APPENDIX. (A).

No. 18-3757

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Apr 25, 2019
DEBORAH S. HUNT, Clerk

KERMIT B. HARRIS,

Petitioner-Appellant,

v.

CHARMAINE BRACY, WARDEN,

Respondent-Appellee.

ORDER

**BEFORE:** SUTTON, DONALD, and THAPAR, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

**Deborah S. Hunt, Clerk**

APPENDIX (A) (1). 1 OF 4 PAGE'S

No. 18-3757

FILED
Jan 31, 2019
DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KERMIT B. HARRIS,

Petitioner-Appellant,

v.

CHARMAINE BRACY, Warden,

Respondent-Appellee.

ORDER

Before: SUTTON, DONALD, and THAPAR, Circuit Judges.

Kermit B. Harris, a pro se Ohio prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254, and his motion to recuse the district court judge. Harris has filed a motion for a certificate of appealability (COA). Harris has also moved for leave to proceed in forma pauperis.

In 1997, a jury convicted Harris of: 1) aggravated robbery with firearm specifications, in violation of Ohio Revised Code Annotated § 2911.01; 2) receiving stolen property, in violation of Ohio Revised Code Annotated § 2913.51; 3) attempted murder with firearm and peace officer specifications, in violation of Ohio Revised Code Annotated §§ 2923.02 & 2913.51; and 4) felonious assault with firearm and peace officer specifications, in violation of Ohio Revised Code Annotated § 2903.11. *State v. Harris*, No. 72687, 1998 WL 323616, at *5 (Ohio Ct. App. June 18, 1998). The trial court sentenced Harris to an aggregate term of twenty-four years of imprisonment. *Id.* The Ohio Court of Appeals affirmed Harris's convictions, *id.* at *8, and the Ohio Supreme Court denied Harris leave to file a delayed appeal, *State v. Harris*, 709 N.E.2d 1215 (Ohio 1999) (table).

In 2001, Harris filed his first habeas petition, which the district court dismissed as time-barred by the Antiterrorism and Effective Death Penalty Act's one-year statute of limitations.

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We denied Harris's motion for a COA. *Harris v. Hurley*, No. 03-3677 (6th Cir. Sept. 12, 2003) (order).

In 2008, the state trial court sua sponte ordered that Harris appear for a resentencing hearing. The trial court re-advised Harris of his postrelease control responsibilities because this notification was not documented in the sentencing entry from his first sentencing hearing. *State v. Harris*, No. 92892, 2010 WL 376821, at *1 (Ohio Ct. App. Feb. 4, 2010). Harris's original sentence did not change. *Id.* Harris appealed, arguing primarily that the trial court erred in failing to hold a de novo sentencing hearing. The Ohio Court of Appeals reversed and remanded the trial court's judgment and granted Harris a de novo sentencing hearing, but it denied two other assignments of error regarding defects in the indictment because those arguments were barred by res judicata. *Id.* at *2-3. The Supreme Court of Ohio denied leave to appeal. *State v. Harris*, 928 N.E.2d 738 (Ohio 2010) (table).

In 2011, the state trial court, citing a recent Ohio Supreme Court decision, *State v. Fischer*, 942 N.E.2d 332 (Ohio 2010), entered an order noting that "the prior limited hearing informing Harris of his postrelease control was sufficient to impose a valid postrelease control"—i.e., that a de novo sentencing hearing was unnecessary notwithstanding the remand by the court of appeals, *State v. Harris*, No. 96887, 2011 WL 6920731, at *1 (Ohio Ct. App. Dec. 29, 2011); *see Fischer*, 942 N.E.2d at 341. The Ohio Court of Appeals affirmed the trial court's judgment, *Harris*, 2011 WL 6920731, at *3, and the Ohio Supreme Court denied Harris's motion for leave to file a delayed appeal, *State v. Harris*, 974 N.E.2d 111 (Ohio 2012) (table).

