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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

STEPHEN J. KARES,
Petitioner-Appellant,
v.

BRYAN MORRISON, Warden,
Respondent-Appellee.

No. 21-2845

Appeal from the United States District Court for the Western District of Michigan at Marquette.

No. 2:19-cv-00007—Hala Y. Jarbou, District Judge.

Argued: May 3, 2023

Decided and Filed: August 8, 2023

Before: MOORE, CLAY, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Brendan Bernicker, RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, Washington, D.C., for Appellant. Linus Banghart-Linn, OFFICE OF THE MICHIGAN ATTORNEY

GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF**: Brendan Bernicker, RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, Washington, D.C., Easha Anand, RODERICK & SOLANGE MACARTHUR JUSTICE CENTER, San Francisco, California, for Appellant. Scott R. Shimkus, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. Eugene M. Gelernter, PATTERSON BELKNAP WEBB & TYLER LLP, New York, New York, Matthew McGinnis, ROPES & GRAY LLP, Boston, Massachusetts, for Amici Curiae.

OPINION

CLAY, Circuit Judge. Petitioner, Stephen Kares, appeals the district court's denial of his habeas petition brought pursuant to 28 U.S.C. § 2254. In 2012, a jury convicted Kares of third-degree criminal sexual conduct in violation of Mich. Comp. Laws § 750.520d(1)(b). For the reasons set forth below, we **REVERSE in part** the district court's order denying as untimely Petitioner's motion to vacate his sentence but **DENY** Kares' motion to expand the certificate of appealability ("COA") to include his merits claim.

I. BACKGROUND

A. Factual Background

In 2012, a jury found Kares guilty of raping a 16-year-old girl. *See People v. Kares*, No. 312680, 2013

WL 6124313, at *1–2 (Mich. Ct. App. Nov. 21, 2013).[1] The victim was the child of a woman whom Kares had been dating. After the rape, the victim visited a nurse who examined her and collected samples from her for a rape kit. *Id.* at *1. The samples obtained from the rape kit were tested and the Michigan State Police Forensic Scientist who conducted the testing appeared at trial and testified that the DNA samples resulted in a match to Kares' DNA. *Id.* At trial, Kares did not contest that the victim had visited his house on the night of the rape; instead, he argued that no sexual contact occurred. *Id.* at *2. Kares testified that he had engaged in sexual intercourse with another woman three or four days prior and had disposed of a vaginal condom in the trash. *Id.*

B. Procedural History

Kares was convicted of third degree criminal sexual conduct following a jury trial in Michigan's Shiawassee County Circuit Court. At sentencing, the judge found five "Offense Variables" that increased Kares' sentencing range, including the mandatory minimum. Sentencing Tr., R. 21-8. While Kares' case was on appeal to the Michigan Court of Appeals, the United States Supreme Court decided *Alleyne v. United States*, 570 U.S. 99 (2013). *Alleyne* held that the Constitution requires any fact that increases the mandatory minimum penalty for a crime to be found by a jury beyond a reasonable doubt. 570 U.S. at 116.

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[1] The factual history provided herein cites to the Michigan Court of Appeal's summary of facts and is entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *see also Coleman v. Bradshaw*, 974 F.3d 710, 717 n.3 (6th Cir. 2020).

Kares' appellate counsel failed to raise an *Alleyne* claim on direct appeal. Kares' conviction and sentence were affirmed by the Michigan Court of Appeals and then, on September 29, 2014, by the Michigan Supreme Court. The time for Kares to appeal to the Supreme Court of the United States expired 90 days later, on December 28, 2014. U.S. Sup. Ct. R. 13.

Kares then began collateral review proceedings in Michigan state court. He filed his first motion for relief from judgment pursuant to Michigan Court Rule ("MCR") 6.500 *et seq.* on October 20, 2015. Through that motion, Kares raised several issues, including that his sentence was based on inaccurate information, and that he had ineffective assistance of trial and appellate counsel. The trial court denied his motion, determining that his claims were procedurally defaulted and should have been raised on direct appeal. Kares then applied for leave to appeal the denial of his motion for relief from judgment, citing *Alleyne* for the first time. The Michigan Court of Appeals denied Kares' appeal in a short order. Kares applied for leave to appeal to the Michigan Supreme Court, but this request was denied on December 27, 2017.

On February 9, 2018, Kares filed a motion with the Michigan trial court under Michigan Compiled Laws ("MCL") § 770.16 requesting that the court order additional DNA testing. The motion requested the testing of biological materials that Kares claims were not tested, including evidence collected by the nurse who administered the rape kit[2] and bedding from

[2] The nurse who administered the rape kit collected swabs, smears, wipes, and the victim's underwear. The forensic scientist tested all items that were collected and reported that all of the

Kares' apartment. The trial court denied his request on February 12, 2018. In the order denying his request for biological testing, the trial court noted that Kares' motion failed to address the statutory requirements for showing he qualified to petition the Court to order DNA testing, and he also failed to present proof that that DNA testing was warranted in his case.

Kares then filed an application for leave to appeal the trial court's order denying his request for biological testing. The Michigan Court of Appeals denied him leave to appeal on August 29, 2018. Kares then applied for leave to appeal to the Michigan Supreme Court. While that motion was pending, Kares filed the instant § 2254 petition in federal court on December 21, 2018. The Michigan Supreme Court denied Kares' application for leave to appeal the denial of his motion for biological testing on April 2, 2019. Kares then requested that the district court permit him to amend his § 2254 petition to include claims related to his DNA testing request. The district court permitted Kares to amend his petition, and he filed his amended petition on May 28, 2019.

The district court referred Kares' petition to a magistrate judge who produced a report and recommendation ("R&R") determining that the district court should deny Kares' petition as untimely. The

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swabs (except for the oral swabs), anal and vaginal smears, and the undergarments tested positive for the presence of semen (but did not conduct DNA testing on all of the semen). She then DNA tested the anal and vaginal smears and located genetic material from Kares and the victim in those samples. Petitioner sought to have the other swabs DNA tested–those swabs previously tested positive for the presence of sperm (the speculum, labial fold, and external swabs).

R&R analyzed MCL § 770.16 and determined that Kares' petition for DNA testing was not a properly filed collateral attack; it also analyzed the merits of Kares' claims and found that they were either lacking merit or procedurally defaulted. Kares objected to the R&R, arguing that his petition was timely, his claims had merit, and his claims were not procedurally defaulted.

The district court adopted the R&R. In its order, the court found that Kares' § 770.16 motion was not a properly filed application for collateral review; addressed the merits claims to which Kares had objected; and agreed with the R&R that those claims also lacked merit or were procedurally defaulted. The district court granted a COA to Kares on the question of whether motions brought pursuant to MCL § 770.16 toll the statute of limitations under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), but denied a COA on all of Kares' other claims.

Kares timely filed this appeal. Kares also filed a motion requesting that the COA be expanded to include his merits claim that the state trial court committed an *Alleyne* violation and that this claim was not procedurally defaulted because his state appellate counsel provided ineffective assistance of counsel.

II. DISCUSSION

A. Timeliness of Habeas Petition

AEDPA sets a time limit for petitioners to apply for a writ of habeas corpus, requiring a petition to be filed within one year after the judgment becomes

final.[3] 28 U.S.C § 2244(d)(1)(A). The statute permits the tolling of the limitations period during the time period during which "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

This Court reviews the dismissal of a § 2254 petition *de novo*. *Thomas v. Meko*, 828 F.3d 435, 438 (6th Cir. 2016). Whether the district court properly calculated the timeliness of a habeas corpus petition is reviewed *de novo*. *DiCenzi v. Rose*, 452 F.3d 465, 467 (6th Cir. 2006). The district court's factual findings are reviewed for clear error. *Boggs v. Collins*, 226 F.3d 728, 736 (6th Cir. 2000).

In Kares' case, the statute of limitations began to run 90 days[4] after the Michigan Supreme Court denied his request for leave to appeal his conviction, on December 28, 2015. With only 69 days left to file a § 2254 petition, Kares tolled the running of that time period on October 20, 2015 by filing a motion for relief from judgment in the Shiawassee County Circuit Court. The statute of limitations began to run again once Kares' post-conviction proceedings terminated on December 27, 2017. This meant that Kares had until March 6, 2018—69 days later—to file a federal habeas petition. Kares did not file his habeas petition until December 21, 2018. Kares, however, argues that the

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[3] Section 2244(d)(1) sets forth three additional circumstances which begin the one-year limitations period, but only the first ground is at issue in this case.

[4] Ninety days is the time period to file a petition for certiorari to the United States Supreme Court. *See* U.S. Sup. Ct. R. 13.

MCL § 770.16 petition for DNA testing, which he filed on February 9, 2018, tolled the limitations period.

For Kares' habeas petition to be considered timely, this Court must answer two questions in the affirmative: (1) was Kares' petition for DNA testing pursuant to MCL § 770.16 properly filed; and (2) are motions for DNA testing pursuant to MCL § 770.16 considered post-conviction or other collateral review proceedings that toll the AEDPA limitations period? We address both questions in turn.

1. Kares' motion was "properly filed"

MCL § 770.16 permits defendants convicted of a felony at trial to petition the circuit court where they were sentenced to order DNA testing of biological materials. The statute permits this sort of petition for any defendant convicted before 2001, but requires defendants convicted on or after January 8, 2001 to establish that all of the following apply: "(a) That DNA testing was done in the case or under this act[;]" "(b) [t]hat the results of the testing were inconclusive[;]" and "(c) [t]hat testing with current DNA technology is likely to result in conclusive results." MCL § 770.16(1). The statute provides that a court shall order DNA testing only if a defendant does all of the following:

> (a) Presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.

> (b) Establishes all of the following by clear and convincing evidence:
>
> > (i) A sample of identified biological material described in subsection (1) is available for DNA testing.
> >
> > (ii) The identified biological material described in subsection (1) was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.
> >
> > (iii) The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.

MCL § 770.16(4) (2015).

Respondent argues that Kares' petition for DNA testing was not properly filed because Kares failed to satisfy the conditions for petitioning the court specified in MCL § 770.16(1). Kares argues that those conditions are not conditions to filing since they do not relate to the form of the motion, the time limit for filing it, or the proper forum, but are instead merits determinations.

The Supreme Court has analyzed the question of what constitutes a "properly filed application" in only a few cases. In the first case, the Supreme Court determined that a state defendant's post-conviction motion to vacate his judgment tolled AEDPA's one year limitations period even though the claims raised within that application were procedurally barred.

Artuz v. Bennett, 531 U.S. 4, 8 (2000). *Artuz* noted that an application is properly filed when "its delivery and acceptance are in compliance with the applicable laws and rules governing filings" and noted that the procedural bars listed in the state statute presented a "condition to obtaining relief" and did not "set forth a condition to filing." 531 U.S. at 8, 11.

In *Pace v. DiGuglielmo*, the Supreme Court determined that AEDPA's one year limitations period was not tolled by a state court post-conviction petition that was dismissed by the state court for being untimely. 544 U.S. 408, 417 (2005). The Supreme Court determined that although the state court was required to review the petition to assess whether it fit into statutory exemptions for the time limit, timeliness was still a "condition to filing" and noted that "there is an obvious distinction between time limits, which go to the very initiation of a petition and a court's ability to consider that petition, and the type of 'rule of decision' procedural bars at issue in *Artuz,* which go to the ability to obtain relief." *Id.* The Supreme Court later reiterated its rule that a state post-conviction petition that is dismissed as untimely does not toll the AEDPA limitations period, regardless of whether the "time limit is jurisdictional, an affirmative defense, or something in between." *Allen v. Siebert*, 552 U.S. 3, 6 (2007).

The Sixth Circuit has also addressed the "properly filed" requirement of § 2244. In *Williams v. Birkett*, the Court determined that a successive post-conviction motion was not properly filed where it was rejected by the state court because it failed to meet the requirements listed in the state statute for bringing

successive motions. 670 F.3d 729, 736 (6th Cir. 2012). In *Williams*, this Court noted that MCR 6.502(G) flatly forbids defendants from filing successive post-conviction motions for relief from judgment unless the successive petition demonstrates that it falls into one of the exceptions listed in the statute, including "motions based on (1) 'a retroactive change in law that occurred after the first motion for relief from judgment,' or (2) 'a claim of new evidence that was not discovered before the first such motion.'" 670 F.3d at 733 (citing MCR 6.502(G)(2)). This Circuit noted that even though "judicial scrutiny" was required to assess whether a statutory exception applied to permit a successive petition, those exceptions remained filing conditions because a successive petition cannot be considered by the state court unless it meets one of those two exceptions. *Id*. at 734.

An unsuccessful motion may still toll the limitations period, so long as the petitioner complies with all filing requirements. In *Board v. Bradshaw*, this Circuit determined that a motion for leave to file a delayed appeal brought under Ohio Appellate Rule 5(A) was properly filed and tolled AEDPA's statute of limitations. 805 F.3d 769, 776 (6th Cir. 2015). Although the *Board* petitioner's motion for a delayed appeal was ultimately unsuccessful, this Circuit determined that his motion was properly filed because the Ohio rule contained no time limit for filing such motions and because his motion complied with all filing conditions, namely the requirements listed in the statute that the application must "set forth the reasons for the failure . . . to perfect an appeal." *Id*. at 773 (quoting Ohio App. R. 5(A)(2). This Court noted that "[o]nce the movant has provided these explanations, the conditions to

filing the Rule 5(A) motion have been satisfied." *Id*. at 775.

In *Thomas v. Meko*, the Sixth Circuit addressed a case similar to *Artuz*, regarding whether a petitioner's successive post-conviction motion could be considered properly filed. 828 F.3d at 435. This Circuit determined that the petitioner's motion for post-conviction relief in Kentucky state court was properly filed and tolled the AEDPA statute of limitations, even where that petition was unsuccessful because it contained procedurally defaulted claims. *Id*. at 440. This Court examined the underlying state court order on the petitioner's motion, noting that the Kentucky courts had adjudicated that motion on the merits instead of rejecting it for failing to meet "state laws and rules governing filings." *Id*. at 439–40 (internal quotation marks omitted).

Turning to the facts of this case, Kares' motion was properly filed. MCL § 770.16 lists the conditions for filing a petition for DNA testing in only one section of the statute, which requires only that a "petition under this section *shall be filed* in the circuit court for the county in which the defendant was sentenced." MCL § 770.16(2) (emphasis added). The government does not dispute that Kares filed his petition for DNA testing in the correct court. Additionally, the fact that Kares' petition was ultimately unsuccessful because he could not meet the requirements for testing does not mean that his petition was improperly filed. *See Pace*, 544 U.S. at 417; *Board*, 805 F.3d at 776. Just as this Court previously noted in *Thomas*, "[r]ules governing filings, in the main, speak to the court clerk;

rules setting forth a procedural bar speak to the court itself." 828 F.3d at 439.

The conditions listed in sections (1) and (4) of MCL § 770.16 are the merits determinations that the state court must make when deciding whether the petitioner is entitled to further DNA testing. This is evidenced by the fact that the legislature used the words "may petition" in section (1) of MCL § 770.16 instead of the words "may file." Given that the legislature used the words "shall be filed" in section (2) of MCL § 770.16, we may rely on the presumption that where a legislature "includes particular language in one section of a statute but omits it in another section," it acts "intentionally and purposely in the disparate inclusion or exclusion." *Dean v. United States*, 556 U.S. 568, 573 (2009) (quoting *Russello v. United States,* 464 U.S. 16, 23 (1983)).

Furthermore, the state court considering Kares' petition did not reject the petition for failing to meet a filing condition, and instead addressed the merits of his request. Unlike the statute at issue in *Williams*, the Michigan DNA testing statute does not impose a substantive condition to filing. *See Williams*, 670 F.3d at 730 (analyzing MCR 6.502(G)(2) and determining that the law "does not allow the filing of second motions for post-conviction relief" unless one of two listed conditions is met). Although Michigan courts do conduct a sequential analysis by first assessing whether a petition meets the requirements listed in section (1) of MCL § 770.16 before turning to the factors articulated in section (4), they do not flatly return without filing a petition that does not meet the requirements in section (1). *Cf. Williams* 670 F.3d at 731 (noting

that state trial court "rejected" and "returned" petitioner's motion for failing to meet requirements for filing a second or successive motion for relief from judgment). Accordingly, we find that Kares' motion was properly filed.

2. Kares' petition for DNA testing constituted a post-conviction or other collateral review proceeding

To toll AEDPA's limitations period, the DNA petition filed by Kares must also satisfy another requirement: it must be an "application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). Kares argues that his motion pursuant to MCL § 770.16 is an application for collateral review because the statute contemplates that a court will review the underlying judgment in deciding whether to order testing and a new trial. Respondent argues that Kares' motion does not count as an application for collateral review because MCL § 770.16 is a sequential statute, and a petitioner must first clear several statutory hurdles before a court can even review the underlying judgment.

The Supreme Court addressed the question of whether a particular motion under state law was a motion for "post-conviction or other collateral review" in *Wall v. Kholi*, 562 U.S. 545 (2011). In *Wall*, the Supreme Court determined that a motion to reduce a sentence brought pursuant to Rule 35 of Rhode Island's Superior Court Rules of Criminal Procedure was a motion for collateral review of the sentence and therefore tolled AEDPA's one year limitations period. 562 U.S. at 555. The Supreme Court noted that although methods of filing for collateral review may vary

among the states, collateral review "refers to judicial review that occurs in a proceeding outside of the direct review process." *Id.* at 560.

The Supreme Court and the Sixth Circuit have not yet addressed the question of whether motions for DNA testing under Michigan law are a form of collateral or post-conviction review. In an unpublished opinion, a panel of this Court determined that post-conviction discovery motions under Ohio law are not a form of collateral or post-conviction review and do not toll AEDPA's limitations period. *Johnson v. Randle*, 28 F. App'x 341, 343 (6th Cir. 2001) ("The request for information and the request for a copy of the record are not challenges to the conviction or judgment. Therefore, these requests do not toll the statute of limitations."). Although dicta, one footnote in the Supreme Court's decision in *Wall* indicates that the Court is unlikely to find that motions for post-conviction discovery constitute a form of collateral review. *Wall*, 562 U.S. at 556 n.4. In footnote four, the *Wall* court noted that "[a] motion to reduce sentence is unlike a motion for post-conviction discovery or a motion for appointment of counsel, which generally are not direct requests for judicial review of a judgment and do not provide a state court with authority to order relief from a judgment." *Id.*

The majority of circuits to examine this issue have determined that post-conviction motions for discovery or DNA testing are not forms of collateral or post-conviction review. *See Woodward v. Cline*, 693 F.3d 1289, 1293 (10th Cir. 2012) (determining that a motion under Kansas statute permitting biological testing is not an application for collateral review that tolls AEDPA's

statute of limitations); *Brown v. Sec'y for Dep't of Corr.*, 530 F.3d 1335, 1338 (11th Cir. 2008) (determining that Florida rule permitting post-conviction DNA testing did not toll AEDPA's limitations period because it did not provide a review mechanism); *Price v. Pierce*, 617 F.3d 947, 952–53 (7th Cir. 2010) (determining that Illinois statute permitting post-conviction forensic testing was not a collateral review mechanism and did not toll AEDPA's limitations period); *Ramirez v. Yates*, 571 F.3d 993, 999–1000 (9th Cir. 2009) (determining that post-conviction discovery motions did not toll AEDPA limitations period because they did not challenge his conviction); *Hodge v. Greiner*, 269 F.3d 104, 107 (2d Cir. 2001) (determining that post-conviction motion for discovery under New York law did not challenge conviction and therefore did not toll AEDPA's limitations period).

Only the Fifth Circuit has determined that a motion for post-conviction DNA testing qualifies as a collateral review motion. *See Hutson v. Quarterman*, 508 F.3d 236, 237 (5th Cir. 2007); *see also Ramos v. Lumpkin*, No. 21-50775, 2023 WL 2967898, at *1 (5th Cir. Apr. 17, 2023) (determining that district court plainly erred by not tolling AEDPA's limitations period during the pendency of petitioners' motion for DNA testing under Texas law). Importantly, the statute at issue in the Fifth Circuit case, Texas Code of Criminal Procedure Article 64, is the most analogous to MCL § 770.16. Unlike the statutes at issue in the other circuits' decisions,[5] Texas' statute provides a mechanism

[5] Most of the statutes at issue in the cases decided by other circuits provide only a mechanism for a defendant to request DNA testing and do not otherwise provide for review of the judgment. Instead, a defendant must subsequently file a separate

for review of the underlying judgment by setting forth the procedures that a court *must follow* after receiving the results of postconviction DNA testing. Tex. Code Crim. Proc. Ann. Art. 64.04 (West) ("After examining the results of testing . . . the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted."). Similarly, upon receipt of DNA testing results showing that the defendant is not the source of the identified biological material, section (8) of MCL § 770.16 requires a reviewing court to hold a hearing and decide whether the defendant is entitled to a new trial.

Respondent argues that although one part of MCL § 770.16 does permit collateral review of the underlying judgment, the statute is sequential in nature, and a defendant must first meet several different requirements before the court can review the judgment. It is true that Michigan courts view the statute as sequential in nature. *See e.g., People v. Poole*, 874 N.W.2d 407, 414 (Mich. Ct. App. 2015) (noting that "MCL [§] 770.16 envisions two main phases; the first phase involves the court assessing whether DNA testing should be ordered, and the second phase entails, if DNA testing was ordered, whether a motion for new trial should be granted" and that a court may not conflate its analysis of the two phases in its opinion). Respondent's argument is unpersuasive, however, because the question of whether a motion for collateral relief tolls the statute of limitations is not dependent

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petition for review of the judgment based on the results of the DNA testing.

on the success of that motion, either in whole or in part, in the state court. This Court has repeatedly found that even unsuccessful motions for collateral review toll the limitations period. *See Board*, 805 F.3d at 773 (noting that "although an unsuccessful motion for leave to file a delayed appeal cannot restart the AEDPA limitations period, it may toll the limitations period while it is pending") (*citing Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001)). Petitioner's failure to obtain relief does not address whether the statute itself calls for collateral review of the judgment. Moreover, Respondent cites no cases that require a defendant to file a separate action to initiate review under subsection (8) of the statute. In fact, the plain language of MCL § 770.16 suggests that a defendant need not file a separate petition for a new trial in order to obtain review of his judgment. MCL § 770.16(7) states that after DNA testing has been ordered, if the results are inconclusive, the reviewing court "shall deny the motion for new trial." Likewise, MCL § 770.16(8) states that if "the DNA testing show[s] that the defendant is not the source of the identified biological material, the court shall . . . hold a hearing" to determine whether to grant a new trial. This suggests that the petition for DNA testing is also considered a motion for a new trial since no other section of the statute requires a separate petition or action to be filed for the court to consider whether to grant a new trial.

As the Supreme Court noted in *Wall*, "'collateral review' of a judgment or claim means a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process." 562 U.S. at 553. In this case, the statute requires reexamination of the underlying judgment because it requires the

reviewing court, upon receipt of test results indicating that the defendant is not the source of the DNA, to hold a hearing to determine the following:

> (a) That only the perpetrator of the crime or crimes for which the defendant was convicted could be the source of the identified biological material.
>
> (b) That the identified biological material was collected, handled, and preserved by procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified biological material cannot be determined to be identical to the DNA profile of the sample initially collected during the investigation described in subsection (1).
>
> (c) That the defendant's purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial.

MCL § 770.16(8). Accordingly, a properly filed motion under § 770.16 would constitute a motion for collateral or other post-conviction review.

Respondent also argues that a petition under MCL § 770.16 is not one for collateral review because Michigan law permits a defendant to challenge his conviction only through a motion for relief from judgment pursuant to MCR 6.500. Respondent cites an unpublished decision from this Court for the proposition

that the only post-conviction proceedings which may toll the statute of limitations are those "recognized as such under governing state procedures." *Williams v. Brigano*, 238 F.3d 426 at *2 (6th Cir. 2000) (unpublished table decision). This proposition may be true, but it does not apply in this instance. In *Williams*, this Circuit rejected the defendant's attempts to toll the limitations period by filing a motion to reopen his post-conviction proceedings (even though there was no state statute or rule permitting this type of motion) and by filing a motion for a declaratory judgment action (which are typically used only in civil cases). *Id.* *1. Unlike the applicable law in that case, MCL § 770.16(1) permits a court to order a new trial if the petition is meritorious.

Furthermore, several short orders by the Michigan Supreme Court suggest that § 770.16 is an alternative means of obtaining a new trial, and thus neither: (1) impacts a defendant's ability to obtain post-conviction relief under MCR 6.500 *et. seq.*; nor (2) is subject to the statutory requirements for successive petitions. *See, e.g., People v. Faulkner*, 840 N.W.2d 365 (Mich. 2013) (holding that the court of appeals erred in denying defendant's motion for relief from judgment brought pursuant to MCR 6.500 as a successive petition because defendant's prior petition for DNA testing under MCL § 770.16 "did not preclude him from filing a motion for relief from judgment under MCR Subchapter 6.500"); *People v. Alexander*, 896 N.W.2d 432 (Mich. 2017) (determining that defendant's subsequently filed post-conviction motion for relief from judgment was not a successive motion and barred by MCR 6.502(G) because defendant

previously had filed only a motion for new trial and DNA testing pursuant to MCL § 770.16).

Accordingly, Kares' petition for DNA testing and a new trial pursuant to MCL § 770.16 tolls AEDPA's limitations period because it was properly filed and calls for "postconviction or other collateral review" pursuant to § 2244(d)(2).

B. Certificate of Appealability

After determining that Kares' § 2254 petition was untimely, the district court also addressed each of Kares' objections and determined that the claims asserted within the habeas petition lacked merit or were procedurally defaulted. The district court granted Kares a COA solely on the issue of whether his habeas petition was timely filed. Kares now moves this court to expand the COA to allow him to appeal the district court's decision on the merits of his habeas petition. Kares seeks leave to appeal only one of his merits claims, arguing that the state trial court committed an *Alleyne* violation and that this claim was not procedurally defaulted because his failure to bring that claim on direct appeal in the state court was due to his appellate counsel's ineffective assistance.

A state prisoner whose § 2254 petition is denied by the district court does not have an absolute right to appeal and must instead obtain a COA from a circuit justice or judge. *Buck v. Davis*, 580 U.S. 100, 115 (2017) (citing 28 U.S.C. § 2253(c)(1)). A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* (quoting 28 U.S.C. § 2253(c)(2). This Court reviews *de novo* a district court's determination that a claim is

procedurally defaulted. *Hicks v. Straub*, 377 F.3d 538, 551 (6th Cir. 2004). This Court also reviews *de novo* a district court's application of the "cause and prejudice" test excusing procedural default. *Hargrave-Thomas v. Yukins*, 374 F.3d 383, 387 (6th Cir. 2004).

Kares urges this Court to expand the COA to include his claim that the state trial court violated his Sixth and Fourteenth Amendment rights by sentencing him based on facts it found by a preponderance of the evidence, in violation of *Alleyne v. United States*. Kares does not dispute that he failed to raise this claim on direct appeal in the state courts. Instead, he relies on this Court's decision in *Chase v. MaCauley*, 971 F.3d 582 (6th Cir. 2020), and argues that the procedural default of his *Alleyne* claim should be forgiven because his failure to raise the claim on direct appeal was due to his appellate counsel's ineffective assistance.

In *Chase*, this Circuit determined that the petitioner could demonstrate cause and prejudice to overcome the procedural default of his *Alleyne* claim because his appellate counsel was ineffective in failing to raise that claim on direct appeal. 971 F.3d at 596. The *Chase* decision, however, is not directly applicable to Kares' claim. This is because in *Chase*, the petitioner not only raised the *Alleyne* claim in his state motion for post-conviction relief, but he also raised his claim of ineffective assistance of appellate counsel for failing to raise the *Alleyne* claim in that very same post-conviction review motion. 971 F.3d at 590 (noting that "[t]wo months after the Michigan Supreme Court's decision in *Lockridge*, Chase filed a pro se motion for relief from judgment in the state trial court

pursuant to Michigan Court Rule 6.500 *et seq.* Chase asserted, in relevant part, that the sentencing court's judicial fact-finding in his case had violated *Alleyne* and his appellate counsel had been constitutionally ineffective in failing to raise this claim on direct appeal.").

As this Court noted in *Chase*, a habeas petitioner is required to "raise an ineffective-assistance-of-counsel claim to the state court." *Id.* at 592 (citing *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000)). Kares does not dispute that he failed to raise an ineffective assistance of appellate counsel claim premised on the failure to raise the *Alleyne* violation in his Rule 6.500 motion.[6] Moreover, he provides no reasons why his procedural default of that ineffective assistance of counsel claim should be excused. *See Edwards*, 529 U.S. at 453–54 (noting that "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted" but "that procedural default may. . . *itself* be excused if the

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[6] Kares raised an ineffective assistance of counsel claim in his Rule 6.500 motion, but it was not based on the failure to raise the *Alleyne* claim on direct appeal. Instead, Kares argued that his appellate counsel was ineffective because appellate counsel failed to raise the issue of trial counsel's ineffectiveness. Kares' failure to specifically argue that his appellate counsel was deficient in not bringing the *Alleyne* claim is fatal because this Court has previously held that fair presentation requires "'the same claim under the same theory be presented' for the state court's consideration" *Caver v. Straub*, 349 F.3d 340, 346–47 (6th Cir. 2003) (determining that "to the extent that an ineffective assistance of counsel claim is based upon a different allegedly ineffective action than the claim presented to the state courts, the claim has not been fairly presented to the state courts.").

prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim.").

To overcome a procedural default, a petitioner must establish cause and prejudice. An ineffective assistance of counsel claim can establish cause and prejudice, but it too must be raised in the state court first. Because Kares' state post-conviction motion failed to assert an ineffective assistance of appellate counsel claim based on his defaulted *Alleyne* claim, Kares procedurally defaulted his "cause" and "prejudice" excuse, and this Court cannot review the substance of his claim that an *Alleyne* violation occurred during his sentencing proceeding. Accordingly, we **DENY** Kares' motion to expand the COA and **AFFIRM** the district court's denial of his *Alleyne* claim as procedurally defaulted.[7]

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[7] Kares argues that the failure to grant his motion for a COA will render this Court's opinion with respect to the timeliness of his habeas petition advisory. This is not so. Article III of the Constitution empowers courts to hear cases or controversies and forbids courts from rendering advisory opinions "advising what the law would be upon a hypothetical state of facts." *United States v. Asakevich*, 810 F.3d 418, 420 (6th Cir. 2016) (citing *Chafin v. Chafin*, 568 U.S. 165, 172 (2013)). This court's decision is not "advisory" merely because it does not grant the relief requested by the petitioner. The question of whether Kares' habeas petition was timely filed presents a case or controversy that this Court must resolve, even though this Court ultimately also decides to affirm the district court's decision on the merits of that petition. Had Kares offered an excuse for his default of his ineffective assistance of appellate counsel claim premised on the *Alleyne* violation, this Court could have excused his procedural default of that claim. Thus, Kares' claim is redressable and presents a live dispute this court must resolve.

III. CONCLUSION

For the reasons stated above, we **REVERSE** the district court's order denying Kares' § 2254 petition as untimely, **DENY** Kares' motion to expand the COA, and **AFFIRM** the district court's denial of his petition on the *Alleyne* claim as procedurally defaulted.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

STEPHEN JOHN KARES,

Petitioner,

v. Case No. 2:19-cv-7

Hon. Hala Y. Jarbou

CONNIE HORTON,

Respondent.
_____/

ORDER

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner's claims under the *Slack* standard.

Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate

that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating 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). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

Because the question whether a motion brought under Mich. Comp. Laws § 770.16 tolls the AEDPA's statute of limitations is an issue of first impression, the Court concludes that reasonable jurists could find that this Court's dismissal of Petitioner's petition as untimely was debatable or wrong. Therefore, the Court will grant Petitioner a certificate of appealability on that ground.

With respect to the merits of Petitioner's claims, the Court finds that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims would be debatable or wrong. Therefore, the Court will deny a certificate of appealability on all other issues.

Accordingly,

IT IS ORDERED that a certificate of appealability is **GRANTED** with respect to Petitioner's assertion that his habeas petition was timely.

IT IS FURTHER ORDERED that a certificate of appealability is **DENIED** in all other respects.

The Court declines to certify that an appeal would not be taken in good faith.

Dated: August 3, 2021

/s/ Hala Y. Jarbou
HALA Y. JARBOU
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

STEPHEN JOHN KARES,
Petitioner,
v. Case No. 2:19-cv-7

Hon. Hala Y. Jarbou

CONNIE HORTON,
Respondent.
_____/

OPINION

Petitioner Stephen John Kares is incarcerated with the Michigan Department of Corrections. Kares seeks a writ of habeas corpus overturning his conviction. (Am. Pet'n, ECF No. 10.) The matter was referred to a magistrate judge, who produced a Report and Recommendation (R&R, ECF No. 31) that the Court deny Kares's habeas petition. The R&R determined that Kares's amended petition was untimely. Even if the petition were timely, the R&R found Kares's claims procedurally defaulted or lacking in merit.

With respect to timeliness, the question is whether a motion for DNA testing and a new trial, filed by Kares in state court, tolled the statute of limitations for Kares to file the present habeas petition. If the DNA motion tolled the statute of limitations, Kares's habeas petition is timely. If the DNA motion did not toll the statute of limitations, the Court must deny the petition as untimely.

Kares timely objected, asserting that his petition is timely and that most of his claims are meritorious and not procedurally defaulted. (ECF No. 36.) The Court will adopt the R&R.

