

No. 17-4051

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 08, 2018
DEBORAH S. HUNT, Clerk

WILLIAM A. PARRISH, JR.,

Petitioner-Appellant,

v.

LYNEAL WAINWRIGHT, Warden,

Respondent-Appellee.

ORDER

William A. Parrish, Jr., a pro se Ohio prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition. This court construes the notice of appeal as an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2). Additionally, Parrish moves to proceed in forma pauperis on appeal and for the appointment of counsel.

In 2012, an Ohio jury convicted Parrish of two counts of aggravated robbery, two counts of felonious assault, and one count of having weapons while under a disability. The trial court sentenced him to twenty-four years in prison. The Ohio Court of Appeals dismissed Parrish's pro se appeal because he failed to timely file an appellate brief. Parrish did not appeal to the Ohio Supreme Court or file a state post-conviction petition.

In 2016, Parrish filed this § 2254 petition, raising thirty-two grounds for relief. A magistrate judge recommended that the petition be denied because Parrish had procedurally defaulted all of his grounds. The district court adopted the recommendation, denied Parrish's petition, and declined to issue a COA.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *accord Miller-El v. Cockrell*, 537 U.S. 322, 336

(2003). “When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim,” the petitioner can satisfy § 2253(c)(2) by establishing that “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The district court determined that Parrish had procedurally defaulted all of his thirty-two grounds for relief because the Ohio Court of Appeals dismissed his appeal for failure to file a brief, he did not appeal to the Ohio Supreme Court, and he failed to file a state post-conviction petition.

When a petitioner fails to comply with an adequate and independent state procedural rule when presenting a federal constitutional claim, the petitioner may be barred from federal court review of his claim. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). A federal habeas court must first determine whether a state procedural rule applies to the petitioner’s claim and whether the petitioner failed to comply with that rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). Second, the federal “court must decide whether the state courts actually enforced the state procedural sanction.” *Id.* Third, the federal “court must decide whether the state procedural forfeiture is an ‘adequate and independent’ state ground on which the state can rely to foreclose review of a federal constitutional claim.” *Id.* (citing *Cty. Court of Ulster Cty. v. Allen*, 442 U.S. 140, 148 (1979)). Fourth, the habeas petitioner can excuse a procedural default by demonstrating cause for his failure to comply with the state procedural rule and prejudice from the alleged constitutional error. *Id.* For purposes of determining procedural default, this court looks to the “last reasoned state court opinion.” *Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010) (en banc).

Reasonable jurists would not debate that Parrish procedurally defaulted his claims by failing to file an appellate brief. Here, the Ohio Court of Appeals specifically cited Parrish’s failure to file a timely brief under Ohio Rule of Appellate Procedure 18(C) as its reason for dismissing his appeal. And this court has found that Ohio Rule of Appellate Procedure 18 is an adequate and independent rule upon which to deny relief. *Normand v. McAninch*, No. 98-3747, 2000 WL 377348, at *4-5 (6th Cir. Apr. 6, 2000).

Parrish appears to argue that his procedural default should be excused because the State failed to provide him with an adequate trial transcript to perfect his appeal, and the State failed to appoint him effective counsel, thus forcing him to proceed pro se. First, as the district court noted, the state court did provide Parrish with a trial transcript, although he disputed its accuracy. Yet he has failed to demonstrate that the trial transcript provided contains any material errors or omissions.

Second, Parrish claims that he was forced to proceed pro se on appeal, but the State appointed him four separate appellate attorneys, although all eventually withdrew from representing him. The heart of this claim appears to be Parrish's contention that none of these attorneys provided effective assistance. However, any claim of ineffective assistance of counsel is itself procedurally defaulted because Parrish failed to properly raise it under Ohio's procedural rules. As a result, this claim cannot be used to demonstrate cause. *See Edwards v. Carpenter*, 529 U.S. 446, 451-53 (2000) (holding that a claim of ineffective assistance of appellate counsel may not be used to demonstrate cause for procedural default if the ineffectiveness claim is likewise procedurally defaulted).

Additionally, reasonable jurists would not disagree that Parrish failed to exhaust his claims by not appealing to the Ohio Supreme Court. *See Rayner v. Mills*, 685 F.3d 631, 643 (6th Cir. 2012) ("Proper exhaustion requires that a petitioner present every claim in the federal petition to each level of the state courts, including the highest state court to which the petitioner is entitled to appeal."); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[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."). Further, to the extent that any of Parrish's claims could have been raised in a state post-conviction petition under Ohio Revised Code § 2953.21, Parrish can no longer raise them as the 365-day limitations period has expired. *See* § 2953.21(A)(2). And for the reasons given earlier, Parrish failed to establish cause and prejudice for his failure to exhaust.

Accordingly, this court **DENIES** Parrish's COA application and **DENIES** as moot his motions to proceed in forma pauperis and for appointment of counsel.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk

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

WILLIAM A. PARRISH, JR.,

Petitioner,

: Case No. 3:16-cv-486

- vs -

District Judge Walter Herbert Rice

Magistrate Judge Michael R. Merz

WARDEN, Marion
Correctional Institution,

:
Respondent.

REPORT AND RECOMMENDATIONS

This habeas corpus case is before the Court on Respondent's Motion to Dismiss on grounds that Petitioner's claims are unexhausted, procedurally defaulted, or not cognizable in federal habeas corpus (ECF No. 19). Petitioner opposes the Motion and has also objected (ECF No. 26) to the Magistrate Judge's Decision and Order denying his renewed Motion for Evidentiary Hearing (ECF No. 24). Judge Rice has recommitted the matter to the Magistrate Judge for reconsideration in light of the Objections (ECF No. 28).

Petitioner pleads the following thirty-two Grounds for Relief:

GROUND ONE: Petitioner was denied his right to a direct appeal from his conviction when the State failed to meet the requirements of Equal Protection and Due Process Clause of the United States Constitution, Amendment Fourteen.

Supporting Facts: The trial court conspired with other public official to prevent the Petitioner from having a meaningful direct appeal by deliberately filing an incomplete trial transcript to the Court of Appeals with missing testimony of the States only witness which was proven to perjured, and missing testimony of character witnesses, and a total of (476) large gaps in the trial transcript, and

Appendix B

a erroneous certification of service attached to the trial transcript in somebody else name and case number which prevented appointed counsel from filing an appellate brief. By the States failure to file a complete record for two (2) years and six (6) month and then deny the Petitioner access to it, knowing that he would be unable to file a appellate brief, then dismiss the Petitioner appeal for failure to prosecute, violated Petitioners Fourteenth Amendment. Exhaustion requirement should be waived, and to further litigate this matter in State court would be futile because the Supreme Court has ruled that the clerk of Court is not required to provide an indigent defendant with his personal copy of the transcript in addition to the copy filed with the Court of Appeals. State ex rel Greene v. Enright(1992) 63 Ohio St.3d 729, 732, 590 N.E. 2d 1257. The Supreme Court of Ohio has also decided that, if the Appellant chooses to proceed pro se on direct appeal he relinquished the ability to gain access to the transcript by refusing the assistance of counsel. In re Greene 506 U.S. 1025.

GROUND TWO: Petitioner was denied effective assistance appellate counsel, in violation of Six, Fourteenth Amendment of the U.S. Const.

Supporting Facts: Through out the Petitioner appeal five court appointed attorneys where ineffective for failure to file a brief, and failed to have the record corrected which denied the Petitioner a direct appeal.

GROUND THREE: Court of Appeals abused it's discretion by allowing (5) court appointed attorneys to with-draw.

Supporting Facts: Five court appointed attorneys where appointed to represent the Petitioner and one attorney, Chris Wesner, was appointed twice and removed both times for no known reason. (Exhibit A) Shows that Chris Wesner was appointed twice. These actions committed by the Court of Appeals caused a severe, excessive, unexcusable delay processing the Petitioners direct appeal. Failure of the Court of Appeals to appoint effective counsel forced the Petitioner to proceed pro se.

GROUND FOUR: Court of Appeals abused it's discretion when it gave the trial court an order to provide the Petitioner with a copy of the record, but when the trial court violated the order the Court of appeals reversed there order.

Supporting Facts: On December 6th, 2013, Court of Appeals ordered the trial court to prepare a CD-ROM that has PDF versions

of the trial transcript & proceedings and mail it to the Petitioner. This order was made directly to the trial Judge Steven K. Dankof. That order was violated and the Court of Appeals reversed the order.

