[8] Respondent also cited Ohio Revised Code § 2941.29, which states that "[n]o indictment or information shall be quashed, set aside, or dismissed, or motion to quash be sustained, or any motion for delay of sentence for the purpose of review be

responds in his Traverse that procedural default does not apply in this situation or, in the alternative, that cause and prejudice exist to excuse any procedural default due to trial counsel's ineffective assistance during the trial. Doc. #18, PagelD#1986-2001.[9]

In his initial Report and Recommendations, Magistrate Merz concluded that Petitioner's claim for relief was barred by procedural default. Doc. #22, PagelD#2139. Magistrate Merz provided an extensive analysis of the procedural default doctrine and the four-part analysis employed in the Sixth Circuit to determine whether a habeas claim is precluded by procedural default. He rejected Petitioner's claims of excusing cause and prejudice,

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granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment or information, unless the objection to such indictment or information, specially stating the defect claimed, is made prior to the commencement of the trial, or at such time thereafter as the court permits."

[9] Petitioner, in Ground Four, raises a separate argument regarding the ineffective assistance of counsel claim regarding trial counsel's failure to raise an objection to the indictment. See Doc. #1, PagelD#27-30; Doc. #18, PagelD#2001-09; Doc. #27, PagelD#2223-31; Doc. #34, PagelD#2404-19. Petitioner defers any arguments regarding the "cause" to excuse any potential procedural default to that section. See, e.g., Doc. #27, PagelO#2220 ("As is set out in more detail in Hartman's objections to denial of his Fourth Ground for Relief, trial counsel's ineffectiveness establishes cause."); Doc. #34, PagelO#2406 (stating the same). Since the Court does not reach the merits of Ground Three, it declines to address how "cause" could be established here and would defer to the analysis in that Section. See discussion infra Ground Four.

and of actual innocence. See id at PagelD#2125-36. In the alternative, Magistrate Merz found that the claim should be dismissed on the merits, because the Second District had not unreasonably applied clearly established federal law. As Magistrate Judge Merz noted, "[t]he indictment stated the elements of the offenses in the language of the statute and gave Hartman notice of the date these offenses allegedly occurred and the potential severity of the punishment." See id at PagelD#2136-39.

Petitioner filed Objections to Magistrate Merz's Report and Recommendations, largely citing the same arguments previously raised in his initial filings. See Doc. #27, PagelD#2219-23. Petitioner again argues that he can show cause and prejudice to excuse his default due to his ineffective trial counsel and the potential Double Jeopardy issue identified by the Second District Court of Appeals. Id. at PagelD#2219-21. In the alternative, Petitioner once again argues that he may avoid any procedural default in this case because he is "actually innocent" of the underlying crime. See id. at PagelD#2221-23. Petitioner does not provide any additional evidence to support this claim, but rather, states that his case is analogous to that of Sullivan v. Louisiana, 508 U.S. 275 (1993), and therefore, the Court can and should grant his Writ on this Ground. See id.[10]

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[10] In *Sullivan v. Louisiana,* Petitioner challenged his conviction for first-degree murder on the grounds that the instructions given to the jury, regarding the definition of "reasonable doubt" were erroneous and previously held unconstitutional in *Cage v. Louisiana,* 498 U.S. 39. *Sullivan,* 508 U.S. at 276-77. The Supreme Court determined that conviction under the erroneous jury instruction would qualify as "structural error" and would

Magistrate Judge Merz, in his Supplemental Report and Recommendations, reaffirms his initial recommendation that Petitioner's claim is precluded due to his procedural default. See Doc. #29, PagelD#2230-31. Magistrate Merz found that Sullivan was inapplicable in this situation because "Sullivan contains no discussion of 'actual innocence' and in fact was handed down two years before the actual innocence gateway exception to procedural default was recognized in Schlup v. Delo, 513 U.S. 298,319 (1995)." Id. at PagelD#2331. He noted that the actual innocence gateway, as articulated in Schlup, required "new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." Id. (citing Schlup, 513 U.S. at 324). He found that no further analysis of the merits of the claim was warranted.

Petitioner filed a second round of Objections, again raising the same claims. Compare Doc. #27, PagelD#2219-22 with Doc. #34, PagelD#2404-08 (arguing the concepts of notice, prejudice, and the actual innocence gateway with virtually identical language). Petitioner also argued the issue on the merits, which he had previously done in his initial filings. Compare Doc. #18, PagelD#1994-2001 with Doc. #34, PagelD#2408-19 (Petitioner's argument

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require a new trial, pursuant to the Fifth and Sixth Amendments to the United States Constitution. *See id.* at 277-82. Petitioner, pursuant to his argument under Ground One, argues that his conviction was based on insufficient evidence to meet the reasonable doubt standard and, therefore, warrants habeas relief in this instance.

regarding the indictment's failure to provide notice and failure to shield Petitioner from Double Jeopardy concerns).

Petitioner has not provided any new arguments in his Objections to the Supplemental Report and Recommendations. As stated previously, a petitioner's restatement of arguments does not constitute a proper objection. The court therefore declines to review these arguments beyond Magistrate Merz's analysis.

See, e.g., Roach, 2016 U.S. Dist. LEXIS 11820 at *3; Green, 2010 U.S. Dist. LEXIS 47694 at *17-19.

For the reasons stated by the Magistrate Judge, the Court finds that Petitioner's Third Ground for Relief is procedurally defaulted. In the alternative, the Court finds that it fails on the merits. Again, for reasons already addressed by Magistrate Judge Merz, the Second District's treatment of this claim is not an unreasonable application of clearly established federal law.

As such, this Court ADOPTS Magistrate Merz's recommendation that, because Petitioner's Third Ground for Relief is barred by procedural default and, in the alternative, fails on the merits, it should be dismissed.

D. Ground Four: Ineffective Assistance Claim for Failing to Challenge Indictment

In his Fourth Ground for Relief, Petitioner claims that he received ineffective assistance of counsel, pursuant to Strickland v. Washington, 466 U.S. 668 (1984), when his trial counsel failed to challenge the sufficiency of the indictment.[11] See Doc. #18, PagelD#2001-09; Doc. #27, PagelD#2223-31; Doc. #34, PagelD#2419-32. Respondent defended this claim on the merits, arguing that the Second

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[11] *Strickland* is the standard for ineffective assistance of counsel claims. Under *Strickland,"* A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction of 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 results from a breakdown in the adversary process that renders the result unreliable." *Strickland,* 466 U.S. 687. Since the AEDPA applies to this claim, "[Petitioner] must do more than show that he would have satisfied *Strickland's* test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly. Rather, he must show that the [Second District Court of Appeals) applied *Stricklandto* the facts of his case in an objectively unreasonable manner." *Bell v. Cone,* 535 U.S. at 698-99 (2002); *see also Harrington v. Richter,* 562 U.S. 86, 101 (2011) ("When § 2254{d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.").

District's decision on this claim is entitled to deference under the AEDPA. See Doc. #6, PagelD#1162-65. Magistrate Merz, in his initial Report and Recommendations and his Supplemental Report and Recommendations, recommended that Petitioner's claim be denied as meritless. See Doc. #22, PagelD#2142-44; Doc. #29, PagelD#2331-33. Petitioner contends, in his Objections to the Supplemental Report and Recommendations, that his case is analogous to that of Bennett v. Warden, Lebanon Correctional Institution, 782 F. Supp. 2d 466 {S.D. Ohio 2011) and, therefore, warrants habeas relief. See Doc. #34, Page1D#2419-32. The Court disagrees.

In Bennett, the petitioner, in two separate cases, was charged with ten counts of sexual battery and fifty-two counts of rape. Bennett, 782 F. Supp. 2d at 471-72.[12] The challenged conduct, involving sexual abuse of a minor, took place over several years and multiple locations. *See id.* at 473 {detailing when petitioner began living with victim's mother and the various moves by the family during that time frame). The charges included in the indictment were "arbitrarily picked." Additionally, the victim in *Bennett* was a minor at the time of the conduct. Id. (noting that the victim was approximately eight years old when the alleged abuse began).

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[12] The petitioner in Bennett was charged with "ten counts of sexual battery in violation of Ohio Rev. Code§ 2907.03(A)(5) and fifty counts of rape in violation of Ohio Rev. Code § 2907.02(A)(1)(b)" in Case No. 2003-2143 and "two counts of rape in violation of Ohio Rev. Code § 2907.02(A)(2)" in Case No. 2204-2008. Bennett, 782 F. Supp. 2d at 471-72.

Relying on Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005), the Sixth Circuit held that petitioner's counsel provided unreasonable assistance in failing to object to the sixty-two charges in the indictment. See Bennett, 782 F. Supp. 2d at 497. As part of the analysis, the Sixth Circuit determined that counsel's failure to object was a "choice of trial strategy [that] fell outside the wide range of reasonable professional assistance under the first prong of Strickland." Id. The Sixth Circuit also concluded that "trial counsel's error amounted to ineffective assistance prejudicially affecting the outcome of the trial under the second prong of the Strickland test" because several of the counts were based on "identically-worded" counts and could not be differentiated at trial. Id.

Petitioner's case here is distinguishable from Bennett because Petitioner is not challenging an indictment that spans an extensive amount of time or an ongoing pattern of conduct. Petitioner was charged with three counts of rape regarding his interactions with Molly Weckesser. Doc. #1, PagelD#4. This conduct took place over less than a twenty-four period. See Doc. #1, PagelD#5-15. Additionally, Molly Weckesser was not a child when the conduct occurred. See id.; see also State v. Hartman, 2016-Ohio-2883 at ,r 30 (noting that Weckesser was twenty years old at the time of the interaction). With those distinctions in mind, this Court is unpersuaded that Bennett is analogous and would warrant relief.

Additionally, the rest of Petitioner's arguments, in this Court's opinions, are simply reiterations of Petitioner's original arguments that were addressed by Magistrate Merz. Compare Doc. #18, PagelD#2001-09; Doc. #27, PagelD#2223-31; and Doc. #34, PagelD#2419-32. As such, this Court declines to elaborate beyond Magistrate Merz's reasoned analysis. See, e.g., Roach, 2016 U.S. Dist. LEXIS 11820 at *3; Green, 2010 U.S. Dist. LEXIS 47694 at *17-19. The Court ADOPTS Magistrate Merz's recommendation that Ground Four of Petitioner's Petition should be denied on the merits.

E. Ground Five: Ineffective Assistance Claim for Failing to Request a Bill of Particulars

In his Fifth Ground for Relief, Petitioner claims that he was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel, pursuant to Strickland, when his trial counsel failed to request a bill of particulars. See Doc. #18, PagelD#2009-15; Doc. #27, PagelD#2231-43; Doc. #34, PagelD#2432-40. Respondent defended this ground on the merits, arguing that the decision of the Second District is entitled to AEDPA deference. Doc. #6, Pagel0#1164. Magistrate Merz recommended in his Report and Recommendations that this claim be dismissed. Doc. #22, PagelD#2142-44. He reiterated this recommendation in his Supplemental Report and Recommendations. Doc. #29, PagelD#2334-35.
Petitioner raises several contentions in his Objections to the Supplemental Report and Recommendations. See Doc. #34, PagelD#2432-40.

1) Petitioner's Objection that the Second District "Never Addressed" the First Prong of Strickland and that Magistrate Merz Never Discussed That Issue is Without Merit.

In his Objections to the Supplemental Report, Petitioner first contends that the Second District "never addressed" the first prong of Strickland and that Magistrate Merz "made nothing of the court's silence on the deficient performance prong."[13] Doc. #34, PagelD#2432. The Court disagrees. The Supreme Court has stated that, under the first prong of *Strickland*:

> Judicial scrutiny of counsel's performance must be highly deferential ...A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's

[13] Although the Court notes that this is a new argument by Petitioner in his Objections to the Supplemental Report and Recommendations, the Court takes note that Petitioner took the opposite position in his initial Reply. *Compare* Doc. #34, PagelO#2432 ("The Court of Appeals *never* addressed the deficient performance prong of *Stricklandin* deciding the issue on direct appeal.") *with* Doc. #18, PagelD#2011 ("It is clear that the Second District Court of Appeals found deficient performance in counsel's failure to *move* for a bill of particulars, thus satisfying the first prong of *Strickland.").* Further, Petitioner appears to have raised this contention only after Magistrate Merz disagreed with his blanket assertion that the Second District found deficient performance under Ground Five. Doc. #22, PagelO#2143 ("The Magistrate Judge declines to infer such a 'clear' finding from silence.").

> challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland, 466 U.S. at 689.

Further, when arguing this claim on the merits, Petitioner must go beyond the Strickland analysis and satisfy the deference required by the AEDPA. Under 28 U.S.C. § 2254(d)(1), Petitioner must show that the Second District Court of Appeals applied Stricklandto these facts in an "objectively unreasonable manner." See Bell v. Cone, 535 U.S. at 698-699; see also Harrington, 562 U.S. at 105 ("When § 2254(d)(1) 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."). Petitioner admits in his initial Objections that he has not found any direct authority to support the proposition that a failure to request a bill of particulars would constitute per se ineffective assistance of counsel under Strickland See Doc. #27, PagelD#2235.

Under the analysis outlined in Strickland, Bell, and Harrington, the Court believes that

Petitioner has not established that counsel's failure to request a bill of particulars equates to ineffective assistance of counsel in this case. As stated in Ground Three, the challenged conduct in this case took place over a twenty-four-hour period. See Doc. #1, PagelD#5-15. The conduct only involved two persons: Petitioner and Weckesser. See State v. Hartman, 2016-Ohio-2883 at 1J 30. Additionally, both Petitioner and Weckesser were adults at the time the conduct took place. See id. (noting the age of the parties involved).

Moreover, it is evident that Petitioner was aware of the conduct at issue in this case. See State v. Hartman, 2016-Ohio-2883 at 1J 47 ("In his written statement, and in his trial testimony, Hartman admitted in engaging in a sexual encounter ... with [Weckesser]"); see also Doc. #34, PagelD#2434 ("Petitioner knew that he had engaged in fellatio ... "); see also Doc. #7-1, PagelD#1851 (Petitioner testifying "I was sliding my middle finger in and out of her vagina."); Doc. #7-1, PagelD#1585 (Petitioner testifying "I asked her if she wanted to go to doggy style, and at that point she said yes ... [a]nd at that point is when she reached back through her legs and grabbed my penis and put my penis in her vagina for me."). Based on this information, this Court believes that trial counsel could have reasonably believed that a bill of particulars was not needed since Petitioner, and therefore trial counsel, were aware of the challenged conduct.
Even if Petitioner could establish deficient performance under Strickland, and the Court is not conceding that Petitioner has, the Court agrees with

Magistrate Merz that "the Second District's conclusion that Hartman was not prejudiced by [trial counsel's decision to forgo a bill of particulars] appears quite reasonable." Doc. #22, PagelD#2144. Throughout the trial, Petitioner did not deny that the sexual encounter between himself and Weckesser occurred. See State v. Hartman, 2016-Ohio-2883 at 1J 47 ("In his written statement, and in his trial testimony, Hartman admitted in engaging in a sexual encounter ... with [Weckesser]"). Petitioner argued only that the encounter was consensual in nature. Id at ,I 46 ("Through the trial, it is apparent that the defense strategy was to prove that the victim consented to the sexual conduct, and that Hartman did not purposefully force her to submit to the sexual conduct.").

To summarize, the Second District stated that:

> To establish that [Petitioner] was prejudiced, Hartman would need to establish that but for counsel's failure to move for a bill of particulars, there is a reasonable probability that the outcome of the proceeding would have been different. As discussed above, the guilty verdicts in this case resulted from the trier of fact's decision to find the victim's testimony to be more credible. Under these circumstances, we conclude that the details provided by a bill of particulars would not have resulted in a reasonable probability of a different outcome.

Hartman, 2016-Ohio-2883 at ,r 47. Although Petitioner attempts to argue several ways in which the outcome of the trial may have been different, he has not convinced the Court that the Second District's analysis, in applying Strickland to these facts and determining that Petitioner did not suffer prejudice in this instance, was objectively unreasonable under the AEDPA.

2) Petitioner's Remaining Arguments Are Reiterations of Previous Arguments and Will Not Be Addressed Further by this Court.

Petitioner also argues that counsel's failure to request the bill of particulars was unreasonable because it did not allow Petitioner to learn "of the conduct of the defendant alleged to constitute [each] offense." Doc. #34, PagelD#2434 (citing Ohio Rule of Criminal Procedure Rule 7(E)). Petitioner then explains his position by expounding upon the differences regarding the conduct involved in each of the underlying convictions. See id. at PagelD#2434-35.

Like many of Petitioner's Objections, this Court feels that these are not proper objections, but, rather, are simply reiterations of arguments that Magistrate Merz previously examined in his Report and Recommendations. See, e.g., Roach, 2016 U.S. Dist. LEXIS 11820 at *3; Green, 2010 U.S. Dist. LEXIS 47694 at *17-19. Therefore, this Court will not elaborate beyond Magistrate Merz's analysis and, as such, ADOPTS Magistrate Merz's recommendation that Ground Five should be denied

on the merits. Doc. #22, PageID#2144; Doc. #29, Pagel0#2334-35.

F. Ground Six: Ineffective Assistance Claim Regarding the Cross-Examinations of the Victim. The Victim's Best Friend. And the Lead Investigator and Unreasonable Trial Strategy

In his Sixth Ground for Relief, Petitioner contends that he received ineffective assistance of counsel, pursuant to Strickland v. Washington, when his trial counsel "introduced on cross-examination testimony establishing the element of force" and "bolster[ed] the State's case against Hartman with inadmissible hearsay." Doc. #1, PageID#32. Respondent, in its Return, argued this claim on the merits and stated that the decision of the Second District Court of Appeals was entitled to AEDPA deference. Doc. #6, PageID#1166. In his Reply, Petitioner asserts that "[d]efense counsel failed in their duty to prepare and make reasonable decisions concerning whether and how to cross-examine witnesses." Doc. #18, PageID#2018. Specifically, Petitioner cites the cross-examinations of several witnesses to support his contention that trial counsel aided the State in proving the element of force for his underlying convictions. See Doc. #18, Pagel 0#2020-28.

In his initial Report and Recommendations, Magistrate Merz recommended that Petitioner's claim be dismissed on the merits. Doc. #22, PageID#2149. After reviewing the Second District

decision on the issue, Magistrate Merz summarized his recommendation on Ground Six, stating that:

> [I]t was Hartman's trial strategy to undermine Weckesser's claim she was forced to have sex with him. To that end, it was not an unreasonable strategy to attempt to elicit potentially inconsistent statements Weckesser might have made shortly after the incident, to a friend, to the nurse, or to the detective.

Doc. #22, PagelD#2147.

Petitioner then filed his initial Objections, stating that trial counsel's strategy of attempting to undermine Weckesser's testimony by eliciting potentially inconsistent statements was unreasonable, because "[t]here were no prior inconsistent statements with which to impeach, only reinforcement of the State's position." Doc. #27, PagelD#2249. Petitioner again provided several sections of cross-examination testimony to support his contention. See, e.g., id. at PagelD# 2249-50. Petitioner also reiterated his claim that "inadmissible hearsay and bolstering testimony was elicited by defense counsel from the alleged victim's best friend ... " Id at PagelD#2252.

In his Supplemental Report and Recommendations, Magistrate Merz separates his discourse into two separate sub-issues: the "Lack of a Trial Strategy" by trial counsel and the "Ineffective

Assistance in Cross-Examination of Witnesses Weckesser, Potter[] and Norris." Doc. #29, PagelD#2235, 2237. Magistrate Merz reaffirms his conclusion regarding the first sub-issue, stating that the affidavit of Petitioner's mother "cannot overcome the Second District's finding that there was a strategy." Doc. #29, PagelD#2336.

Magistrate Merz, however, changed his opinion on the second sub-issue, ineffective assistance in cross-examination of some of the witnesses:

> Petitioner has now persuaded the Magistrate Judge that his recommendation on this claim was in error. It would of course have been very useful to the defense case if counsel could have shaken Ms. Weckesser's account or created a perception through cross-examination that she was equivocating. But trial counsel apparently had no lever from prior statements she had made which would enable him to shake her account of the events. Under those circumstances, the cross-examination allowed her to reinforce her direct testimony and, as the Second District found, to add to its facts not elicited by the prosecutor, facts supplied in the predicates of counsel's questions.
>
> ***

> The Magistrate Judge also agrees with Petitioner that it was ineffective assistance of trial counsel for trial counsel to elicit from witnesses Potter and Norris hearsay statements of Weckesser that bolstered the State's case regarding the use of force. There is even less arguable tactical justification for eliciting a victim's prior statements consistent with her trial testimony than there is for trying to shake the victim's story by vigorous cross.

Doc. #29, PageID#2338-39.

Petitioner filed his Objections to the Supplemental Report and Recommendations, reiterating his contention against the Magistrate's conclusions regarding Sub-Issue One. Doc. #34, PagelD#2441-49. Respondent also filed its Objections to the Supplemental Report and Recommendations, Doc. #35, asking this Court to dismiss Magistrate Merz's findings with respect to Sub-Issue Two and, instead, to adopt the findings and conclusions in his initial filing. Both parties also filed Responses in support of their respective positions. See Docs. #40, 41.

1) Sub-Issue One: Unreasonable Trial Strategy

The Court concurs with Magistrate Merz's recommendation that this Sub-Issue should be

denied on the merits. In its decision on direct appeal, the Second District decided this issue as follows:

> [*P48] We agree with Hartman's assertion that defense counsel, on cross-examination of the victim, brought up factual matters not presented during the direct examination of the victim that may have helped the State prove the element of force. Specifically, the record reveals that defense counsel asked the victim to confirm that Hartman was "restraining" her, Trial Transcript at 74-75, that Hartman pinned her arms down, Trial Transcript at 75-76, that Hartman held his forearm across her chest, Hartman grabbed her wrists, grabbed her arm, and "was doing that forcefully," Trial Transcript at 80-81. We have held that "trial counsel's decision to cross-examine a witness and the extent of such cross-examination are tactical matters." State v. Russell, 2d Dist. Montgomery No. 21458, 2007-Ohio-137, P 55. "A reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy." State v. Conley, 2015-Ohio-2553, P 56, 43 N.E.3d 773 (2d Dist.), citing State v. Smith, 17 Ohio St.3d 98, 17 Ohio B. 219,477 N.E.2d 1128 (1985). "Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy has been available." Id., citing State v. Cook, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992). Because it was at least arguable that the State had presented sufficient evidence of force relating to at least one of the Rape counts-

> the last one occurring on the bed-trial counsel could reasonably have concluded that it would not be safe to eschew cross-examination on the element of force.
>
> > [*P49J It appears that the strategy of defense counsel asking the victim about facts relevant to the issue of force was an attempt to attack her credibility based on different versions of the events she provided to the sexual assault nurse, to the detective, and during direct examination at trial. In a case that rests entirely on the credibility of witnesses, a strategic choice to conduct cross-examination of the victim on factual issues relating to elements of the offense is not automatically ineffective assistance of counsel. In the case before us, it was a valid defense strategy to attack the credibility of the victim through the use of prior inconsistent statements, a well-established trial strategy. See Evid. R. 613. We conclude that Hartman was not denied the effective assistance of counsel when reasonable trial strategy was utilized to challenge the victim's credibility through a cross-examination technique of raising inconsistent statements.

Hartman, 2016-Ohio-2883 at 1148-49. In a case that centered upon the credibility of both Petitioner and Weckesser, it would be considered reasonable strategy to attempt to discredit Weckesser's testimony and credibility. Petitioner somewhat concurs in this strategy as well, listing several ways

that trial counsel could have cross-examined Weckesser to discredit her testimony. See, e.g., Doc. #27, PagelD#2248 ("Cross examine the alleged victim on the amount of alcohol she consumed, the fact that she returned to the house with the intent to stay over ... there was plenty to cross examine the victim about.").

Furthermore, Petitioner's attempt to argue this contention is largely based upon the affidavit of Beth Horvath, Petitioner's mother. See Doc. #27, PagelD#2245-46 (citing Doc. #5-2, PagelD#633-44). Beyond this affidavit, Petitioner does not cite to any testimony of himself or his trial counsel to support this claim. As such, the Court concurs with Magistrate Merz's conclusion that "Ms. Horvath's hindsight Affidavit cannot overcome the Second District's finding that there was a strategy." Doc. #29, PagelD#2336. Therefore, the Court will ADOPT Magistrate Merz's conclusion that relief should be denied on his Sub-Issue. Id. at PagelD#2340.

2) Sub-Issue Two: Cross-Examination of Weckesser. Potter and Detective Norris

In Sub-Issue Two, Petitioner focuses specifically on the form of the questions used during the cross-examinations of Weckesser, Potter and Norris. See Doc. #27, PagelD#2247-60. He also challenges the fact that counsel sought and received inadmissible hearsay that bolstered the State's case regarding the alleged use of force.

Magistrate Judge Merz, in his Supplemental Report and Recommendations, found that, because

trial counsel had "no lever from prior statements [the victim] had made which would enable him to shake her account of the events," counsel's cross-examination of the victim and other witnesses, in which the predicate of the questions supplied new evidence supporting the prosecution's case, fell below an objective standard of reasonableness. Doc. #29, PagelD#2338. He also found that such testimony was "certainly harmful to Petitioner's case," satisfying the prejudice prong of Strickland. He concluded that the Second District erred in deferring to trial counsel's alleged "tactic," where such tactic was not reasonable under the circumstances. Id. at PagelD#2339. Magistrate Judge Merz further found that it was ineffective assistance of counsel to elicit hearsay statements from Potter and Norris regarding what Weckesser told them about the alleged use of force. Id.

In the Objections to the Supplemental Report and Recommendations, Doc. #34, Respondent argues that Magistrate Judge Merz misapplied Strickland. Respondent argues that the question is not whether certain evidence elicited by defense counsel on cross-examination, in hindsight, proved to be "harmful" to his client's case. Rather, Petitioner must show that counsel's performance was objectively unreasonable, and that it prejudiced the defense to such an extent that it rendered the result of the trial unreliable or fundamentally unfair. Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

Respondent maintains that the Second District reasonably rejected Petitioner's claim of ineffective assistance of counsel in holding that it

was a reasonable trial strategy to attack the victim's credibility through the use of prior inconsistent statements, and in holding that the hearsay statements elicited by defense counsel were not sufficiently prejudicial to have affected the outcome of the trial. Respondent maintains that even though counsel's trial strategy was ultimately unsuccessful, it was not constitutionally ineffective.

The Court overrules Respondent's Objections to this portion of the Supplemental Report and Recommendations, Doc. #35. Although judicial scrutiny of counsel's performance is highly deferential, Strickland, 466 U.S. at 688, courts have often found cross-examination to be constitutionally deficient. See, e.g., Ward v. United States, 995 F.2d 1317, 1318-19 (6th Cir. 1993) (defense counsel opened door to inadmissible character evidence); Gebaree v. Steele, 792 F.3d 991, 999-1000 (8th Cir. 2015) (defense counsel elicited statements that bolstered state's case); Dillon v. Weber, 737 N.W.2d 420, 428 (S.D. 2007) (defense counsel elicited damaging testimony on nature of alleged sexual conduct and testimony concerning the truthfulness of the victim).

As Petitioner notes, counsel asked leading questions of Weckesser, Potter and Norris in which the predicate information, if accepted by the witness, supplied evidence concerning the use of force -- in this case, evidence that was not established by the prosecution on direct examination. The Second District specifically found this to be the case. "We agree with Hartman's assertion that defense counsel, on cross-examination of the victim, brought

up factual matters not presented during the direct examination of the victim that may have helped the State prove the element of force." Hartman, 2016-Ohio-2883, at 1148.

Trial counsel's cross-examination of Weckesser, on the issue of force, was extensive:

> Q: You said you're trying to getaway from him?
>
> A: Yeah. That's why I really wasn't paying attention if he was using two hands or one.
>
> Q: But you were resisting?
>
> A: Yes
>
> Q: Or you didn't want him to do it?
>
> A: Yes
>
> Q: And he was restraining you in some way; is that right?
>
> A: Yes. He was just on top of me so it was hard for me to move.
>
> Q: But when he was on top, you managed to get up in an effort to try and get away?
>
> A: Yeah, I tried, but then he kept me there. Q: Then he got you back down?
>
> A: Yes.

Doc. #7-1, PageID#1262-63. Trial counsel also gave Weckesser the opportunity to confirm several statements she made to Detective Norris:

Q: Now, you indicated in your statement to, I believe, Detective Norris that he had your arms pinned down?

A: He did when he was kissing me. And when I tried to escape, he pinned my arms down.

Q: And you also said at one point to Detective Norris that when Mark was trying to get your shirt off, that he had his forearm across your chest and neck; do you recall that?

A: Yeah

Id. at PagelD#1263-64.

Trial counsel also extensively questioned Weckesser to confirm a statement, regarding the element of force, that she made to the sexual assault nurse examiner:

Q: And do you recall telling the nurse that you were being held against your will and your wrists were being held down?

A: By Mark?

Q: Yes.

A: Yes, I told her that he was holding me down. Q: And by your wrists, specifically?

A: I don't remember specifically, but he held me down by my arms. Q: Well, I want to just focus on the wrists.

A: Okay.

Q: Grabbed your wrists. You recall that he held you down?

A: Well, he had grabbed my wrists a few times when I tried to leave from the situation, and he'd grab my wrist- like my arm around my wrist area to pull me into the shower.

Q: And-

A: But when he held me down, it was mainly by my arms each time he held me down.

Q: When you say your arms though, you're pointing to your shoulders.

A: Well, arms, shoulder. I mean, it was here. It was on my arms.

Q: Okay, so above your elbow and below your shoulder?

A: Yeah. I mean, a few times he was below my elbow. It's just whatever he could grab on my arm.

Q: And he was doing that forcefully so that you couldn't move?

A: Yes.

Id. at PageID#1268-69.

This line of questioning did not attempt to impeach Weckesser with any inconsistent statements but, rather, bolstered her credibility and supported the State's case by supplying several examples of "force" used by Petitioner. Even giving counsel's conduct the "highly deferential" treatment required, the Court finds that, in this case, counsel's conduct falls outside the range of "reasonable

professional assistance," thereby satisfying the first prong of Strickland.

Moreover, trial counsel elicited hearsay statements from Courtney Potter and Detective Steve Norris that also support the State's case. For instance, the following colloquy occurred between trial counsel and Potter, Weckesser's friend, during the trial:

> Q: Did she say that she had been forced to have sex?
>
> A: Yes.
>
> Q: And, in fact, Molly also said that she realized she had been drunk; isn't that right?
>
> A: I don't believe so.
>
> Q: She didn't say that?
>
> A: I don't believe so.
>
> Q: Okay. But she did say to you that she had said no? A: Yes
>
> Q: And you believed her?
>
> A: Yes.
>
> Q: Because you're her friend?
>
> A: Yes.
>
> Q: And you're close to her?
>
> A: Yes.
>
> Q: And that's what good friends do?
>
> A: Yes.

Q: They're supportive to one another?

A: Yes.

Q: And you also have this background of being a sexual assault counselor-

A: Yes.

Q: -- that's right? And in doing that you know it's important to be supportive?

A: Yes.

Q: -- right? No matter what you're hearing from that-A: Yes

Q: --person right? And when you're in your bedroom and Molly is telling you about what happened the night before, she was more upset than she was when you first woke her up; is that right?

A: Yes

Q: And she was more upset than when you tried to wake her up the second time; is that right?

A: Yes.

Q: Was she more upset even than when she said let's go?

A: Yes.

Doc. #7-1, PagelD#1343-45.

Hearsay statements were also elicited during the cross-examination of Detective Norris. At trial, the following colloquy occurred:

Q: And based upon what Molly has told you is that she didn't want to take the shower and so Mark had to force her into the shower -

A: Yes

Q: -- and get her over that tub and get in there for the shower to take place -

A: Yes.

Q: -- is that right?

A: Yes.

Q: And she didn't have any marks or bruising on her knees or shins

or legs or any –

A: No, sir.

Q: -- from that activity?

A: No, sir.

Q: Now, while you were at the hospital, did you hear Molly say that she was held down by her wrists against her will?

A: She said she was held down a number of different ways. I don't remember specifically if she said her wrists. I know she said he had his forearm or pushed her down by the throat.

Doc. #7-1, PagelD#1492. Magistrate Judge Merz properly concluded that there was "even less arguable tactical justification" for eliciting such hearsay statements from Potter and Norris. Again,

these statements "bolstered the State's case regarding the use of force." Doc. #29, PagelD#2339.

In the Court's view, counsel's conduct falls outside the "wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. The Court also agrees with Magistrate Merz's conclusion that the testimony elicited from Weckesser on cross-examination satisfies the prejudice prong of Strickland as well. Doc. #29, PagelD#2339.

Respondent argues that Magistrate Judge Merz misapplied Strickland in focusing on whether counsel's actions were merely "harmful" to Petitioner's case. Doc. #29, PagelD#2339. Quoting Lockhart v. Fretwell, 506 U.S. 364, 372 (1993), Respondent notes that the prejudice prong "focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair."

Although the Magistrate Judge's use of the word "harmful" in the Supplemental Report and Recommendations may not have been as precise as it could have been, there is no question that he understands what is required to establish the second prong of Strickland. In his initial Report and Recommendations, he explained that "[t]his requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." See, e.g., Doc. #22, PagelD#2140 (quoting Strickland, 466 U.S. at 687).

In the Court's view, a criminal trial is fundamentally unfair when defense counsel's cross-examination elicits facts not elicited by the

prosecution on direct examination, when such facts are necessary for a conviction. Here, defense counsel elicited testimony that Petitioner forcibly restrained the victim by pinning her arms down, by placing his forearm across her chest and neck, and by grabbing her by the wrists. Accordingly, the Court agrees with Magistrate Judge Merz that Petitioner has established both deficient performance and prejudice. As such, the Court ADOPTS the recommendation of Magistrate Merz on this Sub-Issue and will grant a conditional writ of habeas corpus on this portion of Ground Six.

To summarize, the Second District properly found that it was reasonable trial strategy for defense counsel to attempt to challenge the victim's credibility through a cross-examination technique of raising inconsistent statements.

Nevertheless, Petitioner was denied effective assistance of counsel when his attorney repeatedly elicited facts concerning the use of force that were not elicited by the prosecutor on direct examination. While attempting to impact the credibility of the victim was a wise trial strategy, there is no reasonable trial strategy to ask the questions asked designed to elicit the answers given.

Ground Seven: *Crawford Violation* Regarding Mark Squibb Testimony

In his Seventh Ground for Relief, Petitioner argues that his Sixth Amendment rights, pursuant to the Confrontation Clause and the holding of Crawford v. Washington, 541 U.S. 36 (2004), were violated when the trial court admitted the expert

testimony of Mark Squibb ("Squibb") because Squibb did not complete the forensic analysis and DNA testing of the crime scene and rape kit evidence and, therefore, should not have been permitted to testify. Doc. #1, PageID#39-40; Doc. #18, PagelD#2031-40.[14] Respondent contends in its Return that Ground Seven has been procedurally defaulted and cannot be considered by this Court because "Hartman failed to lodge any contemporaneous objection to this testimony during the trial proceedings." Doc. #6, PageID#1129; see also Ohio Evid. Rule 103(A)(1).[15]

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[14] The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI.; *see also Davis v. Alaska,* 415 U.S. 308, 315-16 (1974) ("The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."). The Confrontation Clause prohibits "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had a prior opportunity for cross-examination." *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004). Statements are testimonial in nature "when the circumstances objectively indicate ... that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington,* 547 U.S. 813,822 (2006).

[15] Ohio Evid. R. 103 states the following:
(A) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
(1) In case the ruling is one admitting evidence, timely objection or motion to strikes appears of record stating the specific ground of objection, if the specific ground was not apparent from the context.

Magistrate Merz, in his initial Report and Recommendations, recommended that Petitioner's claim under Ground Seven should be dismissed. Magistrate Merz agreed with Petitioner that there was a violation of the Confrontation Clause. Doc. #22, PageID#2154.[16] At the same time, Magistrate Merz also agreed with the Second District Court of Appeals' application of the plain error analysis due to Petitioner's failure to timely object to Squibb's testimony and the Second District's enforcement of Ohio's contemporaneous objection rule. See id at Pagel0#2153-54 (citing several Sixth Circuit cases identifying Ohio's contemporaneous objection rule as an adequate and independent state ground of decision).

Next, Magistrate Merz determined that the Confrontation Clause violation did not equate to structural error, and furthermore, cited several Sixth Circuit cases that have expressly held that Confrontation Clause errors are subject to harmless error analysis under the factors outlined in Delaware v. Van Arsdall, 475 U.S. 673 (1986). Doc. #22, PagelD#2156-57; accord Reiner v. Woods, 955 F.3d 549 (6th Cir. 2020); Gover v. Perry, 698 F.3d 295 (6th Cir. 2012). Lastly, Magistrate Merz concluded that the Second District analyzed the facts under the Van Arsdall factors and correctly determined that any Confrontation Clause error was harmless and did not have a "substantial and

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[16] Magistrate Merz also noted that Respondent did not directly contest whether a Confrontation Clause violation occurred, only whether such a claim was procedurally defaulted. Doc. #22, PageID#2154. As part of its de novo review, this Court has also not discovered any such argument from Respondent.

injurious effect or influence in determining the ... verdict" as required by Brecht v. Abrahamson, 507 U.S. 619 (1993). Doc. #22, PagelD#2156-58.

In response, Petitioner filed his initial Objections, reiterating the same arguments raised in his initial Reply. See Doc. #27, PageID#2260-71.[17] Additionally, Petitioner claimed that four of the five Van Arsdall factors weighed in his favor and supported a finding that the Confrontation Clause violation was not harmless. Doc. #27, PagelD#2266-71.17 Magistrate Merz, in his Supplemental Report and Recommendations, continued to disagree with Petitioner. See Doc. #29, PagelD#2343 ("Applying Brecht, the Magistrate Judge found the Confrontation Clause error did not have a substantial and injurious effect in determining Judge Tucker's verdict."). Petitioner again raises similar arguments in his Objections to the Supplemental Report and Recommendations. Doc. #34, PagelD#2449-55.

1) Petitioner's Argument that the Confrontation Clause Violation Equates to Structural Error and Warrants Relief is Without Merit.

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[17] Petitioner maintains that the following *Van Arsdallfactors* weigh in his favor and support his claim that the Confrontation Clause violation at trial was not harmless: " (1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (4) the extent of the cross-examination otherwise permitted and (5) the overall strength of the prosecution's case." Doc. #27, Page1D#2267.
The only *Van Arsdal/factor* that Petitioner does not claim weighs in his favor is (3) the presence or absence of evidence of corroborating or contradictory testimony on critical points.

Structural errors are a "'highly exceptional category' of fundamental constitutional errors that are not subject to harmless error analysis 'because they undermine the fairness of a criminal proceeding as a whole." United States v. Smith, Case No. 21-5432, 2021 U.S. App. LEXIS 35476, *5 (6th Cir. Nov. 29, 2021) (quoting United States v. Davila, 569 U.S. 597, 611 (2013)). These errors "'are so intrinsically harmful' that they 'require automatic reversal' of conviction regardless of whether they actually prejudiced the defendant or affected the outcome of the proceeding. Id (quoting Neder v. United States, 527 U.S. 1, 7 (1999)).

Additionally, as noted by Magistrate Merz in his initial Report and Recommendations, the Sixth Circuit has listed the instances in which structural errors have been found:

> The Supreme Court has "found structural error only in a very limited class of cases." Johnson v. United States, 520 U.S. 461,468 (1997). These structural errors include: total deprivation of the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); lack of an impartial trial judge, Turney v. Ohio, 273 U.S. 510 (1927); unlawful exclusion of grand jurors of the defendant's race, Vasquez v. Hillery, 474 U.S. 254 (1986); denial of the right to self-representation at trial, McKaskle v. Wiggins, 465 U.S. 168 (1984); denial of the right to a public trial, Waller v. Georgia, 467 U.S. 39

> (1984); and denial of the right to a jury verdict of guilty beyond a reasonable doubt, Sullivan v. Louisiana, 508 U.S. 275 (1993). In United States v. Chronic, 466 U.S. 648,659 and n.25 (1984), the Supreme Court added to the list the denial of counsel at a "critical stage" of the criminal proceedings, entitling the defendant to a new trial without a specific showing of prejudice because the error makes "the adversary process itself presumptively unreliable." See also Van v. Jones, 475 F.3d 292, 311-12 (6th Cir.) (holding that a defendant is deprived of counsel at a critical stage, "a per se Sixth Amendment violation [results,] warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error."), cert. denied, 128 S.Ct. 708 (2007); Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000).

Hereford v. Warren, 536 F.3d 523, 529 (6th Cir. 2008) (parallel citations omitted); see also Doc. #22, PageID#2155-56 (quoting the same).

The Court agrees with Magistrate Merz that Petitioner has not established that the Confrontation Clause violation equates to a structural error that warrants reversal. Case law in the Sixth Circuit is clear that Confrontation Clause violations are subject to a harmless error analysis and do not warrant automatic reversal. See, e.g., Reiner v. Woods, 955 F.3d at 555 ("Confrontation Clause

violations do not require automatic reversal, and are instead subject to harmless error analysis"); Couturier v. Vasbinder, 385 Fed. Appx. 509,515 (6th Cir. 2010) ("When reviewing Confrontation Clause violations for harmless error, the reviewing court considers the factors laid out in Van Arsda/1 ..."); Vasquez v. Jones, 496 F.3d at 574 ("Confrontation Clause errors are subject to harmless-error analysis."). Further, Petitioner has not cited to any Supreme Court precedent to support the premise that a Confrontation Clause violation is a structural error. As such, Petitioner's argument is not well taken.

2) The Confrontation Clause Error Did Not Have a Substantial and Injurious Effect on Petitioner.

Confrontation Clause violation claims are analyzed under the standard outlined in Brecht v. Abrahmanson, 507 U.S. 619 (1993). Fry v. Pliler, 551 U.S. 112 (2007). Under the Brecht standard, "an error requires reversal only if it 'had substantial and injurious effect or influence in determining the jury's verdict.'" 507 U.S. at 631 (quoting Kotteakos v. United States, 328 U.S. 750 (1946)). Furthermore, "If a judge is in grave doubt about whether or not the error is harmless, the uncertain judge should treat the error ... as if it had a substantial and injurious effect or influence in determining the jury's verdict." Gover, 698 F.3d at 302 (quoting Neal v. McAninch, 513 U.S. 432 (1995)) (internal quotations omitted). "The Supreme Court and [the Sixth Circuit] have made clear that 'Brecht is always the test' for evaluating harmless error on collateral review, even

where AEDPA applies." Reiner, 955 F.3d at 556 (quoting Ruelas v. Wolfenbarger, 580 F.3d 403, 411-12 (6th Cir. 2009)); accord Davenport v. Maclaren, 964 F.3d 448, 455 (6th Cir. 2020).