I. Procedural History

The R&R gives significant factual background, which the Court will only briefly recite. Simply put, Kares was charged with two counts of first-degree criminal sexual conduct for vaginal and oral penetration. (R&R, PageID.1622.) He was tried in the Shiawassee County Circuit Court. (*Id.*, PageID.1618.) In 2012, Kares was convicted of third-degree criminal sexual conduct, Mich. Comp. Laws § 750.520d, for vaginal penetration and acquitted on the charge of oral penetration. (*Id.*, PageID.1618.) He appealed. (*Id.*, PageID.1623-1624.) On November 21, 2013, the Michigan Court of Appeals upheld Kares's conviction. (*Id.*, PageID.1624.) Kares then sought leave to appeal to the Michigan Supreme Court. (*Id.*) The Michigan Supreme Court denied leave to appeal on May 27, 2014. (*Id.*) Kares moved for reconsideration, and the Michigan Supreme Court again denied leave to appeal on September 29, 2014. (*Id.*) Kares did not seek review from the United States Supreme Court. (*Id.*)

Simultaneous with his direct appeals, Kares moved for a new trial in the Shiawassee County Circuit Court on May 8, 2013. (*Id.*, PageID.1625.) The trial court denied that motion as untimely on June 18, 2013. (*Id.*) Kares appealed. The Michigan Court of Appeals dismissed the appeal as untimely because the trial court's order was not a final order subject to appeal as of right. (*Id.*) Where there is no appeal as of right, a person may still seek leave to file an appeal

with the Michigan Court of Appeals. Kares requested leave to appeal the trial court's denial of his motion for a new trial. (*Id.*) On March 21, 2013, the Michigan Court of Appeals denied leave to appeal, finding Kares's application lacked merit. (*Id.*) The Michigan Supreme Court likewise denied leave to appeal on September 5, 2014. (*Id.*)

On October 1, 2015, Kares petitioned the Western District of Michigan for a writ of habeas corpus. *Kares v. Trierweiler*, No. 1:15-cv-992 (W.D. Mich.). Then, on October 20, 2015, Kares moved the Shiawassee County Circuit Court for relief from judgment under Michigan Court Rule 6.500. (R&R, PageID.1625.) The Shiawassee County Circuit Court denied the 6.500 motion on November 2, 2015, while this Court dismissed the habeas petition without prejudice for failure to exhaust available state-court remedies on January 28, 2016. (*Id.*, PageID.1625-1626.)

Kares sought leave to appeal the denial of his 6.500 motion. (*Id.*) The Michigan Court of Appeals denied leave on September 27, 2016. (*Id.*, PageID.1626-1627.) Kares applied for leave to appeal to the Michigan Supreme Court. (*Id.*, PageID.1627.) The Michigan Supreme Court denied relief on December 27, 2017. (*Id.*)

Then came the motion that the R&R says failed to toll the time to file a habeas petition. On February 9, 2018, Kares brought a motion in the Shiawassee County Circuit Court under Mich. Comp. Laws § 770.16. (*Id.*) The motion requested DNA testing of certain evidence collected during the investigation leading to Kares's conviction. If that request were granted and the resulting DNA tests exculpated Kares, the

motion asked for a new trial. The court denied the motion for DNA testing on February 12, 2018. (*Id.*) Kares sought leave to appeal, which the Michigan Court of Appeals denied on August 29, 2018. (*Id.*) The Michigan Supreme Court likewise denied leave to appeal on April 2, 2019. (*Id.*)

Kares filed the present habeas petition on December 21, 2018. (*Id.*)

II. Standard

Under 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the Court must conduct de novo review of those portions of the R&R to which objections have been made. Specifically, the Rules provide that:

> The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b)(3).

III. Analysis

A. Timeliness

1. Statutory tolling

The question is whether the motion for DNA testing/new trial was "properly filed" and thus tolled the statute of limitations for Kares to file the present

habeas petition. The R&R concluded that that the motion did not toll the statute of limitations. (R&R, PageID.1637.) Kares objects that it did. (Pet'r's Objs., PageID.1726-1727.) Because this issue is dispositive, the Court will begin by describing the meaning of "properly filed."

Per the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), habeas petitions brought by state prisoners are subject to a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). That limitations period is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment . . . is pending[.]" 28 U.S.C. § 2244(d)(2).

"The Supreme Court has defined 'properly filed' as 'when [an application's] delivery and acceptance are in compliance with the applicable laws and rules governing filings.'" *Williams v. Birkett*, 670 F.3d 729, 733 (6th Cir. 2012) (quoting *Artuz v. Bennett*, 531 U.S. 4, 8 (2000)). In other words, a motion is properly filed if it satisfies "condition[s] to filing," even if it fails to satisfy conditions for "obtaining relief." *Artuz*, 531 U.S. at 11.

A good, but imperfect, rule of thumb is to ask whether a court would even consider a filing. If, for example, a court is flatly prohibited from considering a motion because it is untimely, then that motion is not properly filed. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005). Sometimes a rule may require "judicial scrutiny" to determine whether a filing is in fact properly filed. *Id.* at 414-15. Such rules are still conditions to filing: judicial inquiry into whether

something is properly filed does not render that filing proper. *Id.*; *Williams*, 670 F.3d at 734.

The task now is to determine when Kares's limitations period began to run and, considering motions that tolled his time, whether and when the limitations period expired. For Kares, the statute of limitations began to run on "the date on which the judgment [against him] became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Kares's request for leave to file a direct appeal was finally denied by the Michigan Supreme Court on September 29, 2014. He had 90 days from September 29 to appeal to the United States Supreme Court, which he never did. That 90-day period ended on December 28, 2014. (R&R, PageID.1630.) So Kares had until December 28, 2015, to file a habeas petition with this Court. At first glance, then, Kares's habeas petition is untimely because he did not file until December 21, 2018.

But there was some tolling. On October 20, 2015, with 69 days left to file a habeas petition, Kares filed his 6.500 motion for relief from judgment in the Shiawassee County Circuit Court. (R&R, PageID.1631.) That motion, which satisfied the filing requirements, qualified as a "properly filed application for State post-conviction . . . review" under section 2244(d)(2) and thus tolled the AEDPA's limitations period for the duration of the motion's review and appeal process. *Lawrence v. Florida*, 549 U.S. 327, 332 (2007).

The trial court denied Kares's motion, and the Michigan Court of Appeals refused leave to appeal. The Michigan Supreme Court denied leave to appeal

on December 27, 2017. (R&R, PageID.1631.) That same day, the statute of limitations began to run again. It expired 69 days later, on March 6, 2018. (*Id.*) Unless the February 9, 2018 motion for DNA testing tolled the limitations period, Kares's December 21, 2018 habeas motion is untimely.

The R&R correctly concluded that the motion for DNA testing did not toll the statute of limitations for Kares because the companion motion for a new trial was not properly filed. (Id., PageID.1637.) This is an issue of first impression. Examining the relevant Michigan statutes and court rules, the Court concludes that, for a movant who could only obtain a new trial through a successive motion for relief from judgment under Mich. Ct. R. 6.502(G), a motion for a new trial brought under Mich. Comp. Laws § 770.16 is "properly filed" only if the motion for DNA testing is granted and exculpates the movant. If the motion for DNA testing is denied, or if the testing does not exculpate the defendant, then the motion for a new trial under section 770.16 is not "properly filed" and thus does not toll the statute of limitations.

Analysis begins with the statute permitting requests for DNA testing. Mich. Comp. Laws § 770.16(1) arguably allows two distinct but simultaneous requests by movants: "[A] defendant convicted of a felony at trial on or after January 8, 2001 . . . may petition the circuit court [1] to order DNA testing of biological material identified during the investigation leading to his or her conviction, and [2] for a new trial based on the results of that testing." The first request is a discovery motion, which does not toll the AEDPA's limitations period. *Rideaux v. Perry*, No. 2:15-cv-

10774, 2016 WL 1182729, at *2 (E.D. Mich. Mar. 28, 2016) (citing *Hodge v. Greiner*, 269 F.3d 104, 107 (2d Cir. 2001)). A motion for a new trial, on the other hand, would toll the statute of limitations so long as that motion was "properly filed." 28 U.S.C. § 2244(d)(2).

For Kares, whether his motion for a new trial was properly filed depended on the success of his request for DNA testing. Mich. Comp. Laws § 770.16 confers a *basis* for a new trial motion, but all motions for new trials are governed by Mich. Ct. R. 6.431. *Accord* Mich. Ct. R. 1.104 ("Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the [Michigan] Supreme Court."); *People v. Strong*, 539 N.W.2d 736, 738 (Mich. Ct. App. 1995) ("In resolving a conflict between a statute and a court rule, the court rule prevails if it governs practice and procedure."). Where a defendant "is no longer entitled to appeal by right or by leave," Rule 6.431(A)(4) instructs movants to "seek relief pursuant to the procedure set forth in subchapter 6.500."

Kares is out of appeals, so his motion for a new trial under section 770.16 must be treated as a motion for relief from judgment under Mich. Ct. R. 6.502. *See People v. Poole*, 874 N.W.2d 407, 412 (Mich. Ct. App. 2015) (suggesting in dicta that section 770.16 would be subject to the successive motion ban in Rule 6.502(G)). But Kares has previously made a Rule 6.502 motion. He is therefore hemmed in by the filing condition of Rule 6.502(G)(1), which generally prohibits the filing of successive motions under Rule 6.502. *Williams*, 670 F.3d at 733-34 (Mich. Ct. R. 6.502(G) is

a filing condition). Absent an exception permitting some successive motions, discussed below, a successive Rule 6.502 motion is not considered properly filed and thus does not toll the statute of limitations for habeas petitions. *Id.* at 730 ("Because Michigan law does not allow the filing of second motions for post-conviction relief . . . [the petitioner's] second motion was not 'properly filed[.]'") (citing *Pace*, 544 U.S. 408).

Successive motions *are* permitted when they are based on "claim[s] of new evidence that was not discovered before the first [6.502] motion." Mich. Ct. R. 6.502(G)(2).[1] "'[N]ew evidence' includes . . . shifts in science[.]" Mich. Ct. R. 6.502(G)(3). Under Mich. Comp. Laws § 770.16(4), courts are to order DNA testing of evidence that "was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted." Thus, a successful motion for DNA testing yields the kind of "new evidence" that permits a successive Rule 6.502 motion.

Pulling everything together: a defendant, out of appeals and having previously filed a Rule 6.502 motion, may still seek a new trial under Mich. Comp. Laws § 770.16. However, that motion for a new trial must be treated as a successive motion under Rule 6.502(G). Whether that motion for a new trial is "properly filed" turns on the success of the companion motion for DNA testing. If the motion for DNA testing is denied, or if testing is performed but does not point

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[1] Successive motions are also allowed following "a retroactive change in law that occurred after the first [6.502] motion," Mich. Ct. R. 6.502(G)(2), but this is not an asserted basis of Kares's motion for a new trial and thus is irrelevant.

to another culprit, then there is no "new evidence" and hence no basis for a successive Rule 6.502 motion. In such circumstances, a motion for a new trial brought through section 770.16 will not toll the AEDPA's limitations period. Because his request for DNA testing was denied, Kares's section 770.16 motion did not toll the statute of limitations and his present habeas petition is untimely.

Kares objects that if his motion "was not properly filed then the trial court would have returned the motion citing it as defective and refus[ed] to adjudicate." (Pet'r's Objs., PageID.1727.) But the trial court only considered the request for DNA evidence. Indeed, the court could not have examined the motion for a new trial *until* it decided the DNA issue. "[I]t would be improper to deny DNA testing on the basis that a court concludes that it would deny a future motion for new trial regardless of the results of any DNA testing. A court is not statutorily permitted to conflate the two phases of analysis." *Poole*, 874 N.W.2d at 414.

And a motion is not "properly filed" simply because it is given some judicial consideration. "[T]he Supreme Court . . . explicitly rejected the argument that rules that 'necessitate judicial scrutiny' . . . may not still be considered condition[s] to filing.'" *Williams*, 670 F.3d at 734 (quoting *Pace*, 544 U.S. at 414-15). The Sixth Circuit has held that Rule 6.502(G)(2), which requires courts to decide whether a filing falls within the exception permitting successive motions, is nevertheless a condition to filing. *Id.* *Williams* controls here: Kares's motion for a new trial is subject to Rule 6.502(G), and whether that motion is properly filed is a question that cannot be determined until the

request for DNA testing has been resolved. The act of determining whether a motion is properly filed does not render that motion properly filed. *Pace*, 544 U.S. at 471. Addressing the request for DNA testing is simply a component of that determination.

2. Equitable tolling

The AEDPA's one-year limitations period is also subject to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 645 (2010). A petitioner bears the burden of showing that he is entitled to equitable tolling. *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). The Sixth Circuit has repeatedly cautioned that equitable relief should be granted "sparingly." *See, e.g.*, *Ata v. Scutt*, 662 F.3d 736, 741 (6th Cir. 2011); *Solomon v. United States*, 467 F.3d 928, 933 (6th Cir. 2003); *Souter v. Jones*, 395 F.3d 577, 588 (6th Cir. 2005); *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). A petitioner seeking equitable tolling must show: "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 560 U.S. at 649 (citing *Pace*, 544 U.S. at 418).

Kares has not argued for equitable tolling, nor has he alleged any facts or circumstances that would warrant its application in this case. His status as a *pro se* petitioner does not warrant tolling; tolling is even unwarranted where the petitioner is unaware of the statute of limitations. *See Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 464 (6th Cir. 2012) ("Keeling's *pro se* status and lack of knowledge of the law are not sufficient to constitute an extraordinary circumstance and excuse his late filing.").

There were no extraordinary circumstances preventing timely filing. In fact, Kares knew about the evidence he now says should be tested. (R&R, PageID.1639.) Prior to trial, Kares hired his own expert to test the very same evidence he says should be tested now. (*Id.*) Kares's expert *did* test the evidence in question. As the R&R puts it, Kares is "aware of those results, but [the results] are not part of the state record, which suggests the results did not exculpate [Kares] in any way." (*Id.*) These circumstances do not justify equitable tolling.

3. Actual innocence

In *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the Supreme Court held that a habeas petitioner who can show actual innocence under the rigorous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), is excused from the procedural bar of the statute of limitations under the miscarriage-of-justice exception. In order to make a showing of actual innocence under *Schlup*, a petitioner must present new evidence showing that "'it is more likely than not that no reasonable juror would have convicted [the petitioner.]'" *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 327 (addressing actual innocence as an exception to procedural default)). Because actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim, though a court may consider the timing of the claim in determining the credibility of the evidence of actual innocence. *Id.* at 399-400.

Though Kares baldly asserts that he is actually innocent, he proffers no new evidence of his innocence, much less evidence that makes it more likely than not that no reasonable juror would have convicted him. *Schlup*, 513 U.S. at 327, 329. Indeed, Kares's claim of innocence is not based on a claim that he had a consensual sexual encounter with the victim; he instead maintains that there was no sexual contact at all. (*See* R&R, PageID.1622.) Considering that his semen was found in the victim's vagina, a reasonable juror could easily have convicted Kares. Because he has wholly failed to provide evidence of his actual innocence, he would not be excused from the statute of limitations under the AEDPA.

In sum, Kares's habeas petition is untimely.

B. Merits

The R&R also performed seventy pages of analysis on the merits of the petition's eleven asserted grounds for relief. The R&R determined that the habeas petition should be rejected on the merits even if it was filed within the limitations period. Kares objected to those conclusions. The objections will be addressed on an issue-by-issue basis, in the order they are analyzed by the R&R.

1. Ground XI—Denial of motion for DNA testing

Kares claims his Fourteenth Amendment right to Equal Protection was violated when the Shiawassee County Circuit Court denied his motion for DNA testing. (R&R, PageID.1646.) The R&R found this claim non-cognizable on habeas review. (*Id.*, PageID.1650.)

In his objection, Kares essentially argues that his motion for DNA testing was meritorious and thus the trial court's denial violated the imperative that "the states . . . apply its laws equally to similarly situated individuals." (Pet'r's Objs., PageID.1728.) This objection is meritless.

As the R&R notes, habeas petitions cannot be used to "'challenge errors or deficiencies in state post-conviction proceedings . . . because the claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration.'" (R&R, PageID.1648 (quoting *Kirby v. Dutton*, 794 F.2d 245, 247 (6th Cir. 1986)).) "[T]he petition must directly dispute the facts or duration of confinement." *Kirby*, 794 F.2d at 248. Kares's challenge to the trial court's adjudication of a post-conviction discovery motion does no such thing.

Kares also takes issue with the R&R's statement that "clearly established federal law [i]s determined by the Supreme Court."[2] (Pet'r's Objs., PageID.1728.) It is not clear how this relates to Issue XI because the R&R's disposition of Issue XI did not turn on whether some point of law was clearly established. Either way, the R&R correctly stated the law. This objection is denied.

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[2] Kares repeats this argument many times in his objections. Because the R&R correctly stated the law, the Court will not reconsider this argument each time it is reasserted.

2. Ground IV—Denial of Mich. Ct. R. 6.502 motion

Kares further challenges the denial of his first motion for relief from judgment under Mich. Ct. R. 6.502. (R&R, PageID.1650.) The R&R determined that Kares's claim was not cognizable on habeas review. (*Id.*) Kares objects that, because his motion "was never adjudicated on the merits" in state court, his claim is subject to *de novo* review. (Pet'r's Objs., PageID.1728.) Because the claim is subject to *de novo* review, he says, the "claim is cognizable on habeas review." (*Id.*) Kares misses the mark. *Reviewability* is a separate question from *standard of review*. A claim is not cognizable simply because it *would be* subject to a particular standard of review if the claim *were* reviewable. This objection is denied.

3. Ground I—Admission of hearsay over defense objection

At trial, a nurse who examined the victim after the sexual assault testified as to certain statements the victim made during the examination. (R&R, PageID.1651.) Counsel for Kares objected to that testimony as inadmissible hearsay; the trial court overruled. Kares claims admission of that testimony violated his right to a fair trial and the Due Process Clause.

The R&R determined that admission of the testimony did not violate the Constitution. (*Id.*, PageID.1655.) Kares objects that the nurse gave testimonial hearsay and thus admission of her statements violated the Confrontation Clause. (Pet'r's Objs., PageID.1729.) It is true that the Confrontation

Clause generally prohibits testimonial hearsay. *Crawford v. Washington*, 541 U.S. 36, 53-56 (2004). However, testimonial hearsay is admissible where the declarant appears at trial and is subject to cross-examination. *Id.* at 59. Here, the victim—the declarant—testified at trial and was subject to "unrestricted cross-examination" by the defense. (R&R, PageID.1655.) Assuming the nurse's statements qualified as testimonial hearsay, no Confrontation Clause violation occurred. Kares's objection is denied.

4. Ground II—Improper judicial conduct to enhance sentence

At sentencing, Kares claims that the trial court "relied upon inaccurate information when scoring [his] prior record and offense variables" and engaged in impermissible fact-finding to impose a lengthier sentence. (*Id.*, PageID.1656-1657.) He also claims that the trial court incorrectly applied the relevant statutory scoring guidelines. (*Id.*, PageID.1657.)

The R&R concluded that the incorrect scoring issue was "purely a state law claim," and thus "not cognizable on habeas review." (*Id.*) Kares objects to this finding, stating that his petition "clearly sets forth the *information* applied by the state court violates either or both . . . the 6th and 14th Amendments to the United States Constitution." (Pet'r's Objs., PageID.1730 (emphasis added).) But the R&R's statement clearly related to the erroneous *scoring* issue, not the improper *information* issue. Kares's objection on this point is therefore irrelevant and denied.

Examining the impermissible judicial fact-finding, the R&R concluded that the trial court's actions at sentencing were contrary to *Alleyne v. United States*, 570 U.S. 99 (2013) and *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015) (*Lockridge II*). According to the R&R, "[t]here is little question the trial court impermissibly relied on judge-found facts to score some of the variables when determining [Kares's] minimum sentencing guidelines range." (R&R, PageID.1660.) However, because Kares never raised such an argument to the trial court when he could have and needed to, the R&R determined that this issue was procedurally defaulted. (*Id.*, PageID.1660-1663.)

Kares objects that he *did* make such an argument in his first Rule 6.502 motion, and that he cited *People v. Lockridge*, 849 N.W.2d 388 (Mich. Ct. App. 2014) (*Lockridge I*) to support his position. But the only passage from his 6.502 motion that could possibly be construed as a judicial fact-finding argument is too vague: "[a] trial court may not make an independent finding regarding a defendant's guilt[] of another offense to justify an offense variable scoring." (ECF No. 21-10, PageID.1020.) This statement came in the context of Kares's claim that he received improper enhancements based on acquitted conduct. (*See id.*) That argument does not relate to *Alleyne* and *Lockridge II*, which held that the U.S. Constitution invalidated Michigan's sentencing guidelines to the extent they required "judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables [] that *mandatorily* increase the floor of the guidelines minimum sentence range." *Lockridge II*, 870 N.W.2d at 506 (emphasis in original). Kares's citation to *Lockridge I*, partially reversed by *Lockridge*

II, does not clarify the ambiguity in his 6.502 brief. And worse, *Lockridge I* only discussed state law, not federal law. Under the circumstances, it cannot be said that Kares "fairly presented" to the trial court any argument based on *Alleyne* and *Lockridge II*. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). Kares did not present a federal or constitutional judicial fact-finding argument when he needed to, and this ground for habeas relief is therefore procedurally defaulted.

The R&R further found that Kares's arguments about improperly scored offense variables were procedurally defaulted. (R&R, PageID.1667-1670.) Kares again objects that he properly raised the claims relating to the offense variables in state court. (Pet'r's Objs., PageID.1729.) The Court agrees with the R&R that Kares's arguments were too vague and shifted between stages of review, meaning he did not fairly present his claims to the trial court and at each stage of appeal. (R&R, PageID.1667-1670.) The result is procedural default. Kares's objection is denied here.

The R&R did find one offense variable argument (OV 11 Argument) was properly raised and exhausted. (R&R, PageID.1670.) However, the state cout denied Kares's claims for relief based on the OV 11 Argument, and the R&R concluded that the state court's denial was not contrary to or based on an unreasonable application of federal law. (R&R, PageID.1671.) The R&R thus recommended denying habeas relief on the OV 11 Argument. Kares fails to object to this conclusion. Kares likewise fails to object to the R&R's finding that his sentence was *not* based on inaccurate information. (*Id.*, PageID.1671-1672.)

5. Gound III—Improper lesser offense instruction by trial court

Kares argues that the trial court erroneously instructed the jury on third-degree criminal sexual conduct, suggesting that "the court so instructed the jury because the court believed that [third-degree criminal sexual conduct] was a lesser-included offense of [first-degree criminal sexual conduct]." (*Id.*, PageID.1672.) But, as the R&R notes, Kares, through counsel, was the one who requested the instruction on third-degree criminal sexual conduct. (*Id.*, PageID.1675 (citing Trial Tr. II, ECF No. 21-6, PageID.852, 859-861).) Kares objects that the R&R mistakenly "assum[es]" that he agreed to the challenged instruction when there is "not any evidence within the trial record to support such an assumption." (Pet'r's Objs., PageID.1732.) The evidence is that his own attorney requested the addition of the third-degree criminal sexual misconduct instruction.

Even if the instruction should not have been given, the R&R correctly states that Kares committed "invited error" and thus cannot obtain habeas relief. (R&R, PageID.1676 (citing *Fields v. Bagley*, 275 F.3d 478, 485-86 (6th Cir. 2001)).) Kares objects that if his own counsel "in fact invited the jury instruction," then this was ineffective assistance of counsel. (Pet'r's Objs., PageID.1732.) This argument will be addressed in section III.B.10 below.

6. Ground V—Misrepresentation of DNA evidence

At trial, a nurse who examined the victim after the sexual assault testified that she collected samples

from the victim's anus and vagina. (R&R, PageID.1678.) The nurse did not indicate that she collected these samples in a report she drafted right after the examination. (*Id.*, PageID.1679.) Another witness, who tested the samples collected by the nurse, corroborated the nurse's testimony. (*Id.*) During closing arguments, the prosecutor "urged the jurors to infer that the report was in error," and argued that the samples, which tested positive for Kares's DNA, along with other evidence, demonstrated Kares's guilt. (*Id.*)

In his amended petition, Kares argues that the prosecution misrepresented the DNA evidence to show a critical element of the offense—sexual penetration. (*Id.*, PageID.1678.) Kares contends that this misrepresentation was prosecutorial misconduct amounting to a Due Process violation. However, this argument is based on the inconsistencies between the nurse's testimony and her examination report. The R&R concluded that the inconsistencies simply created a question of fact, one that was resolved against Kares, and that he "failed to demonstrate that the prosecutor's arguments with regard to the DNA evidence rise to the level of prosecutorial misconduct that denied him due process." (*Id.*, PageID.1680-1681 (citing *Coleman v. Jackson*, 566 U.S. 650, 655-56 (2012) (Due Process only violated where prosecutor urges inferences that are irrational)).)

Objecting, Kares mostly challenges the R&R's analysis on whether an anal swab was collected. (Pet'r's Objs., PageID.1733.) But, as the R&R points out, this is not enough. "[E]ven if one accepted [Kares's] invited inference with regard to the anal swabs—that the inconsistency gives rise to reasonable

doubt—that would not render unreasonable the allegedly invited inference that [Kares's] DNA on the cervical swabs evidence[d] penetration, an inference that is particularly reasonable because the victim testified" about vaginal penetration. (R&R, PageID.1680.) The cervical swabs were more relevant anyway, because Kares was convicted of vaginal, not anal, penetration. With respect to the vaginal samples, Kares simply objects that "there was no record" of them being collected. (Pet'r's Objs., PageID.1733.) As explained in the R&R, the lack of such a record is not dispositive, it was simply inconsistent with the nurse's testimony about collecting vaginal samples. That testimony was corroborated by other witnesses and evidence. Therefore, the jury could reasonably infer that vaginal samples were actually collected, despite the lack of a contemporaneous record indicating such. Kares's objections are denied.

7. Ground VI—Prosecution suppressed exculpatory evidence

"[S]uppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Kares claims that two pieces of evidence were suppressed by the prosecution in violation of *Brady*: his bedding and the victim's toxicology report. (R&R, PageID.1681.)

The R&R found these claims entirely meritless. Kares "concedes" the R&R's conclusions, but only "as to the legal standing of . . . [the] claim." (Pet'r's Objs., PageID.1734.) The Court is not sure what Kares

means by "the legal standing of the claim." Nevertheless, it is irrelevant because Kares concurs that there was no *Brady* violation.

8. Ground VII—Failure to produce endorsed *res gestae* witnesses at trial

Kares argues that the prosecution was required to call two *res gestae* witnesses. (R&R, PageID.1684.) The R&R concluded that Kares was not entitled to relief because the requirement to call all *res gestae* witnesses comes from Michigan law—there is no federal analog. (*Id.*, PageID.1687-1688.) If the prosecution failed to do so, no constitutional violation occurred. "Michigan's requirement that prosecutors produce res gestae witnesses is a matter of state law, and its enforcement is outside the scope of [federal] review." *Collier v. Lafler*, 419 F. App'x 555, 559 (6th Cir. 2011).

Kares first objects that his claim "is centered upon the due process right to a fair trial." (Pet'r's Objs., PageID.1734.) That misses the point: the U.S. Constitution does not require prosecutors to call all *res gestae* witnesses and thus a prosecutor's failure to do so cannot amount to a fair trial violation. He also objects that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Id.* (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).) To that end, Kares says he was prejudiced when the prosecution did not call those two witnesses because he "was [left] without the ability" to call the witnesses himself. (*Id.*, PageID.1735.) He did not make this argument in his amended petition so the Court will not consider it. Kares's objections are denied.

9. Ground VIII—Inadequate notice of State's intent to seek sentence enhancement

Kares claims that he did not receive fair notice of potential sentencing enhancements that would trigger based on his prior convictions if he was found guilty of third-degree criminal sexual conduct. (R&R, PageID.1690.) He says he was only informed of the potential consequences of a first-degree criminal sexual conduct conviction because the third-degree was added as a lesser-included offense at trial. (*Id.*) Kares argues this amounted to a Fourteenth Amendment violation.

The R&R spots the logical fallacy. Kares was indicted on charges of first-degree criminal sexual conduct. The indictment stated that "the prosecutor will seek a sentence enhancement because [Kares] had previously [been] convicted of three or more felonies." (*Id.*) Thus, it is of no consequence that Kares was ultimately convicted of third-degree criminal sexual conduct rather than first-degree criminal sexual conduct.

Kares knew from the outset that the prosecution would seek an enhancement and thus had ample opportunity to "prepare a defense against the enhancement." (*Id.*, PageID.1692.) Notice is adequate under the Due Process Clause so long as the indictment "fairly . . . informs the accused of the offense for which he is to be tried," *Mira v. Marshall*, 806 F.2d 636, 639 (6th Cir. 1986) such that "the accused may adequately prepare a defense[.]" (R&R, PageID.1691 (citing *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir. 1984)).)

Kares objects that he "was not provided notice as it relates to . . . sentence enhancement[s] regarding the lesser offense until the day of the sentencing." (Pet'r's Objs., PageID.1735.) But it is not clear why that matters. Kares knew the prosecution would seek an enhancement based on prior convictions when he was charged with first-degree criminal sexual conduct. Was he not prepared to argue against enhancements if he were convicted of first-degree criminal sexual conduct? What changes if he is convicted of third-degree criminal sexual conduct? The ultimate conviction does not matter here: Kares was accused of sexual assault and the prosecution said it would seek enhancements if he were convicted. He had fair notice. The objection is denied.

In his next objection, Kares points to Mich. Comp. Laws § 769.13(3), which "requires the prosecution to file notice of intent to seek an enhanced sentence within 21 days after the defendant has been convicted of the underlying offense or a lesser offense." (Pet'r's Objs., PageID.1736.) He says the prosecution failed to do so. Whether the prosecution complied with a particular state law is irrelevant: habeas petitions cure federal violations only. Kares had fair notice under the Fourteenth Amendment. This objection is denied.

Finally, Kares objects that this Court has found there was "no notice to seek an enhanced sentence" with respect to the third-degree criminal sexual conduct conviction. (*Id.* (citing 4/23/2021 Order, ECF No. 32).) The referenced Order simply states that "there is no 'notice of sentence enhancement' such as [Kares] requests," i.e., the specific document he requested does not exist. (4/23/2021 Order, PageID.1711.) The

Order goes on to conclude, as the Court again concludes today, that the indictment itself—which included a statement of intent to seek enhancements—provided sufficient notice. (*Id.*, PageID.1711-1712.) This objection is likewise denied.

10. Ground IX—Ineffective assistance of trial counsel

A successful ineffective assistance of counsel claim requires showing: (1) that counsel's performance fell below an objective standard of reasonableness; and (2) that counsel's deficient performance prejudiced the defendant, resulting in an unreliable or fundamentally unfair outcome. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Courts must make "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The defendant bears the burden of rebutting this presumption. *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). "The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, 'the identified acts or omissions were outside the wide range of professionally competent assistance.'" (R&R, PageID.1693 (quoting *Strickland*, 466 U.S. at 690).) Deficient performance is irrelevant unless it affected the outcome of the case. *Strickland*, 466 U.S. at 691.

The standard is "doubly" deferential in the habeas context because the court is reviewing a state court's application of *Strickland*. *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)). On habeas review, the question is "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard."

Id. Such deference is not owed where the state court declined to address the defendant's claims on the merits.

The trial court did not address Kares's ineffective assistance of counsel claims on the merits. (R&R, PageID.1695-1696.) The R&R believed Kares's claims were procedurally defaulted, but nevertheless concluded that addressing the merits would offer the "more direct path to resolution." (*Id.*, PageID1695.) Consequently, the R&R reviewed Kares's infective assistance of trial counsel claims *de novo*. Kares concurs with that decision. (Pet'r's Objs., PageID.1736.)

In his amended petition, Kares claims that his trial counsel "failed to adequately investigate and present pictures of [Kares's] identifying marks and tattoos [and] . . . failed to investigate [] DNA evidence." (R&R, PageID.1698.)

Kares has tattoos, including a large one depicting a dreamcatcher on his left thigh. (R&R, PageID.1699.) Defense counsel asked the victim if she remembered seeing any tattoos on Kares's thigh; she said she did not think so. (*Id.* (citing Shiawassee Cnty. Cir. Ct. Order, ECF No. 21-11, PageID.1068-1069).) "In his closing, trial counsel argued that the victim's inability to identify distinguishing features on [Kares's] naked body supported a finding of reasonable doubt." (*Id.* (internal quotation marks omitted).) But Kares's lawyer forgot to solicit any testimony affirming that Kares did, in fact, have tattoos. The R&R found that this error fell outside the range of professionally competent assistance. (*Id.*, PageID.1700.)

However, the R&R concluded that there was no prejudice. (*Id.*, PageID.1700-1701.) Kares's defense was not that he had a *consensual* sexual encounter with the victim; instead, he claimed that there was no sexual encounter *at all*. (*See id.*) The presence of his semen in the victim's vagina severely undercut his defense. And DNA evidence was clearly "of singular importance" to the jury. (*Id.*, PageID.1701.) Kares was accused of both oral and vaginal penetration, and his DNA was only found in the victim's vagina, not her mouth. (*Id.*) Kares was convicted of vaginal penetration but acquitted of oral penetration. (*Id.*) For this reason, the R&R determined that trial counsel's failure to properly elicit testimony about Kares's tattoos did not render the result "unfair or unreasonable[.]" (*Id.*)

Kares essentially argues that effective assistance on the tattoo issue would have affected the outcome because it would have undermined the victim's credibility. (Pet'r's Objs., PageID.1738.) But, as the R&R notes, DNA evidence appeared to be the decisive factor. The victim provided strong testimony regarding both oral and vaginal penetration, and ostensibly faltered in failing to remember Kares's thigh tattoo. Kares was convicted on vaginal penetration, for which there was DNA evidence, and acquitted on oral penetration, for which there was not. Kares has not convinced the Court that extra damage to the victim's credibility, whatever it would have been, could have overcome the DNA evidence inculpating him. This objection is denied.