GROUND FIVE: Petitioner was denied his right to a fast & speedy appeal in violation of Due Process of the State and Federal Constitutions, U.S. Const. Amendment VI, XIV; Section 10, 16, Art I, Ohio Const.

Supporting Facts: Petitioner filed a timely notice of appeal on July 17, 2012, after the failure of court appointed attorneys, it was discovered by the Petitioner that the record filed to the court of appeals was deliberately altered by the trial court where omitted testimony of the victims where he admitted to lying under oath, and omitted testimony of petitioners character witnesses, and the deliberate act of filing transcript with a certification of service with another persons name and case number on it. These actions committed by the State prevented appointed counsel from filing a merit brief, which severely prejudice the Petitioner by the excessive, unexcusable delay that resulted from the erroneous incomplete record filed by the trial court.

GROUND SIX: Petitioner was denied his statutory right to a fast & speedy trial right under the Six Amendment of the U.S. Const.

Supporting Facts: On September 15th, 2011, Petitioner was arrest for the listed charges. On January 13th, 2012, Petitioner attended a pre-trial hearing, during that hearing, Judge Steven K. Dankof and appointed counsel Jay Adams mislead the Petitioner by telling him, on the record, that he did not have the right to a fast & speedy trial because of a unissued probation holder from another county. It was discovered by the Petitioner that he did have a right to a fast & speedy trial. On May 30th, 2012, a motion to Discharge for Delay in Trial was filed, and the Petitioner had served a total of 256 days in the Montgomery County Jail, and had not signed any kind of time waiver, and was being held solely on the listed charges. A hearing was requested, but the motion was not taken inconsideration, and was over-ruled on May 31st, 2012, the next day, and without essential findings.

GROUND SEVEN: The trial court abused it's discretion and violated Petitioners Due Process Rights by denying him a Bill of Particulars.

Supporting Facts: On January 13th, 2012, the Petitioner attended a pre-trial hearing, during that hearing Petitioner verbally requested to be provided with a Bill of Particulars because the indictment lack vital information on how the listed crimes were committed. The indictment just tracked the statutory language, and the Petitioner discovery pack contain a 11 page police report. Petitioner constantly complained about the lack of information discovery pack contained, and the Petitioner was told that the prosecutor was holding back some of the discovery. This was stated by attorney Eugene Robinson, and this information was presented to the trial judge. The trial judge and attorney Jay Adams told the Petitioner that the Montgomery County Prosecutors Office does not provide defendants with a Bill of Particulars, which denied the Petitioner the right to a fair trial.

GROUND EIGHT: Petitioners constitutional rights where violated and denied a fair trial when prosecutor, John C. Amos, called to the Montgomery County Jail and had the Petitioner placed in isolation on phone restrictions so that he could not contact potential witnesses.

Supporting Facts: On or about the Month of March, 2012, prosecutor John C. Amos called the Montgomery County Jail and had the Petitioner placed in isolation. The next pre-trial hearing the indictment was present to the trial judge, Steven K. Dankof, and he called the County Jail and had the Petitioner placed back in regular population.

GROUND NINE: Petitioner Due Process rights where violated and denied a fair trial when the lead Detective, Christen Beane harassed each of the Petitioners witnesses before trial.

Supporting Facts: Right before the Petitioner trial Det. Beane went to each of the Petitioners witnesses residence with the demeanor of intimidation, tried to force them to write a statement against the Petitioner. This incident was presented to the trial judge, Steven K. Dankof, informing him of Det. Beane misconduct, but he refuse to address the issue and stated, "you will have to take that up with her supervisor".

GROUND TEN: The trial court violated a higher court order in violation of Title 18 USCS §402. Contempts Constituting Crimes when it disobeyed an order from the Court of Appeals.

Supporting Facts: On December 6th, 2013, the Second District Court of Appeals of Montgomery, Ohio ordered the trial court to

prepare a CD-ROM with PDF versions of the trial transcript & proceedings be mailed to the Petitioner at the expense of the State. The trial court refuse to provide the Petitioner with the CD-ROM, and when the Petitioner presented the issue to the Court of Appeals to hold Judge Steven K. Dankof in contempt, Appeals Court reversed there order.

GROUND ELEVEN: Petitioner did not knowingly and intelligent waive his right to counsel under U.S. Const. VI.

Supporting Facts: Petitioner was not advised that he would be responsible for the attendance of the Petitioners expert witness which the Petitioner had no knowledge of. During trial it was discovered that the expert witness was not going to show up to testify on behalf of the Petitioner. Expert witness was subpoena by the Petitioner for the sole purpose to interpret the victims medical records, because the victim claimed he was shot, but the report in the medical record contradict that claim. The trial court would not hold the expert witness in contempt for not showing and would not grant an continuance to locate another expert witness.

GROUND TWELVE: Trial court abused it's discretion in denying the Petitioner motion to suppress evidence.

Supporting Facts: On April 9th, 2012, a motion to suppress was filed and a evidentiary hearing was requested to suppress photo's that attorney Lucas Wilder told the Petitioner that the prosecutor have, and that some photo's of the victims wounds taken by the victims mother at there residence, and suppress the victims conflicting statements he made.

GROUND THIRTEEN: The trial court violated the Petitioners Due Process rights when it denied the Petitioner the opportunity to ask the jury supplemental questions.

Supporting Facts: On June 1st, 2012, final pre-trial hearing, the trial Judge, Steven K. Dankof, advised the Petitioner that, he will not allow him to ask the jury any questions during the voir dire. Petitioner objected, and stated, how could he receive a fair trial if he could not question the jury before peremptory challenges. Then the Petitioner asked the judge why was he not allowed to ask the jurors any questions? Judge Steven K. Dankof stated, "I'm not going to let you waste the jurors time with your silly questions".

GROUND FOURTEEN: Petitioner was denied Due Process when the prosecutor constructively amended the indictment during trial.

Supporting Facts: During trial the prosecutor stated several times that the Petitioner car-jacked, stole the victims vehicle, which the charge of Grand Theft of a Motor Vehicle was not listed in the indictment. Petitioner objected, but it was over-ruled.

GROUND FIFTEEN: Prosecutor misconduct was committed and the trial court error by allowing the prosecutor to elicit hearsay testimony from the States witness Detective Christen Beane.

Supporting Facts: In Det. Beane report she stated that a unknown female told her that the Petitioner was the suspect in two shootings which led directly to the Petitioners arrest. Before trial a motion was filed requesting the identification of this witness on May 24th, 2016. In response of the request, the State states that the identity of said witness was unknown, and the motion was denied on June 8th, 2012. During the trial, Det. Beane testified, and the prosecutor asked Det. Beane how the Petitioner became a suspect, a unknown prostitute said that the Petitioner was the one who committed the listed offenses. Petitioner objected and stated, "is'nt that hearsay your honor". The objection was over-ruled.

GROUND SIXTEEN: Prosecutor misconduct was committed and Petitioners Due Process rights where violated when the prosecutor knowingly used perjury testimony to gain a conviction, and allowing it to go uncorrected when it appeared.

Supporting Facts: During trial, on cross examination by the Petitioner, the victim, the States only witness and evidence, testified under oath that he had lied at the preliminary hearing, and the prosecutor let this testimony go uncorrected. Before trial, appointed counsel Lucas Wilder informed prosecutor John C. Amos that the victim had lied under oath at the preliminary hearing.

GROUND SEVENTEEN: The trial court abused it's discretion and violated the Petitioners Due Process right when failed to enter a motion of Motion for Judgment of Acquittal.

Supporting Facts: During closing arguments the Petitioner stated to the jury, "how could you find me guilty when you heard the victim tell you that he had lied under oath at the preliminary hearing". Then the Petitioner began to read the perjury statue to the

jury, but the trial judge intervene and said, "Mr. Parrish, you do not have to go through that because we already know what Mr. Huff (the victim) did, and you did a very good job of impeaching his testimony. After the trial court concluded that the victims testimony was perjured and impeach, and the only evidence the State presented against the Petitioner, the trial court had a mandatory duty to enter a Judgment of Acquittal.

GROUND EIGHTEEN: Petitioners conviction where not supported by sufficient evidence and was against the manifest weight of evidence.

Supporting Facts: The sole piece of evidence was from the victim who had admitted to lying under oath at the preliminary hearing.

GROUND NINETEEN: Petitioner was denied Due Process when the prosecutor suppressed exculpatory evidence.