"To determine whether a Confrontation Clause violation is harmless under Brecht, the Sixth Circuit uses the factors discussed in [Van Arsdam." Id (citing Vasquez, 496 F.3d at 575). These factors "include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." Van Arsdall, 475 U.S. at 684.

The Court disagrees with Petitioner's contention that four of the five Van Arsdall factors favor his position and warrant relief under Brecht. Doc. #27, PagelD#2267-72; Doc. #34, PagelD#2449-55 (arguing that Petitioner can show prejudice, as used in the Second District Court of Appeals decision). The forensic evidence was not required to connect Petitioner to Weckesser because Petitioner openly admitted to such conduct. See, e.g., Doc. #7-1, PagelD#1851, 1585 (Petitioner testifying "I was sliding my middle finger in and out of her vagina." and "I asked her if she wanted to go to doggy style, and at that point she said yes ... [a]nd at that point is when she reached back through her legs and grabbed my penis and put my penis in her vagina for me."). Additionally, Petitioner's counsel was able, on cross-examination, to elicit testimony from Squibb

that both Weckesser and Petitioner had DNA sources at various spots on the comforter, supporting the Petitioner's theory that the sexual encounter was consensual and involved various positions on the mattress. See Doc. #7-1, PagelD#1431-39 (cross-examination of Squibb by trial counsel). This Court also notes, as Magistrate Merz did in his Supplemental Report and Recommendations, that this case did not turn on the DNA evidence, but rather, the credibility of Petitioner and Weckesser. Hartman, 2016-Ohio 2883 at ,r 47; see also Doc. #29, PagelO#2342.

Without more, Petitioner has not convinced the Court that this Confrontation Clause error, because it did not "[have] a substantial and injurious effect or influence in determining the jury's verdict, requires reversal." Brecht, 507 U.S. at 631. As such, the Court ADOPTS Magistrate Merz's recommendation and denies Ground Seven on its merits.

Ground Eight: Ineffective Assistance Claim Regarding Crawford Violation

In his Eighth Ground for Relief, Petitioner contends he was denied the effective assistance of counsel at trial, pursuant to the Sixth Amendment and Strickland, when Petitioner's trial counsel failed to object to Squibb's testimony. Doc. #1, PagelD#40-41; Doc. #18, PagelD#2040-45. Respondent contends that Petitioner's claim should be dismissed as meritless because the appellate decisions are entitled to AEDPA deference. Doc. #6, PagelD#1160-61. Magistrate Merz, in his Report and Recommendations, deferred to his analysis under

Ground Seven and stated the decision of the Second District "was not an objectively unreasonable application of Strickland and is entitled to AEDPA deference." Doc. #22, PageID#2159.

In his initial Objections, Petitioner reiterates his initial arguments from Grounds Seven and Eight, insisting that the Confrontation Clause violation prejudiced his defense. Compare Doc. 27, PageID#2271-80 with Doc. #27, PageID#2260-70. Magistrate Merz briefly addressed Petitioner's claim in his Supplemental Report and Recommendations, restating his position that the Confrontation Clause error was harmless and, as such, Petitioner was not prejudiced by counsel's failure to object. Doc. #29, PageID#2343 (citing Doc. #22, PageID#2159). Magistrate Merz concluded this section of his Supplemental Report and Recommendations, stating that "Petitioner objects, but essentially repeats his argument from the Seventh Ground for Relief. No further analysis is necessary." Id Petitioner objected again, renewing the same arguments for a third time. See Doc. #34, PageID#2455-2461.

The Court agrees with Magistrate Merz's Supplemental Report and Recommendations that "[n]o further analysis is necessary" on this claim. Petitioner has repeatedly reiterated his arguments on this claim but has provided no new objections for this Court to consider during its de novo review. As such, the Court, as it has done previously with some of Petitioner's other arguments, will decline to elaborate further than Magistrate Merz's reasoned analysis. See, e.g., Roach, 2016 U.S. Dist. LEXIS

11820 at *3; Green, 2010 U.S. Dist. LEXIS 47694 at *17-19.

Since Petitioner has not raised any new objections in his latest filing, he has not convinced this Court that Magistrate Merz erred in his analysis. Further, for the reasons outlined in Ground Seven, the Court reiterates its determination that any error in permitting Squibb's testimony was harmless and did not prejudice Petitioner. As such, the Court ADOPTS Magistrate Merz's recommendation that Petitioner's claim under Ground Eight should be denied on the merits.

Ground Nine: Ineffective Assistance Claim for Failing to Secure Tape-Recorded Statements of Defendant

In his Ninth Ground for Relief, Petitioner claims that he was denied the effective assistance of trial counsel, in violation of the Sixth Amendment and the holding of Strickland v. Washington, when trial counsel failed to procure the tape-recorded statements that occurred during Petitioner's two interviews with the Oakwood Police Department. Doc. #1, PageID#41-52. Respondent states that this issue has been procedurally defaulted, under the doctrine of res judicata, because "Hartman abandoned these ... claims before the Ohio Supreme Court on discretionary review." Doc. #6, PageID#1132.[18] Petitioner counters that this claim

[18] "The doctrine of res judicata is that an existing final judgment rendered on the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of

could not be raised on direct review by the Ohio Supreme Court because it relied, in part, on evidence dehors the record, and therefore, res judicata does not apply. Doc. #18, PagelD#2046-59.

Magistrate Merz, in his initial Report and Recommendations, agreed with Respondent that Petitioner failed to raise this claim on his direct appeal and, therefore, the claim was procedurally defaulted. Doc. #22, PagelD#2163.Specifically, Magistrate Merz opined that Petitioner extensively relied on Ohio law, "so that his implicit argument is that the Second District decided this issue of state law incorrectly." Id at PagelD#2161. Magistrate Merz stated that, when evaluating habeas claims, the court "is generally bound by state court interpretations of state law." Id (quoting Railey v. Webb, 540 F.3d 393, 398 (6th Cir. 2008)).

Magistrate Merz also found that Petitioner's argument that he could not raise this claim on direct appeal due to evidence dehors the record was not well taken. The Second District Court of Appeals stated that this claim was barred by res judicata due

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concurrent jurisdiction." Schlangen v. Allied Pest Control, Inc., 2006-Ohio, 2334, 1} 26 (2d Dist.) (quoting Norwood v. McDonald, 142 Ohio St. 299, 52 N.E.2d 67 (1943)); Cont'/ Cas. Co. v. Indian Head Indus., 941 F.3d 828,835 (6th Cir. 2019) ("Res judicata comes from the Latin meaning 'a thing adjudicated,' and it refers to situations in which an earlier judgment can bind a later proceeding on one or more issues. Res judicata in fact covers two different doctrines: claim preclusion and issue preclusion. Claim preclusion prevents parties from re-raising claims or defenses that were or could have been raised in the prior action.") (internal citations omitted).

to Petitioner's failure to raise it on direct appeal. Id. (quoting State v. Hartman, 2017-Ohio-7933, 1] 45 (2d Dist.) ("Hartman II")). This decision functioned as an "adequate and independent" state ground under the Maupin factors and, therefore, required dismissal due to the procedural default. Id. at PagelD#2161-62.

In his Objections, Petitioner shifts his focus, claiming that "[t]he resjudicata finding is an unreasonable finding of fact in light of the evidence presented." Doc. #27, PagelD#2280. Petitioner again claims that this issue could not be fully litigated until the post-conviction phase due to the reliance of evidence dehors the record. See id. at PagelD#2280-88. As such, Petitioner believes that the determination by the Second District, stating that Petitioner's claim is defaulted due to his failure to raise this issue during his direct appeal, is unreasonable in nature. See id

Magistrate Merz, in his Supplemental Report and Recommendations, reiterated his position that Petitioner's claim should be dismissed due to his failure to raise the issue on direct appeal to the Ohio Supreme Court. See Doc. #29, Page1D#2345-46 (noting that Petitioner raised this issue on direct appeal to the Second District Court of Appeals but failed to raise the issue to the Ohio Supreme Court). At the onset, Magistrate Merz explained that the purpose of objections, pursuant to Federal Rule of Civil Procedure 72(b)(3), was to provide the district court with a reasoned analysis as to why the Magistrate Judge was incorrect, not to raise new arguments. See id. at PagelD#2345.

Further, Magistrate Merz explained how the issue, if it weren't procedurally defaulted, is still without merit for two reasons. First, "[the] determination of res judicata is a mixed question of law and fact. That is, an Ohio court must decide what facts were necessary to prove the ineffective assistance of trial counsel claim and whether those facts were available on the direct appeal record." Id at PageID#2346. Second, "the fact that some additional evidence which could be used to prove the claim was presented for the first time in post-conviction does not prove that there was insufficient evidence already in the record to decide the claim on direct appeal." Id

In his Objections to the Supplemental Report and Recommendations, Petitioner reasserts his contention that this claim "could not have been raised on direct appeal, because in order to show the prejudice required to support Petitioner's ineffective assistance of counsel claim evidence dehorsthe record was necessary." Doc. #34, PageID#2462. Specifically, Petitioner once again points to testimony that Detective Norris told Petitioner and trial counsel that the stories of Petitioner and the victim "matched up until the shower," which was elicited during Petitioner's hearing on his Motion for a New Trial. Id at PageID#2466 (quoting 2017-Ohio-7933 at 1J 78). Petitioner's habeas counsel also noted that they were not counsel for Petitioner during the direct appeal and, therefore, did not personally raise the issue during the direct appeal. Id. at PageID#2465.

"[A]n exception to [the] res judicata rule exists if a defendant presents new competent, relevant and material evidence dehors, or outside, the record. Yet, the evidence dehors the record must not be evidence which was in existence and available for use at the time of trial and which could and should have been submitted at trial if the defendant wished to use it." State v. Ginyard, 2004-Ohio-1477, 1f12 (2d Dist.) {internal citations omitted). Additionally, "[w]hen the evidence a defendant relies upon is dehors the record, that evidence must meet a threshold of cogency. Cogent evidence is that which is more than marginally significant and advances a claim beyond mere hypothesis and desire for further discovery." State v. Goldwire, 2005-Ohio-5784, 119 (2d Dist.) (internal citations omitted). "To overcome the res judicata bar, the petitioner must produce new evidence that renders the judgment void or voidable, and show that that he could not have appealed the claim based upon information contained in the original record." Id at,i 11 (quoting State v. Aldridge, 120 Ohio App. 3d 122,697 N.E.2d 228 (2d Dist.)).

After reviewing the record in this case, the Court agrees with Magistrate Merz, as well as the Second District Court of Appeals, that this claim is procedurally defaulted under the doctrine of res judicata. Petitioner's habeas counsel represented Petitioner on his direct appeal as well as his post-conviction proceedings. See Doc. #5-1, Ex. 12, PagelD#205; see also Doc. #5-2, Ex. 20, PagelD#572. Petitioner raised the issue of the missing audio tapes on direct appeal:

> When [trial counsel] did not receive discovery they expected, specifically tape recordings of Hartman's two sessions with Detective Norris, they did not follow-up and thus were surprised at trial when the recordings were not available ... Because they failed to investigate the case, Hartman's lawyers could not meet or adequately test the State's evidence and Hartman was prejudiced thereby.

Doc. #5-1, Ex. 12, PagelD#257 (Appellant's Brief on Appeal). In response, the Second District Court of Appeals, found that Petitioner could not establish the prejudice required to warrant relief under Strickland.

> We also conclude that Hartman has not shown prejudice by his counsel's failure to obtain a copy of the video recorded interrogations with the detective from the Oakwood Police Department. Defense counsel was present with Hartman at the time of the interviews, which should have adequately prepared counsel for making strategic plans to cross-examine the detective, and to prepare Hartman for potential cross-examination during his trial testimony. Hartman has not established how discovery of the video recordings would have led to a different outcome at trial.

Hartman, 2016-Ohio-2883 at ¶57. Petitioner did not raise this claim on direct appeal to the Ohio

Supreme Court. See Doc. #5-2, Ex. 17, PagelD#409-26.

Based on this procedural background, it is clear to this Court why, during the post-conviction proceedings, the Second District Court of Appeals overruled Petitioner's arguments on the grounds of res judicata. See Hartman, 2017-Ohio-7933 at 1142-45. Further, the Court agrees with Magistrate Merz that the doctrine of res judicata, when applied in criminal proceedings, is an "adequate and independent" state ground on which to render a decision herein, and, therefore, supports the recommendation that this claim is procedurally defaulted. See, e.g., Durr v. Mitchell, 487 F.3d 423, 432 (6th Cir. 2007). Moreover, while Petitioner may be able to show how this evidence dehors the record could be helpful in supporting his claim, Petitioner has not convinced this Court that such evidence was necessary to fully consider his claim in this instance. See Goldwire, 2005-Ohio-5784 at 119, 11.

As such, this Court ADOPTS Magistrate Merz's recommendation that this claim be dismissed due to procedural default. Doc. #22, PagelD#2163; Doc. #29, PagelD#2346-47.

Ground Ten: Ineffective Assistance Claim for Failing to Secure Diagram of Comforter

In his Tenth Ground for Relief, Petitioner claims that he was denied the effective assistance of trial counsel, in violation of the Sixth Amendment and the holding of Strickland v. Washington, when trial counsel failed to procure the forensic diagram of the DNA stains on the comforter prior to trial. Doc.

#1, PageID#52-57. Respondent claimed that this ground was precluded from consideration due to procedural default or, in the alternative, entitled to deference under the AEDPA. See Doc. #6, PageID#1130-36. Petitioner contends that his claim is not procedurally defaulted because it could not be fully considered absent evidence dehors the record. See Doc. #18, PageID#2060-68.

Magistrate Merz, in his initial Report and Recommendations, recommended that this claim be denied due to procedural default for failing to raise the issue on direct appeal. Doc. #22, PageID#2166. Petitioner, in his Traverse, largely cited evidence that was available during his direct appeal and, therefore, did not constitute evidence dehors the record. Id. at PageID#2165. Magistrate Merz instructed Petitioner to provide pinpoint cites in his Objections, should he choose to file them, to evidence that he contends was dehors the record, pursuant to S.D. Ohio Civ. 7.2(b)(5). Id at PageID#2165-66. In conclusion, Magistrate Merz stated that:

> Petitioner has not shown that the Second District's determination that the evidence to support this claim was already in the record at the time of direct appeal was an unreasonable determination of the facts based on the evidenced [sic] of record. On that basis the Second District's decision was an appropriate enforcement of Ohio's res judicata rule.

Doc. #22, PageID#2166.

In his initial Objections, Petitioner raised the same arguments as he previously raised in his Reply. Compare Doc. #27, PagelD#2288-94 with Doc.# Doc. #18, PagelD#2060-68. Petitioner also failed to pinpoint cite to any evidence, as directed by Magistrate Merz in his Report and Recommendations, that was attached to the post-conviction filings and, therefore, would have been dehors the record. See generally Doc. #27, PagelD#2288-94. In response, Magistrate Merz reiterated his position, stating that "[h]aving reconsidered that recommendation in light of the Objections, the Magistrate Judge does not believe further analysis on this Ground for Relief is warranted." Doc. #29, PagelD#2347.

Petitioner again, in his Objections to the Supplemental Report and Recommendations, insists that the evidence to fully consider the claim was not available on direct appeal and relies on evidence dehors the record. See Doc. #34, PagelD#2472-80. This "objection" is largely a reiteration of the prior filings by Petitioner. Compare id. with Doc. #27, PagelD#2288-94 and Doc.# Doc. #18, PagelD#2060-68. Petitioner again failed to pinpoint any exhibits that were attached to the Petition for Post-Conviction Relief, in his Objections to the Supplemental Report and Recommendations, see generally id., as instructed by Magistrate Merz in his initial Report and Recommendations.

This court agrees with Magistrate Merz that Petitioner's claim is precluded due to procedural default, since Petitioner could have raised this claim on direct appeal, failed to do so and, furthermore,

failed to identify any evidence dehors the record to excuse the default. Petitioner, represented by current counsel, contended in his direct appeal to the Second District Court of Appeals that trial counsel was ineffective because counsel "failed to contact crime lab supervisor Mark Squibb or to ask about forensic examiner Emily Draper's notes from the testing." Doc. #5-1, PagelD#257. Petitioner, again represented by current counsel, failed to bring this claim, on direct appeal, in his petition for discretionary review by the Ohio Supreme Court. Doc. #5-2, Pagel0#409-26.

Although current counsel has stressed that this claim was brought pursuant to the holding in Brady v. Maryland, 373 U.S. 83 (1963), the Court concurs with Magistrate Merz that current counsel's Brady argument on direct appeal "does not negate the Second District's conclusion that all the evidence on the claim presented by present counsel in post-conviction had already been made part of the record before direct appeal." Doc. #22, PagelD#2165. Petitioner states in his initial Objections and his Objections to the Supplemental Report and Recommendations:

> At the time of Petitioner's direct appeal, the following evidence was in the record with regard to Petitioner's Strickland claim: 1) The lab report dated 7115/14 from Emily Draper (State's exhibit 25); 2) Emily Draper's lab notes with diagram (Defendant's Exhibit F); and the Affidavit of Christopher Conard (ECF No. 5-1, Appendix, PAGE ID#

126-128) and its attachments, authenticated by the Affidavit.

Doc. #27, PageID#2289; see also Doc. #34, PagelD#2473 (Petitioner using near verbatim language to describe the same available evidence in his Objections to the Supplemental Report and Recommendations). Petitioner offers no additional citations to evidence dehors the record, even after by directed to do so by Magistrate Merz in his initial Report and Recommendations. See Doc. #22 PagelD#2165-66; Doc. #27, PagelD#2288-94 (initial Objections with no pinpoint citations to any of the exhibits referenced in Petitioner's post-conviction proceeding); Doc. #34, PagelD#2472-80 (Petitioner's Objections to the Supplemental Report and Recommendations containing no pinpoint citations to any of the exhibits referenced in Petitioner's post-conviction proceeding).

As such, the Court ADOPTS Magistrate Merz's recommendation that Ground Ten should be dismissed as procedurally defaulted. Doc. #22, PagelD#2166; Doc. #29, PagelD#2347.

Ground Eleven: Ineffective Assistance Claim for Delivering Petitioner's Written Statement to Detective Norris Without Client Waiver of Privilege

In his Eleventh Ground for Relief, Petitioner claims that he was denied the effective assistance of counsel, in violation of the Sixth Amendment and the holding of Strickland v. Washington, when trial counsel, absent a knowing, intelligent, and voluntary waiver of the attorney-client privilege by Petitioner, delivered Petitioner's written statement to the lead

detective. Doc. #1, PageID#57-63. This issue, on direct appeal and during the post-conviction proceedings, was discussed on two distinct sub-issues: (1) whether trial counsel Conard rendered ineffective counsel when he gave Petitioner's statement to Detective Norris; and (2) whether trial counsel Conard rendered ineffective counsel when he "concocted" the statement Petitioner signed by using a statement of a prior client as a "template." E.g., Doc. #5-3, Ex. 25, PageID#805-07 (Decision, Entry and Order Granting Respondent State of Ohio's Motion for Summary Judgment). As such, the Court will analyze each sub-claim separately.

1) Ineffective Assistance of Counsel by Giving Statement to Police

Respondent, in its Return, stated that this issue was procedurally defaulted due to Petitioner's failure to raise it on appeal to the Ohio Supreme Court. Doc. #6, PageID#1130, 1132, 1170. Petitioner, in his Traverse, argues that his claim is not defaulted because evidence dehors the record exists to fully litigate the claim. Doc. #18, PageID#2068-76. Specifically, Petitioner argues that "[t]he trial court found that res judicata did not bar a portion of the issue ... thus admitting that Hartman could not 'fully litigate' this claim, thereby denying use of res judicata to bar this court's merit's review." Doc. #18, PageID#2076. (citations omitted).

In his initial Report and Recommendations, Magistrate Merz, after analyzing the decisions of the trial court and the Second District Court of Appeals, concurred with Respondent, that this part of Petitioner's claim under Ground Eleven was

procedurally defaulted and, therefore, precluded review by this court. Doc. #22, PagelD#2171. Petitioner, in his Objections to the Report and Recommendations, largely reiterated the same arguments, renewing his argument that the claim was not procedurally defaulted and, furthermore, that the claim was not meritless. See Doc. #27, PagelD#2294-2303. Magistrate Merz reasserted his position in his Supplemental Report and Recommendations, deferring any analysis to his original Report and Recommendations. Doc. #29, PagelD#2347-48. Petitioner echoed his original arguments again in his Objections to the Supplemental Report and Recommendations. Doc. #34, PagelD#2480-89.

At the onset, the Court notes that Petitioner argued this claim on direct appeal to the Second District Court of Appeals, but failed to raise it in his petition to the Ohio Supreme Court. Doc. #5-1, Ex. 12, PagelD#243-44 (Petitioner's Brief on Appeal to the Second District Court of Appeals); See also Hartman, 2016-Ohio- 2883 at ,r 46 (Second District Court of Appeals determination on this claim); Doc. #5-2, Ex. 17, PagelD#409-26 (Petitioner's Memorandum in Support of Jurisdiction to the Ohio Supreme Court). Therefore, Petitioner did not finish "one complete round of [Ohio's] established appellate review process." Caver v. Straub, 349 F. 340, 346 (6th Cir. 2003).

The trial court considered the same claim during Petitioner's review for post-conviction relief, largely relying on the quoted language from the Second District Court of Appeals opinion. See Doc.

#5-3, Ex. 25, PagelD#805-06 ("This determination, as indicated, precludes further consideration of Mr. Canard's decision to provide Mark Hartman's statement to Detective Norris."). The Second District again barred this claim, stating that "[the Second District Court of Appeals] agree[s] with the trial court that much of what Hartman raises in his third ground for relief is barred by res judicata, because these arguments were raised or could have been raised in his direct appeal." Hartman, 2017-Ohio-7933 at ¶40.

This Court agrees believes that the application of the doctrine of res judicata, due to Petitioner's failure to raise this claim on direct appeal to the Ohio Supreme Court, was reasonable in nature and, therefore, Petitioner's claim is procedurally defaulted and precluded from review here. Petitioner argued this claim, on direct appeal, to the Second District Court of Appeals, stating in part that:

> The times when it is effective practice to advise a client who is a suspect in a criminal case to give a written and oral statement to law enforcement officers are few and far between - usually when there is [a] deal on the table, in writing, and the prosecutor has already signed off on it. To reach that point, counsel must already have investigated the case and know the charges at issue. That did not happen here. Counsel Conard had not had the opportunity to investigate the case. Hartman's written statement

was given to Norris on January 2, 2014, only two days after the incidents at issue had occurred. Conard knew only generally what the charges might be. He could not effectively advise Hartman at that time. Moreover, Conard arranged for Hartman to talk to Norris and acted as the coordinator to set up the police interview, calling Norris and scheduling the January 2, 2013 date. Tr. 295. There was no reasonably foreseeable benefit to Hartman in following this course of action.

Hartman was prejudiced by his lawyer's instruction to provide a written statement to Detective Norris and submit to two rounds of questioning. Tr. 263,279, 411-12, 413. Hartman's statement admitted some elements of the crimes alleged, specifically that sexual conduct occurred, and were used against Hartman at trial.Detective Norris read Hartman's statement into the record, Tr. 266-73, and repeated Hartman's answers to questions from both rounds of questioning. Tr. 273-78, 279-83. The State also used the written statement to repeated[ly] attack Hartman's credibility for having left details out of the written statement. [The facts related to these omissions are addressed infra at pages 24-26]. Counsel Conard was ineffective when he advised Hartman to produce the

> written statement, sign it in the presence of law enforcement, provide it to the police and arranged for Hartman to submit to questioning twice.

Doc. #5-1, Ex. 12, PagelD#243-44. The Second District Court of Appeals examined this subclaim on direct appeal as follows:

> [*P46] Hartman argues six different grounds for establishing that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment. Hartman claims that his counsel was ineffective when he was directed to provide a written statement to the police, and to cooperate fully in a police interrogation. In hindsight, Hartman is able to identify that this strategy of his defense counsel to fully cooperate with the investigation against him caused difficulty in defending inconsistent statements that may have impacted his credibility at trial. "Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel."State v. Woullard, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964, P. 37 (2d Dist.), citing Strickland[]; State v. Parker, 2d Dist. Montgomery No. 19486, 2003-Ohio-4326, P 13. Throughout the trial, it is apparent that the defense strategy was to prove that the victim consented to the sexual conduct, and that

> Hartman did not purposely force her to submit to the sexual conduct. Both his written statement and the statements Hartman made to the police consistently asserted that the victim had consented to the sexual encounter. Hartman and [Weckesser] are the only two witnesses to the sexual conduct, which would inevitably lead to a question of which witness to believe. It was reasonable, in light of counsel's perspective at the time, to pursue a strategy not to let the victim's version of the events go unanswered in the investigative stage. We conclude that counsel's strategy of cooperation with the police investigation, under the circumstances of this case, did not constitute ineffective assistance of counsel.

Hartman, 2016-Ohio-2883 at ,r 46.

Although Petitioner largely relies on the affidavits of Petitioner's mother and Detective Salyer, this Court, after reviewing Petitioner's claim on direct appeal, as well as the decision of the Second District Court of Appeals, concurs with Magistrate Merz that these affidavits were not necessary to fully litigate this claim on direct appeal. See Doc. #22, PagelD#2169; see also Hartman, 2016-Ohio-2883, ,I 46. Petitioner's affidavits seem to question, in hindsight, the effectiveness of Petitioner's trial counsel's decision to act as he did. As the Second District noted, however, hindsight cannot form the basis of a claim for ineffective assistance of counsel. See Hartman, 2016-Ohio-2883 at ,I 46 (quoting Woullard, 2004-Ohio-3395 at P. 37). As such, this evidence would not overcome the

determination of res judicata during post-conviction proceedings. Goldwire, 2005-Ohio-5784 at 1J 9, 11.

Since the res judicata determination functions as an adequate and independent state ground on which to render a decision, Petitioner's subclaim, pursuant to Maupin, is procedurally defaulted and precluded from review by this court. Maupin, 785 F.2d at 138; accord Durr v. Mitchell, 487 F.3d at 432.

2) Ineffective Counsel Due to the Concocted Statement

The remaining balance of Petitioner's claim focuses on whether trial counsel Conard was ineffective when he inserted part of a "template" into Petitioner's statement before delivering it to Officer Norris. See Doc. #18, PagelD#2076-79. Conard added the following to Petitioner's written statement: "Molly and I were sexually irresponsible, inexperienced and immature. Although we were strangers, we were consenting adults... [T]he decisions made will follow and haunt me for the rest of our lives." This language was borrowed from another client's case.

Respondent agrees that this portion of Ground Eleven does rely on evidence dehors the record. Respondent defended this ground on the merits, arguing that such evidence and any conclusion drawn therefrom are entitled to deference under the AEDPA. See Doc. #6, PagelD#1130, n.4; see also Id at PagelD#1174-79.

In his initial Report and Recommendations, Magistrate Merz concurred with the Second District, that this claim was without merit, stating:

> It is hardly malpractice for any attorney to use forms and models developed over time in assisting a new client. In this case the defense strategy of admitting the sexual conduct and expressing remorse for any bad results was a reasonable strategy. The Second District's conclusion that it was not ineffective assistance of trial counsel deserves deference under Strickland.

Doc. #22, PagelD#2171. Petitioner, in his Objections, largely reiterates his arguments, essentially questioning how this could be considered "reasonable trial strategy." See Doc. #27, PagelD#2303-05. Magistrate Merz renewed his initial conclusion, without further analysis, in his Supplemental Report and Recommendations. Doc. #29, PagelD#2347-48. Petitioner again asserted his contention in his Objections to the Supplemental Report and Recommendations, Doc. #34, PagelD#2483-89.

In its analysis, the trial court found that Petitioner's claim was without merit, stating:

> Though the incorporation of another client's statement into Mr. Hartman's statement may be questioned, Mr. Hartman signed his name to the statement indicating he concurred in the sentiment being expressed. Further, the language, though stilted, is not inconsistent with Mr. Hartman's assertion the sexual activity was consensual. This court, given the highly deferential standard used to evaluate

> an attorney's performance cannot conclude Mr. Conard engaged in ineffective assistance of counsel by having Mr. Hartman incorporate the language at issue into his statement.
>
> Additionally, and importantly, Mr. Hartman has failed to demonstrate that the exclusion of the contested language would have, within a reasonable probability, changed the outcome of the case.

Doc. #5-3, Ex. 25, PagelD#806-07. The Second District concurred in this opinion, stating:

> We agree with the trial court that much of what Hartman raises in his third ground for relief is barred by res judicata, because these arguments were raised or could have been raised in his direct appeal. Goldwire at ,r 11. Further, there is no evidence that Hartman did not agree with his counsel's advice or that he did not knowingly waive his rights. Rather, the evidence submitted by Hartman in his petition supports a finding that Hartman and his counsel discussed writing a statement and Hartman then wrote a statement that both he and his counsel revised before it was presented to the lead detective. We agree with the trial court that the emails between Hartman and his trial counsel, which were attached to Hartman's petition for

> post-conviction relief, are insufficient to create a genuine issue of material fact that Hartman's counsel committed professional errors or that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. R.C. 2953.21(D). Moreover, these emails are insufficient to warrant an evidentiary hearing. R.C. 2953.21(C).

Hartman, 2017-Ohio-7933 at ,I 40.

Although Petitioner is correct that he, personally, did not insert the challenged language into his statement, he did assent to its inclusion. See, e.g., Doc. #5-2, Defendant's Ex. I, PagelD#587 (email from Hartman to trial counsel Conard stating "I have attached my statement and added the suggested parts."). Further, Hartman trusted his trial counsel to modify the statement to support their theory. Id. ("Feel free to edit or cut anything out ... "). Petitioner attempts to counter this assent by questioning the strategy of trial counsel in inserting the language into Petitioner's statement, but such hindsight cannot "distort the assessment of what was reasonable in light of counsel's perspective at the time." See Woullard, 2004-Ohio-3395 at ,I 37.

In light of the evidence supporting Petitioner's assent to the statement, the Court concurs with Magistrate Merz that "[t]he Second District's conclusion that it was not ineffective assistance of trial counsel deserves deference under Strickland" Doc. #22, PagelD#2171. As such, the Court ADOPTS

the recommendation of Magistrate Merz to dismiss this portion of the claim as meritless.

Ground Eleven is dismissed in part as procedurally defaulted and dismissed in part on the merits.

Ground Twelve: Ineffective Assistance of Trial Counsel Claim Regarding False and Misleading Information Before Obtaining Jury Waiver

In his Twelfth and final Ground for Relief, Petitioner contends that he was denied the effective assistance of counsel, in violation of the Sixth Amendment and the holding of Strickland v. Washington, when trial counsel failed to fully inform him as to his right to a jury trial and the effect of waiving it, and provided him with "false and legally baseless reasons" for doing so. Doc. #1, PagelD#64-65. Respondent, in its Return, defended this claim on the merits, arguing that the Second District's opinion is entitled to deference under the AEDPA. Doc. #6, Pagel 0#1179.

The Ohio Supreme Court has held that "if the record shows that a jury waiver occurred, the verdict will not be set aside except on a plain showing that the waiver was not freely and intelligently made." State v. Lawson, 2021-Ohio-3566, 165 Ohio St. 3d 445,460, cert denied, 212 L. Ed. 2d 332, 142 S. Ct. 1379 (2022).

In United States v. Martin, 704 F.2d 267 (6th Cir. 1983), the Sixth Circuit addressed the issue of an intelligent waiver of the constitutional right to a jury trial:

> Moreover, a defendant ignorant of the nature of the jury trial right cannot intelligently weigh the value of the safeguard. A defendant, therefore, should have both the mental ability and some knowledge of the jury trial right before he is allowed to waive it. See Adams, 317 U.S. at 280; United States ex re. McCann, 320 U.S. at 221. A technical knowledge of the jury trial right, however, is not what is required. See, e.g., Johnson v. Wolfenbarger, 391 Fed. Appx. 510,516 (6th Cir. 2010). A defendant is sufficiently informed to make an intelligent waiver if he was aware that a jury is composed of 12 members of the community, he may participate in the selection of the jurors, the verdict of the jury must be unanimous, and that a judge alone will decide guilt or innocence should he waive his jury trial right. See United States v. Delgado, 635 F.2d 889, 890 (7th Cir. 1981). Knowledge of these essential attributes is generally sufficient to enable a defendant to make a knowing and intelligent decision.

Martin, 704 F.2d at 273.

A signed written waiver of a petitioner's right to a jury trial, in open court, is presumptively voluntary, knowing, and intelligent. United States v. Sammons, 918 F.2d 592,597 (6th Cir. 1990). In this case, it is undisputed that Petitioner executed a

written jury waiver, indicating that he "fully understand[s] that under the laws of this state, I have a constitutional right to a trial by jury." Doc. #5-1, PagelD#85. Petitioner admits that he waived his right to a jury trial "in open court and on the record." Doc. #1, PagelD#64. The transcript of that proceeding, however, has not been made part of the record. As Magistrate Judge Merz noted in his initial Report and Recommendations, "[i]n the absence of a transcribed record showing that Judge Tucker did not adequately inform Hartman of the consequences of waiving a jury, this Court presumes the regularity of those proceedings." Doc. #22, PagelD#2177 (citing Walker v. Johnston, 312 U.S. 275, 286 (1941)).

In its opinion affirming the dismissal of Petitioner's petition for post-conviction relief, the Second District stated:

> [*P76] Hartman contends that the trial court erred in finding that counsel's advice to waive a jury trial was not objectively unreasonable. According to Hartman, the following evidence shows that there is a genuine issue of material fact as to whether the advice was objectively unreasonable: (1) Counsel first informed the trial court at a bond conference "that the family would probably be going with a bench trial"; (2) counsel told Hartman's family that he had a good relationship with the judge, which Hartman's grandfather interpreted as being strong enough for the judge to find reasonable doubt; (3) counsel informed Hartman that the trial court judge raised three sons when in fact he had raised three

daughters; (4) counsel did not explain the benefits of the jury trial and that one juror could save the defendant; (5) on August 11, 2014, counsel stated to the family that he had not been provided with all the discovery and was going to write a letter; (6) counsel did not write the discovery letter until August 26, 2014, and (7) Hartman executed the jury trial waiver on August 20, 2014. Hartman Appellate Brief, p. 57-58.

[*P77] "Defense counsel's [advice] to a client to waive his right to a jury trial has been considered sound trial strategy in the absence of record evidence showing otherwise." State v. Neitzel, 2d Dist. Miami No. 98 CA 11, 1998 Ohio App. LEXIS 4958, *6 (Oct. 23, 1998). Further, Hartman "has not suggested a single reason why the outcome of the trial would probably have been otherwise had he been tried by a jury rather than before a judge." Id. See also State v. Aaron, 10th Dist. Franklin No. 00AP-268, 2000 Ohio App. LEXIS 5534, *4 (Nov. 30, 2000) ("Without supporting evidence, the mere claim that a jury would have believed defendant falls far short of establishing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

[*P78] We conclude that trial counsel's advice to Hartman to waive his right to a jury trial was reasonable trial strategy and does not rise to the level of ineffective assistance of counsel and Hartman has failed to put forth sufficient

> operative facts to establish that there is a reasonable probability that the result of the trial would have been different if it was tried to a jury rather than a judge. Therefore, the trial court properly dismissed the tenth ground for relief in Hartman's petition.

Hartman, 2017-Ohio-7933 at 1J 76-78.

At issue is whether the Second District's decision was an objectively unreasonable application of Strickland. Petitioner, in his Traverse, argues that his waiver was not knowing and intelligent. He maintains that he had no prior experience with the criminal justice system, and that professional norms dictated that trial counsel fully inform him of the right to a jury trial and the effect of waiving it. He further argues that "prejudice directly flows from or is presumed by the forfeiting of a constitutional right on false and legally baseless grounds." Doc. #18, PagelD#2082. He maintains that the Second District unreasonably applied Strickland to the facts of his case.

In his initial Report and Recommendations, Magistrate Merz concluded that Petitioner's claim was meritless. Doc. #22, PagelD#2171-78. He noted that trial counsel told Petitioner that he would recommend a bench trial before only a handful of judges, and Judge Tucker was one of those. He told Petitioner that Judge Tucker was fair and that he had a good relationship with him. He also discussed the likelihood of intense media coverage and how this could affect a jury's verdict.

As to Petitioner's claim that counsel never informed him that, in a jury trial, he needed just one juror to side with him to avoid a conviction, Magistrate Judge Merz correctly noted that "[t]echnically, one juror can cause a mistrial which does not equate to an acquittal. Particularly in high profile cases, which this apparently was, the prosecutor may feel pressure to retry the case." Id. at PagelD#2175.

Under these circumstances, Magistrate Judge Merz concluded that the Second District reasonably applied Strickland in holding that counsel's advice to try the case to the bench was sound trial strategy, and that Petitioner had failed to show how he was prejudiced, given that he had offered no operative facts to establish that there is a reasonable probability that the result of the trial would have been different if it were tried to a jury.

Petitioner filed Objections to the initial Report and Recommendations. See Doc. #27, PagelD#2305-10. He reiterated his contention that his waiver of his right to a jury trial could not have been knowing and intelligent due to his lack of knowledge of the criminal justice system and trial counsel's misrepresentations.

Magistrate Merz, in his Supplemental Report and Recommendations, changed his position and recommended that habeas relief be granted on Ground Twelve. He wrote:

> The one point on which the Magistrate Judge believes the Report is in error on this Ground for Relief is trial counsel's

> failure to investigate sufficiently the facts on which he relied in advising the jury waiver. It is apparently conceded that Conard told Hartman that Judge Tucker had raised three sons and would therefore "understand" the situation in which Hartman found himself on December 31, 2013. It is also apparently conceded that Judge Tucker has in fact raised three daughters instead of three sons ...[B]ecause Conard considered it critical and persuaded his client that it was critical, he had a duty to investigate and be accurate in his advice on this point.
>
> Hartman was prejudiced by this deficient performance. The case turned on the competing credibility of Hartman and Weckesser. Both were young adult college students who had admittedly consumed a great deal of alcohol. Neither was shown to have made inconsistent pretrial statements. Under those circumstances, it is probable that at least one juror would have believed Hartman, causing a mistrial.

Doc. #29, PagelD#2348-49.

Petitioner then provided additional citations to portions of the record that further supported the Magistrate Judge's position. See Doc. #34, PagelD#2489-91. Respondent filed Objections to the Supplemental Report and Recommendations, requesting this Court "[to] not adopt the faulty

reasoning in the Magistrate Judge's Supp. R. and R, but[) instead look to the sound conclusion of the initial Rand R holding" in making its final decision. Doc. #35, PagelD#2514. Petitioner filed his Response to Respondent's Objections, Doc. #40. Respondent also filed its Response, stating that "a review of Petitioner's protracted Objections reveals nothing substantially different than he had previously set forth in his Traverse and Objection to the Magistrate Judge's initial Rand R." Doc. #41, PagelD#2555 (citations omitted).

Having carefully reviewed the record and the applicable law, the Court SUSTAINS Respondent's Objections to the Supplemental Report and Recommendations. The Court agrees that the initial Report and Recommendations are better reasoned.

Notably, Magistrate Judge Merz changed his position based sole/yon the fact that trial counsel gave Petitioner and his family false information when he told them that Judge Tucker had raised three sons. The Magistrate Judge stated that trial counsel considered this fact to be "critical" to his advice to try the case to the bench. The record shows, however, that, in discussing the benefits of a bench trial, counsel did not volunteer any information concerning the gender of Judge Tucker's children. It was Petitioner's grandfather who questioned whether Judge Tucker had any daughters. Doc. #5-2, PagelD#625. Counsel responded -albeit incorrectly-- that Judge Tucker had all sons. Notably, counsel did not include the gender of the judge's children among the initial reasons why Petitioner should consider a bench trial. Instead, this false information was given

in response to the grandfather's question. Although Petitioner may have relied on it, to some extent, in waiving his right to a jury trial, it was not "critical" to counsel's advice to try the case to the bench, as Magistrate Judge Merz suggests.

Moreover, as the Second District held, there were numerous other reasons why the advice to waive the right to a jury trial was "sound trial strategy" in this case. Counsel told Petitioner that Judge Tucker was "fair," that he had a good relationship with him and would feel comfortable trying the case to him. He also told them that, given the extensive media coverage that similar date-rape cases had recently received, this may unduly influence the jury's verdict. Under these circumstances, the faulty information concerning the gender of the judge's children does not take counsel's advice outside the range of competence demanded of criminal defense attorneys.

In addition, given that Petitioner executed a written waiver on the record in open court, his waiver is presumptively knowing, intelligent and voluntary.

Petitioner has failed to rebut that presumption. He argues that when counsel told him that, given the current media coverage of date-rape cases, it would be hard to convince twelve people to believe him, this left him with the mistaken impression that, if he asserted his right to a jury trial, he would have the burden of convincing the jury of his innocence. However, as Magistrate Judge Merz noted in the Report and Recommendations, regardless of what counsel told Petitioner, there is

no evidence that Judge Tucker did not adequately inform Petitioner of his right to a jury trial and the consequences of waiving it prior to accepting the jury waiver. Doc. #22, PagelD#2177. Absent a transcript, the regularity of those proceedings is presumed. Walker, 312 U.S. at 286. Petitioner has therefore failed to establish that the jury waiver was not knowing, intelligent and voluntary.

Petitioner also maintains that he did not understand that "the Judge did not receive the same discovery that we had been provided and that the only thing the Judge could consider was everything admitted at trial." Doc. #18, PagelD#2089-90. This, however, falls under the category of "technical knowledge" and, as such, cannot form the basis of Petitioner's claim of an unknowing and unintelligent waiver. See Johnson v. Wolfenbarger, 391 Fed. Appx. 510,516 {6th Cir. 2010).

Based on the foregoing, the Court finds that the Second District's conclusion, that "trial counsel's advice to Hartman to waive his right to a jury trial was a reasonable trial strategy that does not rise to the level of ineffective assistance of counsel," Hartman, 2017-Ohio-7933, 1178, is not an objectively unreasonable application of Strickland.