Onto the DNA evidence claim. Kares maintains that the victim deposited his semen in her vagina "by

transferring it from a used female condom" that Kares says "was thrown in his bathroom trash a few days before the alleged criminal sexual conduct." (R&R, PageID.1701.) He argues that his lawyer "did nothing to investigate" this claim. (*Id.*, PageID.1702.) The R&R found otherwise, concluding that "[c]ounsel was plainly aware of [Kares's] theory" and asked two forensic witnesses at trial whether they tested samples for foreign substances. (*Id.*) He "specifically explored" this theory with one of the witnesses, who "testified that if semen were transferred from a vaginal condom," there would be "DNA carryover from that third person," but said that there "was no such carryover in the samples tested[.]" (*Id.*)

The R&R found "nothing in the record that forecloses the possibility that counsel in fact investigated the presence of foreign substances through the expert hired to conduct independent testing." (*Id.*) If trial counsel did not test the female condom, the R&R concluded that the decision was a sound exercise in strategy: "It may be that such testing was not conducted because the prospect of no test results—and no actual tests by the prosecutor's experts to rule out the possibility—put [Kares] in a better position to argue reasonable doubt." (*Id.*) The R&R discovered no ineffective assistance: "The flaw was in [Kares's] theory, not his counsel's performance," concluding that "counsel did the best that he could with an unconvincing theory." (*Id.*, PageID.1703.)

Kares objects and argues that his attorney should have investigated his DNA-transfer theory more fulsomely. (Pet'r's Objs., PageID.1738.) But this fails to account for the R&R's reasoning that it may have been

a smart and strategic decision to not test the female condom because counsel knew the prosecution would not test it. To buttress his argument, Kares says his attorney's failure to investigate was significant because "unidentified male DNA was present in the samples collected." (*Id.*, PageID.1739.) In making this claim, Kares cites to Lori Bruski's laboratory report. As far as the Court can tell, that report is not in the record. But there is a record of Bruski's testimony at trial, where she unequivocally states that she found no third source of DNA. (ECF No. 21-6, PageID.765 (Q: "[S]o the jury is clear, did you find a third source of DNA in any of your testing?" A: "No, I did not.").) Kares has not shown that it was unreasonable for his counsel to not test the female condom, assuming no testing was performed, and has also failed to show that this decision affected the outcome of the trial. His objections are denied.

The R&R also concluded that trial counsel did not provide ineffective assistance when he requested an instruction on third-degree criminal sexual conduct. (R&R, PageID.1703.) Noting the "compelling" DNA evidence against Kares, the R&R saw two potential strategies regarding instructions: (1) "all or nothing" or (2) "third option." (*Id.*) An attorney pursuing the first strategy would not have requested an instruction on third-degree criminal sexual conduct, while an attorney going the "third option" route would.

The "all or nothing" strategy is a gamble that the jury will decide the prosecution failed to prove a particular element of the offense and thus acquit the defendant. But it is risky, especially where the defendant clearly did *something* wrong. "Where one of the

elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Keeble v. United States*, 412 U.S. 205, 212-13 (1973). For this very reason, the defense may find it desirable to present a "third option," a less severe offense with a less severe penalty for conviction. *Id.*

Here, Kares's attorney went with the "third option" strategy. Kares claimed he did not have sex with the victim, but his semen was found in her vagina and his "transference through a female condom" theory was far-fetched. To prove first-degree criminal sexual conduct, the prosecution had to show that Kares forced or coerced the victim into committing sexual acts, and that the victim suffered physical injury during the course of those acts. Third-degree criminal sexual conduct requires the same proof, except the prosecution does not have to show that the victim suffered physical injury during the assault. Whether Kares caused physical harm sufficient to satisfy first-degree criminal sexual conduct may have been in doubt but, as observed in *Keeble*, this put him at extreme risk of a harsher conviction if no third option were offered.

In his objections, Kares indicates that he did not consent to the instructions and that his attorney committed ineffective assistance in requesting instructions for third-degree criminal sexual conduct. (Pet'r's Objs., PageID.1740.) Under the circumstances, his attorney made a reasonable judgment call. There was no ineffective assistance of counsel and Kares's objection is denied.

Finally, the R&R notes a plethora of other ineffective assistance claims raised and later abandoned by Kares. (R&R, PageID.1697-1698.) The R&R therefore refused to consider those arguments. (*Id.*) Kares does not object.

11. Ground X—Ineffective assistance of appellate counsel

As with the previous claims, the R&R reviewed Kares's ineffective assistance of appellate counsel claims *de novo*. (*Id.*, PageID.1696.) Kares supports the R&R's use of this standard of review. (Pet'r's Objs., PageID.1736.) *Strickland* applies equally to appellate counsel as it does to trial counsel: Kares must show that his appellate attorney was incompetent and that competent representation would have yielded a different outcome.

The R&R analyzes ten claims of ineffective assistance of counsel and recommends denying all of them. Kares objects to two recommendations.

In his amended petition, Kares says his appellate counsel was ineffective for failing to raise the *Alleyne* judge-found facts issue on direct appeal. It is true that his counsel did not do so. (R&R, PageID.1705.) But Kares himself did not raise an ineffective assistance claim on this ground until he sought leave to appeal denial of his motion for relief from judgment. (*Id.*) Thus, the issue is unexhausted. Finding no means for Kares to seek a remedy in state court, and seeing no cause for Kares's failure to exhaust, the R&R concluded that this claim is procedurally defaulted. (*Id.*)

Kares objects and states that the R&R "contradict[s]" itself because it previously concluded "that the trial court impermissibly relied on judge-found facts" in sentencing. (Pet'r's Objs., PageID.1740.) There is no contradiction. The R&R found that Kares *had* a viable claim—the trial judge likely impermissibly relied on judge-found facts—but that the claim was procedurally defaulted. (R&R, PageID.1660-1663.) The R&R then found that any claim of ineffective appellate assistance *predicated* on the judge-found facts claim was likewise procedurally defaulted. (*Id.*, PageID.1705.)

Kares argues that procedural default should be forgiven where it is the result of ineffective assistance of counsel. (Pet'r's Objs., PageID.1741 (citing *Coleman v. Thompson*, 501 U.S. 722, 254 (1991)).) But this argument can only relate to the underlying *Alleyne* claim that his appellate counsel failed to raise. Kares had no ineffective assistance of appellate counsel claim until his attorney provided allegedly ineffective assistance. He offers no explanation why procedural default of the latter claim should be excused given ineffective assistance with respect to the *Alleyne* claim. This objection is therefore denied.

Kares also advances an ineffective assistance of appellate counsel claim based on his appellate attorney's failure to raise an ineffective assistance claim with respect to the trial attorney. (R&R, PageID.1708.) The R&R recommends denying this claim because "[t]rial counsel did not render ineffective assistance." (*Id.*) Kares objects and asserts that trial counsel's assistance was ineffective. (Pet'r's Objs., PageID.1741.) This objection is denied because,

as explained in Section III.B.10, the trial attorney did not provide effective assistance of counsel.

Finally, there are claims that the R&R did not consider. In the brief supporting his amended petition, Kares states that he "has presented numerous issues herein that his Appellate Counsel failed to include[] within his direct appeal." (Pet'r's Br., ECF No. 10-1, PageID.205.) Following Kares's lead, the R&R "limit[ed] its analysis to claims [fitting] that description: claims that appellate counsel did not raise on appeal and that [Kares] raised in his amended petition." (R&R, PageID.1704.) Kares objects and maintains that the R&R should have reviewed the additional claims, but does not explain why. (Pet'r's Objs., PageID.1740.) The objection is therefore denied.

IV. Conclusion

For the foregoing reasons, the Court denies all of Kares's objections and will adopt the R&R. Kares's amended petition is untimely. Even if it were filed within the statute of limitations, Kares's claims are meritless or otherwise procedurally defaulted. An order, judgment, and certificate of appealability will enter consistent with this Opinion.

Dated: August 3, 2021

/s/ Hala Y. Jarbou
HALA Y. JARBOU
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

STEPHEN JOHN KARES,
Petitioner,
v. Case No. 2:19-cv-7

Honorable Hala Y. Jarbou

CONNIE HORTON,
Respondent.
_____/

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Petitioner Stephen John Kares is incarcerated with the Michigan Department of Corrections at the Lakeland Correctional Facility (LCF) in Coldwater, Branch County, Michigan. On August 30, 2012, following a three-day bench trial in the Shiawassee County Circuit Court, Petitioner was convicted of third-degree criminal sexual conduct (CSC-III), in violation of Mich. Comp. Laws § 750.520d. On September 29, 2012, the court sentenced Petitioner as a fourth habitual offender, Mich. Comp. Laws § 769.12, to a prison term of 25 years to 58 years, 4 months, to be served consecutively to a sentence for assault for which Petitioner was on parole when he committed the CSC-III offense.

Petitioner filed his habeas corpus petition in this Court on or around December 21, 2018. Under Sixth Circuit precedent, the application is deemed filed

when handed to prison authorities for mailing to the federal court. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). Petitioner signed his application on December 21, 2018. (Pet., ECF No. 1, PageID.9.) The petition was received by the Court on January 9, 2019. For purposes of this Report and Recommendation, I have given Petitioner the benefit of the earliest possible filing date. *See Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008) (holding that the date the prisoner signs the document is deemed under Sixth Circuit law to be the date of handing to officials) (citing *Goins v. Saunders*, 206 F. App'x 497, 498 n.1 (6th Cir. 2006)).

The petition raises eleven grounds for relief, as follows:

I. Petitioner was denied his due process right to a fair trial by the admission of hearsay evidence over a defense objection.

II. Trial court applied inaccurate information and engaged in judicial fact finding to increase Petitioner's sentence.

III. Petitioner was denied his due process rights by the trial court giving an improper lesser offense instruction.

IV. Petitioner was denied his constitutional right to due process and equal protection by the State of Michigan ruling "good cause" and "actual prejudice" were not demonstrated.

V. Petitioner was denied a fair trial by the prosecutor misrepresenting DNA evidence to the jury.

VI. Petitioner was denied his due process rights by the prosecutor suppressing exculpatory evidence in its possession.

VII. Petitioner was denied his due process right to a fair trial by the prosecution failing to produce endorsed res gestae witnesses at trial.

VIII. Petitioner was denied his due process right to adequate notice to seek a sentence enhancement.

IX. Trial counsel was ineffective for failing to conduct an adequate investigation and present a complete defense.

X. Appellate counsel was ineffective by failing to raise meritorious issues on direct appeal resulting in prejudice to Petitioner's appeal.

XI. Petitioner was deprived of his right to equal protection when he was denied testing of forensic evidence.

(Am. Pet., ECF No. 10, PageID.135–150.)[1] Respondent has filed an answer to the petition (ECF No. 20) stating that the grounds should be denied because the petition is untimely, most of the grounds are procedurally defaulted, several of the grounds are not cognizable on habeas review, and all of the grounds are meritless. Upon review and applying the standards of the

[1] Petitioner filed his amended petition on May 17, 2019. The amended petition added habeas ground XI, for which Petitioner had not exhausted his state court remedies at the time he filed his initial petition, as explained fully below.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA), I conclude that the petition is untimely. Nonetheless, because that conclusion depends upon resolution of an issue of first impression in this district and circuit—whether or not a motion seeking DNA testing under Mich. Comp. Laws § 770.16 is a petition for collateral review that tolls the running of the period of limitation—and because that is a question upon which reasonable minds could certainly differ, I have also considered the merits of the grounds raised. I further conclude that Petitioner's habeas grounds are either procedurally defaulted or meritless or both. Accordingly, I recommend that the petition be denied.

Discussion

I. Factual allegations

The Michigan Court of Appeals summarized the testimony elicited at trial as follows:

> Defendant knew the 16 year old victim because he dated her mother, and the victim had been over to his apartment on a number of occasions. On the day of the assault, defendant texted the victim and offered to pay her money if she would clean his horse saddle. Later that day, defendant texted the victim that he would be home soon, he bought her a pack of cigarettes (as he had done in the past), and he purchased a gift for her from Goodwill.
>
> The victim asked a friend to drive her to defendant's apartment. When she arrived, defendant showed her the saddle, but said that

she did not need to clean it right away. The victim and defendant were talking and smoking a cigarette in the living room when he offered to help her get emancipated, which is something they had talked about before. Defendant also gave her the gift from Goodwill, which was a pair of earrings.

The victim cleaned the saddle, and defendant eventually went into his bedroom. Defendant then asked the victim if a pair of pants in the bedroom were hers, which prompted the victim to walk toward the bedroom. Defendant then told the victim that they needed to talk, and closed the bedroom door. He then caressed her face, and the victim told him no. Because the victim began to whimper and shake, defendant said "stop, don't make me hurt you." Defendant then kissed the victim and said "what do you think I'm doing this for? What do you think I'm doing all this for you for?" The victim knew that he was referring to the emancipation offer and the purchase of cigarettes.

Defendant told the victim to walk over by the bed and take her clothes off, which she did. He then grabbed a camera, took his pants off, and told the victim to lie down on the bed. When she complied, he opened her legs, spread open her vaginal area to take a picture, and told her that if she told anyone he would distribute the photographs everywhere. He then ordered her to sit up, and forced her to perform oral sex on

him. He next ordered her to lie down on the bed, and he inserted his penis into her vagina.

Defendant eventually stood up and put his pants back on. The victim got dressed but did not run because she was afraid he would catch her. Defendant said that he thought she would be more into it, and asked if she had sex before. They eventually proceeded back into the living room, and the food defendant ordered earlier arrived. While the victim went back to cleaning the saddle, she felt threatened because defendant told her that he did not want the police showing up at his door. The victim's friend arrived to pick her up, and the victim told defendant not to worry that she would not tell.

However, after driving away, the victim told her friend, and eventually her mother, that defendant raped her. She had a rape kit examination performed, and a sexual-assault nurse testified that the victim relayed to her what happened. Thus, the nurse conducted a full body assessment of the victim, including a detailed genital assessment. She obtained a urine sample to check for infection or prior pregnancy, and provided the victim with medications to prevent pregnancy and infection. The nurse testified that near the victim's anus she observed a half-millimeter tear that could be consistent with forced or consensual sexual contact. She also collected various samples, including a sample of a white substance at the victim's cervix and a vaginal swab. An

> employee at the Michigan State Police Forensic Science Division testified that the anal and cervical swabs were tested and resulted in a match to defendant's DNA.[1]
>
> Defendant testified at trial, and while he admitted that the victim came over to his apartment to clean the saddle, he claimed that no sexual contact occurred, and he did not know why the victim accused him of such. He testified that he had sexual intercourse with a different woman three or four days before, and had disposed of a vaginal condom in the trash.
>
> [1] Defendant questioned the prosecution's witnesses regarding the nurse's report, which did not show a check mark that anal swabs or vaginal smears were collected.

(Mich. Ct. App. Op., ECF No. 21-12, PageID.1073–1074.) Petitioner does not challenge the court of appeals' recounting of the trial testimony. Indeed, Petitioner's statements of the facts in his state court briefs are more detailed, but generally consistent with the account provided by the appellate court. The undersigned will provide additional detail regarding the trial testimony where it is relevant to an analysis of the issues Petitioner has raised.

The prosecutor charged Petitioner with two counts of first-degree criminal sexual conduct (CSC-I), one count for Petitioner's penetration of the victim's vagina with his penis and one count for Petitioner's penetration of the victim's mouth with his penis. The CSC-I statute identifies several circumstances where

sexual penetration rises to the level of a first-degree offense. The prosecutor relied on the following circumstance:

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]he actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration.

Mich. Comp. Laws § 750.520b.[2]

Petitioner's counsel requested that the jury also be instructed with regard to the elements of CSC-III. (Trial Tr. II, ECF No. 21-6, PageID.859–860.) There is a difference of only one element between the CSC-I circumstance argued by the prosecutor and one of the CSC-III circumstances. *Compare* Mich. Comp. Laws § 750.520b(1)(f) and Mich. Comp. Laws § 750.520d(1)(b). If sexual penetration is accomplished by force or coercion, but the actor does not cause personal injury, the actor would be guilty of CSC-III rather than CSC-I. The trial court instructed the jury regarding CSC-I, (Trial Tr. III, ECF No. 21-7, PageID.907–910), and CSC-III, (*Id.*, PageID.910), describing the latter offense as a "less serious," not "lesser included" offense.

The jurors apparently struggled with discerning the difference between CSC-I and CSC-III, because they sent the judge a note asking him to explain the difference. (*Id.*, PageID.919.) With the agreement of

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[2] The statute then proceeds to define force or coercion. Mich. Comp. Laws § 750.520b(1)(f).

counsel, the judge brought the jury back in to the courtroom and reviewed the CSC-I and CSC-III instructions, highlighting that the difference between them was that CSC-III did not require proof of a resulting personal injury. (*Id*., PageID.919–923.) A couple of hours later, the jurors returned their verdict: they found Petitioner guilty of CSC-III with regard to the penile/vaginal penetration and not guilty with regard to the penile/oral penetration or any of the CSC-I charges.

On September 28, 2012, the court sentenced Petitioner as described above. (Sentencing Tr., ECF No. 21-8.) Petitioner included the sentencing information report and the applicable sentencing grid as exhibits to his brief on direct appeal to the Michigan Court of Appeals. (Sentencing Information Rep., ECF No. 21-12, PageID.1122; Sentencing Grid, ECF No. 21-12, PageID.1123.) Petitioner reached the maximum point levels on the Offense Variables and the Prior Record Variables, yielding a minimum sentence range of 117 to 320 months. (*Id.*)

Petitioner, with the assistance of counsel, directly appealed his conviction and sentence, raising two issues: a claim that the trial court improperly admitted hearsay evidence regarding out-of-court statements of the victim through the testimony of the sexual assault nurse examiner (SANE); and a claim that the trial court had improperly scored certain offense variables. The first issue is now before this Court as habeas ground I. The second direct appeal issue is a small part of habeas ground II. By opinion issued November 21, 2013, the court of appeals rejected Petitioner's

challenges and affirmed the trial court. (Mich. Ct. App. Op., ECF No. 21-12, PageID.1073–1078.)

Petitioner then filed a *pro per* application for leave to appeal to the Michigan Supreme Court, raising the same issues he raised in the Michigan Court of Appeals. (Pet'r's Appl. for Leave to Appeal, ECF No. 21-17, PageID.1329–1353.) The Michigan Supreme Court denied leave to appeal, initially on May 27, 2014, (Mich. Order, ECF No. 21-17, PageID.1320) and then upon reconsideration on September 29, 2014, (Mich. Order, ECF No. 21-17, PageID.1321). Petitioner did not file a petition for certiorari in the United States Supreme Court. (Am. Pet., ECF No. 10, PageID.132.)

At the same time Petitioner was pursuing his direct appeal with the assistance of counsel, he requested a new trial in the trial court by way of a *pro per* motion filed May 8, 2013. The motion raised one issue, Petitioner argued that instructing the jury on the elements of CSC-III was erroneous because CSC-III is not a lesser included offense of CSC-I. On June 18, 2013, the trial court denied the motion as untimely. (Shiawassee Cnty. Cir. Ct. Order, ECF No. 21-13, PageID.1199.) Petitioner filed a claim of appeal from that order. (Mich. Ct. App. Claim of Appeal, ECF No. 21-13, PageID.1198.) The Michigan Court of Appeals dismissed the appeal because the trial court's order was not a final order subject to appeal as of right. (Mich. Ct. App. Order, ECF No. 21-13, PageID.1196.)

Petitioner then filed an application for leave to appeal the trial court's denial of his motion for new trial. In addition to arguing the merits, Petitioner argued that his motion was timely as measured from the trial

court's entry of an amended judgment of sentence.[3] On March 21, 2014, the court of appeals denied leave because the application lacked merit. (Mich. Ct. App. Order, ECF No. 21-14, PageID.1211.) It is not clear whether the lack of merit was attributable to the timeliness issue, the lesser-included offense issue, or both.

Petitioner then filed an application for leave to appeal to the Michigan Supreme Court. That court denied leave by order entered September 5, 2014. (Mich. Order, ECF No. 21-18, PageID.1418.) Thus, the "lesser included offense" appeal was concluded before Petitioner's direct appeal.

Petitioner returned to the trial court, filing a motion for relief from judgment on October 20, 2015. (Mot. for Relief from J., ECF No. 21-10.) In his motion for relief from judgment, Petitioner raised the claims he now presents as habeas grounds IV–X in his amended petition. The motion also raised an issue regarding the scoring of offense and prior record variables for sentencing; however, as set forth in detail below, it is ***not*** the same issue Petitioner raises as a

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[3] The trial court entered an amended judgment of sentence on November 8, 2012. The initial judgment of sentence indicated that the CSC-III sentence was consecutive, but it did not indicate which of Petitioner's sentences it was consecutive to. (Shiawassee Cnty. Cir. Ct. J., ECF No. 21-12, PageID.1088.) The sentencing transcript indicates the CSC-III sentence would be consecutive to the sentence for which Petitioner was on parole at the time he committed the CSC-III offense. (Sentencing Tr., ECF No. 21-8, PageID.970-971.) The amended judgment of sentence added that information. (Shiawassee Cnty. Cir. Ct. Am. J., ECF No. 21-14, PageID.1232.)

federal constitutional issue in the amended petition as habeas ground II.

By opinion and order entered November 2, 2015, the trial court concluded that Petitioner had failed to demonstrate the ineffective assistance of appellate counsel; therefore, Petitioner had failed to show good cause for not raising his motion issues on direct appeal. (Shiawassee Cnty. Cir. Ct. Op. & Order, ECF No. 21-11, PageID.1071.) The trial court also acknowledged that it could waive the good cause requirement where Petitioner showed he was actually innocent of the crime; but the court concluded that Petitioner had not made that showing. (*Id*.)

Even before the circuit court denied relief, Petitioner filed his first habeas petition in this Court. *Kares v. Trierweiler*, No. 1:15-cv-992 (W.D. Mich.) (*Kares I*). The Court dismissed the petition on January 28, 2016, because Petitioner had not yet exhausted his state court remedies—he had not appealed the trial court's denial of his motion for relief from judgment to the Michigan Court of Appeals and the Michigan Supreme Court. *Kares I* (Op., Order, & J., ECF Nos. 11, 12, 13.)

Petitioner then applied for leave to appeal the trial court's denial of his motion for relief from judgment to the Michigan Court of Appeals. He raised the issues he raised in the trial court, and he changed his argument with regard to the offense and prior record variable scoring claims: he added a claim regarding judicial-fact-finding based on the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and including *Ring v. Arizona*, 53 U.S. 584 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004),

United States v. Booker, 543 U.S. 220 (2005), and *Alleyne v. United States*, 570 U.S. 99 (2013).[4] (Pet'r's Appl. for Leave to Appeal, ECF No. 21-15, PageID.1272–1275.) That issue, as altered, is the issue he raises in this Court as habeas ground II. Nonetheless, on September 27, 2016, the court of appeals denied relief "because [Petitioner] failed to establish that the trial court erred in denying his motion for relief from judgment." (Mich. Ct. App. Order, ECF No. 21-15, PageID.1236.)

Petitioner then filed an application for leave to appeal to the Michigan Supreme Court raising the same issues he raised in the court of appeals. The supreme court denied relief by order entered December 27, 2017. (Mich. Order, ECF No. 21-19, PageID.1474.)

On February 9, 2018, Petitioner returned to the trial court again. This time he filed a motion under Mich. Comp. Laws § 770.16 asking the court to order testing of biological material. (Shiawassee Cnty. Cir. Ct. Docket Sheet, ECF No. 21-1, PageID.371; Pet'r's Mot. for Testing of Biological Material, ECF No. 21-16, PageID.1316–1318.) Specifically, Petitioner asked the court to order testing of the following: (1) items of evidence collected by the sexual assault nurse examiner that the contends had not been tested; and (2) multiple items of bedding from Petitioner's residence that had not been tested. (Pet'r's Mot., ECF No. 21-16, PageID.1317.) By order entered February 12, 2018,

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[4] In fact, Petitioner had already changed the issue to include his "judicial fact-finding" claim when he filed his petition and amended petition in *Kares I*. *Kares I* (Pet., ECF No. 1, PageID.27–29; Am. Pet., ECF No. 10, PageID.80.) He just never presented the issue that way to the trial court.

the trial court denied relief because Petitioner's motion did not address any of the three things Petitioner had to show under the statute to file the motion. (Shiawassee Cnty. Cir. Ct. Op. & Order, ECF No. 21-16, PageID.1313–1315.) Petitioner did not allege, much less show, that DNA testing was done—although it clearly was. Petitioner did not allege, much less show, that the results of the testing were inconclusive—they clearly were not. And Petitioner did not allege, much less show, that testing with current DNA technology was likely to yield conclusive results. Therefore, the court concluded, Petitioner failed to show that he qualified to even file such a motion under the statute. Petitioner's claim failed at the "first phase" of the two-phase proceeding contemplated by the statute.[5]

Petitioner filed an application for leave to appeal the trial court's order to the Michigan Court of Appeals. That court denied leave by order entered August 29, 2018. (Mich. Ct. App. Order, ECF No. 21-16, PageID.1300.) Petitioner then filed an application for leave to appeal to the Michigan Supreme Court. The supreme court denied leave by order entered April 2, 2019. (Mich. Order, ECF No. 21-20, PageID.1533.)

Before the supreme court entered its order denying leave, Petitioner filed his petition in this Court. (Pet., ECF No. 1.) Petitioner raised the first ten of the

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[5] Even though the court did not entertain Petitioner's motion, the court went on to note that even if Petitioner had addressed, and could satisfy, the requirements to file his motion, Petitioner had also failed to satisfy the showing necessary to compel testing. (Shiawassee Cnty. Cir. Ct. Op. & Order, ECF No. 21-16, PageID.1315.)

eleven issues that appear in his amended petition. After the Michigan Supreme Court denied relief on April 2, 2019, Petitioner sought leave to amend the petition to add his DNA testing issue. (Pet'r's Mot. to Amend, ECF No. 8.) The Court allowed Petitioner to amend his petition. (Order, ECF No. 9.) Petitioner filed his amended petition on May 28, 2019.

Based on the timeline through the Michigan Supreme Court's denial of leave to appeal on the motion for relief from judgment—or approximately that timeline[6]—upon conducting a preliminary review of the petition, the undersigned recommended dismissal of the petition as untimely. (R. & R., ECF No. 11.) Petitioner filed objections to that recommendation and, by way of those objections, informed the Court of the specifics regarding Petitioner's motion for testing of biological material. (Pet'r's Objs., ECF No. 12.) Petitioner argued that the DNA testing motion tolled the period of limitation, thereby rendering his petition timely.

By order entered July 30, 2019, Chief Judge Jonker rejected the report and recommendation, in significant part because whether the DNA testing motion provided by Michigan statute tolled the habeas period of limitation was an issue of first impression. The Court noted that there was a circuit split regarding whether similar statutes in other states tolled the

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[6] At the time of the preliminary review, the Court relied on Petitioner's recounting of the dates that the Michigan Supreme Court denied leave to appeal and the subsequent motion for reconsideration and the date that he had filed his motion for relief from judgment. The state court record has clarified those dates. They are slightly different than Petitioner's initial representations.

period of limitation. Therefore, the Court concluded, it could not be said that "'it plainly appear[ed] from the face of the petition . . . that the petitioner [was] not entitled to relief[.]'" (Order, ECF No. 14, PageID.254) (quoting Rule 4, Rules Governing § 2254 Cases). The Court determined that the parties should have an opportunity to litigate the statute of limitations issue on a more fully developed record. The Court ordered Respondent to file an answer to the amended petition and Petitioner to file a reply. The record is now fully developed.

II. The petition is untimely

Petitioner's application is barred by the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1), which became effective on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA). Section 2244(d)(1) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is

> removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

In most cases, § 2244(d)(1)(A) provides the operative date from which the one-year limitations period is measured. Under that provision, the one-year limitations period runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Petitioner appealed the judgment of conviction to the Michigan Court of Appeals and the Michigan Supreme Court. The Michigan Supreme Court denied his application initially on May 27, 2014, (Mich. Order, ECF No. 21-17, PageID.1320) and then denied it upon reconsideration on September 29, 2014, (Mich. Order, ECF No. 21-17, PageID.1321). Petitioner did not petition for certiorari to the United States Supreme Court. (Am. Pet., ECF No. 10, PageID.132.) The one-year limitations period, however, did not begin to run until the ninety-day period in which Petitioner could have sought review in the

United States Supreme Court had expired. *See Lawrence v. Florida*, 549 U.S. 327, 332–33 (2007); *Bronaugh v. Ohio*, 235 F.3d 280, 283 (6th Cir. 2000). The ninety-day period expired on December 28, 2014.

Petitioner had one year, until December 28, 2015,[7] to file his habeas application. Petitioner filed his application on December 21, 2018. Obviously, he filed more than one year after the period of limitations began to run. Thus, absent tolling, his application is time-barred.

The running of the statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending . . . ." 28 U.S.C. § 2244(d)(2); *see also Duncan v. Walker*, 533 U.S. 167, 181–82 (2001) (limiting the tolling provision to only State, and not Federal, processes); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (defining "properly filed"). Petitioner filed a motion for relief from judgment in state court on October 20, 2015, (Pet'r's Mot. for Relief from J., ECF No. 21-10), when there were 69 days remaining in the limitations period. That motion tolled the limitations period for as long as it remained "pending" before the trial court and on appeal. *See Lawrence*, 549 U.S. at 332 (holding that § 2244(d)(2) tolls the statute of limitations from the filing of an application for state post-conviction or other collateral relief until a decision is issued by the state supreme court). The trial court denied the motion and Petitioner appealed

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[7] The Court's analysis differs from that offered by Respondent by one day. By Respondent's reckoning, Petitioner could have timely filed his petition on December 29, 2015. By the Court's reckoning, that would be the 366th day and, thus, one day too late.

that decision to both levels of the Michigan appellate courts. The Michigan Supreme Court finally denied leave to appeal on December 27, 2017. Consequently, the statute of limitations began to run again after that date and expired 69 days later, on Monday, March 6, 2018. Thus, even with the benefit of tolling under § 2244(d)(2) based on Petitioner's filing of the motion for relief from judgment and subsequent appeals, Petitioner's application is more than nine months late.

If, on the other hand, Petitioner's motion for testing of biological material is a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim[,]" then it was filed with 25 days remaining in the period of limitation and remained pending until after the petition was filed in this case.

Petitioner's motion to test biological material was filed pursuant to Mich. Comp. Laws § 770.16 which provides:

> [A] defendant convicted of a felony at trial on or after January 8, 2001 who establishes that all of the following apply may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing:
>
> > (a) That DNA testing was done in the case or under this act.

> (b) That the results of the testing were inconclusive.
>
> (c) That testing with current DNA technology is likely to result in conclusive results.

Mich. Comp. Laws § 770.16(1). If Petitioner satisfies the requirements to file the motion, he is entitled to the testing if he:

> (a) Presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.
>
> (b) Establishes all of the following by clear and convincing evidence:
>
> > (i) A sample of identified biological material described in subsection (1) is available for DNA testing.
> >
> > (ii) The identified biological material described in subsection (1) was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.
> >
> > (iii) The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.

Mich. Comp. Laws § 770.16(4).

If the court grants the petition to conduct testing, it must deny the motion for new trial if the results are inconclusive or show that the defendant is the source of the biological material. Mich. Comp. Laws § 770.16(7). If, on the other hand, the DNA testing shows that the defendant is not the source of the biological material, the court must appoint counsel and hold a hearing to determine if, by clear and convincing evidence, that only the perpetrator of the crime could be the source of the biological material, that the biological material was properly handled, and that the exclusion of the defendant as the source, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial. Mich. Comp. Laws § 770.16 (8).

The federal circuits have not uniformly decided that motions that seek post-conviction DNA testing toll the running of the habeas period of limitation. Some courts have concluded that a motion for DNA testing is in the nature of a discovery motion and, therefore, not a motion for review of the judgment. *Brown v. Secretary for Dep't of Corr.*, 530 F.3d 1335, 1337 (11th Cir. 2008) (court held that motion under rule that provided procedures for obtaining DNA testing involved "an application for discovery only"; to attack the conviction based on the results requires "institut[ion of] a proceeding under Florida's collateral attack rules . . . ."); *Woodward v. Cline*, 693 F.3d 1289, 1293 (10th Cir. 2012) (regarding the Kansas statute, the court stated: "In essence the motion was a request for discovery. Because it did not call for reexamination of the judgment . . . .") (footnote omitted); *Price v. Pierce*, 617 F.3d 947, 952–53 (7th Cir. 2010) (regarding the Illinois statute, the court stated: "[W]hen a

defendant moves under [the statute] for forensic testing, the best that can happen is that the trial court grants the motion, the tests are performed, and the defendant receives the results. The defendant may choose to use the results of the DNA test in a *separate* post-conviction petition for relief claiming his or her actual innocence, but no hearing automatically follows.") (emphasis in original); *see also Alverto v. Obenland*, No. 3:19-cv-5212, 2020 WL 5077425, at *5 (W.D. Wash. May 7, 2020) ("The purpose of [the DNA testing statute] is 'to provide a means for a convicted person to obtain DNA evidence . . . that would support a petition for postconviction relief.' . . . As a motion for post-conviction DNA testing provides a means to seek post-conviction relief, it does not toll the limitations period."), *R. & R. adopted*, 2020 WL 5064215 (Aug. 27, 2020); *Kennedy v. Ryan*, No. CV-17-04300, 2018 WL 7570288, at *3 (D. Ariz. Sept. 18, 2018), *R. & R. adopted*, 2019 WL 1099801 (Mar. 8, 2019) *certificate of appealability den.*, 2019 WL 8269083 (9th Cir. Oct. 25, 2019) ("DNA testing [motions] pursuant to Ariz. Rev. Stat. § 13-4240 . . . do not have any statutory tolling effect because [they] 'differ[] from a petition for postconviction relief under Rule 32 and its statutory counterparts.'"); *Brown v. Hunt*, No. 1:16cv160, 2017 WL 628463, at *2–3 (W.D.N.C. Feb. 15, 2017) *certificate of appealability den.*, 694 F. App'x 201 (4th Cir. 2017) ("Petitioner filed a motion for post-conviction DNA testing . . . [it] did not seek review of, or to vacate, his convictions and/or sentences. Instead [it] sought information that had the potential to help Petitioner develop challenges to his convictions and/or sentences."); *Rowe v. Giroux*, No. 3:13-cv-02444, 2015

WL 5997127 (M.D. Penn. Oct. 14, 2015)[8]; *Montgomery v. Turner*, No. 1:15-cv-00330, 2016 WL 11371451, at *13 (N.D. Ohio, Oct. 26, 2016) *R. & R. adopted*, 2016 WL 7437915 (Dec. 27, 2016) *certificate of appealability den.*, No. 17-3082 (6th Cir. Jul. 18, 2017) ("[S]ince his application for DNA testing amounted to a request for discovery, not an actual petition for post-conviction relief or for collateral review of his judgment, the undersigned finds the reasoning of the Seventh, Tenth, and Eleventh Circuits persuasive and concludes that Montgomery's application for DNA did not serve to toll the AEDPA statute of limitations."); *Werner v. Wall*, No. Civ.A. 06-31T, 2006 WL 2559484, at *3 (D.R.I. Aug. 31, 2006) ("Because the DNA Motion cannot be construed as a motion for post-conviction or collateral review, it also does not toll the statute of limitations for purposes of filing a § 2254 Motion in this federal court."); *Burton v. Runnels*, No. CIV S-02-0675, 2006 WL 1062097, at *5 n.12 (E.D. Cal. Apr. 21, 2016), *R. & R. adopted*, 2006 WL 2839254 (Sept. 29,

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[8] In *Rowe*, the magistrate judge issued a report and recommendation holding that DNA testing motions did not toll the habeas period of limitation. In resolving the petitioner's objections, the district court judge agreed with that proposition, but ultimately concluded that the motion at issue was not only a DNA testing motion, but also a separate motion under the Pennsylvania Post Conviction Relief Act (PCRA). The court concluded that a PCRA motion would toll the habeas period of limitation. When the case came back to the magistrate judge, she then considered whether the PCRA motion was "properly filed." She concluded that the PCRA motion was untimely and, therefore, not properly filed such that it could not toll the habeas period of limitation anyway. *Rowe v. Giroux*, No. 3:13-cv-02444, 2016 WL 3513401 (M.D. Pa. Jun. 1, 2016). The district court adopted that report and recommendation in its entirety. *Rowe v. Giroux*, No. 3:13-cv-02444, 2016 WL 3511544 (M.D. Pa. Jun. 27, 2016) *certificate of appealability den.*, No. 17-1650 (3d Cir. Jan. 11, 2018).