Meanwhile, in 2010, Harris filed a second § 2254 habeas petition, raising claims regarding defects in the indictment. The district court dismissed the action under Rule 4 of the Rules Governing § 2254 Cases. After considering Harris's claims on the merits, we denied Harris's motion for a COA. *Harris v. Clipper*, No. 11-3066 (6th Cir. Feb. 1, 2012) (order).

In 2015, Harris filed a motion for resentencing, arguing that the jury verdict form from "his attempted murder conviction had failed to delineate whether he was convicted of a violation of R.C. 2903.02(A) or (B)." *State v. Harris*, No. 103807, 2016 WL 2942908, at *1 (Ohio Ct.

APPENDIX (A)(1)
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App. May 19, 2016). Harris argued that because the jury verdict form failed to specify the degree of the offense, the verdict form must be construed to constitute a finding of guilt for the least degree of the offense charged. *See id.* Harris argued further that felony murder was the least degree of Ohio Revised Code Annotated § 2923.02 and because attempted felony murder was not a cognizable crime, *see State v. Nolan*, 25 N.E.3d 1016, 1018 (Ohio 2014), he was entitled to be resentenced for this conviction, *Harris*, 2016 WL 2942908, at *1. The state trial court denied Harris's motion on the merits and noted that his argument was barred by res judicata. The Ohio Court of Appeals also rejected this argument, determining that it was barred by res judicata and noting that "at the time of his offenses on December 30, 1996, R.C. 2903.02 did not contain a felony murder provision in subsection (B)," and affirmed the judgment of the trial court. *Id.* The Supreme Court of Ohio denied leave to appeal. *State v. Harris*, 60 N.E.3d 7 (Ohio 2016) (table).

In 2017, Harris filed the instant § 2254 petition, in which he raised three claims: 1) there was an error in the indictment regarding count three, which listed the incorrect statute; 2) the jury verdict form failed to state whether he was convicted of attempted murder or attempted felony murder; and 3) his sentence for attempted murder was not authorized by statute or conviction. The district court dismissed Harris's petition for a writ of habeas corpus, finding that his petition was second or successive, and declined to issue a COA. The district court also denied Harris's motion for recusal of the district court judge.

We agree that Harris's current habeas petition is a second or successive petition. This is Harris's third-in-time petition and his second since the state court resentenced him in 2009. Harris argues in his COA application under *Magwood v. Patterson*, 561 U.S. 320 (2010), that the state trial court's denial of his motion for resentencing in 2015 constituted a new judgment and that his subsequently filed § 2254 petition was therefore not a second or successive petition. In *Magwood*, the Supreme Court held that where there is a "new judgment intervening between the two habeas petitions, . . . an application challenging the resulting new judgment is not 'second or successive' at all." *Id.* at 341-42 (quoting *Burton v. Stewart*, 549 U.S. 147, 156 (2007)).

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*Magwood* does not help Harris, however, because in a criminal case, "[f]inal judgment . . . means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212 (1937). Harris was not resentenced in 2015; rather, the state trial court denied Harris's motion for resentencing. Despite Harris's argument that this denial is a new judgment, it is not.

But because Harris's petition is second or successive, the district court should have transferred it to this court instead of dismissing it. *See In re Bowling*, 422 F.3d 434, 440 (6th Cir. 2005); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997). We must authorize the district court to consider a second or successive habeas application before the petitioner can file the petition in district court. 28 U.S.C. § 2244(b)(3)(A). In these circumstances, the court construes a motion for a COA as an application for leave to file a second or successive habeas petition. *See In re Bowling*, 422 F.3d at 435. Leave may be granted only if Harris's claims rely on 1) a new rule of constitutional law that the Supreme Court has made retroactive to cases on collateral review or 2) facts that could not have been discovered earlier with due diligence and that establish that no reasonable factfinder would have convicted Harris but for constitutional error. *See* 28 U.S.C. § 2244(b)(2). Because Harris's claims do not rely on a new constitutional rule or new facts, his construed application for leave to file a second or successive petition is denied.

