IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL M. REVELES,

Petitioner, OPINION AND ORDER

v. 11-cv-378-bbc

LIZZY TEGELS, Warden,
New Lisbon Correctional Institution,

Respondent.

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Petitioner Michael M. Reveles, an inmate at the New Lisbon Correctional Institution, has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his December 2005 conviction in the Circuit Court for Dane County on six counts of second-degree sexual assault. Petitioner contends that his custody violates the laws or Constitution of the United States in ten respects:

(1) his conviction was not supported by sufficient evidence, which violated his right to due process, because the government failed to prove an essential element of the offense beyond a reasonable doubt;

(2) the State violated his right to be free from double jeopardy because two of the six counts against him were identical and, therefore, multiplicitous;

(3) he was denied the right to effective assistance of counsel because his trial lawyer failed to object to the multiplicitous charges;

(4) the statute governing the charged offense, Wis. Stat. § 940.225(2)(g), is overbroad and, therefore, unconstitutional;

(5) he was denied due process because the criminal complaints against him did not afford adequate notice of the potential penalties;

(6) the State violated the Fourth Amendment by including false and prejudicial information in the affidavits submitted in support of the criminal complaints;

(7) he was denied effective assistance by his postconviction counsel, who failed to raise all issues involving his trial lawyer's ineffectiveness;

(8) the State violated his right to due process by failing to disclose evidence favorable to the defense and by sponsoring false or misleading testimony from a witness;

(9) his trial was tainted by judicial bias; and

(10) he is "actually innocent" of the charges.

In affirming petitioner's conviction, the Wisconsin Court of Appeals rejected claims 1 and 3 on the merits, while holding that petitioner had forfeited claim 2 by failing to raise the issue in a timely manner at trial. The Wisconsin Supreme Court denied petitioner's request for review of that decision. Petitioner raised claims 4 through 10 in a motion for postconviction relief under Wis. Stat. § 974.06. The circuit court denied that motion. Petitioner filed an appeal with the Wisconsin Court of Appeals, but he did not challenge the substance of that decision or pursue his appeal all the way to the Wisconsin Supreme Court.

Respondent argues that petitioner did not exhaust his state court remedies as required by the federal habeas corpus statutes and that, along with claim 2, claims 4 through 10 are barred by the doctrine of procedural default.

I am denying petitioner's application for a writ of habeas corpus. To the extent that petitioner exhausted his claims, the state courts made reasonable determinations of fact and applied clearly established federal law in a reasonable manner when adjudicating claims 1 and 3 on the merits. Because the state court's decision on these claims was reasonable, federal habeas relief is unavailable to petitioner on claims 1 and 3. I conclude further that, in addition to being barred by the doctrine of procedural default, claim 2 is without merit. Petitioner's remaining grounds for relief (claims 4 through 10) are also procedurally barred and, because petitioner does not fit within an exception to this doctrine, federal habeas review is unavailable for these claims.

The state courts' factual determinations are presumed correct for purposes of federal habeas corpus review unless the petitioner rebuts those findings with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Although petitioner disagrees with certain legal conclusions made by the state courts, he has not presented any clear and convincing evidence to rebut the courts' factual determinations. Accordingly, in setting out the facts below, I rely on the state court records and the findings made in connection with petitioner's conviction, appeal, and postconviction review.

FACTS

Petitioner was charged in Dane County cases nos. 05-CF-0703, 05-CF-0839, and 05-CF-1152 with committing six counts of second-degree sexual assault in violation of Wis. Stat. § 940.225(2)(g). This statute makes it a Class C felony for an employee of a treatment "facility or program," which includes an "inpatient health care facility" as defined in § 940.295(2)(h), to have "sexual contact or sexual intercourse with a person who is a patient or resident of the facility or program." Wis. Stat. § 940.225(2)(g). For purposes of § 940.225, Wis. Stat. § 940.225(5)(b)1. provides that "sexual contact" means

> Any of the following types of intentional touching, whether direct or through clothing, if that intentional touching is either for the purpose of sexually degrading[] or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under [§] 940.19(1):
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> a. Intentional touching by the defendant or, upon the defendant's instruction, by another person, by the use of any body part or object, of the complainant's intimate parts.

"Intimate parts" means "the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being." Wis. Stat. § 939.22(19).

The charges against petitioner stemmed from allegations by four patients (Ramona B., Betty T., Terry W. and Susan M.) at St. Mary's Hospital in Madison, Wisconsin, where petitioner was employed as a certified nursing assistant. The women alleged that petitioner

sexually assaulted them by fondling them inappropriately on their breasts or genitalia while they were patients at the hospital. The charges against petitioner were consolidated for trial on all six counts: two involving sexual contact with Ramona B., two for sexual contact with Betty T. and one each for sexual contact with Terry W. and Susan M.