2006), *aff'd*, No. 06-17072, 2009 WL 580695 (9th Cir. Mar. 5, 2009) ("[P]etitioner filed a motion for DNA testing pursuant to Cal. Pen. Code § 1405 in the California Superior Court. (Ex. H.) This motion did not toll the statute of limitations.").

Courts interpreting other post-conviction statutory provisions for DNA testing motions have concluded that such motions properly toll the running of the period of limitation because the statutory provisions upon which they are based actually call for a review of the judgment. *Hutson v. Quarterman*, 508 F.3d 236, 238–39 (5th Cir. 2007) (court held that Texas statute that provided for post-conviction DNA testing tolled the habeas period of limitation because, if the court found favorably to the prisoner regarding the likelihood that the prisoner would have been convicted had the new DNA results been available at trial, the court could release the prisoner on bail)[9];

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[9] The Fifth Circuit's holding in *Hutson* is suspect. Three dissenting Justices in *Skinner v. Switzer*, 562 U.S. 521 (2011), concluded that the DNA testing statute may be part of Texas' collateral review procedures but it is not "an 'application for . . . collateral review' under 28 U.S.C. § 2244(d)(2)." *Skinner*, 562 U.S. at 538 n.2 (the majority did not consider or take a position on that issue). Moreover, the Texas courts have clearly concluded, despite *Hutson*, that the criminal procedure chapter that authorizes the court to order DNA testing authorizes that, and nothing more. *Farrell v. Texas*, No. 09-15-00454, 2017 WL 1536186, at *3 (Tex. App. Apr. 26, 2017). It does not permit the court to order a new trial; to obtain that relief, the prisoner must file a habeas corpus petition. *Texas v. Holloway*, 360 S.W.3d 480, 485-490 (Tex. Crim. App. 2012), *overruled in part on other grounds by Whitfield v. Texas*, 430 S.W.3d 405, 409 (Tex. Crim. App. 2014). The premise of the *Hutson* court's conclusion was that Texas courts consider motions under the post-conviction DNA testing statute to be like

McDonald v. Smith, No. 02-cv-6743, 2003 WL 22284131, at *6 (E.D.N.Y. Aug. 21, 2003), *aff'd on other grounds*, 134 F. App'x 466 (2d Cir. 2005) (court held that motions for DNA testing, which were provided for in the statute setting forth procedure for motions to vacate judgment, N.Y. Crim. Pro. § 440.30, "is akin to a section 440.10 motion to vacate, it is distinguishable from motions for discovery, which do not toll the limitation period."); *Jackson v. Hendricks*, No. Civ.A.04-2145, 2006 WL 1307655, at *7 (D.N.J. May 8, 2006) (court determined that PCR petition seeking DNA testing tolled the habeas period of limitation).

These cases beg the question, is the motion Petitioner filed in the state court like a "discovery" motion or a "new trial" motion? Section 770.16 plainly contemplates both types of relief, but the language of the statute also suggests that the relief is available in two separate stages. The statute provides: "a defendant . . . may petition the circuit court to order DNA testing of biological material . . . ***and for a new trial based on the results of that testing*** . . . ." Mich. Comp. Laws § 770.16 (emphasis added). The Michigan courts have recognized that the statute contemplates two distinct procedural phases:

> MCL 770.16 envisions two main phases; the first phase involves the court assessing whether DNA testing should be ordered, and the second phase entails, if DNA testing was ordered, whether a motion for new trial should be granted. Here, we are solely concerned with the first phase. As indicated

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a habeas petition. *Hutson*, 508 F.3d at 239 n.17. That is clearly no longer the case.

> earlier, if a defendant satisfies the required factors with respect to the question whether DNA testing should be ordered, "[t]he court shall order DNA testing[.]" MCL 770.16(4) (emphasis added). Accordingly, it would be improper to deny DNA testing on the basis that a court concludes that it would deny a future motion for new trial regardless of the results of any DNA testing. A court is not statutorily permitted to conflate the two phases of analysis.

People v. Poole, 874 N.W.2d 407, 414 (Mich. Ct. App. 2015).[10]

The motion Petitioner filed on February 9, 2018, seeks both types of relief: an order for testing and a new trial based upon the results. The two are not only distinct, per *Poole*, but also sequential. The first step—the motion for testing—is simply not a collateral attack on the judgment. It seeks only discovery and should not toll the running of the period of limitation.

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[10] Respondent points out that even the first phase involves two distinct inquiries that serve different purposes: the requirements of subparagraph 1 spell out preconditions to filing the motion; and the requirements of subparagraph 3 spell out the circumstances where the motion to test must be granted. (Resp't Br., ECF No. 20, PageID.295–297.) Respondent then argues that the trial court denied Petitioner's motion because he failed to satisfy the preconditions and, thus, his motion was not "properly filed" and could not toll the running of the period of limitation. Because the undersigned concludes that the motion could not toll the period of limitation even if it were "properly filed," I will not address Respondent's argument regarding proper filing.

The second step—the motion for new trial—is premature until testing is ordered. In fact, it does not appear that the motion for new trial contemplated by Mich. Comp. Laws § 770.16 is any different than any other such motion under Michigan Court Rule 6.431. Under that rule, once the conviction is final—as was the case for Petitioner—the defendant must seek relief by way of a motion for relief from judgment under subchapter 6.500. Mich. Ct. R. 6.431(A)(4). Once the testing is ordered, even if the defendant must seek relief under subchapter 6.500, he is permitted to file even a successive motion, because the testing results would be "new evidence" under 6.502(G)(2).[11] Until the testing is ordered, however, that part of the motion is not "properly filed." Until Petitioner has new test results, he does not have new evidence to justify his filing of a successive petition. For that reason, the undersigned concludes that Petitioner's request "for a new trial based upon the results of the testing of said biological material" cannot toll the running of the period of limitation as a properly filed collateral attack.

The motion Petitioner filed on February 9, 2018, whether considered as a motion for DNA testing or as a motion for new trial, was not a properly filed collateral attack. For that reason, the motion did not toll

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[11] The Sixth Circuit Court of Appeals similarly considers new DNA test results as overcoming a bar to second or successive petitions. *In re Michael D. Harris*, No. 17-2603, p. 2 (6th Cir. May 24, 2018) ("The events giving rise to Harris's claims related to the DNA testing began in 2016 when he first obtained that testing. Because he could not have presented those claims in a prior habeas petition, Harris is not required to obtain our authorization.").

the running of the period of limitation. Accordingly, the petition was untimely and is properly dismissed.

Although not germane to the issue of timeliness, it is worthwhile to touch upon the merits of Petitioner's motion for DNA testing when considering what Petitioner has lost by virtue of the trial court's denial of the motion. The SANE collected swabs, smears, wipes, and the victim's underwear. (SANE Report Excerpt, ECF No. 21-16, PageID.1311.) Forensic Scientist Cassandra Campbell, of the Michigan State Police Crime Lab in Lansing, Michigan, tested the items that the SANE collected. (Trial Tr. II, ECF No. 21-6, PageID.725–729.) Ms. Campbell reported that all of the swabs (except the oral swabs), the anal and vaginal smears, and the undergarments tested positive for the presence of semen. (*Id.*) She took cuttings from the swabs labeled anal[12] and vaginal for further testing. (*Id.*) Forensic Scientist Lori Bruski tested the swab cuttings. She identified genetic material from the victim and Petitioner in the cuttings. Put

[12] There was some inconsistency between the SANE's report regarding the items collected and the lab's report regarding the items tested. The nurse reported that she collected cervical, vaginal, oral, pubic area, and speculum swabs. Ms. Campbell reported that she received and tested swabs labeled cervical, anal, oral, speculum, labial fold, and external. Similarly, the nurse reported that she collected cervical and oral smears, but Ms. Campbell reported that she received and tested vaginal, anal, and oral smears. Ms. Campbell also reported that each kit has three preprinted sleeves for the glass slides used for smears. Those sleeves are labeled vaginal, anal, and oral. Thus, it does not appear that the SANE report form checklist for smears matches the contents of the standard kit.

simply, Petitioner's semen was found in the victim's vagina.

The items that Petitioner wants tested now are his own bedding and the materials collected by the SANE that were not DNA tested by Ms. Bruski (the victim's underwear and the other swabs—speculum, labial fold, and external). Those materials collected by the SANE were tested, and tested positive for, the presence of sperm. It is a reasonable inference that the sperm was Petitioner's. But, even if the sperm were not Petitioner's, it would not detract one whit from the persuasive force of the testing that showed the sperm identified in the swabs taken from the victim's vaginal and anal area was Petitioner's. Similarly, if Petitioner's bedding—part of which was taken from his dryer, not his bed—did not have the victim's DNA in it or did have Petitioner's DNA (whether from epithelial or sperm cells) in it, it would not tend to make any fact of significance to the determination of his guilt more or less likely.

Petitioner may be permitted to file a post-conviction motion for DNA testing, but the motion he filed is nothing more than a smokescreen. The trial court denied Petitioner's motion for DNA testing because it did not meet and could not meet any of the statutory requirements for relief. But even apart from the statutory preconditions to filing, Petitioner's motion was utterly frivolous.

The pointlessness of Petitioner's motion for DNA testing is even more apparent when one considers that the trial court permitted Petitioner to hire his own expert to conduct DNA tests on the evidence and that Petitioner's expert conducted DNA tests on the

evidence. (Mot. Hr'g Tr., ECF No. 21-3, PageID.408–413; Hr'g Tr., ECF No. 21-4, PageID.426–428.) Petitioner is aware of those results, but they are not part of the state court record, which suggests the results did not exculpate Petitioner in any way.

Petitioner's request for DNA testing is in the nature of a discovery motion; it is not the sort of collateral attack that warrants tolling under the statute.

III. Procedural default

Respondent argues that this Court's review of virtually all of Petitioner's habeas grounds is barred by the doctrine of procedural default. There are two types of procedural default. First, there is procedural default under state law. When a state-law default prevents further state consideration of a federal issue, the federal courts ordinarily are precluded from considering that issue on habeas corpus review. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). To determine whether a petitioner procedurally defaulted a federal claim in state court, the Court must consider whether (1) the petitioner failed to comply with an applicable state procedural rule, (2) the state court enforced the rule so as to bar the claim, and (3) the state procedural default is an "independent and adequate" state ground properly foreclosing federal habeas review of the federal constitutional claim. *See Hicks v. Straub,* 377 F.3d 538, 551 (6th Cir. 2004). In determining whether a state procedural rule was applied to bar a claim, a reviewing court looks to the last reasoned state-court decision disposing of the claim. *See Ylst*, 501 U.S. at 803; *Guilmette v. Howes*, 624 F.3d 286, 291–92 (6th Cir. 2010).

Second, there may be a procedural default if Petitioner has failed to raise a federal issue in the state courts. Before the Court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Exhaustion requires a petitioner to "fairly present" federal claims so that state courts have a "fair opportunity" to apply controlling legal principles to the facts bearing upon a petitioner's constitutional claim. *Id.* at 844, 848; *see also Picard v. Connor*, 404 U.S. 270, 275–78 (1971); *Duncan v. Henry*, 513 U.S. 364, 365–66 (1995); *Anderson v. Harless*, 459 U.S. 4, 6 (1982).

Failure to fairly present an issue to the state courts is only a problem if a state court remedy remains available for petitioner to pursue. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). If no further state remedy is available to Petitioner, his failure to exhaust does not bar relief; but the claim may be procedurally defaulted. *Gray v. Netherland,* 518 U.S. 152, 161–62 (1996).

If a petitioner procedurally defaulted his federal claim, the petitioner must demonstrate either (1) cause and prejudice—cause for his failure to comply with the state procedural rule (or fairly present the issue in the state courts) and actual prejudice flowing from the violation of federal law alleged in his claim—or (2) that a lack of federal habeas review of the claim will result in a fundamental miscarriage of justice. *See House v. Bell*, 547 U.S. 518, 536 (2006); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Murray v. Carrier*, 477 U.S. 478, 495–96 (1986); *Hicks*, 377 F.3d at 551–52. The miscarriage-of-justice exception only can

be met in an "extraordinary" case where a prisoner asserts a claim of actual innocence based upon new reliable evidence. *House*, 547 U.S. at 536–37. A habeas petitioner asserting a claim of actual innocence must establish that, in light of new evidence, it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

Respondent argues that Petitioner has procedurally defaulted habeas grounds I, II, V, VI, VII, VIII, and IX. The Court notes that there is also an argument that petitioner procedurally defaulted habeas ground III. To show cause sufficient to excuse a failure to raise claims, Petitioner must point to "some objective factor external to the defense" that prevented him from raising the claims. *Murray*, 477 U.S. at 488; *see McCleskey v. Zant*, 499 U.S. 467, 497 (1991). Factors that may establish cause include interference by officials, attorney error rising to the level of ineffective assistance of counsel, and a showing that the factual or legal basis for a claim was not reasonably available. *Cvijetinovic v. Eberlin*, 617 F.3d 833, 837 (6th Cir. 2010) (citing *Hargrave-Thomas v. Yukins*, 374 F.3d 383, 388 (6th Cir. 2004) (quoting *McCleskey*, 499 U.S. at 493–94) (quotations omitted)). For Petitioner's procedural defaults, he offers as "cause" the ineffective assistance of his trial or appellate counsel.

The showing necessary to establish ineffective assistance of counsel as "cause" is the same showing necessary to establish an independent claim of ineffective assistance of counsel: the petitioner must prove (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's

deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). A court considering a claim of ineffective assistance "must indulge a strong presumption that counsel's conduct falls within the 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.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Even if a court determines that counsel's performance, in light of the circumstances as they existed at the time of counsel's action, was outside the wide range of reasonable professional assistance, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 690–91.

To determine whether counsel rendered ineffective assistance because he or she failed to raise a claim, therefore, necessarily involves some inquiry into the merits of the claim that counsel failed to raise. There is simply no other way to assess the professional reasonableness of counsel's failure to raise the claim or the effect that failure had on the judgment. Thus, it is often true that resolution of a procedural default claim necessarily involves consideration of the merits of the claim foregone. At that point, it might well be easier to simply address the merits claim.

The Supreme Court has held that federal courts are not required to address a procedural-default issue before deciding against the petitioner on the merits. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) ("Judicial economy might counsel giving the [other]

question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law."); *see also Hudson v. Jones*, 351 F.3d 212, 215–16 (6th Cir. 2003) (citing *Lambrix* and *Nobles v. Johnson*, 127 F.3d 409, 423–24 (5th Cir. 1997)); *Overton v. MaCauley*, 822 F. App'x 341, 345 (6th Cir. 2020) ("Although procedural default often appears as a preliminary question, we may decide the merits first."); Where the procedural default issue raises more questions than the case on the merits, the Court may assume without deciding that there was no procedural default or that Petitioner could show cause and prejudice for that default. *See Hudson*, 351 F.3d at 215–16; *Binder v. Stegall*, 198 F.3d 177, 178 (6th Cir. 1999) ("[T]he procedural default raises more questions than the case on the merits. We will therefore assume without deciding that there was no procedural default by petitioner and decide the merits of the case."); *Watkins v. Lafler*, 517 F. App'x 488, 498 (6th Cir. 2013) ("[T]he district court specifically noted that it chose not to address these [procedural default] arguments and rather assumed that no procedural default existed because "the procedural default issue raises more questions than the case on the merits.' . . . Given the variety and complexity of the defaults involved . . . we do likewise."). For most of Respondent's claims of procedural default, it is simpler to resolve Petitioner's claims on the merits. The undersigned has proceeded accordingly, with a couple of exceptions that are explained in detail below.

IV. AEDPA standard

The AEDPA "prevent[s] federal habeas 'retrials'" and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693–94 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the 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 upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). "Under these rules, [a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Stermer v. Warren*, 959 F.3d 704, 721 (6th Cir. 2020) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011) quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)) (internal quotation marks omitted). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). In determining whether federal law is clearly established, the Court

may not consider the decisions of lower federal courts. *Williams*, 529 U.S. at 381–82; *Miller v. Straub*, 299 F.3d 570, 578–79 (6th Cir. 2002). Moreover, "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state court. *Greene v. Fisher*, 565 U.S. 34, 37–38 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405–06). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 575 U.S. at 316 (quoting *Harrington*, 562 U.S. at 103).

Determining whether a rule application was unreasonable depends on the rule's specificity. *Stermer*, 959 F.3d at 721. "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Yarborough*, 541 U.S. at 664. "[W]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their

adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. 415, 424 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011) (en banc); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546–547 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

Section 2254(d) limits the facts a court may consider on habeas review. The federal court is not free to consider any possible factual source. The reviewing court "is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). "If a review of the state court record shows that additional fact-finding was required under clearly established federal law or that the state court's factual determination was unreasonable, the requirements of § 2254(d) are satisfied and the federal court can review the underlying claim on its merits. *Stermer*, 959 F.3d at 721 (citing, *inter alia*, *Brumfield v. Cain*, 576 U.S. 305 (2015), and *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007)).

If the petitioner "satisfies the heightened requirements of § 2254(d), or if the petitioner's claim was never 'adjudicated on the merits' by a state court 28

U.S.C. § 2254(d), AEDPA deference no longer applies." *Stermer*, 959 F.3d at 721. Then, the petitioner's claim is reviewed *de novo*. *Id*. citing *Maples v. Stegall*, 340 F.3d 433, 436 (6th Cir. 2003).[13]

A. Petitioner was deprived of his right to equal protection when he was denied testing of forensic evidence (habeas issue XI)

Because the DNA testing issue—the last listed of Petitioner's eleven habeas issues—was addressed in depth in resolving the statute of limitations question, the Court begins its merits discussion with this issue. Petitioner offers little elaboration with regard to his equal protection argument. He quotes the Equal Protection Clause, contends he met the requirements for testing under Mich. Comp. Laws § 770.16, notes that equal protection requires that similarly situated persons be treated alike, and concludes that his equal protection rights have been violated. (Pet'r's Br., ECF No. 10-1, PageID.207–208.) Whether or not Petitioner's conclusory allegations state a claim for violation of his equal protection rights, the allegations do not state a claim that warrants habeas corpus relief.

Michigan's DNA testing statute is a form of post-conviction remedy. *See, e.g., Dist. Att'y's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67–69

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[13] Where the state court refused to consider the merits of a claim because of a procedural default, the undersigned concludes that such claims were never "adjudicated on merits" by the state court and, therefore, that *de novo* review applies. Nonetheless, where the merits review rejecting Petitioner habeas grounds below is *de novo*, the same result would follow if the state courts had offered a merits decision or some analysis to which the Court might defer.

(2009). The states have no constitutional obligation to provide such postconviction remedies:

> Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. *See Fay v. Noia*, 372 U.S. 391, 423–424 (1963). It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief, *cf. United States v. MacCollom*, 426 U.S. 317, 323 (1976) (plurality opinion) . . . .

Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987). The Supreme Court has very specifically declined to recognize a free-standing constitutional right to access DNA evidence in the postconviction setting. *Osborne*, 557 U.S. at 55–56; *see also Alley v. Key*, No. 06-5552, 2006 WL 1313364 (6th Cir. May 14, 2006) ("[W]e agree for purposes of the dispute now before us, with the district court's ruling that there exists no generally constitutional right to post-judgment DNA testing."). Therefore, Petitioner's right to DNA testing arises under the state statute, not the federal constitution.

Petitioner's claim that he is entitled to relief under Mich. Comp. Laws § 770.16 is a claim that the state erred in applying its own statute. Such a claim is not cognizable on habeas review. The extraordinary remedy of habeas corpus lies only for a violation of the Constitution. 28 U.S.C. § 2254(a). As the Supreme Court explained in *Estelle v. McGuire*, 502 U.S. 62

(1991), whether or not a state court correctly applied its own law "is no part of the federal court's habeas review of a state conviction . . . [for] it is not the province of a federal habeas court to re-examine state-court determinations on state-law questions." *Id.* at 67–68. The decision of the state courts on a state-law issue is binding on a federal court. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983); *see also 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."). The state court's decision that Petitioner was not entitled to postconviction DNA testing under the statute, therefore, is axiomatically correct on habeas review.

Although Petitioner and this Court are bound by the state court's determination that the statute does not entitle Petitioner to DNA testing, that does not rule out the possibility that the state has applied the statute to Petitioner in an unconstitutional way, for example, as Petitioner argues, that the state court has violated Petitioner's equal protection rights by applying the statute to him in a way that is inconsistent with the way the state has applied it to similarly situated persons. Whether or not that claim has merit, however, it could not form the basis for habeas relief.

In *Kirby v. Dutton*, 794 F.2d 245 (6th Cir. 1986), the Sixth Circuit considered when errors in post-conviction proceedings were properly cognizable on habeas review. The court turned to *Preiser v. Rodriguez*, 411 U.S. 475 (1973), for guidance. In *Preiser*, three prisoners brought suit under 42 U.S.C. § 1983,

claiming that they were unconstitutionally deprived of good-time credits following a guilty finding in disciplinary proceedings. The deprivation of the credits impacted the duration of each prisoner's sentence; restoration of credits, on the other hand, could result in immediate release. *Id.* at 476. The *Preiser* court held that habeas corpus was the exclusive mode of relief because an attack on the legality of custody that seeks release is the traditional function of a habeas writ.

The *Kirby* court considered how *Preiser*'s reasoning might apply to Sixth Amendment claims seeking the effective assistance of counsel and Fourteenth Amendment claims alleging denials of due process and equal protection would apply to post-conviction proceedings. Such claims, the court noted, were not directed at the proceeding where Petitioner was convicted and sentenced and thus, even if Kirby prevailed on his constitutional claims, the result would not be release or a reduction in time. *Kirby*, 794 F.2d at 247. The *Kirby* court concluded that *Preiser* precluded the grant of habeas relief for such claims. The *Kirby* court found support in cases from other circuits that also held "the writ is not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings . . . because the claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration." *Id.*

The *Kirby* court recognized that "the result of the habeas petition need not necessarily be reversal of the conviction[; h]owever, the petition must directly dispute the fact or duration of confinement." *Id.* at 248. That the ultimate goal might be release from

confinement was not sufficient if "the result of the specific issues before [the court was] not in any way related to the confinement." *Id.*

The Sixth Circuit continues to validate the *Kirby* holding. In *Cress v. Palmer*, 484 F.3d 844 (6th Cir. 2007), the court stated:

> [T]he Sixth Circuit has consistently held that errors in post-conviction proceedings are outside the scope of federal habeas corpus review. *See Kirby v. Dutton*, 794 F.2d 245, 246–47 (6th Cir. 1986); *Roe v. Baker*, 316 F.3d 557, 571 (6th Cir. 2002). We have clearly held that claims challenging state collateral post-conviction proceedings "cannot be brought under the federal habeas corpus provision, 28 U.S.C. § 2254," because "'the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.'" *Kirby*, 794 F.2d at 246 (quoting *Preiser*[, 411 U.S. at 484]). . . . A due process claim related to collateral post-conviction proceedings, even if resolved in a petitioner's favor, would not "result [in] . . . release or a reduction in . . . time to be served or in any other way affect his detention because we would not be reviewing any matter directly pertaining to his detention." *Kirby*, 794 F.2d at 247. "Though the *ultimate* goal in" a case alleging post-conviction error "is release from confinement, the result of habeas review of the specific issue[ ] . . . is not in any way related to the confinement." *Id.* at 248.

> Accordingly, we have held repeatedly that "the scope of the writ [does not] reach this second tier of complaints about deficiencies in state post-conviction proceedings," noting that "the writ is not the proper means" to challenge "collateral matters" as opposed to "the underlying state conviction giving rise to the prisoner's incarceration." *Id*. at 248, 247; *see also Alley v. Bell*, 307 F.3d 380, 387 (6th Cir. 2002) ("error committed during state post-conviction proceedings can not [sic] provide a basis for federal habeas relief" (citing *Kirby*, 794 F.2d at 247)); *Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir. 2001) ("habeas corpus cannot be used to mount challenges to a state's scheme of post-conviction relief").

Cress, 484 F.3d at 853 (emphasis in original). More recently, when asked to revisit *Kirby*, the court of appeals stated that the petitioner "ha[d] not pointed to any decision by an *en banc* court or any Supreme Court decision to undermine the logic of *Kirby* . . . ." *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 855 (6th Cir. 2017).

Petitioner's attack on the state court's rejection of his post-conviction request for DNA testing is likewise not cognizable on habeas review. That claim does not seek immediate or quicker release from custody, it simply seeks a new hearing or perhaps DNA testing. That relief might be available in an action under 42 U.S.C. § 1983, but it is not available under 28 U.S.C. § 2254. Accordingly, Petitioner's claim for the unconstitutional denial of DNA testing does not warrant habeas relief.

B. Petitioner was denied his constitutional right to due process and equal protection by the State of Michigan ruling "good cause" and "actual prejudice" were not demonstrated (habeas ground IV)

Petitioner also contends that the state erred in application of its own postconviction remedy under Michigan Court Rule 6.500 et seq. Because that claim is resolved by following the same analytical path as Petitioner's claim regarding DNA testing, it is appropriately considered next.

The State of Michigan provides a postconviction remedy under the Michigan Court Rules. Once a prisoner's conviction is final, he may seek relief from judgment under Mich. Ct. R. 6.500 et seq. Under Rule 6.502, the trial court must determine whether or not the prisoner raised the issue on direct appeal. If he did, he is not entitled to relief. If he did not, he may be permitted to obtain relief if he can show cause for the failure to raise the issue on direct appeal and prejudice. Alternatively, the court may consider the issue despite a failure to raise it on direct appeal and a failure to show cause and prejudice if a prisoner demonstrates that he is actually innocent.

Petitioner contends that he has been denied due process and equal protection because the trial court erred when it concluded that Petitioner had failed to show cause and prejudice. Petitioner has no free-standing right to the postconviction relief provided by the Michigan Court Rules. The trial court's conclusion

that Petitioner failed to show cause or prejudice is axiomatically correct.[14]

Even if the trial court's denial of relief on the motion for relief from judgment was somehow constitutionally infirm, that infirmity would not call into question Petitioner's conviction or sentence. It would only entitle Petitioner to state court review of his post-conviction motion issues on the merits. For the reasons stated in *Kirby* and *Cress*, correcting that sort of error is not the purpose of habeas review. Petitioner's claim that the state court erred in resolving his motion for relief from judgment is not cognizable, and Petitioner is not entitled to relief.

C. Petitioner was denied his due process right to a fair trial by the admission of hearsay evidence over a defense objection (habeas ground I)

The SANE, Alyssa Gilreath, testified regarding statements the victim made to her during the examination. Petitioner contends he was denied a fair trial because the statements were inadmissible hearsay.

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[14] There are parallel federal considerations of cause and prejudice that this Court applies when determining whether Petitioner can overcome the bar of a procedural default. There is quite likely overlap in the meaning afforded to the terms "cause and prejudice" by the state court when interpreting Mich. Ct. R. 6.508(D)(3) and the federal courts when determining whether a procedural default bars federal habeas review. Nonetheless, the meaning ascribed by the state court to the words when applying the state rule and the meaning ascribed by the federal courts when conducting the procedural default analysis are distinct.

The Michigan Court of Appeals disagreed:

> Defendant claims that the nurse's testimony was inadmissible hearsay, which affected the outcome of the trial. "Hearsay evidence is inadmissible unless it fits within an exception to the hearsay rule." *People v McDade*, 301 Mich App 343, 353; 836 NW2d 266 (2013). One such exception is MRE 803(4), which excludes from the general hearsay rule "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment." In other words, "[s]tatements made for the purpose of medical treatment are admissible pursuant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care." *People v Mahone*, 294 Mich App 208, 214–215; 816 NW2d 436 (2011).
>
> In the instant case, the sexual-assault nurse testified regarding her treatment of the victim soon after the assault, and the victim's report of the incident. Defendant argues that the nurse's testimony should have been excluded as hearsay because it involved statements made for the purpose of collecting evidence in a criminal prosecution, not for

medical treatment. This argument is meritless for several reasons. First, the nurse specifically testified that her primary duties were medical diagnosis and treatment, not the collection of evidence. Moreover, only a statement offered to prove the truth of the matter asserted is hearsay. MRE 801(c). Here, the testimony was offered to describe the process of the medical examination and the routine gathering of information necessary for such an examination. The nurse refrained from even identifying defendant as the man the victim said raped her.

Further, even if the nurse's testimony was hearsay, it was for the purpose of medical treatment under MRE 803(4). The victim's account of the sexual assault was "reasonably necessary for diagnosis and treatment" because it determined the type of examination and course of treatment that was most appropriate. *Mahone*, 294 Mich App at 214–215. Based on the victim's statements, the nurse conducted a full body exam, gave her medications to prevent infections as well as pregnancy, and detailed instructions for follow-up procedures for infections they could not prevent and testing after the victim left the hospital. As this Court has recognized, a sexual assault can result in injuries that are not readily apparent, such as sexually transmitted diseases or psychological injury, and "a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements

> made for medical treatment." *Mahone*, 294 Mich App at 215; see also *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996) ("Sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment."). The victim also had a self-interested motivation to be truthful in order to receive the proper medical care. *Mahone*, 294 Mich App at 214–215. Thus, the trial court did not err in admitting the nurse's testimony.

(Mich. Ct. App. Op., ECF No. 21-12, PageID.1075.)

The extraordinary remedy of habeas corpus lies only for a violation of the Constitution. 28 U.S.C. § 2254(a). Whether evidence was properly admitted or improperly excluded under state law "is no part of the federal court's habeas review of a state conviction . . . [for] it is not the province of a federal habeas court to re-examine state-court determinations on state-law questions." *Estelle*, 502 U.S. at 67–68. The decision of the state courts on a state-law issue is binding on a federal court. *See Wainwright*, 464 U.S. at 84 (1983); *Bradshaw*, 546 U.S. at 76. Thus, the state appellate court's determination that the testimony was not hearsay conclusively resolves that issue.

"In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 68. "Generally, state-court evidentiary rulings cannot rise to the level of due process violations unless they 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Seymour v. Walker*,

224 F.3d 542, 552 (6th Cir. 2000) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)). This approach accords the state courts wide latitude in ruling on evidentiary matters. *Seymour*, 224 F.3d at 552 (6th Cir. 2000).

Further, under the AEDPA, the court may not grant relief if it would have decided the evidentiary question differently. The court may only grant relief if Petitioner is able to show that the state court's evidentiary ruling was in conflict with a decision reached by the Supreme Court on a question of law or if the state court decided the evidentiary issue differently than the Supreme Court did on a set of materially indistinguishable facts. *Sanders v. Freeman*, 221 F.3d 846, 860 (6th Cir. 2000). Petitioner has not met this difficult standard.

Even if the testimony at issue was "hearsay," Petitioner would not be entitled to relief based on that characterization alone. As the Sixth Circuit has held, the Supreme Court has never recognized that the constitution is violated by the admission of unreliable hearsay evidence. *Desai v. Booker*, 732 F.3d 628, 630–31 (6th Cir. 2013).

Although hearsay *qua* hearsay is not constitutionally impermissible, hearsay does raise the specter of another issue: violation of the Confrontation Clause. The Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him." U.S. Const., am. VI; *Pointer v. Texas*, 380 U.S. 400, 403–05 (1965) (applying the guarantee to the states through the Fourteenth Amendment). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence

against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

Reliability is ensured through entitling the accused to see the witnesses against him face-to-face, and to hear their testimony. *See Craig*, 497 U.S. at 846–47; *Coy v. Iowa*, 487 U.S. 1012, 1019–20 (1988). Additionally, each witness must "'give his statements under oath–thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury.'" *Lee v. Illinois*, 476 U.S. 530, 540 (1986). The Confrontation Clause also permits the jury to observe the witnesses, enabling them to judge by their demeanor on the stand whether they are worthy of belief. *See Mattox v. United States*, 156 U.S. 237, 242–43 (1895).

The very heart of the Confrontation Clause, however, is the right to cross-examine witnesses. *See Ohio v. Roberts*, 448 U.S. 56, 63 (1980). Cross-examination is the "greatest legal engine ever invented for the discovery of truth . . . ." *California v. Green*, 399 U.S. 149, 158 (1970) (citation and internal quotes omitted). The Confrontation Clause therefore prohibits the admission of an out-of-court testimonial statement at a criminal trial unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 59 (2004).