Supporting Facts: The prosecutor repeatedly refused to hand-over photo's of the victims alleged gun shot wound. Two demand for discovery was filed, one request specifically asking for the photo's filed on May 24, 2012. On June 1, 2012, the trial court granted the request for the medical records, but denied the request for the photo's. During trial the prosecutor was permitted to enter the photo's as evidence, over the Petitioners objections.

GROUND TWENTY: The trial court errored when over-ruling the Petitioner motion for acquittal Crim. R. 29(C).

Supporting Facts: It was proven before trial and during trial that the victim had committed perjury, and the trial court had concluded that the victims testimony was perjured and also impeached, and the motion for acquittal should have been granted.

GROUND TWENTY-ONE: The trial court Lack Subject Matter Jurisdiction when the prosecutor knowingly used perjured testimony to indict the Petitioner.

Supporting Facts: One September 23, 2011, the victim testified at the preliminary hearing under oath that he did not consume any alcohol on the night the crime was committed against him. Before the victim testified the State had possession of the medical records, (Exhibit B) because on September 20, 2011, in Det. Beanes notes she stated that the medical records are coming for the victim. The medical record prove that the victim had lied under oath, because the victims lab results came back that his ethanol value was 175

which made him double over the states limit. The prosecutor knew that he had lied before he presented the case to the Grand Jury, because the prosecutor withheld the victims medical records until (3) days before trial.

GROUND TWENTY-TWO: Petitioners Due Process rights were violated when the trial court failed to give the jury instructions on how to rule.

Supporting Facts: Before closing arguments, and after closing arguments, the trial court intentionally did not give the jury any instruction.

GROUND TWENTY-THREE: Brady violation was committed and denied the Petitioner a fair trial.

Supporting Facts: The state had in custody the Petitioner's co-defendant when she was arrested in Terre Haute, IN. She had waived extradition (Exhibit C) willing to come back to Ohio, but the prosecutor dismissed the charges (Exhibit D) against her without giving the Petitioner the opportunity to question her after she stated in the police report that she knows who the person is that committed this crime. When asking the prosecutor on the whereabouts of co-defendant, prosecutor stated that he had no knowledge.

GROUND TWENTY-FOUR: The prosecutors misconduct violated the Petitioner's Due process and denied him a fair trial.

Supporting Facts: Prosecutor deliberately withheld the victims medical records (3) days before trial. When appointed counsel asked the prosecutor for those medical records in a e-mail (Exhibit E), the prosecutor was untruthful and stated that Det. Beane never got the medical records, but in her notes (Exhibit B) she indicated that the medical records are coming for victim.

GROUND TWENTY-FIVE: The trial court violated the Petitioner's Equal Protection Rights by systematic exclusion of African Americans from the Petitioner Grand Jury proceedings, and from the Petitioner jury trial.

Supporting Facts: Before the commencement of the Petitioner trial the jury pool consisted of one African American, and the trial court let him excuse himself, which left the Petitioner with a all white jury pool. The Petitioner requested to have at-least one African American seated on the jury for the purpose of identifying

certain characteristics of blacks. That request was denied and the trial judge stated that there was'nt any blacks available. The jury pool failed to represent a fair cross section of the community.

GROUND TWENTY-SIX: Petitioner was denied the right to a fair trial when the prosecutor used the Petitioners prior conviction to impeach the Petitioners character witnesses.

Supporting Facts: During trial the prosecutor question the Petitioners character witnesses about other crimes committed by the Petitioner to demonstrate Petitioners bad character, and not to prove that he committed the indicted offences.

GROUND TWENTY-SEVEN: The trial court failure to properly file the jury verdict forms denied the Petitioner the opportunity to challenge the error they contain.

Supporting Facts: The trial court abused it's discretion by deliberately not filing the jury verdict forms. It has been discovered by the Petitioner that the lead Detective in this case, Christen Beane, wrote guilty on the verdict forms after the jurors signed them. The hand-writing (Exhibit F) on the verdict matches the hand-writing on the police (Exhibit G) report written out by Det. Beane.

GROUND TWENTY-EIGHT: The Jury Verdict forms that were submitted to the jury were highly prejudicial to the Petitioner.

Supporting Facts: The Jury Verdict forms contain statutory definition of the listed offense which makes them viod.

GROUND TWENTY-NINE: The trial court error when it failed to properly file the exhibits that were presented at trial:

Supporting Facts: The trial court failed to file the medical records, and the preliminary hearing transcript as exhibits. The petitioner used these documents at trial and trial court did not preserve these documents for review on direct appeal.

GROUND THIRTY: The Petitioners Termination Entry that has a rubber stamp is not a final appealable order. (Exhibit H)

GROUND THIRTY-ONE: The Petitioner was illegally detained when transferred from the county jail to Correctional Reception Center.

Supporting Facts: It was discovered by the public defender at C.R.C. that the Petitioner arrived at C.R.C. On July 18, 2016, judgment of conviction was finally entered.

GROUND THIRTY-TWO: Cumulative errors deprived the Petitioner a fair trial in violation of the Fifth, Sixth, and Fourteenth Amendment to the U.S. Constitution.

(Petition, ECF No. 3, PAGEID : 58-62, 13-17.)(Misspellings are quoted as they appear in the original without noting them by insertion of "sic.")

Procedural History

Parrish was indicted by the Montgomery County grand jury in September 2011 with two counts of aggravated robbery with firearm specifications, two counts of felonious assault, also with firearm specifications, and one count of having weapons while under a disability (Indictment, State Court Record, ECF No. 18, PageID 218-21). After dismissing three appointed attorneys, Parrish exercised his constitutional right under *Faretta v. California*, 422 U.S. 806, (1975), to try the case pro se. At trial the jury convicted Parrish on all five counts with the relevant firearm specifications. *Id.* at PageID 271. Common Pleas Judge Steven K. Dankof then sentenced Parrish to twenty-one years imprisonment. *Id.* at PageID 283-85.

Parrish appealed through stand-by counsel and was appointed new counsel by the Court of Appeals. That attorney withdrew after being discharged by Parrish. After discharging several other attorneys, Parrish proceeded pro se, arguing the trial transcript was erroneous and incomplete. After numerous additional extensions of time, the Second District Court of Appeals noted that the trial court has authority under Ohio law to correct the record. It thereupon remanded the case to Judge Dankof and ordered Parrish to re-file his motion in that court (Decision and Entry of April 9, 2015, State Court Record, ECF No. 18, PageID 402-03).

Judge Dankof noted in his decision, *inter alia*, that Parrish had not raised in his renewed motion the asserted missing testimony of Laddie Mae Jackson, the supposed 476 large gaps in the transcript, the omitted jury instructions, or the erroneous certification page. *Id.* at PageID 412-14. On November 19, 2015, after Parrish failed to respond to a show cause order, the Second District dismissed the appeal for failure of Parrish to file a brief. *State v. Parrish*, Case No. 25282 (2nd Dist. Nov. 19, 2015)(copy at State Court Record, ECF No. 18, PageID 477-78.) Parrish did not appeal to the Ohio Supreme Court. Parrish timely filed his habeas corpus petition in this Court on November 28, 2016.

Respondent's Motion to Dismiss provides a lengthy analysis of why Grounds Three, Four, Seven, Ten, Twelve, Eighteen, Twenty-Five, and Twenty-Eight through Thirty-Two state only claims under state law which are not cognizable in habeas corpus (Motion, ECF No. 19, PageID 1423-28). As to Grounds One, Four, Eight, Nine, Ten, Twenty-Seven and Twenty-Nine, Respondent argues Parrish has failed to exhaust available state court remedies, i.e., a petition for post-conviction relief under Ohio Revised Code § 2953.21. *Id.* at PageID 1432-38. Finally, Respondent makes procedural default or exhaustion arguments regarding Grounds Six, Seven, Eleven through Twenty-Six, and Thirty through Thirty-Two. *Id.* at PageID 1439-42.

Parrish responds to the Motion with a motion to compel discovery and a request for an evidentiary hearing (Motion, ECF No. 29).

Analysis

In the Magistrate Judge's opinion, Mr. Parrish has procedurally defaulted in presenting all of his claims to the Ohio courts.

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

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

Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see also Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional rights claim he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107, 110 (1982). Absent cause and prejudice, a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review. *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000)(citation omitted); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle*, 456 U.S. at 110; *Wainwright*, 433 U.S. at 87. *Wainwright* replaced the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391 (1963). *Coleman*, 501 U.S. at 724.