With respect to the prejudice prong of Strickland, the Second District noted that Petitioner had not suggested even one reason why the outcome of the trial would have been different had he been tried by a jury. Quoting State v. Aaron, 10th Dist. Franklin No. 00-AP-268, 2000 WL 1753151, *4 (Nov. 30, 2000), the Second District noted that "[w]ithout supporting evidence, the mere claim that a jury

would have believed defendant falls far short of establishing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."

In the initial Report and Recommendations, Magistrate Judge Merz agreed with the Second District that Petitioner had offered no proof that he would have been acquitted by a jury. He noted that the outcome of the case turned on the credibility of Petitioner and the victim concerning the issue of consent, and that the standard for credibility determinations was the same regardless of whether the case was tried by a judge or a jury.

In his Supplemental Report and Recommendations, the Magistrate Judge, without further explanation, found instead that Petitioner was prejudiced by counsel's deficient performance in failing to provide accurate information about the gender of the judge's children. He concluded that, because the case turned on competing credibility, "it is probable that at least one juror would have believed Hartman, causing a mistrial." Doc. #29, PagelD#2349. However, he makes no effort to explain why he now believes that Hartman offered sufficient proof to support his claim of prejudice.

In the Court's view, the Second District's conclusion that "Hartman failed to put forth sufficient operative facts to establish that there is a reasonable probability that the result of the trial would have been different if it was tried to a jury rather than a judge," 2017-Ohio-7933, 1178, is not objectively unreasonable.

For these reasons, the Court DECLINES to adopt the Supplemental Report and Recommendations with respect to Ground Twelve and DENIES Petitioner's claim as meritless. Nevertheless, given that reasonable jurists could disagree, the Court will grant Petitioner a Certificate of Appealability on Ground Twelve.

Conclusion

In sum, the Court ADOPTS IN PART and REJECTS IN PART the position taken by Magistrate Merz in his Supplemental Report and Recommendations, Doc. #29. The Court will grant a conditional writ of habeas corpus on Ground Six, Sub-Part Two. The State of Ohio must discharge Petitioner from custody on his conviction and remove Petitioner's registration from the sex offender database, unless he is retried and re-convicted within 180 days from the issuance of the writ.

The Court DISMISSES the remaining Grounds for Relief with prejudice. The Court, however, grants Petitioner a Certificate of Appealability on Ground Twelve. The Court denies Certificates of Appealability on all other grounds asserted.[19]

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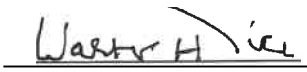
[19] Although Magistrate Judge Merz previously indicated that he would allow additional briefing on the question of Certificates of Appealability, Doc. #22, PageID#2178, the Court, having carefully reviewed the record, does not find that additional briefing is necessary or warranted. The Court has discussed this with Magistrate Judge Merz, who has no objection to this procedure.

Judgment shall be entered granting Petitioner a conditional writ of habeas corpus on Ground Six, Sub-Issue Two. As to all remaining claims, judgment shall be entered in favor of Respondent and against Petitioner.

The captioned case is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

Date: March 31, 2023



WALTER H. RICE

UNITED STATES DISTRICT JUDGE

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

Mark Hartman,	)	
Petitioner,	)	Case No. 3:19-cv-03
v.	)	
Ohio Adult Parole	)	
Authority,	)	Judge Walter H. Rice
Respondent.	)	Magistrate Judge Michael R. Merz

REPORT AND RECOMMENDATIONS

This is a habeas corpus case brought by Petitioner Mark Hartman with the assistance of counsel. As of August 21, 2019, counsel advised the Court that the case was ripe for decision without further filings by the parties (Notice, ECF No. 21).

Litigation History

On July 18, 2014, a Montgomery County Grand Jury indicted Hartman on three counts of rape in violation of Ohio Revised Code § 2907.02(A)(2). Hartman pleaded not guilty, waived his right to trial by jury, and tried the case to the bench. After a two-day trial in September 2014, the trial judge found Hartman guilty on all counts. Before sentencing, Hartman filed a motion for new trial which was denied in a written opinion (Decision, State Court Record, ECF No. 5-1, Ex. 8). Hartman was then sentenced to four years'

imprisonment on each count, to be served concurrently.[1]

Hartman appealed but his conviction was affirmed. State v. Hartman, 2016-Ohio-2883 (Ohio App. 2nd Dist. May 6, 2016), appellate jurisdiction declined, 146 Ohio St. 3d 1515 (2016).

On April 27, 2015, Hartman filed a petition for post-conviction relief under Ohio Revised Code § 2953.21 (State Court Record, ECF No. 5-2, Ex. 20). On May 31, 2016, Judge Tucker granted the State's motion for summary judgment and dismissed the post-conviction petition on the merits (Decision, State Court Record, ECF No. 5-3. Ex. 25). Hartman again appealed to the Second District which again affirmed. State v. Hartman, 2017-Ohio-7933 (Ohio App. 2nd Dist. Sep. 29, 2017), appellate jurisdiction declined, 152 Ohio St. 3d 1424 (2018).

Hartman then filed the instant Petition for Writ of Habeas Corpus on January 3, 2019, pleading the following grounds for relief:

GROUND ONE: Petitioner's Due Process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated by the State's failure to prove each element of the offenses charged beyond a reasonable doubt.

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[1] Because Hartman completed the imprisonment portion of his sentence after this case was filed but remains in the custody of the Adult Parole Authority, the Court substituted the APA as Respondent (ECF No. 20).

GROUND TWO: Petitioner's Due Process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated when the state appellate court affirmed Hartman's convictions by retroactively applying new constructions of the elements of rape.

GROUND THREE: Petitioner Hartman was prejudiced by being tried under the indictment that is constitutionally insufficient for its failure to provide notice, failure to insure [sic] that trial proceeded on the basis of the grand jury's findings, and failure to shield Hartman form subsequent prosecutions for the same offenses.

GROUND FOUR: Petitioner's rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated because Petitioner was denied effective assistance of counsel when his trial lawyer failed to move to dismiss the constitutionally insufficient indictment.

GROUND FIVE: Petitioner's rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated because Petitioner was denied the effective assistance of counsel when his trial counsel failed to request a bill of particulars.

GROUND SIX: Petitioner Hartman's rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution were violated when he was denied the effective assistance of counsel during the cross-examination of the alleged victim because his trial counsel introduced evidence on elements of the offense that the state

had failed to prove and sought and received inadmissible hearsay that bolstered the State's case all to the prejudice of Hartman.

GROUND SEVEN: The admission of Mark Squibb's testimony in violation of Crawford v. Washington, 541 U.S. 36 (2004) violates Hartman's Sixth Amendment right to Confrontation.

GROUND EIGHT: Trial counsel's failure to object to Mark Squibb's testimony, introduced in violation of Crawford v. Washington, 541 U.S. 36 (2004), violates Hartman's Sixth Amendment right to the effective assistance of counsel and requires habeas relief.

GROUND NINE: Trial counsel's failure to secure Hartman's tape recorded statements prior to trial or, upon finding they did not exist, failure to withdraw as counsel so he could become a witness violated Hartman's Sixth Amendment right to the effective assistance of counsel and requires habeas relief.

GROUND TEN: Trial counsel's failure to secure the diagram of the comforter stains from the Miami Valley Regional Crime Laboratory prior to trial and/or when provided with the diagram at trial, failed to seek a continuance to analyze same and to fully utilize it at Petitioner's trial and/or to recall witnesses who had previously testified, violated Hartman's Sixth Amendment right to the effective assistance of counsel and requires habeas relief.

GROUND ELEVEN: Trial counsel's delivery of Petitioner's statement, to the lead detective, absent a knowing and intelligent waiver of the attorney client privilege and/or the attorney work product doctrine when the statement was concocted, violated

Hartman's Sixth Amendment right to the effective assistance of counsel and requires habeas relief.

GROUND TWELVE: Trial Counsel's false and legally baseless reasons provided to Petitioner to support waiver of a jury trial violated Hartman's Sixth Amendment right to the effective assistance of counsel and requires habeas relief.

(Petition, ECF No. 1, PageID 2-3.)

Analysis

Ground One: Insufficient Evidence to Convict

In his First Ground for Relief, Hartman claims he was convicted on insufficient evidence.Respondent defends Ground One on the merits.

The Second District found the relevant facts as follows:

> **I. Late Night Party Leads to Sexual Encounter**
>
> [*P3] During his winter break from college, Mark Hartman agreed to spend the evening with his best friend, Gordon, who was housesitting at the home of a family friend.[2] Hartman, Gordon, and one other friend were drinking heavily. Gordon texted a female friend, Courtney, inviting her to the party. Courtney agreed, and brought two of her

[2] This house is sometimes referred to in the record as the "tree house" and its owners are named Routsong.

girlfriends with her, M.W.[3]and Cassie. The women arrived at the party around 11:00 p.m. Some time during the evening, M.W. texted her parents to let them know she would not be returning home that evening. After about one hour at the party, Cassie texted her friends to silently communicate that she wanted to leave, because she was allergic to the dog in the house. Courtney and M.W left the party and took Cassie back to Courtney's house, where she had left her car. M.W. and Courtney returned to the party after 1:00 a.m. and joined the men in their drinking and card-playing.

[*P4] After the third male went to bed, Courtney and Gordon were in the bathroom together, which left M.W. and Hartman alone in the living room. M.W. testified that she wanted to go to bed, and Hartman agreed to show her to a bedroom. M.W. testified that she was a willing participant when Hartman began to kiss her. After this point, M.W.'s and Hartman's versions of the facts began to diverge.

[*P5] M.W. testified that after she and Hartman entered the bedroom, he initiated kissing, and she was okay with that. She testified that as Hartman continued to kiss her, he put his hand up her shirt, she said no, and he stopped. M.W. testified that "then we kept kissing and he pushed me onto the bed,

[3] The complaining witness is Molly Weckesser.

and then he went up my shirt again. And again I said no. Which was fine. So we kept - - we kissed again. And then that's when he started to go down my pants, and I said no. And that's when it didn't stop. He just kept saying things like, it's fine, it will be okay, it will be fun, stuff like that. So then he went ahead and took off my shirt and bra." Trial Transcript at 29.

[*P6] M.W. testified that she began to get nervous because she was not sure what was going to happen. She testified that Hartman continued to go down her pants again as he was kissing her, and she kept saying "no, that I didn't want to do that." Id. at 30. She described that he removed her shirt, bra, and leggings, and then removed his own clothes. She testified, "that's when I basically just started to get really scared about the situation and wasn't sure how to handle the situation." Id. She explained the basis of her fear by testifying:

> I was scared because I knew that I was not as strong as he was, and I knew that if he would have done anything like hit me or anything like that I would have been out and I wouldn't have really remembered what had happened. And it was more important to me to remember what was happening to me than not know what was happening to me. As a girl growing up in your teenage years, you hear a ton of

> stories about what people can do to you and what, you know, strangers do and you don't know the person and you're not sure what they're going to do. So it just really scared me to not - - like and I didn't know who was around me. I didn't know where Courtney was. I didn't know where anyone else in the house was. And I just got really scared that something bad might have happened to me. And then I kept thinking that in this situation I can outsmart the situation, and you know, I can get out the smart way. And I like have been told how to get out of these situations and how to be smart. So that's what I kept thinking, was how I was going to get out because I knew I wasn't strong enough. And I was worried about being hit, or something.

Id. at 32.

> [*P7] M.W. testified that Hartman continued to kiss her — causing the hickeys on her neck, and he continued to touch her in different places, including penetrating her vagina with his fingers. When asked what she was doing at this point, M.W. responded:
>
> > I was just sitting there. A few times I had started to go along with it because I thought that if I went along with some

> of it, he might let me go and he might think that I was like kind of into it, too, and that if he thought that, that he might let me leave or like go and do something to the point where I could try and get out and escape. But basically, the whole time I would say no before and I just kind of sat there. I wasn't really into it or doing anything back. I was just there.

Id. at 35.

> [*P8] M.W. testified that Hartman proceeded to penetrate her vagina with his penis after she said no, and that he kept saying "like its okay, it will be fine, it will be fun, don't worry about it." Id. at 36. M.W. testified that she kept saying no, and was numb because she was so scared. She testified that he stopped, took a break, and then began touching her again, and again penetrated her vagina with his penis. Afterwards, M.W. testified that she left the room and went into the bathroom, and that Hartman followed her, and began kissing her again. She described that he grabbed her arms, using enough force to pull her into the shower with him. She again testified that she "started to go along with it, too, because I was scared it was going to happen again and I wanted to get out of the situation, and I was like maybe -- again, I kept thinking the same

thing. If I go along with this, there might be a chance that I can get out of this situation. So that's what I kept thinking the whole time was if I go along with this for a little bit, there might be a chance that I can get out and this wouldn't have happened to me." Id. at 40.

[*P9] M.W. testified that after they showered, they returned to the bedroom, and Hartman began kissing her again, pushed her back onto the bed and again he penetrated her vagina with his penis. M.W. testified that "I was just so numb and didn't really feel like fighting back because I was so scared. And I was like, you know what, I'll just let it happen and then it will be done and then I'll get out of the situation." Id. at 41. M.W. testified that when he was done, she attempted to leave the bed, but he pulled her back into the bed. When she thought Hartman was asleep, she tried to move, but he was still awake and he asked her to stay. M.W. testified that she agreed to stay there with him "because I didn't want anything to happen again." Id. at 42.

[*P10] Hartman's version of the facts was presented though the admission of a written statement he gave to the police the day after the event, State's Ex. 24, the testimony of the officer who interviewed him, and from Hartman's testimony at trial. Hartman admitted that he was intoxicated earlier in the evening, but he testified that he had stopped drinking alcoholic beverages, and was drinking water before the sexual encounter.

He testified that M.W. initiated intimacy by kissing him before they went to the bedroom. He testified that they engaged in a good amount of kissing, and when he began to feel her breasts, and when he slid his hand down her pants, he specifically asked if she would like to have sex, and she answered yes. He testified that she willingly participated in the sexual encounter by helping to remove her own clothes and his clothes, asked him to squeeze her breasts and guided his hand, switched positions, and upon request willingly engaged in oral sex. Hartman testified that the only time she said "No" was when he asked if "we could have sex until we finished, and she said no at that time." He stated that he stopped after she said "No," and then they conversed a bit, talking about life, relationships and school, and then he asked again "if we could finish," and she said, "Yes, go ahead." Because he did not have a second condom, he asked if she was on birth control, and she replied, "you really think I would have sex with a random 20 years old without birth control?" His testimony that he pulled out and ejaculated on the bed was later corroborated by DNA testing on the bed coverings. The fact that M.W. was taking birth-control medication was reflected in hospital records.

[*P11] The victim's testimony reflects that she did have her cell phone with her that evening -- she received a text from the other female at the party that she wanted to go home, and she

texted her parents to tell them she would not be coming home that evening. The text messages that M.W. and her friend Courtney sent to each other later that morning were admitted into evidence as defendant's Ex. H. In the text messages, M.W. expressed reluctance about reporting the sexual assault, in the following exchange:

> M.W.: I need to think about if I want to press charges or not.
>
> Courtney: What are you thinking?
>
> M.W.: I don't know. I really don't know.
>
> Courtney: Are you wanting to confront him?
>
> M.W.: No. I don't ever want to talk to him. I just don't know if I should press charges and it'll be big because "rape in the [R.] house."
>
> Courtney: I didn't even think of that. He needs to know what he did was wrong. Was protection used? And did you shower before or after? As far as the [Rs], oh well
>
> M.W.: I know. I agree but I can't handle a big thing. I can't even remember things because I was so in shock. I'm not sure if he did it [or] not. And in between.

[*P12] After M.W. told her parents what had happened to her, she was taken to the hospital, arriving at 3:39 P.M. She was initially examined by an ER doctor, then she talked to the police detective, and then she was referred to a nurse designated as a "sexual assault nurse examiner." [footnote omitted] This nurse interviewed M.W., making notes, Ex. 20, which recorded the victim's allegations as follows:

> Courtney and I went back to the house that one of the guys was housesitting for. Me and Mike[4] was taking a tour of the house when he showed me to the bedroom which was downstairs. Mike kissed me on the lips and tried to take my shirt off and I said no, I'm not doing that. He (clarified with patient that he was Mike) kept kissing me over and over again and I kept yelling at him, telling him to stop. That's when things went from bad to worse. Mike pushed me on the bed and I landed on my back. He kept trying to kiss me and this time pulled off my shirt. He held my hands down beside me and kissed all over my neck, face and chest. He (clarified with patient that he is Mike) pulled off my leggings. I kept telling him no, get off of

[4] Referring to Petitioner whose first name is Mark.

> me, but he didn't. He had sex with me and stuck his hands inside of me. I managed to get free and go to the bathroom, and he followed me in there, grabbing my arms trying to pull me in the shower, asking me to take a shower with him. When I wouldn't he got mad and pulled on my arms back into the bedroom. He raped me again. Clarified with patient that Mike stuck penis and hands inside of vagina. I kept trying to leave but he wouldn't let me. My friend finally came upstairs and got me out of there.

[*P13] The medical records also indicate that during the process at the hospital, the victim's parents were present, and also present were the victim witness advocate, an Oakwood police officer and an Oakwood police detective. The medical records confirm that M.W. was not physically injured during the assault, other than the neck bruising referred to as hickeys. M.W. testified that since the event, she is no longer a social person, that she is scared to do anything, and no longer goes anywhere alone.

[*P14] The day after the alleged incident, defense counsel advised Hartman to create a written description of everything about the incident, which was given to police two days

> after the incident. Defense counsel accompanied his client to two police interviews. Hartman freely answered all questions asked during the interviews.

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The Second District then decided the sufficiency of the evidence claim as follows:

> [*P23] Hartman's First Assignment of Error asserts as follows:
>
> THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.
>
> *P24] Hartman was indicted for three counts of Rape, in violation of R.C. 2907.02(A)(2). Under this section, to obtain a conviction for Rape, the State must prove beyond a reasonable doubt that the accused engaged in sexual conduct with another by purposely compelling the other person to submit to the sexual conduct by force or threat of force. Hartman has admitted that he engaged in sexual conduct with another. The question is whether sufficient evidence was presented to prove beyond a reasonable doubt that he purposely compelled M.W. to submit to the sexual conduct by force or threat of force.
>
> [*P25] A challenge to the sufficiency of the evidence presents a question of law as to whether the State has presented adequate evidence on all elements of the offense to sustain the verdict as a matter of law. State v.

Hawn, 138 Ohio App.3d 449, 471, 741 N.E.2d 594 (2d Dist.2000). "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." State v. Jackson, 2d Dist. Montgomery No. 26050, 2015-Ohio-5490, P 41, 63 N.E.3d 410, quoting State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

[*P26] Pursuant to R.C. 2901.22 (A), "[a] person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." Therefore, in a Rape case, to prove that the defendant acted "purposely," the State must prove that it was the defendant's intention to engage in sexual conduct by forcefully compelling the other person to submit to the sexual conduct. "A rape occurs only if the perpetrator purposely compels the other to submit by force or threat of force." State v.

Wilkins, 64 Ohio St.2d 382, 385, 415 N.E.2d 303 (1980).

[*P27] Ohio's rape statute does not require proof of the victim's lack of consent. Ohio law does recognize certain victims incapable of giving consent, based on mental or physical incapacity. Those exceptions do not apply in the case before us. See, e.g., State v. Hillock, 7th Dist. Harrison No. 02-CA-538, 2002-Ohio-6897. Consent is not an affirmative defense, but when applicable, consent is used as a defense to challenge the State's evidence on the element of purposeful force or compulsion. State v. El-Berri, 8th Dist. Cuyahoga No. 89477, 2008-Ohio-3539, P 57. When consent is raised as a defense to a charge of Rape, the test of whether consent negates a finding of force is not whether a reasonable person confronted with similar circumstances would have understood that the victim did not consent, the test requires the trier-of-fact to find, beyond reasonable doubt, that the specific defendant's purpose or intent was to commit the crime of rape. State v. Mundy, 99 Ohio App.3d 275, 650 N.E. 2d 502 (2d Dist. 1994). As we discussed in Mundy:

> The determination of a defendant's mental state, absent some comment on his or her part, must of necessity be determined by the nature of the act when viewed in conjunction with the surrounding facts and circumstances. State v. Lott (1990), 51 Ohio St.3d 160,

> 168, 555 N.E.2d 293, 302. This is, in fact, the well-recognized process of inferential reasoning. This process by necessity incorporates an objective mechanism or standard in determining the defendant's state of mind by the use of circumstantial evidence. The trier of fact reviews the defendant's conduct in light of the surrounding facts and circumstances and infers a purpose or motive.

Id., 99 Ohio App.3d at 288, 650 N.E.2d 502.

> [*P28] R.C. 2901.01(A)(1) defines "force" as any "violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." In the case before us, the trial court did not find that Hartman used physical constraint or any form of violence that caused physical harm during the sexual encounter. The trial court did not find that Hartman constrained the victim in any way or that the victim exhibited physical resistance to Hartman's advances. However, the trial court did find that Hartman "pushed" M.W. onto the bed, removed her clothes, laid on top of her, and pulled her into the shower. It has been recognized that proof of physical violence or physical resistance is not required to establish Rape if the defendant creates in the mind of the victim the belief that physical force will be used if the victim does not submit. State v. Umphries, 4th Dist. Ross No. 11CA3301, 2012-Ohio-4711, P 21, and P 16,

citing State v. Schaim, 65 Ohio St. 3d 51, 55, 1992 Ohio 31, 600 N.E. 2d 661 (1992). "The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other." State v. Eskridge, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988). "Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established." Umphries at ¶16, quoting State v. Fowler, 27 Ohio App.3d 149, 154, 27 Ohio B. 182, 500 N.E .2d 390 (8th Dist. 1985).

[*P29] In the case before us, the victim testified that her will was overcome by fear, because she believed she would be hurt if she did not submit to Hartman's advances. To find that her will was overcome by fear, the trier-of-fact must have sufficient evidence from which to infer that her fear was based on some wrongful action or conduct of the defendant that purposely compelled her to submit to the sexual conduct, against her will. In the case before us, the trial court stated, "that the force element must be viewed within the context of M.W.'s concerns regarding Mr. Hartman's size and strength, that Mr. Hartman was intoxicated, that she did not know Mr. Hartman, and that, as the sexual conduct was occurring, she did not know the location of the remaining occupants of the house." Dkt. #80, pg. 10.

[*P30] Hartman testified that he is 6'3", weighed 200 pounds, and was physically fit. Medical records reflected that M.W. is 5'3" and weighed 165 pounds. Hartman and M.W. were both 20 years old, and both were college students. The victim testified that she was scared because she was not as strong as Hartman, and she believed that he would use his superior strength to hurt her if she did not submit to his sexual advances. The victim testified that she repeatedly said "No" to Hartman during the sexual encounter. The physical force described by the victim included her testimony that Hartman "pushed" her onto the bed, removed her clothing, laid on top of her, and "pulled" her into the shower.

[*P31] Each of the cases cited by the State addressing the issue of force is distinguishable from the case before us. In Umphries, the victim felt compelled to submit out of fear when she awoke during the night to find her uncle on top of her, who had broken into the house through a window, and she begged him to stop. State v. Umphries, 4th Dist. Ross No. 11CA3301, 2012-Ohio-4711. There was no admission that the victim in Umphries was a willing participant to any part of the encounter, and she communicated her fear by begging him to stop. Id. The victims in Whitt, Shannon, and Eskridge were minors. State v. Whitt, 8th Dist. Cuyahoga No. 82293, 2003-Ohio-5934; State v. Shannon, 11th Dist. Lake

Nos. 2002-L-007, 2002-L-008, 2004-Ohio-1669; State v. Eskridge, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988). In State v. Patel, we found sufficient evidence of force when an employer held his employee "in a locked bathroom and inserted his finger in her vagina against her will and while ignoring her plea to stop." State v. Patel, 2d Dist. Greene No. 2010CA77, 2011-Ohio-6329, P 63. Unlike in the case before us, the defendant in Patel locked the room to prevent the victim from leaving, and no part of the sexual encounter was consensual. Id. None of the cited cases present a fact pattern in which a sexual encounter between adults starts out as consensual, before changing into a non-consensual encounter.

[*P32] We agree that the elements of Rape can be established when the two participants start the sexual encounter on a consensual basis, but the consent is revoked by words, actions or conduct that clearly communicates non-consent, the defendant fails to respect the change in consent, and purposely proceeds to engage in sexual conduct through force or threat of force evidenced by violence, physical restraint, or some type of coercive or threatening conduct that creates a belief or fear that physical force will be used if the victim does not consent. In the case before us, both the defendant's physique -- he was bigger and stronger than his victim -- and his conduct of pushing the victim on the bed, removing her clothes, and pulling her into the shower, was evidence from which a reasonable

> finder of fact could find that he purposely acted in a manner that induced fear in the victim, compelling her to submit to his sexual conduct, against her will.
>
> [*P33] Based on our review of the record, we conclude that the State did present sufficient evidence from which the trier of fact could conclude that Hartman purposely compelled M.W. to submit to sexual conduct by force or threat of force. There is no dispute that it was Hartman's intention to engage in sexual conduct with M.W. Also, the testimony of the victim, if believed, supports a finding that Hartman used force to compel M.W. to submit to sexual conduct at least three times during the course of the evening. Hartman's First Assignment of Error is overruled.

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An allegation that a verdict was entered upon insufficient evidence states a claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Jackson v. Virginia, 443 U.S. 307, 315 (1979), citing In re Winship, 397 U.S. 358, 364 (1970); Johnson v. Coyle, 200 F.3d 987, 991 (6th Cir. 2000); Bagby v. Sowders, 894 F.2d 792, 794 (6th Cir. 1990)(en banc). For a conviction to be constitutionally sound, every element of the crime must be proved beyond a reasonable doubt. In re Winship, 397 U.S. at 364.

> [T]he 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 This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts.

Jackson, 443 U.S. at 319; United States v. Paige, 470 F.3d 603, 608 (6th Cir. 2006); United States v. Somerset, 2007 U.S. Dist. LEXIS 76699 (S.D. Ohio Oct. 11, 2007). This rule was recognized in Ohio law at State v. Jenks, 61 Ohio St. 3d 259 (1991). Of course, it is state law which determines the elements of offenses; but once the state has adopted the elements, it must then prove each of them beyond a reasonable doubt. In re Winship, supra.

In cases such as Petitioner's challenging the sufficiency of the evidence and filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"), two levels of deference to state decisions are required:

> In an appeal from a denial of habeas relief, in which a petitioner challenges the constitutional sufficiency of the evidence used to convict him, we are thus bound by two layers of deference to groups who might view facts differently than we would. First, as in all sufficiency-of-the-evidence challenges, we must determine whether, viewing the trial testimony and exhibits 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. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In doing so, we do not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute our judgment for that of the jury. See United States v. Hilliard, 11 F.3d 618, 620 (6th Cir. 1993). Thus, even though we might have not voted to convict a defendant had we participated in jury deliberations, we must uphold the jury verdict if any rational trier of fact could have found the defendant guilty after resolving all disputes in favor of the prosecution. Second, even were we to conclude that a rational trier of fact could not have found a petitioner guilty beyond a reasonable doubt, on habeas review, we must still defer to the state appellate court's sufficiency determination as long as it is not unreasonable. See 28 U.S.C. § 2254(d)(2).

Brown v. Konteh, 567 F.3d 191, 205 (6th Cir. 2009). In a sufficiency of the evidence habeas corpus case, deference should be given to the trier-of-fact's verdict under Jackson v. Virginia and then to the appellate court's consideration of that verdict, as commanded by AEDPA. Tucker v. Palmer, 541 F.3d 652 (6th Cir. 2008); accord Davis v. Lafler, 658 F.3d 525, 531 (6th Cir. 2011)(en banc); Parker v. Matthews, 567 U.S. 37, 43 (2012). Notably, "a court may sustain a conviction based upon nothing more than circumstantial evidence." Stewart v. Wolfenbarger, 595 F.3d 647, 656 (6th Cir. 2010).

> We have made clear that Jackson claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, "it is the responsibility of the jury-- not the court -- to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." Cavazos v. Smith, 565 U. S. 1, [2], 132 S.Ct.2, 181 L.Ed.2d 311, 313 (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.'" Ibid. (quoting Renico v. Lett, 559 U. S.766, 773, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)).

Coleman v. Johnson, 566 U.S. 650, 651, (2012)(per curiam); Parker v. Matthews, 567 U.S. 37, 43 (2012) (per curiam). The federal courts do not make credibility determinations in reviewing sufficiency of the evidence claims. Brooks v. Tennessee, 626 F.3d 878, 887 (6th Cir. 2010).

In his Reply, Hartman asserts the Second District's decision is both an unreasonable

application of clearly established federal law (Winship and Jackson) and an unreasonable determination of the facts based on the evidence presented (ECF No. 18, PageID 1947, et seq.). Specifically Hartman argues that "the State failed to meet its burden of proof on the elements of force, threat of force, and culpable mental state. . . ." Id.

Hartman rightly notes that, under Winship and Jackson, the elements of a crime are established by state law. As relevant law, Petitioner relies on State v. Schaim, 65 Ohio St.3d 51, 55 (1992), and State v. Dye, 82 Ohio St.3d 323, 327 (1998).

Hartman argues that the State tried this case on the theory that in a rape case the victim's expression of lack of consent is sufficient, that 'no' means 'no'." Reciting the history of recent efforts to reform rape law to reflect this theory, Hartman argues that this has not become the law in Ohio and that the State must still prove in an Ohio rape case[5] that the defendant purposely used force or the threat of force to compel the victim to submit against her will (Reply, ECF No. 18, PageID 1951-54).

Hartman takes issue with Judge Tucker's preliminary findings of fact in his decision to deny a new trial which were:

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[5] Petitioner notes that the relevant statute has been amended effective March 22, 2020, but still does not adopt the theory that lack of consent is sufficient (Reply, ECF No. PageID 1954). Of course, the statute in effect at the time of the alleged offenses is the one which must be applied here.

> There is, focusing on a few preliminary evidentiary findings, a marked discrepancy between Mark Hartman's size and strength and Molly Weckesser' s size and strength. Mark Hartman, in the hours before the sexual conduct, consumed a significant amount of alcohol. Ms. Weckesser and Mr. Hartman had not met before the December 30-31 "get together" at the Routsong's Oakwood home. Ms. Weckesser, in fact, referred to Mr. Hartman as "Mike" in the immediate aftermath of that which occurred. Ms. Weckesser had not previously been in the Routsong home, and, thus, was not familiar with the home's layout which, apparently, is rather unique. Ms. Weckesser did not know where the remaining occupants of the home were as the critical events unfolded. Molly Weckesser, in short, was confronted with the following as the sexual conduct occurred – a larger, stronger, and intoxicated individual she did not know (and, thus, she could not gage [sic] how he might react) with the events occurring in an unfamiliar home at a time when she did not know the location of the home's remaining occupants.

(Reply, ECF No. 18, PageID 1955-56, quoting State Court Record, ECF Doc. 5-1, New Tr. Dec., PageID 83.) Reminding this Court that the "force" element in

a rape case must be the action of the defendant, id. citing Schaim, Petitioner argues, "None of the preliminary facts found by the trial judge is the result of any action Hartman took with regard to Weckesser and thus cannot be considered an aspect of, or basis for finding, the element of force." Id. at PageID 1956. Disparity of size is argued to be irrelevant. Id. at PageID 1956-58. Hartman's voluntary intoxication is disallowed as impacting his mental state under Ohio law. Id. at PageID 1958. The third finding is said to be about Weckesser's knowledge and therefore irrelevant to the force element. Id. at PageID 1959-60.

The Magistrate Judge disagrees with this analysis. The force element of the rape statute is objective: did the defendant do some act which constituted the use of force or the threat of the use of force with the force element defined as "a physical action exerted against the one compelled" Ohio Revised Code § 2901.01(A)(1), Schaim, 65 Ohio St.3d at 55. The next element is that the defendant must have acted purposely, i.e., with the intention of compelling the victim to submit. But the victim's reaction to the force or threat of force must be that she felt compelled. In Petitioner's counsel's own words, "the force used must have compelled submission. R.C. 2907.02(A)(2)." (ECF 18, PageID 1950.) "'[F]orce or threat of force' is not proven unless and until the State proves beyond a reasonable doubt that the will of the victim was overcome." State v. Euton, 2007-Ohio-6704, ¶43, 2007 Ohio App. LEXIS 5883 *22 (3rd Dist., Auglaize, No. 2-06-35, 12/17/2007)." Id.

To put it another way, the force or threat of force must actually have caused the victim's submission; it must be compelling, the efficient cause of the victim's giving in to sex.

These preliminary findings of fact by Judge Tucker are very relevant to Weckesser's state of mind as to whether she felt compelled. Petitioner discounts Weckesser's testimony about her fears which she said arose in part from what she had learned growing up about possible harms from "date rape" situations. But the aggressor in a sexual situation takes his victim as he finds her. The State had to prove that Weckesser was in fear and her explanation of why she was in fear were appropriate.

Counsel repeat many times that Weckesser came back to the Routsong house intending to stay the night, that she knew Hartman had been drinking heavily, that she had never been in the house before and did not know its layout, that this was the first time she had ever met Hartman (Reply, ECF No. 18, PageID 1961-65). She also knew when she went back to the house that her girlfriend Courtney had been a sexual partner of the other awake male present, Gordon, so that if the two of them went to bed together, she would likely be "left" with Hartman. She also had in her head when she went back all of the accumulated "horror" stories that she had learned in her teenage years about the dangers of date rape. Nonetheless she went back. She took a very serious risk and the consequences

for her post-event life have been serious according to her testimony. But taking a risk is not the same as giving consent.

Hartman's Reply proceeds for many pages to slice Judge Tucker's findings as if with a microtome. It asserts the judge intermingled irrelevant facts about Weckesser's state of mind with factual findings about force. The Reply goes so far as to argue:

> How much force is required to accomplish any given task is a mathematical construct. It is not dependent on the thoughts of the parties. In a rape prosecution, what was going through the victim's mind at the time of the incident is irrelevant to the question of guilt. See State v. Hart, 72 Ohio App. 3d 92, 96, 593 N.E.2d 463 (10th Dist., Franklin 1991). Ohio does not permit consideration of the victim's perception of an aggressor to be considered in the proof of the element of force except in the cases of child victims.

(ECF No. 18, PageID 1965.) The Magistrate Judge disagrees. Conducting a rape trial is not an exercise in physics, determining how much "force" is needed to accomplish a physical task. Rather, the question is how much physical force or threat of force was actually used and was it successful in compelling the victim's submission.

Hartman relies on State v. Hart, 72 Ohio App. 3d 92 (10th Dist. 1991). There the Tenth District upheld an attempted rape conviction over a claim that the trial court had improperly allowed the victim to testify to her belief that the defendant was going to rape her. The defendant there had argued, as does Petitioner here, that it was his state of mind and not that of the victim that was in issue. The Tenth District agreed, but found no prejudice because there was ample evidence of attempted rape: beating, ripping off of underwear, and digital penetration. But in an attempted rape case, it is only the defendant's state of mind that matters because the victim has not submitted and therefore the question of what caused her to submit does not arise. Hart does not stand for the proposition that the victim's state of mind is irrelevant in a completed rape case.

> For the proposition that the victim's perception of the aggressor is irrelevant, Hartman relies on State v. Dye, 82 Ohio St.3d 323, 327 (1998), State v. Schaim, 65 Ohio St.3d 51, 54-55 (1992), and State v. Eskridge, 38 Ohio St.3d 56, 58 (1998). (ECF No. 18, PageID 1965.)

In Dye the Supreme Court of Ohio reinstated the life sentence of a defendant convicted of rape of a nine-year-old boy. In doing so it quoted Eskridge:

> > In Eskridge, the defendant was convicted of raping his four-year-old daughter by force. This court reinstated the defendant's conviction and held that "the force and violence necessary to

> commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. With the filial obligation of obedience to a parent, the same degree of force and violence may not be required upon a person of tender years, as would be required were the parties more nearly equal in age, size and strength. (State v. Labus [1921], 102 Ohio St. 26, 38-39, 130 N.E. 161, 164.)" Id., paragraph one of the syllabus.

82 Ohio St. 3d at 326. Thus, although both Dye and Eskridge were child rape cases, the court did not limit the relevance of relative size and strength to cases involving children.

Coming to the Second District's decision, Petitioner reads it as "reject[ing] the trial court's determination that physical force had compelled Weckesser's submission." (Reply, ECF No. 18, PageID 1969). To reach that conclusion, Hartman relies on the Second District's statement that "the trial court did not find that Hartman used physical constraint or any form of violence that caused physical harm during the sexual encounter. The trial court did not find that Hartman constrained the victim in any way or that the victim exhibited physical resistance to Hartman's advances." Hartman, 2016-Ohio-2883 at ¶28. With respect, that is not a rejection of Judge Tucker's finding of use of force or threats of force. "Force" is not necessarily violence. Weckesser did not suffer any physical harm with the exception of the bruising from rough kissing

on her neck. Rather, as Judge Tucker found, she submitted for fear that she would be physically harmed. There was in fact no evidence of physical constraint except for Hartman's lying on top of Weckesser at one point in time. Nor was there evidence of physical resistance on Weckesser's part, but lack of physical resistance does not equate to consent. Attempting to drive a logical wedge between the trial court's decision and that of the court of appeals, Hartman argues the Second District's decision was based only on threats of force (Reply, ECF No. 18 PageID 1970):

> [B]oth the defendant's physique -- he was bigger and stronger than his victim -- and his conduct of pushing the victim on the bed, removing her clothes, and pulling her into the shower, was evidence from which a reasonable finder of fact could find that he purposely acted in a manner that induced fear in the victim, compelling her to submit to his sexual conduct, against her will.

Id. at ¶32 (emphasis added). Never finding an actual threat of force, the court of appeals said that "a threat of force" could be found in the combination of Hartman's physique and actions.

(ECF No. 18, PageID 1970, emphasis in Reply.) Thus, with one stroke Hartman discounts the findings of actual force -- pushing the victim on the bed, removing her clothes, and pulling her into the shower – and faults the court of appeals for not

finding an "actual" threat, by which Hartman presumably means a verbal threat. In determining whether a gunman has threatened a victim with a gun, we do not demand evidence that the gunman said, "This is a gun. If I continue pointing it at you and pull this trigger, you will die."

Hartman extends his dissection of findings approach to further findings of the court of appeals. Noting the Second District's findings about Hartman's physique, he argues:

> [T]he defendant's physique is not a circumstance from which any aspect of a culpable mental state can be inferred any more than one could infer intent from the color of eyes, skin, or hair. Physique is a physical fact. It simply does not indicate or legitimately allow any inference about Hartman's state of mind/purpose.

(Reply, ECF No. 18, PageID 1971.) Of course, physique alone is insufficient for finding mens rea. But the court of appeals did not rely on physique alone. Instead it found that this particular individual, who was in good physical condition but was drunk and substantially outweighed his victim, pushed her onto a bed and inserted his hand in her pants, had the purpose of compelling her to submit to sex.

Hartman discounts his pushing Weckesser onto the bed by saying she continued to kiss him after they were on the bed, claiming the kissing was consensual (Reply, ECF No. 18, PageID 1972). Even

assuming that sexual contact – kissing – that occurs after force is used must be construed as consensual, Weckesser expressly testified that she did not consent willingly to either the subsequent breast manipulation or digital or penile penetration.

Hartman next attacks the Second District's finding of mens rea.

> Purposely acting in a manner that induced fear in Weckesser . . . is not proof of a threat of force used to compel submission. The statutory purpose required to be proved is the purpose to compel submission by use of a threat of force. (R.C. 2907.02(A)(2): "purposely compels the other person to submit by force or threat of force.") Purposely acting in a manner that caused fear does not meet this requirement. A person can purposely act in a manner that inadvertently causes fear. A person can purposely act in a manner that causes fear without intending to compel submission. The court of appeals' conception of the purposeful conduct required to commit rape eliminates the requirement that the purpose must be to compel submission against the will of the victim. Jackson, 443 U.S. at 324 n. 16. No reasonable fact finder could find the culpable mental state element of purposely compelling submission on the basis identified by the court of appeals or on the evidence presented at trial.

(Reply, ECF No. 18, PageID 1974.) The facts as proved at trial are that Hartman had a lot to drink. It is reasonable to infer from that fact that his inhibitions were lowered; most people's are. Hartman was substantially bigger than Weckesser from which can reasonably be inferred that he was capable of acting forcibly on her. He did act forcibly on her – pushing her on the bed, pulling her into the shower. He wanted to have sex with her by his own admission. The forcible acts were related to possible sex – he did not show he was strong by ripping up telephone books. Instead the forcible acts found both by the trial and appellate courts involved intentional contact between his body and hers. Given those facts, there is nothing irrational about inferring a purpose to get her to go to bed with him. At law, intent must usually be inferred from circumstances. In this case Hartman does not suggest a different intent that could reasonably have been inferred from his forcible acts other than to persuade Weckesser to have sex with him. For what other reasons does a drunk twenty-year-old male push a woman with whom he is alone and with whom he wants to have sex onto a bed?

Hartman's counsel proclaim their belief that is actually innocent (Reply, ECF No. 18, PageID 1947). The Magistrate Judge believes that is appropriate, although a prosecutor may not proclaim to a jury his or her belief in a defendant's guilt. If the undersigned had been the trial judge, he might have agreed, which is to say he might have found Hartman credible and Weckesser's testimony worthy

of belief. In the circumstances of contemporary "hookup" culture, young men and women subject themselves to the risks inherent in combining alcohol, hormones, and freedom from parental supervision. Those risks include unintended pregnancy which is often a disaster for both parents and the child; Hartman and Weckesser apparently recognized that risk and guarded against it with contraception. But the other serious risk is that the law now takes nonconsensual sex much more seriously than it did heretofore. Any participant in sexual conduct ought to appreciate the risk that the other participant will convincingly reconstruct the event in a court of law in a way that misallocates responsibility for what happened. Had Judge Tucker believed Hartman's account of what happened, which in itself is not incredible given the circumstances, Weckesser would now be branded as a liar who refused to take responsibility for her bad choices.[6]

But habeas corpus courts do not remake credibility determinations already made at trial and on state court appeal. Because there was evidence which, when construed most favorably to the prosecution, was sufficient to prove Hartman guilty beyond a reasonable doubt, and the state appellate court's decision was neither an unreasonable application of federal law as determined by the Supreme Court, nor an unreasonable determination of the facts, 28

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[6] She would not, however, have been convicted of perjury and spent time in prison as a result. Despite its everyday occurrence in courts, perjury is rarely prosecuted.

U.S.C. § 2254(d), Hartman's first ground for relief should be denied on the merits.