The crux of Petitioner's complaint regarding Ms. Gilreath's hearsay testimony is that it ran afoul of *Crawford*. (Pet'r's Mem. of Law, ECF No. 10-1, PageID.178–181.) But it did not.

Although an out-of-court statement may not have been subject to any of these protections, it regains the lost protections if the declarant is present and testifying at trial. *Green*, 399 U.S. at 158–61. Further, an inability to cross-examine the witness at the time the out-of-court statement is made is not of crucial significance as long as the witness is subject to full and effective cross-examination at trial. *Id.* at 159. Similarly, the jury's inability to view the declarant's demeanor when the statement was made is not important when the jury may view that witness at trial either affirming or disavowing the statement. *Id.* at 160. In other words, contemporaneous cross-examination before the jury is not so much more effective than subsequent examination at trial that it must be made the touchstone of the Confrontation Clause. *Id.* at 161. Thus, where the declarant testifies and is cross-examined, "our cases, if anything, support the conclusion that the admission of his [or her] out-of-court statements does not create a confrontation problem." *Green*, 399 U.S. at 162; *see also United States v. Owens*, 484 U.S. 554, 560 (1988) (inquiry into the "indicia of reliability" or the "particularized guarantees of trustworthiness" of the out-of-court statements is not called for when the declarant is available at trial and subjected to unrestricted cross-examination, because "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements"). The declarant—the victim—testified at trial, and Petitioner's counsel subjected her to unrestricted cross-examination. Petitioner's Confrontation Clause argument, therefore, has no merit.

To the extent that Petitioner's constitutional challenge regarding hearsay was raised on direct appeal, Petitioner has failed to show that the state court's resolution is contrary to, or an unreasonable application of, clearly established federal law. To the extent Petitioner's constitutional challenge was not raised on direct appeal, but was raised instead by way of his motion for relief from judgment, the claim fails on *de novo* review.

D. Trial court applied inaccurate information and engaged in judicial fact finding to increase Petitioner's sentence (habeas ground II)

Claims concerning the improper scoring of sentencing guidelines are state-law claims and typically are not cognizable in habeas corpus proceedings. *See Hutto v. Davis*, 454 U.S. 370, 373–74 (1982) (federal courts normally do not review a sentence for a term of years that falls within the limits prescribed by the state legislature); *Austin v. Jackson*, 213 F.3d 298, 301–02 (6th Cir. 2000) (alleged violation of state law with respect to sentencing is not subject to federal habeas relief); *Cook v. Stegall*, 56 F. Supp. 2d 788, 797 (E.D. Mich. 1999) (the sentencing guidelines establish only rules of state law). There is no constitutional right to individualized sentencing. *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991); *United States v. Thomas*, 49 F.3d 253, 261 (6th Cir. 1995); *see also Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978). Moreover, a criminal defendant has "no federal constitutional right to be sentenced within Michigan's guideline minimum sentence recommendations." *Doyle v. Scutt*, 347 F. Supp. 2d 474, 485 (E.D. Mich. 2004);

accord Austin, 213 F.3d at 301; *Lott v. Haas*, No. 17-2462, 2018 WL 2717052, at *1 (6th Cir. Apr. 10, 2018) (concluding that it is beyond reasonable debate that errors in applying sentencing guidelines do not state a claim for federal habeas relief).

Although state law errors generally are not reviewable in a federal habeas proceeding, an alleged violation of state law "could, potentially, 'be sufficiently egregious to amount to a denial of equal protection or of due process of law guaranteed by the Fourteenth Amendment.'" *Bowling v. Parker*, 344 F.3d 487, 521 (6th Cir. 2003) (quoting *Pulley v. Harris*, 465 U.S. 37, 41 (1984)). For example, a sentence may violate due process if it is based upon material "'misinformation of constitutional magnitude.'" *Roberts v. United States,* 445 U.S. 552, 556 (1980) (quoting *United States v. Tucker,* 404 U.S. 443, 447 (1972)); *see also Townsend v. Burke,* 334 U.S. 736, 741 (1948). Petitioner attempts to bring his sentence scoring challenges under the umbrella of habeas cognizability by claiming that the court relied upon inaccurate information when scoring the prior record and offense variables.

Additionally, a state "guidelines" sentence might violate the Sixth Amendment if judge-found-facts are used to score mandatory sentencing guidelines rather than facts that are found by the jury or admitted by the petitioner. Petitioner also makes that claim with regard to the trial court's scoring of the prior record and offense variables.

Finally, Petitioner claims that his sentence violates due process because the court sentenced him based on factual findings that are inconsistent with

the jury's verdict in that the jury acquitted him of the underlying conduct that the court used to score the guidelines.

Petitioner merges and mingles all four of these arguments—erroneous application of the guidelines, use of inaccurate information, use of judge-found facts, and use of acquitted conduct—into habeas ground II. That part of his argument which is premised on the trial court applying the state statutory scoring guidelines incorrectly is purely a state law claim. It is not cognizable on habeas review. That is how Petitioner raised the argument on direct appeal. That is also how the Michigan Court of Appeals resolved the claim. (Mich. Ct. App. Op., ECF No. 21-12, PageID.1076–1078.) The Court need not address it on habeas review.

Petitioner's other three arguments are addressed below.

1. Judge-found facts

Petitioner bases his Sixth Amendment claim on a line of cases referenced above: *Apprendi*, 530 U.S. 466 (2000), *Ring*, 53 U.S. at 584, *Blakely*, 542 U.S. at 296, *Booker*, 543 U.S. at 220, and *Alleyne*, 570 U.S. at 99. In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. *Apprendi* enunciated a new rule of Sixth Amendment jurisprudence. In the subsequent case of *Blakely*, the Court applied the rule of *Apprendi* to a state sentencing-guideline scheme, under which the maximum

penalty could be increased by judicial fact-finding. The *Blakely* Court held that the state guideline scheme violated the Sixth and Fourteenth Amendments, reiterating the rule that any fact that increases the maximum sentence must be "admitted by the defendant or proved to a jury beyond a reasonable doubt." *See Booker*, 543 U.S. at 232 (citing *Blakely*, 542 U.S. at 303).

Thereafter, in *Alleyne*, 570 U.S. 99, the Supreme Court held that the *Blakely* line of cases applies equally to mandatory minimum sentences. In *People v. Lockridge*, 870 N.W.2d 502 (Mich. 2015), the Michigan Supreme Court held that, under *Alleyne*, the Michigan sentencing guidelines scheme violates the Sixth Amendment, because the "guidelines *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables [] that *mandatorily* increase the floor of the guidelines minimum sentence range." *Lockridge*, 870 N.W.2d at 506 (emphasis in original). The Court's remedy for the unconstitutionality of the Michigan guidelines was to sever and strike the mandatory component of the guidelines and make the guidelines advisory only. *Id.* at 520–21 (relying on *Booker,* 543 U.S. at 264–265 (holding that the remedy for the unconstitutionality of the mandatory federal sentencing guidelines was to sever only the mandatory component, still requiring courts to consider the guidelines, but making them advisory and subject to review for reasonableness)).

On August 24, 2018, the Sixth Circuit agreed with the *Lockridge* analysis. *Robinson v. Woods*, 901 F.3d 710 (6th Cir. 2018). The *Robinson* court held that the Supreme Court's decision in *Alleyne* clearly

established that Michigan's mandatory minimum sentencing scheme was unconstitutional. *Robinson*, 901 F.3d at 714. The court reasoned that, "[]a]t bottom, Michigan's sentencing regime violated *Alleyne*'s prohibition on the use of judge-found facts to increase mandatory minimum sentences. *Id.* at 716 (citing *Alleyne*, 570 U.S. at 111-12).

In the instant case, Petitioner was sentenced on September 29, 2012, before *Alleyne* was decided. The *Alleyne* court was not writing on a blank slate. More than 10 years earlier, the Supreme Court held that judicial factfinding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. *Harris v. United States*, 536 U.S. 545 (2002). Relying on *Harris*, as well as *Apprendi*, *Booker*, and *Blakely*, the Michigan Supreme Court concluded that any guidelines sentence, even one based on facts and circumstances not proven to a jury beyond a reasonable doubt, was permissible under the Sixth Amendment, so long as it did not exceed the statutory maximum. *People v. Drohan*, 715 N.W.2d 778, 784–87 (2006). That was the state of the law when Petitioner was sentenced and when Petitioner filed his brief in the Michigan Court of Appeals.

Perhaps Petitioner could have raised the issue as a supplement before the court of appeals decided his case, but the effort would have been futile. That was the approach taken by criminal defendant Paul Herron. Herron's appeal was pending at the same time as Petitioner's. Herron filed a supplemental brief raising the *Alleyne* issue. *See* https://courts.michigan.gov/opinions_orders/case_search/pages/default.aspx?SearchType =1&CaseNumber=309320

&CourtType_CaseNumber=2 (visited Jan. 22, 2021). The *Herron* court of appeals panel concluded that *Alleyne* did not apply to Michigan's sentencing guidelines which impacted only the minimum end of an indeterminate sentence and was entirely discretionary. *People v. Herron*, 845 N.W.2d 533 (Mich. Ct. App. 2013).

Moreover, the same panel that decided Petitioner's appeal—Judges Meter, Servitto, and Riordan—concluded *Alleyne* did not alter the holding in *Drohan*, just five days after that panel decided Petitioner's appeal. *See People v. Wilcox*, No. 310550, 2013 WL 6182633, at *4–5 (Mich. Ct. App. Nov. 26, 2013). Perhaps because of those decisions, Petitioner chose not to include the *Alleyne* issue in his *pro per* application for leave to appeal to the Michigan Supreme Court.

Lockridge was decided during the summer of 2015. Petitioner's judgment was final before the Michigan Supreme Court decided *Lockridge*; therefore, the *Lockridge* decision did not apply to him directly and afford him a remedy. *People v. Richards*, 891 N.W.2d 911, 924 (Mich. Ct. App. 2016), *rev'd, in part, on other grounds* 903 N.W.2d 555 (Mich. 2017) (court held that *Lockridge* applies retroactively to cases pending on direct review when *Lockridge* was issued on July 29, 2015). But *Lockridge* overruled *Drohan*, opening the door to application of *Alleyne* to Michigan sentencing guidelines minimums that became final after *Alleyne*, but before *Lockridge*. Thus, Petitioner was still free to argue that *Alleyne* rendered judicial fact-finding in support of scoring the sentencing guidelines unconstitutional in his case. And *Alleyne* applied to Petitioner

because his case was still pending on direct review when the *Alleyne* opinion was issued. *Robinson*, 901 F.3d at 714–15 ("And Supreme Court opinions apply to all criminal cases pending on direct review, no matter how much of a departure the decision represents from prior caselaw.") (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

That is the argument he makes in this Court. At least on the surface, it is a compelling one. There is little question the trial court impermissibly relied on judge-found facts to score some of the variables when determining Petitioner's minimum sentence guidelines range.

Petitioner also made that argument when he filed applications for leave to appeal the denial of his motion for relief from judgment in the Michigan Court of Appeals and the Michigan Supreme Court. But he never made the argument in the trial court.

As noted above, before the Court may grant habeas relief to a state prisoner, the prisoner must exhaust remedies available in the state courts. 28 U.S.C. § 2254(b)(1); *O'Sullivan*, 526 U.S. at 842. Exhaustion requires a petitioner to "fairly present" federal claims so that state courts have a "fair opportunity" to apply controlling legal principles to the facts bearing upon a petitioner's constitutional claim. *Id.* at 844, 848; *see also Picard*, 404 U.S. at 275–77 (1971); *Duncan*, 513 U.S. at 365; *Anderson*, 459 U.S. at 6. "[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. Petitioner did not.

Moreover, fair presentation has a substantive component and a procedural component. With regard to substance, fair presentation is achieved by presenting the asserted claims in a constitutional context through citation to the Constitution, federal decisions using constitutional analysis, or state decisions which employ constitutional analysis in a similar fact pattern. *Levine v. Torvik*, 986 F. 2d 1506, 1516 (6th Cir. 1993); *see also Picard*, 404 U.S. at 277–78. With regard to procedure, "[t]he fair presentation requirement is not satisfied when a claim is presented in a state court in a procedurally inappropriate manner that renders consideration of its merits unlikely." *Black v. Ashley*, No. 95-6184, 1996 WL 266421, at *1 (6th Cir. May 17, 1996) (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1998) ("[W]here the claim has been presented for the first and only time in a procedural context in which its merits will not be considered unless 'there are special and important reasons therefor,' . . . does not, for the relevant purpose, constitute 'fair presentation.'")); *see also Long v. Sparkman*, No. 95-5827, 1996 WL 196263, at *2 (6th Cir. Apr. 22, 1996); *Fuller v. McAninch*, No. 95-4312, 1996 WL 469156, at *2 (6th Cir. Aug. 16, 1996).

When Petitioner presented the *Alleyne* issue to the Michigan Court of Appeals and the Michigan Supreme Court, he was presenting it for the first time in an application for discretionary review. When a conviction is on direct review, presentation of an issue for the first time on discretionary review to the state supreme court does not fulfill the requirement of "fair presentation." *Castille*, 489 U.S. at 351. Applying *Castille*, the Sixth Circuit repeatedly has recognized that a habeas petitioner does not comply with the

exhaustion requirement when he fails to raise a claim in the state court of appeals but raises it for the first time on discretionary appeal to the state's highest court. *See Skinner v. McLemore*, 425 F. App'x 491, 494 (6th Cir. 2011); *Thompson v. Bell*, 580 F.3d 423, 438 (6th Cir. 2009); *Warlick v. Romanowski*, 367 F. App'x 634, 643 (6th Cir. 2010); *Granger v. Hurt*, 215 F. App'x 485, 491 (6th Cir. 2007); *Dunbar v. Pitcher*, No. 98-2068, 2000 WL 179026, at *1 (6th Cir. Feb. 9, 2000); *Miller v. Parker*, No. 99-5007, 1999 WL 1282436, at *2 (6th Cir. Dec. 27, 1999); *Troutman v. Turner*, No. 95-3597, 1995 WL 728182, at *2 (6th Cir. Dec. 7, 1995); *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990); *accord Parkhurst v. Shillinger*, 128 F.3d 1366, 1368-70 (10th Cir. 1997); *Ellman v. Davis*, 42 F.3d 144, 148 (2d Cir. 1994); *Cruz v. Warden of Dwight Corr. Ctr.*, 907 F.2d 665, 669 (7th Cir. 1990); *but see Ashbaugh v. Gundy*, 244 F. App'x 715, 717 (6th Cir. 2007) (declining to reach question of whether a claim raised for the first time in an application for leave to appeal to the Michigan Supreme Court is exhausted). Unless the state supreme court actually grants leave to appeal and reviews the issue, it remains unexhausted in the state courts.

The same reasoning applies on collateral review, but the application is broader because review is discretionary at both levels of Michigan's appellate system. When the court of appeals denied leave "because defendant failed to establish that the trial court erred in denying his motion for relief from judgment" (Mich. Ct. App. Order, ECF No. 21-15, PageID.1236), the court could only speak with regard to the issues Petitioner had raised in the trial court. Unless the court of appeals granted leave to appeal and reviewed

Petitioner's *Alleyne* issue, it remained unexhausted. Of course, the same is true with regard to Petitioner's presentation of the issue to the Michigan Supreme Court. Thus, Petitioner has not fairly presented his *Alleyne* issue to any level of the Michigan court system.

Failure to fairly present an issue to the state courts is only a problem if a state court remedy remains available for petitioner to pursue. *Rust,* 17 F.3d at 16. If no further state remedy is available to Petitioner, his failure to exhaust does not bar relief; but the claim may be procedurally defaulted. *Gray,* 518 U.S. at 161–62.

Petitioner no longer has a state court remedy to pursue with regard to his *Alleyne* claim. Michigan Court Rule 6.502(G) permits one, and only one, motion for relief from judgment. Petitioner may file a second such motion "based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion." Mich. Ct. R. 6.502(G)(2). Petitioner's *Alleyne* argument does not rely on a retroactive change in law that occurred after his first motion or new evidence discovered after his first motion. The bar to successive motions for relief from judgment, therefore, "acts as an adequate and independent state ground for denying review sufficient to procedurally default a claim." *Ingram v. Prelesnik*, 730 F. App'x 304, 311 (6th Cir. 2018).

If a petitioner procedurally defaulted his federal claim in state court, the petitioner must demonstrate either cause and prejudice or a miscarriage of

justice—that he is actually innocent.[15] Petitioner has not even attempted to explain his failure to raise the *Alleyne* issue in his first motion for relief from judgment.[16] Where a petitioner fails to show cause, the court need not consider whether he has established prejudice. *See Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Leroy v. Marshall*, 757 F.2d 94, 100 (6th Cir. 1985).

Petitioner has also not shown that he is actually innocent of CSC-III. He offers no new evidence that would make it more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt. For the reasons set forth above, even the new DNA evidence he seeks to obtain offers no hope of that result, no matter what the new test results might show. Because of Petitioner's procedural default, consideration of his *Alleyne* claims on habeas review is barred.

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[15] *See* § III, *infra*.

[16] Petitioner's circumstance is not the same as the circumstance of the petitioner in *Chase v. MaCauley*, 971 F.3d 582 (6th Cir. 2020). In *Chase*, the petitioner procedurally defaulted his *Alleyne* claim because counsel failed to raise it on direct appeal. The Sixth Circuit explained in detail why counsel's failure to raise the issue might be considered ineffective assistance even before *Lockridge* was decided. The default in Petitioner's case is his failure to raise the claim in his motion for relief from judgment. That failure cannot be attributed to counsel.

2. Guidelines scored based on acquitted conduct

Petitioner claims that the trial court violated his due process rights by scoring the guidelines based on conduct that, according to the jury's verdicts of acquittal on both CSC-I charges and the CSC-III charge based on penile/oral penetration, did not happen. Petitioner mentions the "acquitted conduct claim with regard to Offense Variables 3, 8, 10, 11, and 13. (Pet'r's Br., ECF No. 10-1, PageID.182–186.)[17]

a. Offense Variable 3

Petitioner raises an interesting point with regard to the scoring of Offense Variable 3. Offense Variable 3 requires the court to assign points based on physical injury to the victim. Mich. Comp. Laws § 777.33. The court assigned Petitioner 10 points on Offense Variable 3, which corresponds to a determination that "[b]odily injury requiring medical treatment occurred to a victim." Mich. Comp. Laws § 777.33(1)(d). The Michigan Court of Appeals concluded that the scoring found support in the record:

> The sexual-assault nurse reported a half-millimeter tear near the victim's anus, which could have been from forced sexual contact. Further, the victim was given medication to prevent or diminish the impact of infection, such as sexually transmitted diseases that may have been introduced during the sexual

[17] Petitioner did not mention the "acquitted conduct" issue with regard to the scoring of Prior Record Variable 7 or Offense Variable 19. (Pet'r's Br., ECF No. 10-1, PageID.182–186.)

> assault. In light of the fact that such treatment was considered necessary by the medical staff, we do not find that the trial court plainly erred in finding that a score of 10 points for bodily injury requiring medical attention was warranted.

(Mich. Ct. App. Op., ECF No. 21-12, PageID.1078.) Petitioner does not contest the appellate court's conclusion regarding the evidence. Instead, he contends that the jury's verdict compels the conclusion that the jury found there was no bodily injury.

Logic supports Petitioner's conclusion that the jury did not find, beyond a reasonable doubt, that Petitioner caused physical injury to the victim by virtue of the penile/vaginal penetration. If the jury had found, beyond a reasonable doubt, that Petitioner had caused such injury, the jury would have found Petitioner guilty of CSC-I, not CSC-III. Because the jury found Petitioner guilty of CSC-III and not guilty of CSC-I, it necessarily follows that the jury acquitted Petitioner of causing physical injury by way of the coerced penile/vaginal penetration, or at least could not reach unanimity on that issue.

The Michigan Supreme Court has concluded that scoring based on acquitted conduct violates due process:

> When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard. But when a

> jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent. "To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." *Marley*, 321 N.C. at 425, 364 S.E.2d 133.
>
> Unlike the uncharged conduct in *McMillan*, conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process.

People v. Beck, 939 N.W.2d 213, 225 (Mich. 2019) (footnotes omitted).[18] The Michigan Supreme Court,

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[18] Petitioner's direct appeal, and the denial of his motion for relief from judgment, were final before the Michigan Supreme Court decided *Beck*. Prior to *Beck*, the Michigan Supreme Court's most definitive statement regarding the use of "acquitted conduct" for sentencing appeared in *People v. Ewing (After Rem.)*, 458 N.W.2d 880 (Mich. 1990). There were three substantive opinions in *Ewing*. The *Beck* majority described the *Ewing* decision as "a fractured set of opinions in which it is not entirely clear what rule of law commanded a majority." *Beck*, 939 N.W.2d at 220. Nonetheless, three justices "blessed the practice of sentencing courts relying on acquitted conduct as long as it was proven by a preponderance of the evidence." *Id*. And another justice stated "that 'the mere fact of a prior acquittal of charges whose underlying facts are properly made known to the trial judge is not, without more, sufficient reason to preclude the judge from taking those facts into account at sentencing.'" *Id*. Thus, it would

however, is not the arbiter of clearly established federal law.

In *United States v. Watts*, 519 U.S. 148 (1997), the Supreme Court held "that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id.* at 157. Based on *Watts*, therefore, ***not*** finding beyond a reasonable doubt that Petitioner caused physical injury is different than finding beyond a reasonable doubt that he did not cause physical injury. Petitioner attempts to assign the significance of the latter finding to the former determination.

It is difficult to reconcile the *Watts* holding with the Michigan Supreme Court's conclusion in *Beck*. The *Beck* majority thought so as well: "*Watts* is in many ways the most difficult to dispense with, and also the most difficult to parse." *Beck*, 939 N.W.2d at 224. The Michigan Supreme Court attempted to cabin the *Watts* holding by describing the question before the Supreme Court in *Watts* as "only a double jeopardy challenge to the use of acquitted conduct." *Id.* By so limiting *Watts*, the Michigan Supreme Court concluded that *Watts* did not require rejection of the "argument that the use of acquitted conduct to sentence a defendant more harshly violates due process . . . ." *Id.* (footnote omitted). As far as the Michigan Supreme Court was concerned, it addressed that issue "on a clean slate." *Id.* at 225 (footnote omitted).

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not be unfair to characterize *Beck* as "a new rule for the conduct of criminal prosecutions." *See People v. Amerson*, No. 345215, 2020 WL 4557739, at *2 n.3 (Mich. Ct. App. Aug. 6, 2020).

In the end, for purposes of habeas review, the conflict between the Michigan Supreme Court's holding in *Beck* and the Supreme Court's holding in *Watts*, at least as applied to Offense Variable 3, proves to be nothing more than an interesting point. *Watts* is clearly established law. To the extent that the Michigan courts followed *Watts* when considering acquitted conduct relating to physical injury, that determination was not contrary to, or an unreasonable application of, clearly established federal law. But careful examination of the record reveals that the Michigan courts were never called upon to consider this question because Petitioner never raised it in the state courts.

Petitioner did not challenge the scoring of Offense Variable 3 in his motion for relief from judgment (Mot. for Relief from J., ECF No. 21-10, PageID.1018–1022), or in his subsequent applications for leave to appeal to the Michigan Court of Appeals (Appl. for Leave to Appeal, ECF No. 21-15, PageID.1272–1275) or the Michigan Supreme Court (Appl. for Leave to Appeal, ECF No. 21-19, PageID.1507–1511). Petitioner challenged the scoring of Offense Variable 3 on direct appeal (Appeal Br., ECF No. 21-12, PageID.1112–1114), but he did not challenge the scoring on this ground. In fact, Petitioner specifically acknowledged in his brief that the difference in the burden of proof standard for the determination of guilt and sentencing purposes rendered the verdict of acquittal "not determinative" with regard to sentencing. (*Id.*, PagerID.1114.)

For the reasons set forth above with regard to Petitioner's *Alleyne* argument, with regard to Offense Variable 3, Petitioner's "acquitted conduct" argument

is also unexhausted, and now procedurally defaulted. Petitioner no longer has a remedy to pursue because he failed to raise the acquitted conduct issue in his first motion for relief from judgment. He has not established cause for that failure. He has not established actual innocence of CSC-III. Accordingly, his procedural default bars this Court's consideration of the issue.

b. Offense Variables 8, 10, and 13

In his habeas brief, Petitioner raises the "acquitted conduct" issue with regard to Offense Variable 8, Offense Variable 10, Offense Variable 11, and Offense Variable 13. With the exception of Offense Variable 11, he does not really explain how the "acquitted conduct" issue applies. Also, with the exception of Offense Variable 11, he did not exhaust his "acquitted conduct" claims in the state courts.

Offense Variable 8 requires the court to assign 15 points where a victim was asported to another place of greater danger. Mich. Comp. Laws § 777.38. The court assigned a score of 15 points because Petitioner lured the victim to his apartment by promising payment for a job—cleaning a saddle. Moreover, once she was there, he lured her into his bedroom with some pretense regarding identifying a pair of sweatpants. There is nothing in the jury's verdicts of acquittal or guilt that speaks to the issue of asportation. There is no inconsistency between the verdicts and the court's score of Offense Variable 8. Petitioner's argument is groundless.

Moreover, Petitioner did not challenge the scoring of Offense Variable 8 in his motion for relief from

judgment. Petitioner challenged the scoring of Offense Variable 8 on direct appeal, but he questioned the court's application of the guideline to the facts, not that the court's finding was based on acquitted conduct. The court of appeals concluded the variable was properly scored. (Mich. Ct. App. Op., ECF No. 21-12, PageID.1076–1077.)

Offense Variable 10 requires the court to assign points based upon whether or not the perpetrator exploited a vulnerable victim. Mich. Comp. Laws § 777.40. Petitioner did not contest the initially proposed scoring of the variable at 10 points because that score was consistent with a determination that Petitioner exploited the victim's youth. Mich. Comp. Laws § 777.40(1)(b); (Appeal Br., ECF No. 21-12, PageID.1116.) In fact, Petitioner suggested that a score of 10 points would be consistent with the verdict. (*Id.*) ("[G]iven the verdict, ten points could likely be scored under OV 10 for exploitation of the victim's youth."). Petitioner objected, however, when the trial court bumped the score up to 15 points for predatory conduct. The court of appeals concluded that the variable was properly scored. (Mich. Ct. App. Op., ECF No. 21-12, PageID.1077–1078.)

Petitioner did not challenge the scoring of Offense Variable 10 in his motion for relief from judgment. He challenged the scoring only on direct appeal and only on the ground that the court misapplied the guideline, not because it involved "acquitted conduct." The court of appeals concluded that the offense variable was properly scored. (Mich. Ct. App. Op., ECF No. 21-12, PageID.1077–1078.)

Offense Variable 13 requires the court to assign a score based upon how the sentencing offense fits into a pattern of criminal behavior. Mich. Comp. Laws § 777.43. The court scored Petitioner 10 points because the CSC-III offense was "part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . . ." Mich. Comp. Laws § 777.43(1)(d). The section considers all crimes within a 5-year period, regardless of whether the offense resulted in a conviction. Mich. Comp. Laws § 777.43(2)(a). The sentencing transcript does not support Petitioner's suggestion that the trial court relied on any of the CSC offenses other than the sentencing offense. (Sentencing Tr., ECF No. 21-8, PageID.944–947.)

Petitioner did not raise a challenge to the scoring of this variable on direct appeal. He questioned the scoring in his motion for relief from judgment; but he did not complain that the scoring was based on acquitted conduct, he complained that he was only initially charged with two crimes and two crimes would not suffice to show a pattern of three crimes. (Mot. for Relief from J., ECF No. 21-10, PageID.1020–1021.)[19] Petitioner modified his challenge on appeal to the Michigan Court of Appeals, but he changed it to an *Alleyne* challenge, not an "acquitted conduct" challenge. (Appl. for Leave to Appeal, ECF No. 21-15, PageID.1273–1274.) Petitioner modified his challenge again on appeal to the Michigan Supreme Court. (Appl. for Leave to Appeal, ECF No. 2119,

[19] Petitioner's argument appears to be founded on the misconception that the pattern at issue when scoring Offense Variable 13 must be present in the criminal proceeding that includes the sentencing offense. That is plainly not the case.

PageID.1510.) It is difficult to discern exactly what Petitioner was arguing to the Michigan Supreme Court. Perhaps it was, in part, an *Alleyne* challenge and, in part, a claim that the court erroneously applied the guideline. In any event, it was not an "acquitted conduct" challenge.

With regard to Offense Variables 8, 10, and 13, therefore, Petitioner never exhausted his "acquitted conduct" claims in the Michigan courts. He no longer has a remedy there. He has failed to show cause for his failure to raise the "acquitted conduct" claims on direct appeal or in his motion for relief from judgment, and he has failed to demonstrate that he is actually innocent of the CSC-III crime of which he was convicted. Accordingly, Petitioner's procedural default precludes the Court's consideration of these "acquitted conduct" claims.

c. Offense Variable 11

Offense Variable 11 requires the court to assign points based upon the number of sexual penetrations that occurred. Mich. Comp. Laws § 777.41. One criminal sexual penetration warrants the assignment of 25 points, two or more, 50 points. The one penetration that forms the basis of a first- or third-degree criminal sexual conduct offense is not scored.

The trial court scored 25 points for Offense Variable 11. (Sentencing Information Rep., ECF No. 21-12, PageID.1122.) Petitioner posits that the court must have scored as the second penetration the charged penile/oral penetration. Because Petitioner was acquitted of that penetration, Petitioner contends he was denied due process at sentencing.

There is no discussion of the Offense Variable 11 scoring in the sentencing transcript. Petitioner assumes that the scored second penetration was the "acquitted conduct." That is not necessarily true. Although only two penetrations were charged, the testimony indicated there were at least three penetrations. In addition to the charged penile/oral and penile/vaginal penetrations, the victim testified to a digital/vaginal penetration. She reported that Petitioner ordered her to remove her clothes and lie down on the bed. He spread her legs, and then spread her labia with his fingers. "Any penetration, no matter how slight, is sufficient to satisfy the 'penetration' element . . . ." *People v. Hunt*, 501 N.W.2d 151, 154 (Mich. 1993). "*[A]ny* intrusion, however slight, into the vagina *or* the labia majora" will suffice. *People v. Lockett*, 814 N.W.2d 295, 307 (Mich. Ct. App. Jan. 10, 2012) (emphasis in original). Thus, it is not at all apparent on the record before the Court that Petitioner was scored based on "acquitted conduct."

Moreover, even if the trial court scored the penile/oral penetration as the second penetration, there was ample evidence in the record to support such a finding by a preponderance of the evidence based on the testimony of the victim. Thus, scoring the penile/oral penetration is not contrary to, or an unreasonable application of, *Watts*, the clearly established federal law regarding consideration of "acquitted conduct" at sentencing.

3. Guidelines variables scored based on inaccurate information

Petitioner also contends that his sentence violates due process because it was based on false or

inaccurate information. To prevail on such a claim, the petitioner must show (1) that the information before the sentencing court was materially false, and (2) that the court relied on the false information in imposing the sentence. *United States v. Polselli,* 747 F.2d 356, 358 (6th Cir. 1984). In *Tucker*, the Supreme Court was concerned about the sentencing court's reliance on misinformation where the court gave "explicit attention" to it, "found[ed]" its sentence "at least in part" on it, or gave "specific consideration" to the information before imposing sentence. *Tucker*, 404 U.S. at 447.

Petitioner raises all of, or at least some subset of, his amalgam of erroneous application/judge-found facts/acquitted conduct/inaccurate information challenges for each of the seven sentencing guidelines variables he contests. Upon review of his arguments, however, it is apparent that the inaccurate information challenge does not apply to Prior Record Variable 7 (Pet'r's Br., ECF No. 10-1, PageID.183), Offense Variable 3 (*Id*., PageID.183–184), Offense Variable 8 (*Id*., PageID.184), Offense Variable 10 (*Id*.), Offense Variable 11 (*Id*., PageID.185), and Offense Variable 13 (*Id*.). That leaves Offense Variable 19.

Offense Variable 19 requires the court to assign points for interference with the administration of justice. The court assigned 15 points (Sentencing Information Report, ECF No. 21-12, PageID.1122), which is appropriate where "[t]he offender used force or the threat of force against another person . . . to interfere with, or attempt to interfere with . . . the administration of justice . . . ." Mich. Comp. Laws § 777.49(b). The prosecutor offered several possible justifications for

scoring the variable, but the court rested its decision on Petitioner's threat to the victim that if she told anyone about the incident he would distribute the nude photographs he took of her. (Sentencing Tr., ECF No. 21-8, PageID.947–953.)

Petitioner argues:

> The trial court engaged in judicial fact-finding to apply information to increase the sentence being imposed. The information applied here is inaccurate and is contradictory to the testimony of Detective Carson who stated Mr. Kares was calm, cool, and cooperative. (Ts. II, pg. 256).

(Pet'r's Br., ECF No. 10-1, PageID.185–186.) Apparently, Petitioner believes that the court scored this variable as it did because Petitioner was somehow uncooperative when the police interviewed Petitioner. Petitioner is plainly wrong. He has failed to point to any false or inaccurate information that prompted the trial to score 15 points for Offense Variable 19. Therefore, he is not entitled to habeas relief on his "inaccurate information at sentencing" habeas claim.

E. Petitioner was denied his due process rights by the trial court giving an improper lesser offense instruction (habeas ground III)

Petitioner next complains that the trial court erred because it instructed the jury regarding CSC-III. Petitioner's argument suggests that the court so instructed the jury because the court believed that CSC-III was a lesser-included offense of CSC-I.

Typically, a claim that a trial court gave an improper jury instruction is not cognizable on habeas review. Instead, Petitioner must show that the erroneous instruction so infected the entire trial that the resulting conviction violates due process. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *see also Estelle*, 502 U.S. at 75 (erroneous jury instructions may not serve as the basis for habeas relief unless they have so infused the trial with unfairness as to deny due process of law); *Rashad v. Lafler*, 675 F.3d 564, 569 (6th Cir. 2012) (same); *Sanders*, 221 F.3d at 860 (same). If Petitioner fails to meet this burden, he fails to show that the jury instructions were contrary to federal law.