Petitioner waived his right to have his cases heard by a jury and elected to proceed with a bench trial. On December 14, 2005, the circuit court found him guilty as charged in all six counts and issued a lengthy set of findings in support of the judgment of conviction. Circuit Court's Findings and Decisions, Dane County cases nos. 05-CF-0703, 05-CF-0839, and 05-CF-1152, attached to Pet., dkt. #1, exh. 1. On January 23, 2007, the circuit court sentenced petitioner to an aggregate term of 32 years in prison, to be followed by a period of extended supervision.

Shortly after the circuit court entered its judgment, petitioner filed a motion for postconviction relief in which he challenged the legal sufficiency of the evidence. Petitioner argued that the state had not shown beyond a reasonable doubt that St. Mary's Hospital was licensed or approved by the Department of Health and Family Services, now known as the Department of Health Services, or DHS, 2007 Wis. Act 20, § 9121(6)(a), and had therefore, failed to prove that St. Mary's Hospital met the statutory definition of an "inpatient health care facility" found in Wis. Stat. § 940.295(h) for purposes of the sexual assault offense. Petitioner argued further that two of the sexual assault counts lodged against

him concerning Ramona B. and Betty T. were multiplicitous, thereby violating his right not to be placed in double jeopardy. The trial court denied petitioner's postconviction motion for relief from the judgment in a written order entered on September 26, 2007. Decision and Order on Defendant's Motion for Post-Conviction Relief, Dane County cases nos. 05-CF-0703, 05-CF-0839, and 05-CF-1152, attached to Pet., dkt. #1, exh. 6.

Petitioner filed a direct appeal from the judgment and the trial court's decision to deny his postconviction motion. In that proceeding, petitioner repeated his claim that the evidence was insufficient to support a conviction for sexual assault because the State had failed to prove an essential element of the offense beyond a reasonable doubt. The Wisconsin Court of Appeals agreed with the circuit court, holding that the evidence was sufficient because there was proof in the record that St. Mary's Hospital met the statutory definition of an inpatient health care facility.

> Reveles contends there was insufficient evidence to establish beyond a reasonable doubt that St. Mary's Hospital was licensed or approved by DHS and that, in this case, this was an element of the crime under Wis. Stat. § 940.225(2)(g). The State does not dispute Reveles's contention that St. Mary's Hospital's licensure or approval by DHS is an element of the crime with which Reveles[] was charged. We take this as an implicit concession that it is an element of the crime. See State ex rel. Sahagian v. Young, 141 Wis. 2d 495, 500, 415 N.W.2d 568 (Ct. App. 1987). The State's position is that there was circumstantial evidence and reasonable inferences from the evidence sufficient to establish this element beyond a reasonable doubt.
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> Before discussing the evidence we provide some additional statutory

background. A hospital is defined in Wis. Stat. § 50.33(2)(a) as

> any building, structure, institution or place devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment of and medical or surgical care for 3 or more nonrelated individuals hereinafter designated patients, suffering from illness, disease, injury or disability, whether physical or mental, and including pregnancy and regularly making available at least clinical laboratory services, and diagnostic X-ray services and treatment facilities for surgery, or obstetrical care, or other definitive medical treatment.

> It is illegal for a facility to use the term "hospital" to identify itself if it is not approved by DHS. Wis. Stat. § 50.39(2). In addition, "no hospital may operate in Wisconsin unless it is approved by the department." Wis. Admin. Code § HFS 124.03(1) (Dec. 2004). . . . Once DHS has issued a certificate of approval to a hospital, that certificate remains in effect unless there is a substantial failure to comply with the statutes or administrative code provisions regulating hospitals. Wis. Stat. § 50.35. If the department issues an order revoking a certificate of approval, the attorney general enforces the order by court action, including injunctive relief. Section 50.39(4).

State v. Reveles, App. Nos. 2008AP364-CR, 2008AP365-CR, 2008AP366-CR (Ct. App. Jan. 29, 2009) at ¶¶ 6, 8 (footnote omitted), attached to Pet., dkt. #1, exh. 8. The court of appeals observed that the State had presented evidence to show that St. Mary's Hospital was operating as a licensed entity for the purpose of providing medical diagnosis and treatment. That evidence included testimony from registered nurses who were working at St. Mary's Hospital, and showed that Betty T., Ramona B., Terry W. and Susan M. were patients at the facility and were receiving treatment for serious medical issues when the offenses occurred. Id. at ¶¶ 9-11. Crediting this testimony, the court found that the evidence was

sufficient to establish beyond a reasonable doubt that St. Mary's Hospital met the statutory definition of an inpatient health care facility. Id. at ¶¶ 12, 14.