Ground Two: Unconstitutional Retroactive Application of New Case Authority

In his Second Ground for Relief, Petitioner claims his "Due Process rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution were violated when the state appellate court affirmed his convictions by retroactively applying new constructions of the elements of rape." (Reply, ECF No. 18, PageID 1981.)

The Return of Writ interprets Ground Two as raising only a state law question: did the Second District properly interpret Ohio rape law? But that is not the claim Petitioner raises. Instead he claims the Second District fashioned a new definition of the elements of rape and then applied it retroactively to Petitioner's conduct in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments.

The Second District certainly did not think it was creating new interpretations of the rape statute's elements and the Magistrate Judge's review of its decision in analyzing the First Ground for Relief did not reveal any such new law. To summarize, the force necessary to prove rape must be more than the force inherent in the sexual conduct at issue. The force element can be proved by showing actual physical force or the threat of such force. Regardless of how the force is proved,

the State must prove the force or threat was done to overcome the will of the victim and it must be shown to have been effective, to actually have caused the victim to submit. Petitioner keeps insisting that the state of mind of the victim is irrelevant, but for the reasons given with respect to Ground One, the Magistrate Judge disagrees.

Petitioner is correct that a change in case law can be sufficiently extreme that its application to past conduct violates the Due Process Clause. In Bouie v. City of Columbia, 378 U.S. 347 (1964) the Supreme Court struck down as unconstitutional a new judicial construction of a trespass statute which applied it to persons who failed to leave a store after notice, as opposed to the prior construction, in which it applied only to those who received notice prior to entry. In Bouie, the South Carolina Supreme Court had, by a new interpretation of the trespass statute which it applied retrospectively, made criminal conduct which was innocent when it was done: remaining in a place of public accommodation after being asked to leave when one had had no notice before entering the store that one was unwanted. That is the most radically unfair sort of retrospective state action: criminalizing primary conduct when it is too late for the subject to conform his conduct to the prohibition.

However, in Rogers v. Tennessee, 532 U.S. 451 (2001), the Court distinguished Bouie and held that the Due Process Clause does not incorporate to state judicial decisionmaking all the restrictions imposed on state legislatures by the Ex Post Facto Clause. In Rogers the Tennessee Supreme Court, as

an act of common-law lawmaking, (1) abolished the common-law rule that the death of an assault victim within a year and a day after the assault is a prerequisite to a homicide prosecution and (2) applied the abolition to uphold the murder conviction in that case where death occurred fifteen months after the assault. The United States Supreme Court upheld the conviction, holding that the retroactive abolition of the year-and-a-day rule did not violate Rogers' due process rights. In Rogers, the Court described the situations to which it had applied Bouie:

> Those decisions instead have uniformly viewed Bouie as restricted to its traditional due process roots. In doing so, they have applied Bouie's check on retroactive judicial decisionmaking not by reference to the ex post facto categories set out in Calder [v. Bull, 3 Dall. 386, 1 L. Ed. 648 (1798)], but, rather, in accordance with the more basic and general principle of fair warning that Bouie so clearly articulated. See, e.g., United States v. Lanier, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) ("Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope"); Marks v. United States, 430 U.S. at 191-192 (Due process protects against judicial infringement of the "right to fair

> warning" that certain conduct will give rise to criminal penalties); Rose v. Locke, 423 U.S. 48, 53, 96 S.Ct. 243, 46 L.Ed.2d 185, (1975) (per curiam) (upholding defendant's conviction under statute prohibiting "crimes against nature" because, unlike in Bouie, the defendant "[could] make no claim that [the statute] afforded no notice that his conduct might be within its scope"); Douglas v. Buder, 412 U.S. 430, 432, 93 S.Ct. 2199, 37 L.Ed.2d 52 (1973) (per curiam) (trial court's construction of the term "arrest" as including a traffic citation, and application of that construction to defendant to revoke his probation, was unforeseeable and thus violated due process); Rabe v. Washington, 405 U.S. 313, 316, 2 S.Ct. 993, 31 L.Ed.2d 258, 9 (1972) (per curiam) (reversing conviction under state obscenity law because it did "not give fair notice" that the location of the allegedly obscene exhibition was a vital element of the offense).

532 U.S. at 460.

In Metrish v. Lancaster, 569 U.S. 351 (2013), the Supreme Court held it was not an unreasonable application of Bouie and Rogers to retroactively apply the Michigan Supreme Court's abolition of the Michigan diminished capacity defense on a re-trial, although it had been available on the first trial.

To prove the Second District changed the law, Hartman cherry-picks phrases from its decision. He claims that the court changed the purposely element to mean "purposely induced fear in the victim." (Reply, ECF No. 18, PageID 1985) Read in the context of the facts of this case and the decision as a whole, the Second District applied the previously established meaning of the statute: a defendant must by means of force (actual physical force) have compelled the victim to submit sexually, not just to have been afraid in some inchoate fashion.

Petitioner's Second Ground for Relief is without merit.

Ground Three: Constitutionally Insufficient Indictment

In his Third Ground for Relief, Petitioner asserts his rights under the Fifth and Fourteenth Amendments of the United States Constitution were violated when he was tried on an indictment that is constitutionally insufficient because it failed to ensure that the trial proceeded on the basis of the Grand Jury's findings, failed to give notice of the charges, and failed and continues to fail to shield him from subsequent prosecution for the same offenses (Reply, ECF No. 18, PageID 1986-2001).

Respondent asserts Ground Three is procedurally defaulted by Hartman's failure to raise it in the trial court as required by Ohio R. Crim P. 12(C)(2)(Return, ECF No. 6, PageID 1127).

The procedural default doctrine in habeas corpus is described by the Supreme Court as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991); see also Simpson v. Jones, 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional rights claim he could not raise in state court because of procedural default. Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107, 110 (1982). "Absent cause and prejudice, 'a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review.'" Boyle v. Million, 201 F.3d 711, 716 (6th Cir. 2000), quoting Gravley v. Mills, 87 F.3d 779, 784-85 (6th Cir. 1996); Murray v. Carrier, 477 U.S. 478, 485 (1986); Engle,

456 U.S. at 110; Wainwright, 433 U.S. at 87.

> [A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule. E.g., Beard v. Kindler, 558 U.S. 53, 55, 130 S.Ct. 612, 175

> L.Ed.2d 417 (2009). This is an important "corollary" to the exhaustion requirement. Dretke v. Haley, 541 U.S. 386, 392, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004). "Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address" the merits of "those claims in the first instance." Coleman [v. Thompson], 501 U.S. [722,] 731-732, 111 S.Ct. 2546, 115 L.Ed.2d 640 [(1991)]. The procedural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine. See McCleskey v. Zant, 499 U.S. 467, 493, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

Davila v. Davis, 137 S.Ct. 2058, 2064 (2017).

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. Barton v. Warden, S. Ohio Corr. Facility, 786 F.3d 450, 464 (6th Cir. 2015), Guilmette v. Howes, 624 F.3d 286, 290 (6th Cir. 2010)(en banc); Eley v. Bagley, 604 F.3d 958, 965 (6th Cir. 2010); Reynolds v. Berry, 146 F.3d 345, 347-48 (6th Cir. 1998), citing Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986); accord Lott

v. Coyle, 261 F.3d 594, 601-02 (6th Cir. 2001); Jacobs v. Mohr, 265 F.3d 407, 417 (6th Cir. 2001).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing County Court of Ulster County v. Allen, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
>
> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under Sykes that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986); accord, Hartman v. Bagley, 492 F.3d 347, 357 (6th Cir. 2007), quoting Monzo v. Edwards, 281 F.3d 568, 576 (6th Cir. 2002). A habeas petitioner can overcome a procedural default by showing cause for the default and prejudice from the asserted error. Atkins v. Holloway, 792 F.3d 654, 657 (6th Cir. 2015).

Hartman asserts that no procedural default exists or, alternatively, that it was ineffective assistance of trial counsel to fail to raise this issue at trial and this ineffective assistance excuses any procedural default (Reply, ECF No. 18, PageID 1986). Hartman asserts he raised this claim as his Eleventh Assignment of Error on direct appeal. Id. The Second District decided this assignment as follows:

> [*P63] For his Eleventh Assignment of Error, Hartman asserts:
>
> THE INDICTMENT IS CONSTITUTIONALLY INSUFFICIENT
>
> [*P64] For each of the three charges of rape, the indictment states:
>
> > Mark Hartman, on or about December 31, 2013 in the County of Montgomery, aforesaid and the State of Ohio, did engage in sexual conduct with another, by purposely compelling the other person to submit by force or threat of

> force; contrary to the form of the statute (in violation of Section 2907.02(A)(2) of the Ohio Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

[*P65] The language of the indictment charging Hartman with three counts of Rape does contain all the elements of the Rape statute, R.C. 2907.02(A)(2). The Supreme Court of Ohio has held that " [a]n indictment meets constitutional requirements if it 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" State v. Childs, 88 Ohio St.3d 558, 565, 2000 Ohio 425, 728 N.E.2d 379 (2000), quoting Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). In Childs, the Court recognized that an indictment is generally acceptable if citing the actual language of the statute, unless it inadequately notifies the defendant of the charge and the severity of the penalty. More recently, in State v. Jackson, 134 Ohio St.3d 184, 2012-Ohio-5561, 980 N.E.2d 1032, the Supreme Court of Ohio confirmed this holding and found that a charge for aggravated trafficking was sufficient, without listing the specific drug involved, as long as the indictment identified the statutory schedule, I through V, in which the drug was listed as it made a difference to the severity of the

penalty. Id. at P 21. Hartman alleges that the indictment is insufficient because it does not identify the name of the victim, and does not identify the nature of the sexual conduct for each of the three charges. Hartman argues that without these specifics, the indictment fails to adequately notify him of the charges against him, and subjects him to the possibility of additional charges, which would impair his protection from a potential Double Jeopardy violation.

[*P66] The Supreme Court of Ohio has held that when an objection to an indictment is not raised prior to trial as required by Crim. R. 12(C)(2), it is waived, unless it constitutes plain error. Skatzes, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, P 26, citing State v. Frazier, 73 Ohio St.3d 323, 332, 1995 Ohio 235, 652 N.E.2d 1000 (1995). According to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error is not found unless it can be concluded that but for the error, the outcome of the trial would have been different. State v. Waddell, 75 Ohio St.3d 163, 166, 1996 Ohio 100, 661 N.E. 2d 1043 (1996). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." State v. Haney, 12th Dist. Clermont No. CA2005-07-068, 2006-Ohio-3899, P 50, quoting State v. Long, 53

Ohio St.2d 91, 372 N.E. 2d 804 (1978), paragraph three of the syllabus.

[*P67] As we concluded above, since the name of the victim was undisputed, Hartman was not harmed by the failure to identify the name of the victim in the indictment. We have held that the indictment in a rape case with multiple counts "was sufficient because it paralleled the language of the statutes, including every element of each charge. Because the nature of the sexual acts had no bearing on the identity or severity of the offenses, the specific acts were not essential elements of the crimes and therefore were not required to be set forth in the indictment." State v. Shaw, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317, P 20.

[*P68] Although the failure to identify the nature of the sexual conduct, in this case, does not affect the severity of the penalty for Rape, it does raise potential Double Jeopardy concerns. For example, Hartman admitted that he engaged in both oral and anal intercourse with the victim, but the State did not attempt to prosecute either of these potential offenses in the present case. In closing arguments, the State argued that the first count of Rape was supported by evidence of digital penetration, and the second and third counts were supported by evidence of penile penetration. Trial Transcript at 494. However, in the entry overruling the motion for a new trial, the trial court stated that all

> three counts were proven by penile penetration. Under the facts of this case, without identifying the specific sexual conduct in the language of the indictment, the State might consider pursuing a second prosecution for the digital penetration or the oral or anal intercourse. As we concluded in Shaw, supra, the failure of the indictment to notify the defendant of the nature of the sexual conduct upon which each of his convictions were based prevents a retrial for any of the potential offenses that occurred during the same time span covered by the indictment. Id. at P 25. As addressed by the Supreme Court of Ohio in State v. Anderson, 138 Ohio St. 3d 264, 2014-Ohio-542, P 59, 6 N.E. 3d 23, the proper time for raising a Double Jeopardy violation is after a second indictment is issued and a motion to dismiss the indictment is decided. We cannot find that the potential for a future Double Jeopardy problem is grounds for reversal of a conviction that does not involve a current Double Jeopardy violation. In other words, we cannot conclude that but for the defective indictment error, the outcome of this trial would have been different. We conclude that failure to object to the indictment prior to trial, in accordance with Crim. Rule 12, waived this error on appeal. Consequently, Hartman's Eleventh Assignment of Error is overruled.

Hartman, 2016-Ohio-2883.

Hartman argues that because the Second District offered a "reasoned elaboration of the issue under federal law, there has been a merits ruling on the claim." (Reply, ECF No. 18, PageID 1988, relying on Stewart v. Trierweiler, 867 F.3d 633 (6th Cir. 2017).(Sutton, J.)[7] In Stewart, Judge Sutton wrote:

> At the outset, we must referee a dispute about whether AEDPA deference applies to these rulings given that the state court reviewed some of these claims for plain error. Our circuit has not been a paragon of clarity about whether a state court's plain-error ruling amounts to a ruling on the merits under AEDPA. See Leonard v. Warden, Ohio State Penitentiary, 846 F.3d 832, 851 (6th Cir. 2017). In 2009, we held that AEDPA applies to a state court's plain-error analysis if it "conducts any reasoned elaboration of an issue under federal law." Fleming v. Metrish, 556 F.3d 520, 531 (6th Cir. 2009). But in 2014, we said that "plain-error review is not equivalent to adjudication on the merits, which would trigger AEDPA deference." Frazier v. Jenkins, 770 F.3d 485, 496 n.5 (6th Cir. 2014).
>
> Both rulings cannot be right, as they look in opposite directions. Trimble v. Bobby, 804 F.3d 767, 777 (6th Cir. 2015). To resolve this Janus-like dilemma, we look to the oldest decision on point. See United States v. Abboud, 438 F.3d 554, 567 (6th Cir. 2006).

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[7] In the Reply, which is 164 pages long, the name of this case is misspelled as "Steward v. Trierweiler" and the citation is given as 667 F.3d 633 three times at PageID 1987-88.

> That is Fleming. If that weren't enough, our sister circuits sing with one voice on this issue—relying, in part, on our earlier decision. See, e.g., Lee v. Comm'r, Ala. Dep't of Corr., 726 F.3d 1172, 1207-10 (11th Cir. 2013); Rolan v. Coleman, 680 F.3d 311, 319-21 (3d Cir. 2012); Douglas v. Workman, 560 F.3d 1156, 1177-79 (10th Cir. 2009).
>
> Stewart tries to sidestep this conclusion on the ground that Fleming failed to respect earlier circuit decisions. But he misreads the decisions. They stand only for the proposition that a state court's plain-error analysis cannot resurrect an otherwise defaulted claim. Fleming, 556 F.3d at 530.
>
> Confirming this conclusion is Harrington v. Richter. It obligates us to "presume[] that the state court adjudicated the claim on the merits" in ambiguous situations. 562 U.S. 86, 99, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

867 F.3d at 638.

Hartman misreads Stewart. The penultimate paragraph quoted above reaffirms the well-established rule that plain error analysis is an enforcement rather than a waiver of procedural default in the trial court. Wogenstahl v. Mitchell, 668 F.3d 307, 337 (6th Cir. 2012); Jells v. Mitchell, 538 F.3d 478, 511 (6th Cir. 2008); Lundgren v. Mitchell, 440 F.3d 754, 765 (6th Cir. 2006); Awkal v. Mitchell, 613 F.3d 629, 648 (6th Cir. 2010)(en banc); White v. Mitchell, 431 F.3d 517, 525 (6th Cir. 2005); Biros v. Bagley, 422 F.3d 379, 387 (6th Cir. 2005);

Hinkle v. Randle, 271 F.3d 239, 244 (6th Cir. 2001), citing Seymour v. Walker, 224 F.3d 542, 557 (6th Cir. 2000)(plain error review does not constitute a waiver of procedural default); accord, Mason v. Mitchell, 320 F.3d 604, 635 (6th Cir. 2003), quoting Hinkle, supra. However, the opinion of a state court on plain error review is still entitled to AEDPA deference if the federal court reaches the merits despite the procedural default. Fleming v. Metrish, 556 F.3d 520, 532 (6th Cir. 2009); Kittka v. Franks, 539 Fed. Appx. 668, 672 (6th Cir. 2013); Bond v. McQuiggan, 506 Fed. Appx. 493, 498 n. 2 (6th Cir. 2013); Stojetz v. Ishee, 2014 U.S. Dist. LEXIS 137501 *231 (S.D. Ohio Sept. 24, 2014)(Frost, D.J.). Stewart reaffirms the authority of Fleming.

The Second District's decision in this case recognized that Hartman was raising two constitutional claims about the indictment, to wit, that it failed to provide him with adequate notice of the allegations against which he must defend himself and that it failed to provide him with an adequate means of pleading once in jeopardy if he were reindicted for an sexual conduct with Molly Weckesser on December 31, 2013. The appellate court ruled on both of those claims. It found them both waived by failure to raise them under Ohio R. Crim. P. 12(C)(2), but it also provided a merits analysis.

Hartman first attacks the waiver analysis (Reply, ECF No. 18, PageID 1988-93). He asserts, correctly, that the State must satisfy the Maupin test to establish a procedural default. Id. at 1988. He then claims that "Ohio law allows defects in an

indictment to be raised on direct appeal." Id. at PageID 1989, citing State ex rel. Bandarapalli v. Gallagher, 128 Ohio St.3d 314 (2011); State v. Cimpritz, 158 Ohio St. 490 (1953), paragraph six of the syllabus; State v. Childs, 88 Ohio St.3d 194 (2000); and State v. Culp, 32 Ohio App. 2d 39, 46, 288 N.E.2d 308, 314 (1971).

Bandarapalli was a prohibition case brought directly in the Supreme Court of Ohio. The court denied the writ because, it held, "Bandarapalli has adequate remedies in the ordinary course of law by motion to dismiss the indictment and, in the event he is convicted based on the alleged defective indictment, by appeal." Thus, the opinion does not address whether the issue could be raised on appeal if it had not been previously raised by motion to dismiss. In Cimpritz, the court had held that a judgment of conviction based on an indictment which does not charge an offense is void under Ohio law for lack of jurisdiction of the subject matter, and that it may be successfully attacked either on direct appeal to a reviewing court or by a collateral proceedings. However, in Midling v. Perrini, 14 Ohio St. 2d 106 (1968), cited as good law in Bandarapilla, the Ohio Supreme Court held the failure to object to an indictment that does not state an offense must be raised in the trial court and cannot be raised for the first time on appeal because it does not deprive the trial court of subject matter jurisdiction. See also State v. Burkitt, 84 Ohio App. 3d 214 (Ohio App. 2nd Dist. 1993); State v. Cochran, 1995 Ohio App. LEXIS 5809 (Ohio App. 2nd Dist. Dec. 29, 1995).

In Childs the Ohio Supreme Court affirmed a Second District dismissal of an indictment without discussing the issue of waiver by failure to object in the trial court. Culp was decided in 1971 before the Ohio Rules of Criminal Procedure were adopted and cannot stand as authority that Rule 12 is not enforced.

Having reviewed the case law cited by Hartman, the Magistrate Judge concludes that the rule requiring objections to an indictment to be made first in the trial court is "firmly established and regularly followed." Walker v. Martin, 562 U.S. 307, 316 (2011). The Second District also actually relied on the rule in this case.

Hartman next argues that the rule requiring a trial court challenge to an allegedly deficient indictment is not "adequate and independent" as required by Maupin. The Magistrate Judge agrees with Hartman that this is a question of federal law. Cone v. Bell, 556 U.S. 449 (2009), citing Coleman v. Thompson, 501 U.S. 722, 729 (1991), and Lee v. Kemna, 534 U.S. 362, 375 (2002).

"Adequacy" turns on the state interest protected by the rule. Maupin, 785 F.2d at 138, citing Henry v. Mississippi, 379 U.S. 443, 446-48 (1965). States have a very strong interest in the contemporaneous objection rule. Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000), quoting extensively from Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977). It is an adequate and independent state ground. Hinkle v. Randle, 271 F.3d 239, 244 (6th Cir. 2001); Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000), citing Engle v. Isaac, 456 U.S. 107, 124-29 (1982). Ohio R.

Crim. P. 12 serves the same state interests as the contemporaneous objection rule – allowing correction of errors when they first occur and before they infect a verdict. It also protects the State's interest in the finality of criminal judgments. The Magistrate Judge concludes Rule 12(C)(2) is adequate within the meaning of the Maupin test.

Hartman next asserts the rule is not independent of federal law. "Because federal Due Process requires that the accused be informed of the charges, any rule prohibiting review of the denial of such federally required notice is not independent of the federal Due Process requirement. (Reply, ECF No. 18, PageID 1992). However, Hartman provides no analysis of the "independence" criterion and cites no authority for this very broad proposition.

Determination of whether a state procedural ground is independent is a federal question that the federal court itself must decide. Henry v. Mississippi, 379 U. S. 443, 447 (1965); Abie State Bank v. Weaver, 282 U.S. 765, 773 (1931).

> When . . . a state court decision fairly appears to rest on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." Florida v. Powell, 559 U.S. 50, 57 (2009), quoting Michigan v. Long, 463 U.S. 1032 at 1041 (1983).

The Second District's decision on whether Hartman had forfeited[8] his defective indictment claim by not raising it in the trial court is "clearly and expressly" based on the Ohio Rules of Criminal Procedure.

Thus, Respondent has established that Hartman procedurally defaulted his defective indictment claim. Hartman rejoins that he can show excusing cause and prejudice and has done so in explicating his Fourth Ground for Relief (Reply, ECF No. 18, PageID 1993). The reader is referred to the analysis of that Ground, infra.

Even without excusing cause and prejudice, a habeas court can reach the merits of a claim if

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[8] Although Ohio Rule 12 uses the word "waiver," the correct analysis is that the claim was forfeited. The Supreme Court relied on the distinction in *Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012) ("We note here the distinction between defenses that are 'waived' and those that are 'forfeited.' A waived claim or defense is one that a party has knowingly and intelligently relinquished; a forfeited plea is one that a party has merely failed to preserve. *Kontrick v. Ryan*, 540 U.S. 443, 458, n. 13 (2004); *United States v. Olano,* 507 U.S. 725, 733 (1993).).

failure to do so would work a "manifest injustice." To invoke that exception, Hartman relies on his claim that he is actually innocent of the crimes of which he was convicted and reiterates his own trial testimony that Weckesser was a willing participant in the sexual conduct which occurred (Reply, ECF No. 18, PageID 1993-94).

However, to qualify for the manifest injustice/actual innocence "gateway," a habeas petitioner must present new evidence of innocence. In Souter v. Jones, 395 F.3d 577 (6th Cir. 2005), the Sixth Circuit held:

> [I]f a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." Schlup v. Delo, 513 U.S. 298, 316 (1995)." Thus, the threshold inquiry is whether "new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." Id. at 317. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Id. at 327. The Court has noted that "actual innocence means factual innocence, not

> mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623, 140 L.Ed.2d 828, 118 S.Ct. 1604 (1998). "To be credible, such a claim requires 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. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" Id. at 321.

395 F.3d at 590. Hartman presents no new evidence of his innocence and thus does not qualify for the "gateway." His defective indictment claim is therefore procedurally defaulted.

Alternatively, the claim is without merit. When a state court decides on the merits a federal constitutional claim later presented to a federal habeas court, the federal court must defer to the state court decision unless that decision is contrary to or an objectively unreasonable application of clearly established precedent of the United States Supreme Court. 28 U.S.C. § 2254(d)(1); Harrington v. Richter, 562 U.S. 86, 100 (2011); Brown v. Payton, 544 U.S. 133, 140 (2005); Bell v. Cone, 535 U.S. 685, 693-94 (2002); Williams (Terry) v. Taylor, 529 U.S. 362, 379 (2000). Deference is also due under 28 U.S.C. § 2254(d)(2) unless the state court decision was based on an unreasonable determination of the

facts in light of the evidence presented in the State court proceedings.

As noted above, the Second District made a reasoned analysis of both the fair notice and Double Jeopardy branches of Hartman's claim. The Magistrate Judge evaluates those in turn.

Regarding the fair notice requirement, the Second District held an indictment is sufficient if made in the terms of the statute and advised the defendant of the charges against which he must defend. Hartman, 2016-Ohio-2883 at ¶ 65, relying on Childs which in turn relied on Hamling v. United States, 418 U.S. 87 (1974). Hartman had claimed "that the indictment is insufficient because it does not identify the name of the victim, and does not identify the nature of the sexual conduct for each of the three charges. Hartman argues that without these specifics, the indictment fails to adequately notify him of the charges against him." The Second District found that the name of the alleged victim was uncontested and that the indictment was sufficiently specific about the manner of commission of the rapes because rape by oral, anal, or penile penetration all carried the same penalty, relying by analogy on charging trafficking in drugs on different controlled substances schedules as the Supreme Court of Ohio had done in State v. Jackson, 134 Ohio St.3d 184 (2012), and its own precedent in State v. Shaw, 2008-Ohio-1317, P 20 (2nd Dist. 2008).

Hartman argues this decision is an unreasonable application of clearly established federal law as decided by the United States Supreme Court (Reply, ECF No. 18, PageID 1994-97, relying

on, inter alia, Cochran and Sayre v. United States, 157 U.S. 286, 290 (1895); United States v. Simmons, 96 U.S. 360, 362 (1878); United States v. Carll, 105 U.S. 611, 612 (1882); United States v. Hess, 124 U.S. 483, 487 (1888); and United States v. Cruikshank,[9] 92 U.S. 542, 558 (1876)).More contemporary and controlling authority is also cited, to wit, Russell v. United States, 369 U.S. 749 (1962), and Hamling v. United States, 418 U.S. 87 (1974). Because there is recent authority in point, the Magistrate Judge declines to analyze the nineteenth century authority cited since it comes from an era of much more technical pleading rules in general and decisions of the Supreme Court were often on writ of error.

"[T]here is no constitutional right in a state prosecution to a grand jury indictment with particular specificity." Williams v. Haviland, 467 F.3d 527, 534 (6th Cir. 2006), citing Rose v. Mitchell, 443 U.S. 545, 557, n.7 (1979). "Due process mandates only that the indictment provide the defendant with 'fair notice of the charges against him to permit adequate preparation of his defense.'" Williams, supra at 535, quoting Koontz v. Glossa, 731 F.2d 365, 369 (6th Cir. 1984).

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[9] *Cruikshank* arose from the Colfax Massacre of 1873 in which an armed mob of white men stormed a Louisiana courthouse and murdered scores of black men. The Supreme Court found the indictment defective because it did not expressly allege a racial motive. Its citation in Hartman's Reply instances the aphorism that even the devil can quote Scripture to his purposes.

Russell v. United States, 369 U.S. 749 (1962), holds the sufficiency of an indictment is to be measured by the following criteria:

> first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and, secondly, "'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'"

369 U.S. at 763-64. While the right to grand jury indictment has not been extended to the States, the Sixth Circuit has held these criteria are applicable as a matter of due process. Valentine v. Konteh, 395 F.3d 626, 631 (6th Cir. 2005), citing De Vonish v. Keane, 19 F.3d 107, 108 (2nd Cir. 1994); Fawcett v. Bablitch, 962 F.2d 617, 618 (7th Cir. 1992); see also Isaac v. Grider, 211 F.3d 1269 (6th Cir. 2000).

The Second District's decision relied on Childs which in turned relied on Hamling which in turn recited the requirements from Russell. Thus, it is fairly read as having decided the federal issues presented here. Harrington v. Richter, 562 U.S. 86, 103 (2011). The Magistrate Judge is not persuaded that the Second District's decision was an unreasonable application of Russell or Hamling. The indictment stated the elements of the offenses in the language of the statute and gave Hartman notice of the date these offenses allegedly occurred and the potential severity of the punishment. This is not a

case like Valentine where the offenses allegedly occurred over an extended period of time.

The Second District recognized that the failure of the indictment to specify which sexual conduct was alleged to be at issue could potentially present a Double Jeopardy problem because Hartman had admitted to digital, oral, and anal penetration, albeit claiming they were consensual, and his conviction based on three instances of penile/vaginal penetration could in theory leave him open to prosecution for the other conduct. Hartman, 2018-Ohio-2883 at ¶ 68. The Double Jeopardy problem was only potential, however, because binding Ohio precedent would prohibit conviction for such conduct. Id. Moreover, no Double Jeopardy claim would be ripe until and unless the State reindicted Hartman. Id. Ohio courts consider a denial of a motion to dismiss on double jeopardy grounds to be a final appealable order, State v. Anderson, 1138 Ohio St.3d 264, 274-75 (2014), and as such would be immediately appealable in the state court and, if affirmed, subject to federal habeas corpus review.

Hartman analogizes his case to Valentine. There the defendant had been convicted on twenty "carbon-copy" rape counts and twenty such felonious sexual penetration counts and sentenced to forty consecutive life sentences. The District Court granted habeas relief on all forty counts on grounds the indictment was not definite enough. While the Sixth Circuit affirmed relief on thirty-eight of the counts, it allowed to stand life sentences on one count of each crime where the time period alleged

was "March 1, 1995, to January 1, 1996" and the act alleged was digital penetration of the anus or the vagina. The testimony at trial was not of digital penetration, but of forced fellatio and anal intercourse. Valentine does not support relief in this case.

The Magistrate Judge concludes Hartman's Third Ground for Relief is barred by his procedural default in presenting it to the Ohio courts and alternatively on the merits. It should therefore be dismissed.

Ground Four: Ineffective Assistance of Trial Counsel: Failure to Move to Dismiss Indictment

In his Fourth Ground for Relief, Hartman claims he received ineffective assistance of trial counsel when his trial attorney failed to move to dismiss the defective indictment.

The governing standard for ineffective assistance of counsel is found in Strickland v. Washington, 466 U.S. 668 (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 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.

466 U.S. at 687. In other words, to establish ineffective assistance, a defendant must show both deficient performance and prejudice. Berghuis v. Thompkins, 560 U.S. 370, 389 (2010), citing Knowles v. Mirzayance, 556 U.S.111 (2009).

With respect to the first prong of the Strickland test, the Supreme Court has commanded:

> Judicial scrutiny of counsel's performance must be highly deferential A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, the defendant must

> overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

466 U.S. at 689.

As to the second prong, the Supreme Court held:

> 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. A reasonable probability is a probability sufficient to overcome confidence in the outcome.

466 U.S. at 694. See also Darden v. Wainwright, 477 U.S. 168, 184 (1986), citing Strickland, supra.; Wong v. Money, 142 F.3d 313, 319 (6th Cir. 1998), citing Strickland, supra; Blackburn v. Foltz, 828 F.2d 1177, 1180 (6th Cir. 1987), quoting Strickland, 466 U.S. at 687. "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 v. Richter, 562 U.S. 86, 111-12 (2011).

On direct appeal, Hartman alleged ineffective assistance of trial counsel in Assignments of Error IV, V, VI, VII, VIII, and IX. The claim brought forward in Ground Four was Assignment V which Second District decided as follows:

> [*P47] We also conclude that Hartman was not denied the assistance of effective counsel when defense counsel failed to file a motion to dismiss the indictment. The indictment charging Hartman with three counts of Rape did contain all the elements of the offenses set forth in the Rape statute, R.C. 2907.02(A)(2). Although the indictment did not include the name of the victim and the nature of the sexual conduct, the name of the alleged victim was never in question, and the nature of the sexual conduct would have been available to defense counsel by moving for a bill of particulars.

Hartman, 2016-Ohio-2883. The court had previously acknowledged that Strickland provided the governing standard. Id. at ¶ 45.

Because the indictment was not defective in the ways alleged, as both the Second District and the Magistrate Judge have found, it was not ineffective assistance of trial counsel to fail to raise the claim by motion to dismiss. Although this failure defaulted consideration of the claim on the merits on direct appeal and here, Hartman received that consideration in the alternative and was not prejudiced by failure to file a motion to dismiss. The Second District's decision on Assignment of Error V is not an objectively unreasonable application of Strickland, so Ground Four should be dismissed.

Ground Five: Ineffective Assistance of Trial Counsel: Failure to Move for a Bill of Particulars

In his Fifth Ground for Relief, Hartman asserted he received ineffective assistance of trial counsel when his trial attorney failed to move for a bill of particulars. As with Ground Four, Respondent defends this claim on the merits, asserting the Second District's decision on this claim is entitled to deference under AEDPA (Return of Writ, ECF No. 6, PageID 1164 et seq.).

Hartman presented this claim as his Sixth Assignment of Error on direct appeal and the Second District decided it as follows:

> While it may be argued, again from hindsight, that defense counsel should have moved for a bill of particulars, Hartman has not established that he was prejudiced by counsel's failure to do so. In his written statement, and in his trial testimony, Hartman admitted engaging in a sexual encounter that included digital penetration, vaginal, anal and oral intercourse with M.W., so disputing that sexual conduct occurred was not part of his defense. To establish that he was prejudiced, Hartman would need to establish that but for counsel's failure to move for a bill of particulars, there is a reasonable probability that the outcome of the proceeding would have been different. As discussed above, the guilty verdicts in this case resulted from the trier of fact's decision to find

> the victim's testimony to be more credible. Under these circumstances, we conclude that the details provided by a bill of particulars would not have resulted in a reasonable probability of a different outcome.

Hartman, 2016-Ohio-2883 at ¶ 47.

The standard for deciding this claim, as with Ground Four, is provided by Strickland. The Second District did not discuss the performance prong at all. From this Hartman infers that "[i]t is clear that the Second District Court of Appeals found deficient performance in counsel's failure to move for a bill of particulars, thus satisfying the first prong of Strickland." (Reply, ECF No. 18, PageID 2011). The Magistrate Judge declines to infer such a "clear" finding from silence. The Supreme Court has sanctioned deciding a Strickland claim by deciding the prejudice prong alone. Strickland, 466 U.S. at 697.

Counsel's performance is measured by "prevailing professional norms" at the time of the alleged errors. Strickland, supra, at 690; Maryland v. Kulbicki, 577 U.S. , 36 S.Ct. 2, 4 (2015); Rickman v. Bell, 131 F.3d 1150, 1154 (6th Cir. 1997). As evidence of what those norms are, Hartman quotes ABA Standards for the Defense Function 4-3.6 and 4-4.1, but neither mentions requesting a bill of particulars. Nor does he cite any other authority holding that making such a request is mandatory practice in a case such as this. In a case like Valentine a bill of particulars would have been necessary to narrow dates, times, and places. But

Hartman knew what sexual conduct he had engaged in with Molly Weckesser, the only date when it occurred, the place where it occurred, who else might have been a witness, and so forth. As the Second District emphasized, this was a credibility contest and Hartman's decision, with the advice of counsel, looks even in hindsight to the Magistrate Judge as a good way to heighten Hartman's perceived credibility. While this would not have precluded also requesting a bill of particulars, the Second District's conclusion that Hartman was not prejudiced by the omission appears quite reasonable.

Hartman's Fifth Ground for Relief should therefore be dismissed.

Ground Six: Ineffective Assistance of Trial counsel: Inept Cross-Examination of the Victim

In his Sixth Ground for Relief, Hartman alleges he received ineffective assistance of trial counsel in the manner in which trial counsel cross-examined Molly Weckesser in that "counsel introduced evidence on elements of the offense that the state had failed to prove and sought and received inadmissible hearsay that bolstered the State's case all to the prejudice of Hartman."

Respondent defends this Ground on the merits, urging deference to the Second District's decision (Return, ECF No. 6, PageID 1166). Hartman raised this claim as his Seventh Assignment of Error on direct appeal and the Second District decided it as follows:

[*P48] We agree with Hartman's assertion that defense counsel, on cross-examination of the victim, brought up factual matters not presented during the direct examination of the victim that may have helped the State prove the element of force. Specifically, the record reveals that defense counsel asked the victim to confirm that Hartman was "restraining" her, Trial Transcript at 74-75, that Hartman pinned her arms down, Trial Transcript at 75-76, that Hartman held his forearm across her chest, Hartman grabbed her wrists, grabbed her arm, and "was doing that forcefully," Trial Transcript at 80-81. We have held that "trial counsel's decision to cross-examine a witness and the extent of such cross-examination are tactical matters." State v. Russell, 2d Dist. Montgomery No. 21458, 2007-Ohio-137, P 55. "A reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy." State v. Conley, 2015-Ohio-2553, P 56, 43 N.E.3d 775 (2d Dist.), citing State v. Smith, 17 Ohio St.3d 98, 17 Ohio B. 219, 477 N.E.2d 1128 (1985). "Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available." Id., citing State v. Cook, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992). Because it was at least arguable that the State had presented sufficient evidence of force relating to at least one of the Rape

counts — the last one occurring on the bed — trial counsel could reasonably have concluded that it would not be safe to eschew cross-examination on the element of force.

[*P49] It appears that the strategy of defense counsel asking the victim about facts relevant to the issue of force was an attempt to attack her credibility based on different versions of the events she provided to the sexual assault nurse, to the detective, and during direct examination at trial. In a case that rests entirely on the credibility of the witnesses, a strategic choice to conduct cross-examination of the victim on factual issues relating to elements of the offense is not automatically ineffective assistance of counsel. In the case before us, it was a valid defense strategy to attack the credibility of the victim through the use of prior inconsistent statements, a well-established trial strategy. See Evid. R. 613. We conclude that Hartman was not denied the effective assistance of counsel when reasonable trial strategy was utilized to challenge the victim's credibility through a cross-examination technique of raising inconsistent statements.

[*P50] Hartman also argues that his counsel was ineffective based on his failure to object to inadmissible hearsay from the testimony of the victim's friend, Courtney, the sexual assault nurse, and the detective who interviewed the victim at the hospital. With respect to the victim's friend, Courtney,

Hartman claims that his counsel should have objected to inadmissible testimony regarding the character of the victim, including her demeanor immediately after the incident, and to specific statements made by the victim the following morning. While opinions elicited to prove that a victim is being truthful are generally inadmissible, a distinction has been made for testimony "which is additional support for the truth of the facts testified to by the [victim], or which assists the fact finder in assessing the [victim's] veracity." State v. Sedgmer, 7th Dist. Harrison No. 00 522 CA, 2002-Ohio-1527, P 23, citing State v. Stowers, 81 Ohio St. 3d 260, 1998 Ohio 632, 690 N.E. 2d 881 (1998). In the case before us, defense counsel did not err by failing to object to testimony that was admissible to assist the trier-of-fact in assessing the victim's veracity.

[*P51] With respect to the sexual assault nurse, Hartman argues that counsel's failure to object to the nurse's inadmissible hearsay was prejudicial. The hospital's designated sexual assault nurse did testify as to statements made by the victim, after the victim had been examined by an ER doctor, so that at the time of the interview a medical diagnosis had already been completed. The nurse testified that her examination of the victim was to look for injury that could be consistent with force. Trial Transcript at 177-178. In response to the victim's statements, the sexual assault nurse took samples of the victim's DNA in order to complete a rape kit,

which was to assist law enforcement, not for medical diagnosis. Ohio licensing law limits a registered nurse's role to assessing the patient for the purpose of providing nursing care, and a nursing diagnosis is limited to "identification of a patient's needs or problems which are amenable to nursing intervention." R.C. 4723.01; O.A.C. 4723-4- 01. The victim's statements to a nurse about the cause and origin of the injury is inadmissible hearsay, unless "the inception or general character of the cause of external source thereof is reasonably pertinent to diagnosis or treatment." Evid. R. 803(4). The only statements made to a nurse by a victim that are admissible under Evid. R. 803(4) are statements made for the purpose of nursing diagnosis or treatment. Therefore, a nurse's testimony concerning statements made by a rape victim, recorded by the nurse for the purpose of assisting a criminal investigation, and not for nursing treatment or diagnosis, is inadmissible hearsay.

[*P52] In the case before us, the nurse did not testify that the victim had any injuries requiring nursing treatment, or that she provided treatment. Even though defense counsel failed to object to the nurse's testimony or the admission of the nurse's report, Ex. 20, we conclude that this was not sufficiently prejudicial to have affected the outcome of the trial. The verdicts rested on

the credibility of the victim, and no part of the nurse's testimony was essential to the trier of fact's finding that all elements of the offense of Rape had been established through the victim's testimony. Therefore, we conclude that Hartman was not denied effective assistance of counsel by counsel's failure to object to the nurse's testimony.

[*P53] Hartman also argues that his counsel was ineffective by having failed to object to the hearsay evidence admitted through the testimony of the detective. The State concedes that it was hearsay when the detective testified regarding the statements made during his interview of the victim. The State does not argue that these statements were admissible through any exception to the hearsay rule, such as an excited utterance allowed by Evid. R. 803(2), or a present-sense impression under Evid. R. 803(1). The only question under this assignment of error is whether the admission of this hearsay was prejudicial. This question must be viewed in the same manner discussed above regarding the defense strategy to cross-examine the victim regarding prior inconsistent statements, which included the statements she made to the detective. As we have already concluded, it was a reasonable defense strategy to allow the admission of the victim's various statements of the incident in order to challenge the victim's credibility by pointing out inconsistencies in these pre-trial statements with her testimony at trial. We

> conclude that Hartman was not denied effective assistance of counsel as a result of counsel's strategic decision not to object to the detective's testimony in order to allow the admission of inconsistent statements by the victim.

Hartman, supra. To summarize, it was Hartman's trial strategy to undermine Weckesser's claim she was forced to have sex with him. To that end, it was not an unreasonable strategy to attempt to elicit potentially inconsistent statements Weckesser might have made shortly after the incident, to her friend, to the nurse, or to the detective.

Hartman argues, however, that failure to make these hearsay objections denied him effective assistance. As with Ground Five, he asserts that the Second District agreed with him that failure to make these hearsay objections was deficient performance (Reply, ECF No. 18, PageID 2017). Not so. Here, the Second District was silent on the deficiency prong and decided this Assignment of Error entirely on the prejudice prong.

To show deficient performance, counsel again quote the ABA Defense Standards, this Standard 4-5.2. Id. That standard does not begin to suggest that trial counsel perform deficiently if they do not object every time hearsay testimony is offered. Instead the Standard provides counsel should consult with the client on "whether and how to conduct cross-examination." Hartman never suggests, however, that his counsel did not consult with him about the scope of cross-examination.