Petitioner's objection to the giving of a lesser-included offense instruction is not typical. It is far more common for a criminal defendant to argue that his due process rights were violated because the court refused to give a lesser-included offense instruction. In *Keeble v. United States*, 412 U.S. 205 (1973) the Supreme Court identified why lesser-included offense instructions can operate to the benefit of a criminal defendant:

> [I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be

> exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. In the case before us, for example, an intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner's intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented. But the jury was presented with only two options: convicting the defendant of assault with intent to commit great bodily injury, or acquitting him outright. We cannot say that the availability of a third option—convicting the defendant of simple assault—could not have resulted in a different verdict.

Keeble, 412 U.S. at 212–13. The Supreme Court described this as "providing the jury with the 'third option' of convicting on a lesser included offense [which] ensures that the jury will accord the defendant the full benefit of the reasonable-doubt standard." *Beck v. Alabama*, 427 U.S. 625, 634 (1980).

Although the *Keeble* Court identified the potential benefit of a lesser-included offense instruction, the court did not protect that interest through the Due Process Clause. The Due Process Clause requires providing lesser included offense instructions in ***capital*** cases. *Beck v. Alabama*, 447 U.S. at 637–38.

Lesser-included offense instructions were also required in ***noncapital*** cases under the English common law and they are still required under the common law or by statute in every state and in the federal courts, if and when the evidence supports it. *Id.* at 633–634, 636 n.n.11, 12. Even though the courts of this nation are in complete accord as to the propriety of lesser included offense instructions, the Supreme Court has never held that lesser included offense instructions are required as a matter of constitutional due process in noncapital cases. *Id.* at 638 n. 14; *see also Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990) (en banc) ("[The failure to instruct on lesser included offenses in noncapital cases [is not] such a fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure[.]").

Petitioner's challenge suggests he would have preferred the "all or nothing option."[20] At least that is what he says now. At trial, however, he, through counsel, was the one who requested the CSC-III

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[20] *See, e.g., Kelly v. Lazaroff*, 846 F.3d 819, 830–31 (6th Cir. 2017) ("Kelly argues that his trial counsel's decision to pursue an 'all-or-nothing' defense falls below the level of professionally competent assistance. . . .Trial counsel certainly pursued a "high risk, high reward" approach to [petitioner's] representation. That approach had significant risks, including the possibility that Kelly would ultimately be convicted and face a lengthy prison sentence. But it also carried potential reward, including the possibility that Kelly could avoid imprisonment entirely. It cannot be the case that every risky trial strategy, upon failing, amounts to constitutionally ineffective counsel. Because there was sufficient evidence in the record to support trial counsel's decision to pursue an 'all-or-nothing' defense, trial counsel's performance did not fall below the bar of professionally competent assistance.").

instruction. (Trial Tr. II, ECF No. 21-6, PageID.852, 859–861.) He wanted to give the jurors the "third option." *Beck v. Alabama*, 427 U.S. at 634.

The court and defense counsel agreed that CSC-III was not a necessarily lesser-included offense of CSC-I. (*Id.*, PageID.859–860.) But the prosecutor did not object to instructing the jury on CSC-III. (*Id.*, PageID.860.) When the court referred to CSC-III in the instructions, he did not refer to it as a lesser-included offense, he referred to it as a less serious offense.

Where a criminal defendant is charged with a crime that has different degrees, the State of Michigan, by statute, permits the jury to "find the accused not guilty of the offense in the degree charged" but instead to "find the accused . . . guilty of a degree of that offense inferior to that charged . . . ." Mich. Comp. Laws § 768.32(1). In *People v. Cornell*, 646 N.W.2d 127, 139 (2002), the Michigan Supreme Court concluded that an offense is inferior to the charged offense if the charged "greater" offense requires the jury to find a disputed factual element that is not part of the "lesser included" offense. An important characteristic of a lesser included offense is that it does not require the prosecutor to prove facts that the prosecutor is not required to prove with regard to the greater offense. The importance of that characteristic derives from the constitutional requirement of notice: if every element of the lesser offense is an element of the greater offense, notice of the greater offense necessarily gives the accused notice that he will have to defend against the elements of the lesser offense. *Id.* at 138. If the inferior offense included an element that

was not required in the greater offense—a circumstance that would render the inferior offense a "cognate" lesser offense, rather than an "included" lesser offense[21]—to instruct on that offense over defense objection would implicate the due process requirement of notice, *id.* at 138–40, as well as the prosecutor's prerogative to determine what charge or charges to bring, *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

CSC-III is not, categorically, a lesser-included offense of CSC-I. The CSC-I statute defines multiple circumstances that would render a sexual penetration a first-degree crime. Mich. Comp. Laws § 750.520b. Likewise, the CSC-III statute defines multiple circumstances that would render a sexual penetration a third-degree crime. Mich. Comp. Laws § 750.520d. Each set of circumstances that constitutes a CSC-III does not necessarily line up as a lesser-included set of circumstances of a CSC-I crime. Nonetheless, the proposed CSC-III charge against Petitioner, Mich. Comp. Laws § 750.520d(1)(b), corresponds to the CSC-I charge, Mich. Comp. Laws § 750.520b(1)(f), with only one differentiating factor, the latter requires proof of personal injury to the victim. Thus, a CSC-III charge based on the set of circumstances described in 1(b) is a lesser-included offense of a CSC-I charge based on the set of circumstances described in 1(f). *People v. Clark*, No. 320007, 2015 WL 4546501 (Mich. Ct. App.

[21] The Supreme Court touched upon the difference in the context of jury instructions in *Hopkins v. Reeves*, 524 U.S. 88, 96 n.6 (1998).

Jul. 28, 2015).[22] Therefore, the reading of the CSC-III instruction was proper.

Moreover, even if the instruction were somehow inappropriate, Petitioner could not obtain habeas relief because he invited the error. In *Fields v. Bagley*, 275 F.3d 478 (6th Cir. 2001), the court explained the doctrine of invited error as follows:

> The doctrine of "invited error" is a branch of the doctrine of waiver in which courts prevent a party from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside. *Harvis v. Roadway Express, Inc.*, 923 F.2d 59, 61 (6th Cir.1991). When a petitioner invites an error in the trial court, he is precluded from seeking habeas corpus relief for that error. *See Leverett v. Spears*, 877 F.2d 921, 924 (11th Cir. 1989); *Draughn v. Jabe*, 803 F. Supp. 70, 75 (E.D. Mich. 1992).

Fields, 275 F.3d at 485–86. The court was not inclined to read the instruction and the prosecutor took no position. The only reason the jury was instructed regarding CSC-III is because Petitioner asked for it. The

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[22] There are several instances where the Michigan courts have concluded that another particular CSC-III charge is a lesser-included offense to a particular CSC-I charge. *See, e.g., People v. Fabela*, No. 337365, 2018 WL 3129694 (Mich. Ct. App. Jun. 26, 2018); *People v. Smith*, No. 328642, 2016 WL 6992690 (Mich. Ct. App. Nov. 29, 2016); *People v. Kalmbach*, No. 317978, 2015 WL 248732 (Mich. Ct. App. Jan. 20, 2015); *People v. Ridley*, No. 303251, 2012 WL 2362427 (Mich. Ct. App. Jun. 21, 2012).

invited error doctrine, therefore, precludes habeas relief on the jury instruction issue.[23]

F. Petitioner was denied a fair trial by the prosecutor misrepresenting DNA evidence to the jury (habeas ground V)

Petitioner next argues that his trial was rendered unfair by improper comments from the prosecutor regarding the nature of the DNA evidence. The scope of review for prosecutorial misconduct claims is narrow. A petitioner must do more than show erroneous conduct. "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. De Christoforo*, 416 U.S. 637, 643 (1974)). "[T]he touchstone of due-process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

In evaluating the impact of the prosecutor's misconduct, a court must consider the extent to which the claimed misconduct tended to mislead the jury or prejudice the petitioner, whether it was isolated or extensive, and whether the claimed misconduct was

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[23] The United States District Court for the Eastern District of Michigan has concluded that "[i]nvited error may be overcome when the request for the instruction amounts to constitutionally ineffective assistance of counsel." *Coleman v. Harry*, No. 07-15172, 2009 WL 3805611, at *13 n.1 (E.D. Mich. Nov. 10, 2009) (citing *Turner v. Calderon*, 970 F. Supp. 781, 805 (E.D. Cal. 1997) and *Patterson v. Dahm*, 769 F.Supp. 1103, 1106 (D. Neb. 1991)). Whether counsel's request for the instruction amounts to ineffective assistance is discussed below.

deliberate or accidental. *See United States v. Young*, 470 U.S. 1, 11–12 (1985). The court also must consider the strength of the overall proof establishing guilt, whether the conduct was objected to by counsel and whether a curative instruction was given by the court. *See id.* at 12–13; *Darden*, 477 U.S. at 181–82; *Donnelly*, 416 U.S. at 646–47; *Berger v. United States*, 295 U.S. 78, 84–85 (1935). "[A] prosecutor's comments violate the defendant's right to due process only if, ***in context***, they 'undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice.'" *Winowiecki v. Gidley*, No. 20-1461, 2020 WL 6743472, at *2 (6th Cir. Sept. 8, 2020) (quoting *Young*, 470 U.S. at 16) (emphasis added); *see also United States v. McQuarrie*, 817 F. App'x 63, 81 (6th Cir. 2020) ("[C]ontext is key . . . .").

A prosecutor is not limited to simply recounting the evidence during closing argument. He may also argue reasonable inferences from the evidence. *Byrd v. Collins*, 209 F.3d 486, 535 (6th Cir. 2000); *see also Young*, 470 U.S. at 8 n.5 (acknowledging as a useful guideline the American Bar Association Standard: "The prosecutor may argue all reasonable inferences from the evidence."). Nonetheless, it is unquestionably improper for a prosecutor to argue facts not in evidence. *Abela v. Martin*, 380 F.3d 915, 929 (6th Cir. 2004) (citing *Berger*, 295 U.S. at 78).

The "misrepresentations" of which Petitioner complains are the prosecutor's references to the DNA evidence as "collected from the victim's vaginal and anal area." (Pet'r's Br., ECF No. 10-1, PageID.195.) Petitioner claims that, by way of that misrepresentation,

"a critical element of the offense was improperly established, sexual penetration." (*Id.*)

As noted above, there were inconsistencies between how the SANE recorded the items she collected from the victim in the SANE report and how items collected were labeled in the kit. Petitioner seizes upon those inconsistencies to claim that the prosecutor misrepresented the DNA evidence. He argues that because the SANE report does not have a check mark indicating collection of an anal swab that no swab was collected and because the SANE report does not have a check mark indicating creation of a vaginal smear, no vaginal smear was created.

Petitioner suggests that the SANE testified that she did not collect those items, but that is not what she said. She testified: "I did not document a swab from the anal area." (Trial Tr. II, ECF No. 21-6, PageID.685.) She never testified that she did not collect a swab from the anal area. Similarly, the SANE never testified that she did not create a vaginal smear. Cassandra Campbell testified that she tested the items from the kit labeled as anal and vaginal smears for the presence of sperm cells to confirm her initial results showing that the cervical swabs, anal swabs, speculum swabs, labial fold swabs, external swabs, and undergarments tested positive for the presence of semen. (Trial Tr. II, ECF No. 21-6, PageID.725–729.)

There are no glaring inconsistencies between the testimony of the SANE and the contents of the kit as tested by Cassandra Campbell. There are inconsistencies between the SANE report indicating which swabs and smears were collected and the contents of the kit. The prosecutor urged the jurors to infer that the

report was in error. Petitioner's counsel urged the jurors to infer that the contents of the kit were in error, thereby creating reasonable doubt that precluded conviction. Were those reasonable inferences or did the prosecutor and defense counsel argue facts not in evidence?

In *Coleman v. Jackson*, 566 U.S. 650 (2012), the Supreme Court provided guidance "in determining what distinguishes a reasoned inference from 'mere speculation.'" *Id*. at 655. The Court described a reasonable inference as an inference that a rational jury could make from the facts. Certainly, the inferences urged by the prosecutor rationally flow from the identified facts. They are not compelled by those facts. The inferences are not even more likely than not. They are simply rational. *Id.* at 656. To succeed in his challenge, therefore, Petitioner must show that the inferences urged by the prosecutor are irrational. He has not made, and cannot make, that showing.

Under the circumstances, the prosecution's references to the anal and vaginal swabs as having been collected from the victim is entirely consistent with how they were labeled in the kit, even if that is not consistent with the identification in the SANE report of the items collected. Moreover, it is not inconsistent with testimony of the SANE, who indicated only that she did not document the collection on the report. Petitioner's conclusion that the SANE did not collect an anal swab or create a vaginal smear is not invalid, it is just not the only conclusion one can draw from the evidence.

Whether or not the inference invited by the prosecutor was strong, it was reasonable on its face.

Moreover, Petitioner's contention that the invited inference rendered his trial unfair because it established penetration is not accurate. The victim did not testify that Petitioner penetrated her anus with his penis. The prosecutor did not charge Petitioner with penile/anal penetration. The SANE did not testify that she collected semen from the anal area in a way that necessarily would evidence the fact of penetration.

The swabs tested for DNA that were generally referenced as vaginal were, according to the DNA expert, the cervical swabs. Certainly, presence of Petitioner's DNA in the cervical area strongly suggests penetration; but there were no inconsistencies between the SANE report and the kit with regard to the cervical swabs. So, even if one accepted Petitioner's invited inference with regard to the anal swabs—that the inconsistency gives rise to reasonable doubt—that would not render unreasonable the allegedly invited inference that Petitioner's DNA on the cervical swabs evidences penetration, an inference that is particularly reasonable because the victim testified that the Petitioner penetrated her vagina with his penis.

Petitioner has failed to demonstrate that the prosecutor's arguments with regard to the DNA evidence rise to the level of prosecutorial misconduct that denied him due process. Accordingly, he is not entitled to habeas relief on this claim.

G. Petitioner was denied his due process rights by the prosecutor suppressing exculpatory evidence in its possession (habeas ground VI)

Petitioner next complains that the prosecutor suppressed favorable evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Under *Brady*, "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The Supreme Court has held that "[t]here are three components of a true *Brady* violation: [t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Prejudice (and materiality) is established by showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 280 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)); *see also Cone v. Bell*, 556 U.S. 449, 469–70 (2009). A reasonable probability is "'a probability sufficient to undermine confidence in the outcome.'" *Bagley*, 473 U.S. at 682 (quoting *Strickland*, 466 U.S. at 694.).

However, the *Brady* rule "only applies to evidence that was known to the prosecution, but unknown to the defense, at the time of trial." *Apanovitch v. Houk*, 466 F.3d 460, 474 (6th Cir. 2006). The government's failure to disclose potentially exculpatory evidence

does not violate *Brady* "where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information,' *United States v. Grossman*, 843 F.2d 78, 85 (2d Cir. 1988) . . . , or where the evidence is available to defendant from another source." *United States v. Clark*, 928 F.2d 733, 738 (6th Cir. 1991). "[I]n such cases there is really nothing for the government to disclose." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998).

Petitioner complains that the prosecutor suppressed "the bedding that was seized from his residence" and "the toxicology report from the victim." (Pet'r's Br., ECF No. 10-1, PageID.196.) With regard to the bedding, Petitioner argues that it "would establish that Mr. Kares did not change the sheets to tamper with evidence and that the sexual assault did not transpire." (*Id.*) With regard to the toxicology report, Petitioner argues "when dealing with a case of this nature, the possibility of the complainant/victim being under the influence of controlled substances is not only relevant, but highly favorable to the defense." (*Id.*, PageID.197.) Petitioner's claims are absurd. He has failed to show that he is entitled to relief at any of the three levels of a *Brady* claim: he has not shown that the prosecutor suppressed any evidence, he has not shown that the evidence was favorable, and he has not shown that he suffered any prejudice.

1. The bedding

The victim described Petitioner's bedding to the police. The sheets on the bed when the deputy arrived, however, did not match the victim's description. The sheets in the dryer did. The deputy took Petitioner's sheets, with his permission. (Trial Tr. II, ECF No. 21-

6, PageID.708, 822–823.) The sheets were not suppressed. They also were not tested. (*Id.*, PageID.708.) Thus, the prosecutor did not suppress any test results from the sheets either.

Petitioner's argument appears to be that the prosecutor's failure to test the sheets constitutes suppression. That is simply wrong. Neither the police nor the prosecutor "have a constitutional duty to perform any particular tests." *Arizona v. Youngblood*, 488 U.S. 51, 59 (1988).

Moreover, even if there were tests, what could the tests possibly show that would be "favorable"? The sheets that the victim said were on the bed when she was assaulted were in the dryer. If the sheets had the victim's DNA on them, that fact would not help Petitioner. If the sheets did not have the victim's DNA on them it would not help Petitioner either because those sheets had been laundered. If the sheets that were on the bed when the deputy arrived had Petitioner's DNA on them, it would not help Petitioner. If they did not, it would not help Petitioner either because, according to the victim, those sheets were not on the bed during the assault. If Petitioner's DNA were on the sheets or not on the sheets would be immaterial as well. There is simply no scenario—no possible outcome of testing—that would have any influence on the outcome of the proceeding.

Petitioner has failed to demonstrate that the prosecutor violated *Brady* with regard to his bedding. He is not entitled to habeas relief on that claim.

2. Toxicology report

Petitioner's arguments regarding toxicology testing of the victim's urine is similar to his argument regarding the bedding. The SANE reported that she collected a urine sample "to check both for infection of blood as well as previous pregnancy prior to giving her any medication." (Trial Tr. II, ECF No. 21-6, PageID.676.) There is nothing in the record to suggest that the urine was tested for the presence of controlled substances. There was no obligation for the prosecutor to test urine if, in fact, any remained after the SANE obtained the information necessary to provide medical treatment. *Youngblood*, 488 U.S. at 59. If there is no such report, there was nothing for the prosecutor to suppress. Moreover, Petitioner does not claim that he did not know that the urine was collected. If any remained, he could have sought testing.

Petitioner claims that a toxicology report would have been "highly favorable," but he does not explain why. The victim spoke with the deputy that night, shortly after the assault. She was examined by the nurse that night. Both testified. Neither suggested the victim was under the influence of controlled substances. Petitioner was with the victim that night. He did not suggest that she was under the influence of controlled substances. Even if there were a toxicology report, and even if it showed the presence of controlled substances, it is not clear how that would favor Petitioner. Moreover, without knowing that a toxicology report actually showed the presence of controlled substances, Petitioner cannot demonstrate prejudice.

Petitioner has, again, failed to demonstrate that the prosecutor violated *Brady* with regard to the non-

existent toxicology report. He is not entitled to habeas relief on that claim.

H. Petitioner was denied his due process right to a fair trial by the prosecution failing to produce endorsed res gestae witnesses at trial (habeas ground VII)

Petitioner next contends that the prosecution violated his due process rights by failing to produce *res gestae* witnesses Kimberly Lowry and Samantha Black. Petitioner attaches to his amended petition an April 9, 2012, an amended witness list from the prosecutor that indicates that the prosecutor intended to produce Lowry and Black at trial. (Witness List, ECF No. 10-2, PageID.228.) By the first day of trial, however, it was apparent that the parties knew Kimberly Lowry would not be called because she was not included on the list of prospective witnesses read to the jury. (Trial Tr. I, ECF No. 21-5, PageID.450–451.) Petitioner did not object.

Petitioner contends that the testimony of Kimberly Lowry was important to the defense because she admitted that the victim had knowledge of what is necessary to falsify allegations of being sexually assaulted. As with most of Petitioner's contentions, that is quite a reach. Kimberly Lowry was the victim's mother and Petitioner's girlfriend. The "favorable-to-the-defense" statement upon which Petitioner relies is somewhere in the investigating deputy's interview of Ms. Lowry:

Q: So you believe she's never had sex before?

A: I do not believe she's ever had sex before.

Q: The fact that [the victim] told you this is extra disturbing because she's not interested in men.

A: Correct.

Q: And when she told you this story, you knew that there had to be some validity to it because she's just not interested in men.

A: Correct. And my, my daughter would never make an accusation like that. She's had friends that have done it and has, has been blown away by it. Like, how could you accuse somebody if it really didn't happen. That ruins people's lives. And that, those are her words. She would never, ever make a false, false accusation like that. Ever. She's a very intelligent, very bright, very happy kid. And not anymore. She's not doing it just to get attention. She's not, that's not her.

Q: You've noticed a change in her behavior after this?

A: Instantly. Instantly. She doesn't want to leave the house. She doesn't want to leave my side. Last night was the first night that she, the first time she'd laughed and it was ha-ha. She's a long laugher. She's a happy kid. She's bubbly. She walks in a room and makes people smile. She won't even make eye contact with men anymore. Not even her dad. She wouldn't even let her dad hug her. She did that and that's not her.

(Case Supp. Report, ECF No. 10-2, PageID.229.) How this helps Petitioner is a mystery.

Perhaps an even greater mystery, however, is why, if this testimony were so important to Petitioner, he did not call her. She was at the trial. (Trial Tr. II, ECF No. 21-6, PageID.807–808.) Petitioner was aware that she was at the trial. (*Id.*)

Samantha Black, on the other hand, was mentioned in the list of prospective witnesses, and the prosecutor did not call her to testify. It is not clear whether she was under subpoena. There is nothing in the trial transcripts or the transcripts of the pretrial proceedings that suggested that Samantha Black played a role in the events of the evening of the sexual assault or the events immediately afterward.

She is identified as a friend of the victim and other witnesses. Moreover, Petitioner told an investigator that, although he had never touched the victim that night, "one other time at a party he may have touched her butt on accident . . . ." (Trial Tr. III, ECF No. 21-6, PageID.707.) Petitioner reported that Samantha Black may have witnessed that incident. (*Id.*) Additionally, Petitioner testified that Samantha Black was present days before in Petitioner's apartment when Petitioner first mentioned that the victim could clean his saddle(s) to earn $20 for homecoming. (*Id.*, Page.806.) Ms. Black is not mentioned anywhere else during the trial testimony.

Petitioner points to the Case Supplemental Report authored by Detective Carson and attached to Petitioner's amended petition. That report includes a note of Carson's telephone contact with Black:

> Undersigned Detective spoke to Samantha Black over the telephone . . . . Samantha stated that she has been friends with [the victim] since Kindergarten. Samantha was asked if she ever saw [the victim] reach her hand down [Petitioner's] pants, or whether [Petitioner] has forced [the victim's] hand down his pants and she stated "no." Samantha stated that she has never seen [the victim] and [Petitioner] hug, share a kiss, or touch each other in private places.

(Case Supp. Report, ECF No. 10-2, PageID.230.) It is not apparent how this helps Petitioner. He was the only one who suggested that Ms. Black perhaps saw something. Petitioner also reports that "Samantha Black . . . was in contact with the victim . . . by phone during the time she was at [Petitioner's] apartment[,]" presumably on the night of the assault. (Pet'r's Br., ECF No. 10-1, PageID.199.) The Court has pored over the record to find some support for Petitioner's assertion, but can find none, and Petitioner does not cite to any record support for the assertion.

The premise of Petitioner's argument regarding these witnesses is that the prosecutor has a duty to produce *res gestae* witnesses. The idea that the prosecutor must produce all witnesses "to the transaction" is a product of the English courts:

> The prosecutor in a criminal case, is not at liberty, like a plaintiff in a civil case, to select out a part of an entire transaction which makes against the defendant, and then, to put the defendant to the proof of the other part, so long as it appears at all probable from the evidence,

> that there may be any other part of the transaction undisclosed; especially, if it appears to the court that the evidence of the other portion is attainable. The only legitimate object of the prosecution is, "to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence." The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community. And, according to the well-established rules of the English courts, all the witnesses present at the transaction, should be called by the prosecution, before the prisoner is put to his defense, if such witnesses be present, or clearly attainable. See *Maher v. The People*, 10 Mich., 225, 226. The English rule goes so far as to require the prosecutor to produce all present at the transaction, though they may be the near relatives of the prisoner. See *Chapman's case*, 8 C. & P., 559; *Orchard's case*, *Id*., note *Roscoe's Cr. Ev*., 164.

Hurd v. People, 25 Mich. 405, 416, 1872 WL 3237 (Mich. Oct. 8, 1872). The principle made its way into Michigan statutes by way of a requirement that the indictment—and eventually the information—include

a list of witnesses endorsed by the prosecutor. *See People v. Pearson*, 273 N.W.2d 856, 866 (Mich. 1979) ("The rule took legislative form in 1859; the statute now provides: [statutory language]. The relevant language has remained unchanged since first enacted.") (footnotes omitted). It is not so much the statutory language, however, that matters here. Instead, it is the Michigan courts' construction of that language "to require the prosecutor to indorse on the information**, *produce in court, and call all known res gestae witnesses***." *Id*. (footnote omitted, emphasis added).

That is the source of Petitioner's claim that the prosecutor must produce all res gestae witnesses—not the federal constitution, not federal law—state law. Moreover, in 1986, the Michigan Legislature eliminated the requirement that the prosecutor endorse all res gestae witnesses and the requirement that the prosecutor produce all endorsed witnesses. *People v. Koonce*, 648 N.W.2d 153, 156 (Mich. 2002); *People v. Perez*, 670 N.W.2d 655, 657–658 (Mich. 2003). The statutory amendment "replaced the prosecutor's duty to produce res gestae witnesses with 'an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request.'" *Perez*, at 657–658. There does not appear to be any question that the prosecutor fulfilled his statutory duties in Petitioner's case. The witness list provides notice of Lowry and Black as witnesses. There is no suggestion that Petitioner sought assistance in locating them. Indeed, Petitioner was apparently well-aware of where they might be found.

The res gestae witness rule is, or more accurately was, purely a matter of state law. The Sixth Circuit

Court of Appeals has repeatedly held that the failure of a Michigan prosecutor to produce res gestae witnesses implicates no federal right. *See Collier v. Lafler,* 419 F. App'x 555, 559 (6th Cir. 2011) ("Michigan's requirement that prosecutors produce res gestae witnesses is a matter of state law, and its enforcement is outside the scope of our review. We have rejected on that basis claims raised under this very state requirement."); *Brown v. Burton*, No. 18-2145, 2019 WL 4865932, at *2 (6th Cir. Apr. 9, 2019) ("Brown[] claim[ed] that his Sixth and Fourteenth Amendment rights were violated when the prosecutor failed to produce two witnesses and failed to assist him in locating such witnesses. . . . The district court concluded that Brown's claim alleged a state-law violation, which is not a basis for federal habeas relief. . . . Reasonable jurists would not debate that conclusion."); *Hatten v. Rivard*, No. 17-2520, 2018 WL 3089204, at *3 (6th Cir. May 9, 2018) ("This court has explained, however, that 'Michigan's requirement that prosecutors produce res gestae witnesses is a matter of state law, and its enforcement is outside the scope of our review.'") (quoting *Collier*); *Moreno v. Withrow*, No. 94-1466, 1995 WL 428407, at *1 (6th Cir. Jul. 19, 1995) ("Moreno's claim the prosecutor failed to call a res gestae witness, Bennett's sister, concerned a perceived error of state law which rarely serves as a basis for habeas corpus relief and does so only when, under federal constitutional law, the petitioner is denied fundamental fairness in the trial process."); *Smith v. Elo*, No. 98-1977, 1999 WL 1045877, at * 2 (6th Cir. Nov. 8, 1999) ("Smith is not entitled to relief on his claim that the prosecutor failed to call res gestae witnesses because issues of state law are not cognizable on federal habeas review . . . ."); *Lewis v. Jabe*, No. 88-1522,

1989 WL 145895, at *3 (6th Cir. Dec. 4, 1989) ("[T]he res gestae requirement is a state law question. Claims based on violations of state law are for the state courts to decide."); *Atkins v. Foltz*, No. 87-1341, 1988 WL 87710 (6th Cir. Aug. 24, 1988) ("[F]ederal law does not require production of all *res gestae* witnesses. . . . [A]lthough Michigan law requires the production of all *res gestae* witnesses . . . this court cannot hear state claims on petition for writ of habeas corpus . . . ."); *see also Grays v. Lafler*, 618 F. Supp. 2d 736, 745 (W.D. Mich. 2008) ("There is no clearly established Supreme Court law recognizing a constitutional right to a res gestae witness.").

Habeas petitioners have attempted to "federalize" the claim that the prosecutor failed to produce a res gestae witness by contending that the prosecutor violated *Brady*, or interfered with the right to compulsory process, or the right to present a defense, or the right to confrontation; but none of those rights are at issue here. The prosecutor plainly disclosed the existence of these witnesses and Petitioner had the police reports that he relies on now to show that their testimony mattered, so *Brady* is not implicated. The court did not bar Petitioner from calling these witnesses, so his rights to compulsory process or to present a defense were not hampered. And the witnesses did not testify either in court or through out-of-court statements, so Petitioner's confrontation rights were preserved. In short, Petitioner raises only a state law claim that is not cognizable on habeas review; thus, he is not entitled to habeas relief.

I. Petitioner was denied his due process right to adequate notice of the State's intent to seek a sentence enhancement (habeas ground VIII)

Petitioner next argues that he did not receive adequate notice of the habitual offender sentence enhancement. Petitioner's argument is surprising in that the information (ECF No. 21-9, PageID.975–976) clearly provides notice that he is charged with two counts of CSC-I and that the prosecutor will seek a sentence enhancement because Petitioner had previously convicted of three or more felonies. Petitioner argument is a little more subtle. He is not complaining that he did not receive notice that his sentence for CSC-I might be enhanced because of prior convictions, he is complaining because he did not receive notice that his sentence for CSC-III might be enhanced because of prior convictions.

The nature of the habitual offender-fourth offense enhancement is spelled out in Michigan Compiled Laws § 769.12. The enhancement was significant; it doubled the upper limit of Petitioner's guidelines minimum sentence range from 160 months to 320 months.

Petitioner notes that Michigan Compiled Laws § 769.13 governs the timing of notice of the prosecutor's intent to seek a habitual offender enhancement. The time for notice is within 21 days of the arraignment. Petitioner claims that he could not have received notice that his CSC-III sentence would be enhanced by prior convictions because he was not charged with CSC-III and could not know that his sentence for that crime might be enhanced until the jury's verdict.

"[A] federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (quoting 28 U.S.C. § 2254(a)). A habeas petition must "state facts that point to a 'real possibility of constitutional error.'" *Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) (quoting Advisory Committee Notes on Rule 4, Rules Governing Habeas Corpus Cases).The federal courts have no power to intervene on the basis of a perceived error of state law. *Wilson*, 562 U.S. at 5; *Bradshaw*, 546 U.S. at 76; *Estelle*, 502 U.S. at 67–68. Petitioner's claim that he did not receive notice that complied with the Michigan habitual offender statute is a state-law claim that is not cognizable on habeas review.

Although the prosecutor's compliance with the Michigan statute, a state-law issue, is conclusively resolved, the issue of constitutionally adequate notice remains. The Due Process Clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him so as to provide him an adequate opportunity to prepare his defense. *See*, *e.g.*, *In re Ruffalo*, 390 U.S. 544 (1968); *Blake v. Morford*, 563 F.2d 248 (6th Cir. 1977); *Watson v. Jago*, 558 F.2d 330, 338 (6th Cir. 1977). This requires that the offense be described with some precision and certainty so as to apprise the accused of the crime with which he stands charged. *Combs v. State of Tennessee*, 530 F.2d 695, 698 (6th Cir. 1976). Such definiteness and certainty are required as will enable a presumptively innocent man to prepare for trial. *Id*. "Beyond notice, a claimed deficiency in a state

criminal indictment is not cognizable on federal collateral review." *Roe v. Baker*, 316 F.3d 557, 570 (6th Cir. 2002) (quoting *Mira v. Marshall*, 806 F.2d 636, 639 (6th Cir. 1986)). "An indictment which fairly but imperfectly informs the accused of the offense for which he is to be tried does not give rise to a constitutional issue cognizable in habeas proceedings." *Mira*, 806 F.2d at 639. In other words, as long as "sufficient notice of the charges is given in some . . . manner" so that the accused may adequately prepare a defense, the Fourteenth Amendment's Due Process Clause is satisfied. *Koontz v. Glossa*, 731 F.2d 365, 369 (6th Cir. 1984).

Petitioner cannot legitimately claim that he did not receive notice sufficient to permit him to defend against the habitual offender "charge" in this case. The information provided him notice that the prosecutor would seek a fourth habitual offender sentence enhancement. Defending against such an enhancement based on a CSC-III conviction is no different than defending against the enhancement for a CSC-I conviction. He does not—and cannot—contend that the notice was insufficient to permit him to adequately prepare a defense against the enhancement. Therefore, his claim does not implicate his due process notice rights.[24]

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[24] In fact, it was beyond dispute that Petitioner had been convicted of three prior felonies. Two of the three felonies upon which the prosecutor relied were convictions based on Shiawassee County guilty pleas; the third was a conviction based on an Ingham County guilty plea. (Plea Tr., ECF No. 21-2, PageID.397–399.) Moreover, at the same time Petitioner was being prosecuted for the CSC crimes, he was being prosecuted for an attempted escape and resisting a police officer—he leapt from

Moreover, Petitioner claim is based on a faulty premise. His claim is founded on a lack of notice with regard to CSC-III charges; but because the CSC-III charge of which he was convicted was a lesser-included offense of the CSC-I charge, he in fact received all of the notice he was due. As explained in detail above, Petitioner's CSC-III offense was a lesser-included offense of the CSC-I charge. Therefore, the notice of the CSC-I charge necessarily provided Petitioner an opportunity to defend against the CSC-III charge.

Finally, Petitioner not only had notice of the CSC-I charge, the CSC-III charge, and the habitual offender enhancement, he had actual notice of the precise impact of the enhancement on his minimum sentence guidelines should he be convicted of CSC-I or CSC-III. The prosecutor offered Petitioner the opportunity to enter a guilty plea to a charge of CSC-III as part of a package that included the escape plea. The court and counsel specifically advised Petitioner that the minimum range for the CSC-I conviction would 22 years, 6 months, to 75 years and the minimum range for the CSC-III conviction would be 9 years, 9 months, to 26 years, 8 months—exactly as they were scored after Petitioner's conviction. (Plea Tr., ECF No. 21-2, PageID.375–380.)