In addition to challenging the sufficiency of the evidence, petitioner repeated on appeal his argument that, of the four counts of sexual assault lodged against him involving Ramona B. and Betty T., two were multiplicitous in violation of the prohibition against double jeopardy found in the state and federal constitutions. In particular, petitioner argued that the two counts involving Ramona B. and the two counts involving Betty T. were identical in fact because each set of charges arose out of a "single brief, continuous incident" of touching or fondling each woman. The court of appeals found that Reveles waived this claim, however, by failing to present it in a timely objection before the end of trial. Id. at ¶¶ 16-19 (relying on State v. Koller, 2001 WI App 253, 248 Wis. 2d 259, 635 N.W.2d 838)).

Petitioner conceded that he had waived his right to raise a multiplicity challenge on appeal, but argued that his waiver should be excused because his defense attorney had failed to raise a timely objection to the multiplicitous charges and his deficient representation had prejudiced petitioner. The court of appeals rejected petitioner's argument and found that, in addition to waiving his multiplicity challenge, he had not demonstrated that his counsel's performance was deficient for failing to raise an objection because the charges were not identical in fact or multiplicitous under state law:

Charges are not identical in fact if they are "separated in time or are of a significantly different nature . . . ." State v. Eisch, 96 Wis. 2d 25, 31, 291 N.W.2d 800 (1980).

> The "different nature" inquiry is not limited to an assessment of whether the acts are different types of acts. Rather, even the same types of acts are different in nature "if each requires 'a new volitional departure in the defendant's course of conduct.'" Furthermore, time is an important factor, but even a brief time separating acts may be sufficient:
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> "That the interval is merely minutes or even seconds, as with the other elements and factors discussed, cannot be a solely determinative factor. The resolution of this factor is not solved by a stopwatch approach."
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> The pertinent time question is whether the facts indicate the defendant had "'sufficient time for reflection between the assaultive acts to again commit himself.'"

Koller, 248 Wis.2d 259, ¶ 31, 635 N.W.2d 838 (citations omitted).

Ramona B. testified as follows. While she was a patient at St. Mary's Hospital, Reveles came into her room, asked her if she wanted a back rub, and drew the curtains around her bed. He told her to lay on her stomach, and he began rubbing her back. In the course of this he moved his hands around her sides and began rubbing her breast. At that point, she tensed up and Reveles pulled away. After that, Reveles placed his hand on her buttocks and asked her if she wanted it rubbed. She said no. She indicated that he said something to her along the lines of "it feeling good." She rolled over, trying to sit up, but Reveles reached under her gown and rubbed her breast again and while he did this, his other hand "came up through my private part." According to Ramona B., this continued until she heard a noise, at which point he stopped. She then left the room and went to a common area where she sat "thinking about what just went on." She decided that "he wasn't getting away with it" and she reported the incident to a nurse ten to fifteen minutes later.

> We conclude that the two counts involving Ramona B. are not multiplicious. After Reveles rubbed her breast, she tensed up, and he pulled away. At that point, he could have refrained from any further sexual contact with Ramona B. Instead, he placed his hand on her buttocks and when she said no and tried to evade his touch, he chose to touch her breast again and also to touch her genitals. We are satisfied that the touching of her genitals constituted a separate violation from the act of touching her breast.
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> Betty T. testified as follows. While she was a patient at St. Mary's Hospital, Reveles asked her roommate, Ramona B., if she wanted a back rub, but because the curtains were drawn, she could not see what happened. After Ramona B. left the room, Reveles asked her if she wanted a back rub, and she said yes. Reveles instead gave her a sponge bath. In the course of the sponge bath, Reveles motioned for her to turn over on to her back, and she did. He touched her breast and her nipple and then "rubbed the nipple and pulled it out." He then placed his fingers in the folds of her genitals and rubbed "back and forth." She stiffened up and he stopped.
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> We conclude that the two counts involving Betty T. were not multiplicitous. Not only did Reveles touch two different intimate parts, he manipulated each in two distinct ways, each a separate volitional act.
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> Because we conclude that the two counts against Reveles with respect to Ramona B. and the two counts with respect to Betty T. were not multiplicitous based on the trial evidence, Reveles's trial counsel was not deficient for not raising a multiplicity objection, nor was Reveles prejudiced by the lack of an objection. . . . Accordingly, we conclude that Reveles did not receive ineffective assistance of counsel.

State v. Reveles, App. Nos. 2008AP364-CR, 2008AP365-CR, 2008AP366-CR (Ct. App. Jan. 29, 2009) at ¶¶ 23-32 (footnotes omitted), attached to Pet., dkt. #1, exh. 8.

The court of appeals affirmed the conviction after determining that "the circuit court correctly denied [petitioner's] post-conviction motion based on his challenge to the

sufficiency of the evidence and his multiplicity challenge." *Id.* at ¶ 33. The Wisconsin Supreme Court denied petitioner's request for review of this decision on April 14, 2009.