Hartman rightly notes that counsel cannot escape examination of his or her conduct merely by labeling it "strategy." (Reply, ECF No. 18, PageID 2018, citing White v. McAninch, 235 F.3d 988 (6th Cir. 2000.) But there appears to have been an evident reasonable strategy at work here: admit the sexual conduct and claim it was consensual. Hartman and his attorney did not wait for trial to begin to carry out that strategy, but made an early statement to that effect to the police. This "I've got nothing to hide" approach would be consistent with allowing the friend, Courtney, the nurse, and the detective to testify without technically correct hearsay objections.

To the Magistrate Judge the trial context is also important. The case was tried to the bench and was presided over by Judge Michael Tucker. He was admitted to practice in 1980 and had an active trial practice before taking the bench. He would have been well known to defense counsel at the time the decision was made to try the case to the bench. Although the rules of evidence apply alike to jury and bench trials, they were largely developed both at common law and in their codified form to keep juries from hearing material that is unreliable or prejudicial. Those concerns are far less important in a bench trial and indeed inadmissible evidence is presumed to be ignored by a judge in a bench trial. Harris v. Rivera, 454 U.S. 339, 346 (1981)(per curiam); Wickline v. Mitchell, 319 F.3d 813, 823-24 (6th Cir. 2003). Making technically correct hearsay objections could readily be seen as inconsistent with

a defense strategy that proclaims loudly, "I've got nothing to hide."

Hartman's current counsel argue Weckesser did not testify to the use of force. Therefore, they say, "At the close of direct examination, the State had failed to establish the element of force or threat of force. The State having failed to establish an element of the offense, there should have been no cross-examination." (Reply, ECF No. 18, PageID 2020.) Provided Judge Tucker had been prepared to accept their analysis of the evidence at that stage of the case, they would be right.

But in a case where everything turned on whom Judge Tucker believed, it would have been a very risky approach to fail to cross-examine the complaining witness.

Hartman's Sixth Ground for Relief should be dismissed.

Ground Seven: Violation of the Confrontation Clause

In his Seventh Ground for Relief Petitioner alleges his Sixth Amendment Confrontation Clause rights were violated when the trial court admitted the testimony of Mark Squibb in violation of Crawford v. Washington, 541 U.S. 36 (2004) (Petition, ECF No. 1, PageID 39).

Respondent asserts this Ground for Relief is procedurally defaulted because Hartman's trial counsel made no contemporaneous objection (Return, ECF No. 6, PageID 1129).

Noting that the Second District reviewed this claim for plain error but gave a merits analysis,

Hartman again argues this is not enforcement of the contemporaneous objection rule, again misciting Stewart, supra, as Steward v. Trierweiler, 667 F.3d 633). This argument is unpersuasive for the same reasons given respecting Ground Three, supra.

The relevant portions of the Second District's decision are as follows:

> [*¶18] . . . The trial court conducted a hearing on the motion for a new trial, and accepted testimony from Mark Squibb, an employee of the Miami Valley Regional Crime Laboratory, and Detective Norris from the Oakwood Public Safety Department. During trial, Squibb was qualified as an expert in the field of DNA analysis. Squibb explained that the police gather evidence and submit it to the laboratory for testing. Each item or exhibit submitted for testing is given a submission number and a submittal sheet is filled out by the requesting agency identifying the item and the type of testing requested. Once submitted it is retained in a property room that is only accessible by individuals in the DNA section. When it is assigned to an analyst, that person will remove it from the evidence room, keep it in their care and custody, perform the testing, and then the item is returned to the law enforcement agency that supplied the item. The DNA lab retains any samples found to contain DNA.

[*P19] Squibb was not the analyst who performed the screening or testing. Squibb conducted a technical review of the analyst's work, and testified from the contents of analyst's report. He did not inspect the comforter or conduct any part of the extraction or testing. At the post-trial hearing, Squibb testified that part of his review process was to review the case notes of the lab technician, but these notes had not been requested or provided to defense counsel. Emily Draper, who wrote the notes and performed the testing, did not testify at trial or at the post-trial hearing. The testing generated two Laboratory Reports, one on the rape kit and one on the comforter. Squibb's testimony revealed that the lab's approach is to first test the most probative evidence to confirm or deny that sexual activity has taken place, and if that test is positive, the testing on the remaining swabs are deferred until some action is initiated by someone to do further testing. The notes of Emily Draper were interpreted by Squibb to mean that after Hartman's DNA was matched with swabs from M.W.'s vagina, the lab did not test swabs taken from rectal, oral and underwear samples or the comforter. Squibb testified that the police originally requested testing on both the rape kit and the comforter, but once Hartman's DNA was found from the rape kit, they did not test the comforter until a later time after it was requested again. From the notes he reviewed, Squibb did not know who

made that second request, or when it was made. Squibb testified that they had electronic records of the original submittal from the law enforcement agency and the subsequent request that caused the comforter to be tested, but he did not have those records and could not testify to their content. In response to questions by the trial court, Squibb also testified that he had personally added highlighting and other markings to the lab report to assist himself in his testimony.

* * *

[*P80] For his Fourteenth Assignment of Error, Hartman asserts:

THE ADMISSION OF MARK SQUIBB'S TESTIMONY IN VIOLATION OF CRAWFORD V. WASHINGTON, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) REQUIRES REVERSAL

[*P81] Hartman argues that the admission of scientific evidence through a witness who did not conduct the scientific test is structural error. Convictions based on structural errors, which involve a constitutional "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," are subject to automatic reversal, regardless of whether harm or prejudice is shown. Neder v. United States,

527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The State argues that the expert's testimony was not hearsay, because the DNA expert testified to his own actions in performing a peer review of the actual lab technician's report. The State also argues that a confrontation clause violation, if any, was waived when the defense failed to object to the testimony of the DNA expert at trial. The State also argues that any error was harmless. As discussed below, we conclude that our review of this assignment of error must be based on whether the error was waived or constitutes plain error (emphasis added).

[*P82] For purposes of the confrontation clause, it has been held that the contents of a laboratory report is testimonial in nature when its conclusion is prima facie evidence of an element of the offense. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); Bullcoming v. New Mexico, 564 U.S. 647, 663- 664, 131 S.Ct. 2705, 2716, 180 L.Ed.2d 610 (2011). However, the U.S. Supreme Court has also held that expert testimony from a forensic specialist about the findings of a DNA test that was not performed by the witness did not violate the defendant's right to confrontation because the testimony was offered for the purpose of explaining the assumptions on which the expert's opinion relied, and were not offered

for the truth of the assumptions. Williams v. Illinois, [567] U.S. [50], 132 S.Ct. 2221, 183 L.E.2d 89 (2012). See also State v. Maxwell, 139 Ohio St. 3d 12, 2014-Ohio-1019, P 42, 9 N.E.3d 930. In the case before us, Hartman challenges not only the admission of the lab reports, but his inability to cross-examine the witness who actually performed the DNA tests. The record supports that the DNA expert who did testify was unable to fully explain the reasoning for the process used to conduct the testing, which the witness did not conduct. "Fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." Melendez-Diaz v. Massachusetts, 557 U.S. at 325. "[T]he [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Bullcoming v. New Mexico, 564 U.S. at 662.

[*P83] We agree that the record establishes that during trial, defense counsel did not object to the testimony of Squibb, the DNA expert, in place of Draper, the lab analyst who personally conducted the testing and interacted with the persons in law enforcement who requested the tests. We do not agree that counsel's failure to object

automatically constitutes a waiver of his Sixth Amendment right to confrontation. We acknowledge that the Supreme Court of Ohio in State v. Pasqualone, 121 Ohio St. 3d 186, 2009-Ohio-315, 903 N.E. 2d 270, held that confrontation clause rights, like other constitutional rights, can be waived. Although the Court in Pasqualone was addressing the potential error of admitting a laboratory report, without the testimony of the person who prepared the report, the holding in Pasqualone rests entirely on a statutory provision, R.C. 2925.51, that specifically provides that defense counsel statutorily waives the right to insist on the testimony of the lab technician, if the procedure specified by the statute is not followed. Inapplicable to the case before us, R.C. 2925.51 only applies to testing done on drugs, not DNA samples. The statute applicable to drug testing puts the defense on notice that they have a right and that it is waived if the procedure is not followed, which comports with the legal concept of waiver requiring a voluntary relinquishment of a known right. In re B.N.C., 2d Dist. Montgomery No. 25615, 2013-Ohio-4071, P 49. The U.S. Supreme Court in Melendez-Diaz, supra, commented that state statutes, such as R.C. 2925.51, do not run afoul of the confrontation clause when the effect of the statute is only to establish the procedural timing of when the right must be exercised. In the case before us, the State identified Emily Draper as the witness it

intended to call to introduce the lab report and the DNA analysis. Dkt. #40. The defense had no prior notice that it would waive the right to cross-examine the lab technician if she did not show up for trial. However, by failing to object at trial when the State called Squibb instead of Draper, Hartman waived all but plain error. "Where preserved by objection, review of Confrontation Clause claims is for harmless error. Confrontation Clause claims not preserved by objection are reviewed for plain error." State v. Habo, 11th Dist. Portage No. 2012-P-0056, 2013-Ohio-2142, P 35, citing State v. Scott, 10th Dist. Franklin No. 05AP-1144, 2006-Ohio-4981, P 11, fn. 4.

[*P84] By claiming structural error, Hartman essentially argues that on this record, without the testimony of the analyst, prejudice is presumed. We disagree. The purpose of the testimony of the DNA expert was twofold; first, it proved that Hartman engaged in sexual intercourse with M.W., because his semen was found from a vaginal swab taken from M.W.; and secondly, that DNA testing of the bed comforter proved that there was movement of the two bodies on the comforter, as DNA evidence was found in numerous different spots. Hartman testified at trial, and did not dispute that he had sexual intercourse with M.W., so he was not prejudiced by the admission of the DNA lab report or the testimony that explained the testing process. The evidence involving the comforter was also

not prejudicial, because it was not probative to any element of the charged offenses, and may actually have supported Hartman's defense that the encounter was consensual, based upon a reasonable inference that M.W. was not held down or restrained during the sexual encounter. In closing arguments, Hartman's counsel did suggest that the testimony of the DNA expert be given little weight because, "when swabs were taken from [M.W.]'s mouth, they weren't tested. So, there's aspects of the investigation that appear to be incomplete as well that could have helped us in this path as we look for the truth." Trial Transcript at 520. If Hartman's argument is based on the possibility of evidence that was not provided by the State, that potential error does not constitute a confrontation-clause violation. "The state has no duty to gather exculpatory evidence. Moreover, it is wholly speculative whether further investigation would have uncovered potentially exculpatory evidence." State v. Smith, 2d Dist. Montgomery No. 20247, 2005-Ohio-1374, P 12, citing State v. Farris, 2d Dist. Clark No. 2003 CA 77, 2004-Ohio-5980, P 20. The defendant bears the burden to show that the evidence not produced was materially exculpatory, or that the failure to produce the evidence was based on bad faith, in order to demonstrate a due-process violation. State v. Powell, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, P 74-77. Since Hartman has not raised a due-process argument, the issue of whether the lab

> should have tested the full rape kit to provide potentially exculpatory evidence to the defense is not before us. Hartman has not established that there is a reasonable possibility that had he been able to cross-examine the lab analyst there would have been a great likelihood of a different outcome.
>
> [*P85] Even without the testimony of the DNA analyst, the trier-of-fact had sufficient evidence to support each element of the charged offenses. Hartman has not established that but for a confrontation-clause error, the outcome of the trial would have been different. Accordingly, Hartman's Fourteenth Assignment of Error is overruled.

Hartman, 2016-Ohio-2883.

Forensic evidence gathered regarding this case consisted of a rape kit containing oral, vaginal, and anal swabs taken from Molly Weckesser the day after the sexual encounter and a comforter from the bed on which it happened. DNA extraction and analysis was performed at the Miami Valley Regional Crime Laboratory by Emily Draper who was listed as a trial witness by the State. She did not, however, testify at either the trial or the hearing on the new trial motion. Instead, Mark Squibb, another employee of the Crime Lab, who testified he reviewed Draper's notes and testified as to their contents. While the Second District did not expressly hold that admission of Squibb's testimony violated the Confrontation Clause, it did so implicitly by

proceeding to decide whether the Confrontation Clause claim had been waived[10] by failure to object. The Magistrate Judge agrees with Petitioner that there was a clear violation of the Confrontation Clause in the admission of some or all of the contents of Draper's expert DNA report without her being present for cross-examination. The Respondent does not contest this point.

As can be seen from the highlighted language, the Second District conducted a plain error analysis of Hartman's Confrontation Clause claim. In doing so it was enforcing Ohio's contemporaneous objection rule. Ohio's contemporaneous objection rule — that parties must preserve errors for appeal by calling them to the attention of the trial court at a time when the error could have been avoided or corrected, set forth in State v. Glaros, 170 Ohio St. 471 (1960), paragraph one of the syllabus; see also State v. Mason, 82 Ohio St. 3d 144, 162 (1998) — is an adequate and independent state ground of decision. Wogenstahl v. Mitchell, 668 F.3d 307, 334 (6th Cir. 2012), Keith v. Mitchell, 455 F.3d 662, 673 (6th Cir. 2006); Goodwin v. Johnson, 632 F.3d 301, 315 (6th Cir. 2011); Smith v. Bradshaw, 591 F.3d 517, 522 (6th Cir. 2010); Nields v. Bradshaw, 482 F.3d 442 (6th Cir. 2007); Biros v. Bagley, 422 F.3d 379, 387 (6th Cir. 2005); Mason v. Mitchell, 320 F.3d 604 (6th

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[10] A gain, the distinction between waiver and forfeiture, explained above at note 8, is important here. Hartman never knowingly, intelligently, and voluntarily gave up ("waived") his right to insist on being able to cross-examine Draper. Whether he forfeited that right is a legally different question and the one that is relevant here.

Cir. 2003), citing Hinkle v. Randle, 271 F.3d 239, 244 (6th Cir. 2001); Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000), citing Engle v. Isaac, 456 U.S. 107, 124-29 (1982). See also Seymour v. Walker, 224 F.3d 542, 557 (6th Cir. 2000); Goodwin v. Johnson, 632 F.3d 301, 315 (6th Cir. 2011); Smith v. Bradshaw, 591 F.3d 517, 522 (6th Cir. 2010).

Hartman argues here, as he did before the Second District, that admission of Squibb's testimony was a structural error. Errors of a structural nature cannot be harmless. Arizona v. Fulminante, 499 U.S. 279 (1991). To prove this was a structural error, Petitioner relies on language from Bullcoming, supra, that the State cannot satisfy a Confrontation Clause obligation by providing a substitute witness whose testimony provides "a fair enough opportunity from cross-examination." 564 U.S. at 662. Indeed, once the unconfronted witness's testimony has been presented, "no additional showing of prejudice is required to make the violation complete." Id. at 663. The same language appears in the prior case, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), which Petitioner also cites (Reply, ECF No. 18, PageID 2039). The Magistrate Judge is not persuaded this language amounts to a holding that Confrontation Clause violations amount to structural error.

> The Supreme Court has "found structural error only in a very limited class of cases." Johnson v. United States, 520 U.S. 461, 468 (1997). These structural errors include: total

deprivation of the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963); lack of an impartial trial judge, Tumey v. Ohio, 273 U.S. 510 (1927); unlawful exclusion of grand jurors of the defendant's race, Vasquez v. Hillery, 474 U.S. 254 (1986); denial of the right to self-representation at trial, McKaskle v. Wiggins, 465 U.S. 168 (1984); denial of the right to a public trial, Waller v. Georgia, 467 U.S. 39 (1984); and denial of the right to a jury verdict of guilt beyond a reasonable doubt, Sullivan v. Louisiana, 508 U.S. 275 (1993). In United States v. Cronic, 466 U.S. 648, 659 and n.25 (1984), the Supreme Court added to the list the denial of counsel at a "critical stage" of the criminal proceedings, entitling the defendant to a new trial without a specific showing of prejudice because the error makes "the adversary process itself presumptively unreliable." See also Van v. Jones, 475 F.3d 292, 311-12 (6th Cir.) (holding that a defendant is deprived of counsel at a critical stage, "a per se Sixth Amendment violation [results,] warranting reversal of a conviction, a sentence, or both, as applicable, without analysis for prejudice or harmless error"), cert. denied, 128 S.Ct. 708 (2007); Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000).

Hereford v. Warren, 536 F.3d 523, 529 (6th Cir. 2008)(parallel citations omitted). "Most constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness.

. . . Only the rare type of error – in general, one that 'infect[s] the entire trial process' and 'necessarily render[s] [it] fundamentally unfair' requires automatic reversal." Glebe v. Frost, 574

U.S. 21, 23 (2014)(some internal quotation marks omitted), citing Neder v. United States, 527 U.S. 1, 8 (1999).

The Supreme Court has never found a Confrontation Clause violation to be structural error. In fact, it has applied harmless error analysis to Confrontation Clause claims. Delaware v. Van Arsdall, 475 U.S. 673 (1986). The Sixth Circuit has expressly and recently held that Confrontation Clause violations are subject to harmless-error analysis. Reiner v. Woods, F. 3d , 2020 U.S. App. LEXIS 10838, *10-11 (6th Cir. Apr. 7, 2020), Gover v. Perry, 698 F.3d 295, 302 (6th Cir. 2012), citing Vasquez v. Jones, 496 F.3d 564, 574 (6th Cir. 2007); Jensen v. Romanowski, 590 F.3d 373, 379 (6th Cir. 2009). The Second District held that the Confrontation Clause claim here was to be reviewed for harmlessness. Hartman, 2016-Ohio-2883 at ¶ 83. It then analyzed the DNA evidence for prejudice. Id. at ¶¶ 84-85. In doing so, it applied the same tests required for harmless error analysis by Van Arsdall:

> "The Van Arsdall factors include: (1) "the importance of the witness' testimony in the prosecution's case," (2)

> "whether the testimony was cumulative," (3) "the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points," (4) "the extent of cross-examination otherwise permitted," and (5) "the overall strength of the prosecution's case."

Gover, quoting Van Arsdall, 475 U.S. at 684. Here the DNA evidence from the rape kit was not needed by the prosecution to prove Weckesser and Hartman had sex because he freely admitted it. Indeed, DNA evidence from the comforter could have supported Hartman's theory that the sex was consensual because that evidence placed Weckesser's body at different places on the comforter.

The State defended this Assignment on the ground any error was harmless (Appellee Brief, State Court Record, ECF No. 5, PageID 313-14). Although the Second District used the language of "prejudice" rather than "harmless error," its lack of prejudice findings support the conclusion that the Confrontation Clause error was harmless when reviewed under the standard from Brecht v. Abrahamson, 507 U.S. 619 (1993): constitutional error is harmless if the habeas court is satisfied it did not have a "substantial and injurious effect or influence in determining the . . . verdict," Brecht, 507 U.S at 637-38, quoting and adopting standard from Kotteakos v. United States, 328 U.S. 750, 776 (1946). A federal court may grant habeas relief only if a constitutional violation had a "substantial and

injurious effect or influence in determining the jury's verdict." Williams v. Bauman, 759 F.3d 630, 637 (6th Cir. 2014), quoting Brecht, 507 U.S. at 631. This standard calls for reversal when the reviewing court lacks a "fair assurance" that the outcome of a trial was not affected by evidentiary error. Beck v. Haik, 377 F.3d 624 (6th Cir. 2004). Brecht applies post-AEDPA "whether or not the state appellate court recognized the error and reviewed it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in Chapman v. California, 386 U.S. 18, 24 (1967)." Fry v. Pliler, 551 U.S. 112, 114 (2007)(parallel citations omitted). A federal habeas petitioner "must satisfy Brecht, and if the state court adjudicated his claim on the merits, the Brecht test subsumes the limitations imposed by AEDPA" Davis v. Ayala, 576 U.S. 257, 135 S.Ct. 2187, 2199 (2015), citing Fry v. Pliler, 551 U.S. 112, 119-20 (2007). "The Supreme Court and this court have made clear that 'Brecht is always the test' for evaluating harmless error on collateral review, even where AEDPA applies. Reiner, 2020 U.S. App. LEXIS 10838 at *13-14, quoting Ruelas v. Wolfenbarger, 580 F.3d 403, 411-12 (6th Cir. 2009).

Applying the Brecht standard, the Magistrate Judge concludes the error in admitting Mark Squibb's testimony had no injurious effect on the outcome of the trial. Hartman's relies on Judge Tucker's conclusory statement that he "based the guilty verdicts on the evidence presented at trial." (Reply, ECF No. 18, PageID 2037, quoting Trial Transcript, State Court Record, ECF No. 7-1, PageID 1722-23.) What Judge Tucker actually said was, "Going first to Count I of the indictment, I find,

based upon the evidence presented, the applicable law and my assessment of witness credibility that the State of Ohio proved beyond a reasonable doubt all the essential elements of rape as charged in Count I of the indictment." Id. at 1722. He repeated the same pattern of language with respect to all three counts of the Indictment. Id. at 1723. It completely parallels the language that would appear in a jury verdict if the case had been tried to a jury and tells the reader nothing about the judge's reliance on any particular evidence presented. The Second District's finding that the DNA evidence was essentially immaterial is not an unreasonable determination of the facts based on the evidence presented.

Admission of the DNA evidence through the Squibb testimony violated the Confrontation Clause, but the error was harmless. Hartman's Seventh Ground for Relief should be dismissed.

Ground Eight: Ineffective Assistance of Trial Counsel: Failure to Raise Confrontation Clause Objection

In his Eighth Ground for Relief, Petitioner asserts he received ineffective assistance of trial counsel when his trial attorney did not make a Confrontation Clause objection to the Squibb testimony. Respondent defends this Ground for Relief on the merits, arguing this Court should defer under AEDPA to the Second District's decision of this claim (Return, ECF No. 6, PageID 1160).

The Second District dismissed this claim because it found admission of the DNA evidence was

harmless. It recognized that trial counsel had failed to object, but implicitly held Hartman was not prejudiced thereby. While it reviewed the DNA evidence only for plain error, it did not find that plenary review of this claim would have produced a different result.

Hartman's Reply reiterates his claim that admission of the DNA evidence was a structural error and therefore raising the objection would have preserved for appeal an issue requiring reversal because harmless error analysis would not have been allowed (Reply, ECF No. 18, PageID 2040-45). For the reasons given in discussing the Seventh Ground for Relief, this structural error argument is unpersuasive.

Because admission of the DNA evidence was harmless error, Hartman was not prejudiced by his attorney's failure to object. Therefore, dismissal of this claim by the Second District was not an objectively unreasonable application of Strickland and is entitled to AEDPA deference.

Ground Nine: Ineffective Assistance of Counsel: Failure to Obtain Hartman's Recorded Statement

In his Ninth Ground for Relief, Petitioner asserts he received ineffective assistance of trial counsel when his trial attorney failed to obtain Petitioner's tape recorded statements prior to trial or, if they did not exist, to withdraw and become a witness as to the content of those statements.

Respondent asserts this Ground for Relief is procedurally defaulted by failure to pursue it on direct review by the Supreme Court of Ohio or, in

the alternative, that the Second District's decision is entitled to deference under AEDPA (Return, ECF No. 6, PageID 1161, 1170).

The Second District decided this particular claim of ineffective assistance of trial counsel as follows:

> [*P57] We also conclude that Hartman has not shown prejudice by his counsel's failure to obtain a copy of the video recorded interrogations with the detective from the Oakwood Police Department. Defense counsel was present with Hartman at the time of the interviews, which should have adequately prepared counsel for making strategic plans to cross-examine the detective, and to prepare Hartman for potential cross-examination during his trial testimony. Hartman has not established how discovery of the video recordings would have led to a different outcome at trial.

Hartman, 2016-Ohio-2883. This claim is not among those raised by asserting a proposition of law to the Supreme Court of Ohio (See Memorandum in Support of Jurisdiction, State Court Record, ECF No. 5, PageID 410).

Hartman did raise this claim in his petition for post-conviction relief under Ohio Revised Code § 2953.21:

> **FOURTH GROUND FOR RELIEF:** Mark Hartman was denied the effective assistance of counsel secured to him by Article I,§ 10 of the Ohio Constitution and the Sixth and

> Fourteenth Amendments to the United States Constitution at trial by counsels' failure to secure Mark Hartman's tape recorded statements made to Detective Steve Norris prior to trial and when the tape recorded statements were no longer available[footnote omitted], to remove themselves as defense counsel, because at least Christopher R. Conard then became a witness. As a result of counsels' deficient performance, Mark Hartman was prejudiced.

(Post-Conviction Petition, State Court Record, ECF No. 5, PageID 527.) Judge Tucker dismissed this Ground for Relief on the State's Motion for Summary Judgment because Hartman had not submitted evidentiary materials in support so as to require an evidentiary hearing and, more importantly, the statement by Hartman during the police interview which would have allegedly have shown he admitted to digital penetration of Weckesser before trial was adverted to only in the rebuttal closing argument of the prosecutor and "simply was not a factor in the verdicts which were reached." (Decision, Entry and Order, State Court Record, ECF No. 5, Ex. 25, PageID 807- 809.)

On appeal, the Second District affirmed the grant of summary judgment. State v. Hartman, 2017-Ohio-7933 (Ohio App. 2nd Dist. Sep. 29, 2017)("Hartman II"). As to this particular claim, it held:

> [*P45] It appears undisputed that no recordings exist from the interview with Detective Norris. Thus, there cannot be

> a supportable claim that trial counsel was ineffective for failing to secure something that did not exist. Further, in his motion for a new trial, Hartman raised this issue of the recordings as part of a potential Brady violation by the State. Indeed, the primary evidence Hartman cites in his petition in support of his fourth ground for relief are citations to the transcript from the hearing on his motion for a new trial and letters from his trial counsel that were either presented with his motion for a new trial or reference contentions that were made in his motion for a new trial. In short, Hartman could have raised this particular ineffective assistance of counsel claim in his direct appeal from his conviction and sentence. Therefore, this ground for relief is barred by res judicata. [State v.] Goldwire, [2005-Ohio-5784 (Ohio App. 2nd Dist. Oct. 28, 2005)] at ¶ 11.

Id.

Petitioners challenges this application of Ohio's criminal res judicata doctrine (Reply, ECF No. 18, PageID 2046, et seq.) In doing so, he relies almost exclusively on Ohio case law, so that his implicit argument is that the Second District decided this issue of state law incorrectly. But a federal habeas corpus court cannot review state court decisions on questions of state law. Whereas an appellate court on habeas review decides federal law

questions de novo. . ., the federal reviewing court is generally bound by state court interpretations of state law. Railey v. Webb, 540 F.3d 393, 398 (6th Cir. 2008), citing Bradshaw v. Richey, 546 U.S. 74, 76 (2005) "We have 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." Id., quoting Bradshaw, supra; Maldonado v. Wilson, 416 F.3d 470, 476 (6th Cir. 2005); Vroman v. Brigano, 346 F.3d 598, 603-04 (6th Cir. 2003); Caldwell v. Russell, 181 F.3d 731, 735-36 (6th Cir. 1999); Duffel v. Dutton, 785 F.2d 131, 133 (6th Cir. 1986).

Petitioner relies on the distinction in Ohio law between claims of ineffective assistance of trial counsel which can be properly adjudicated on direct appeal and those which rely on evidence outside[11] the record. Petitioner notes the recognition of that distinction in McGuire v. Warden, 738 F.3d 741, 752 (6th Cir. 2013).[12] But neither McGuire nor any other

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[11] "*Dehors*" the record in law French. Fortunately this is one of the very few law French terms that persist in Ohio law. The Anglo-Saxon "outside" expresses in plain English exactly the same concept.

"*Dehors*" the record in law French. Fortunately this is one of the very few law French terms that persist in Ohio law. The Anglo-Saxon "outside" expresses in plain English exactly the same concept.

[12] *McGuire*, a capital case, arose from a decision of this Court declining to apply the *Martinez/Trevino* exception for procedural default in post-conviction in Ohio. This Court's refusal to do so was upheld by the circuit court, but is no longer

authority cited by Petitioner authorizes this Court to override a state appellate court decision that a particular claim of ineffective assistance of trial counsel could, on the record before that court on both appeals, have been adjudicated on the direct appeal.

To put the matter clearly in terms of the required Maupin analysis, Ohio has a procedural rule that requires ineffective assistance of trial counsel claims which can be raised on direct appeal to be adjudicated in that forum. The Second District expressly enforced that rule here. Ohio's doctrine of res judicata in criminal cases, enunciated in State v. Perry, 10 Ohio St. 2d 175 (1967), is an adequate and independent state ground of decision. Durr v. Mitchell, 487 F.3d 423, 432 (6th Cir. 2007); Buell v. Mitchell, 274 F.3d 337, 349 (6th Cir. 2001); Coleman v. Mitchell, 268 F.3d 417, 427 (6th Cir. 2001); Byrd v. Collins, 209 F.3d 486, 521-22 (6th Cir. 2000); Rust v. Zent, 17 F.3d 155, 160-61 (6th Cir. 1994)(citation omitted); Van Hook v. Anderson, 127 F. Supp. 2d 899, 913 (S.D. Ohio 2001). The Ohio courts have consistently enforced the rule. State v. Cole, 2 Ohio St. 3d 112 (1982); State v. Ishmail, 67 Ohio St. 2d 16 (1981). The rule is on its face independent of federal law. Thus, the Maupin factors are all satisfied in this case.

To excuse this procedural default, Hartman relies again on his claim of actual innocence (Reply, ECF No. 18, PageID 2059). For the reasons given above in analyzing Ground Three, Hartman has not presented new evidence of actual innocence

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good law on that point in light of *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270 (6th Cir. 2019).

sufficient to satisfy the Schlup v. Delo, 513 U.S. 298 (1995) gateway.

Hartman's Ninth Ground for Relief should be dismissed as procedurally defaulted for failure to raise it on direct appeal.

Ground Ten: Ineffective Assistance of Trial Counsel: Comforter Stains

In his Tenth Ground for Relief Petitioner asserts he received ineffective assistance of trial counsel when his trial counsel did not adequately deal with stains on the comforter from the sexual encounter bed. Respondent defends this claim on the same basis as Ground Nine (Return, ECF No. 6, PageID 1170).

Petitioner raised this claim in his Petition for Post-Conviction Relief as his sixth ground for relief:

SIXTH GROUND FOR RELIEF: Mark Hartman was denied the effective assistance of counsel secured to him by Article I, § 10 of the Ohio Constitution and the Sixth and Fourteenth Amendments to the United States Constitution when a diagram of the comforter stains was produced for the first time at trial, and counsel failed to seek a continuance to analyze same and to fully utilize it at Mark Hartman's trial and/or to recall witnesses who had previously testified, all of which was objectively deficient performance. As a result of counsel's deficient performance, Mark Hartman was prejudiced.

(Post-Conviction Petition, State Court Record, ECF No. 5, PageID 544.)

Judge Tucker initially concluded this claim was bared by res judicata because it could have been raised on direct appeal (Decision, State Court Record, ECF No. 5, Ex. 25, PageID 811, relying on Goldwire, supra.). He also concluded that the claim would fail on the merits because Hartman had offered no evidence of what would have been discovered if further analysis had been done or that it would likely have affected the outcome of the trial. Id. at PageID 812.

Petitioner presented this Ground for Relief to the Second District as his Eighth Assignment of Error. The Second District affirmed on the basis of Judge Tucker's res judicata ruling, noting

> [*P57] In support of this ground for relief, Hartman only cited evidence that was submitted to the trial court in support of Hartman's motion for a new trial. The motion for a new trial, along with the affidavit in support of the motion, were part of the record in Hartman's direct appeal from his conviction and sentence. Hartman could have raised this same argument with the same evidence in his direct appeal from his conviction and sentence. Therefore, we agree with the trial court that Hartman's claim in his sixth ground for relief is barred by res judicata. Goldwire at ¶ 11.

Hartman II, 2017-Ohio-7933.

In his Reply Petitioner argues this is a misapplication of Ohio's criminal res judicata

doctrine because counsel could not have been expected to argue his own ineffectiveness on appeal. (Reply, ECF No. 18, PageID 2061, citing State v. Lentz, 70 Ohio St. 3d 527 (1994), which in turn relied on Judge Rice's seminal decision in State v. Carter, 36 Ohio Misc. 170 (Mont. Cty. CP 1973). The same proposition was endorsed by the Supreme Court in Christeson v. Roper, 574 U.S. 373, 378 (2015), citing Restatement (Third) of Law Governing Lawyers § 125 (1998).

Hartman was represented at trial by attorneys Christopher Conard and Sasha Vandegrift Blaine. By the time of the Amended Motion for New Trial, Blaine had been replaced by attorney Jennifer Roberts. But by the time of the direct appeal, Hartman was represented by his present counsel, attorneys Lawrence Greger and S. Adele Shank; they suffered from no conflict of interest regarding the trial representation and indeed made several claims of ineffective assistance of trial counsel on direct appeal. They continued to represent Hartman in filing the Petition for Post-Conviction Relief, but, as the Second District found, submitted no evidence that had not been a part of the record on direct appeal. Present counsel note that Conard's focus as to the comforter in the motion for new trial was on a claim under Brady v. Maryland, 373 U.S. 83 (1963). But that does not negate the Second District's conclusion that all the evidence on this claim presented by present counsel in post-conviction had already been made part of the record before direct appeal.

Counsel argue that evidence outside the record was needed to prove attorney Conard's ineffectiveness (Reply, ECF No. 18, PageID 2063). They state

> The evidence dehors the record includes, but is not limited to, how the diagrams use for cross examination purposes was all but eliminated, what witnesses Conard would have recalled, and how he would have woven the diagram's exculpatory nature into the fabric of his case. Conard swore that the late production prejudiced Hartman's case. Yet, in an effort to dispense with the collateral attack on the judgment, the trial court narrowed the issue presented, mischaracterized it, grasp [sic] for an easy out (res judicata) and foreclosed relief to Hartman postconviction, by erroneously granting the state's motion for summary judgment.

Id. at PageID 2064. The Petition for Post-Conviction Relief is supported by almost eighty pages of exhibits, all of which were outside the direct appeal record (PageID 573-650), yet the Reply provides no record citation to which portions of those exhibits are relied on to show the Second District made an unreasonable determination of facts about what supported the post-conviction petition. In ordering an answer in this case, the Court ordered

> When the record is filed electronically, the Court's CM/ECF filing system will

> affix a unique PageID number to each page of the record, displayed in the upper righthand corner of the page. All papers filed in the case thereafter by either party shall include record references to the PageID number.

(ECF No. 2, PageID 71, emphasis supplied.) This language in the Order for Answer merely reminds the parties of the provisions of S. D. Ohio Civ. R. 7.2(b)(5):

> (5) Pinpoint Citations. Except for Social Security cases, which must comply with S.D. Ohio Civ. R. 8.1(d), all filings in this Court that reference a prior filing must provide pinpoint citations to the PageID number in the prior filing being referenced, along with a brief title and the docket number (ECF No. or Doc. No.) of the document referenced (emphasis in original).

If Petitioner files objections to this Report, he shall comply with that requirement, particularly as to this Ground for Relief.

Petitioner has not shown that the Second District's determination that the evidence relied on to support this claim was already in the record at the time of direct appeal was an unreasonable determination of the facts based on the evidenced of record. On that basis the Second District's decision was an appropriate enforcement of Ohio's res judicata rule. Hartman's claim of excusing actual

innocence is unavailing here as it was with prior Grounds for Relief.

Petition's Tenth Ground for Relief should be dismissed as procedurally defaulted.

Ground Eleven: Ineffective Assistance of Trial Counsel: Waiver of Privilege and Work Product

In his Eleventh Ground for Relief, Petitioner asserts he received ineffective assistance of trial counsel when his trial attorney delivered his statement to the lead detective on the case, given that the statement was "concocted" and its delivery effected a waiver of attorney-client communication privilege and attorney work product protection.

Respondent asserts this Ground for Relief is procedurally defaulted by Hartman's failure to carry it forward from the Second District to the Supreme Court of Ohio on direct review (Return, ECF No. 6, PageID 1170). Hartman responds that it was properly presented in post-conviction where it was supported, as required, by evidence outside the appellate record (Reply, ECF No. 18, PageID 2068).

On direct appeal. counsel assigned as error that Conard advised Hartman to give a written statement to the police. (Brief of Appellant, State Court Record, ECF No. 5, PageID 242-44). The Second District decided this assignment of error as follows:

> Hartman claims that his counsel was ineffective when he was directed to provide a written statement to the police, and to cooperate fully in a police

interrogation. In hindsight, Hartman is able to identify that this strategy of his defense counsel to fully cooperate with the investigation against him caused difficulty in defending inconsistent statements that may have impacted his credibility at trial. "Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." State v. Woullard, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964, P 37 (2d Dist.), citing Strickland, supra; State v. Parker, 2d Dist. Montgomery No. 19486, 2003-Ohio-4326, P 13. Throughout the trial, it is apparent that the defense strategy was to prove that the victim consented to the sexual conduct, and that Hartman did not purposely force her to submit to the sexual conduct. Both his written statement and the statements Hartman made to the police consistently asserted that the victim had consented to the sexual encounter. Hartman and M.W. are the only two witnesses to the sexual conduct, which would inevitably lead to a question of which witness to believe. It was reasonable, in light of counsel's perspective at the time, to pursue a strategy not to let the victim's version

> of events go unanswered in the investigative stage. We conclude that counsel's strategy of cooperation with the police investigation, under the circumstances of this case, did not constitute ineffective assistance of counsel.

Hartman, supra, ¶ 46. Hartman did not include this assignment of error as a proposition of law on his appeal to the Supreme Court of Ohio (See Memorandum in Support of Jurisdiction, State Court Record, ECF No. 5, PageID 410).

In the Post-Conviction Relief Petition, Hartman specifically pleaded this claim in the same terms he presents it here as his Third Ground for Relief (Post-Conviction Petition, State Court Record, ECF No. 5, PageID 520). Judge Tucker concluded the first part of this claim – that Conard provided a statement from Hartman to the police before determining that it aligned with the physical evidence – was barred by res judicata per the Second District's decision as quoted above (Decision, State Court Record, ECF No. 5, PageID 806.) The balance of the claim – that the statement was concocted in part by using portions of a similar statement from another client – he decided on the merits, finding that Hartman had affirmed the statement and that in any event it had not affected his assessment of credibility and was within the range of appropriate attorney performance. Id. at PageID 806-07.

The Second District affirmed, holding

> [*P40] We agree with the trial court that much of what Hartman raises in his third ground for relief is barred by res judicata, because these arguments were raised or could have been raised in his direct appeal. Goldwire at ¶ 11. Further, there is no evidence that Hartman did not agree with his counsel's advice or that he did not knowingly waive his rights. Rather, the evidence submitted by Hartman in his petition supports a finding that Hartman and his counsel discussed writing a statement and Hartman then wrote a statement that both he and his counsel revised before it was presented to the lead detective. We agree with the trial court that the emails between Hartman and his trial counsel, which were attached to Hartman's petition for post-conviction relief, are insufficient to create a genuine issue of material fact that Hartman's counsel committed professional errors or that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. R.C. 2953.21(D). Moreover, these emails are insufficient to warrant an evidentiary hearing. R.C. 2953.21(C).

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Petitioner disputes the res judicata finding by arguing many asserted facts outside the appellate record which he says support his claim (Reply, ECF No. 18, PageID 2069-75). Here as with the Tenth Ground for Relief there is a paucity of record citations to support this claim. For example, regarding the instruction to write the statement, the Reply asserts "Conard knew that Hartman had consumed alcohol to the point of intoxication, provided by Conard's other client, Gordon Lowden, the night before." Id. at PageID 2070, but no record reference is given. From that point the Reply continues for half a page to make factual assertions, presumably thought to be material to the argument, with no record citations. Finally, at the middle of PageID 2071 the Reply quotes from an Affidavit of Beth Horvath, Petitioner's mother, about what Conard said and did not say to Petitioner about the use of the statement. The Reply then resumes making factual assertions without record references (PageID 2071-73).

Petitioner argues as a general matter res judicata does not properly apply when a post-conviction petition is supported by evidence outside the record. Id. at PageID 2075, citing, inter alia, State v. Finfrock, 1998 Ohio App. LEXIS 4889 (2nd Dist. Oct. 16, 1998); State v. Franklin, 2002-Ohio-2370 (Ohio App. 2nd Dist. May 17, 2002); and McGuire, 738 F.3d 741 (6th Cir. 2013). The quoted language from Finfrock depends in turn on the leading case, State v. Cole, 2 Ohio St. 3d 112 (1982). But neither Cole nor any other authority cited or of which the Magistrate Judge is aware holds that res judicata can be defeated just by filing some

supportive material that was not part of the appellate record. Rather, a defendant must show that the new evidence is necessary to decide the claims made. A contrary rule allowing any new supportive evidence to defeat res judicata would completely undermine that doctrine because resourceful counsel could almost always find some new relevant evidence which was not in the appellate record. Here the Second District held part of this claim could have been adjudicated on direct appeal and Petitioner has not shown that was an unreasonable determination of the facts.

Part of the claim was not barred by res judicata – the part accusing Conard of "concocting" the statement Hartman signed by using a statement of a prior client as a "template." Current counsel gratuitously accuse Conard even of unprofessional conduct toward the prior client by not protecting his confidentiality without a showing that the "template" was confidential.

Conard suggested including from the prior client's statement, "Molly and I were sexually irresponsible, inexperienced and immature. Although we were strangers, we were consenting adults . . . [T]he decisions made will follow and haunt me for the rest of lives." (Reply, ECF No. 18, PageID 2076.) Current counsel criticize Conard's advice by claiming:

> Hartman did not insert the last paragraph in his own statement, although having the template. Why?

1) Neither Hartman nor Weckesser were "sexually irresponsible". Weckesser was on birth control and Hartman used a condom. Courtney Potter sheds light on Weckesser's experience when she testified, she did not believe that the night spent with Hartman was the first time that Weckesser had spent the night with a boy in the same room. ECF Doc. 7-1, Trans., PAGEID# 1341;

2) Neither Hartman nor Weckesser was "inexperienced" (See #1);

3) Both were in their twenties, both had prior sexual experience, and neither was immature;

4) They were not strangers. As Hartman wrote in his statement, "I remember talking to Molly about where she went to school and grew up. I found out that her last name, Weckesser, making her related to Nicole Weckesser whom Gordon, Marcus and I went to grade school [with]. I thought it was cool meet another one, because of how genuine the family is towards all of us". ECF Doc. 5-2 PAGEID# 582;

5) "The decisions made will follow and haunt me for the rest of lives" was inserted by Conard and is tantamount to a confession.

Id. at PageID 2077. Petitioner has adequately shown that Conard gave Hartman advice to incorporate this language into his statement, but he did not do so.