"A claim may become procedurally defaulted in two ways." *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013), *quoting Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). First, a claim is procedurally defaulted where state-court remedies have been exhausted within the meaning of § 2254, but where the last reasoned state-court judgment declines to reach the merits because of a petitioner's failure to comply with a state procedural rule. *Id.* Second, a claim is procedurally defaulted where the petitioner failed to exhaust state court remedies, and the remedies are no longer available at the time the federal petition is filed because of a state procedural rule. *Id.*

Failure to raise a constitutional issue at all on direct appeal is subject to the cause and prejudice standard of *Wainwright v. Sykes*, 433 U.S. 72 (1977). *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Mapes v. Coyle*, 171 F.3d 408, 413 (6th Cir. 1999); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); *Leroy v. Marshall*, 757 F.2d 94, 97 (6th Cir.), *cert denied*, 474 U.S. 831 (1985). Failure to present an issue to the state supreme court on discretionary review constitutes procedural default. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)(citations omitted). "Even if the state court failed to reject a claim on a procedural ground, the petitioner is also in procedural default 'by failing to raise a claim in state court, and pursue that claim through the state's ordinary appellate procedures.'" *Thompson v. Bell*, 580 F.3d 423, 437 (6th Cir. 2009), *citing Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006)(quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 846-7(1999)); *see also Deitz v. Money*, 391 F.3d 804, 808 (6th Cir. 2004) ("A federal court is also barred from hearing issues that could have been raised in the state courts, but were not[.]").

Parrish has procedurally defaulted on all of his Grounds for Relief because he has never presented any of them to the Ohio courts on appeal: his direct appeal to the Second District was dismissed for failure to file a brief and he never appealed from that decision to the Ohio Supreme Court. To the extent that he raised issues that depend on facts that are not in the state court record, he had the possibility of filing a post-conviction petition under Ohio Revised Code § 2953.21, but the statute of limitations now bars that approach.

Mr. Parrish seems to believe that since the trial transcripts do not contain matter that he believes should be there, this case will never be ripe for final decision until the record is corrected to add material he believes should be there, but which he failed to persuade Judge

Dankof was properly a matter of record. For example, Judge Dankof, who presided at trial, specifically found that Laddie Mae Jackson did not testify and that Parrish had done nothing to fill in the alleged 476 “large gaps.” Under *Cullen v. Pinholster*, 563 U.S. 170 (2011), this Court must decide whether the Ohio courts committed constitutional error by examining the record that was before them, not by holding an evidentiary hearing to hear testimony not presented in the state courts.

Conclusion

Based on the foregoing analysis, the Magistrate Judge respectfully recommends that the Petition herein be dismissed with prejudice because all claims are procedurally defaulted. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

May 23, 2017.

s/ Michael R. Merz
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report

and Recommendations. Pursuant to Fed. R. Civ. P. 6(d), this period is extended to seventeen days because this Report is being served by mail. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 153-55 (1985).

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

WILLIAM A. PARRISH, JR.,

Petitioner,

v.

LYNEAL WAINWRIGHT, Warden,
Marion Correctional Institution,

Respondent.

Case No. 3:16-cv-486

JUDGE WALTER H. RICE

MAGISTRATE JUDGE MICHAEL R. MERZ

DECISION AND ENTRY AFFIRMING DECISION AND ORDER OF
MAGISTRATE JUDGE DENYING PETITIONER WILLIAM A. PARRISH,
JR.'S MOTION FOR EVIDENTIARY HEARING AND FOR APPEAL BOND
(DOC. #13), AND OVERRULING PARRISH'S OBJECTIONS THERETO
(DOC. #14), EXCEPT AS MODIFIED IN SUPPLEMENTAL OPINION AND
MODIFIED ORDER ON RECOMMITTAL (DOC. #16); AFFIRMING IN
FULL SUPPLEMENTAL OPINION AND MODIFIED ORDER ON
RECOMMITTAL (DOC. #16); AFFIRMING IN FULL DECISION AND
ORDER OF MAGISTRATE JUDGE OVERRULING RENEWED MOTION
FOR EVIDENTIARY HEARING (DOC. #24), AND OVERRULING
PARRISH'S OBJECTIONS THERETO (DOC. #26); OVERRULING
ORDER OF MAGISTRATE JUDGE STRIKING OBJECTIONS AS
UNTIMELY (DOC. #32), SUSTAINING PARRISH'S OBJECTIONS
THERETO (DOC. #33), AND OVERRULING SUPPLEMENTAL OPINION
ON STRIKING OBJECTIONS (DOC. #35); ADOPTING IN FULL
REPORT AND RECOMMENDATIONS OF MAGISTRATE JUDGE (DOC.
#30), AND OVERRULING PARRISH'S OBJECTIONS THERETO (DOC.
#31); MOTION TO DISMISS OF RESPONDENT LYNEAL WAINWRIGHT,
WARDEN, MARION CORRECTIONAL INSTITUTION (DOC. #19), IS
SUSTAINED, AND PARRISH'S PETITION FOR WRIT OF *HABEAS*
CORPUS (DOC. #3) IS DISMISSED WITH PREJUDICE; PARRISH IS
DENIED A CERTIFICATE OF APPEALABILITY, AS NO REASONABLE
JURIST WOULD FIND THAT HE MADE A SUBSTANTIAL SHOWING OF
A DENIAL OF A CONSTITUTIONAL RIGHT; CERTIFICATION THAT
PARRISH SHOULD NOT BE PERMITTED TO PROCEED ON APPEAL
IN FORMA PAUPERIS, AS ANY APPEAL WOULD BE OBJECTIVELY
FRIVOLOUS; JUDGMENT TO ENTER IN FAVOR OF THE WARDEN
AND AGAINST PARRISH; TERMINATION ENTRY

Appendix B

Petitioner William A. Parrish, Jr. ("Petitioner" or "Parrish") filed a *pro se* Petition Under 28 U.S.C. § 2254 for Writ of *Habeas Corpus* ("Petition"), raising thirty-two grounds as to why he believed that he was entitled to relief from the sentence imposed by Montgomery County, Ohio, Court of Common Pleas ("Trial Court") Judge Steven K. Dankof. Doc. #3.¹ Parrish subsequently filed motions for an evidentiary hearing with respect to his claim that the record submitted to this Court was inaccurate and incomplete, Doc. #12, 23; conversely, the Respondent, Lyneal Wainwright, Warden, Marion Correctional Institution ("Respondent") moved to dismiss Parrish's Petition. Doc. #19. Pending before the Court, pursuant to Rule 72(a), are:

1. Magistrate Judge Michael R. Merz's January 18, 2017, Decision and Order Denying Petitioner's Motion for Evidentiary Hearing and for Appeal Bond, Doc. #13, Parrish's Objections to the Order, Doc. #14, and the Magistrate Judge's February 9, 2017, Supplemental Opinion and Modified Order on Recommittal, Doc. #16, to which Parrish filed no objections;
2. The Magistrate Judge's April 19, 2017, Decision and Order denying Parrish's Renewed Motion for Evidentiary Hearing and Appeal Bond, Doc. #24, and Parrish's Objections to the Order, Doc. #26; and
3. The Magistrate Judge's June 19, 2017, Order Striking as Untimely Parrish's Objections to the below-described Report and Recommendations, Doc. #32, Parrish's Objections to that Order, Doc. #33, and the Magistrate Judge's Supplemental Opinion, Doc. #35, to which Parrish filed no objections.

¹ Parrish filed a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. Doc. #3, PAGEID #55. However, because Parrish is in the custody of the State of Ohio, and was convicted in a State of Ohio court, his Petition properly arises under 28 U.S.C. § 2254.

Pending before the Court, pursuant to Rule 72(b), are: the Magistrate Judge's May 23, 2017, Report and Recommendations regarding Respondent's Motion to Dismiss Parrish's Petition, Doc. #30, and Parrish's Objections to said judicial filing, Doc. #31.

