UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LARRY HALE, 844194,

Petitioner,

v.

STEVEN RIVARD,

Respondent.

CASE NO. 14-14600

HON. STEPHEN J. MURPHY, III

MAG. MONA K. MAJZOUB

Answer in Opposition to Petition for Writ of Habeas Corpus

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Introduction

Petitioner, Larry Hale, molested two young girls—he inappropriately touched them and made at least one of them perform oral sex on him.

As result of his Berrien County no-contest plea conviction of third-degree criminal sexual conduct, Mich. Comp. Laws § 750.520d(1)(b), Warden Steven Rivard now holds Hale in custody in the Michigan Department of Corrections. Hale is currently serving a sentence of 10 to 15 years' imprisonment.

Hale commenced this action under 28 U.S.C. § 2254 by filing a petition with this Court. The State understands the petition to be raising the following claims:

I. Were the decisions of the state courts of Michigan contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court because Petitioner's no-contest plea was not voluntarily, knowingly and understandably made in violation of due process clause of the Fifth and Fourteenth Amendments to the U.S. Constitution?

Should the Court interpret the petition to be raising different claims, the State requests an opportunity to file a supplemental pleading. To the extent that Hale failed to raise any other claims that he raised in

the state courts, those claims are now abandoned. *See Sommer v. Davis*, 317 F.3d 686, 691 (6th Cir. 2003) (holding that an issue is abandoned if a party does not present any argument respecting the issue in his brief). Thus, habeas review of abandoned claims is barred.

The State now answers the petition and requests that it be denied.

Statements in Compliance with Habeas Rule 5(b)

With respect to the bars that preclude habeas review, the State asserts the following in conformance with Habeas Rule 5(b):

A. Statute of Limitations

The State is not arguing that any of Hale's habeas claims are barred by the statute of limitations.

B. Exhaustion

The State is not arguing that any of Hale's habeas claims are barred by the failure to exhaust a claim for which a state court remedy exists.

C. Procedural Default

The State is not arguing that any of Hale's habeas claims are barred by procedural default.

D. Non-retroactivity Doctrine

The State is not arguing that any of Hale's claims are barred by the non-retroactivity doctrine.

Statement of the Case

A. Trial Facts

Nine-year-old MK was living with her aunt and uncle when she went over to Hale's house for sleepovers. (3/6/12 Preliminary Examination [Prelim.] Tr. at 25-26.[1]) Hale was a family friend. (3/6/12 Prelim. Tr. at 26.) MK would sleep on the floor in the living room or in Hale's bedroom. (3/6/12 Prelim. Tr. at 27.) Hale's wife would typically sleep in a different room than Hale and MK. (3/6/12 Prelim. Tr. at 31.)

At one point, Hale started touching MK. (3/6/12 Prelim. Tr. at 27-28.) He used his privates, fingers, and tongue to touch her privates. (3/6/12 Prelim. Tr. at 28.) His privates and fingers touched her privates on the inside and the outside. (3/6/12 Prelim. Tr. at 29.) Their clothes would be off. (3/6/12 Prelim. Tr. at 28-29.) Hale also put his private in her mouth. (3/6/12 Prelim. Tr. at 29.) "It would hurt." (3/6/12 Prelim. Tr. at 30.) These things happened more than once. (3/6/12 Prelim. Tr. at 31.)

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[1] The trial court accepted the testimony from the preliminary examination, along with the probable-cause sheet, as the factual basis for Hale's no-contest plea. (6/11/12 Plea Tr. at 11.) Accordingly, it is utilized here.

MK identified Hale on the record. (3/6/12 Prelim. Tr. at 31.) She was afraid of him because he kept a gun under his bed. (3/6/12 Prelim. Tr. at 37.)

MK first disclosed the abuse to her uncle, Jason, as they drove in the car with her younger sister AK. (3/6/12 Prelim. Tr. at 36, 39.) They turned down Hale's street and MK mentioned that was where Hale lived; she then said what Hale had done to her and AK. (3/6/12 Prelim. Tr. at 39.) AK testified that Hale did "bad touches" to her, but she could not remember any details. (3/6/12 Prelim. Tr. at 20.)[2] She also identified Hale on the record. (3/6/12 Prelim. Tr. at 20.) Jason testified as well, confirming the circumstances of MK and AK's disclosures in the car. (3/6/12 Prelim. Tr. at 9-10.) The three witnesses (Jason, MK, and AK) were sequestered during the preliminary examination. (3/6/12 Prelim. Tr. at 3.)

The court ultimately bound Hale over on five felony counts of criminal sexual conduct. (3/6/12 Prelim. Tr. at 47.)

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[2] The prosecutor ultimately did not move to bind Hale over on the counts involving AK, contending that he would instead move to admit them as other bad acts under Mich. Comp. Laws § 768.27a. (3/6/12 Prelim. Tr. at 41.)

The State opposes any factual assertions made by Hale that are not directly supported by—or consistent with—the state court record, because Hale has failed to overcome the presumption of factual correctness under 28 U.S.C. § 2254(e)(1) or meet the requirements of 28 U.S.C. § 2254(e)(2).

B. Procedural History

Hale pled no contest to third-degree criminal sexual conduct. Before his sentencing, he moved to withdraw his plea. The trial court denied his motion, finding that it was not in the interest of justice, that the prosecution would be prejudiced, and that the plea was entered knowingly, voluntarily, and intelligently. (7/12/12 Motion Hr'g at 10-14.) The trial court sentenced him to 10 to 15 years' imprisonment.

Following his conviction and sentence, Hale filed a delayed application for leave to appeal in the Michigan Court of Appeals, which raised the following claims:

I. Whether Larry Robert Hale was denied his constitutional right to a jury trial when the trial court refused to grant Defendant Appellants motion to withdraw his no contest plea that was made prior to his sentencing under MCR 6.310(B)(1)?

II. Whether the trial court judge abused his discretion when he refused to grant Defendant Appellants motion

to withdraw his no contest plea that was made prior to his sentencing under MCR 6.310(B)(1)?

III. Whether Larry Robert Hale was denied his constitutional right to counsel of his choice when the trial court refused to grant Defendant Appellants motion to withdraw his no contest plea that was made prior to his sentencing under MCR 6.310(B)(1) by not having a jury trial with substituted counsel and without involvement of counsel of his choice in the plea agreement?

IV. Whether the Trial Court Judge committed error or abused his discretion by sentencing Larry Robert Hale to prison for 10 to 15 years when the Trial Court Judge failed to state adequate reasons on the record for an upward departure from the sentencing guidelines?

V. Whether the Trial Court Judge committed error or abused his discretion by sentencing Larry Robert Hale to prison for 10 to 15 years when the Trial Court Judge failed to give due consideration to the 55 point reduction in OV points that defense counsel was able to obtain through argument prior to sentencing.

The Michigan Court of Appeals denied the application for leave to appeal "for lack of merit in the grounds presented." (5/24/13 Mich. Ct. App. Order at 1.)

Hale subsequently filed an application for leave to appeal in the Michigan Supreme Court, raising the same claims as in the Michigan Court of Appeals, with the following additional claims:

I. Whether Larry Robert Hale was denied his constitutional right to counsel as guaranteed by the

U.S. Constitution's 6th and 14th Amendments because his counsel handling his case up to his plea hearing was not functioning as such, due to deficient performance.

II. Was Larry Robert Hale's counsel ineffective for failure to have Larry Hale tested for mental competency prior to committing him to a plea without full knowledge or comprehension.

The Michigan Supreme Court denied the application because it was not persuaded that the questions presented should be reviewed by the Court. *People v. Hale*, 839 N.W.2d 455 (Mich. 2013) (unpublished table decision).

Hale did not appeal to the United States Supreme Court or seek collateral review before the trial court. Rather, he filed the instant petition for habeas relief.

Standard of Review Pursuant to AEDPA

Congress mandated the standards of review in federal habeas proceedings in 1996 in the Antiterrorism and Effective Death Penalty Act (AEDPA). Recognizing the foundational principle that "[s]tate courts are adequate forums for the vindication of federal rights," "AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 134 S. Ct. 10, 15, 16 (2013); 28 U.S.C. § 2254(d).

Congress has limited the availability of federal habeas corpus relief "with respect to any claim" the state courts "adjudicated on the merits." 28 U.S.C. § 2254(d). Habeas relief may not be granted to Hale under § 2254(d) unless the state court adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

With respect to § 2254(d)(1), a state court decision is "contrary to" federal law only "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of

materially indistinguishable facts." *Metrish v. Lancaster*, 133 S. Ct. 1781, 1786 n.2 (2013) (internal quotation marks and citation omitted). A state court decision involves an unreasonable application of clearly established Federal law pursuant to § 2254(d)(1) if "the state-court decision identifies the correct governing legal principle in existence at the time," but "unreasonably applies that principle to the facts of prisoner's case." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1399 (2011) (internal quotation marks and citation omitted).

"Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta," of the Supreme Court's decisions. *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (internal quotations and citations omitted). "And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Id.*

Under § 2254(d)(2), the "unreasonable determination" clause, "a state-court's factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Titlow*, 134 S. Ct. at 15 (internal quotation marks and citation omitted). "Under AEDPA, if the state-court decision was

reasonable, it cannot be disturbed." *Hardy v. Cross*, 132 S. Ct. 490, 495 (2011) (per curiam).

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (internal quotation marks and citations omitted). This means that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* Instead, the state court's "application must be objectively unreasonable." *Id.* That distinction creates "a substantially higher threshold" to obtain relief than de novo review. *Id.*

"It is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (internal quotation marks and citation omitted). And federal court of appeals precedent cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme] Court has not announced." *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam) (citation

omitted); *see also Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (providing that absent a decision by the Supreme Court addressing "the specific question presented by [a] case" a federal court cannot reject a state court's assessment of claim). And, as the Supreme Court recently held, where no Supreme Court cases confront "the specific question presented" by the habeas petitioner, "the state court's decision [cannot] be contrary to any holding from this Court." *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam) (internal quotation marks and citation omitted).

Further, the Supreme Court has specifically warned habeas courts that, "[b]y framing [Supreme Court] precedents at [too] high [a] level of generality, [it] could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.'" That "approach would defeat the substantial deference that AEDPA requires" be given to state-court decisions. *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam).

Moreover, pursuant to § 2254(d), "a habeas court must determine what arguments or theories supported or . . . could have supported, the state court's decision; and then it must ask whether it is possible

fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision" of the Supreme Court. *Richter*, 562 U.S. at 102. This standard protects against intrusion of federal habeas review upon "both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* at 103 (internal quotation marks and citation omitted).

A federal court must refrain from issuing a writ "so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (internal quotation marks and citation omitted). To clear the § 2254(d) hurdle, a habeas petitioner "must 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." *Id.* at 103. "If this standard is difficult to meet, that is because it was meant to be." *Id.* at 102.

The burden of providing a petitioner a new trial "should not be imposed unless *each* ground supporting the state court decision is examined and found to be unreasonable under AEDPA." *Wetzel v. Lambert*, 132 S. Ct. 1195, 1199 (2012).

The Supreme Court has also instructed habeas courts to apply a rebuttable presumption that a "federal claim was adjudicated on the merits" even "[w]hen a state court rejects a federal claim without expressly addressing that claim." *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013). "[S]tate-court decisions [must] be given the benefit of the doubt." *Pinholster*, 131 S. Ct. at 1398 (internal quotation marks and citation omitted). "Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunction in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Richter*, 562 U.S. at 102-03 (internal quotation marks and citation omitted). "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Id.* at 102 (citation omitted).

Finally, the petitioner's burden is made even heavier by the fact that a federal court is "limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 131 S. Ct. at 1398.

Argument

I. Hale has failed to show that his no-contest plea was unintelligent, unknowing, or involuntary: the Michigan Court of Appeals' decision was not objectively unreasonable.

The Michigan Court of Appeals reasonably rejected Hale's claim that his no-contest plea was not entered voluntarily, knowingly, and intelligently in light of his inability to read and other mental deficiencies. His issues do not rise to the level of legal incompetence and do not vitiate his repeated acknowledgements of understanding on the record during the plea colloquy. Hence, he is not entitled to habeas relief.

A. Clearly established federal law on pleas

A guilty plea must be voluntarily and knowingly made in order to satisfy the dictates of due process. *Hart v. Marion Corr. Inst.*, 927 F.2d 256, 257 (6th Cir. 1991); *King v. Dutton*, 17 F.3d 151, 153 (6th Cir. 1994) (citing *Boykin v. Alabama*, 395 U.S. 238 (1969)). The defendant must be aware of the "relevant circumstances and likely consequences." *Hart*, *supra*; *King*, *supra*. In general, this means that he must be aware of the maximum sentence that may be imposed. *King*, 17 F.3d at 154.

Further, the "agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant." *Brady v. United States*, 397 U.S. 742, 750 (1970). In other words, "[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void." *Machibroda v. United States*, 368 U.S. 487, 493 (1962).

When a state defendant brings a federal habeas petition challenging the voluntariness of his plea, the state generally satisfies its burden of showing the plea was voluntary by producing a written transcript of the state court proceeding. *Garcia v. Johnson*, 991 F.2d 324, 326 (6th Cir. 1993). Where the transcript is adequate to show that the plea was voluntary and intelligent, a presumption of correctness attaches to the state court findings of fact and to the judgment itself. *Id.* at 326-27. A satisfactory state-court transcript containing findings, after a proper colloquy, places upon the petitioner a "heavy burden" to overturn the state findings. *Id.* at 328. The Sixth Circuit has held "that where the [trial] court has scrupulously followed the required procedure, 'the defendant is bound by his statements in response to that

court's inquiry.'" *Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986) (quoting *Moore v. Estelle*, 526 F.2d 690, 696-97 (5th Cir. 1976)).

Further, "'it is well-settled that post-sentencing 'buyer's remorse' is not a valid basis on which to dissolve a plea agreement and the fact that a defendant finds himself faced with a stiffer sentence than he had anticipated is not a fair and just reason for abandoning a guilty plea.'" *Meek v. Bergh*, 526 F. App'x 530, 536 (6th Cir. 2013) (quoting *Moreno-Espada v. United States*, 666 F.3d 60, 67 (1st Cir. 2012) & citing *United States v. Wilson*, 351 F. App'x 94, 96 (6th Cir. Nov. 5, 2009)).

B. Hale's colloquy shows that his plea was constitutional.

Here, the Michigan Court of Appeals reasonably denied Hale's delayed application for leave to appeal in a summary order because it did not find merit in the claims presented. (3/7/14 Mich. Ct. App. Order at 1.) Such summary orders are subject to AEDPA deference. *Werth v. Bell*, 692 F.3d 486, 493 (6th Cir. 2012) (citing *Harrington*, 131 S. Ct. at 785). The Michigan Court of Appeals' decision was not contrary to, nor involved an unreasonable application of, clearly established federal law, and was not based on an unreasonable determination of the facts.

Hale has not met his heavy burden of showing that his plea was entered unknowingly, unintelligently, or involuntarily. The record belies any contention that Hale did not understand the plea proceedings, as the following colloquy shows:

The Court:	Alright, I understand that we have a plea agreement in this case, Mr. Parish?
Mr. Parish:	We do, your Honor. The agreement is that Mr. Hale will plead no contest to a single count of Criminal Sexual Conduct in the 3rd degree in return all the other charges will be dismissed. It's also part of the agreement, on both sides, that there be an agreed sentence in this matter of not less than 10, nor more than 15 years. Do you understand all that?
The Defendant:	Yes.
Mr. Parish:	And that's what you wanna do?
The Defendant:	Yes.
The Court:	Okay.
Mr. Parish:	We do have one small problem I want to call to your Honor's attention and that's this. My client does not read and as a result, while I can have him sign the Advice of Rights, I have not had an opportunity until just this moment to go through those with him, so I would suggest that, perhaps, it might be quickest just to read them aloud when we reach that point.

The Court: Okay, that's fine. Alright, sir, can you please raise your right hand? Do you solemnly swear or affirm, under the pains and penalties of perjury, that the testimony you're about to give in the matter now pending before the Court will be the truth, the whole truth and nothing but the truth?

The Defendant: Yes.

The Court: Okay. Can you give me the rights form, please, Mr. Parish?

Mr. Parish: Yes. You wanna sign it there. I'm gonna have him sign it, although, as I said, he—

The Court: That's fine.

Mr. Parish: I'm gonna to give him a a copy so that anybody else can help him read it.

The Court: Alright, I need to ask you a few questions, sir. I'm not trying to be insulting. I just need to establish a record. How old are you?

The Defendant: Fifty-four.

The Court: How far have you gone in school?

The Defendant: Actually, I quit in the 10th grade.

The Court: Okay. You just—Can you speak closer to the microphone, please? You—You—

The Defendant: I'm 54 and I quit in the 10th grade.

The Court: Okay. And we already covered the fact that you have some difficulty reading, so I'm gonna go through—

The Defendant: Correct.

The Court: --these rights—

The Defendant: My education's—

The Court: --with you one—

The Defendant: --bad.

The Court: --at a time. Are you currently under the influence of any controlled substance, prescription medication or alcohol that would make it difficult for you to understand me or speak with your attorney Mr. Parish?

The Defendant: Nope. I just take medication for my heart.

The Court: Okay. But that doesn't affect your comprehension of your—

The Defendant: No.

The Court: --surrounding or what's happening?

The Defendant: No.

The Court: Okay. You're currently appearing in Courtroom 193 in Saint Joseph, Michigan with your attorney Mr. Parish standing at your side, the People are, again, represented here this morning by the prosecuting attorney Mr. Sepic. It is alleged that from September 20th of 2009 to on or about August 24th of 2011 in Berrien County, Michigan, you committed the offense of Criminal Sexual Conduct in the 3rd Degree by having sexual contact with [MK], a person under 13-years of age—

Mr. Parish: And that would be by—Count 1 would be by penetration judge.

The Court: All right. –by penetration. . . Was it digitally or. . .

Mr. Sepic: Penis/vagina.

The Court: All right. –penetration, penis to vagina, with [MK], a person under 13-years of age. This is charged as Criminal Sexual Conduct in the 3rd Degree. It is a felony. The maximum penalty is 15 years in a Michigan state prison, mandatory collection of a DNA sample, fines, costs, probation, as well as, registration under the Michigan Sex Offender Act. You understand the charge against you, sir?

The Defendant: Correct.

The Court: You have to say, yes or no.

The Defendant: Yes.

The Court: And how do you wish to plead, guilty, not guilty, no contest?

The Defendant: No contest.

The Court: You understand, sir, that if I accept your no contest plea here this morning, you'll not have a jury trial of any kind and you'll be giving up all the rights you'd have had at that jury trial? You understand that?

The Defendant: No trial?

The Court: Right. And, do you understand that all of the rights that you would have at that jury trial are contained in this Advice of Rights Circuit Court Plea form, which you've signed here this morning; they include: The right to be tried by a jury; to be presumed

innocent until proven guilty; to have the Prosecutor, in this case, Mr. Sepic, prove beyond a reasonable doubt that you are guilty; to have the witnesses against you appear at your trial; to question the witnesses against you – Mr. Parish, your attorney, would question them for you; to have the Court ordy—order any witnesses that you want for your defense to appear at trial – in other words, if you believe you have witnesses that can prove you're innocent of this charge, they would be subpoenaed and I would require them to be here and attend; to remain silent during your trial – you don't have to testify; to not have that silence used against you – I would give the jury an instruction that they're not to consider the fact that you didn't testify; and finally, if you choose to, you have the right to testify at your own felony jury trial; do you understand that if I accept your no contest plea all of these rights that I just read to you are gone?

The Defendant: Yes.

The Court: You have to speak louder, please.

The Defendant: Yes.

The Court: And that's what you want me to do, sir?

The Defendant: Yes.

The Court: You further understand that if the Court accepts your no contest plea here this morning you'll be giving up any claim that your plea was because of, or the result of, any promises, tricks or threats that you don't tell me about right now, and, you'll

also be waiving any claim that this was not your decision to plead no contest; in other words, you can't come back tomorrow morning and say, I didn't want to do that yesterday morning, Judge LaSata, Mr. Parish told me I had to do it, or, Mr. Sepic came back and threatened me in the holding cell; you understand you're giving up any claim like that?

The Defendant: You means towards—

The Court: Yeah. If I accept—Did any of that happen? Did anyone threaten you or tell you—

The Defendant: No.

The Court: --to plead—

The Defendant: No.

The Court: --no contest? Okay.

The Defendant: No.

The Court: And you understand that you can't come back and—and tell me that—

The Defendant: Right.

The Court: --tomorrow?

The Defendant: Okay.

The Court: This is the time and place. I have not yet accepted your no contest plea, and you're under oath.

The Defendant: (No verbal response)

The Court: All right. Do you further understand that any appeal of your conviction and sentence

pursuant to this no contest plea to the Michigan Court of Appeals, the court above me, must be by application for leave to appeal and not by right?

The Defendant: Yeah.

The Court: Okay. Are you currently on parole or probation, sir?

The Defendant: Sir?

The Court: Are you currently on parole or probation?

The Defendant: No. This is my first.

The Court: Mr. Sepic, can you please place the plea agreement on the record, sir?

Mr. Sepic: Yes, judge. In exchange for a plea of no contest to the amended Count 1 of CSC 3rd, the People will dismiss Counts 2, 3, 4, and 7, and further, that at the time of sentence, the parties agree that the minimum sentence will be 10 years.

The Court: Mr. Parish?

Mr. Parish: That's all correct, your Honor. I don't have the charges in front of me. I presume those—that the dismissal is of all charges except the amended Count 1. And am I correct on that?

Mr. Sepic: That's correct.

Mr. Parish: Then it is correct, your Honor.

The Court: Okay. And finally, Mr. Hale, is that your understanding, sir?

The Defendant: (Inaudible)

The Court: Can you speak up, please?

The Defendant: Yes. Sorry.

The Court: Other than that plea agreement just placed on the record and agreed to by all the parties, has anyone used any other promises, tricks or threats to get you to plead no contest?

The Defendant: No.

The Court: Are you pleading no contest of your own free act and will?

The Defendant: On my own. Yes—

The Court: I'm—

The Defendant: --on my—

The Court: Yea—

The Defendant: --own.

The Court: Okay. I didn't understand the last thing you said.

The Defendant: On my own.

The Court: On your own. Okay. And, counsel, obviously, I presided over the preliminary examination conducted on March 6th of 2012. I recall the testimony of the two victims at that court proceeding. May the Court also review the probable cause sheet in order to establish the factual basis for the no contest plea?

Mr. Parish: Yes, your Honor.

Mr. Sepic: Yes, your Honor.

The Court: I also have my notes in the file from the preliminary examination; the testimony of the two children. Alright, counsel, are you satis—that's a factual basis as established in the court file at the preliminary examination as well as the probable cause sheet?

Mr. Parish: I am, your Honor.

Mr. Sepic: Yes, your Honor. And I would just note for the record that actually those facts the Court is referring to would actually give the facts for CSC 1st Degree, but, of course, the Court can accept a plea to a lesser based on the greater offense, and I believe that's—

The Court: You agree—

Mr. Sepic: --the case.

The Court: You agree with all that, Mr. Parish?

Mr. Parish: Yes.

The Court: Okay. Counsel, are either of you aware of any promises, tricks or threats not disclosed on the record here this morning?

Mr. Sepic: No, your Honor.

Mr. Parish: No, your Honor.

The Court: And has the Court complied with all of MCR 6.302 (B) through (D)?

Mr. Sepic: Yes, judge.

Mr. Parish: Yes, your Honor.

The Court: Alright, Mr. Hale, I find, sir, that a sufficient factual basis has been established

> to support your no contest plea. I further find that your plea of no contest has been made knowingly, freely, voluntarily and understandingly, it is offered without duress, compulsion, undue influence, the promise of benefit or leniency, and I do accept your no contest plea. You'll be sentenced by me on July 16th of 2012 at 1:30 p.m.; PSI review on July 13th of 2012. We already got DNA on file. Obviously, counsel, Mr. Hale's headed to prison so I'm gonna revoke his bond and order him held with no bond until his—his sentencing. Anything further?
>
> Mr. Parish: No, your Honor.
>
> Mr. Sepic: No, your Honor.
>
> The Court: Okay, you're all set, sir.

(6/11/12 Plea Tr. at 3-12.)

This colloquy demonstrates that Hale—as the court found—entered his plea knowingly, intelligently, voluntarily, and constitutionally. There were no defects in the court's, prosecutor's, or defense attorney's actions during the colloquy. Hale was fully apprised of the terms of the plea, the rights he was waiving, and the consequences of pleading no contest, including the agreed-upon sentence of 10 to 15 years' imprisonment. The federal constitutional requirements were met.

C. Hale's claimed diminished capacity did not render him legally incompetent to negate his voluntary, intelligent, and understanding plea.

Hale argues that his plea was necessarily involuntary, unknowing, and unintelligent because post-sentencing assessments show that his IQ falls in the "mentally deficient" range and he otherwise has difficulty with comprehension. Not so. First, the assessments he now relies upon from September and October 2012—after his sentencing—were not available to the state trial court in denying Hale's motion to withdraw his plea. The plea was taken in June 2012 and the court heard and decided the motion to withdraw the plea a month later, in July 2012.

Moreover, Hale did not present these assessments to the Michigan Court of Appeals or the Michigan Supreme Court on appeal. While he did argue that his mental capacity was a concern during the plea proceedings, he did not draw the courts' attention to the assessments he now relies upon on habeas review, despite their availability during his state appeals. He filed his brief in the Michigan Court of Appeals in April 2013, months after the assessments were completed. This constitutes an impermissible attempt to expand the state-court record

and, thus, cannot form the basis for habeas relief. *Pinholster*, 131 S. Ct. at 1398. This Court may not consider that evidence. *Moore v. Mitchell*, 708 F.3d 760, 780 (6th Cir. 2013) (citing *Pinholster*, 131 S. Ct. at 1398).

In any event, Hale's mental deficiencies did not render his plea unconstitutional. His deficiencies would have to rise to the level of legal incompetence to stand trial, which they do not. "The competency standard to stand trial is identical to the standard to plead guilty." *Warren v. Lewis*, 365 F.3d 529, 533 n.3 (6th Cir. 2004). "A criminal defendant is legally competent if he is able to consult rationally with his attorney and have a rational and factual understanding of the proceedings against him." *Doughty v. Grayson*, 397 F. Supp. 2d 867, 878 (E.D. Mich. 2005) (citing *Dusky v. United States*, 362 U.S. 402, 402 (1960)). But the "defendant need not be able to function in . . . a completely unimpaired manner or be able to interact with his lawyer as an equally competent co-counsel." *Id.* "That the petitioner's mental illness caused him some diminished ability to concentrate in general does not mean that he was not competent." *Id.*

In *Warren*, the Sixth Circuit reversed the district court's grant of habeas relief, holding that the state trial court did not err in failing to

sua sponte conduct a competency hearing under *Pate v. Robinson*, 383 U.S. 375 (1966). This was so despite the trial court having an expert report concluding that Warren functioned "within the upper limits of mental retardation and the lower limits of borderline intellectual level[.]" *Id.* Other information available to the trial court showed that Warren was competent to stand trial or enter a guilty plea, including the fact that he was married, held jobs, had a driver's license, and was discharged from the military for physical—not mental—reasons. *Id.*

Similarly, here, Hale's low IQ and other mental limitations did not render him legally incompetent to enter his plea. The trial court found Hale's claim of incomprehension "completely without merit." (7/12/12 Motion Hr'g at 12.) That is because the court went through each point of the advice-of-rights form with Hale and continually asked him during the plea proceedings whether he understood what was happening and what the agreement was. Hale's affirmative answers to each of the court's inquiries are binding and belie his instant claims. *See Baker*, 781 F.2d at 90.