Hence there is no Strickland prejudice from the bad advice.

Current counsel treat the suggested inclusions as indisputably wrong, but the Magistrate Judge believes some of the suggested characterizations of what occurred are well taken. The evidence showed Weckesser and Potter shared two bottles of wine between them and Hartman had far more alcohol than that. It is hardly "sexually responsible" to engage in sex with that much alcohol in one's system. We have no evidence of the prior sexual experience of either person;[13] we know only that they were equipped with contraceptive means. It is indisputable that they met for the first time that night; conversation about families, relationships, etc., between rounds of sexual intercourse hardly made them less than strangers. Being twenty years old does not make one "mature;" current neuroscience suggests that the human pre-frontal lobe, the part of the brain that produces "executive function" decisions, is not fully mature at twenty.

It is hardly malpractice for any attorney to use forms and models developed over time in assisting a new client.[14] In this case the defense strategy of admitting the sexual conduct and

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[13] We are prevented from learning about Weckesser's prior experience by the rape shield law.

[14] If following models so old that their rationale is lost in the mists of time were not a venerable practice at the bar, one might ask why paragraphs 90, 123, 128, 143, 163, 172, 193, 201, 205, 247, 266, and 291 of the Petition all repeat verbatim "petitioner incorporates herein by reference all previous paragraphs as if fully rewritten herein."

expressing remorse for any bad results was a reasonable strategy. The Second District's conclusion that it was not ineffective assistance of trial counsel deserves deference under Strickland.

Ground Eleven should be dismissed because it is in part procedurally defaulted[15] and in part without merit.

Ground Twelve: Ineffective Assistance of Trial Counsel: Waiver of Jury Trial

In his last Ground for Relief, Hartman claims he received ineffective assistance of trial counsel when counsel advised him to waive a jury trial (Petition, ECF No. 1, PageID 64). Hartman raised this claim for the first time in his Petition for Post-Conviction Relief as the Tenth Ground for Relief (Post-Conviction Petition, State Court Record, ECF No. 5, Ex. 20, PageID 569.) In the Petition here, Hartman phrases the claim as trial counsel's giving "false and legally baseless reasons for a jury waiver"; in state court he alleged his counsel "failed to obtain his informed consent" to the waiver. Id. These appear to be two sides of the same coin: if your decision is induced by false information I give you, then it is arguably not knowing and intelligent. In any event, Respondent concedes they are the same claim for purposes of this case (Return, ECF No. 6, PageID 1179).

Judge Tucker decided this claim against Hartman on the merits, concluding that the choice of

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[15] Hartman's claim of excusing actual innocence is unavailing here for the reasons given above: he has produced no qualifying new evidence.

a bench trial instead of a jury is a strategic choice on which counsel's experience and advice properly have much weight (Decision, State Court Record, ECF No. 5, PageID 815-17, relying on State v. Linehan, 1998 Ohio App. LEXIS (2nd Dist. Sept. 4, 1998). The Second District affirmed,[16] holding:

> [*P76] Hartman contends that the trial court erred in finding that counsel's advice to waive a jury trial was not objectively unreasonable. According to Hartman, the following evidence shows that there is a genuine issue of material fact as to whether the advice was objectively unreasonable: (1) Counsel first informed the trial court at a bond conference "that the family would probably be going with a bench trial"; (2) counsel told Hartman's family that he had a good relationship with the judge, which Hartman's grandfather interpreted as being strong enough for the judge to find reasonable doubt; (3) counsel informed Hartman that the trial court judge raised three sons when in fact he had raised three daughters; (4) counsel did not explain the benefits of the jury trial and that one juror could save the defendant; (5) on August 11, 2014, counsel stated to the family that he had not been provided with all the discovery and was going to write a letter; (6) counsel did not write the discovery letter until August 26,

[16] On appeal Hartman again changed the wording of the assignment of error: "counsel failed to accurately advise Hartman on the costs and benefits of waiving a jury trial." *Hartman II*, 2017-Ohio-7933 at ¶ 73.

2014, and (7) Hartman executed the jury trial waiver on August 20, 2014. Hartman Appellate Brief, p. 57-58.

[*P77] "Defense counsel's [advice] to a client to waive his right to a jury trial has been considered sound trial strategy in the absence of record evidence showing otherwise." State v. Neitzel, 2d Dist. Miami No. 98 CA 11, 1998 Ohio App. LEXIS 4958, 1998 WL 735942, *6 (Oct. 23, 1998). Further, Hartman "has not suggested a single reason why the outcome of the trial would probably have been otherwise had he been tried by a jury rather than before a judge." Id. See also State v. Aaron, 10th Dist. Franklin No. 00AP-268, 2000 Ohio App. LEXIS 5534, 2000 WL 1753151, *4 (Nov. 30, 2000) ("Without supporting evidence, the mere claim that a jury would have believed defendant falls far short of establishing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

[*P78] We conclude that trial counsel's advice to Hartman to waive his right to a jury trial was a reasonable trial strategy that does not rise to the level of ineffective assistance of counsel and Hartman has failed to put forth sufficient operative facts to establish that there is a reasonable probability that the result of the trial would have been different if

> it was tried to a jury rather than a judge. Therefore, the trial court properly dismissed the tenth ground for relief in Hartman's petition. The eleventh assignment of error is overruled.

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Petitioner asserts that "[w]hen defense counsel incorrectly advises the defendant on the consequences of jury waiver, the waiver was not a knowing, intelligent, and voluntary relinquishment of a known right." (Reply, ECF No. 18, PageID 2080.) In support he relies on Padilla v. Kentucky, 559 U.S. 356 (2010), where a consequence of the waiver could have been deportation and no advice was given as to that possible consequence. He also relies on Hill v. Lockhart, 474 U.S. 52 (1985), where the Court held that the "voluntariness of the [guilty] plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." Id. at 56.

Hartman claims he

> waived his jury trial because he was told by Conard in the presence of his parents, grandfather and uncle that 1) defense counsel's relationship with the judge was such that a bench trial was the better route; 2) that the judge "raised sons and so he would understand" when in fact the Judge had raised three daughters; 3) that with the current media coverage of these kinds of cases on college campuses, Hartman

> could not expect to get all twelve jurors to believe him (thereby leaving the impression that Hartman had to convince all twelve jurors of the truth of the facts), when in fact Hartman had to convince no jurors because he had no burden of proof; 4) when you go to a bench trial, only a judge rules on the evidence, and "there is no evidence of a rape" in Mark's case; 5) "do you want twelve uneducated people or an educated judge to make the decision?"
>
> Hartman, his parents, grandfather and uncle were never told by defense counsel what the effect of the waiver of a jury trial would be, including but not limited to the fact that on direct appeal, issues related to evidentiary questions would be severely limited if not eliminated and that one juror not believing the complaining witness could alone, foreclose a finding of guilt.

(Reply, ECF No. 18, PageID 2082, citing Affidavit of Beth Horvath, ¶ 43, State Court Record, ECF No. 5-2, PageID 641-42.) What the Horvath Affidavit actually says at ¶ 43 on the jury waiver issue is

> On Monday August 11, 2014 John, Mark, my father, my brother and I met at Chris' office beginning at 5:30 p.m In that meeting, the waiver of Mark's right to a jury trial was discussed. Chris discussed a bench trial versus a jury trial. Chris stated the benefits of a

> bench trial but never explained how a jury trial would work. He mentioned the following benefits to a bench trial, 1) there are three to five judges before whom he would do a bench trial and that Judge Tucker would be one of them; 2) the Judge was fair and that Chris had a good relationship with him; 3) Judge Tucker had all sons and would understand from a male's point of view; 4) Chris stated it would be hard to get all twelve jurors to side with Mark with all of the media coverage that is out there regarding these kinds of cases: "Would you rather have twelve uneducated people making the decision or an educated judge"? We were not aware that just one juror who did not agree, could save our son. Chris sold the bench trial firmly without explaining the benefits of a jury trial. Chris never told us that a Judge could overturn a jury's verdict, or that a bench trial decision was very hard to reverse, we learned that only after Mark was convicted. It was decided that Mark would appear and waive his right to a jury trial on the advice of Chris.

Id.

Importantly, Conard did not recommend a bench trial over a jury trial as a general matter, but would do so only for three to five judges, including Judge Tucker, presumably out of the eleven

General Division Common Pleas Judges who try felony cases in Montgomery County. That certainly supports his advice to try the case to the bench, as well as his comment that Judge Tucker was fair. Hartman does not argue that was false advice.

Hartman does argue that he was not told that one juror could "save our son," in his mother's words. Technically, one juror can cause a mistrial which does not equate to an acquittal. Particularly in high profile cases, which this apparently was, the prosecutor may feel pressure to retry the case.

Conard mentioned the likelihood of press coverage and how that might impact a jury. Hartman does not argue that that was false and given the intense press coverage of the Brock Turner case which occurred about a year later, it seems prescient. Conard's comment that there was no rape here is certainly consistent with Hartman's continued insistence on his innocence and an experienced judge is more likely to carefully weigh complex and inconsistent evidence such as was given here than a jury. While it is technically true that, because consent is not an affirmative defense, Hartman had no burden of proof, as a practical matter proving Weckesser's consent was the only defense Hartman had. If he could not persuade the trier of fact that she consented, he probably could not have prevailed because there was DNA evidence to prove vaginal intercourse and probably DNA evidence to prove both oral and anal intercourse if the facts of that conduct had been denied. Again, it is technically true that there are differences between

appellate review of evidence questions in bench and jury trials – judges are presumed, for example, to have ignored irrelevant evidence. But the standard for review of credibility decisions is exactly the same – and very narrow – regardless of whether a jury or a judge tried the case.

In sum, even if the question of the advice to try the case to the bench were before this Court de novo, the Magistrate Judge would find the advice reasonable. However in habeas the issue is whether the Second District's decision is a reasonable application of Strickland – and it is.

On the prejudice prong of Strickland, Petitioner asserts "[p]rejudice directly flows from or is presumed by the forfeiting[17] of a constitutional right on false and legally baseless grounds." (Reply, ECF No. 18, PageID 2082.) Not so. How was Hartman prejudiced by trying the case to the bench? What proof does he offer that he would have been acquitted by a jury?

Turning from what Conard did or did not tell Hartman and his family, Petitioner's counsel then focus on the minimum information necessary for a valid jury waiver, citing United States v. Martin, 704 F.2d 267 (6th Cir. 1983). The Martin court recited factors necessary for a valid jury waiver including some understanding by the defendant:

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[17] The right to jury trial here was not "forfeited," but waived, following the procedure required in Ohio law. Note the distinction referenced in note 8 supra.

> Moreover, a defendant ignorant of the nature of the jury trial right cannot intelligently weigh the value of the safeguard. A defendant, therefore, should have both the mental ability and some knowledge of the jury trial right before he is allowed to waive it. See Adams, 317 U.S. at 280; United States ex rel. McCann, 320 U.S. at 221. A technical knowledge of the jury trial right, however, is not what is required. Cf. Faretta v. California, 422 U.S. 806, 837 (1975). A defendant is sufficiently informed to make an intelligent waiver if he was aware that a jury is composed of 12 members of the community, he may participate in the selection of the jurors, the verdict of the jury must be unanimous, and that a judge alone will decide guilt or innocence should he waive his jury trial right. See United States v. Delgado, 635 F.2d 889, 890 (7th Cir. 1981). Knowledge of these essential attributes is generally sufficient to enable a defendant to make a knowing and intelligent decision.

704 F.2d at 273(parallel citation omitted).

In this case Petitioner executed a Jury Waiver which he asserted was voluntary (State Court Record, ECF No. 5, Ex. 3, PageID 85). According to Judge Tucker, Hartman acknowledged in his Petition for Post-Conviction Relief that the waiver occurred in open court after a discussion with the

court (Decision, State Court Record, ECF No. 5, Ex. 27, PageID 815). However, no transcript of that proceeding has been filed as part of the State Court Record in this case. In the absence of a transcribed record showing that Judge Tucker did not adequately inform Hartman of the consequences of waiving a jury, this Court presumes the regularity of those proceedings. Walker v. Johnston, 312 U.S. 275, 286 (1941).

As part of their complaint against Conard, Hartman and his family complain that they "were so ill-informed they did not understand 'the Judge did not receive the same discovery that we had been provided and that the only thing the Judge could consider was everything admitted at trial.'" (ECF No. 18, PageID 2089-90.) That is a red herring. Failure of a trial attorney to explain to a client, much less his whole family, that not everything disclosed in discovery becomes evidence hardly makes a subsequent jury waiver involuntary.

Counsel conclude the Reply with a three-page list of things trial counsel could have done in the handling of this case, including attacking the indictment, demanding a bill of particulars, moving for discovery, adding female co-counsel the day before trial, interviewing other persons who were present at the "party," handling polygraph examinations better, and preparing Hartman for cross-examination (ECF No. 18, PageID 2093). Many of these asserted deficiencies are not raised as part of those Grounds for Relief alleging ineffective assistance of trial counsel. Counsel end the Reply by offering the opinion of Hartman's grandfather,

"experienced with litigation for more than twenty years as the CEO of a major local hospital,"[18] that "there was little or no preparation to try my grandson's case. It was my impression that Chris would take notes and then forget about the case until we met again." (ECF No. 18, PageID 2094.) Although this language appears in quotation marks, no citation to the record is given. However experienced Hartman's grandfather may be with civil litigation, a habeas corpus court cannot accept his off-record non-expert, uncross-examined opinion as a basis for finding the Second District Court of Appeals unreasonably found facts and applied the law.

Conclusion

This is undoubtedly a tragic case. Two young person's lives were irrevocably and perhaps irremediably changed by the admixture of underage alcohol and sex on just one occasion. When occasions like that are brought into the criminal justice system and there really are only two witnesses to the critical facts, the case will inevitably turn on the factfinder's assessment of credibility. Hartman and his trial attorney obviously believed he was innocent in the sense that Weckesser consented and believed he would credibly persuade Judge Tucker of that. Current counsel point to no reason why Hartman would not have been credible and apparently believe him themselves because they repeatedly assert he is actually innocent. He may still believe that he is, but when he decided to have sex with a person who

[18] Identified elsewhere in the Reply as Dayton Children's Hospital.

credibly believed he was raping her, he took a risk which turned out very badly for both of them. Habeas corpus is not a cure for the results.

It is respectfully recommended that the Petition be dismissed with prejudice.

Certificate of Appealability

When it enters judgment in this case, the Court must grant or deny a certificate of appealability as to each Ground for Relief. Rule 11, Rules Governing § 2254 Cases. Despite the length of the pleadings in this case (314 pages), the parties have not addressed the appealability issue and the Magistrate Judge is reluctant to make a recommendation without briefing. Accordingly, it is hereby ORDERED that Petitioner file a motion for certificate of appealability not later than fourteen days after Judge Rice rules on this Report and any supplemental report.

April 23, 2020.

s/ *Michael R. Merz*

United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

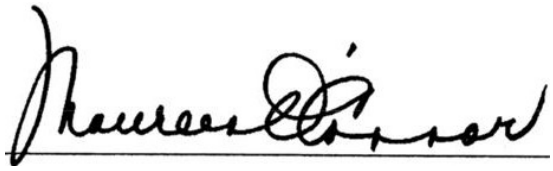
Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.

The Supreme Court of Ohio

State of Ohio	)	Case No. 2016-0910
	)	
v.	)	ENTRY
	)	
Mark Hartman	)	

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Montgomery County Court of Appeals; No. 26609)



Maureen O'Connor

Chief Justice

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	Apellate Case No. 26609
Plaintiff-Appellee	:	
	:	
v.	:	(Trial Court Case No. 14-
	:	CR-834)
MARK HARTMAN	:	(Criminal Appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	Judge Michael T. Hall
	:	Judge Mike Fain
	:	Judge Jeffrey M. Welbaum

OPINION

Rendered on the 6th day of May, 2016.

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Attorneys for Defendant-Appellant

FAIN, J.

Defendant-appellant Mark Hartman appeals from his conviction and sentence on three counts of Rape. Hartman sets forth fifteen assignments of error, alleging numerous issues involving ineffective assistance of counsel, a defective indictment, the improper admission of hearsay, a confrontation clause error based on the admission of scientific evidence from an improper source, and that his convictions are both unsupported by sufficient evidence and against the manifest weight of the evidence. Hartman also argues that the cumulative effect of all errors requires reversal. The State asserts that Hartman was not prejudiced by any of the alleged errors.

We conclude that sufficient evidence was presented to support the convictions and that the convictions are not against the manifest weight of the evidence. We conclude that the indictment was not defective, that any errors regarding the admission of hearsay were harmless, and that trial counsel's strategic decisions, if falling below an objective standard of reasonable representation, are not sufficiently prejudicial to conclude that there is a reasonable probability that the outcome of the trial would have been different but for the ineffective assistance of counsel. We conclude that the potential error which may have affected the defendant's right to confrontation was waived. Finally, we conclude that even considered cumulatively, any errors are not

sufficiently prejudicial to merit reversal. Accordingly, the judgment of the trial court is Affirmed.

I. Late Night Party Leads to Sexual Encounter

{113} During his winter break from college, Mark Hartman agreed to spend the evening with his best friend, Gordon, who was housesitting at the home of a family friend. Hartman, Gordon, and one other friend were drinking heavily. Gordon texted a female friend, Courtney, inviting her to the party. Courtney agreed, and brought two of her girlfriends with her, M.W. and Cassie. The women arrived at the party around 11:00 p.m. Some time during the evening, M.W. texted her parents to let them know she would not be returning home that evening. After about one hour at the party, Cassie texted her friends to silently communicate that she wanted to leave, because she was allergic to the dog in the house. Courtney and M.W left the party and took Cassie back to Courtney's house, where she had left her car. M.W. and Courtney returned to the party after 1:00 a.m. and joined the men in their drinking and card-playing.

After the third male went to bed, Courtney and Gordon were in the bathroom together, which left M.W. and Hartman alone in the living room. M.W. testified that she wanted to go to bed, and Hartman agreed to show her to a bedroom. M.W. testified that she was a willing participant when Hartman began

to kiss her. After this point, M.W.'s and Hartman's versions of the facts began to diverge.

M.W. testified that after she and Hartman entered the bedroom, he initiated kissing, and she was okay with that. She testified that as Hartman continued to kiss her, he put his hand up her shirt, she said no, and he stopped. M.W. testified that "then we kept kissing and he pushed me onto the bed, and then he went up my shirt again. And again I said no. Which was fine. So we kept - - we kissed again. And then that's when he started to go down my pants, and I said no. And that's when it didn't stop. He just kept saying things like, it's fine, it will be okay, it will be fun, stuff like that. So then he went ahead and took off my shirt and bra." Trial Transcript at 29.

{116} M.W. testified that she began to get nervous because she was not sure what was going to happen. She testified that Hartman continued to go down her pants again as he was kissing her, and she kept saying "no, that I didn't want to do that." Id. at 30. She described that he removed her shirt, bra, and leggings, and then removed his own clothes. She testified, "that's when I basically just started to get really scared about the situation and wasn't sure how to handle the situation." Id. She explained the basis of her fear by testifying:

I was scared because I knew that I was not as strong as he was, and I knew that if he would have done anything like hit me or anything like that I would have been out and I wouldn't have really remembered what had happened. And it was more

important to me to remember what was happening to me than not know what was happening to me. As a girl growing up in your teenage years, you hear a ton of stories about what people can do to you and what, you know, strangers do and you don't know the person and you're not sure what they're going to do. So it just really scared me to not - - like and I didn't know who was around me. I didn't know where Courtney was. I didn't know where anyone else in the house was. And I just got really scared that something bad might have happened to me. And then I kept thinking that in this situation I can outsmart the situation, and you know, I can get out the smart way. And I like have been told how to get out of these situations and how to be smart. So that's what I kept thinking, was how I was going to get out because I knew I wasn't strong enough. And I was worried about being hit. or something.

Id. at 32.

M.W. testified that Hartman continued to kiss her - causing the hickeys on her neck, and he continued to touch her in different places, including penetrating her vagina with his fingers. When asked what she was doing at this point, M.W. responded:

I was just sitting there. A few times I had started to go along with it because I thought that if I went along with some of it, he might let me go and he might think that I was like kind of into ii, too, and that if he thought that, that he might let me leave or like go and do something to the point where I could try and get out and escape. But basically, the whole

time I would say no before and I just kind of sat there. I wasn't really into it or doing anything back. I was just there.

Id. at 35.
M.W. testified that Hartman proceeded to penetrate her vagina with his penis after she said no, and that he kept saying "like its okay, it will be fine, it will be fun, don't worry about it." Id. at 36. M.W. testified that she kept saying no, and was numb because she was so scared. She testified that he stopped, took a break, and then began touching her again, and again penetrated her vagina with his penis. Afterwards, M.W. testified that she left the room and went into the bathroom, and that Hartman followed her, and began kissing her again. She described that he grabbed her arms, using enough force to pull her into the shower with him. She again testified that she "started to go along with ii, too, because I was scared it was going to happen again and I wanted to get out of the situation, and I was like maybe -- again, I kept thinking the same thing. If I go along with this, there might be a chance that I can get out of this situation. So that's what I kept thinking the whole time was if I go along with this for a little bit, there might be a chance that I can get out and this wouldn't have happened to me." Id. at 40.

M.W. testified that after they showered, they returned to the bedroom, and Hartman began kissing her again, pushed her back onto the bed and again he penetrated her vagina with his penis. M.W. testified that "I was just so numb and didn't really feel like fighting back because I was so scared. And I

was like, you know what, I'll just let it happen and then it will be done and then I'll get out of the situation." Id. at 41. M.W. testified that when he was done, she attempted to leave the bed, but he pulled her back into the bed. When she thought Hartman was asleep, she tried to move, but he was still awake and he asked her to stay. M.W. testified that she agreed to stay there with him "because I didn't want anything to happen again." Id. at 42.

Hartman's version of the facts was presented though the admission of a written statement he gave to the police the day after the event, State's Ex. 24, the testimony of the officer who interviewed him, and from Hartman's testimony at trial. Hartman admitted that he was intoxicated earlier in the evening, but he testified that he had stopped drinking alcoholic beverages, and was drinking water before the sexual encounter. He testified that M.W. initiated intimacy by kissing him before they went to the bedroom. He testified that they engaged in a good amount of kissing, and when he began to feel her breasts, and when he slid his hand down her pants, he specifically asked if she would like to have sex, and she answered yes. He testified that she willingly participated in the sexual encounter by helping to remove her own clothes and his clothes, asked him to squeeze her breasts and guided his hand, switched positions, and upon request willingly engaged in oral sex. Hartman testified that the only time she said "No" was when he asked if "we could have sex until we finished, and she said no at that time." He stated that he stopped after she said "No," and then they conversed a bit, talking about life,

relationships and school, and then he asked again "if we could finish," and she said, "Yes, go ahead." Because he did not have a second condom, he asked if she was on birth control, and she replied, "you really think I would have sex with a random 20 years old without birth control?" His testimony that he pulled out and ejaculated on the bed was later corroborated by DNA testing on the bed coverings. The fact that M.W. was taking birth-control medication was reflected in hospital records.

The victim's testimony reflects that she did have her cell phone with her that
evening -- she received a text from the other female at the party that she wanted to go home, and she texted her parents to tell them she would not be coming home that evening. The text messages that M.W. and her friend Courtney sent to each other later that morning were admitted into evidence as defendant's Ex. H. In the text messages, M.W. expressed reluctance about reporting the sexual assault, in the following exchange:

> M.W.: I need to think about if I want to press charges or not.
>
> Courtney: What are you thinking?
>
> M.W.: I don't know. I really don't know.
> Courtney: Are you wanting to confront him?

> M.W.: No. I don't ever want to talk to him. I just don't know if I should press charges and it'll be big because "rape in the [R.] house."
>
> Courtney: I didn't even think of that. He needs to know what he did was wrong. Was protection used? And did you shower before or after? As far as the [Rs], oh well.
>
> M.W.: I know. I agree but I can't handle a big thing. I can't even remember things because I was so in shock. I'm not sure if he did it [or] not. And in between.

After M.W. told her parents what had happened to her, she was taken to the hospital, arriving at 3:39 P.M. She was initially examined by an ER doctor, then she talked to the police detective, and then she was referred to a nurse designated as a "sexual assault nurse examiner." [1]This nurse interviewed M.W., making notes, Ex. 20, which recorded the victim's allegations as follows:

> Courtney and I went back to the house that one of the guys was housesitting for. Me and Mike was taking a tour of the house when he showed me to the bedroom which was downstairs. Mike kissed me on the lips and tried to take my shirt off and I said no, I'm not doing that. He (clarified with patient that he was Mike) kept kissing me over and over

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[1] The nurse testified that she had attended a 40-hour class in forensics, but she was not certified as a sexual assault nurse examiner.

again and I kept yelling at him, telling him to stop. That's when things went from bad to worse. Mike pushed me on the bed and I landed on my back. He kept trying to kiss me and this time pulled off my shirt. He held my hands down beside me and kissed all over my neck, face and chest. He (clarified with patient that he is Mike) pulled off my leggings. I kept telling him no, get off of me, but he didn't. He had sex with me and stuck his hands inside of me. I managed to get free and go to the bathroom, and he followed me in there, grabbing my arms trying to pull me in the shower, asking me to take a shower with him. When I wouldn't he got mad and pulled on my arms back into the bedroom. He raped me again. Clarified with patient that Mike stuck penis and hands inside of vagina. I kept trying to leave but he wouldn't let me. My friend finally came upstairs and got me out of there.

The medical records also indicate that during the process at the hospital, the victim's parents were present, and also present were the victim witness advocate, an Oakwood police officer and an Oakwood police detective. The medical records confirm that M.W. was not physically injured during the assault, other than the neck bruising referred to as hickeys. M.W. testified that since the event, she is no longer a social person, that she is scared to do anything, and no longer goes anywhere alone.

The day after the alleged incident, defense counsel advised Hartman to create a written description of everything about the incident, which was given to police two days after the incident.

Defense counsel accompanied his client to two police interviews. Hartman freely answered all questions asked during the interviews.

II. The Course of Proceedings

Hartman was indicted on three counts of Rape, felonies of the first degree, in violation of R.C. 2907.02(A)(2). About a month after the indictment, the defendant waived, in writing, his right to a jury trial and elected to have his case heard by the trial judge, after acknowledging that he had a constitutional right to a trial by jury.

Pertinent to this appeal, we note that Hartman did not move to dismiss the indictment, did not request a bill of particulars, and did not file any motions regarding discovery, until after the trial.

A two-day trial was had before the trial judge, acting as the trier of fact.

Ten days after the trial, the trial court made the following announcement in open court:

> Good afternoon everyone. We are, of course, present in the case of State of Ohio v. Hartman, 2014-CR-834. Obviously, we are here for me to announce the verdicts that I have arrived at in this case, following the presentation of the evidence during the two day bench trial on September 29th and September 30th.
>
> I realize given the stakes and emotions at issue, that everyone in the courtroom is on edge, and

that includes this judge. This case, given the circumstances, and the role I was required to play has been very difficult. It's been very difficult for me, and I know for all concerned.
I also realized that many of you in this courtroom are going to be devastated by the verdicts after they are announced, and there's nothing I can do about that. This will be of little help to those so devastated. I want you to know that I considered this matter very, very carefully; and I approached it with the diligence and the care that it deserves. This being said, I, of course, had to make decisions and I have arrived at those decisions and I'm now going to announce those decisions.

Going first to Count I of the indictment, I find, based upon the evidence presented, the applicable law and my assessment of witness credibility that the State of Ohio proved beyond a reasonable doubt all the essential elements of rape as charged in Count 1 of the indictment. The State, that is, proved beyond a reasonable doubt that on December 31, 2013 and in Montgomery County, Ohio, the Defendant, Mark Hartman engaged in sexual conduct. digital penetration with M.W. by purposely compelling her to submit to such sexual conduct by forced [sic] or threat of force.

Going into Count II, I find again, based upon the evidence presented, the applicable law, and my assessment of witness credibility that the State of Ohio proved beyond a reasonable doubt all of the essential elements of rape as charged in Count II

> of the indictment. The State, that is, proved beyond a reasonable doubt that on December 31, 2013 and in Montgomery County, Ohio, the Defendant, Mark Hartman engaged in sexual conduct, vaginal intercourse with M.W. by purposely compelling her to submit to such sexual conduct by force or threat of force.
>
> And finally, as it relates to Count Ill of the indictment, I finally find again, based upon the evidence presented, the applicable law, and my assessment of witness credibility that the State of Ohio proved beyond a reasonable doubt all of the essential elements of Count Ill, of rape as charged in Count Ill of the indictment. The State, that is, proved beyond a reasonable doubt that on December 31, 2013 and in Montgomery County, Ohio, the Defendant, Mark Hartman engaged in sexual conduct, vaginal intercourse with M.W. by purposely compelling her to submit to such sexual conduct by force or threat of force.

Hartman moved for a new trial, arguing that reasonable doubt existed as a matter of law because the victim's testimony was not consistent with the substantive evidence, that the court should have considered the lesser-included offense of Sexual Battery, and that the State of Ohio failed to fully disclose all exculpatory evidence. The trial court conducted a hearing on the motion for a new trial, and accepted testimony from Mark Squibb, an employee of the Miami Valley Regional Crime Laboratory, and Detective Norris from the Oakwood Public Safety Department. During trial, Squibb was

qualified as an expert in the field of DNA analysis. Squibb explained that the police gather evidence and submit it to the laboratory for testing. Each item or exhibit submitted for testing is given a submission number and a submittal sheet is filled out by the requesting agency identifying the item and the type of testing requested. Once submitted it is retained in a property room that is only accessible by individuals in the DNA section. When it is assigned to an analyst, that person will remove it from the evidence room, keep it in their care and custody, perform the testing, and then the item is returned to the law enforcement agency that supplied the item. The DNA lab retains any samples found to contain DNA.

Squibb was not the analyst who performed the screening or testing. Squibb conducted a technical review of the analyst's work, and testified from the contents of analyst's report. He did not inspect the comforter or conduct any part of the extraction or testing. At the post-trial hearing, Squibb testified that part of his review process was to review the case notes of the lab technician, but these notes had not been requested or provided to defense counsel. Emily Draper, who wrote the notes and performed the testing, did not testify at trial or at the post-trial hearing. The testing generated two Laboratory Reports, one on the rape kit and one on the comforter. Squibb's testimony revealed that the lab's approach is to first test the most probative evidence to confirm or deny that sexual activity has taken place, and if that test is positive, the testing on the remaining swabs are deferred until some action is initiated by someone to do further testing. The notes

of Emily Draper were interpreted by Squibb to mean that after Hartman's DNA was matched with swabs from M.W.'s vagina, the lab did not test swabs taken from rectal, oral and underwear samples or the comforter. Squibb testified that the police originally requested testing on both the rape kit and the comforter, but once Hartman's DNA was found from the rape kit, they did not test the comforter until a later time after it was requested again. From the notes he reviewed, Squibb did not know who made that second request, or when it was made. Squibb testified that they had electronic records of the original submittal from the law enforcement agency and the subsequent request that caused the comforter to be tested, but he did not have those records and could not testify to their content. In response to questions by the trial court, Squibb also testified that he had personally added highlighting and other markings to the lab report to assist himself in his testimony.

The trial court overruled the motion for a new trial, making the following findings of fact:

> Mark Hartman, in the hours before the sexual conduct, consumed a significant amount of alcohol. M.W. and Mr. Hartman had not met before the December 30-31 "get together" at the [Rs') Oakwood home. M.W., in fact referred to Mr. Hartman as "Mike" in the immediate aftermath of that which occurred. M.W. had not previously been in the [R] home, and thus, was not familiar with the home's layout which, apparently, is rather unique.

> M.W. did not know where the remaining occupants of the home were as the critical events unfolded. M.W., in short, was confronted with the following as the sexual conduct occurred- a larger, stronger intoxicated individual she did not know (and thus, she could not gauge how he might react) with the events occurring in an unfamiliar home at a time when she did not know the location of the home's remaining occupants. The element of force regarding each rape count must be reviewed with those facts in mind.

Mark Hartman escorted M.W. to a bedroom within the [R.) home so that M.W. could go to bed. Mr. Hartman after escorting M.W. to the bedroom, began kissing M.W. while they were standing near the bedroom door. M.W. consented to the kissing initiated by Mr. Hartman.

Mr. Hartman, as the kissing continued, placed a hand under M.W.'s shirt and moved the hand upward toward M.W.'s breasts. M.W. indicated she did not want this to occur with Mr. Hartman, at this point, removing his hand from underneath M.W.'s shirt.

Mr. Hartman, at this point, pushed M.W. onto the bed. Mr. Hartman placed a hand underneath M.W.'s pants. M.W., once again, indicated she did not want this activity to occur. Mr. Hartman did not withdraw his hand, but instead told M.W. "it will be okay," "it will be fine," and "it will be fun."

Mr. Hartman, after saying these words, beg[a)n to take off M.W.'s shirt and bra. M.W., as this was occurring said, "no" but Mr. Hartman, ignoring M.W.'s protest, completed the removal of the shirt and bra. Mr.Har[t]man, ignoring M.W.'s indication that she did not want the conduct to progress, removed his clothes and M.W.'s pants. M.W., at this point, became frightened and unsure concerning how to "handle the situation." M.W.'s fear was prompted by her recognition she did not have sufficient strength to overcome Mr. Hartman, with this fear including the thought that Mr. Hartman, an individual she did not know, could render her unconscious, and if this occurred, she would not remember what occurred. M.W. was also concerned because she did not know the location of the home's remaining occupants.

Mark Hartman, after removing M.W's clothing, continued to kiss M.W. M.W. failed to respond with Mr. Hartman, at this point, kissing each side of M.W.'s neck. The results of the kissing are depicted by State's Exhibits 4-9. Mr. Hartman,- additionally, began touching M.W.'s body with his hands and fingers, such touching included "grabbing" M.W.'s breasts and touching M.W.'s vagina with this touching including Mr. Hartman's digital penetration of M.W.'s vagina. Mark Hartman at this point, initiated sexual conduct with M.W. by inserting his penis into her vagina. M.W., before the penetration occurred, said "no" with Mr. Hartman responding that it would be "okay", it would be "fine"

and it would be "fun." The vaginal penetration continued for a "minute or two."

Mark Hartman, at this juncture, removed his penis from M.W.'s vagina. M.W. interpreted this as a "break" because soon thereafter Mark Hartman began touching M.W. once again with this renewed touching culminating with Mr. Hartman, for the second time, penetrating his penis into M.W.'s vagina. This episode continued for a minute or two.

M.W., after the second penis/vaginal penetration terminated, decided, with her thought being such activity might create an escape opportunity, to go into the bathroom connected to the bedroom. Mark Hartman, however, followed M.W. into the bathroom. Mr. Hartman, after entering the bathroom, began kissing M.W. Mr. Hartman then pulled M.W. into the shower and turned on the water. Mr. Hartman once again began touching M.W.'s breasts and vagina. M.W. began crying, but she placed her face into the running water to hide this from Mr. Hartman.

M.W. exited the shower and informed Mr. Hartman that she did not "want this." M.W. walked back into the bedroom with Mr. Hartman following. Mr. Hartman, at this time, started to kiss M.W. once again, and while doing so, pushed M.W. back onto the bed. Mark Hartman, at this point, and for the third time, penetrated his penis into M.W.'s vagina with this episode continuing for sixty to ninety seconds.

Mark Hartman, after this last act, rolled off of M.W. M.W., thereafter, attempted on two occasions to leave the bedroom with each attempt prompting Mark Hartman's request that she stay. M.W., fearful

of what Mr. Hartman's reaction may have been if she refused, stayed until Courtney, sometime during the morning hours, entered the bedroom. M.W., upon Courtney's arrival, quickly exited the [R.) home.

Dkt.# 80, pgs. 7-9.

Addressing the evidence on the element of force, the trial court concluded: Mark Hartman, as to Count I, continued his sexual advance upon M.W. despite her verbal indication that she did not consent to the activity. Mr. Hartman pushed M.W. onto the bed, and without her consent, removed her clothing, used his hands and fingers to touch M.W.'s breasts and vagina, and finally, penetrated M.W.'s vagina with his penis. The conduct constitutes force necessary to establish beyond a reasonable doubt the force element. This conclusion recognizes the force element is, by necessity, a relative concept, that M.W.'s resistance is not a prerequisite to the force element, and that the force element must be viewed within the context of M.W.'s concerns regarding Mr. Hartman's size and strength relative to her size and strength, that Mr. Hartman was intoxicated, that she did not know Mr. Hartman, and that as the sexual conduct was occurring, she did not know the location of the remaining occupants of the home.

Mark Hartman's conduct relating to Count 2 must be viewed within the context of that which had already occurred. Mr. Hartman, having already ignored M.W.'s entreaties to stop and while he remained on top of M.W., once again penetrated M.W.'s vagina with his penis. This conduct,

recognizing the concepts and concerns discussed above, constitutes the force necessary to establish beyond a reasonable doubt the force element as to Count 2.

Turning, finally, to Count 3, Mr. Hartman's conduct must, once again, be viewed within the context of that which had already occurred. Mr. Hartman, ignoring a final entreaty to stop, once again began kissing and touching M.W., pushed her onto the bed, positioned himself on top of M.W., and penetrated M.W.'s vagina with his penis. This conduct, again recognizing the concepts and concerns already discussed, constitutes force necessary to establish beyond a reasonable doubt the element of force.

Mr. Hartman's motion vigorously argues that M.W.'s testimony that she at certain points "went along" with the sexual activity makes a finding of force impossible. M.W. testified that on occasion she did "go along with some of it" with the hope that by doing so Mr. Hartman might conclude she was "into it" with the thought being that if Mr. Hartman thought she was "into it" this might create an escape opportunity. M.W., however, was not "going along" with the sexual activity on the occasions when Mr. Hartman completed the described penis/vaginal penetration. M.W.'s testimony, when viewed in its entirety, established the element of force as to each rape count.

Id., pgs. 10-11.

Hartman was sentenced to four years of imprisonment for each of the three counts of Rape, to be served concurrently. Hartman was also designated as a tier three sexual offender, requiring lifetime registration requirements, pursuant to Chapter 2950 of the Revised Code. Hartman appeals from his conviction and sentence.

III. The Convictions Are Supported By Sufficient Evidence

Hartman's First Assignment of Error asserts as follows:

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS.

Hartman was indicted for three counts of Rape, in violation of R.C. 2907.02(A)(2). Under this section, to obtain a conviction for Rape, the State must prove beyond a reasonable doubt that the accused engaged in sexual conduct with another by purposely compelling the other person to submit to the sexual conduct by force or threat of force. Hartman has admitted that he engaged in sexual conduct with another. The question is whether sufficient evidence was presented to prove beyond a reasonable doubt that he purposely compelled M.W. to submit to the sexual conduct by force or threat of force.

A challenge to the sufficiency of the evidence presents a question of law as to whether the State

has presented adequate evidence on all elements of the offense to sustain the verdict as a matter of law. State v. Hawn, 138 Ohio App.3d 449, 471, 741 N.E.2d 594 (2d Dist.2000). "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."
State v. Jackson, 2d Dist. Montgomery No. 26050, 2015-Ohio-5490, 11 41, quoting State
v. Jenks, 61 Ohio St.3d 259,574 N.E.2d 492 (1991), paragraph two of the syllabus.

Pursuant to R.C. 2901.22 (A). "[a) person acts purposely when it is the person's specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is the offender's specific intention to engage in conduct of that nature." Therefore, in a Rape case, to prove that the defendant acted "purposely," the State must prove that it was the defendant's intention to engage in sexual conduct by forcefully compelling the other person to submit to the sexual conduct. "A rape occurs only if the perpetrator purposely compels the other to submit by force or threat of force." State v.

Wilkins, 64 Ohio St.2d 382,385,415 N.E.2d 303 (1980).

Ohio's rape statute does not require proof of the victim's lack of consent. Ohio law does recognize certain victims incapable of giving consent, based on mental or physical incapacity. Those exceptions do not apply in the case before us. See, e.g., State v. Hillock, 7th Dist. Harrison No. 02-CA-538, 2002-Ohio-6897. Consent is not an affirmative defense, but when applicable, consent is used as a defense to challenge the State's evidence on the element of purposeful force or compulsion. State v. El-Berri, 8th Dist. Cuyahoga No. 89477, 2008-Ohio-3539, 'IJ 57. When consent is raised as a defense to a charge of Rape, the test of whether consent negates a finding of force is not whether a reasonable person confronted with similar circumstances would have understood that the victim did not consent, the test requires the trier-of-fact to find, beyond reasonable doubt, that the specific defendant's purpose or intent was to commit the crime of rape. State v. Mundy, 99 Ohio App.3d 275, 650 N.E. 2d 502 (2d Dist. 1994). As we discussed in Mundy:

> The determination of a defendant's mental state, absent some comment on his or her part, must of necessity be determined by the nature of the act when viewed in conjunction with the surrounding facts and circumstances. State v. Lott (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, 302. This is, in fact, the well-recognized process of inferential reasoning. This process by necessity incorporates an

> objective mechanism or standard in determining the defendant's state of mind by the use of circumstantial evidence. The trier of fact reviews the defendant's conduct in light of the surrounding facts and circumstances and infers a purpose or motive.

Id., 99 Ohio App.3d at 288,650 N.E.2d 502.

R.C. 2901.01(A)(1) defines "force" as any "violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." In the case before us, the trial court did not find that Hartman used physical constraint or any form of violence that caused physical harm during the sexual encounter. The trial court did not find that Hartman constrained the victim in any way or that the victim exhibited physical resistance to Hartman's advances. However, the trial court did find that Hartman "pushed" M.W. onto the bed, removed her clothes, laid on top of her, and pulled her into the shower. It has been recognized that proof of physical violence or physical resistance is not required to establish Rape if the defendant creates in the mind of the victim the belief that physical force will be used if the victim does not submit. State v. Umphries, 4th Dist. Ross No. 11CA3301, 2012-Ohio-4711, 'II 21, and 'II 16, citing State v. Schaim, 65 Ohio St. 3d 51, 55, 600 N.E. 2d 661 (1992). "The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other." State v. Eskridge, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988). "Force need not be overt and

physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established." Umphries at 'IJ16, quoting State v. Fowler, 27 Ohio App.3d 149, 154,500 N.E .2d 390 (8th Dist. 1985).