Based upon the reasoning and citations set forth in the Orders and in the Reports and Recommendations, as well as upon a thorough *de novo* review of Parrish's Objections to said judicial filings, and of the applicable law, this Court AFFIRMS IN PART AND OVERRULES IN PART the Magistrate Judge's January 18, 2017, Decision and Order, Doc. #13, overruling it only to the extent that it was modified by the Supplemental Order. The Court SUSTAINS Parrish's Objections to said judicial filing, Doc. #14, only to the extent that the Initial Decision and Order was modified by the Supplemental Order, and OVERRULES the Objections to said judicial filing in all other respects. The Court AFFIRMS IN FULL the Magistrate Judge's February 9, 2017, Supplemental Decision and Order, Doc. #16, and April 19, 2017, Decision and Order, Doc. #24, and OVERRULES Parrish's Objections to the latter judicial filing, Doc. #26. The Court REJECTS the Magistrate Judge's June 19, 2017, Order Striking Objections, Doc. #32, SUSTAINS Parrish's Objections thereto, Doc. #33, and REJECTS the July 7, 2017, Supplemental Opinion, Doc. #35.

Further, the Court ADOPTS IN FULL the Report and Recommendations of the Magistrate Judge, Doc. #30, and OVERRULES Parrish's Objections thereto, Doc. #31. Respondent's Motion to Dismiss, Doc. #19, is SUSTAINED, and Parrish's Petition, Doc. #3, is DISMISSED WITH PREJUDICE. As no reasonable jurist could find that Parrish "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. §

2253(c)(2), he is DENIED a Certificate of Appealability as to all thirty-two grounds for relief. Finally, as any appeal would be objectively frivolous, this Court certifies to the U.S. Court of Appeals for the Sixth Circuit that Parrish should not be permitted to proceed on any appeal *in forma pauperis*.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. State Court Proceedings

In September 2011, Parrish was indicted by the Montgomery County Grand Jury on five felony counts. Doc. #18, PAGEID #218-21. Montgomery County, Ohio, Court of Common Pleas ("Trial Court") Judge Steven K. Dankof appointed Eugene Robinson ("Robinson") to represent Plaintiff. *Id.*, PAGEID #223, 225. Robinson subsequently withdrew, and on December 1, 2011, Judge Dankof appointed Jay Adams ("Adams") to represent Parrish. *Id.*, PAGEID #228. Parrish filed a motion to dismiss Adams as counsel, and on May 4, 2012, the Trial Court permitted Adams "to withdraw and appointed new counsel, Lucas Wilder [('Wilder')]." Doc. #19, PAGEID #1406 (citing Doc. #18, PAGEID #247-51). Parrish subsequently filed a motion to dismiss Wilder and represent himself at trial, which the State Court granted after a May 24, 2012, hearing in which it found that Parrish's waiver of his right to counsel was knowing and voluntary. Doc. #18, PAGEID #259-60; Doc. #18-1, PAGEID #580-644. Wilder was appointed as standby counsel for trial. Doc. #18-1, PAGEID #644. On or about June 29, 2012, after a jury trial at which Parrish represented himself *pro se*, Parrish was convicted on all five counts, and was sentenced to twenty-four years in prison by Judge Dankof. Doc. #3, PAGEID #55.

On July 17, 2012, Wilder, on behalf of Parrish, filed a timely notice of appeal to the Ohio Second District Court of Appeals ("Appellate Court" or "Second District"). Doc. #18, PAGEID #286. The Appellate Court appointed J. David Turner ("Turner") to represent Parrish on direct appeal. *Id.*, PAGEID #490-91. On November 13, 2012, Turner, at Parrish's request, moved to withdraw as counsel. *Id.*, PAGEID #288. The Appellate Court granted Turner's motion, and appointed Melissa Prendergast ("Prendergast") of the Office of the Ohio Public Defender to represent Parrish on direct appeal. *Id.*, PAGEID #290, 293.² On May 20, 2013, Prendergast, at Parrish's request, filed a motion to withdraw, which the Appellate Court sustained. *Id.*, PAGEID #298, 305). Parrish filed a motion to proceed *pro se*, which the Appellate Court sustained on December 6, 2013. In so sustaining, the Appellate Court ordered the Trial Court to provide Parrish with a CD-ROM containing the transcripts of the record that would be considered on appeal. *Id.*, PAGEID #309-10.

On March 25, 2014, Parrish moved that the Appellate Court appoint Wilder as his appellate counsel, Doc. #18, PAGEID #317, which the Court denied and, instead, appointed Elizabeth Scott ("Scott") as counsel. *Id.*, PAGEID #318. On May 30, 2014, the State moved to dismiss Parrish's appeal for failure to file an opening brief within the specified time. *Id.*, PAGEID #321-22. Parrish, via Scott, moved for an extension of time to file his opening brief, which the Appellate Court sustained. *Id.*, PAGEID #323, 327. On June 10, 2014, citing a breakdown in communication and Parrish's failure to cooperate with the appeal process, Scott filed a motion to withdraw as counsel. *Id.*,

² As the Respondent notes, "[o]n December 4, the appellate court also appointed attorney Chris Wesner [(\"Wesner\")] to represent Parrish, but noted that appointment was made in error and vacated that appointment. Doc. #19, PAGEID #1407 (citing Doc. #18, PAGEID #: 291, 295).

PAGEID #325. The Appellate Court sustained Scott's motion and appointed Anthony Cicero ("Cicero") to represent Parrish. *Id.*, PAGEID #328-32. On August 19, 2014, the State again moved to dismiss Parrish's appeal for failing to file an opening brief, and Parrish cross-moved for an extension of time to file an appeal brief. *Id.*, PAGEID #335-38. The Appellate Court sustained Parrish's motion and overruled the motion of the State. *Id.*, PAGEID #339.

On January 7, 2015, the State filed its third motion to dismiss for failure to file an opening brief. On January 15, 2015, Parrish, without assistance of counsel, filed a motion to vacate his conviction, and on January 23, 2015, Cicero moved to withdraw as counsel, citing a conflict of interest. Doc. #18, PAGEID #356, 366, 384. On February 25, 2015, the Appellate Court sustained Cicero's motion to withdraw, overruled without prejudice the State's motion to dismiss, overruled Parrish's motion to vacate, and ordered Parrish to file an opening brief within twenty days. *Id.*, PAGEID #387-88. On March 6, 2015, Parrish filed a *pro se* motion to correct the record and for a new trial, claiming that the copy of the transcript of record that he had received was inaccurate and incomplete. Parrish argued that the testimony of a Laddie Mae Jackson ("Jackson") was improperly included in the transcript, and that jury instructions were improperly included in the transcript, despite never being given to jurors prior to deliberations. *Id.*, PAGEID #390. Finally, he claimed that "the transcripts have a total of 476 large gaps that omit important objections and rulings . . . [and] the certification attached to the Appellant's transcripts ha[s] the wrong name and case number on it." *Id.* On March 19, 2015, the State again moved to dismiss Parrish's appeal, *id.*, PAGEID #396; on April 9, 2015, the Appellate Court overruled both motions in full, but remanded

the case to the Trial Court “for the limited purpose of considering the record omissions and certification issue raised by Parrish.” *Id.*, PAGEID #403.

Parrish refiled his motion to correct the record and for a new trial with the Trial Court; in response, the Trial Court ordered a full transcript prepared. Doc. #18, PAGEID #405, 412. Judge Dankof “specifically direct[ed] the [reporting] company to use every available channel to review inaudible portions of the recordings. AVTranz submitted the transcript, and it was filed . . . on June 30, 2015.” *Id.*, PAGEID #438. The Trial Court overruled Parrish’s motion for a new trial, and noted that his claims about Ms. Jackson’s testimony, the inclusion of jury instructions, and the “476 large gaps” in the transcript were either procedurally defaulted or belied by the transcript itself. Further, the Trial Court noted that the error on the transcript’s certification page had already been corrected. *Id.*, PAGEID #413. Simultaneously, in the Appellate Court, Parrish moved to: strike the amended transcript; correct the sentencing entry; and vacate his convictions. *Id.*, PAGEID #415-37. On July 17, 2015, the Appellate Court overruled all three motions, and again directed Parrish to file an opening brief within twenty days. *Id.*, PAGEID #442. That same day, Parrish moved to strike the amended transcript and for a new trial. *Id.*, PAGEID #444. In his motion, Parrish argued that he could not file a proper appellate brief because he had not had a chance to review the modified transcript, and thus, could not determine if it contained the errors and omissions that he had identified in the original transcript. *Id.*, PAGEID #446-47.