Finally, because this application is not properly before us as an appeal from the district court, the motion for recusal is not before us.

Accordingly, we **DENY** Harris's construed motion for leave to file a second or successive habeas petition and **DENY** the motion to proceed in forma pauperis as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

| | | |
|---|---|---|
| KERMIT B. HARRIS, | ) | Case No. 1:17cv2094 |
| | ) | |
| Petitioner, | ) | JUDGE JOHN R. ADAMS |
| v. | ) | |
| | ) | **JUDGMENT** |
| WARDEN CHARMAINE BRACY, | ) | |
| | ) | |
| Respondent. | ) | |

For the reasons set forth in the Order and Decision filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Kermit B. Harris' Petition for a Writ of Habeas Corpus is hereby DISMISSED in its entirety, with prejudice. Pursuant to 28 U.S.C § 1915(a)(3), the Court certifies that Petitioner Harris may not take an appeal from the Court's decision in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

**IT IS SO ORDERED.**

s/John R. Adams
JOHN R. ADAMS
UNITED STATES DISTRICT JUDGE

**DATED:** 7/24/18

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**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

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|---|---|---|
| KERMIT B. HARRIS, | ) | Case No. 1:17cv2094 |
| | ) | |
| | ) | |
| Petitioner, | ) | JUDGE JOHN R. ADAMS |
| v. | ) | |
| | ) | |
| | ) | **ORDER AND DECISION** |
| WARDEN CHARMAINE BRACY, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

This matter is before the Court on Petitioner Kermit B. Harris' objections to the Magistrate's Report and Recommendation ("R&R") filed May 11, 2018. For the following reasons, Harris' objections are OVERRULED. This Court ADOPTS the R&R of the Magistrate Judge and DISMISSES Harris' Petition for Habeas Corpus filed pursuant to 28 U.S.C. § 2254.

The R&R adequately states the factual and procedural background of the case. (Doc. 12, p. 1-2.) Harris has not demonstrated any error in the background as set forth by the Magistrate. Therefore, the Court will not reiterate that section herein.

## I. STANDARD OF REVIEW

If a party files written objections to a magistrate judge's report and recommendation, a judge must perform a *de novo* review of "those portions of the report or specified proposed findings recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

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WL 6579036, at *6 (N.D. Ohio, Dec. 13, 2013). Thus, Harris has not stated any grounds that would establish that his current petition is not successive petition.

Regarding a successive habeas petition, 28 U.S.C. § 2244(b)(3)(A) states:

> Before a second or successive application permitted in this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Harris has not moved the Sixth Circuit for an order authorizing this Court to consider his habeas petition.

Moreover, the Court notes that Harris' "objections" to the R&R are a repetition of the underlying argument to this Court in the original petition. "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Block*, 327 F.Supp.2d 743, 747 (E.D. Mich. 2004). Given this, and for all of the reasons stated herein, Harris has not demonstrated error by the Magistrate Judge. Accordingly, his objections are OVERRULED.

## III. CONCLUSION

For the reasons set forth herein, the Court finds no merit to Harris' objections. Therefore, his objections are OVERRULED. The Court ADOPTS the Magistrate's R&R (Doc. 12). The Petition for Habeas Corpus is DISMISSED.

The Court certifies, pursuant to 28 U.S.C. § 1915(A)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b).

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Kermit B. Harris,

Petitioner,

v.

Warden Charmaine Bracy,

Respondent.

CASE NO. 1:17CV2094

JUDGE JOHN R. ADAMS

ORDER

Pending before the Court is Petitioner Kermit Harris' motion requesting that the undersigned recuse from consideration of this matter. Doc. 7. The motion is DENIED.