In the case before us, the victim testified that her will was overcome by fear, because she believed she would be hurt if she did not submit to Hartman's advances. To find that her will was overcome by fear, the trier-of-fact must have sufficient evidence from which to infer that her fear was based on some wrongful action or conduct of the defendant that purposely compelled her to submit to the sexual conduct, against her will. In the case before us, the trial court stated, "that the force element must be viewed within the context of M.W.'s concerns regarding Mr. Hartman's size and strength; that Mr. Hartman was intoxicated, that she did not know Mr. Hartman, and that, as the sexual conduct was occurring, she did not know the location of the remaining occupants of the house." Dkt. #80, pg. 10.

Hartman testified that he is 6'3", weighed 200 pounds, and was physically fit. Medical records reflected that M.W. is 5'3" and weighed 165 pounds. Hartman and M.W. were both 20 years old, and both were college students. The victim testified that she was scared because she was not as strong as Hartman, and she believed that he would use his superior strength to hurt her if she did not submit to his sexual advances. The victim testified that she repeatedly said "No" to Hartman during the sexual

encounter. The physical force described by the victim included her testimony that Hartman "pushed" her onto the bed, removed her clothing, laid on top of her, and "pulled" her into the shower.

Each of the cases cited by the State addressing the issue of force is distinguishable from the case before us. In Umphries, the victim felt compelled to submit out of fear when she awoke during the night to find her uncle on top of her, who had broken into the house through a window, and she begged him to stop. State v. Umphries, 4th Dist. Ross No. 11CA3301, 2012-Ohio-4711. There was no admission that the victim in Umphries was a willing participant to any part of the encounter, and she communicated her fear by begging him to stop. Id. The victims in Whitt, Shannon, and Eskridge were minors. State v. Whitt, 8th Dist. Cuyahoga No. 82293, 2003-Ohio-5934; State v. Shannon, 11th Dist. Lake Nos. 2002-L-007, 2002-L-008, 2004-Ohio-1669; State v. Eskridge, 38 Ohio St.3d 56, 526 N.E.2d 304 (1988). In State v. Patel, we found sufficient evidence of force when an employer held his employee "in a locked bathroom and inserted his finger in her vagina against her will and while ignoring her plea to stop." State v. Patel, 2d Dist. Greene No. 2010CA77, 2011-Ohio-6329, ,i 63. Unlike in the case before us, the defendant in Patel locked the room to prevent the victim from leaving, and no part of the sexual encounter was consensual. Id. None of the cited cases present a fact pattern in which a sexual encounter between adults starts out as consensual, before changing into a non-consensual encounter.

We agree that the elements of Rape can be established when the two participants start the sexual encounter on a consensual basis, but the consent is revoked by words, actions or conduct that clearly communicates non-consent, the defendant fails to respect the change in consent, and purposely proceeds to engage in sexual conduct through force or threat of force evidenced by violence, physical restraint, or some type of coercive or threatening conduct that creates a belief or fear that physical force will be used if the victim does not consent. In the case before us, both the defendant's physique -- he was bigger and stronger than his victim -- and his conduct of pushing the victim on the bed, removing her clothes, and pulling her into the shower, was evidence from which a reasonable finder of fact could find that he purposely acted in a manner that induced fear in the victim, compelling her to submit to his sexual conduct, against her will.

Based on our review of the record, we conclude that the State did present sufficient evidence from which the trier of fact could conclude that Hartman purposely compelled M.W. to submit to sexual conduct by force or threat of force. There is no dispute that it was Hartman's intention to engage in sexual conduct with M.W. Also, the testimony of the victim, if believed, supports a finding that Hartman used force to compel M.W. to submit to sexual conduct at least three times during the course of the evening. Hartman's First Assignment of Error is overruled.

IV. Overruling the Motion for a New Trial Was Not an Abuse of Discretion

Hartman's Second Assignment of Error asserts:
THE COURT ERRED WHEN IT DENIED HARTMAN'S MOTION FOR A NEW TRIAL

Pursuant to Crim. R. 33(A)(4), a new trial may be granted "if the verdict is not sustained by sufficient evidence or is contrary to law." The decision whether to grant a motion for a new trial lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Hayden, 2d Dist. Montgomery No. 26524, 2015-Ohio-3262, ,i 30, citing State v. Schiebel, 55 Ohio St.3d 71, 564 N.E.2d 54 (1990). An "abuse of discretion" implies an arbitrary, unreasonable, or unconscionable attitude on the part of the court. State v. Ulery, 2d Dist. Clark No. 201O-CA-89, 2011-Ohio-4549, ,i 9, citing State v. Adams, 62 Ohio St.2d 151,404 N.E.2d 144 (1980). "A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de nova, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result." State v. Rossi, 2d Dist. Montgomery No. 24740, 2012-Ohio-2545, 1[12, citing AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157,161,553 N.E.2d 597 (1990).

Hartman asserts three separate arguments related to alleged errors in the trial court's denial of his motion for his new trial. The first two arguments are both concerned with the evidence utilized by the trial court to conclude that the element of force was established by proof of the victim's subjective thoughts and concerns instead of the defendant's conduct. As discussed above, lack of consent is not an element to prove the offense of Rape, but it is a relevant factor in determining whether force was used to compel the victim to submit to the sexual conduct against her will. In the decision denying the motion for a new trial, the trial court did not rely solely on the victim's conduct, thoughts or subjective point of view in concluding that Hartman's conduct was sufficient to induce the victim's fear. The trial court looked at the totality of the circumstances, including the relative size and strength of the defendant and his victim, Hartman's physical contact with the victim when he pushed and pulled her, removed her clothes and laid on top of her, his conduct in ignoring the victim's repeated verbal statements of "No," the victim's unfamiliarity with her surroundings, and the victim's reaction to her fears. The trial court, as the trier of fact, could reasonably infer from the totality of the circumstances, and from the victim's testimony, that she was too scared to resist, and that Hartman compelled her to submit to his sexual conduct against her will.

Hartman also argues that the trial court's decision denying the motion for a new trial

erroneously concluded that three separate instances of rape occurred by penile

penetration, which conflicted with the trial court's earlier pronouncement that the convictions were based on one instance of digital penetration and two instances of penile penetration. Hartman argues that the trial court's revision of the type of sexual conduct proven to establish the three charges of Rape shows that the evidence was insufficient to support the convictions, and that the trial court therefore abused its discretion by denying the motion for a new trial. As noted earlier, the record does support the conclusion that the State presented sufficient evidence to allow the trier of fact to find, beyond a reasonable doubt, that Hartman committed three offenses of Rape. Accordingly, the trial court did not err by overruling the motion for a new trial, notwithstanding possible confusion by the trial court, in ruling on the motion, as to the particular offenses comprising the three Rape convictions. Hartman's Second Assignment of Error is overruled.

V. The Convictions Are Not Against the Manifest Weight of the Evidence

For his Third Assignment of Error, Hartman asserts:

HARTMAN'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In determining whether a verdict is against the manifest weight of the evidence, we are required to review the entire record, to weigh the evidence

and all reasonable inferences, and to consider the credibility of the witnesses. State v. Jackson, 2d Dist. Montgomery No. 26050, 2015-Ohio-5490, ,r 48, citing State v. Hancock, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ,r 39. In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." Id. at ,r 49, citing State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "Under this standard of review, the appellate court weighs the evidence in order to determine whether the trier-of-fact 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " Id.

Unlike the sufficiency-of-evidence standard of review, a reviewing court does not construe the evidence most strongly in favor of the prosecution when using a manifest-weight standard of review. State v. Woullard, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E. 2d 964 (2d Dist.). A manifest-weight-of-the-evidence argument questions the believability of the evidence and asks a reviewing court to determine which of the competing inferences is more believable. Id. "However, the appellate court may not substitute its judgment for that of the trier-of-fact on the issue of the credibility of the witnesses unless it is patently apparent that the factfinder lost its way." Id. at ,i 81, citing State v. Bradley, 2d Dist. Champaign No. 97-CA-03, 1997 WL 691510 (Oct. 24, 1997).

In State v. Lawson, 2d Dist. Montgomery No. 16288, 1997 WL 476684 (August 22, 1997), we explained:

> (B]ecause the factfinder ... has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness.

In the case before us, we must give substantial deference to the trial judge, who acted as the trier of fact, and who had the opportunity to see and hear the witnesses in judging their credibility. We find nothing in the record from which to conclude that the trial judge patently lost his way in finding the victim to be a more credible witness than the defendant. Although both the victim and the defendant were drinking alcohol prior to the sexual encounter, which may have affected their memory of the event, we do not find sufficient indicia of untruthfulness in the victim's recollection of the events, or the other witnesses who supported her testimony, that would require the trier of fact to find that her testimony lacked credibility. "The trier of fact is better situated than an appellate court to view witnesses and to observe their demeanor, gestures, voice inflections and to use those observations in weighing credibility." State v. Jackson, 2d Dist.

Montgomery No. 26050, 2015-Ohio-5490, ,i 50, citing State v. Lewis, 4th Dist. Scioto No. 01CA2787, 2002 WL 368625 (Feb. 25, 2002). Hartman argues that the victim's trial testimony and the statements she made the day after the incident contain several inconsistencies and admissions that should destroy her credibility. Hartman argues that the victim made an admission of her lack of recall in a text to her friend, which stated, "I can't even remember things because I was so in shock. I'm not sure if he did it (or) not. And in between." The State suggests that this comment was made in reference to her memory of whether Hartman was using a condom, or whether he completed the act of sexual intercourse. "A trier of fact is free to believe all, part or none of the testimony of each witness." Id., citing State v. Long, 127 Ohio App.3d 328, 713 N.E.2d 1 (4th Dist.1998). In the case before us, the trier of fact was in the best position to judge the victim's credibility on the version of the facts she gave from the witness stand at the time of trial.

The outcome of this case rested on the credibility of the witnesses. Respecting the trial court's judgment on credibility, we conclude that the convictions are not against the manifest weight of the evidence. This is not the exceptional case in which the finder of fact lost its way. Hartman's Third Assignment of Error is overruled.

VI. Ineffective Assistance of Counsel

In all of the following assignments of error, Hartman alleges that he was denied the effective assistance of counsel:

IV. COUNSEL WAS INEFFECTIVE WHEN HE ADVISED HARTMAN TO GIVE THE POLICE A WRITTEN STATEMENT AND TO SUBMIT TO TWO ROUNDS OF QUESTIONING

V. TRIAL COUNSEL WERE INEFFECTIVE WHEN THEY FAILED TO MOVE TO DISMISS THE INDICTMENT

VI. TRIAL COUNSEL WERE INEFFECTIVE WHEN THEY FAILED TO REQUEST A BILL OF PARTICULARS

VII. TRIAL COUNSEL WERE INEFFECTIVE IN CROSS-EXAMINATION WHEN THEY INTRODUCED EVIDENCE ON ELEMENTS THE STATE HAD FAILED TO PROVE, HEARSAY, AND OTHERWISE INADMISSIBLE EVIDENCE

VIII. DEFENSE COUNSEL WERE INEFFECTIVE WHEN THEY FAILED TO OBJECT TO HEARSAY INTRODUCED BY THE STATE

IX. COUNSEL WERE INEFFECTIVE WHEN THEY FAILED TO INVESTIGATE THE CASE

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), paragraph two of the

syllabus; State v. Bradley, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Two elements must be demonstrated: 1) that counsel's representation fell below an objective standard of reasonableness; and 2) that counsel's errors were serious enough to create a reasonable probability that, but for the errors, the outcome of the proceeding would have been different. Id. In our review of an ineffective assistance of counsel claim, "we will not second-guess trial strategy decisions, and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " State v. English, 2d Dist. Montgomery No. 26337, 2015-Ohio-1665, 'IJ 10, quoting State v. Mason, 82 Ohio St.3d 144, 157-158, 694 N.E.2d 932 (1998).

Hartman argues six different grounds for establishing that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment. Hartman claims that his counsel was ineffective when he was directed to provide a written statement to the police, and to cooperate fully in a police interrogation. In hindsight, Hartman is able to identify that this strategy of his defense counsel to fully cooperate with the investigation against him caused difficulty in defending inconsistent statements that may have impacted his credibility at trial. "Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel." State v. Woullard, 158 Ohio App.3d 31, 2004-Ohio-

3395, 813 N.E.2d 964, 'II 37 (2d Dist.), citing Strickland, supra; State v. Parker, 2d Dist. Montgomery No. 19486, 2003- Ohio-4326, 'II 13. Throughout the trial, it is apparent that the defense strategy was to prove that the victim consented to the sexual conduct, and that Hartman did not purposely force her to submit to the sexual conduct. Both his written statement and the statements Hartman made to the police consistently asserted that the victim had consented to the sexual encounter. Hartman and M.W. are the only two witnesses to the sexual conduct, which would inevitably lead to a question of which witness to believe. It was reasonable, in light of counsel's perspective at the time, to pursue a strategy not to let the victim's version of events go unanswered in the investigative stage. We conclude that counsel's strategy of cooperation with the police investigation, under the circumstances of this case, did not constitute ineffective assistance of counsel.

We also conclude that Hartman was not denied the assistance of effective counsel when defense counsel failed to file a motion to dismiss the indictment. The indictment charging Hartman with three counts of Rape did contain all the elements of the offenses set forth in the Rape statute, R.C. 2907.02(A)(2). Although the indictment did not include the name of the victim and the nature of the sexual conduct, the name of the alleged victim was never in question, and the nature of the sexual conduct would have been available to defense counsel by moving for a bill of particulars. While it may be argued, again from hindsight, that defense

counsel should have moved for a bill of particulars, Hartman has not established that he was prejudiced by counsel's failure to do so. In his written statement, and in his trial testimony, Hartman admitted engaging in a sexual encounter that included digital penetration, vaginal, anal and oral intercourse with M.W., so disputing that sexual conduct occurred was not part of his defense. To establish that he was prejudiced, Hartman would need to establish that but for counsel's failure to move for a bill of particulars, there is a reasonable probability that the outcome of the proceeding would have been different. As discussed above, the guilty verdicts in this case resulted from the trier of fact's decision to find the victim's testimony to be more credible. Under these circumstances, we conclude that the details provided by a bill of particulars would not have resulted in a reasonable probability of a different outcome.

We agree with Hartman's assertion that defense counsel, on cross-examination of the victim, brought up factual matters not presented during the direct examination of the victim that may have helped the State prove the element of force. Specifically, the record reveals that defense counsel asked the victim to confirm that Hartman was "restraining" her, Trial Transcript at 74-75, that Hartman pinned her arms down, Trial Transcript at 75-76, that Hartman held his forearm across her chest, Hartman grabbed her wrists, grabbed her arm, and "was doing that forcefully," Trial Transcript at 80-81. We have held that "trial counsel's decision to cross-examine a witness and the

extent of such cross-examination are tactical matters." State v. Russell, 2d Dist. Montgomery No. 21458, 2007-Ohio-137, ,i 55. "A reviewing court may not second-guess decisions of counsel which can be considered matters of trial strategy." State v. Conley, 2015-Ohio-2553, 43 N.E.3d 775, ,J 56 (2d Dist.), citing State v. Smith, 17 Ohio St.3d 98, 477 N.E.2d 1128 (1985). "Debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel, even if, in hindsight, it looks as if a better strategy had been available." Id.; citing State v. Cook, 65 Ohio St.3d 516, 524, 605 N.E.2d 70 (1992). Because it was at least arguable that the State had presented sufficient evidence of force relating to at least one of the Rape counts - the last one occurring on the bed - trial counsel could reasonably have concluded that it would not be safe to eschew cross-examination on the element offorce.[2]

It appears that the strategy of defense counsel asking the victim about facts relevant to the issue of force was an attempt to attack her credibility based on different versions of the events she provided to the sexual assault nurse, to the detective, and during direct examination at trial. In a case that rests entirely on the credibility of the witnesses, a strategic choice to conduct cross-examination of the victim on factual issues relating to elements of the offense is not automatically ineffective assistance of counsel. In the case before us, it was a valid defense strategy to attack the credibility of the victim

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[2] In fact, since the three Rape sentences were ordered to be served concurrently,

through the use of prior inconsistent statements, a well-established trial strategy. See Evid. R. 613. We conclude that Hartman was not denied the effective assistance of counsel when reasonable trial strategy was utilized to challenge the victim's credibility through a cross-examination technique of raising inconsistent statements.

Hartman also argues that his counsel was ineffective based on his failure to object to inadmissible hearsay from the testimony of the victim's friend, Courtney, the sexual assault nurse, and the detective who interviewed the victim at the hospital. With respect to the victim's friend, Courtney, Hartman claims that his counsel should have objected to inadmissible testimony regarding the character of the victim, including her demeanor immediately after the incident, and to specific statements made by the victim the following morning. While opinions elicited to prove that a victim is being truthful are generally inadmissible, a distinction has been made for testimony "which is additional support for the truth of the facts testified to by the [victim], or which assists the fact finder in assessing the [victim's) veracity." State v. Sedgmer, 7th Dist. Harrison No. 00 522 CA, 2002-Ohio-1527, ,J 23, citing State v. Stowers, 81 Ohio St. 3d 260,690 N.E. 2d 881 (1998). acquittal on two of the Rape charges would have amounted to a Pyrrhic victory. In the case before us, defense counsel did not err by failing to object to testimony that was admissible to assist the trier-of-fact in assessing the victim's veracity.

With respect to the sexual assault nurse, Hartman argues that counsel's failure to object to the nurse's inadmissible hearsay was prejudicial. The hospital's designated sexual assault nurse did testify as to statements made by the victim, after the victim had been examined by an ER doctor, so that at the time of the interview a medical diagnosis had already been completed. The nurse testified that her examination of the victim was to look for injury that could be consistent with force. Trial Transcript at 177-178. In response to the victim's statements, the sexual assault nurse took samples of the victim's DNA in order to complete a rape kit, which was to assist law enforcement, not for medical diagnosis. Ohio licensing law limits a registered nurse's role to assessing the patient for the purpose of providing nursing care, and a nursing diagnosis is limited to "identification of a patient's needs or problems which are amenable to nursing intervention." R.C. 4723.01; O.A.C. 4723-4-01. The victim's statements to a nurse about the cause and origin of the injury is inadmissible hearsay, unless "the inception or general character of the cause of external source thereof is reasonably pertinent to diagnosis or treatment." Evid. R. 803(4). The only statements made to a nurse by a victim that are admissible under Evid. R. 803(4) are statements made for the purpose of nursing diagnosis or treatment. Therefore, a nurse's testimony concerning statements made by a rape victim, recorded by the nurse for the purpose of assisting a criminal investigation, and not for nursing treatment or diagnosis, is inadmissible hearsay.

In the case before us, the nurse did not testify that the victim had any injuries requiring nursing treatment, or that she provided treatment. Even though defense counsel failed to object to the nurse's testimony or the admission of the nurse's report, Ex. 20, we conclude that this was not sufficiently prejudicial to have affected the outcome of the trial. The verdicts rested on the credibility of the victim, and no part of the nurse's testimony was essential to the trier of fact's finding that all elements of the offense of Rape had been established through the victim's testimony. Therefore, we conclude that Hartman was not denied effective assistance of counsel by counsel's failure to object to the nurse's testimony.

Hartman also argues that his counsel was ineffective by having failed to object to the hearsay evidence admitted through the testimony of the detective. The State concedes that it was hearsay when the detective testified regarding the statements made during his interview of the victim. The State does not argue that these statements were admissible through any exception to the hearsay rule, such as an excited utterance allowed by Evid. R. 803(2), or a present-sense impression under Evid. R. 803(1). The only question under this assignment of error is whether the admission of this hearsay was prejudicial. This question must be viewed in the same manner discussed above regarding the defense strategy to cross-examine the victim regarding prior inconsistent statements, which included the statements she made to the detective. As we have already concluded, it was a reasonable defense

strategy to allow the admission of the victim's various statements of the incident in order to challenge the victim's credibility by pointing out inconsistencies in these pre-trial statements with her testimony at trial. We conclude that Hartman was not denied effective assistance of counsel as a result of counsel's strategic decision not to object to the detective's testimony in order to allow the admission of inconsistent statements by the victim.

Hartman also argues that counsel was ineffective as a result of counsel's failure to investigate the case. Hartman claims that prior to trial his counsel failed to interview the victim's friend, Courtney, and the lab witness, Squibb. Hartman also claims that his counsel was ineffective as a result of counsel's failure to seek discovery of the notes of the forensic analyst who actually conducted the DNA tests, Emily Draper, or to obtain the video recordings of Hartman's police interviews. We agree that defense counsel has an obligation to conduct a reasonable pre-trial investigation sufficient to develop appropriate defense strategies. State v. Ayers, 5th Dist. Licking No. 98 CA 53, 1999 WL 3976 (Nov. 25, 1998), citing State v. Johnson, 24 Ohio St. 3d 87,494 N.E.2d 1061 (1986), and 1 A.B.A. Standard for Criminal Justice (1982 Supp.), No. 4-4.1. The defense strategy in this case was focused on defeating the State's claim that Hartman purposely forced M.W. to submit to sexual conduct. This strategy necessitated an attack on the victim's credibility, and evidence to bolster Hartman's credibility. As discussed above, Courtney's testimony was offered to support the victim's credibility.

Therefore, defense counsel's investigation should have included an interview with Courtney to develop a reasonable defense strategy to discredit her testimony. Notwithstanding the failure to interview Courtney, defense counsel did make appropriate objections during her testimony to challenge the admissibility of hearsay and the admissibility of Courtney's observations of the victim's demeanor after the incident to bolster the victim's credibility. We conclude that the failure to interview Courtney before trial was not sufficiently prejudicial to warrant reversal.

The failure to conduct a pretrial interview of Squibb did not amount to ineffective assistance of counsel. Since defense counsel had no advance notice that Squibb would be called to testify instead of Draper, the analyst who actually conducted the DNA tests, it cannot be concluded that counsel failed in the duty to conduct a pre-trial interview of an unnamed witness. In pre-trial discovery, defense counsel was provided with the lab report prepared by Draper, but failed to seek any additional documents from the lab, including Draper's lab notes, which could have helped counsel prepare an effective cross-examination to challenge the procedures followed by the lab. The potential for challenging the lab procedure was fully explored in the post-trial hearing on the motion for a new trial, but did not result in any evidence that would have supported the reasonable probability of a different outcome in the trial. Therefore, the failure to seek discovery of Draper's lab report notes was not shown to be prejudicial.

Hartman also claims that defense counsel's failure to review the sexual assault evidence kit caused surprise during the trial -- that the kit contained untested samples of fingernail scrapings and DNA from the victim's mouth. However, Hartman has not established how this additional discovery would have helped his defense. Additional DNA testing was not necessary to establish that it was Hartman who participated in the sexual encounter with M.W., which Hartman admitted when he first gave a statement to police, and never thereafter disputed. Hartman has not shown that additional testing would assist in his defense that M.W. consented to the sexual encounter. We conclude that Hartman has not established that he was prejudiced by his counsel's failure to pursue additional discovery from the rape kit.

We also conclude that Hartman has not shown prejudice by his counsel's failure to obtain a copy of the video recorded interrogations with the detective from the Oakwood Police Department. Defense counsel was present with Hartman at the time of the interviews, which should have adequately prepared counsel for making strategic plans to cross-examine the detective, and to prepare Hartman for potential cross-examination during his trial testimony. Hartman has not established how discovery of the video recordings would have led to a different outcome at trial.

Hartman's Fourth through Ninth Assignments of Error are overruled.

VI. Cumulative Effect of Counsel's Errors

For his Tenth Assignment of Error, Hartman asserts:

THE CUMULATIVE EFFECT OF COUNSEL'S ERRORS DENIED HARTMAN A FAIR TRIAL AND RENDERED THEIR ASSISTANCE INEFFECTIVE

The Supreme Court of Ohio in State v. DeMarco, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus, recognized the doctrine of cumulative error. Under this doctrine, a conviction will be reversed when the cumulative effect of errors in a trial deprives a defendant of a fair trial even though each of the numerous instances of trial court error does not individually constitute cause for reversal. Id. at 196-197. See also State v. Jackson, 141 Ohio St.3d 171, 2014-Ohio-3707, 23 N.E.3d 1023, 11 258; State v. McGail, 2d Dist. Miami No. 2014-CA-27, 2015-Ohio-5384, 1181; State v. Royster, 2d Dist. Montgomery No. 25870, 2015-Ohio-3608, 1156.

The Supreme Court of Ohio has recognized that multiple errors, when aggregated, may violate a defendant's right to a fair trial, even when those errors are determined to be harmless when separately considered. State v. Madrigal, 87 Ohio St.3d 378, 397, 721 N.E.2d 52 (2000). To find cumulative error, we first must find multiple errors committed at trial, and secondly, we must conclude that a reasonable probability exists that the outcome

of the trial would have been different but for the combination of the harmless errors. Id. at 398. See also State v. Zimpfer, 2d Dist. Montgomery No. 26062, 2014-Ohio-4401, citing State v. Thomas, 2d Dist. Clark No. 2000-CA-43, 2001 WL 1103328 (Sept. 21, 2001).

Based upon our above discussion of the alleged instances of ineffective assistance of counsel, we conclude that the instances of arguably ineffective assistance of counsel, even when considered cumulatively, do not give rise to a reasonable probability of a different result, had they not occurred. Hartman's Tenth Assignment of Error is overruled.

VII. The Indictment Was Sufficient

For his Eleventh Assignment of Error, Hartman asserts:

THE INDICTMENT IS CONSTITUTIONALLY INSUFFICIENT

For each of the three charges of rape, the indictment states:

> Mark Hartman, on or about December 31, 2013 in the County of Montgomery, aforesaid and the State of Ohio, did engage in sexual conduct with another, by purposely compelling the other person to submit by force or threat of force; contrary to the form of the statute (in violation of Section 2907.02(A)(2) of the Ohio

Revised Code) in such case made and provided, and against the peace and dignity of the State of Ohio.

The language of the indictment charging Hartman with three counts of Rape does contain all the elements of the Rape statute, R.C. 2907.02(A)(2). The Supreme Court of Ohio has held that "[a]n indictment meets constitutional requirements if it 'first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.' "State v. Childs, 88 Ohio St.3d 558, 565, 728 N.E.2d 379 (2000), quoting Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). In Childs, the Court recognized that an indictment is generally acceptable if citing the actual language of the statute, unless it inadequately notifies the defendant of the charge and the severity of the penalty. More recently, in State v. Jackson, 134 Ohio St.3d 184, 2012-Ohio-5561, 980 N.E.2d 1032, the Supreme Court of Ohio confirmed this holding and found that a charge for aggravated trafficking was sufficient, without listing the specific drug involved, as long as the indictment identified the statutory schedule, I through V, in which the drug was listed as it made a difference to the severity of the penalty. Id. at ,J 21. Hartman alleges that the indictment is insufficient because it does not identify the name of the victim, and does not identify the nature of the sexual conduct for each of the three charges. Hartman argues that without these specifics, the indictment

fails to adequately notify him of the charges against him, and subjects him to the possibility of additional charges, which would impair his protection from a potential Double Jeopardy violation.

The Supreme Court of Ohio has held that when an objection to an indictment is not raised prior to trial as required by Crim. R. 12(C)(2), it is waived, unless it constitutes plain error. State v. Skatzes, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ,J 26, citing State v. Frazier, 73 Ohio St.3d 323, 332, 652 N.E.2d 1000 (1995). According to Crim.R. 52(B), "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error is not found unless it can be concluded that but for the error, the outcome of the trial would have been different. State v. Waddell, 75 Ohio St.3d 163,166,661 N.E. 2d 1043 (1996). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." State v. Haney, 12th Dist. Clermont No. CA2005-07-068, 2006-Ohio-3899, ,i 50, quoting State v. Long, 53 Ohio St.2d 91, 372 N.E. 2d 804 (1978), paragraph three of the syllabus.

As we concluded above, since the name of the victim was undisputed, Hartman was not harmed by the failure to identify the name of the victim in the indictment. We have held that the indictment in a rape case with multiple counts "was sufficient because it paralleled the language of the statutes, including every element of each charge. Because the

nature of the sexual acts had no bearing on the identity or severity of the offenses, the specific acts were not essential elements of the crimes and therefore were not required to be set forth in the indictment." State v. Shaw, 2d Dist. Montgomery No. 21880, 2008-Ohio-1317, ,i 20.

Although the failure to identify the nature of the sexual conduct, in this case, does not affect the severity of the penalty for Rape, it does raise potential Double Jeopardy concerns. For example, Hartman admitted that he engaged in both oral and anal intercourse with the victim, but the State did not attempt to prosecute either of these potential offenses in the present case. In closing arguments, the State argued that the first count of Rape was supported by evidence of digital penetration, and the second and third counts were supported by evidence of penile penetration. Trial Transcript at 494. However, in the entry overruling the motion for a new trial, the trial court stated that all three counts were proven by penile penetration. Under the facts of this case, without identifying the specific sexual conduct in the language of the indictment, the State might consider pursuing a second prosecution for the digital penetration or the oral or anal intercourse. As we concluded in Shaw, supra, the failure of the indictment to notify the defendant of the nature of the sexual conduct upon which each of his convictions were based prevents a retrial for any of the potential offenses that occurred during the same time span covered by the indictment. Id. at ,i 25. As addressed by the Supreme Court of Ohio in State v. Anderson, 138 Ohio St. 3d 264, 2014-Ohio-542, 6

N.E. 3d 23, ,i 59, the proper time for raising a Double Jeopardy violation is after a second indictment is issued and a motion to dismiss the indictment is decided. We cannot find that the potential for a future Double Jeopardy problem is grounds for reversal of a conviction that does not involve a current Double Jeopardy violation. In other words, we cannot conclude that but for the defective indictment error, the outcome of this trial would have been different. We conclude that failure to object to the indictment prior to trial, in accordance with Crim. Rule 12, waived this error on appeal. Consequently, Hartman's Eleventh Assignment of Error is overruled.

VIII. Admission of Evidence to Establish Demeanor

For his Twelfth Assignment of Error, Hartman asserts:

THE TRIAL COURT ERRED WHEN IT ADMITTED AND RELIED ON IRRELEVANT AND INADMISSIBLE DEMEANOR-AFTER-THE-FACT EVIDENCE

The Supreme Court of Ohio has held that the admission or exclusion of evidence is within the sound discretion of the trial court and that, unless the trial court clearly abused its discretion and a party was materially prejudiced as a result, reviewing courts should be slow to interfere. State v. Byrd, 2d Dist. Montgomery No. 25842, 2014-Ohio-2553, 'I(26, citing State v. Hymore, 9 Ohio St. 2d

122, 224 N.E. 2d 126 (1967). A trial court abuses its discretion when it makes a decision that is unreasonable, arbitrary, or unconscionable. State v. Renner, 2d Dist. Montgomery No. 25514, 2013-Ohio-5463, 24.

> MR. CONARD: Objection, Your Honor. No foundation.
>
> THE COURT: Further, I do not see the relevance. What's the relevance of this?
> MS. MULLINS: Your Honor, it's to show how a tragic situation changed her demeanor and her personality. It goes to when someone goes through a tragic situation, they change. It goes to show that.
>
> THE COURT: How does make - - I'll allow just a little bit of this. But. again, it seems to me that her change in demeanor, it has to be directed toward whether - - proving that the events she has described more probably happened. That's the only reason it could be relevant; is that if those changes in her demeanor makes it more likely that the events that have been described occurred. I don't want this for any form of sympathy.
>
> MS. MULLINS: No, Your Honor. THE COURT: All right. Go ahead.
>
> MS. MULLINS: (M.W.), how did your demeanor, how did your personality change

> from before this happened to after this happened?
>
> MR. CONARD: Your honor, I would renew my objection.
>
> THE COURT: And the basis?
>
> MR. CONARD: It would be relevance.
>
> THE COURT: And again, I think there is some minimal relevance to this under Evidence Rule 401, in that if this event did change her demeanor, her personality, that does make it perhaps slightly more likely that the events described occurred. So for that purpose and that purpose alone, I will allow this testimony.

Trial Transcript at 46-47.

The record also reflects that questions were asked of the victim's friend Courtney, about the victim's demeanor after the incident to bolster the victim's credibility. Again, the trial court admitted the bolstering testimony, stating as follows:

> THE COURT: Again, I am going to allow it for the minimal purpose of - since this witness can testify to what [M.W.]'s personality was before the alleged incident and then after the incident. Not for any purposes of sympathy, but simply for purposes, under [Evid. R.] 401, of whether or

> not this change in personality makes the events more or less probable. For that purpose and that purpose alone.

Trial Transcript at pgs. 124-125.

We conclude that the trial court properly found that the evidence of the victim's demeanor was probative. While admissible, the trier of fact is free to give little weight to the evidence. On this record, we conclude that the trial court, the trier of fact, as evidenced by its comments, did not give undue weight, or even much weight at all, in rendering its verdict. The alleged change in the victim's demeanor is but one of numerous facts that were considered by the trial judge in his conclusion that the victim was raped.

Courtney's opinions regarding the victim's demeanor after the sexual encounter were rationally based on her perceptions of the victim's conduct, and helpful to a clear understanding of her testimony, because her conclusions were drawn from a close personal friendship with the victim, not just from the type of common experiences used by juries to draw reasonable inferences. The victim's testimony about her own personality changes was subject to cross-examination and was admissible under Evid. R. 401.

In the case before us, the trial court did not abuse its discretion by admitting the testimony regarding a change in the victim's demeanor. Hartman's Twelfth Assignment of Error is overruled.

IX. Admission of Hearsay Was Not Materially Prejudicial

For his Thirteenth Assignment of Error, Hartman asserts:

THE TRIER OF FACT'S ADMISSION AND CONSIDERATION OF THE OVERWHELMING AMOUNT OF HEARSAY IN THIS CASE REQUIRES REVERSAL

Hartman argues that the trial court improperly admitted hearsay evidence and that the hearsay was material to the outcome because the trial court announced the verdict in open court and in the written decision overruling the motion for a new trial, by stating that its decision was "based on the evidence presented." We initially note that the "decision whether to admit or exclude evidence is within the sound discretion of the trial court, and 'unless the trial court clearly abused its discretion and a party was materially prejudiced as a result, reviewing courts should be slow to interfere.' "Kademian v. Marger, 2014-Ohio-4408, 20 N.E.3d 1176, 1J 41 (2d Dist.), quoting Waste Mgt. of Ohio, Inc. v. Mid- America Tire, Inc., 113 Ohio App.3d 529, 533, 681 N.E.2d 492 (2d Dist.1996). "The trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception." State v. Everson, 7th Dist. Mahoning No. 12 MA 128, 2016-Ohio-87, 1127, quoting State v. Dever, 64 Ohio St.3d 401,410,596 N.E.2d 436 (1992).

The fact that defense counsel did not object to this hearsay testimony at the time of trial requires us to utilize a plain error standard of review. Plain error is not grounds for reversal, unless it is established that but for the error, the outcome of the trial would have been different. State v. Waddell, 75 Ohio St.3d 163, 166, 661 N.E. 2d 1043 (1996). "Notice of plain error 'is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " State v. Haney, 12th Dist. Clermont No. CA2005-07-068, 2006-Ohio-3899, ,r 50, quoting State v. Long, 53 Ohio St.2d 91, 372 N.E. 2d 804 (1978), paragraph three of the syllabus. Presuming that the trial court considered and relied on hearsay statements in reaching its verdict, we must determine if the effect was materially prejudicial such that the outcome would have been different had the hearsay been excluded.

As discussed above, the trial court did admit statements made by the victim to the victim's friend, Courtney, to the sexual assault nurse, and to the detective who interviewed the victim. As we concluded above, ii was a reasonable defense strategy not to object to this hearsay in order to establish prior inconsistent statements to attack the credibility of the victim during cross-examination. Hartman has not produced evidence of any other grounds for attacking the victim's credibility that could have been raised if the hearsay statements had not been admitted. Without the evidence of the prior inconsistent statements, the defense strategy to attack the victim's credibility would have been even

more difficult, and less likely to result in an acquittal. Since we find no material prejudice to the admission of the hearsay statements, we do not find plain error or an abuse of discretion. Hartman's Thirteenth Assignment of Error is overruled.

X. Scientific Testing May Be Admitted Through the Testimony of an Expert Who Did Not Conduct the Testing

For his Fourteenth Assignment of Error, Hartman asserts:
THE ADMISSION OF MARK SQUIBB'S TESTIMONY IN VIOLATION OF CRAWFORD V. WASHINGTON, 541 U.S. 36 (2004) REQUIRES REVERSAL

Hartman argues that the admission of scientific evidence through a witness who did not conduct the scientific test is structural error. Convictions based on structural errors, which involve a constitutional "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," are subject to automatic reversal, regardless of whether harm or prejudice is shown. Neder v. United States, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). The State argues that the expert's testimony was not hearsay, because the DNA expert testified to his own actions in performing a peer review of the actual lab technician's report. The State also argues that a confrontation clause violation, if any, was waived when the defense failed to object to the testimony of the DNA expert at trial. The State also argues that

any error was harmless. As discussed below, we conclude that our review of this assignment of error must be based on whether the error was waived or constitutes plain error.

For purposes of the confrontation clause, it has been held that the contents of a laboratory report is testimonial in nature when its conclusion is prima facie evidence of an element of the offense. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); Bullcoming v. New Mexico, 564 U.S. 647, 663-664, 131 S.Ct. 2705, 2716, 180 L.Ed.2d 610 (2011). However, the U.S. Supreme Court has also held that expert testimony from a forensic specialist about the findings of a DNA test that was not performed by the witness did not violate the defendant's right to confrontation because the testimony was offered for the purpose of explaining the assumptions on which the expert's opinion relied, and were not offered for the truth of the assumptions. Williams v. Illinois,_ U.S._, 132 S. Ct. 2221, 183 L.E.2d 89 (2012). See also State v. Maxwell, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ,i 42. In the case before us, Hartman challenges not only the admission of the lab reports, but his inability to cross-examine the witness who actually performed the DNA tests. The record supports that the DNA expert who did testify was unable to fully explain the reasoning for the process used to conduct the testing, which the witness did not conduct. "Fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." Melendez-Diaz

v. Massachusetts, 557 U.S. at 325. "[T]he (Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." Bui/coming v. New Mexico, 564 U.S. at 662.

We agree that the record establishes that during trial, defense counsel did not object to the testimony of Squibb, the DNA expert, in place of Draper, the lab analyst who personally conducted the testing and interacted with the persons in law enforcement who requested the tests. We do not agree that counsel's failure to object automatically constitutes a waiver of his Sixth Amendment right to confrontation. We acknowledge that the Supreme Court of Ohio in State v. Pasqua/one, 121 Ohio St. 3d 186, 2009-Ohio-315, 903 N.E. 2d 270, held that confrontation clause rights, like other constitutional rights, can be waived. Although the Court in Pasqua/one was addressing the potential error of admitting a laboratory report, without the testimony of the person who prepared the report, the holding in Pasqua/one rests entirely on a statutory provision, R.C. 2925.51, that specifically provides that defense counsel statutorily waives the right to insist on the testimony of the lab technician, if the procedure specified by the statute is not followed. Inapplicable to the case before us, R.C. 2925.51 only applies to testing done on drugs. not DNA samples. The statute applicable to drug testing puts the defense on notice that they have a right and that it is waived if the procedure is not followed, which comports with the

legal concept of waiver requiring a voluntary relinquishment of a known right. In re B.N.C., 2d Dist. Montgomery No. 25615, 2013-Ohio-4071, 1149. The U.S. Supreme Court in Melendez-Diaz, supra, commented that state statutes, such as R.C. 2925.51, do not run afoul of the confrontation clause when the effect of the statute is only to establish the procedural timing of when the right must be exercised. In the case before us, the State identified Emily Draper as the witness it intended to call to introduce the lab report and the DNA analysis. Dkt. #40. The defense had no prior notice that it would waive the right to cross-examine the lab technician if she did not show up for trial. However, by failing to object at trial when the State called Squibb instead of Draper, Hartman waived all but plain error. "Where preserved by objection, review of Confrontation Clause claims is for harmless error. Confrontation Clause claims not preserved by objection are reviewed for plain error." State v. Habo, 11th Dist. Portage No. 2012-P-0056, 2013-Ohio-2142, ,i 35, citing State v. Scott, 10th Dist. Franklin No. 05AP-1144, 2006-Ohio-4981, 11, fn. 4.

By claiming structural error, Hartman essentially argues that on this record, without the testimony of the analyst, prejudice is presumed. We disagree. The purpose of the testimony of t□e DNA expert was twofold; first, it proved that Hartman engaged in sexual intercourse with M.W., because his semen was found from a vaginal swab taken from M.W.; and secondly, that DNA testing of the bed comforter proved that there was movement of the two bodies on the comforter, as DNA evidence was

found in numerous different spots. Hartman testified at trial, and did not dispute that he had sexual intercourse with M.W., so he was not prejudiced by the admission of the DNA lab report or the testimony that explained the testing process. The evidence involving the comforter was also not prejudicial, because it was not probative to any element of the charged offenses, and may actually have supported Hartman's defense that the encounter was consensual, based upon a reasonable inference that M.W. was not held down or restrained during the sexual encounter. In closing arguments, Hartman's counsel did suggest that the testimony of the DNA expert be given little weight because, "when swabs were taken from [M.W.]'s mouth, they weren't tested. So, there's aspects of the investigation that appear to be incomplete as well that could have helped us in this path as we look for the truth." Trial Transcript at 520. If Hartman's argument is based on the possibility of evidence that was not provided by the State, that potential error does not constitute a confrontation-clause violation. "The state has no duty to gather exculpatory evidence. Moreover, it is wholly speculative whether further investigation would have uncovered potentially exculpatory evidence." State v. Smith, 2d Dist. Montgomery No. 20247, 2005-Ohio-1374, 1112, citing State v. Farris, 2d Dist. Clark No. 2003 CA 77, 2004-Ohio-5980, 1120. The defendant bears the burden to show that the evidence not produced was materially exculpatory, or that the failure to produce the evidence was based on bad faith, in order to demonstrate a due-process violation. State v. Powell, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d

865, 1174-77. Since Hartman has not raised a due-process argument, the issue of whether the lab should have tested the full rape kit to provide potentially exculpatory evidence to the defense is not before us. Hartman has not established that there is a reasonable possibility that had he been able to cross-examine the lab analyst there would have been a great likelihood of a different outcome.

Even without the testimony of the DNA analyst, the trier-of-fact had sufficient evidence to support each element of the charged offenses. Hartman has not established that but for a confrontation-clause error, the outcome of the trial would have been different. Accordingly, Hartman's Fourteenth Assignment of Error is overruled.