On August 17, 2015, the Appellate Court overruled Parrish’s motion, holding that he “is not entitled to a personal copy of the transcript. As this [C]ourt has previously informed [Parrish], the Supreme Court of Ohio has held that by choosing to proceed

without the assistance of counsel, he has relinquished his ability to gain easy access to the transcript[,]" and an indigent defendant's only right with respect to a transcript is that a copy be "forwarded to the clerk of the [A]ppellate [C]ourt for use in a direct appeal. [Parrish] acknowledges [that] this has been done here." *Id.*, PAGEID #469. The Appellate Court again ordered Parrish to file an opening brief within twenty days. *Id.*, PAGEID #470.

On September 22, 2015, the State moved to dismiss Parrish's appeal for failure to file an opening brief, and on September 24, 2015, the Appellate Court ordered Parrish to file a brief or show cause as to why his appeal should not be dismissed. Doc. #18, PAGEID #471-74. On October 8, 2015, Parrish responded to the show cause order, arguing once again that he had not received an accurate copy of the trial transcript, and that the state's failure to provide him with such a copy free of charge violated his Constitutional rights. *Id.*, PAGEID #475-76. The Appellate Court was not swayed by Parrish's argument, and dismissed his appeal with prejudice on November 19, 2015. *Id.*, PAGEID #477. Parrish did not seek reconsideration in the Appellate Court or file a petition for transfer to the Supreme Court of Ohio; nor, at any time, did he file a petition for post-conviction relief with the Trial Court, pursuant to Ohio Rev. Code § 2953.21.

B. Federal Court Proceedings

On November 18, 2016, Parrish filed his Petition, Doc. #3, and a Motion to Appoint Counsel, Doc. #4, the latter of which was overruled by the Magistrate Judge. Doc. #5. Parrish objected to the denial of appointed counsel, Doc. #9, and on December 20, 2016, the Magistrate Judge issued a Supplemental Opinion, again

denying Parrish's motion. Doc. #11. As part of a Motion for Evidentiary Hearing and for Appeal Bond, Parrish filed a timely objection to the Supplemental Opinion. Doc. #12. On January 18, 2017, The Magistrate Judge issued a Decision and Order overruling the Motion, denying Parrish an evidentiary hearing or an appeal bond, and refusing to reconsider his Order denying appointment of counsel. Doc. #13. Parrish filed timely Objections to all three portions of the Decision and Order, Doc. #14, and after this Court issued a Recommittal Order, Doc. #15, on February 9, 2017, the Magistrate Judge issued a Supplemental Opinion and Modified Order. Doc. #16. The Supplemental Order modified his January 18, 2017, Order only to the following extent: that Parrish's motion for an evidentiary hearing should be overruled without prejudice, subject to renewal after the state court record was filed. *Id.*, PAGEID #206. Further, the Magistrate Judge held that, "[i]n any renewed motion, Mr. Parrish must set forth what factual questions he believes are in issue and how he can satisfy the requirements of *Cullen v. Pinholster*." *Id.* (citing 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011)). Neither party filed objections to the Supplemental Order.

On March 17, 2017, the same day that the state court record was filed, Doc. #18, the Warden filed its Motion to Dismiss *Habeas* Petition, Doc. #19, arguing that Parrish's motion failed as a matter of law because, among other reasons, all thirty-two grounds for relief were procedurally defaulted. *Id.*, PAGEID #1404. On April 13, 2017, prior to filing his memorandum *contra*, Parrish filed a renewed motion for evidentiary hearing. Doc. #23. In that motion, Parrish renewed his argument that the trial transcript had "a total of 476 large gaps that [have] omitted objections by the [P]etitioner, and erroneous rulings by the [T]rial [C]ourt judge that are very significant, and reversible errors." *Id.*,

PAGEID #2139. Further, Parrish claimed that “[p]art of the victim[’s] testimony has been deliberately omitted from the trial transcript[.]”; specifically, a portion in which the victim “admitted that he had lied under oath at the preliminary hearing.” *Id.* (citing Ohio Rev. Code § 2921.11(A)). Parrish also alleged that the jury never received the jury instructions that were included in the trial transcript. *Id.* Finally, Parrish claimed that the improper court reporter certification that was initially attached to his trial transcript “was [an] intentional act on behalf of the state, which severely prejudice[d] the Petitioner[,] because it prevent[ed] all five attorneys that were court appointed from filing a merit brief on behalf of the Petitioner.” *Id.*, PAGEID #2139-40 (citing Doc. #18, PAGEID #350; Doc. #18-3, PAGEID #1403).

On April 19, 2017, the Magistrate Judge issued a Decision and Order overruling Parrish’s motion for an evidentiary hearing, and ordered Parrish to file his memorandum in opposition to the Warden’s motion no later than May 1, 2017. Doc. #24, PAGEID #2143. In so ruling, the Magistrate Judge noted that Parrish did not reference *Pinholster* in his motion; nor did he explain why the facts underlying his *habeas corpus* claim would entitle him to an evidentiary hearing under 28 U.S.C. § 2254(e)(2). *Id.*, PAGEID #2142-43. Further, the Magistrate Judge noted that the only inaccuracy in the transcript identified by Parrish was that the original certification page from the trial transcript was actually the certification page for the case of *State v. Pugh*. *Id.*, PAGEID #2143 (citing Doc. #18, PAGEID #350; Doc. #18-3, PAGEID #1403). The Magistrate Judge concluded that the discrepancy “does not show what questions of fact need to be resolved by an evidentiary hearing.” *Id.* Parrish filed timely Objections to the April 19,

2017, Decision and Order, reiterating his earlier arguments as to errors and omissions in the trial transcript. Doc. #26.

On May 23, 2017, the Magistrate Judge issued a Report and Recommendations, recommending that the Warden's Motion to Dismiss be sustained. Doc. #30. The Magistrate Judge concluded that most of Parrish's claims were procedurally defaulted due to the Appellate Court dismissing his direct appeal for failure to file an opening brief, and Parrish failing to appeal that dismissal to the Supreme Court of Ohio. Doc. #30, PAGEID #2186 (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Thompson v. Bell*, 580 F.3d 423, 437 (6th Cir. 2009)). The Magistrate Judge further concluded that "to the extent that [Parrish] raised issues that depend on facts that are not in the state court record, he had the possibility of filing a post-conviction petition under Ohio Revised Code § 2953.21, but the statute of limitations now bars that approach." *Id.* Further, the Magistrate Judge noted that the Trial Court had already ruled that the errors or omissions in the record alleged by Plaintiff had been properly excluded from the record, *id.*, PAGEID #2186-87, and that this Court's role is to "decide whether the Ohio courts committed constitutional error by examining the record that was before them, not by holding an evidentiary hearing to hear testimony not presented in the state courts." *Id.*, PAGEID #2187.

On June 13, 2017, Parrish filed Objections to the Report and Recommendations. Doc. #31, PAGEID #2199. Therein, Parrish argues that the Appellate Court never appointed effective counsel to represent him. *Id.* PAGEID #2190 (citing Doc. #30, PAGEID #2183). Further, he claims that Judge Merz erred in his conclusion "that the

Petitioner failed to respond to a show cause order filed [by the Appellate Court] on September 24, 2015." *Id.*, PAGEID #2191 (citing Doc. #30, PAGEID #2184). Parrish notes that he filed a memorandum in which he argued that he could not file an opening brief because the transcript was incomplete, and that ordering him to do so violated Supreme Court precedent. *Id.*, PAGEID #2191-92 (citing *Draper v. Washington*, 372 U.S. 487, 489, 9 L.Ed.2d 899, 83 S.Ct. 774 (1963); *Griffin v. Illinois*, 351 U.S. 12, 19, 100 L.Ed. 891, 76 S.Ct. 585 (1956)). Parrish argues that any further appeal would have been futile and, thus, the procedural default doctrine does not bar any of his grounds for relief. *Id.*, PAGEID #2193, 2198-99 (citing *Turner v. Bagley*, 401 F.3d 718, 727 (6th Cir. 2005); *Greene v. Brigano*, 123 F.3d 917, 922 (6th Cir. 1997); *U.S. v. Wilson*, 16 F.3d 1027, 1031 (6th Cir. 1994)).

On June 19, 2017, the Magistrate Judge issued an Order Striking Objections as Untimely, noting that, under Rule 72, Parrish was required to file Objections no later than June 9, 2017. However, "[t]he Objections show that they were not deposited in the prison mail system until June 13, 2017." Doc. #32, PAGEID #2210. On July 5, 2017, Parrish filed Objections to that Order, claiming that he was not served with a copy of the Report and Recommendations until May 30, 2017. Doc. #33, PAGEID #2212. Upon recommitment, the Magistrate Judge issued a Supplemental Opinion, finding that "Parrish's Objections . . . are not well taken and should be overruled." Doc. #35, PAGEID #2225. Parrish did not file objections to the Supplemental Opinion.

II. LEGAL STANDARDS

A. 28 U.S.C. § 2254

A prisoner may petition “for a writ of *habeas corpus* . . . pursuant to the judgment of State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A petition “shall not be granted with respect to any claim,” such as Parrish’s, which:

[W]as adjudicated on the merits in State court proceedings unless the adjudication of the claim—(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.

28 U.S.C. § 2254(d). A *habeas corpus* petitioner must also satisfy additional procedural requirements, including but not limited to exhaustion of State Court judicial remedies.

28 U.S.C. § 2254(b)(2). The Court’s review of facts adjudicated in a State Court proceeding is sharply circumscribed; “a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.”

28 U.S.C. § 2254(e)(1).

B. Rule 72(a)

As the January 18, April 19, and June 19, 2017 Orders by the Magistrate Judge, and any supplemental opinions or orders thereto, Doc. # 13, 16, 24, 32, 35, concern non-dispositive matters, the Court may modify or set aside only those portions of the orders that are “clearly erroneous” or “contrary to law.” Fed. R. Civ. P. 72(a). A finding is “clearly erroneous” if the “reviewing judge has a ‘definite and firm conviction’ that an

error has been committed.” *Dickinson v. Zurko*, 527 U.S. 150, 162, 119 S.Ct. 1816, 144 L.Ed.2d 143 (1999) (quoting *U.S. v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)). A decision is “contrary to law” if the legal conclusions “contradict or ignore applicable precepts of law, as found in the Constitution, statutes, or case precedent.” *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992) (Kinneary, J.) (quoting *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202, 205 (N.D. Cal. 1983)).

C. Rule 72(b)

The Magistrate Judge’s Reports and Recommendations addressed the merits of Parrish’s Petition; thus, the Court must conduct a *de novo* review of “any part of the [M]agistrate [J]udge’s disposition that has been properly objected to. The [Court] may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the [M]agistrate [J]udge with instructions.” Fed. R. Civ. P. 72(b)(3).

III. ORIGINAL MOTION FOR EVIDENTIARY HEARING AND APPEAL BOND

In the January 18, 2017, Decision and Order, the Magistrate Judge noted that review of a “state court decision under 28 U.S.C. § 2254(d)(1) is strictly limited to ‘review of the state court record,’” Doc. #13, PAGEID #155 (quoting *Pinholster*, 563 U.S. at 182), and that under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a petitioner could obtain an evidentiary hearing only if “the state court decision is contrary to an objectively unreasonable application of clearly established Supreme Court precedent or an unreasonable determination of the facts upon the evidence presented to the state court.” *Id.* (citing Pub. L. 104-132, 110 Stat. 1214). As the record had not yet been filed, the Magistrate Judge was correct that an evidentiary

hearing was not warranted. Further, in response to Parrish's Objections, Doc. #14, the Magistrate Judge correctly overruled Parrish's motion for an evidentiary hearing without prejudice, subject to renewal upon filing of the state court record. Doc. #16, PAGEID #206. Plaintiff did not object to the Supplemental Opinion, and the Magistrate Judge's order was both prudent and in compliance with the AEDPA. Thus, the January 18, 2017, Decision and Order is affirmed except to the extent that it was modified by the Supplemental Opinion, which is affirmed in full.

IV. RENEWED MOTION FOR EVIDENTIARY HEARING

In his renewed motion for evidentiary hearing, Parrish largely restated his arguments from his original motion; specifically, that the errors in the transcript and the improper (allegedly fraudulent) certification page meant that a valid transcript never existed, and, thus, the Appellate Court's dismissal was improper. Doc. #23, PAGEID #2139-40 (citing Ohio App. R. 9(B)(6-7); *In re Guardianship of Fraser*, 9th Dist. Medina No. 03CA0021-M, 2003-Ohio-6808, ¶ 8 (Dec. 17, 2003)). He argued that an evidentiary hearing was necessary so that he could identify the 476 gaps in the record and prove that the certification page was a forgery. *Id.*, PAGEID #2140-41.

As the Magistrate Judge correctly noted in his April 19, 2017, Order, Parrish did not comply with the Supplemental Order's mandate that, upon the filing of the record, he identify the factual questions regarding the transcript that he believed were at issue, and how his renewed motion satisfied *Pinholster*. Doc. #24, PAGEID #2142-43 (quoting Doc. #16, PAGEID #206). Further, the Magistrate Judge concluded that there was no evidence suggesting that the court reporter's certification was fraudulent. Rather, the

certification page for the trial in *State v. Pugh* was placed into the transcript for his trial by mistake, a mistake which was corrected by the insertion of the correct certification page into the record. *Id.*, PAGEID #2143 (citing Doc. #18, PAGEID #350; Doc. #18-3, PAGEID #1403; Doc. #23, PAGEID #2140). The Magistrate Judge held that, in the absence of any factual dispute regarding the accuracy of the contents of the record itself, no evidentiary hearing necessary was necessary. *Id.*

In his Objections to the April 19, 2017, Order, Parrish renewed his argument that the failure of the Trial Court and Appellate Court to provide him with a paper copy of the transcript, despite his indigence, violated the Due Process Clause of the Fourteenth Amendment. Doc. #26, PAGEID #2148 (citing *Griffin*, 351 U.S. at 18). He also claimed that this failure excused his obligation to exhaust state court remedies, and thus, any failure to prosecute his appeal does not bar his claim for *habeas* relief. *Id.* (citing *Turner v. Bagley*, 401 F.3d 718 (6th Cir. 2005)). Finally, he claimed that State of Ohio Assistant Attorney General Jerri Fosnaught ("Fosnaught") committed fraud upon the Court by removing the certification page from the trial in *State v. Pugh* and replacing it with one for *State v. Parrish*, only to mail Parrish another copy of the original transcript with the certification page for *State v. Pugh* while the State's motion to dismiss his appeal was pending before the Second District. *Id.*, PAGEID #2149 (citing Doc. #18-1, PAGEID #350; Doc. #18-3, PAGEID #1403). Parrish claimed that, due to Fosnaught's actions, an evidentiary hearing was necessary to resolve discrepancies in the transcripts, and Parrish prayed that he be released on his own recognizance prior to such a hearing. *Id.*, PAGEID #2150.

Parrish's Objections failed to address the shortcomings in his renewed motion that were identified by the Magistrate Judge in his April 19, 2017, Order. Parrish's allegation that Fosnaught twice altered the certification page—even if true—does not permit the reasonable inference that she or anyone else altered the substance of the trial transcript. Nor does it identify any factual dispute that would require an evidentiary hearing or assist this Court in evaluating his Petition. To the extent that Parrish was claiming that the alleged errors or omissions in the transcript justified an evidentiary hearing, the Magistrate Judge was correct to differentiate between the cases cited by Parrish and the instant case, as the cited cases were decided prior to the enactment of the AEDPA or the Supreme Court's ruling in *Pinholster*. This Court's review is limited to the state court record and, as discussed below, the proper time for Parrish to raise his concerns over the transcript's completeness and accuracy was on appeal or in a motion for post-conviction relief.

Finally, Parrish's argument that he was never provided a free paper copy of the trial transcript, Doc. #26, PAGEID #2147-48, is dubious but ultimately immaterial. The record reflects that at least one of Parrish's appointed appellate counsel, Cicero, did receive a copy of the trial transcript, Doc. #18, PAGEID #348, and that Parrish was able to review that transcript; indeed, he has purported to identify 476 errors and omissions. Parrish does not, in his Objections, claim that Cicero failed to turn over the transcript upon his withdrawal as counsel. Thus, Parrish's Objections appear to center on alleged inaccuracies and omissions in the transcript, which are not reviewable in this Court.

In sum, the Magistrate Judge's April 19, 2017, Order was a well-reasoned and factually well-grounded application of *Pinholster* and the AEDPA. Pursuant to Rule 72(a), it must be affirmed.