On December 8, 2009, petitioner filed a motion for postconviction relief in state court under Wis. Stat. § 974.06. According to a factual summary of those claims provided by petitioner, he raised the same three grounds for relief that he had presented on direct appeal. Traverse, dkt. # 27, at 6. In addition to those three claims, petitioner also raised the following new grounds for relief on postconviction review:

> (4) Wis. Stat. § 940.225(g) is overbroad, and therefore unconstitutional, because it violated his First Amendment right to engage in the free expression of his "nursing art" and classified him unfairly as a "health care" worker;
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> (5) he was denied due process because the criminal complaint did not give adequate "notice" of the penalties;
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> (6) the affidavit presented in support of the criminal complaint and information was filled with "prejudicial and false information" in violation of the Fourth Amendment;
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> (7) he was denied effective assistance by postconviction counsel, who failed to raise all issues involving his trial lawyer's ineffectiveness;
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> (8) the State failed to disclose evidence that was favorable to the defense;
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> (9) the State sponsored false and misleading testimony from an expert witness;
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> (10) the circuit judge who presided over the trial was biased against him; and

(11) the evidence was factually insufficient to sustain the conviction, meaning that he was actually innocent of the offense.

Appendix, attached to Traverse, dkt. # 27, at exh. C, 17-19.

The judge who had presided over petitioner's trial and initial postconviction proceeding had retired, so the Dane County Clerk's Office assigned petitioner's motion for postconviction relief to Circuit Judge William E. Hanrahan. Judge Hanrahan denied petitioner's motion for postconviction relief in a written order without a hearing, finding that petitioner was not entitled to relief because the grounds he asserted were "either outside the scope of Wis. Stat. § 974.06 or . . . not supported by sufficient facts." Decision on Defendant's Motion for Post-Conviction Relief Under Stat. § 974.06, Dane County case numbers 05-CF-0703, 05-CF-0839, and 05-CF-1152, attached to Pet., dkt. #1, exh. 2.

Two days later, on January 6, 2010, the Dane County Clerk's Office received a request from petitioner for a substitution of judge in petitioner's postconviction proceeding. Because he had already denied petitioner's postconviction motion, Judge Hanrahan denied the request as untimely. Petitioner then filed motions for relief in an effort to vacate Judge Hanrahan's decision and to have petitioner's post-judgment motions reassigned to another judge. Judge Hanrahan denied those motions as well.

Petitioner filed a direct appeal from the order denying his motion for postconviction relief, Brief and Appendix of Defendant Appellant, App. Nos. 2010AP515, 2010AP516,

2010AP517, attached to Ans., dkt #18, at exh. G, but did not take issue with the ultimate decision to deny his motion. Instead, he argued that Judge Hanrahan had erred by denying his motion to substitute or reassign his postconviction proceeding to another judge. The Wisconsin Court of Appeals affirmed the orders of the circuit court summarily on February 25, 2011. State v. Reveles, App. Nos. 2010AP515, 2010AP516, 2010AP517 (Ct. App. Feb. 25, 2011), attached to Ans., dkt. #18, at exh. I. Petitioner did not appeal further by filing a petition for review with the Wisconsin Supreme Court. Petitioner filed this petition for a writ of habeas corpus on May 27, 2011.

OPINION

Review of petitioner's federal habeas corpus petition is governed by the terms of the Antiterrorism and Effective Death Penalty Act, codified at 28 U.S.C. § 2254(d), which "tightly constrains the availability of the writ." Winston v. Boatwright, 649 F.3d 618, 625 (7th Cir. 2011) (citing Stock v. Rednour, 621 F.3d 644, 649 (7th Cir. 2010)). Where a petitioner's claims have been adjudicated on the merits in state court, a federal habeas corpus court may grant relief only if the state court's adjudication of the prisoner's claims

> (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
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> (2) resulted in a decision that was based on an unreasonable

> determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). To grant habeas relief under the "contrary to" clause, a federal court must find that the state court reached a result opposite to a decision by the Supreme Court on materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405 (2000). In this context, "clearly established" law refers to "the holdings, as opposed to the dicta," of the Supreme Court's decisions as of the time of the relevant state court decision. Carey v. Musladin, 549 U.S. 70, 74 (2006) (citing Williams, 529 U.S. at 412); see also Howes v. Fields, — U.S. —, 132 S. Ct. 1181 (2012). A federal court may grant relief under the "unreasonable application" clause "if the state court correctly identifies the governing legal principle from [Supreme Court] decisions but unreasonably applies it to the facts of the particular case." Bell v. Cone, 535 U.S. 685, 694 (2002). The focus of the reasonableness inquiry is on whether the state court's application of clearly established federal law is "objectively unreasonable," not whether it applied clearly established federal law correctly. Id.