Under 28 U.S.C. § 455(a), a judge must disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." Under this provision, the judge need only recuse himself if "a reasonable, objective person, knowing all of the circumstances, would have questioned the judge's impartiality." *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990). Because the standard is an objective one, "the judge need not recuse himself based on the subjective view of a party no matter how strongly that view is held." *Id.* (internal quotation marks and citation omitted). Under §455(b)(1), a judge must disqualify himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Recusal is mandatory pursuant to 28 U.S.C. § 144 "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in



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favor of any adverse party."

Petitioner must establish that the alleged bias and prejudice is personal, *stemming from an extrajudicial source* and resulting in an opinion on the merits on some basis other than what the judge has learned from his participation in the case. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (emphasis added); *United States v. Beneke*, 449 F.2d 1259, 1260 (8th Cir. 1971). The mere fact that a judge has made an adverse ruling against a particular party during the course of judicial proceedings does not establish bias or prejudice on the part of a judge. *Berger v. United States*, 255 U.S. 22, 31 (1921); *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 180 (6th Cir. 1974) cert. denied, 421 U.S. 963 (1975).

Petitioner has made no argument of any bias or prejudice stemming from an extrajudicial source. Instead, Petitioner's sole argument is that the undersigned made rulings against him in prior proceedings in this District. Specifically, it appears that Petitioner takes issue with the resolution of his habeas petition in Case No. 1:10CV1831. The undersigned found no merit in that petition, and the Sixth Circuit declined to grant petitioner a certificate of appealability. As Petitioner's sole allegations regarding prejudice stem from prior rulings in a judicial proceeding, he has not established any legal basis to support his request for recusal. Accordingly, the motion to recuse is DENIED.

IT IS SO ORDERED.

May 17, 2018
Dated

*/s/ John R. Adams*
JUDGE JOHN R. ADAMS
United States District Judge

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| KERMIT B. HARRIS, | ) | CASE NO. 1:17CV2094 |
| | ) | |
| Petitioner, | ) | JUDGE JOHN R. ADAMS |
| | ) | Magistrate Judge George J. Limbert |
| v. | ) | |
| | ) | |
| WARDEN CHARMAINE BRACY, | ) | ORDER |
| | ) | |
| Respondent. | ) | |

This matter is before the undersigned on the motion for an evidentiary hearing filed by Petitioner Kermit B. Harris ("Petitioner") on November 9, 2017. ECF Dkt. #8. In the motion, Petitioner claims that a 2009 sentencing entry does not properly charge an offense in the third count. *Id.* at 2. Continuing, Petitioner asserts that the jury verdict forms do not state if he was convicted of "attempt/murder or attempted/felony murder due to the State's failure to state (A) or (B) on the attempt statue or the murder statute on the jury verdict forms." *Id.* at 3. Petitioner also claims that the "trial court failed to charge a proper offense to a Cuyahoga County Grand Jury" in the indictment filed in 1997. *Id.*

Rule 8 of the Rules Governing §2254 Cases requires the Court to review the answer, any transcripts and records of state-court proceedings, and other materials submitted under Rule 7 of the Rules Governing §2254 Cases in determining whether an evidentiary hearing is necessary. Under the Antiterrorism and Effective Death Penalty Act, evidentiary hearings are not mandatory in federal habeas corpus cases. *See Vroman v. Brigano*, 346 F.3d 598, 606 (6th Cir. 2003). An evidentiary hearing may be held only when the federal habeas petition "alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." *Sawyer v. Hofbauer*, 299 F.3d 605, 610 (6th Cir. 2002). The Court is not required to hold an evidentiary hearing where the record is complete or if the federal habeas corpus petition raises only legal claims that can be resolved without the taking of additional evidence. *Kirschke v. Prelesnik,* No. 2:11-CV-10654, 2012 WL 246272, at *2 (E.D.



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Mich. Jan. 26, 2012) (internal citations omitted).

Petitioner has failed to establish that an evidentiary hearing is necessary in this case. First, Petitioner fails to raise sufficient grounds for relief as the grounds raised in his instant habeas petition are substantially similar to those raised before the Sixth Circuit during a prior habeas proceeding, and the Sixth Circuit denied a certificate of appealability on those grounds for relief. *See* ECF Dkt. #9-1 at 25-28. Additionally, Plaintiff does not assert that the state courts did not hold a full and fair evidentiary hearing, but instead that there were what essentially amount to clerical errors during the state court proceedings. The undersigned finds that the record is complete and Petitioner's federal habeas corpus petition raises only legal claims that can be resolved without the taking of additional evidence. Accordingly, Petitioner's motion for an evidentiary hearing (ECF Dkt. #8) is DENIED.

IT IS SO ORDERED.

Dated: May 11, 2018

*/s/George J. Limbert*
GEORGE J. LIMBERT
U.S. MAGISTRATE JUDGE

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APPENDIX (C)
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| KERMIT B. HARRIS,<br><br>Petitioner,<br><br>v.<br><br>WARDEN CHARMAINE BRACY,<br><br>Respondent. | ) | CASE NO. 1:17CV2094<br><br>JUDGE JOHN R. ADAMS<br>Magistrate Judge George J. Limbert<br><br>REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE |

This matter is before the undersigned on the motion to dismiss case or transfer successive petition filed by Respondent Warden Charmaine Bracy ("Respondent") on December 18, 2017. ECF Dkt. #9. Petitioner Kermit B. Harris ("Petitioner") filed a response on December 28, 2017. ECF Dkt. #10. Respondent did not file a reply. For the following reasons, the undersigned RECOMMENDS that the Court GRANT Respondent's motion to dismiss (ECF Dkt. #9) and DISMISS Petitioner's petition for a writ of habeas corpus (ECF Dkt. #1) in its entirety.

## I. FACTUAL AND PROCEDURAL HISTORY

Petitioner filed the instant action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. ECF Dkt. #1. Respondent is the Warden of Trumbull Correctional Institution in Leavittsburg, Ohio, and maintains custody of Petitioner after his conviction for aggravated robbery, receving stolen property, attempted murder, and felonious assault in 1997. ECF Dkt. #9 at 2. Petitioner's conviction and aggregate sentence of twenty-four years were affirmed on appeal. *State v. Harris*, 8th Dist. Cuyahoga, No. 72687, 1998 WL 323616 (June 18, 1998).

On August 8, 2001, Petitioner filed his first habeas petition challenging his 1997 conviction. ECF Dkt. #9-1 at 1-11. The Court dismissed Petitioner's habeas petition as barred by the one-year statue of limitations provided by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *Id.* at 12-15. Petitioner appealed the decision and the Sixth Circuit denied a certificate of appealability on September 12, 2003. *Id.* at 16-17. On August 19, 2010, Petitioner filed a second habeas petition. *Id.* at 18. The Court dismissed Petitioner's second habeas petition pursuant to Rule 4 of the Rules Governing § 2254 Cases on December 30, 2010. *Id.* at 21-22.

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Petitioner again appealed the decision and the Sixth Circuit denied a certificate of appealability on February 1, 2012. *Id.* at 23-28.

Petitioner also appealed his sentence to the state appellate court in 2011. *State v. Harris*, 8th Dist. Cuyahoga No. 96887, 2011-Ohio-6762. The state appellate court set forth the following relevant procedural history:

> On December 18, 2008, the trial court sua sponte ordered that [Petitioner] be returned to appear for a resentencing hearing. At the February 5, 2009 resentencing hearing, the trial court noted that although [Petitioner] had been advised of postrelease control at his initial sentencing hearing, the notification was not documented in the sentencing entry. The trial court then readvised [Petitioner] of his postrelease control responsibilities, stated the original sentence would still apply, and issued a journal entry documenting [Petitioner's] original sentence and that he would be subject to five years of postrelease control.
>
> [Petitioner] appealed from the resentencing hearing, arguing the trial court only readvised him of postrelease control and should have conducted a de novo resentencing hearing. This court, relying on *State v. Singleton*, 124 Ohio St.3d 173, 2009–Ohio–6434, 920 N.E.2d 958, agreed and remanded the matter for the trial court to conduct a de novo resentencing hearing. *State v. Harris*, Cuyahoga App. No. 92892, 2010–Ohio–362.
>
> Prior to [Petitioner's] resentencing on remand, the Ohio Supreme Court decided *State v. Fischer*, 128 Ohio St.3d 92, 2010–Ohio–6238, 942 N.E.2d 332. Therefore, on May 12, 2011, the trial court entered an order stating that Fischer was controlling and that the prior limited hearing informing [Petitioner] of his postrelease control was sufficient to impose a valid postrelease control.

*Id.* at *1.

Respondent filed the motion to dismiss case or transfer successive petition on December 18, 2017. ECF Dkt. #9. Petitioner filed a response on December 28, 2017.[1] ECF Dkt. #10. Respondent did not file a reply.

## II. FEDERAL HABEAS CORPUS PETITION

Petitioner, acting *pro se*, filed a § 2254 federal habeas corpus petition on October 5, 2017. ECF Dkt. #1. In his habeas petition, Petitioner asserts the following grounds for relief:

[1]Petitioner filed his response as an "answer and reply." ECF Dkt. #10 at 1.

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GROUND ONE: THE TRIAL COURT FAILED TO CHARGE AN OFFENSE IN COUNT (3) THREE OF THE PETITIONER'S INDICTMENT, SENTENCING JOURNAL ENTRIES AND JURY VERDICT FORMS DON'T DO NOT HAVE THE GUN SPEC"S.

GROUND TWO: THE JURY VERDICT FORM DO NOT STATE IF THE PETITIONER IS CONVICTED OF ATTEMPT/MURDER OR ATTEMPT/FELONY MURDER (A) OR (B). VIOLATING A SUBSTANTIAL RIGHT OF THE UNITED STATES CONSTITUTION.

GROUND THREE: THE PETITIONER'S SENTENCE IS NOT AUTHORIZED BY STATUTE OR CONVICTION. [sic]

ECF Dkt. #1 at 10, 13-14.

## III. LAW AND ANALYSIS

28 U.S.C. § 2244(b)(1) provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(2) goes on to state that a claim presented in a second or successive habeas corpus application under § 2254 that was not presented in a prior application shall be dismissed unless –

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The statute further provides that "[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A).

The phrase "second or successive" is not defined by the AEDPA statute and is a "term of art given substance by" prior United States Supreme Court habeas corpus caselaw. *Slack v. McDaniel*, 529 U.S. 473, 486 (2000). The Supreme Court has identified two scenarios in which a subsequently filed federal habeas corpus petition is not considered a "second or successive"

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petition. First, a subsequent petition is not a second or successive petition if the grounds asserted in that petition were not ripe at the time that an earlier petition was filed. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 643–46 (1998) (when a second petition presents identical claim included in an earlier petition but claim was not yet ripe for review, the court should treat both petitions as a single application for habeas relief); *Panetti v. Quarterman*, 551 U.S. 930, 942-944 (2007) (holding that a petition that presents a claim not presented in an earlier petition when the claim would not have been ripe if it had been presented is not a second or successive petition). Second, a subsequent petition is not a second or successive petition if it attacks a state court judgment that was not attacked in the previous petition. *Magwood v. Patterson*, 561 U.S. 320 (2010). As to state court resentencings, the Supreme Court has held that a subsequent petition is not a second or successive petition where it attacks a claim that originated at resentencing and the petitioner could not have been brought it in the earlier petition. *Banks v. Bunting*, No. 5:13CV1472, 2013 WL 6579036, at *6 (N.D. Ohio, Dec. 13, 2013) (citing *Lang v. United States*, 474 F.3d 348, 351–52 (6th Cir. 2007) and *Hines v. Coleman*, No. 3:12–CV–1722, 2012 WL 5383505, *6 (N.D. Ohio Nov. 2, 2012)).