V. OBJECTIONS TO REPORT AND RECOMMENDATIONS WERE TIMELY FILED

Parrish's Objections were filed on June 13, 2017, twenty-one days after the Magistrate Judge filed his Report and Recommendations. Doc. #30-31. The Magistrate Judge's June 19, 2017, Order struck the Objections for not having been filed within seventeen days, as is required under Rule 72(b). Doc. #32, PAGEID #2210. Parrish claims that he was not served the Report and Recommendations until May 30, 2017, when he received it via first-class mail at the Marion Correctional Institution. Doc. #33, PAGEID #2212 (citing Doc. #33-1, PAGEID #2217). Service by mail is considered complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), and *pro se habeas* petitioners, such as Parrish, are allotted three additional days for any filing deadline to account for any delay due to Court orders being transmitted via mail, rather than electronically. Fed. R. Civ. P. 6(d). Thus, the Magistrate Judge's striking of Parrish's Objections was proper. However, Parrish has produced uncontroverted evidence that the Marion Correctional Institution did not receive the Report and Recommendations until May 30, 2017, Doc. #33-1, PAGEID #2217, and, based on that date of receipt, Parrish did submit his Objections within the time period allotted under Rule 72(b). In the interests of equity and adjudicating Parrish's Petition on its merits, Parrish's Objections to the June 13, 2017, Order, Doc. #33, are sustained, and the Order, Doc. #32, and Supplemental Order, Doc. #35, are rejected.

VI. PETITION FOR WRIT OF *HABEAS CORPUS*

A. Report and Recommendations

In recommending that the Warden's Motion to Dismiss be sustained, the Magistrate Judge concluded that none of Parrish's thirty-two grounds for relief was properly before the Court, because Parrish had failed to: (1) prosecute his appeal at the Appellate Court; (2) appeal his dismissal for failure to prosecute to the Supreme Court of Ohio; or (3) file a timely petition for post-conviction relief where appropriate. Doc. #30, PAGEID #2186 (citing Ohio Rev. Code § 2953.21). In support, the Magistrate Judge noted that the Supreme Court and the Sixth Circuit have consistently held that "[f]ailure to present an issue to the state supreme court on discretionary review constitutes procedural default." *Id.* (citing *O'Sullivan v. Boerckel*, 526 U.S. at 848; *Thompson*, 580 F.3d at 437; *Deitz v. Money*, 391 F.3d 804, 808 (6th Cir. 2004)).

Parrish's appeal was dismissed for failure to comply with Appellate Court orders and the Ohio Rules of Appellate Procedure, and no equitable doctrine operated to excuse Parrish's failure to appeal that dismissal to the Supreme Court of Ohio. Thus, the Magistrate Judge concluded, any of his thirty-two grounds for relief that should have been raised on appeal are procedurally defaulted, and this Court may not consider them. Doc. #30, PAGEID #2186. As to the purported errors and omissions in the trial transcript, the Magistrate Judge noted that, in the Trial Court, Judge Dankof had "specifically found that Laddie May Jackson[,] a witness whose credibility Parrish believed to be at issue, "did not testify[,] and that Parrish had done nothing to fill in the alleged 476 'large gaps'" in the transcript. Doc. #30, PAGEID #2187.

Further, to the extent that Parrish contends that Judge Dankof's rulings on those evidentiary issues were erroneous, the proper procedure under Ohio law was for

Parrish to file a petition for post-conviction relief with the Trial Court. *Id.*, PAGEID #2186 (citing Ohio Rev. Code § 2935.21). Parrish never filed such a petition, and the statute of limitations now bars such an approach, the Magistrate Judge concluded that the Court may not review any of the grounds for relief concerning accuracy of the record. *Id.* Consequently, the Magistrate Judge recommended that Parrish's Petition be dismissed with prejudice, and "[b]ecause reasonable jurists would not disagree with this conclusion Petitioner should be denied a certificate of appealability and the Court should certify to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*." *Id.*, PAGEID #2187.

B. Parrish's Objections

Parrish raises three main objections that address the Magistrate Judge's procedural default conclusion: (1) competent appellate counsel was never appointed; (2) he responded to the Appellate Court's show cause order, rendering that Court's dismissal of his appeal improper; and (3) he was never provided a complete and accurate copy of the trial transcript, which constituted a denial of due process and rendered an appeal impossible. Doc. #31. As to Parrish's third objection, the Court notes that the only true error identified by Parrish was the insertion of the certification page for the case of *State v. Pugh*. Yet, the State of Ohio corrected this error by including the certification page for Parrish's trial. More importantly, Parrish does not explain how he was prejudiced by the improper certification page. Specifically, he does not argue, much less designate evidence, that there is any relationship between the inaccurate certification page and any of the 476 alleged omissions that he supposedly identified.

As to those supposed omissions and errors, the Magistrate Judge is correct that they appear to be evidentiary decisions made in the Trial Court as to whether those items were properly part of the record. "[A] reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice[.]" *State v. Morris*, 132 Ohio St. 3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14 (quoting *State v. Diar*, 120 Ohio St. 3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66), and Parrish, in his Objections, fails to meet that heavy burden. Moreover, Parrish never sought to correct the record through the method mandated by Ohio law—by filing a petition for post-conviction relief pursuant to Ohio Rev. Code § 2953.21. Parrish's failure to do so means that his third objection is without merit.

Parrish's objection that competent counsel was never appointed is belied by the record, which shows that no fewer than four attorneys represented Parrish during his appeal. Importantly, Parrish concedes that at least two of his appointed appellate counsel withdrew at his request. Doc. #31, PAGEID #2191. Even assuming *arguendo* that Parrish had good reason to demand that Turner and Prendergast withdraw, the record reflects that his other appellate counsel, Scott and Cicero, worked diligently on his appeal, and, in the case of Scott, withdrew because Parrish failed to communicate effectively with her. Doc. #18., PAGEID #325. Parrish's first objection is overruled.

Parrish is correct that he responded to the Appellate Court's show cause order with his filing. Doc. #31, PAGEID #2191-92 (citing Doc. #18, PAGEID #475). However, if Parrish believed that, in light of his response, the Appellate Court's dismissal of his appeal was wrongful, then his proper course of action was to appeal that decision to the

Supreme Court of Ohio. His failure to do so means that his second objection is procedurally defaulted, and thus, overruled.

Finally, the Court notes that the Magistrate Judge accurately summarized and applied the law regarding procedural default in *habeas corpus* cases, and his conclusion that all thirty-two of Parrish's grounds for relief were either procedurally defaulted or barred by the statute of limitations was proper. Accordingly, the Court adopts the Report and Recommendations in their entirety and sustains the Warden's Motion to Dismiss. As the law on procedural default is well-settled, no reasonable jurist would disagree with this Court's conclusion that none of Parrish's grounds for relief is viable. Thus, Parrish is not entitled to a certificate of appealability, and the Court shall certify to the Sixth Circuit that any appeal would be objectively frivolous and, therefore, Parrish should not be permitted to proceed on appeal *in forma pauperis*.

VII. CONCLUSION

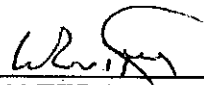
For the foregoing reasons, the Court AFFIRMS the Order of the Magistrate Judge overruling Parrish's Initial Motion for Evidentiary Hearing, Doc. #13, and OVERRULES Parrish's Objections thereto, except to the extent that the Order was modified by the Supplemental Opinion and Modified Order on Remmittal, Doc. #16, which the Court AFFIRMS IN FULL. The Court AFFIRMS IN FULL the Order of the Magistrate Judge overruling Parrish's Renewed Motion for Evidentiary Hearing, Doc. #24, and OVERRULES Parrish's Objections thereto. Doc. #26. The Court OVERRULES the Order of the Magistrate Judge striking Parrish's Objections to the Report and Recommendations as untimely, Doc. #32, SUSTAINS Parrish's Objections

thereto, Doc. #33, and OVERRULES the Supplemental Opinion Striking Opinions of the Magistrate Judge. Doc. #35.

The Court ADOPTS IN FULL Reports and Recommendations of the Magistrate Judge, Doc. #30, OVERRULES Parrish's Objections thereto, Doc. #31, and SUSTAINS the Warden's Motion to Dismiss. Doc. #19. Parrish's Petition, Doc. #3, is DISMISSED WITH PREJUDICE. Judgment shall enter in favor of the Warden and against Parrish. As no reasonable jurist would find that Parrish "has made a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), he shall be denied a Certificate of Appealability as to all thirty-two grounds for relief. This Court shall certify to the the Sixth Circuit that any appeal on those grounds would be objectively frivolous and, therefore, Parrish should not be permitted to proceed *in forma pauperis*.

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

Date: September 5, 2017



WALTER H. RICE
UNITED STATES DISTRICT JUDGE