The Supreme Court has cautioned that, in conducting federal habeas review, state court decisions must be treated with "deference and latitude." Harrington v. Richter, — U.S. —, 131 S. Ct. 770, 787 (2011); Renico v. Lett, 559 U.S. —, 130 S. Ct. 1855, 1862 (2010) (The AEDPA "imposes a 'highly deferential standard for evaluating state-court rulings,

. . . and 'demands that state-court decisions be given the benefit of the doubt.") (citations omitted). The unreasonableness standard is "difficult to meet" because it was meant to limit relitigation of claims already rejected in state proceedings and to preserve the extraordinary nature of federal habeas review as "a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Richter, 131 S. Ct. at 786 (quoting Jackson v. Virginia, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring)).

In deciding whether a habeas corpus petition merits relief, a reviewing court looks to the "last reasoned state-court opinion" to address the petitioner's claims. Ylst v. Nunnemaker, 501 U.S. 797, 805 (1991); Jefferson v. Welborn, 222 F.3d 286, 288 (7th Cir. 2000). The last state court to consider the merits of petitioner's claims 1, 2 and 3 was the Wisconsin Court of Appeals, which affirmed the conviction and the trial court's decision to deny petitioner's motion for postconviction relief. That court addressed claims 1, 2 and 3 but adjudicated the merits of only claims 1 and 3. Petitioner did not exhaust his remaining claims by presenting them properly in his postconviction motion for relief under Wis. Stat. 974.06 or in an appeal to the Wisconsin Court of Appeals, followed by a proceeding before the Wisconsin Supreme Court.

A. Sufficiency of the Evidence (Claim 1)

In claim 1, petitioner argues that the evidence was legally insufficient to support his conviction for second-degree sexual assault in violation of Wis. Stat. § 940.225(2)(g) because the State failed to affirmatively prove an element of the offense, namely, that his employer, St. Mary's Hospital, was a state-licensed inpatient health care facility. In adjudicating this claim, the state court of appeals held that the State had presented sufficient evidence to establish beyond a reasonable doubt that St. Mary's Hospital was an inpatient health care facility as that term is defined by state law. State v. Reveles, App. Nos. 2008AP364-CR, 2008AP365-CR, 2008AP366-CR (Ct. App. Jan. 29March 19, 20122, attached to Pet., dkt. #1, exh. 8. In doing so, the court of appeals rejected petitioner's claim under the standard for reviewing evidentiary sufficiency outlined in State v. Poellinger, 153 Wis. 2d 493, 451 N.W.2d 752 (1990), which follows the same standard articulated by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307 (1979) for determining challenges to the sufficiency of the evidence under the due process clause.

Evidence is sufficient to support a conviction in compliance with the due process clause so long as "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319. As the court of appeals observed, the evidence at petitioner's trial showed that St. Mary's Hospital was operating as a licensed facility for

the purpose of providing medical diagnosis and treatment for injury and illness of the sort suffered by Ramona B., Betty T., Terry W. and Susan M., who were patients at the facility when they encountered petitioner. Petitioner disagrees that this evidence was sufficient to show that St. Mary's Hospital met the legal definition of an inpatient health care facility. A federal habeas corpus court, however, "may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court." Cavazos v. Smith, — U.S. —, 132 S. Ct. 2, 4 (2011). Rather, "[it] may do so only if the state court decision was 'objectively unreasonable.'" Id. (quoting Renico, 559 U.S. at —, 130 S. Ct. at 1862 (internal quotation marks omitted)). Petitioner has not demonstrated that the state court's conclusion was objectively unreasonable.

Petitioner insists, nevertheless, that the evidence presented at trial was inadequate to meet the legal definition of inpatient health care facility as defined by the Wisconsin legislature. To the extent that petitioner disputes the validity of the state court's legal conclusion, his argument implicates an interpretation of state law, which is outside the scope of federal habeas review. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) (emphasizing that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions"). Simply put, "[f]ederal habeas courts lack subject-matter jurisdiction over [questions of state law]." Lambert v. Davis, 449 F.3d 774, 778-79 (7th Cir. 2006). Habeas petitioners cannot avoid this limitation by recasting their arguments as challenges

to the sufficiency of the evidence under Jackson. Curtis v. Montgomery, 552 F.3d 578, 582 (7th Cir. 2009) (citing Bates v. McCaughtry, 934 F.2d 99, 102 (7th Cir. 1991)). For these reasons, I conclude that petitioner is not entitled to relief on his challenge to the sufficiency of the evidence (claim 1).

B. Multiplicity (Claim 2)

In claim 2, petitioner complains that his right to be free from double jeopardy was violated because two of the counts against him were multiplicitous. The Wisconsin Court of Appeals rejected claim 2 for procedural reasons after finding that petitioner waived his right to raise a double jeopardy claim on the issue of multiplicity. In particular, the Wisconsin Court of Appeals found that petitioner waived review because he "did not raise a multiplicity objection to the charges" before the end of trial. State v. Reveles, App. Nos. 2008AP364-CR, 2008AP365-CR, 2008AP366-CR (Ct. App. Jan. 29, 2009) at ¶ 22, attached to Pet., dkt. #1, exh. 8. The court of appeals relied expressly on an independent state procedural rule as the basis for its decision. Id. As respondent notes, it follows that this claim is procedurally barred from federal habeas corpus review. Wainwright v. Sykes, 433 U.S. 72, 86–87 (1977) (observing that defendant's failure to timely object at trial will amount to "an independent and adequate state procedural ground" for rejecting direct appeal, thereby precluding habeas review).