Respondent asserts that the instant habeas petition is Petitioner's third petition challenging the same 1997 conviction. ECF Dkt. #9 at 5. Continuing, Respondent states that Petitioner erroneously claims that he was sentenced on October 29, 2015, and that this was the date the trial court denied his most recent motion for resentencing. *Id.* Respondent avers that even considering Petitioner's 2009 resentencing as a new sentence, which it was not, Petitioner already filed a post-sentencing habeas petition in 2010 challenging his 1997 conviction. *Id.* at 6. Concluding, Respondent asserts that Petitioner filed the instant successive habeas petition without first obtaining permission from the Sixth Circuit as required by 28 U.S.C. § 2244(b)(3)(A). *Id.*

Petitioner contends that his habeas petition is not successive since it challenges a new judgment imposed on resentencing. ECF Dkt. #10 at 1 (citing *Magwood*, 561 U.S. at 331). Specifically, Petitioner states that, through counsel, he filed a motion for resentencing on March

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23, 2015.[2] *Id.* at 2 (citing ECF Dkt. #10-2). Petitioner then discusses the procedural history of his state court filing from 2015 through 2017, and states that he properly brought his grounds for relief before the Supreme Court of Ohio. *Id.* at 2-3. Next, Petitioner asserts that, under *Magwood*, a subsequent petition is not successive if it challenges a new judgment imposed on resentencing following an earlier habeas proceeding. ECF Dkt. #10 at 5. Petitioner also claims that he could properly file his habeas petition following resentencing even if the petition was limited to claims that could have been raised in an earlier petition. *Id.* (citing *King v. Morgan*, 807 F.3d 154, 156-58 (6th Cir. 2015)).

Petitioner's argument is without merit. The motion for resentencing filed in the Cuyahoga Court of Common Pleas by Petitioner on March 23, 2015, was denied on the merits and was also determined to be barred by *res judicata*. ECF Dkt. #10-3. Contrary to Petitioner's argument, the denial of his motion for resentencing does not constitute resentencing as contemplated by *Magwood*. *See* 541 U.S. at 331-34. The state court did not grant Petitioner's motion for resentencing and thus did not resentence Petitioner. Likewise, Petitioner's habeas petition does not bring any claims that could not have been brought in an earlier petition. *See Banks*, 2013 WL 6579036, at *6. Under Petitioner's construction of the law, a petitioner could continuously refresh the ability to properly file a habeas petition by simply filing a motion for resentencing in the state court and then waiting for the motion to be denied. Petitioner's claim that the instant habeas petition challenges a new judgement imposed on resentencing is without merit and his petition is successive.

Regarding a successive habeas petition, 28 U.S.C. § 2244(b)(3)(A) states:

> Before a second or successive application permitted in this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Petitioner has not moved the Sixth Circuit for an order authorizing this Court to consider his habeas petition. Accordingly, the undersigned recommends that the Court dismiss Plaintiff's habeas petition in its entirety.

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[2]Petitioner also states that this attorney attempted to interfere with his constitutional rights. ECF Dkt. #10 at 2-3.

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## IV. CONCLUSION AND RECOMMENDATION

For the foregoing reasons, the undersigned RECOMMENDS that the Court GRANT Respondent's motion to dismiss (ECF Dkt. #9) and DISMISS Petitioner's petition for a writ of habeas corpus (ECF Dkt. #1) in its entirety.

Dated: May 11, 2018

*/s/ George J. Limbert*
George J. Limbert
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days of service of this notice. Fed. R. Crim. P. 59. Failure to file objections within the specified time constitutes a WAIVER of the right to appeal the Magistrate Judge's recommendation. *Id.*