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the police vehicle while returning from the polygraph examination relating to this case. (*Id.*, PageID.389–396.) Petitioner pleaded guilty in the escape case and, during his plea, while under oath, acknowledged all three felony convictions. (*Id.*, PageID.398–399.)

Petitioner's claim regarding insufficient notice is meritless.

J. Trial and appellate counsel rendered ineffective assistance (habeas grounds IX and X)

In *Strickland*, 466 U.S. 668, the Supreme Court established a two-prong test by which to evaluate claims of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, the petitioner must prove (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome. *Id.* at 687. A court considering a claim of ineffective assistance must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. The defendant bears the burden of overcoming the presumption that the challenged action might be considered sound trial strategy. *Id.* (citing *Michel*, 350 U.S. at 101). The court must determine whether, in light of the circumstances as they existed at the time of counsel's actions, "the identified acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Even if a court determines that counsel's performance was outside that range, the defendant is not entitled to relief if counsel's error had no effect on the judgment. *Id.* at 691.

Moreover, when a federal court reviews a state court's application of *Strickland*, under § 2254(d), the deferential standard of *Strickland* is "doubly" deferential. *Harrington*, 562 U.S. at 105 (citing *Knowles v.*

Mirzayance, 556 U.S. 111, 123 (2009)); *see also Burt v. Titlow*, 571 U.S. 12, 15 (2013); *Cullen*, 563 U.S. at 190; *Premo v. Moore*, 562 U.S. 115, 122 (2011). In those circumstances, the question before the habeas court is "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington*, 562 U.S. at 105.

Despite the double deference typically owed, based on the way Petitioner's ineffective assistance of trial counsel claims were resolved in the trial court, it appears that this Court owes no deference at all with regard to those claims—they are subject to *de novo* review. On the other hand, it appears that the Court might owe double deference to the trial court's determination that Petitioner's claims of ineffective assistance of appellate counsel have no merit. A closer examination of Petitioner's motion for relief from judgment, the trial court's resolution of that motion, and the nature of Michigan's post-conviction remedy are necessary to understand the potential difference in deference.

Michigan permits convicted criminals to file one motion for relief from judgment to challenge their convictions and/or sentences after their convictions are final. The court rules preclude relief in three instances: (1) if the convictions and sentences are not final; (2) if the grounds raised were decided against them on appeal or a prior motion (unless a retroactive change in law has undermined that decision; and (3) if the grounds raised could have been raised in a prior appeal or motion and were not. Mich. Ct. R. § 6.508(D). The rule provides two exceptions where the ground could have been raised in a prior appeal but was not:

where the movant demonstrates cause for the failure to raise the claim and prejudice; or even absent cause where there is a significant possibility that the movant is innocent of the crime. Mich. Ct. R. § 6.508(D)(3). If the trial court refuses to grant relief where the issue could have been raised in a prior appeal, but was not, it is considered a procedural default.

Movants often offer as cause for failing to raise an issue on appeal the ineffective assistance of their appellate counsel. That was the theory presented by Petitioner in his motion for relief from judgment. Petitioner contended that the various issues he raised in his motion—the prosecutor's misrepresentation of the DNA evidence, the prosecutor's suppression of exculpatory evidence, the prosecutor's failure to produce res gestae witnesses, the prosecutor's defective notice regard the habitual offender sentence enhancement, the use of inaccurate information to score PRV 7, and OV 11, 13, and 19, and ineffective assistance of trial counsel—were not raised on direct appeal because of the ineffective assistance of appellate counsel. (Pet'r's Mot. for Relief from J., ECF No. 21-10, PageID.983–984.)

The court specifically analyzed only the ineffective assistance of trial and appellate counsel claims. The court concluded that Petitioner had not shown that either counsel rendered ineffective assistance; therefore, he had failed to establish cause and he was not entitled to relief under the court rule. The trial court described the bar to relief as to all of Petitioner's claims—apparently including his claim of ineffective assistance of appellate counsel—as a procedural default.

The court's resolution makes sense with regard to Petitioner's claims of prosecutorial misconduct and error, the use of inaccurate information at sentencing, and ineffective assistance of trial counsel. Those claims could have been raised on appeal. They were not. The court concluded that Petitioner had failed to show that appellate counsel's failure to raise them was professionally unreasonable. To the contrary, the court noted that winnowing out weaker arguments was simply part of effective appellate advocacy. (Shiawassee Cnty. Cir. Ct. Order, ECF No. 21-11, PageID.1070.) The court concluded that counsel was not deficient for failing to raise those arguments. (*Id.*)

Those issues are procedurally defaulted. This Court might rely on that default and analyze whether Petitioner has established cause and prejudice for the default. Or, as set forth above, this Court may forego the procedural default analysis and simply address the merits if that is the more direct path to resolution. That is the more direct path here. But, when proceeding on that path, because the trial court did not address the claim on the merits, the trial court's decision is not entitled to AEDPA deference. This Court in reviewing the merits of those claims, must review them *de novo*.

The analysis is more difficult with regard to Petitioner's ineffective assistance of appellate counsel claim. The trial court reported that he denied that claim for procedural default as well. (Shiawassee Cnty. Cir. Ct. Order, ECF No. 21-11, PageID.1067–1068) ("Defendant now presents his motion on numerous grounds: . . . (7) ineffective assistance of appellate counsel. The Court finds that Defendant's claims are

barred by procedural default."). But that does not make much sense. It is not that Petitioner failed to show cause and prejudice for failing to raise that claim, it is more that counsel could not really raise a claim of his own ineffectiveness on appeal.

Appellate counsel's ineffectiveness could not, as a practical matter, be raised by appellate counsel on direct appeal because that approach would require appellate counsel to raise the claims he thought were appropriate for appellate review and then raise a claim that his or her own assistance was ineffective for not raising other lesser, inadvertently omitted, or even meritless claims. Such a claim slides between the various bars to relief under the court rules because it is not a "ground[] for relief . . . which could have been raised on appeal . . . ." Mich. Ct. R. 6.508(D)(3). Of course, it is not the province of this Court to tell the Michigan courts how to interpret their own procedural rules. Indeed, the state court's interpretation binds this Court.

Accepting the state court's conclusion that Petitioner's ineffective assistance of appellate counsel claim is procedurally defaulted, the undersigned concludes that diving into the federal cause and prejudice analysis complicates the analysis even more. The more direct route to resolution is consideration of the merits. Again, that approach calls for *de novo* review of the ineffective assistance of appellate counsel claim.[25]

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[25] The same standard would apply if the Court followed the federal cause and prejudice analysis in response to the procedural default. In *McKinney v. Horton*, 826 F.App'x 468 (6th Cir. 2020),

K. Trial counsel was ineffective for failing to conduct an adequate investigation and present a complete defense (habeas ground IX)

Petitioner complains that his counsel rendered ineffective assistance because he failed to introduce "critical evidence"—pictures of Petitioner's identifying marks and tattoos, of which the victim did not take note—and failed to investigate the DNA evidence.

Over the course of Petitioner's motion for relief from judgment and related appeals, his original and amended petition in *Kares I*, and his original and amended petitions in this case, Petitioner has raised a number of claims regarding the ineffective assistance of counsel. Some of those claims are raised under the specific heading for ineffective assistance of counsel claims (in the amended petition in this case, habeas ground IX). One is raised as an add-on claim to another claim of error—the trial court erred in

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the Sixth Circuit concluded that the reviewing court should "consider petitioner's claim that ineffective assistance of appellate counsel constitutes cause to excuse his procedural default under *Strickland*, rather than deferring to the state trial court's application of this standard." *Id.* at 474 (citing *Willis v. Smith*, 351 F.3d 741, 745 (6th Cir. 2003) and *Hinkle v. Randle*, 271 F.3d 239, 245–46 (6th Cir. 2001)). To the extent the trial court resolved Petitioner's ineffective assistance of appellate counsel claims on the merits, as a claim independent of Petitioner's assertion of the ineffective assistance of appellate counsel as "cause" for the procedural default, double deference is owed to the state court's determinations. The Court's consideration of the issue yields the same result, whether review is *de novo* or doubly deferential: Petitioner's ineffective assistance of appellate counsel claim has no merit.

giving a CSC-III instruction and counsel was ineffective for failing to correct it.

1. Ineffective assistance of counsel claims specifically raised by Petitioner

In his amended petition in this case, as ground IX-ineffective assistance of trial counsel, Petitioner specifically raises two ineffective assistance of counsel claims: counsel failed to adequately investigate and present pictures of Petitioner's identifying marks and tattoos (Pet'r's Br., ECF No. 10-1, PageID.203–204); and counsel failed to investigate the DNA evidence (*Id.*).

Petitioner specifically raised additional ineffective assistance of trial counsel claims in the motion for relief from judgment in the trial court, the amended petition in *Kares I*, and the initial petition in this case—counsel failed to investigate the victim's use of controlled substances, her use of her cell phone at the time of the assault, the elicitation of testimony from other witnesses, (Pet., ECF No. 1-1, PageID.62–63), Petitioner's whereabouts prior to the alleged assault to discredit the victim's claim that he bought the victim a gift, (*Kares I*, No. 1:15-cv-992, Am. Pet., ECF No. 10, PageID.91), Petitioner's text exchanges with the victim, the possibility that the semen found on and in the victim was the result of a voluntary transfer from a days-old discarded vaginal condom in Petitioner's trash (Mot. for Relief from J., ECF No. 21-10, PageID.1023–1024). His failure to include these specific issues in his amended petition in this case

constitutes an abandonment of those issues.[26] The Court will not address them.

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[26] In *Braden v. United States*, 817 F.3d 926 (6th Cir. 2016), the court explained:

> "Generally, amended pleadings supersede original pleadings." *Hayward v. Cleveland Clinic Found.*, 759 F.3d 601, 617 (6th Cir. 2014). This rule applies to habeas petitions. *See Calhoun v. Bergh*, 769 F.3d 409, 410 (6th Cir. 2014)[,] *cert. denied sub nom.*[,] *Calhoun v. Booker*, —— U.S. ——, 135 S. Ct. 1403, 191 L. Ed. 2d 374 (2015). However, we have recognized exceptions to this rule where a party evinces an intent for the amended pleading to supplement rather than supersede the original pleading, *see Clark v. Johnston*, 413 F. App'x 804, 811–12 (6th Cir. 2011), and where a party is forced to amend a pleading by court order. *See Hayward*, 759 F.3d at 617–18; *but cf. Grubbs v. Smith*, 86 F.2d 275, 275 (6th Cir. 1936) (concluding that regardless of the party's intentions, an "amended and substituted petition" superseded, as a matter of law, the first petition and the first amended petition where the district court had directed the party to combine its first petition and first amended petition into one document). An amended pleading supersedes a former pleading if the amended pleading "is complete in itself and does not refer to or adopt a former pleading [.]" *Shreve v. Franklin Cty., Ohio*, 743 F.3d 126, 131 (6th Cir. 2014) (quoting 61B Am. Jur. 2d Pleading § 789).

Braden, 817 F.3d at 930 (footnote omitted). Here, the Court permitted Petitioner to file an amended petition on his motion. The Court specifically directed Petitioner that "**the amended petition [would] take the place of the original petition**" and "**his amended petition should set forth *all* of the grounds for relief that he intends to raise in this action**." (Order, ECF No. 9, PageID.128) (emphasis in original). Accordingly, the undersigned concludes that Petitioner's decision to eliminate the claims he had raised previously constitutes a deliberate abandonment of them.

a. identifying marks and tattoos

The trial court resolved Petitioner's ineffective assistance of trial counsel claim relating to the identifying marks and tattoos as follows:

> Defendant next argues that he has identifying marks on his body of which the victim was unaware and that trial counsel was therefore ineffective for failing to introduce evidence of this fact. The record does not support this argument.
>
> Trial counsel cross-examined the victim as to the presence or absence of tattoos on Defendant's body. The victim testified that she saw tattoos on the Defendant when he took off his shirt, but that she could not remember them exactly. Trial counsel also asked the victim if she remembered seeing tattoos on Defendant's thigh. The victim testified that she believed he had no tattoos on his thigh. In his closing, trial counsel argued that the victim's inability to identify distinguishing features on Defendant's naked body supported a finding of reasonable doubt. Defendants claims that trial counsel did not present this evidence are unfounded.

(Shiawassee Cnty. Cir. Ct. Order, ECF No. 21-11, PageID.1068–1069.) The trial court concluded its analysis of this claim with the following:

> Trial counsel presented to the jury each of the matters which Defendant now claims were not presented. "Defendant has simply failed to

> overcome the strong presumption that trial counsel's performance was strategic. Nor can we conclude that, but for counsel's alleged errors, the result of defendant's trial would have been different." . . . The Court finds that Defendant has not established the incompetence of trial counsel or prejudice suffered as a result of unprofessional errors, as required by *Strickland v. Washington*, 466 US 668, 688 (1984).

(Shiawassee Cnty. Cir. Ct. Order, ECF No. 21-11, PageID.1069–1070.)

The court's description of the victim's testimony is accurate (Trial Tr. I, ECF No. 21-5, PageID.625–626, 633–634.) The trial court's description of counsel's closing argument is also accurate. Counsel argued that his client testified that he had "large tattoos all over his body, and below his belt area." (Trial Tr. III, ECF No. 21-7, PageID.886.)

But counsel failed to ever ask his client if he had a tattoo. (Trial Tr. II, ECF No. 21-6, PageID.799–836.) No witness ever testified that Petitioner had a tattoo, large or small, below his belt area. Petitioner supplied an affidavit three years after his trial indicating that he has a large tattoo of a "dreamcatcher" on his thigh. (Pet'r's Affid., ECF No. 10-2, PageID.231.) The Offender Tracking Information System confirms that Petitioner has a "Tribal" tattoo on his left thigh. *See* https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=261586 (visited Feb. 2, 2021).

Although this claim is subject to *de novo* review, the undersigned concludes that the trial court's

analysis of whether counsel's performance was professionally reasonable is an unreasonable application of *Strickland*. The trial court's suggestion that counsel's approach may have been strategic is inexplicable. It might be reasonable to not offer pictures of the tattoos, but it was patently unreasonable for counsel to argue that Petitioner had testified he had large tattoos when Petitioner never so testified and counsel never asked Petitioner or any other witness who could confirm the presence of the tattoos. In light of counsel's closing argument, it appears the omission was inadvertent; but whether inadvertent or intentional, the omission is unreasonable on this record.

The undersigned's conclusion regarding the unreasonableness of counsel's performance on the first prong of *Strickland* does not carry over to the second prong. With regard to the prejudice prong of the *Strickland* test, the Court explained "[t]he 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 undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The prejudice prong "focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). Therefore, the prejudice inquiry must not focus solely on mere outcome determination; attention must be given to "whether the result of the proceeding was fundamentally unfair or unreliable . . . ." *Id.* at 369.

The undersigned concludes that counsel's error did not undermine confidence in the outcome. As the Sixth Circuit noted in *Hodge v. Hurley*, 426 F.3d 368 (6th Cir. 2005):

> A court applying *Strickland*'s prejudice prong "must consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Accordingly, the prejudice determination is necessarily affected by the quantity and quality of other evidence against the defendant. In particular, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id*. at 696.

Hodge, 426 F.3d at 376 n.17. If this case were simply a "he said/she said" credibility contest, Petitioner's contention that a rape victim should remember the body art of a person who forcibly penetrates her mouth and vagina with his penis might be more persuasive. When Petitioner's semen is found in the victim's vagina, however, the importance of that point fades quickly.

The jury clearly found the DNA evidence of singular importance in reaching its verdict. The testimony of the victim supported the penile/oral penetration as strongly as it supported the penile/vaginal penetration; but the jury found Petitioner guilty of only the penile/vaginal penetration. The very obvious difference in proof regarding those penetrations was the absence of DNA evidence in the victim's mouth. Under those circumstances, the undersigned concludes that Petitioner has failed to show that the result was

unfair or unreliable because counsel did not provide evidentiary support for Petitioner's tattoo argument.

b. counsel failed to investigate DNA evidence

Petitioner also claims that trial counsel failed to investigate "DNA evidence." Petitioner refers the Court to his affidavit for additional information about this claim. (Pet'r's Br., ECF No. 10-1, PageID.203.) The affidavit explains further that Petitioner's counsel failed "to investigate into the presen[c]e of any foreign substances within the DNA sample to establish that it was a transfer from another object." (Affid., ECF No. 10-2, PageID.231.) This argument, therefore, does not relate to the bedding or the untested swabs or smears. The argument relates to Petitioner's contention that the victim herself deposited Petitioner's semen in her vagina by transferring it from a used female condom that Petitioner reports was thrown in his bathroom trash a few days before the alleged criminal sexual conduct.

Petitioner's claim that counsel did nothing to investigate Petitioner's semen transfer claim is unsupported in the record. Counsel was plainly aware of Petitioner's theory. Counsel asked forensic scientist Campbell if she tested the items collected from the victim for "any other substances, lubricant, spermicides, or anything like that?" (Trial Tr. II, ECF No. 21-6, PageID.735.) She said no. (*Id*.) Similarly, counsel asked forensic scientist Bruski, "Was there any testing of foreign substances in the sampling that was given to you? I mean did you test for anything else, foreign substances?" (*Id*., PageID.763.) She also said no. (*Id*., PageID.763–764.) Counsel specifically

explored with scientist Bruski the possibility of semen transfer from a vaginal condom. (*Id.*, PageID.764–765.) She testified that if semen were transferred from a vaginal condom, you would expect to see DNA carryover from that third person. (*Id.*) There was no such carryover in the samples tested by scientist Bruski. (*Id.*)

Moreover, there is nothing in the record that forecloses the possibility that counsel in fact investigated the presence of foreign substances through the expert hired to conduct independent testing. It may be that such testing was conducted and it did not support Petitioner's claim. It may be that such testing was not conducted because the prospect of no test results—and no actual tests by the prosecutor's experts to rule out the possibility—put Petitioner in a better position to argue reasonable doubt.

In any event, Petitioner has failed to show that counsel did not investigate the claim. Counsel certainly explored the issue with the government's experts, and he had planted a seed of doubt as to whether the samples might have revealed foreign substances if only they had been thoroughly tested. Counsel was able to argue that absent such testing there was reasonable doubt.

Unfortunately, Petitioner's argument regarding the victim's transfer of Petitioner's semen into her own vagina by inserting a days-old, discarded, used vaginal condom, was far-fetched. If that actually happened, the third party's DNA should have shown up in the samples and it did not. The flaw was in Petitioner's theory, not his counsel's performance. Based on the record before the Court, it appears counsel did

the best that he could with an unconvincing theory. Therefore, Petitioner has failed to show that counsel's performance was professionally unreasonable.

2. Counsel's request for the CSC-III instruction

As explained above in connection with Petitioner's base claim that the court erred in providing the CSC-III instruction, *see* § IV. E., above, there may be strategic reasons to forego a lesser-included offense instruction—the "all or nothing" strategy—or to seek a lesser-included offense instruction—the "third option" strategy. The Supreme Court in *Keeble* explained that the theory of "all or nothing" may not work: "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." *Keeble*, 412 U.S. at 212–13.

In Petitioner's case, the DNA evidence was compelling. Petitioner's semen was identified on cervical swabs taken from the victim. Counsel might understandably have concluded that the jury would find Petitioner "guilty of some offense." Moreover, the CSC-III offense offered significant potential for a lower minimum sentence than the CSC-I offense. The CSC-III minimum range was 9 years, 9 months, to 22 years, 8 months. (Plea Hr'g Tr., ECF No. 21-2, PageID.376.) The CSC-I minimum range was 22 years, 6 months, to 75 years. (*Id.*) The "third option" strategy was inherently reasonable under the circumstances. Therefore, Petitioner has failed to show that counsel's active seeking of the CSC-III instruction was professionally unreasonable. Petitioner is not entitled to habeas relief on this ineffective assistance claim.

L. Appellate counsel was ineffective by failing to raise meritorious issues on direct appeal resulting in prejudice to Petitioner's appeal (habeas ground X)

Petitioner has also raised many claims that appellate counsel rendered ineffective assistance because he failed to raise claim on Petitioner's direct appeal. The Court will not address every claim Petitioner has raised in the state court, in *Kares I*, or in his initial petition in this case. In his brief supporting the amended petition in this case, Petitioner states: "[Petitioner] has presented numerous issues herein that his Appellate Counsel failed to include[] within his direct appeal." (Pet'r's Br., ECF No. 10-1, PageID.205.) Accordingly, the Court will limit its analysis to claims that fit that description: claims that appellate counsel did not raise on appeal and that Petitioner raised in his amended petition.

The *Strickland* standard applies to ineffective assistance of counsel claims directed to the conduct of appellate counsel as well. But that which is professionally reasonable for appellate counsel may be different than that which is professionally reasonable for trial counsel. An appellant has no constitutional right to have every non-frivolous issue raised on appeal. "'[W]innowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983)). To require appellate counsel to raise every possible colorable issue "would interfere with the constitutionally protected independence of

counsel and restrict the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. As the Supreme Court has observed, it is difficult to demonstrate that an appellate attorney has violated the performance prong where the attorney presents one argument on appeal rather than another. *Smith v. Robbins*, 528 U.S. 259, 287–88 (2000). In such cases, the petitioner must demonstrate that the issue not presented "was clearly stronger than issues that counsel did present." *Id.* at 288. Moreover, if the argument appellate counsel failed to raise was meritless, the failure cannot be ineffective assistance of counsel. "Omitting meritless arguments is neither professionally unreasonable nor prejudicial." *Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013).

1. Hearsay/Confrontation (habeas ground I)

Appellate counsel raised the hearsay issue on direct appeal. Counsel did not specifically mention the potential Confrontation Clause violation. But, as noted above, Petitioner's Confrontation Clause argument is meritless because the victim, who uttered the out-of-court statement repeated by the SANE, testified at trial. Accordingly, Petitioner cannot establish either *Strickland* prong.

2. Sentence Guideline Scoring issues (habeas ground II)

Appellate counsel raised issues regarding the scoring of Offense Variables 3, 8, and 10. So counsel cannot be accused of ineffectiveness for failing to challenge the scoring of those variables.

Counsel did not raise the *Alleyne* judge-found facts issue. But Petitioner did not raise the ineffective assistance of appellate counsel based on failure to raise the *Alleyne* issue until he filed his Michigan Court of Appeals application for leave to appeal the denial of his motion for relief from judgment. That issue, therefore, remains unexhausted. Moreover, there is no remedy that remains in the state courts. Therefore, to continue with the issue in this Court, Petitioner must demonstrate cause for his failure to exhaust the issue in the state courts. Petitioner's failure to exhaust follows from his failure to raise the issue in his *pro per* motion for relief from judgment or in a procedurally appropriate manner in his subsequent appeals. He offers no cause for those failures. Accordingly, the doctrine of procedural default precludes the Court's consideration of his ineffective assistance of counsel claim based on *Alleyne* the same way it precludes the Court's consideration of the *Alleyne* issue in the first instance.

Counsel did not raise the "acquitted conduct" issue on appeal. That failure, however, was not professionally unreasonable. *Watts*, on the federal level, and *Ewing*, on the state level supported counsel's decision to not pursue such a claim at the time of Petitioner's appeal. Thus, the failure to raise the issue was not professionally unreasonable. As with the *Alleyne* issue, however, Petitioner has not exhausted this claim—he did not raise it in his *pro per* motion for relief from judgment. He no longer has a remedy. The failure to exhaust is not attributable to counsel—it is Petitioner's fault. So there is no cause for the failure and procedural default bars this claim.

Counsel did not raise the "inaccurate information" claim with regard to Offense Variable 19. Petitioner raised it in his motion for relief from judgment. For the reasons stated above, the issue is meritless. Therefore, it was not professionally unreasonable for counsel to fail to raise it, nor was it prejudicial.

Petitioner alleges additional straightforward guidelines scoring error claims with regard to PRV 7, OV 11, and OV 13. The trial court scored PRV 7 at 20 points for Petitioner's commission of two subsequent felonies. Mich. Comp. Laws § 777.57. The guideline calls for scoring felonies committed after the sentencing offense was committed. Petitioner was convicted of escape and resisting a police officer as set forth above. He complains because there are consecutive sentence implications from those convictions; but the statutory limitation on scoring convictions with mandatory consecutive sentences applies to concurrent felonies, not subsequent felonies. Counsel's failure to raise this frivolous issue was neither professionally unreasonable nor prejudicial.

Offense Variable 11 is the multiple penetration variable. For the reasons set forth above, the points scored for multiple penetrations were appropriate under the guideline and well-supported by the record. Appellate counsel's failure to challenge the scoring on appeal was neither professionally unreasonable nor prejudicial.

Offense Variable 13 relates to a pattern of criminal activity. As explained above, Petitioner's complaint regarding the scoring of this variable shifted focus every time he raised it. Whatever claim he intends to raise on habeas review is unexhausted and no

remedy remains. Any ineffective assistance of counsel claim based on the shifting sands of Petitioner's argument is likewise unexhausted and procedurally defaulted. Petitioner's failure to exhaust is his fault, not counsel's. Accordingly, there is no cause that would permit the court to overlook Petitioner's procedural default of this issue.

3. The CSC-III lesser-included offense instruction (habeas ground III)

For the reasons stated above, it was not error for the court to give the instruction and it was not ineffective assistance for counsel to request it. Appellate counsel's failure to raise those meritless claims is neither professionally unreasonable nor prejudicial.

4. The trial court's failure to find cause and prejudice on Petitioner's motion for relief from judgment (habeas ground IV)

The trial court's alleged failures in resolving Petitioner's motion for relief from judgment had not occurred yet when counsel represented Petitioner on appeal. Therefore, counsel's failures to raise those issues on appeal was neither professionally unreasonable nor prejudicial.

5. The prosecutor's misrepresentation of DNA evidence to the jury (habeas ground VI)

The prosecutor did not misrepresent DNA evidence to the jury. Counsel's failure to raise that issue

on appeal was, therefore, neither professionally unreasonable nor prejudicial.

6. The prosecutor's suppression of exculpatory evidence (habeas ground VI)

The prosecutor did not suppress exculpatory evidence. Counsel's failure to raise that issue on appeal was, therefore, neither professionally unreasonable nor prejudicial.

7. The prosecutor's failure to produce endorsed res gestae witnesses (habeas ground VII)

The prosecutor was not required to produce endorsed res gestae witnesses. Counsel's failure to raise that issue on appeal was, therefore, neither professionally unreasonable nor prejudicial.

8. The prosecutor's notice of the habitual offender sentence enhancement (habeas ground VIII)

Petitioner had all appropriate notice of the habitual offender sentence enhancement and all CSC charges. Counsel's failure to raise that issue was, therefore, neither professionally unreasonable nor prejudicial.

9. Ineffective assistance of trial counsel (habeas ground IX)

Trial counsel did not render ineffective assistance. Counsel's failure to raise those issues were, therefore, neither professionally unreasonable nor prejudicial.

10. The trial court's denial of postconviction DNA testing (habeas ground XI)

The trial court did not deny Petitioner's request for postconviction DNA testing until after Petitioner's direct appeal had been finally resolved. Counsel could not raise the issue before it happened. Any failure to raise the issue, therefore, was neither professionally unreasonable nor prejudicial.

Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, I have examined each of Petitioner's claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this

standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

Because the tolling effect of Petitioner's motion for DNA testing is an issue of first impression in the Sixth Circuit, reasonable jurists could conclude that the Court's dismissal of Petitioner's claims as untimely is debatable or wrong. I recommend that the Court grant a certificate of appealability on that issue.

With regard to the merits of Petitioner's claims, however, I find that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims would be debatable or wrong. Therefore, I recommend that the Court deny Petitioner a certificate of appealability as to all other issues.

Moreover, although I conclude that Petitioner has failed to demonstrate that he is in custody in violation of the constitution and has failed to make a substantial showing of a denial of a constitutional right, because of the tolling issue, I would not conclude that any issue Petitioner might raise on appeal would be frivolous. *Coppedge v. United States*, 369 U.S. 438, 445 (1962). Absent that issue, however, I would conclude that any issue Petitioner might raise on appeal would be frivolous.

Recommended Disposition

For the foregoing reasons, I recommend that the habeas corpus petition be denied. I further recommend that a certificate of appealability be denied with regard to all issues except the issue regarding the tolling impact of Petitioner's postconviction motion for

DNA testing. Finally, I recommend that the Court not certify that an appeal would not be taken in good faith because of the tolling issue. Nonetheless, if the Court were to bypass the timeliness issue and dismiss the petition because it has no merit, I would conclude that any issue Petitioner might raise on appeal would be frivolous.

Dated: April 23, 2021 /s/ *Maarten Vermaat*
Maarten Vermaat
United States Magistrate Judge

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within 14 days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

STEPHEN JOHN KARES,

Petitioner,

CASE NO. 2:19-CV-7

v.

HON. ROBERT J. JONKER

CONNIE HORTON,

Respondent.
_____/

ORDER REGARDING
REPORT AND RECOMMENDATION

The Court has reviewed Magistrate Judge Vermaat's Report and Recommendation in this matter (ECF No. 11) and Petitioner's Objection to it (ECF Nos. 12 & 13). Under the Federal Rules of Civil Procedure, where, as here, a party has objected to portions of a Report and Recommendation, "[t]he district judge . . . has a duty to reject the magistrate judge's recommendation unless, on de novo reconsideration, he or she finds it justified." 12 WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3070.2, at 451 (3d ed. 2014). Specifically, the Rules provide that:

> The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district

> judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

FED R. CIV. P. 72(b)(3). De novo review in these circumstances requires at least a review of the evidence before the Magistrate Judge. *Hill v. Duriron Co.*, 656 F.2d 1208, 1215 (6th Cir. 1981).

The Magistrate Judge concluded that Petitioner's habeas petition was untimely under AEDPA's one-year statute of limitations. In brief, the Magistrate Judge observed that the Michigan Supreme Court denied Petitioner leave to file an appeal of his state court criminal case on September 5, 2014 and then denied Petitioner's motion for reconsideration on September 29, 2014. The one-year limitations period began to run on December 29, 2014, ninety days later. On September 26, 2015 (when there were 94 days remaining in the limitations period) Petitioner filed a motion for relief from judgment in the State trial court. The Magistrate Judge found the statute of limitations was tolled while those proceedings were pending, and that it began to run again after the Michigan Supreme Court denied Petitioner's motion for leave to appeal on December 27, 2017. The Magistrate Judge concluded the 94 days expired on April 2, 2018, roughly eight months before Petitioner filed his habeas petition. On that basis, the Magistrate Judge recommended this Court dismiss the habeas petition as time-barred.

Petitioner's Objection argues the statute of limitations was tolled again on February 12, 2018 (before the statute had run) when the trial court denied Petitioner the further relief he sought in that court.

Petitioner asserts he then pursued that denial to the Michigan Supreme Court and that court subsequently denied the motion on April 2, 2019. By then, however, he had filed the instant habeas petition. All this is new information that was not available to the Magistrate Judge. Petitioner should have submitted it originally, but the Court is reluctant to have a time-bar dismissal on what would amount to a forfeiture theory, especially where Petitioner's initial opportunity to address the Magistrate Judge's specific concern arose after the Magistrate Judge spelled it out in the Rule 4 Report and Recommendation.

With respect to Petitioner's claim, it is plain that the mere filing of additional post-conviction motions does not always toll the statute of limitations. *See, e.g., Williams v. Birkett*, 670 F.3d 729, 733 (6th Cir. 2012) (holding that a second motion for relief from judgment that does not meet the limited exceptions of Mich. Ct. R. 6.502(G)(1) is not "properly filed" under Section 2244(d)(2) and does not toll the statute of limitations). Here the grounds for the trial court's February 12, 2018 denial is not clear from the available record. This Court, however, has received courtesy copies of the public records directly from the State court relating to Petitioner's criminal case. Those records reflect that on February 5, 2018 Petitioner filed a motion for DNA testing and for a new trial under MICH. COMP. LAWS § 770.16. The trial court then denied that motion in a February 12, 2018 Opinion and Order. The question, then, is whether Defendant's motion for DNA testing under MICH. COMP. LAWS § 770.16 tolls AEDPA's statute of limitations in Section 2244(d)(2). To the Court's knowledge, no court has considered the issue with respect to the Michigan statute.

Those courts that have considered other statutes have split on the matter. Whether a state statute providing for post-conviction DNA testing serves to toll the statute of limitations appears to be highly dependent on the scope of available relief the statute provides. Those statutes providing for discovery only generally conclude that a post-conviction motion for DNA testing does not toll the AEDPA statute of limitations. *See Brown v. Sec'y for the Dep't of Corr.*, 530 F.3d 1335 (11th Cir. 2008); *see also Woodward v. Cline*, 693 F.3d 1289 (10th Cir. 2012); *Price v. Pierce*, 617 F.3d 947 (7th Cir. 2010). On the other hand, where the discovery may ultimately result in judicial review of the judgment based on the test results, courts have found that a state statute does toll AEDPA's statute of limitations. *See Hutson v. Quarterman*, 508 F.3d 236, 238–39 (5th Cir. 2007)*; McDonald v. Smith*, 2003 WL 22284131 (E.D. N.Y. 2003) , *aff'd*, 134 F. App'x 466 (2d Cir. 2005) ("Motions pursuant to [New York's DNA testing statute] are motions to vacate and, therefore, challenge the conviction[.]").

Petitioner arguably is entitled to statutory tolling of the limitations period during both the pendency of his first motion for relief from judgment, and his motion for biological testing. *See* 28 U.S.C. § 2244(d)(2). Based on the undeveloped record of this case, the new information in Petitioner's Objections, and the above authority, the Court cannot concluded that "it plainly appears from the face of the petition . . . that the petitioner is not entitled to relief[.]" Rule 4, Rules Governing § 2254 Cases; *see* 28 U.S.C. § 2243. The Michigan DNA statute may, or may not, serve to toll AEDPA's statute of limitations. The Court is satisfied the parties should have an opportunity to litigate the matter

on a more fully developed record. Given this decision, the Court need not address at this time Petitioner's second objection that his alleged actual innocence serves to excuse him from the statute of limitations or whether a certificate of appealability should issue.