As to respondent's contention that petitioner waived appellate review of his multiplicity claim, petitioner argues in claim 3 that his failure to raise the issue was the result of ineffective assistance of counsel; his trial lawyer failed to raise a timely objection to the multiplicitous charges. I need not address the effect of petitioner's waiver or determine whether his procedural default was excused by an exception. Instead, I will consider petitioner's multiplicity claim briefly below in connection with the contention that his lawyer was deficient for failing to raise a double jeopardy objection in a timely manner. Like the Wisconsin Court of Appeals, I conclude that counsel was not ineffective in this respect. He had no reason to argue petitioner's multiplicity claim because it had no merit.

C. Ineffective Assistance of Counsel (Claim 3)

In claim 3, petitioner argues that his defense lawyer was deficient for failing to raise a timely objection on the issue of multiplicity prior to the end of trial and that he was prejudiced by this procedural default. In determining that petitioner did not overcome that procedural default, the Wisconsin Court of Appeals adjudicated claim 3 by concluding that petitioner's counsel was not ineffective because his failure to object was not deficient. Consistent with the standard applied by the court of appeals, a defendant's claim that he received ineffective assistance of counsel must show both (1) that his lawyer's performance was so deficient as to "[fall] below an objective standard of reasonableness"; and (2) that any

ineffectiveness prejudiced petitioner, rendering the proceeding fundamentally unfair and the result unreliable. Strickland v. Washington, 466 U.S. 668, 687, 691-92 (1984). To succeed on this claim, petitioner must show first that his counsel had a valid objection that was required by existing law but failed to make it. Stephenson v. Wilson, 619 F.3d 664, 670 (7th Cir. 2010). Petitioner must then show that the deficiency "so prejudiced his defense that it deprived him of a fair trial" or that the outcome would have been different. Id. at 670-71 (quotation and citations omitted).

Petitioner was charged with one count of having sexual contact with Ramona B. by fondling her breasts and one count for having contact with her genitals. Petitioner faced two similar counts of having sexual contact with Betty T. Petitioner insists that the two counts of sexual assault involving Ramona B. and the two counts of sexual assault involving Betty T. were not four separate offenses, but formed a "single course of conduct" where each woman was concerned. Petitioner reasons, therefore, that he should have been charged with only one count of sexual assault involving Ramona B. and one count involving Betty T., for a total of two counts, not four. Arguing that he was punished twice for an offense that stemmed from a "single course of conduct," petitioner contends that the two counts of sexual assault involving Ramona B. and the two counts of sexual assault involving Betty T. were multiplicitous, and that his attorney should have raised an objection under the double jeopardy clause.

"An indictment that charges a single offense in more than one count is multiplicitous." United States v. Allender, 62 F.3d 909, 912 (7th Cir. 1995). Multiplicity in an indictment exposes a defendant to the threat of receiving multiple punishments for the same offense in violation of the double jeopardy clause. United States v. Starks, 472 F.3d 466, 469 (7th Cir. 2006) (citations omitted). The double jeopardy clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. In addition to protecting against subsequent prosecution following acquittal, the double jeopardy clause also protects against multiple punishments for the same offense. Illinois v. Vitale, 447 U.S. 410, 415 (1980) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). In this context, multiplicity occurs when the same conduct is alleged to violate two separate statutes. In such a case, a reviewing court must determine whether the offenses have the "same elements" under the test outlined in Blockburger v. United States, 284 U.S. 299, 304 (1932) ("[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision required proof of a fact which the other does not.").

In the context of resolving petitioner's claim that his counsel should have raised an objection to the counts involving Ramona B. and Betty T., the court of appeals considered whether an objection was required under the following test:

> The purpose of a multiplicity challenge is to prevent the defendant from being subject to multiple punishments for the same offense. State v. Koller, 2001 WI App 253, ¶ 28, 248 Wis. 2d 259, 635 N.W.2d 838. We analyze multiplicity challenges using a two-part test. Id., ¶ 29. First, we decide whether the offenses are identical in law and fact under Blockburger v. United States, 284 U.S. 299, 304 (1932). Koller, 248 Wis. 2d 259, ¶ 29. Second, if the offenses are not identical in law and fact, we inquire whether the legislature intended multiple punishments for the offense in question. Id. . . . .