XI. Cumulative Effect Of Multiple Errors Not Established

For his Fifteenth Assignment of Error, Hartman asserts:

THE CUMULATIVE EFFECT OF MULTIPLE ERRORS DENIED HARTMAN A FAIR TRIAL

Hartman argues that the cumulative effect of two or more errors should be grounds for reversing his convictions, even if-the errors are determined to be harmless. The cumulative-error doctrine provides that a "conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial

error does not individually constitute cause for reversal." State v. Garner, 74 Ohio St.3d 49, 64, 656 N.E. 2d 623 (1995). "In order to find cumulative error, we must find: (1) that multiple errors were committed at trial, and (2) there is a reasonable probability that the outcome of the trial would have been different but for the combination of the separately harmless errors." State v. Goldblum, 2d Dist. Montgomery No. 25851, 2014-Ohio-5068, 58.

Although we have found some basis for a claim of ineffective assistance of counsel, we have concluded that even when cumulated, the instances of ineffective assistance are insufficiently prejudicial to merit reversal. Similarly, when those instances are cumulated with the alleged deficiency in the indictment, and the alleged confrontation clause violation, we still conclude that these alleged errors are not sufficiently prejudicial to have created a reasonable probability of a different result, had the errors not occurred.

Hartman's Fifteenth Assignment of Error is overruled.

XII. Conclusion

All of Hartman's assignments of error having been overruled, the judgment of the trial court is Affirmed.

WELBAUM, J., concurs.

HALL, J., concurring:

I agree with the resolution of the issues reached in the lead opinion. I write separately to express my opinion that the right to confront DNA expert Draper was waived. Moreover, even if it was not, there is no showing that the use of the alternate test reviewer, Squibb, had any prejudicial effect.

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

State of Ohio, Plaintiff,	Case No. **2014 CR 00834**
vs.	Judge Michael L. Tucker
Mark Hartman, Defendant.	**TERMINATION ENTRY**

The defendant on **MARCH 11, 2015** was brought before the Court herein HAVING BEEN FOUND GUILTY BY THE COURT AFTER A BENCH TRIAL TO the following offense(s): **RAPE (by force or threat of force) - 2907.02(A)(2)(F1), RAPE (by force or threat of force) - 2907.02(A)(2)(F1), RAPE (by force or threat of force) - 2907.02(A)(2)(F1).**

WHEREFORE, it is the JUDGMENT and SENTENCE of the Court that the defendant herein be delivered to the **CORRECTIONAL RECEPTION CENTER** there to be imprisoned and confined for a term of:

COUNT 1: FOUR (4) YEARS;

COUNT 2: FOUR (4) YEARS;

COUNT 3: FOUR (4) YEARS;

THE SENTENCE IMPOSED IN COUNTS 1, 2, AND 3 ARE TO BE SERVED CONCURRENTLY TO EACH OTHER; FOR A TOTAL OF FOUR (4) YEARS.

The Court finds the defendant is a **Tier III** sex offender / child victim offender as defined by Ohio Revised Code 2950.01.

The Court advised the defendant of his requirement to register as a sex offender/child victim offender as defined by Ohio Revised Code 2950.04, 2950.041, 2950.05, 2950.06 and 2950.07 AND the Director or Chief Administrative Officer of the defendant's detention facility or correctional institution shall provide notice to the defendant at least ten (10) days before the defendant is released;

TIER III - FOR YOUR LIFETIME WITH IN-PERSON VERIFICATION EVERY 90 DAYS.

Court costs to be paid in full in an amount to be determined by the Montgomery County Clerk of Courts. If the defendant fails to pay court costs as ordered by the Court, or fails to pay court costs pursuant to a payment schedule approved by the Court, the defendant may be ordered to perform community service until the court cost is paid or the court is satisfied that the defendant is in compliance with the approved payment schedule. If community service is so ordered, each hour of community service performed will reduce the amount owed by a specified hourly credit rate.

The defendant is to receive credit for **FOUR (4)** days spent in confinement as of the date of sentencing stated above.

The Court notifies the defendant that, as part of this sentence, on **COUNT 1: RAPE (by force or threat of force) - 2907.02(A)(2)(F1),** the defendant **WILL** be

supervised by the Parole Board for a period of **FIVE (5)** years Post-Release Control after the defendant's release from imprisonment.

The Court notifies the defendant that, as part of this sentence, on **COUNT 2: RAPE (by force or threat of force) - 2907.02(A)(2)(F1),** the defendant **WILL** be supervised by the Parole Board for a period of **FIVE (5)** years Post-Release Control after the defendant's release from imprisonment.

The Court notifies the defendant that, as part of this sentence, on **COUNT 3: RAPE (by force or threat of force) - 2907.02(A)(2)(F1),** the defendant **WILL** be supervised by the Parole Board for a period of **FIVE (5)** years Post-Release Control after the defendant's release from imprisonment.

Should the defendant violate any post-release control sanction or any law, the adult parole board may impose a more restrictive sanction. The parole board may increase the length of the post-release control. The parole board could also impose up to an additional nine (9) months prison term for each violation for a total of up to fifty percent (50%) of the original sentence imposed by the court. If the violation of the sanction is a felony, in addition to being prosecuted and sentenced for the new felony, the defendant may receive from the court a prison term for the violation of the post-release control itself.

Pursuant to R.C. 2929.19(B)(2)(f), the defendant is ordered not to ingest or be injected with a drug of abuse. The defendant is ordered to submit to random drug testing as provided in section 341.26, 753.33, or

5120.63 of the Revised Code. The results of the drug test administered shall indicate that the defendant did not ingest and was not injected with a drug of abuse.

The Court did fully explain to defendant **his** appellate rights and the defendant informed the Court that said rights were understood.

BOND IS RELEASED.

JUDGE MICHAEL L. TUCKER

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

State of Ohio, Case No. **2014 CR 00834**

Plaintiff,

vs. Judge Michael L. Tucker

Mark Hartman,

Defendant.

DECISION, ENTRY AND ORDER OVERRULING DEFENDANT MARK HARTMAN'S MOTION FOR A NEW TRIAL

INTRODUCTION

Defendant Mark Hartman was indicted on July 18, 2014 for three counts of rape in violation of O.R.C.§2907.02(A)(2). The events at issue occurred on December 31, 2013, with the victim being Molly Weckesser. A bench trial, a jury having been waived, occurred on September 29-30, 2014. The court, on October 9, 2014, announced its conclusion that the State of Ohio, by proof beyond a reasonable doubt, established each rape count. The verdict entry finding Mark Hartman guilty on each rape count was filed on October 20, 2014.

Mark Harman, on October 23, 2014, filed a motion seeking a new trial. Mr. Hartman, after receiving the trial transcript, filed an amended motion. A

hearing on the motion for a new trial was conducted on December 17, 2014.

Mark Hartman's motion, when distilled, asserts three reasons a new trial is required: (1) Mark Hartman's convictions are against the weight of the evidence; (2) the court should have considered the lesser included offense of sexual battery, and (3) the State of Ohio committed *Brady* violations. It is concluded, as will be more fully discussed below, that these contentions lack merit, and, as a result, Mark Hartman's motion for a new trial will be overruled.

OHIO R. CRIM P. 33(A)

Ohio R. Crim. P. 33(A) states the following concerning the grounds upon which a new trial may be granted:

A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

1. Irregularity in the proceedings, or in any order or ruling of the court, or abuse of discretion by the court, because of which the defendant was prevented from having a fair trial;

2. Misconduct of the jury, prosecuting attorney, or the witnesses for the state;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. That the verdict is not sustained by sufficient evidence or is contrary to law. If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified;

5. Error of law occurring at the trial;

6. When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing on the motion, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone

> the hearing of the motion for such length of time as is reasonable under all the circumstances of the case. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.

EVIDENTIARY REVIEW

Mark Hartman's assertion that he is entitled to a new trial based upon the evidence presented at trial consists of two basic arguments: (1) the convictions are against the manifest weight of the evidence because the evidence establishes Molly Weckesser consented to the sexual conduct, and (2) the evidence does not support the conclusion Mark Hartman purposely compelled Molly Weckesser to engage in sexual conduct by force or threat of force.

Mark Hartman's assertion that the evidence does not support the rape convictions must be analyzed under Crim. R. 33(A)(4) which provides for a new trial if the verdict is not "sustained by sufficient evidence…" Mr. Hartman's motion uses the term "manifest weight". This term, as well as the term "sufficiency of the evidence," are often discussed in appellate decisions reviewing criminal convictions resulting from a trial.

The Scond Appellate District discussed, and contrasted, the two concepts as following in *State v. Grissom,* 2014-Ohio-857 (2nd Dist.):

A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson,* 2d Dist. Montgomery No. 22581, 2009-Ohio- 525, ¶ 10, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541 (1997). When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis,* 79 Ohio St.3d 421, 430, 1997 Ohio 372, 683 N.E.2d 1096 (1997). A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." *Id.*

In contrast, "a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." (Citation omitted.) *Wilson* at ¶ 12. When evaluating whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier of fact "clearly lost its way and created such a

> manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387, citing *State v. martin*, 20 Ohio 3d 172, 175, 20 Ohio B.215, 485 N.E.2d 717 (1st Dist. 1983). *State v. Garrison* at ¶ 15-16.

A sufficient weight inquiry reviews whether the State's evidence, if believed, establishes the elements of the crime beyond a reasonable doubt. *State v. Braxton,* 2005-Ohio-2198 ¶ 7 (10th Dist.). A manifest weight inquiry, on the other hand, requires the appellate court to become the so called "thirteenth juror" to determine whether the jury "lost its way," and, thus, created a "miscarriage of justice." *State v. Braxton* at ¶ 8. Given this, and as noted by *State v. Grissom*, "manifest weight may subsume sufficiency in conducting the analysis, that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency." Grissom at ¶18 quoting State v. Hill, 2013-Ohio-2016 ¶ 31 (2d. Dist.), quoting State v. McCrary, 2011-Ohio-3161 at ¶ 11 (10th Dist.).

Crim. R. 33(A)(4) requires a new trial if a verdict is not supported by "sufficient" evidence. This suggests, it seems, that a trial court's new trial inquiry is limited to a determination of whether any "rational finder of fact, after reviewing the evidence in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt." State v. Grissom at ¶ 15 citing State v. Dennis, 79 Ohio St.3d 421, 430, 1997-Ohio-372, 683 N.E.2d 1096 (1997). Therefore, the analysis of the evidence requested by Mark Hartman will

focus upon whether the rape convictions are supported by sufficient evidence which, once again, seems to be the standard Crim. R. 33(A)(4) mandates.[1]

MARK HARTMAN'S CONVICTIONS ARE NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE BECAUSE THE EVIDENCE ESTALISHES THAT MOLLY WECKESSER CONCENTED TO THE SEXUAL CONDUCT

This argument requests a manifest weight review of the issue of consent. This court, as indicated, will not engage in such a review. The court, as reflected by the verdicts, found Molly Weckesser's testimony regarding the sexual conduct between Ms. Weckesser and Mr. Harman to be credible, and, thus, believable. The court, on the other hand and again as reflected by the verdicts, did not find Mark Hartman's testimony regarding the sexual conduct at issue to be credible. The conclusion, from this, is that the court, consistent with the verdicts, determined Molly Weckesser did not consent to the involved sexual conduct. Mark Hartman's motion does not persuade the court to a contrary conclusion. Accordingly, Mr. Hartman's motion for a new trial

[1] A new trial manifest weight review following a bench trial seems unworkable. The court, in such a review, acts as the "thirteenth juror" to determine if the trier of fact – usually a jury – lost its way. Such a review following a bench trial would require the judge, as the trier of fact, to determine if he lost his way. This inquiry, within the context of a bench trial, is inherently an appellate court function.

based upon the contention that the manifest weight of the evidence establishes that Molly Weckesser consented to the sexual conduct is overruled. [2]

THE EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT MARK HARTMAN PURPOSEFULLY COMPELLED MOLLY WECKESSER TO ENGAGE IN SEXUAL CONDUCT BY FORCE OR THREAT OF FORCE

This contention is subject to a sufficiency of the evidence review. This review requires the determination of whether the State's evidence, if believed, allows the conclusion beyond a reasonable doubt that Mark Hartman, as to each count, compelled Molly Weckesser to engage in sexual conduct by force or threat of force. A few comments, as gleaned from the case law, O. R. C. §2907.02, and Ohio Jury Instructions (OJI), are appropriate before reviewing the State's evidence.

O.R.C.§2901.01(A) defines force as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." This is the approved OJI instruction regarding a rape allegation

[2] Mark Hartman, under a separate heading within the amended motion for a new trial, argues that Molly Weckesser's trial testimony is "so contradicted by the substantive evidence that it [can] not, standing alone, support a conviction beyond a reasonable doubt." This, obviously, presents a manifest weight argument. It is noted, however, that when making the credibility determination regarding Ms. Weckesser's testimony, the factors discussed in Mr. Hartman's motion were considered.

when the defendant is not a parent or other authority figure. OJI CR 507.02(A)(2)(8).

It is recognized that "[T]he force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relation to each other." *State v. Johnson,* 2010-Ohio-2920 at ¶ 18 (2d Dist.) quoting *State v. Eskridge*, 38 Ohio St.3d 56, 58, 526 N.E.2d 304 (1988) quoting *State v. Labus,* 102 Ohio St. 26, 38-39, 130 N.E. 161 (1921). Further, a victim's physical resistance is "not a prerequisite to a rape conviction." *State v. Umprhies,* 2012-Ohio-4711 (4th Dist.). This concept is statutorily set forth at O.R.C. §2907.02(C) and incorporated into OJI Cr 507.02(A)(2)(11) as follows: "The prosecution need not prove that the victim physically resisted the defendant."

Recently, the Second Appellate District, in *State v. Patel*, 2011-Ohio-6329 (2d Dist.), discussed whether during Patel's rape trial the State presented sufficient evidence to establish the element of force. The facts set forth in the appellate decision, which reflect a portion of the victim's trial testimony, are as follows:

Q. All right. So what happened when [Patel] came in?

A. After we had the discussion, after he asked me if I was hungry and everything. I thought he had left, but apparently he had shut the door and that's when he had reached in the back of my underwear and liner of my pants and told me that I had pretty , nice silk underwear.

Q. What kind of pants were you wearing on pizza day, if you remember?

A. They were scrub pants.

Q. And when [Patel] makes a comment about your underwear, what happens next?

A. He rammed his hand down my pants, touching the bottom of my butt.

Q. So his hand is touching the flesh of your butt at this point?

A. Yes.

Q. What was your reaction when you felt [Patel's] hand on the flesh of your buttocks on this day, on pizza day?

A. I hurried and stood up and turned around.

Q. Why did you hurriedly stand up and turn around?

A. Because I was shocked and I wasn't expecting that.

Q. Did you say anything to him when you turned around?

A. No. By then he had done grabbed me and his hand by then was in the front of me and he had his finger in my vagina.

Q. How did you know his finger is inside your vagina, ma'am?

A. Because I felt it.

Q. And when [Patel's] finger was inside your vagina was he compelling you to submit to his finger inside your vagina by force?

A. Yes, it was by force.

Q. Why do you say yes?

A. Because it was not willingly. I was not willingly participating in that.

Q. Did you say anything to him when he had his finger inside your vagina?

A. Yeah. 'Stop.'

Q. And did he?

A. No. Then he goes and reaches for a kiss and rams his tongue down my throat.

Q. At this point are you facing the hotel room bathroom door or not?

A. Yeah, my face is toward the door.

Q. Is that door opened or closed?

A. No, it was locked.

Q. Did you try to escape from [Patel's] clutching at this point?

A. I was pushing him, but his back was against the door." State v. Patel, at ¶¶ 33-62.

The *Patel* decision stated the following regarding whether Patel's rape conviction was supported by sufficient evidence:

> The foregoing testimony is sufficient to establish the force element of rape. "Force" includes any compulsion or constraint physically exerted against a person. R.C. 2901.01(A)(1). Here the jury could have found force based upon [the victim's] testimony that Patel held her in a locked room and inserted his finger into her vagina against her will and ignoring her plea to stop. *State v Patel* at ¶ 63.

The Fourth Appellate District, in *State v. Umphries*, 2012-Oio-4711, stated the following concerning the element of force in the context of a rape indictment:

> [T]he state presented sufficient evidence that appellant engaged in sexual conduct with the victim by purposely compelling the victim to submit by force or threat of force. The victim testified that appellant removed her pants, underwear, and tampon and that she "begged" him to stop. The victim's testimony implies that appellant acted with physical exertion when he removed her pants, underwear, and tampon. The victim did not offer any testimony that she willingly removed her clothing or the tampon. Obviously, the victim's clothing did not magically remove itself. Instead, appellant had to use some degree of physical force to remove the items.

Additionally, the victim testified that appellant was bigger than she and stated, "what was I going to do." She explained that she was "scared." The state pointed out to the jury that the victim is a petite woman and that appellant obviously outweighed her. From this testimony, the jury could have inferred that appellant was physically imposing and thus induced fear in the victim. The victim's testimony, "what was I going to do," coupled with her petite size in relation to appellant's, shows that she felt compelled to submit, scared, and that she believed she had no other option. Thus, this testimony sufficiently shows that her will was overcome by fear. Taken together, the facts demonstrate that appellant physically exerted, by any means, compulsion upon the victim. R.C. 2901.01(A)(1).

Contrary to appellant's argument, the state did not need to show that appellant "held [the victim] down or otherwise prevented her from getting up." In fact, R.C. 2907.02(C) states that a victim's physical resistance to the defendant's conduct is not a prerequisite to a rape conviction. Thus, we disagree with the appellant that the state failed to present sufficient evidence of force to sustain his rape conviction State v. Umphries, at ¶¶ 19-21.

REVIEW OF STATE'S EVIDENCE

This court, as already stated, found Molly Weckesser's testimony concerning the sexual conduct which occurred to be credible, and, on the other hand, found Mark Hartman's testimony lacked such credibility. There is, focusing on a few preliminary evidentiary findings, a marked discrepancy between Mark Hartman's size and strength and Molly Weckesser's size and strength. Mark Hartman, in the hours before the sexual conduct, consumed a significant amount of alcohol. Ms. Weckesser and Mr. Hartman had not met before the December 30-31 "get together" at the Routsong's Oakwood home. Ms. Weckesser, in fact, referred to Mr. Hartman as "Mike" in the immediate aftermath of that which occurred. Ms. Weckesser had not previously been in the Routsong home, and, thus, was not familiar with the home' layout which, apparently, is rather unique. Ms. Weckesser did not know where the remaining occupants of the home were as the critical events unfolded. Molly Weckesser, in short, was confronted with the following as the sexual conduct occurred – a larger, stronger, and intoxicated individual she did not know (and, thus, she could not gage how he might react) with the events occurring in an unfamiliar home at a time when she did not know the location of the home's remaining occupants. The element of force regarding each rape count must be reviewed with these facts in mind.

REVIEW OF RAPE COUNTS

Mark Hartman escorted Molly Weckesser to a bedroom within the Routsong home so that Ms.

Weckesser could go to bed. Mr. Hartman, after escorting Ms. Weckesser to the bedroom, began kissing Ms. Weckesser while they were standing near the bedroom door. Ms. Weckesser consented to the kissing initiated by Mr. Hartman.

Mr. Hartman, as the kissing continued, placed a hand under Ms. Weckesser's shirt and moved the hand upward toward Ms. Weckesser's breasts. Ms. Weckesser indicated she did not want this to occur with Mr. Hartman, at this point, removing his hand from underneath Ms. Weckesser's shirt.

Mr. Hartman, at this point, pushed Ms. Weckesser onto the bed. Mr. Hartman placed a hand underneath Ms. Weckesser's pants. Ms. Weckesser, once again, indicated she did not want this activity to occur. Mr. Hartman did not withdraw his hand, but, instead told Ms. Weckesser "it will be okay," "it will be fine," and "it will be fun."

Mr. Hartman, after saying these words, begin to take off Ms. Weckesser's shirt and bra. Ms. Weckesser, as this was occurring, said "no," but Mr. Harman, ignoring Ms. Weckesser's protest, completed the removal of the shirt and bra. Mr. Harman, ignoring Ms. Weckesser's indication that she did not want the conduct to progress, removed his clothes and Ms. Weckesser's pants.

Ms. Weckesser, at this point, became frightened and unsure concerning how to "handle the situation." Ms. Weckesser's fear was prompted by her recognition she did not have sufficient strength to overcome Mr. Hartman, with this fear including the thought that Mr. Hartman, an individual she did not know, could

render her unconscious, and, if this occurred, she would not "remember" what occurred. Ms. Weckesser was also concerned because she did not know the location of the home's remaining occupants.

Mark Hartman, after removing Ms. Weckesser's clothing, continued to kiss Ms. Weckesser. Ms. Weckesser failed to respond with Mr. Hartman, at this point, kissing each side of Mrs. Weckesser's neck. The results of this kissing are depicted by State's Exhibits 4-9. Mr. Hartman, additionally, began touching Ms. Weckesser's body with his hands and fingers, such touching included "grabbing" Ms. Weckesser's breasts and touching Ms. Weckesser's vagina with this touching including Mr. Hartman's digital penetration of Ms. Weckesser's vagina.[3] Mark Hartman, at this point, initiated sexual conduct with Ms. Weckesser by inserting his penis into her vagina. Ms. Weckesser, before the penetration occurred, said "no" with Mr.

Hartman responding that it would be "okay", it would be "fine," and it would be "fun." The vaginal penetration continued for a "minute or two."

Mark Hartman, at this juncture, removed his penis from Ms. Weckesser's vagina. Ms. Weckesser interpreted this as a "break" because soon thereafter Mark Hartman began touching Ms. Weckesser once again with this renewed touching culminating with Mr. Hartman, for the second time, penetrating his penis into Ms. Weckesser's vagina. This episode continued for a minute or two.

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[3] Mark Hartman's digital vaginal penetration is not, though it could have been, an indicted rape count.

Molly Weckesser, after the second penis/vaginal penetration terminated, decided, with her thought being such activity might create an escape opportunity, to go into the bathroom connected to the bedroom. Mark Hartman, however, followed Ms. Weckesser into the bathroom. Mr. Hartman, after entering the bathroom, began kissing Ms. Weckesser. Mr. Hartman then pulled Ms. Weckesser into the shower and turned on the water. Mr. Hartman once again began touching Ms. Weckesser's breasts and vagina. Ms.

Weckesser began crying, but she placed her face into the running water to hide this from Mark Hartman. Ms. Weckesser exited the shower and informed Mr. Hartman that she did not "want this." Molly

Weckesser walked back into the bedroom with Mr. Hartman following. Mr. Hartman, at this time, started to kiss Ms. Weckesser once again, and, while doing so, pushed Ms. Weckesser back onto the bed. Mark Hartman, at this point and for the third time, penetrated his penis into Molly Weckesser's vagina with this episode continuing for sixty to ninety seconds.

Mark Hartman, after this last act, rolled off of Ms. Weckesser. Ms. Weckesser, thereafter, attempted on two occasions to leave the bedroom with each attempt prompting Mark Hartman's request that she stay. Ms. Weckesser, fearful of what Mr. Hartman's reaction may have been if she refused, stayed until Courtney Potter, sometime during the morning hours, entered the bedroom. Molly Weckesser, upon Ms. Potter's arrival, quickly exited the Routsong home.

The State's theory is that each incident wherein Mark Hartman penetrated Molly Weckesser's vagina with his penis constitutes a rape count with the initial penetration being Count 1, the second penetration being Count 2, and, of course, the final penetration being Count 3. Molly Weckesser's testimony, if believed, is sufficient to establish the force element required regarding each rape count. This court, again as reflected by the verdicts, did believe Ms. Weckesser's version of events leading, of course, to the already indicated conclusion that Mark Hartman's motion for a new trial based upon insufficiency of evidence regarding the force element will be overruled.

Mark Hartman, as to Count 1, continued his sexual advance upon Molly Weckesser despite her verbal indication that she did not consent to the activity. Mr. Hartman pushed Ms. Weckesser onto the bed and, without her consent, removed her clothing, used his hands and fingers to touch Ms. Weckesser's breasts and vagina, and, finally, penetrated Ms. Weckesser's vagina with his penis. This conduct constitutes the force necessary to establish beyond a reasonable doubt the force element. This conclusion recognizes the force element is, by necessity, a relative concept, that Molly Weckesser's resistance is not a prerequisite to the force element, and that the force element must be viewed within the context of Ms. Weckesser's concerns regarding Mr. Hartman's size and strength relative to her size and strength, that Mr. Hartman was intoxicated, that she did not know Mr. Hartman, and that , as the sexual conduct was occurring, she did not know the location of the remaining occupants of the home.

Mark Hartman's conduct relating to Count 2 must be viewed within the context of that which had already occurred. Mr. Hartman, having already ignored Ms. Weckesser's entreaties to stop and while he remained on top of Ms. Weckesser, once again penetrated Ms. Weckesser's vagina with his penis. This conduct, recognizing the concepts and concerns discussed above, constitutes the force necessary to establish beyond a reasonable doubt the force element as to Count 2.

Turning, finally, to Count 3, Mr. Hartman's conduct must, once again, be viewed within the context of that which had already occurred. Mr. Hartman, ignoring a final entreaty to stop, once again began kissing and touching Ms. Weckesser, pushed her onto the bed, positioned himself on top of Ms. Weckesser, and penetrated Ms. Weckesser's vagina with his penis. This conduct, once again recognizing the concepts and concerns already discussed, constitutes the force necessary to establish beyond a reasonable doubt the element of force.[4]

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[4] Mark Hartman's motion vigorously argues that Molly Weckesser's testimony that she at certain points "went along" with the sexual activity makes a finding of force impossible. Ms. Weckesser testified that on occasion she did "go along with some of it" with the hope that by doing so Mr. Hartman might conclude she was "into it" with the thought being that if Mr. Hartman thought she was "into it" this might create an escape opportunity. Molly Weckesser, however, was not "going along" with the sexual activity on the occasions when Mr. Hartman completed the described penis/vaginal penetration. Molly Weckesser's testimony, when viewed in its entirety, established the element of force as to each rape count.

THE COURT SHOULD HAVE CONSIDERED THE LESSER INCLUDED OFFENSE OF SEXUAL BATTERY

Mark Hartman asserts the court should have considered the lesser included offense of sexual battery, that this failure denied him due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution, and, as such, he is entitled to a new trial. Mr. Hartman supports this argument with the Ohio Supreme Court's recent decision in State v. Wine, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207 (2014).

In this case, Douglas Wine was indicted on one count of rape in violation of O.R.C.§2907.02(A)(2).

A trial occurred during which Mr. Wine presented a complete defense by asserting he did not engage in sexual conduct with the alleged victim. The trial court, over Mr. Wine's objection, instructed the jury concerning the lesser included offenses of sexual battery under O.R.C. §2907.03(A)(1) and gross sexual imposition under O.R.C. §2907.05(A)(1). The jury found Mr. Wine not guilty of rape and sexual battery but guilty of gross sexual imposition. The trial court sentenced Mr. Wine accordingly.

Mr. Wine appealed to the Auglaize County Court of Appeals. Mr. Wine, among other asserted errors, argued the trial court erred by instructing the jury on the lesser included offenses. The appellate court rejected Mr. Wine's position that a defendant, as a matter of trial strategy, has the right to waive applicable lesser included offense jury instructions. The appellate court, from this rejection, concluded

the trial court did not abuse its discretion by instructing the jury on the lesser included offense of gross sexual imposition. However, the appellate court, in a separate assignment of error, concluded there was insufficient evidence to support the gross sexual imposition conviction, but further found the evidence was sufficient to prove the lesser included offense of sexual imposition. The appellate court remanded the case to the trial court to proceed as instructed.

The Ohio Supreme Court accepted a discretionary appeal concerning the following proposition of law: "A Defendant in a criminal trial, as a matter of trial strategy, has a right to present an 'all or nothing defense' and refuse any lesser-included offenses instructions." State v. Wine at ¶ 16.

The Ohio Supreme Court, after reviewing the circumstances when a lesser included offense instruction is appropriate, rejected the proposed proposition of law and concluded, instead, as follows:

A defendant's choice to pursue an all-or-nothing defense does not require a trial judge to impose upon the state an all-or-nothing prosecution of the crime charged if the evidence would support a conviction on a lesser included offense: "If under any reasonable view of the evidence it is possible for the trier of fact to find the defendant not guilty of the greater offense and guilty of the lesser offense, the instruction on the lesser included offense must be given." State v. Wine at ¶ 32 quoting State v. Wilkins, 64 Ohio St.2d 382, 388, 415 N.E.2d 303 (1980).

The Wine decision noted, citing to State v. Wolery, 46 Ohio St.2d 316, 348 N.E.2d 351 (1976) and State v. Clayton, 62 Ohio St.2d 45, 402 N.E.2d 1189 (1980), that a defendant cannot have it "both ways" by deciding, as a matter of trial strategy, not to request a lesser included offense instruction, but after the failure of such strategy, having the ability on appeal to assert the trial court committed plain error by not giving an appropriate lesser included offense instruction. A defendant, that is, waives any error by not requesting a jury instruction on a lesser included offense.

It is instructive, when considering the issue raised by Mr. Hartman, to review the lesser included offense instructions approved by OJI. OJI CR 425.09 states in pertinent part as follows:

1. GUILTY AS CHARGED. You must further consider the offense charged in the indictment. If you find that the state proved beyond a reasonable doubt all the essential elements of the offense of ……..., your verdict must be guilty as charged

2. GUILTY OF LESSER INCLUDED OFFENSE. However, if you find that the state failed to prove beyond a reasonable doubt all the essential elements of (describe greater offense), then your verdict must be not guilty of that offense; and in that event, you will continue your deliberations to decide whether the state has proved beyond a reasonable doubt all the essential elements of the lesser included offense of (describe lesser offense).

If all of you are unable to agree on a verdict of either guilty or not guilty of (described greater offense),

then you will continue your deliberation to decide whether the state has proved beyond a reasonable doubt all the essential elements of the lesser included offense of (describe lesser offense).

OJI CR 425.11 states in pertinent part as follows:

If the evidence warrants it, you may find the defendant guilty of an offense lesser than that charged in the indictment; however, notwithstanding this right, it is your duty to accept the law as given to you by the court, and if the facts and the law warrant a conviction of the offense charged in the indictment (namely,), then it is your duty to make such finding uninfluenced by your power to find a lesser offense.

Mark Hartman, turning to the resolution of the presented issue, is correct, this court, as the trier of fact, did not consider the lesser included offense of sexual battery. This failure, by Mr. Hartman's reckoning,

entitles him to a new trial under Crim. R. 33(A)(5) – an error of law occurring at trial. This argument is rejected as discussed below.

The Court, again as the trier of fact, found Mark Hartman, based upon the presented evidence, guilty of the three rape counts. This trier of fact, consistent with the discussed OJI instructions and the law relating to lesser included offenses, considered the indicted counts and concluded that Mr. Hartman was guilty of the indicted rape counts beyond a reasonable doubt. Thus, there was no need to consider the lesser included offense of sexual battery.

It is also noted that Mr. Hartman's trial strategy was the complete defense that the sexual conduct between Mark Hartman and Molly Weckesser was consensual sexual conduct. Mr. Hartman did not request consideration of the lesser included offense of sexual battery. Mark Hartman, as discussed in State v. Wine, cannot, as a matter of trial strategy, assert consent as a complete defense, but, after the failure of such strategy, contend the lesser included offense of sexual battery should have been considered. Mark Hartman, in short, has waived any error regarding the lesser included offense of sexual battery.[5]

THE STATE VIOLATED ITS OBLIGATIONS UNDER BRADY V. MARYLAND

Mark Hartman asserts the State of Ohio did not comply with its obligations under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), and this failure entitles him to a new trial. The United States Supreme Court, in the seminal Brady v. Maryland decision, ruled that a criminal defendant's due process rights are violated when the government, upon a request by the defendant, suppresses evidence which is favorable and material

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[5] Mark Hartman could have, under Crim. R. 33(A)(4), argued the evidence establishes that Mr. Hartman was not guilty of the rape counts, but guilty of the lesser included offense of sexual battery. A trial court, under such a circumstance, may, without ordering a new trial, modify the verdict to reflect the defendant's guilt regarding the lesser included offense. This court, as already discussed, has concluded the evidence supports the guilty verdicts on the three rape

to either guilt or punishment. State v. Ross, 2010-Ohio-843 (2d Dist.); State v. Tisdale, 2003-Ohio-4209 (2d Dist.). "Evidence is 'material' within the meaning of Brady only if there exists a reasonable probability that the result of the trial would have been different had the evidence been disclosed to the defense." State v. Tisdale at ¶ 32 citing Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555 (1995); United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375 (1985). The government's good faith regarding the suppression is not a relevant inquiry. State v. Ross, supra. A court, upon the determination that a Brady violation has occurred, may grant a defendant a new trial, with such an outcome consistent with Crim R. 33(A)(2) which allows a new trial based upon misconduct by, among others, the prosecuting attorney. State

v. Bonilla, 2009-Ohio-4784 (2d Dist.). The alleged Brady violations are discussed below.

THE STATE COMMITTED A BRADY VIOLATION BY THE FAILURE TO PRODUCE THE LOCATION OF STAINS ON THE COMFORTER

The comforter at issue was on the bed where the sexual conduct at issue occurred. Molly Weckesser credibly testified that after certain conduct had occurred she wrapped herself in the comforter and walked from the bedroom into the adjoining bathroom. Ms. Weckesser further credibly testified that after the sexual conduct concluded she wrapped the comforter around her body with the comforter

remaining in this position until she left the bedroom later on the morning of December 31, 2013.

The assigned Oakwood detective, Steve Norris, took possession of, among items, the comforter.

Detective Norris submitted the comforter to the Miami Valley Regional Crime Labe (Crime Lab) for DNA testing. The DNA testing was completed by laboratory technician Emily Draper, but Mark Squibb testified at trial regarding the DNA test results. Mr. Squibb also testified at the December 17, 2014 hearing conducted regarding Mr. Hartman's motion for a new trial.

Emily Draper completed a Laboratory Report which the State provided to Chris Conard. The Laboratory Report was introduced at trial as State's Exhibit 25 and Defendant's Exhibit A. Emily Draper made lab notes as she conducted the testing. Such notes, according to Mr. Squibb, are used by the technician to complete the Laboratory Report. These notes include a crude diagram of the comforter with the diagram depicting the area of the comforter where stains were seen and tested.

Mark Squibb, at the December 17 hearing, testified that the Crime Lab is an independent agency not associated with the Montgomery County Prosecutor's Office or any police agency. Mr. Squibb, again at the December 17 hearing, further testified that based upon Crime Lab policy, lab notes are not provided to the involved police department or to the Montgomery County Prosecutor's Office. Mr. Squibb testified the lab notes are considered work product, and, as a

result, a court order is needed before lab notes are disseminated beyond the Crime Lab.

The lab notes came to light at trial during Mr. Conard's trial cross-examination of Mr. Squibb. The lab notes were reviewed by Mr. Conard and marked as Defense Exhibit F. Mr. Conard, after this review,

indicated he was prepared to continue the cross-examination. Mr. Conard asked Mr. Squibb a number of questions about the lab notes including questions concerning Mr. Draper's depiction of the location of the stains upon the comforter.

Mr. Squibb testified at the December 17 hearing that John Amos and Cindy Mullin, the Montgomery County Prosecutors assigned to the case, were not provided with nor would they have known about Ms.

Draper's notes until the lab notes were revealed during the indicated trial cross-examination. This testimony is consistent with the Crime Lab protocol Mr. Squibb described. The court, based upon the testimony at the December 17, 2014 hearing, determines that John Amos and Cindy Mullins did not have knowledge of the lab notes until Mr. Conard's cross-examination of Mr. Squibb.

It is, finally, noted that Chris Conard, upon his request, was provided a before trial opportunity to examine the comforter. This examination revealed, based upon cut out areas, the portion of the comforter that had been DNA tested. Mr. Conard, following this examination, did not make any further discovery requests regarding the comforter.

The State, it is concluded, did not commit a Brady violation. First, when purportedly suppressed evidence is discovered during the trial, this circumstance does not constitute a Brady violation requiring a new trial. State v. Wickline, 50 Ohio St.3d 114, 552 N.E.2d 913 (1990) citing United States v. Agus, 427

U.S. 97, 96 St. Ct. 2392 (1976). See also, State v. Wade, 2007-Ohio-6611 (2d Dist.). The Wickline decision noted that Ohio R. Crim. P. 16(E) – now set forth as Rule 16 (L)(1) – provides the mechanism to deal with the discovery of Brady material at trial. A court's options in such a situation include an order to permit inspection of the evidence, a continuance, or an order not allowing the evidence to be introduced. Mr. Conard, when the lab notes were discovered, did not ask for a continuance or any other relief and he sought the introduction of the lab notes. Under these circumstances, even if the lab notes had been suppressed, there is no basis upon which to find a Brady violation requiring a new trial.

Secondly, the lab notes were not suppressed by the Montgomery County Prosecutor's Office or the Oakwood Police Department. The Crime Lab is an independent entity not connected to either the Montgomery County Prosecutor's Office or the Oakwood Police Department. The Crime Lab considers lab notes as work product, and, as such, the notes are not provided to anyone absent a court order. John Amos, Cindy Mullins, and Detective Norris did not know about the lab notes until their existence was revealed during Chris Conard's cross-examination of Mr. Squibb. A Brady violation cannot

occur regarding an item that is not in the custody of the prosecutor's office or the involved police agency. It is, accordingly, concluded that the lab notes were not suppressed and, accordingly, no Brady violation occurred. This conclusion is also supported by Mr. Conard's pretrial examination of the comforter. This examination revealed where stains were discovered and cut out for testing with this being the same information depicted by Ms. Draper's lab note diagram. There is, given these circumstances, no reasonable argument the State suppressed the lab notes.

It is finally noted that Mark Hartman has not established that the information revealed by the lab notes is material. There is no support for a conclusion, within a reasonable probability, that the trial's outcome would have been different had the lab notes been provided to Mr. Conard before trial. The court, in summary, concludes there was no Brady violation regarding the lab notes, and, accordingly, Mark Hartman is not entitled to a new trial on this basis.

THE STATE COMMITTED A BRADY VIOLATION BY ITS FAILURE TO PRODUCE MARK HARTMAN'S JANUARY 2, 2014 RECORDED INTERVIEW WITH DETECTIVE STEVE NORRIS

Mark Hartman, on January 2, 2014, was interviewed at the Oakwood Police Department by Detective Steve Norris. Mr. Hartman voluntarily submitted to the interview with Chris Conard being present during the interview. Detective Norris, a few days after the initial interview, interviewed Mr. Hartman a second time. This interview was also

conducted at the Oakwood Police Department and, once again, Mr. Conard was present.

Detective Norris thought that each interview was being recorded. The recording system in use by the Oakwood Police Department at the time of each interview required that a switch be activated in order to begin a recording. Detective Norris, on each occasion, activated the recording switch but, as it was later discovered, neither interview was recorded. Mr. Conard, before the January 2, 2014 interview, inquired concerning whether the interview would be recorded with Detective Norris indicating the interview would be recorded. Mr. Conard, before commencement of the second interview, did not inquire concerning whether the interview was being recorded, but Detective Norris, at the December 17, 2014 hearing, acknowledged, based upon that which occurred on January 2, it was reasonable for Mr. Conard and Mr. Hartman to assume the interview was being recorded.

Detective Norris took notes during each interview. Detective Norris, thereafter, used the notes to draft supplemental reports detailing each interview . The January 2 interview began with Mr. Hartman presenting a written statement for Detective Norris' review. This written statement was, in verbatim fashion, incorporated into Detective Norris' supplemental report regarding the January 2 interview.

Chris Conard, in a discovery request submitted to the State of Ohio, requested any statements made by

Mr. Hartman or written summaries of any oral statements made by Mr. Hartman. The State, in response, provided the discussed supplemental reports but, of course, audio recordings were not produced, and, further, the State did not explain the absence of audio recordings. Mr. Conard, prior to trial, did not inquire why the State's discovery response did not include any reference to recorded interviews.

Detective Norris, following the trial and verdict and presumably in response to Mr. Hartman's Brady violation contention, attempted to obtain the thought to be recorded statements. This attempt, of course, failed. The system, according to Detective Norris' December 17 testimony, recorded onto a server, but for some reason the interviews were not recorded.

It is concluded, based upon the indicated sequence of events, that the State's failure to provide the recorded statements to Mr. Hartman cannot constitute a Brady violation. A Brady violation cannot be predicated upon a failure to produce that which does not exist. Further, there is nothing to suggest that the content of Mr. Hartman's voluntary interviews during which Mr. Conard was present are markedly different from Mr. Hartman's written statement or from that depicted by Detective Norris' supplemental reports.

Simply put, the trial's outcome would not have been altered by the recording of either interview. The court, in summary, concludes there is no Brady

violation regarding this issue, and Mark Hartman is not entitled to a new trial on this basis.[6]

CONCLUSION

The Court, for the indicated reasons, overruled Defendant Mark Hartman's motion for a new trial. A Sentencing Hearing is scheduled on Wednesday, March 11, 2015 at 1:30 p.m.

SO ORDERED:

JUDGE MICHAEL L. TUCKER

[6] Mark Hartman, on February 5, 2015, filed a motion styled as follows: "Motion for Forensic Examination of the city of Oakwood's Video Recording System And Stay of Case." This motion indicates the recording unit the Oakwood Police Department used when Mark Hartman's interviews occurred remains in Oakwood's custody. Mr. Hartman suggests, since this is the case, the recording system, at the State's expense, should be subjected to a forensic examination "because the recordings may in fact exist and their potential existence should at least be explored." (Hartman Motion pg. 3) Further, Mr. Hartman requests a stay pending the forensic examination. The Court, based upon the determination there was no *Brady* violation, overrules Mr. Hartman's motion seeking a forensic evaluation of Oakwood's recoding system.

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

State of Ohio, Case No. 2014 CR 00834

Plaintiff,

vs. Judge Michael L. Tucker

Mark Hartman,

Defendant.

VERDICT ENTRY – BENCH TRIAL

The Prosecuting Attorneys Cynthia Mullins and John Amos, the Defendant, Mark Hartman, with Counsel Chris Conard, appeared in open court and the case was heard by the Court, as a jury was previously waived.

After all of the testimony, and the arguments of counsel, the Court, returned to open court with the following verdict.

VERDICT

On October 9, 2014, the Defendant was found GUILTY of Rape, as charged in count 1 of the Indictment.

On October 9, 2014, the Defendant was found GUILTY of Rape, as charged in count 2 of the Indictment.

On October 9, 2014, the Defendant was found GUILTY of Rape, as charged in count 3 of the Indictment.

JUDGE MICHAEL L. TUCKER