ACCORDINGLY, IT IS ORDERED that Respondent shall file an answer or other pleading with respect to the petition for a writ of habeas corpus filed by the Petitioner herein within **one hundred eighty (180) days** of the entry of this Order. No extensions of time will be granted.

The answer of the Respondent shall comply with the requirements of Rule 5 of Rules Governing Section 2254 Cases in the United States District Courts. Along with any other argument that Respondent deems necessary, the Respondent shall address the question of whether Petitioner is entitled to statutory tolling of the AEDPA statute of limitations under MICH. COMP. LAWS § 770.16, including how that might affect any exhaustion analysis. Respondent is further notified that the failure to raise affirmative defenses in the first responsive pleading may constitute a waiver of such defenses. *See* FED. R. CIV. P. 8(c). Petitioner may submit a reply to the Respondent's answer within **forty-two (42) days** after the answer is filed. Rule 5(e) of Rules Governing Section 2254 Cases.

The Clerk of the Court shall serve one copy of the petition and amended petition, and this Order by regular mail on the Respondent and one copy by certified mail on the Attorney General of the State of Michigan.

IT IS FURTHER ORDERED that the Magistrate Judge's Report and Recommendation (ECF No.

11) is **REJECTED** in so far as it recommends dismissing the habeas petition as untimely.

Date: July 30, 2019 /s/ Robert J. Jonker
ROBERT J. JONKER
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

STEPHEN JOHN KARES,
Petitioner,

v. Case No. 2:19-cv-7
Honorable Robert J. Jonker

CONNIE HORTON,
Respondent.
_____/

REPORT AND RECOMMENDATION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing § 2254 Cases; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to "screen out" petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). The Court may *sua sponte* dismiss a habeas action as time-barred under 28 U.S.C. § 2244(d). *Day v. McDonough,*

547 U.S. 198, 209 (2006). After undertaking the review required by Rule 4, I conclude that the petition is barred by the one-year statute of limitations.

Discussion

I. Factual Allegations

Petitioner Stephen John Kares is incarcerated with the Michigan Department of Corrections at the Chippewa Correctional Facility (URF) in Chippewa County, Michigan. Following a jury trial in the Shiawassee County Circuit Court, Petitioner was convicted of third-degree criminal sexual conduct, in violation of Mich. Comp. Laws § 750.520d(1)(b). On September 28, 2012, the court sentenced Petitioner as a fourth-offense habitual offender, Mich. Comp. Laws § 769.12, to a prison term of 25 years to 58 years and 4 months.

Petitioner appealed his conviction and sentence to both the Michigan Court of Appeals and the Michigan Supreme Court. Those courts denied leave to appeal on March 21, 2014, and September 5, 2014, respectively.

Petitioner filed a motion for relief from judgment in the Shiawassee Circuit Court on September 26, 2015.[1] The court denied Petitioner's motion on November 2, 2015. Petitioner appealed that decision to

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[1] Petitioner alleges that he filed the motion on September 26, 2015 (Am. Pet., ECF No. 10, PageID.132), but the state court docket sheet shows that he filed it on October 20, 2015. (*See* 35th Circuit Court Register of Actions, ECF No. 1-2, PageID.99.) For purposes of this Report and Recommendation, I will give Petitioner the benefit of the earlier filing date.

the Michigan Court of Appeals and the Michigan Supreme Court, which denied leave to appeal on September 27, 2016, and December 27, 2017, respectively.

Petitioner filed his habeas corpus petition in this Court on or around December 21, 2018. Under Sixth Circuit precedent, the application is deemed filed when handed to prison authorities for mailing to the federal court. *Cook v. Stegall*, 295 F.3d 517, 521 (6th Cir. 2002). Petitioner signed his application on December 21, 2018. (Pet., ECF No. 1, PageID.9.) The petition was received by the Court on January 9, 2019. For purposes of this Report and Recommendation, I have given Petitioner the benefit of the earliest possible filing date. *See Brand v. Motley*, 526 F.3d 921, 925 (6th Cir. 2008) (holding that the date the prisoner signs the document is deemed under Sixth Circuit law to be the date of handing to officials) (citing *Goins v. Saunders*, 206 F. App'x 497, 498 n.1 (6th Cir. 2006)).

II. Statute of Limitations

Petitioner's application is barred by the one-year statute of limitations provided in 28 U.S.C. § 2244(d)(1), which became effective on April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA). Section 2244(d)(1) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1).

Petitioner had one year from December 29, 2014, in which to file his habeas application. Petitioner filed his application on December 21, 2018. Obviously, he filed more than one year after the period of limitations began to run. Thus, absent tolling, his application is time-barred.

The running of the statute of limitations is tolled when "a properly filed application for State post-conviction or other collateral review with respect to the

pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); *see also Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (limiting the tolling provision to only State, and not Federal, processes); *Artuz v. Bennett*, 531 U.S. 4, 8 (2000) (defining "properly filed"). Petitioner filed a motion for relief from judgment in state court on or around September 26, 2015, when there were 94 days remaining in the limitations period. That motion tolled the limitations period for as long as it remained "pending" before the trial court and on appeal. *See Lawrence v. Florida*, 549 U.S. 327, 332 (2007) (holding that § 2244(d)(2) tolls the statute of limitations from the filing of an application for state post-conviction or other collateral relief until a decision is issued by the state supreme court). The trial court denied the motion and Petitioner appealed that decision all the way to the Michigan Supreme Court. The Michigan Supreme Court denied leave to appeal on December 27, 2017. Consequently, the statute of limitations began to run again after that date and expired 94 days later, on Monday, April 2, 2018. Thus, even with the benefit of tolling under § 2244(d)(2), Petitioner's application is more than eight months late.

The one-year limitations period applicable to § 2254 is also subject to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 645 (2010); *Akrawi v. Booker*, 572 F.3d 252, 260 (6th Cir. 2009); *Keenan v. Bagley*, 400 F.3d 417, 420 (6th Cir. 2005). A petitioner bears the burden of showing that he is entitled to equitable tolling. *See Keenan*, 400 F.3d at 420; *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004). The Sixth Circuit repeatedly has cautioned that equitable tolling should be applied "sparingly" by this Court. *See, e.g., Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 749 (6th

Cir. 2011); *Robertson v. Simpson*, 624 F.3d 781, 784 (6th Cir. 2010); *Sherwood v. Prelesnik*, 579 F.3d 581, 588 (6th Cir. 2009). A petitioner seeking equitable tolling of the habeas statute of limitations has the burden of establishing two elements: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Holland*, 560 U.S. at 649 (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *Lawrence v. Florida*, 549 U.S. 327, 335 (2007); *Hall*, 662 F.3d at 750; *Akrawi*, 572 F.3d at 260.

Petitioner has failed to raise equitable tolling or to allege any facts or circumstances that would warrant its application in this case. The fact that Petitioner is untrained in the law, was proceeding without a lawyer, or may have been unaware of the statute of limitations for a certain period does not warrant tolling. *See Allen*, 366 F.3d at 403-04; *see also Craig v. White*, 227 F. App'x 480, 482 (6th Cir. 2007); *Harvey v. Jones*, 179 F. App'x 294, 299-300 (6th Cir. 2006); *Martin v. Hurley*, 150 F. App'x 513, 516 (6th Cir. 2005); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999) ("[I]gnorance of the law, even for an incarcerated *pro se* petitioner, generally does not excuse [late] filing.").

Here, Petitioner cannot even claim that he was unaware of the statute of limitations because this Court previously informed him of it. In 2015, Petitioner filed a habeas petition in this Court challenging the same judgment of sentence that is at issue in the instant case. *See Kares v. Trierweiler*, No. 1:15-cv-992 (W.D. Mich.). The Court dismissed the action without prejudice because Petitioner had not yet exhausted

his state-court remedies by appealing the denial of his motion for relief from judgment. In its opinion dismissing the case, the Court told Petitioner that he had approximately 90 days remaining in the statute of limitations period, and that if he "diligently pursues his state-court remedies and promptly returns to this Court after the Michigan Supreme Court issues its decision, he is not in danger of running afoul of the statute of limitations." (1:15-cv-992, ECF No. 11, PageID.108.) Notwithstanding the Court's notice of the time remaining in his period of limitations, Petitioner did not return to this Court promptly after the Michigan Supreme Court issued its decision. Thus, Petitioner is not entitled to equitable tolling of the statute of limitations.

In *McQuiggin v. Perkins*, 569 U.S. 383, 391-93 (2013), the Supreme Court held that a habeas petitioner who can show actual innocence under the rigorous standard of *Schlup v. Delo*, 513 U.S. 298 (1995), is excused from the procedural bar of the statute of limitations under the miscarriage-of-justice exception. In order to make a showing of actual innocence under *Schlup*, a Petitioner must present new evidence showing that "'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" *McQuiggin*, 569 U.S. at 399 (quoting *Schlup*, 513 U.S. at 329 (addressing actual innocence as an exception to procedural default)). Because actual innocence provides an exception to the statute of limitations rather than a basis for equitable tolling, a petitioner who can make a showing of actual innocence need not demonstrate reasonable diligence in bringing his claim, though a court may consider the timing of the claim in

determining the credibility of the evidence of actual innocence. *Id.* at 399-400.

In the instant case, Petitioner suggests that he is actually innocent, but he fails to offer new evidence of his innocence, let alone evidence that makes it more likely than not that no reasonable jury would have convicted him. *Schlup*, 513 U.S. at 329. Because Petitioner has wholly failed to provide evidence of his actual innocence, he is not excused from the statute of limitations under 28 U.S.C. § 2244(d)(1). His habeas petition therefore is time-barred.

The Supreme Court has directed the District Court to give fair notice and an adequate opportunity to be heard before dismissal of a petition on statute of limitations grounds. *See Day,* 547 U.S. at 210. This report and recommendation shall therefore serve as notice that the District Court may dismiss Petitioner's application for habeas corpus relief as time-barred. The opportunity to file objections to this report and recommendation constitutes Petitioner's opportunity to be heard by the District Judge.

III. Certificate of appealability

Even though I have concluded that Petitioner's habeas petition should be denied, under 28 U.S.C. § 2253(c)(2), the Court must also determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466, 467 (6th Cir. 2001) (per curiam). Rather,

the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.*

I have concluded that Petitioner's application is untimely and, thus, barred by the statute of limitations. Under *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), when a habeas petition is denied on procedural grounds, a certificate of appealability may issue only "when the prisoner shows, at least, [1] that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and [2] that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Both showings must be made to warrant the grant of a certificate. *Id*.

I find that reasonable jurists could not find it debatable whether Petitioner's application was timely. Therefore, I recommend that a certificate of appealability should be denied.

Recommended Disposition

For the foregoing reasons, I recommend that the habeas corpus petition be denied because it is barred by the one-year statute of limitations. I further recommend that a certificate of appealability be denied.

Date: June 25, 2019 ***/s/ Maarten Vermaat***
MAARTEN VERMAAT
U.S. MAGISTRATE JUDGE

NOTICE TO PARTIES

Any objections to this Report and Recommendation must be filed and served within 14 days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to file timely objections may constitute a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *see Thomas v. Arn*, 474 U.S. 140 (1985).

Order

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

April 2, 2019

158616 & (10)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v SC: 158616
COA: 342746
Shiawassee CC: 12-003104-FC

STEPHEN JOHN KARES,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the August 29, 2018 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be

reviewed by this Court. The motion to remand is DENIED.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 2, 2019 *Larry S. Royster*
Clerk

Court of Appeals, State of Michigan
ORDER

Patrick M. Meter
Presiding Judge

Michael J. Kelly

Brock A. Swartzle
Judges

People of MI v Stephen John Kares

Docket No. 342746

LC No. 12-003104-FC

The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this case only.

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

AUG 29 2018 *Jerome W. Zimmer Jr.*
Clerk

STATE OF MICHIGAN
IN THE 35TH CIRCUIT COURT FOR
SHIAWASSEE COUNTY

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff, Case No. 12-3104-FH
Hon. Matthew J. Stewart

v

STEPHEN KARES,

Defendant.

Opinion & Order

DENYING DEFENDANT'S MOTION FOR TESTING OF BIOLOGICAL MATERIAL

This case comes before the Court on Defendant's Motion for Testing of Biological Material.

For the reasons stated in this Opinion, the Court denies the motion. The motion is denied without oral argument under MCR 2.119(E)(3) because oral argument would not assist the Court with its deliberations.

A jury convicted Defendant of Criminal Sexual Conduct, 3rd degree, MCL 750.250. Defendant now seeks DNA testing of biological material pursuant to MCL 770.16. Defendant's conviction occurred after January 8, 2001. Thus, MCL 770.16(1) requires him to establish all of the following:

> (a) That DNA testing was done in the case or under this act.
>
> (b) That the results of the testing were inconclusive.
>
> (c) That testing with current DNA technology is likely to result in conclusive results.[1]

Defendant's motion does not address any of these three prongs. Defendant claims that "the Prosecution introduced forensic evidence" against him, but does not identify whether it was specifically DNA evidence. Defendant's motion contains no argument that the results were inconclusive. Nor does Defendant claim that current testing would yield a conclusive result.

Accordingly, has not shown that he qualifies to petition this Court to order DNA testing. Even if the Court overlooks this first phase of the analysis, Defendant's motion does not prevail. In a motion under MCL 770.16, the Court *shall* order DNA testing if the Defendant meets specific requirements.

First, he must present prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction. MCL 770.16(4)(a). The Defendant must also provide clear and convincing evidence that establishes by clear and convincing evidence that: (1) biological material is available for DNA testing; (2) that it was not previously tested or will be subject to testing

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[1] Defendants convicted prior to January 8, 2001, need not make this showing.

technology not available at the time of conviction and; (3) the identity of the defendant as the perpetrator of the crime was at issue during his trial. MCL 770.16(4)(b).

As to these first two prongs, Defendant's motion establishes only that investigators collected biological material during the investigation of this crime. Defendant attached two exhibits to his motion. The first exhibit purportedly identifies items of biological material collected from the victim during the investigation. This exhibit does not establish that the material is still available for testing, that it went untested at the time of trial, or that it could be subject to more sophisticated testing protocols.

Defendant's second exhibit is an excerpt from a police report. Defendant cites this as evidence that investigators seized items of bedding from his residence. The bedding itself is not biological material, and so does not satisfy the first prong of the test. Defendant's motion claims - but again does not support - that it was not tested prior to his conviction.

Defendant's motion makes no argument on the third prong of the test, that his identity as the perpetrator was at issue during the trial. Defendant bears the burden of establishing this proposition by clear and convincing evidence, and the Court declines to make this argument on his behalf.

In sum, Defendant's motion does not make the showing required for him to file a motion under MCL 770.16. Even if the Court reached a different result, he has not made the showing required for him to obtain relief.

THE COURT THEREFORE ORDERS that Defendant's Motion for Testing of Biological Material is DENIED.

Hon. Matthew J. Stewart P 58047
Circuit Judge, Date: 2-12, 2018

State of Michigan
In the 35th Circuit Court for Shiawassee County

People Of The State Of Michigan,
Plaintiff,

Case No. 12-3104-FC

-vs-

Hon. Matthew J. Stewart

Stephen John Kares,
Defendant.
_____/

Motion For Testing
of
Biological Materials

NOW COMES, Stephen John Kares, the herein Defendant in pro se, seeking testing of biological material pursuant to MCL 770.16, stating the following in support:

1. Stephen John Kares, came before this Honorable Court on August 28, 2012, for a jury trial charges with two counts of CSC 1.
2. At trial the Prosecution introduced forensic evidence against the Defendant. However during the course of the proceedings critical discrepancies were discovered regarding the collection sites of the evidence being presented.
3. There remains numerous items of evidence that were collected by S.A.N.E., Alysia Gilreath, as established by her trial testimony, (Ts II. pg. 232); and pg 248), and by the Medical Forensic Examination Record, under Forensic Specimen Collection, that have not been tested for biological material. (Exhibit

A). Further during the course of the investigation Shiawassee County Sheriff Deputies siezed multiple items of bedding from the Defendant's residence that have not been tested for biological material. (Exhibit B).

4. The biological material contained within these items will directly challenge key offense elements which were necessary to convict the herein Defendant. Thus Defendant is entitled to an Evidentiary Hearing on this matter and for this Court to enter an Order for the requested testing to be performed. See: People v Herandez-Orta, 480 Mich 1101 (2008).

5. It is highly probable that with the results from this testing of the biological material the jury would have rendered a difference verdict. For this evidence directly challenges the elements of identity and sexual penetration.

Relief Requested

THEREFORE, Stephen John Kares, moves this Honorable Court to ORDER the testing of the specific items previously set forth herein that were collected and identified during the investigation which led to the conviction in this matter. And for a NEW TRIAL based upon the results of the testing of said biological material.

Furthermore that this Court will appoint counsel to represent Stephen John Kares and GRANT any other relief deemed necessary.

Respectfully submitted,

2/5/18 — *Stephen John Kares*
Date — Stephen John Kares

Order

Michigan Supreme Court
Lansing, Michigan

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

September 29, 2014

148566(43)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v SC: 148566
COA: 312680
Shiawassee CC: 12-003104-FC

STEPHEN JOHN KARES,
Defendant-Appellant.
_____/

On order of the Court, the motion for reconsideration of this Court's May 27, 2014 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 29, 2014 *Larry S. Royster*
Clerk

Order

Michigan Supreme Court
Lansing, Michigan

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

May 27, 2014

148566

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v SC: 148566
COA: 312680
Shiawassee CC: 12-003104-FC

STEPHEN JOHN KARES,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the November 21, 2013 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 27, 2014 *Larry S. Royster*
Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 21, 2013

v

No. 312680
Shiawassee Circuit Court
LC No. 12-003104-FC

STEPHEN JOHN KARES,

Defendant-Appellant.

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 300 to 700 months in prison. We affirm.

I. FACTUAL BACKGROUND

Defendant knew the 16 year old victim because he dated her mother, and the victim had been over to his apartment on a number of occasions. On the day of the assault, defendant texted the victim and offered to pay her money if she would clean his horse saddle. Later

that day, defendant texted the victim that he would be home soon, he bought her a pack of cigarettes (as he had done in the past), and he purchased a gift for her from Goodwill.

The victim asked a friend to drive her to defendant's apartment. When she arrived, defendant showed her the saddle, but said that she did not need to clean it right away. The victim and defendant were talking and smoking a cigarette in the living room when he offered to help her get emancipated, which is something they had talked about before. Defendant also gave her the gift from Goodwill, which was a pair of earrings.

The victim cleaned the saddle, and defendant eventually went into his bedroom. Defendant then asked the victim if a pair of pants in the bedroom were hers, which prompted the victim to walk toward the bedroom. Defendant then told the victim that they needed to talk, and closed the bedroom door. He then caressed her face, and the victim told him no. Because the victim began to whimper and shake, defendant said "stop, don't make me hurt you." Defendant then kissed the victim and said "what do you think I'm doing this for? What do you think I'm doing all this for you for?" The victim knew that he was referring to the emancipation offer and the purchase of cigarettes.

Defendant told the victim to walk over by the bed and take her clothes off, which she did. He then grabbed a camera, took his pants off, and told the victim to lie down on the bed. When she complied, he opened her legs, spread open her vaginal area to take a picture, and told her that if she told anyone he would distribute the photographs everywhere. He then

ordered her to sit up, and forced her to perform oral sex on him. He next ordered her to lie down on the bed, and he inserted his penis into her vagina.

Defendant eventually stood up and put his pants back on. The victim got dressed but did not run because she was afraid he would catch her. Defendant said that he thought she would be more into it, and asked if she had sex before. They eventually proceeded back into the living room, and the food defendant ordered earlier arrived. While the victim went back to cleaning the saddle, she felt threatened because defendant told her that he did not want the police showing up at his door. The victim's friend arrived to pick her up, and the victim told defendant not to worry that she would not tell.

However, after driving away, the victim told her friend, and eventually her mother, that defendant raped her. She had a rape kit examination performed, and a sexual-assault nurse testified that the victim relayed to her what happened. Thus, the nurse conducted a full body assessment of the victim, including a detailed genital assessment. She obtained a urine sample to check for infection or prior pregnancy, and provided the victim with medications to prevent pregnancy and infection. The nurse testified that near the victim's anus she observed a half-millimeter tear that could be consistent with forced or consensual sexual contact. She also collected various samples, including a sample of a white substance at the victim's cervix and a vaginal swab. An employee at the Michigan State Police Forensic Science Division testified that

the anal and cervical swabs were tested and resulted in a match to defendant's DNA.[1]

Defendant testified at trial, and while he admitted that the victim came over to his apartment to clean the saddle, he claimed that no sexual contact occurred, and he did not know why the victim accused him of such. He testified that he had sexual intercourse with a different woman three or four days before, and had disposed of a vaginal condom in the trash. The jury found defendant guilty of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion). Defendant now appeals.

II. HEARSAY

A. Standard of Review

Defendant first contends the trial court erred in admitting testimony from the sexual-assault nurse recounting the victim's reported history. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). "Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo." *Burns*, 494 Mich at 110. However, "[a] preserved error in the admission of evidence does not warrant reversal unless after an

[1] Defendant questioned the prosecution's witnesses regarding the nurse's report, which did not show a check mark that anal swabs or vaginal smears were collected.

examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Id.* (quotation marks and citation omitted).

B. Analysis

Defendant claims that the nurse's testimony was inadmissible hearsay, which affected the outcome of the trial. "Hearsay evidence is inadmissible unless it fits within an exception to the hearsay rule." *People v McDade*, 301 Mich App 343, 353; 836 NW2d 266 (2013). One such exception is MRE 803(4), which excludes from the general hearsay rule "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment." In other words, "[s]tatements made for the purpose of medical treatment are admissible pursuant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care." *People v Mahone*, 294 Mich App 208, 214-215; 816 NW2d 436 (2011).

In the instant case, the sexual-assault nurse testified regarding her treatment of the victim soon after the assault, and the victim's report of the incident. Defendant argues that the nurse's testimony should have been excluded as hearsay because it involved statements made for the purpose of collecting evidence in a criminal prosecution, not for medical treatment. This argument is meritless for several reasons.

First, the nurse specifically testified that her primary duties were medical diagnosis and treatment, not the collection of evidence. Moreover, only a statement offered to prove the truth of the matter asserted is hearsay. MRE 801(c). Here, the testimony was offered to describe the process of the medical examination and the routine gathering of information necessary for such an examination. The nurse refrained from even identifying defendant as the man the victim said raped her.

Further, even if the nurse's testimony was hearsay, it was for the purpose of medical treatment under MRE 803(4). The victim's account of the sexual assault was "reasonably necessary for diagnosis and treatment" because it determined the type of examination and course of treatment that was most appropriate. *Mahone*, 294 Mich App at 214-215. Based on the victim's statements, the nurse conducted a full body exam, gave her medications to prevent infections as well as pregnancy, and detailed instructions for follow-up procedures for infections they could not prevent and testing after the victim left the hospital. As this Court has recognized, a sexual assault can result in injuries that are not readily apparent, such as sexually transmitted diseases or psychological injury, and "a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment." *Mahone*, 294 Mich App at 215; see also *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996) ("Sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment."). The victim also had a self-interested motivation to be

truthful in order to receive the proper medical care. *Mahone,* 294 Mich App at 214-215. Thus, the trial court did not err in admitting the nurse's testimony.

III. SENTENCING

A. Standard of Review

Next, defendant challenges the scoring of Offense Variables (OVs) 8, 10, and 3. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). However, "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

However, in regard to OV 3, defendant failed to object to the trial court's scoring of this variable. "An unpreserved objection to the scoring of offense variables is reviewed for plain error." *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007). Thus, an error must have occurred, it must be plain, and it must affect substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

B. OV 8

Defendant first contends that the trial court erroneously scored OV 8 at 15 points. A score of 15 points under OV 8 is justified when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time

necessary to commit the offense." MCL 777.38(1)(a). Asportation must involve some movement of the victim that "is not merely incidental" to the commission of the underlying offense. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). However, asportation does not require the use of force. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009); *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005).

In the instant case, the trial court assessed 15 points because defendant moved the victim to a more dangerous place in order to victimize her, noting that defendant enticed the victim to his apartment and then his bedroom. Defendant, however, argues that there was no evidence of any movement of the victim that was not merely incidental to the sexual assault. To support his argument he cites *People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010), a Supreme Court order of remand based on its finding that the victim's movement to the bedroom where the sexual assault occurred was merely incidental to the crime.

Yet, what defendant's argument overlooks is that in this case, it was not just a matter of moving the victim into the bedroom. Instead, defendant first lured the victim to his apartment, where they were alone, based on promises to pay her for cleaning a saddle, a gift from Goodwill, and cigarettes. The victim was likely not in danger of defendant's aggression while at her friend's house, which is where she was when defendant contacted her. Thus, in using promises to entice her to come to his apartment, the "victim was asported to another place of greater danger." MCL 777.38(1)(a); see *Spanke*, 254 Mich App at 648 (upholding a score of 15 points under OV 8 when "[t]he

victims were moved, even if voluntarily, to defendant's home where the criminal acts occurred. The victims were without doubt asported to another place or situation of greater danger, because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others."); see also *Steele*, 283 Mich App at 491 (upholding a score of 15 points under OV 8 when defendant took the victim to more isolated locations, which were "places or situations of greater danger because they are places where others were less likely to see defendant committing crimes.").

Moreover, once defendant had the victim in his apartment, he invited her into his bedroom, closed the door, forced her to lie down on the bed, and then assaulted her. This further increased the probability that defendant's sexual assault would go undetected and uninterrupted. Because luring the victim to these places was not merely incidental to the assault, we agree that OV 8 was properly scored at 15 points.

C. OV 10

Defendant next argues that the trial court erroneously scored OV 10 at 15 points. OV 10 is for the exploitation of a vulnerable victim, and it prescribes a score of 15 points for "predatory conduct." MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purposes of victimization." MCL 777.40(3)(a). Defendant admits that he could have been assessed 10 points under OV 10 based on exploitation of the victim's youth, MCL 777.40(1)(b), but asserts that the trial court erred in scoring 15 points for predatory

conduct because any preoffense conduct was nothing more than mere planning.

Predatory conduct is "only those forms of preoffense conduct that are commonly understood as being predatory in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011) (quotation marks and citation omitted). Further, predatory conduct is conduct that is "directed at a victim before the offense was committed" and for the primary purpose of victimization. *People v Cannon*, 481 Mich 152, 160-161; 749 NW2d 257 (2008) (quotation marks omitted). The relevant questions are whether the offender engaged in conduct before the commission of the offense, was such conduct directed at a specific victim who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation, and whether victimization was the offender's primary purpose for engaging in the conduct. *Cannon*, 481 Mich at 162.

In this case, defendant argues that his conduct was not predatory because there was no clear indication of when he decided to commit the alleged sexual assault. However, the evidence demonstrated that defendant established a relationship with the victim, who was the 16 year-old daughter of a girlfriend. The victim was in need of money, and defendant enticed her to his apartment with the offer of money in exchange for her cleaning his saddle. He provided her with gifts of earrings and cigarettes, and even offered

to help her become legally emancipated from her mother. After conditioning her with his overtures of friendship and understanding, and making her feel indebted to him through gifts, defendant then sexually assaulted the victim.

Essentially, defendant engaged in a course of predatory conduct that made "the victim an easier target for the sexual assault." *Cannon*, 481 Mich at 161. This Court has recognized that a relevant consideration under OV 10 is gifts offered to young victims, as a young victim can be "vulnerable to the temptation of defendant's gifts and susceptible to physical restraint[.]" *People v Johnson*, 298 Mich App 128, 133; 826 NW2d 170 (2012). Moreover, the victim testified that defendant admitted that the gifts and the offer to help with the emancipation had been designed with the sexual assault in mind, as he asked: "what do you think I'm doing this for? What do you think I'm doing all this for you for?"

Thus, the evidence demonstrated that defendant did not spontaneously commit the assault, but developed that intention over time, and acted accordingly. Therefore, we find that the trial court properly scored OV 10 at 15 points for defendant's predatory conduct.

D. OV 3

Lastly, defendant argues that the trial court erred in scoring OV 3 at 10 points for "bodily injury requiring medical treatment [that] occurred to a victim." MCL 777.33(1)(d). However, defendant failed to challenge the scoring of OV 3 below, and raises it for the first time on appeal. See *Kimble*, 470 Mich at 311 (an issue must be "raised at sentencing, in a motion for

resentencing, or in a motion to remand."). Moreover, the trial court's ruling was not plain error. The sexual-assault nurse reported a half-millimeter tear near the victim's anus, which could have been from forced sexual contact. Further, the victim was given medication to prevent or diminish the impact of infection, such as sexually transmitted diseases that may have been introduced during the sexual assault. In light of the fact that such treatment was considered necessary by the medical staff, we do not find that the trial court plainly erred in finding that a score of 10 points for bodily injury requiring medical attention was warranted.[2]

IV. CONCLUSION

The trial court did not err in allowing testimony from the sexual-assault nurse regarding the victim's statements for purposes of medical treatment. Furthermore, because the trial court properly scored OV 8, 10, and 3, resentencing is not required. We affirm.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan

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[2] Furthermore, even if OV 3 was scored at 0 points, that does not alter defendant's sentencing range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Case No. 21-2845

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

STEPHEN J. KARES

Petitioner - Appellant

v.

BRYAN MORRISON, Warden

Respondent - Appellee

BEFORE: MOORE, CLAY, and GIBBONS, Circuit Judges.

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT
Kelly L. Stephens, Clerk

Issued: November 28, 2023 *Kelly L. Stephens*

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d), states in part with respect to time limitations:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> ***
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Michigan's statute governing post-conviction DNA testing, Mich. Comp. Laws § 770.16:

> **770.16 DNA testing; petition; filing; availability of biological material; court order; findings; costs; results; granting or denying request for new trial; notice of petition to victim; preservation of biological material identified.**
>
> Sec. 16. (1) Notwithstanding the limitations of section 2 of this chapter, a defendant convicted of a felony at trial before January 8, 2001 who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing. Notwithstanding the limitations of section 2 of this chapter, a defendant convicted of a felony at trial on or after January 8, 2001 who establishes that all of the following apply may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction, and for a new trial based on the results of that testing:
>
> (a) That DNA testing was done in the case or under this act.
>
> (b) That the results of the testing were inconclusive.

(c) That testing with current DNA technology is likely to result in conclusive results.

(2) A petition under this section shall be filed in the circuit court for the county in which the defendant was sentenced and shall be assigned to the sentencing judge or his or her successor. The petition shall be served on the prosecuting attorney of the county in which the defendant was sentenced.

(3) A petition under this section shall allege that biological material was collected and identified during the investigation of the defendant's case. If the defendant, after diligent investigation, is unable to discover the location of the identified biological material or to determine whether the biological material is no longer available, the defendant may petition the court for a hearing to determine whether the identified biological material is available. If the court determines that identified biological material was collected during the investigation, the court shall order appropriate police agencies, hospitals, or the medical examiner to search for the material and to report the results of the search to the court.

(4) The court shall order DNA testing if the defendant does all of the following:

(a) Presents prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction.

(b) Establishes all of the following by clear and convincing evidence:

(*i*) A sample of identified biological material described in subsection (1) is available for DNA testing.

(*ii*) The identified biological material described in subsection (1) was not previously subjected to DNA testing or, if previously tested, will be subject to DNA testing technology that was not available when the defendant was convicted.

(*iii*) The identity of the defendant as the perpetrator of the crime was at issue during his or her trial.

(5) The court shall state its findings of fact on the record or shall make written findings of fact supporting its decision to grant or deny a petition brought under this section.

(6) If the court grants a petition for DNA testing under this section, the identified biological material and a biological sample obtained from the defendant shall be subjected to DNA testing by a laboratory approved by the court. If the court determines that the applicant is indigent, the cost of DNA testing ordered under this section shall be borne by the state. The results of the DNA testing shall be provided to the court and to the defendant and the prosecuting attorney. Upon motion by either party, the court may order that copies of the testing protocols, laboratory procedures,

laboratory notes, and other relevant records compiled by the testing laboratory be provided to the court and to all parties.

(7) If the results of the DNA testing are inconclusive or show that the defendant is the source of the identified biological material, both of the following apply:

(a) The court shall deny the motion for new trial.

(b) The defendant's DNA profile shall be provided to the department of state police for inclusion under the DNA identification profiling system act, 1990 PA 250, MCL 28.171 to 28.176.

(8) If the results of the DNA testing show that the defendant is not the source of the identified biological material, the court shall appoint counsel pursuant to MCR 6.505(A) and hold a hearing to determine by clear and convincing evidence all of the following:

(a) That only the perpetrator of the crime or crimes for which the defendant was convicted could be the source of the identified biological material.

(b) That the identified biological material was collected, handled, and preserved by procedures that allow the court to find that the identified biological material is not contaminated or is not so degraded that the DNA profile of the tested sample of the identified

biological material cannot be determined to be identical to the DNA profile of the sample initially collected during the investigation described in subsection (1).

(c) That the defendant's purported exclusion as the source of the identified biological material, balanced against the other evidence in the case, is sufficient to justify the grant of a new trial.

(9) Upon motion of the prosecutor, the court shall order retesting of the identified biological material and shall stay the defendant's motion for new trial pending the results of the DNA retesting.

(10) The court shall state its findings of fact on the record or make written findings of fact supporting its decision to grant or deny the defendant a new trial under this section. Notwithstanding section 3 of this chapter, an aggrieved party may appeal the court's decision to grant or deny the petition for DNA testing and for new trial by application for leave granted by the court of appeals.

(11) If the name of the victim of the felony conviction described in subsection (1) is known, the prosecuting attorney shall give written notice of a petition under this section to the victim. The notice shall be by first-class mail to the victim's last known address. Upon the victim's request, the prosecuting attorney shall give the victim notice of the time and place of any hearing on the petition and shall

inform the victim of the court's grant or denial of a new trial to the defendant.

(12) The investigating law enforcement agency shall preserve any biological material identified during the investigation of a crime or crimes for which any person may file a petition for DNA testing under this section. The identified biological material shall be preserved for the period of time that any person is incarcerated in connection with that case.