State v. Reveles, App. Nos. 2008AP364-CR, 2008AP365-CR, 2008AP366-CR (Ct. App. Jan. 29, 2009) at ¶ 20, attached to Pet., dkt. #1, exh. 8. After reviewing the evidence presented in support of the sexual assault charges involving Ramona B. and Betty T., the court concluded that the charges were factually distinct and did not result in the imposition of double punishment for the same offense of sexual assault, as that offense is defined by state law. Id. at ¶¶ 26-28.

The counts at issue are legally identical because all of the charges against petitioner lodged allegations of second-degree sexual assault in violation of the same statute, Wis. Stat. § 940.225(2)(g). Petitioner challenges the state court's conclusion that each of the counts at issue (the two counts involving Ramona B. and the two counts involving Betty T.) stemmed from a distinct set of actions on his part and were not identical as a matter of fact. This determination turns on the manner in which an incident of sexual assault is charged as an offense under Wisconsin law.

To determine whether a charging instrument contains multiplicitous counts, a

reviewing court must look to the applicable criminal statute to see what constitutes an "allowable 'unit' of prosecution" for an offense. United States v. Allender, 62 F.3d 909, 912 (7th Cir. 1995) (quoting United States v. Song, 934 F.2d 105, 108 (7th Cir. 1991)). In other words, the court must determine "the minimum amount of activity for which criminal liability attaches." Id. Whether conduct may form the basis of one or more distinct offenses or units of prosecution is a question of legislative intent. Sanabria v. United States, 437 U.S. 54, 69-70 (1978). In that respect, the power to define an offense for purposes of the double jeopardy clause is vested with the legislative branch. Brown v. Ohio, 432 U.S. 161, 164 (1977); see also Jones v. Thomas, 491 U.S. 376, 381 (1989) (When multiple punishments are imposed at a single criminal trial, the protection afforded by the double jeopardy clause is limited to ensuring that sentencing courts do not exceed "the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments.").

When assessing the intent of the state legislature, a federal habeas corpus court is bound by the construction that the highest court in that state gives that statute. Missouri v. Hunter, 459 U.S. 359, 368 (1982). As outlined above, the sexual assault statute at issue in petitioner's case, Wis. Stat. § 940.225(g), prohibits "sexual contact," which is defined to include certain types of "intentional touching" of patients confined to a treatment facility or program, such as a hospital or inpatient health care facility. The court of appeals

considered the sexual assault statute and the testimony given by Betty T. and Ramona B. at trial and determined that each charged offense stemmed from a "separate volitional act" on petitioner's part, rather than a continuing course of conduct. In cases of sexual assault, Wisconsin courts have held that "where there is a separate volitional act, there is a basis for a separate charge." State v. Bergeron, 162 Wis. 2d 521, 535, 470 N.W.2d 322, 327 (Ct. App. 1991); see also State v. Meehan, 2001 WI App 119, ¶¶ 29–35, 244 Wis. 2d 121, 140-41, 630 N.W.2d 722, 732-33 (Ct. App. 2001); State v. Cleveland, 2000 WI App 142, ¶¶ 25-26, 237 Wis. 2d 558, 574, 614 N.W.2d 543, 551 (Ct. App. 2000). Thus, as the court of appeals observed, the Wisconsin legislature intended to allow separate punishments for each offense of sexual assault legitimately charged under Wis. Stat. § 940.225. Bergeron, 162 Wis. 2d at 535-36, 470 N.W.2d at 328; Cleveland, 2000 WI App. 142, ¶ 26, 237 Wis. 2d at 574, 614 N.W.2d at 551.

Petitioner has not shown that the state court erred in its interpretation of the applicable law or that, if his counsel had raised an objection to the counts at issue, the trial court would have been required to uphold the objection. To the extent that petitioner's underlying double jeopardy claim rests on a state court's interpretation of state law, federal habeas corpus review is not available. McCloud v. Deppisch, 409 F.3d 869, 875-76 (7th Cir. 2005). More important, to the extent that petitioner asserts that his attorney was deficient for failing to object, his argument is without merit because he has not shown that the charges

were multiplicitous or that he was punished twice for the same offense. A lawyer is not deficient for failing to raise a meritless objection. Northern v. Boatwright, 594 F.3d 555, 561 (7th Cir. 2010). Absent a showing that counsel was deficient or that prejudice resulted from counsel's shortcomings, petitioner cannot show that the state courts unreasonably applied the clearly established law governing claims of ineffective assistance of counsel.

D. All Remaining Claims (Claims 4 through 10) are Barred Procedurally

As outlined above, petitioner has alleged in one form or another a series of claims regarding the constitutionality of the state sexual assault statute, the adequacy of pretrial notice that petitioner received, whether the prosecutor failed to disclose evidence and sponsored false or misleading testimony, the trial court's impartiality, and the factual sufficiency of the evidence supporting his guilt or innocence. These remaining claims (4 through 10) are procedurally defaulted and barred from review because, as respondent correctly notes, petitioner did not exhaust his available state court remedies regarding the claims. Petitioner raised claims 4 through 10 in his postconviction motion for relief under Wis. Stat. § 974.06. The record confirms that, after the circuit court denied petitioner's motion, he did not present the substance of these claims to the Wisconsin Court of Appeals or the Wisconsin Supreme Court.