As the trial court noted, after entering his plea it likely set in that Hale was "likely going to prison for 10 years as a convicted sex

offender," which triggered "some buyer's remorse from the knowing decisions that a mature man . . . made with, what I found to be, you know, zealous advocacy, as Mr. Sepic indicated, by Mr. Parish on June 11th of 2012." (7/12/12 Motion Hr'g at 14.) Regret does not render a knowing, voluntary, intelligent plea unconstitutional. *See Meek*, 526 F. App'x at 536.

Accordingly, Hale has not shown that the Michigan Court of Appeals' rejection of his claim on the merits was objectively unreasonable. Hale is not entitled to habeas relief.

Conclusion

I. Summary of defenses/merits argument

The state courts' rejection of Hale's claims did not result in decisions that were contrary to federal law, unreasonable applications of federal law, or unreasonable determinations of the facts. Hale was "entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619 (1953); *see also United States v. Hajal*, 555 F.2d 558, 569 (6th Cir. 1977) ("[W]e have yet to review a perfect jury trial."). The state-court decision in this case was not "so lacking in justification" that they resulted in "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. The formidable threshold for granting habeas relief has not been met because fairminded jurists could disagree on the correctness of the state court's decision. *Yarborough*, 541 U.S. at 664. Consequently, habeas relief should be denied.

II. Opposition to requests for bond, oral argument, discovery, certificate of appealability, and any other relief sought by Hale

Additionally, the State opposes any requests for bond, oral argument, or any other relief, including a certificate of appealability.

The State also contends that Hale has not demonstrated entitlement to discovery. Unlike typical civil litigants, "[h]abeas petitioners have no right to automatic discovery." *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001). Rule 6(a) permits district courts to authorize discovery in habeas corpus proceedings under the Federal Rules of Civil Procedure only "for good cause." R. Governing 2254 Cases in the U.S. Dist. Cts. 6(a). "Rule 6 embodies the principle that a court must provide discovery in a habeas proceeding only 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.'" *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004) (quoting *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997)). "Rule 6 does not 'sanction fishing expeditions based on a petitioner's conclusory allegations.'" *Williams*, 380 F.3d at 974 (quoting *Rector v. Johnson*, 120 F.3d 551, 562 (5th Cir. 1997)); Habeas Rule 6(a). "Conclusory allegations are not enough to warrant discovery under Rule 6; the petitioner must set forth specific allegations of fact." *Williams*, 380 F.3d at 974 (internal quotation marks and citation omitted). Hale has not met this burden.

If this Court denies the petition, the State asserts that Hale is also not entitled to a certificate of appealability (COA) so as to proceed further. In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To demonstrate this denial, the petitioner is required to show that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issues presented were adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) ("Under the controlling standard, a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further."'") (citations omitted).

When a district court rejects a habeas petitioner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims to be debatable or wrong. *Slack*, 529 U.S. at 483-84. Likewise,

when a district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claims, a COA should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.* at 484.

When a plain procedural bar is present, and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal would be warranted. *Id.*

Relief

For the reasons stated above, this Court should deny the petition. The Court should also deny Hale any requested discovery, evidentiary hearings, bond, oral argument, and any other relief he seeks in this action, including a certificate of appealability.

Respectfully submitted,

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Dated: June 12, 2015

Certificate of Service

I hereby certify that on June 12, 2015, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

HONORABLE STEPHEN J. MURPHY, III
MAGISTRATE JUDGE MONA K. MAJZOUB

and I hereby certify that Cristina R. Dowker has mailed by United States Postal Service the papers to the following non-ECF participant:

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