A petitioner who fails to present his claims in a petition for discretionary review to

a state court of last resort has not properly presented or exhausted his claims. O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999). In Wisconsin, state prisoners who wish to have their constitutional claims heard in federal court must first present the operative facts and controlling legal principles of those claims to the Wisconsin Court of Appeals and then to the Wisconsin Supreme Court. Moore v. Casperson, 345 F.3d 474, 486 (7th Cir. 2003). Failure to present claims to the state's highest court constitutes a procedural default that is sufficient to bar federal review unless an exception applies. Boerckel, 526 U.S. at 848; Howard v. O'Sullivan, 185 F.3d 721, 726 (7th Cir. 1999).

Petitioner does not deny that he failed to raise claims 4 through 10 properly by presenting them to the Wisconsin Supreme Court. Dkt. # 28, at 22. Where a petitioner has procedurally defaulted his claims, review is not available unless he can demonstrate both "cause for the default and prejudice from the asserted error." House v. Bell, 547 U.S. 518, 536 (2006) (citations omitted). Alternatively, a petitioner may invoke an exception reserved for "the 'narrow class of cases . . . implicating a fundamental miscarriage of justice'" by asserting a claim of actual innocence. Schlup v. Delo, 513 U.S. 298, 314-15 (1995) (quoting McKleskey v. Zant, 499 U.S. 467, 493-94 (1991)).

Petitioner has not attempted to show cause or prejudice as a result of his procedural default where claims 4 through 9 are concerned. Even if those claims are not procedurally barred, petitioner does not support these claims with specific facts showing that he is entitled

to relief. Under these circumstances, petitioner's conclusory statements are insufficient to overcome the procedural bar. Bintz v. Bertrand, 403 F.3d 859, 864 (7th Cir. 2005). Because petitioner does not demonstrate that any exception applies, I conclude that claims 4 through 9 are procedurally barred and I decline to address them any further.

By raising a claim of actual innocence in claim 10, petitioner appears to argue that his default should be excused under the exception reserved for fundamental miscarriages of justice. To make a credible claim for purposes of this narrow exception, however, a petitioner must support his innocence claim "with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup, 513 U.S. at 324. To fit within this narrow gateway to habeas review of a defaulted claim, a petitioner also must show that "in light of new evidence, it is more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt." House, 547 U.S. at 537 (internal quotation and citation omitted). Petitioner has not presented any evidence that meets this criteria and falls far short of this standard.

In his brief in support of his claim of actual innocence, petitioner does not deny that he fondled the complainants' breasts and rubbed their genitalia while they were patients at St. Mary's Hospital and he was employed as a certified nursing assistant. Rather, petitioner argues that this type of contact could be construed as "consistent with the intimate nature

of nurse aid duties involved with patient cares." Rebuttal Decl. in Support of Traverse, dkt. # 29, at 14. In this argument, petitioner takes issue with the fact finder's interpretation of the evidence; he says something to support a claim of actual innocence. To the extent that petitioner attempts to relitigate arguments that were raised and rejected at trial, this type of inquiry is "beyond the scope" of habeas corpus review. Schlup, 513 U.S. at 330 (observing that challenges to the sufficiency of the evidence are confined to those governed by the due process standard found in Jackson). Because petitioner does not allege facts or present credible proof showing that he is actually innocent, claim 10 does not satisfy the miscarriage-of-justice exception and does not excuse the procedural default in this case.

In summary, petitioner has not established a valid claim of actual innocence or any other exception to the doctrine of procedural default. Accordingly, federal habeas corpus review to claims 4 through 10. Because petitioner has not shown that any of his other claims merit relief under the deferential standard of review found in 28 U.S.C. § 2254(d), his habeas corpus petition must be denied.

D. Certificate of Appealability

Under Rule 11 of the Rules Governing Section 2254 Cases, the court must issue or deny a certificate of appealability when entering a final order adverse to petitioner. To obtain a certificate of appealability, the applicant must make a "substantial showing of the

denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means 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." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one. For the reasons stated above, reasonable jurists would not debate that the decision of the Wisconsin Court of Appeals on claims 1 and 3 was objectively reasonable. In addition, reasonable jurists would not disagree or debate that claim 2 is without merit or that petitioner has procedurally defaulted claims 4 through 10. Therefore, no certificate of appealability will issue.

ORDER

IT IS ORDERED that

1. Petitioner Michael C. Reveles's petition for a writ of habeas corpus under 28 U.S.C. § 2254 is DENIED.

2. Petitioner is DENIED a certificate of appealability. If petitioner wishes he may seek a certificate from the court of appeals under Fed. R. App. 22.

Entered this 20th day of March, 2012.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge