

No. 19-3309

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**FILED**
Sep 10, 2019
DEBORAH S. HUNT, Clerk

STEPHEN L. BUSH,

Petitioner-Appellant,

v.

DAVID W. GRAY, Warden; STATE OF OHIO,

Respondents-Appellees.

O R D E R

Stephen Bush, a pro se Ohio prisoner, appeals a district court judgment denying his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The court construes his timely notice of appeal as a request for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2). Bush also moves to proceed in forma pauperis on appeal.

In 2014, Bush pleaded guilty to raping a child. He was sentenced to fifteen years to life in prison. The Ohio Court of Appeals denied Bush's appeal for lack of jurisdiction because it was untimely, and the Ohio Supreme Court denied leave to appeal. *State v. Bush*, 97 N.E.3d 501 (Ohio 2018) (table).

In 2018, Bush filed a civil rights complaint pursuant to 42 U.S.C. § 1983. The district court determined that the claims raised in the complaint should have been brought in a § 2254 petition and directed Bush to resubmit his claims in a habeas petition. Bush then filed a § 2254 habeas petition, claiming: (1) "Ejusdem generis, Force or threat of force of 2907.02(A)(1)(b)(2)"; (2) "Evidence to prove or disprove fact of allegation 2907.02(A)(1)(b)(2)"; (3) "Testimony of victim being admissible from Chamber Hearing;" and (4) "Statute Procedure Error(s) Legal representation (J.P.) victim; No recorded hearing of chambers; comprehensim [sic] not known (JP)."

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A magistrate judge issued a report recommending that Bush's petition be denied because (1) Bush failed to satisfy Rule 2(c) of the Rules Governing § 2254 Cases insofar as his claims were indecipherable and (2) the petition was time-barred in any event. The district court agreed, denied the petition, and declined to issue a certificate of appealability.

This court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). 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 petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists could not debate the district court's denial of Bush's petition for failure to comply with Rule 2(c), which requires a petitioner to "specify all the grounds for relief" and "state the facts supporting each ground." The four claims raised in Bush's petition were vague, conclusory, and unsupported by any facts. And a habeas corpus petition containing only "vague (or) conclusory" allegations is subject to dismissal. *Blackledge v. Allison*, 431 U.S. 63, 75 (1977) (quoting *Machibroda v. United States*, 368 U.S. 487, 495 (1962)); see also Advisory Committee Notes to Rule 2 of the Rules Governing § 2254 Cases (noting that habeas corpus petitions containing "mere conclusions of law, unsupported by any facts" are "obviously deficient"). Because Bush failed to assert any basis on which to conclude that he is entitled to habeas corpus relief on any of his claims, jurists of reason would agree with the decision to deny his petition under Rule 2(c).

Jurists of reason would also agree with the district court's alternative conclusion that Bush's petition was time-barred. The Antiterrorism and Effective Death Penalty Act imposes a

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one-year statute of limitations for filing habeas corpus petitions. *See* 28 U.S.C. § 2244(d)(1). The statute of limitations begins to run from the latest of four circumstances, including, as relevant here, “the date on which the [state court] judgment became final by the conclusion of direct review.” 28 U.S.C. § 2244(d)(1)(A). The running of the statute of limitations is tolled when “a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

The state court entered judgment on Bush’s sentence on March 31, 2014. Under § 2244(d)(1)(A), therefore, the one-year statute of limitations period began to run on May 1, 2014—the day after the thirty-day period during which Bush could file a timely direct appeal from his conviction and sentence expired. *See* Ohio R. App. P. 4(A); Ohio R. Civ. P. 6(A). Bush filed this action in June 2018, over three years after the statute of limitations expired. The filing of Bush’s untimely notice of appeal did not toll the statute of limitations because it was filed outside the one-year period and the tolling provision of § 2244(d)(2) does not revive an expired limitations period. *See Hargrove v. Brigano*, 300 F.3d 717, 718 n.1 (6th Cir. 2002). Thus, reasonable jurists could not debate the district court’s conclusion that Bush’s habeas corpus petition was time-barred.

Accordingly, the court **DENIES** the application for a certificate of appealability and **DENIES** as moot the motion for leave to proceed in forma pauperis.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Filed: September 10, 2019

Mr. Stephen L. Bush
Belmont Correctional Institution
P.O. Box 540
St. Clairsville, OH 43950

Re: Case No. 19-3309, *Stephen Bush v. OH, et al*
Originating Case No. : 2:18-cv-01107

Dear Sir,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jill Colyer
Case Manager
Direct Dial No. 513-564-7024

cc: Mr. Richard W. Nagel

Enclosure

No mandate to issue

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

STEPHEN BUSH,

Petitioner,

v.

**CASE NO. 2:18-CV-01107
JUDGE GEORGE C. SMITH
Magistrate Judge Jolson**

**WARDEN, BELMONT CORRECTIONAL
INSTITUTION,**

Respondent.

OPINION AND ORDER

On February 28, 2019, the Magistrate Judge issued a Report and Recommendation recommending that the Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed for failure to comply with Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts, and as barred by the one-year statute of limitations provided for under 28 U.S.C. § 2244(d). (ECF No. 5). Petitioner has filed an Objection to the Magistrate Judge's Report and Recommendation. (ECF No. 6). Pursuant to 28 U.S.C. § 636(b), this Court has conducted a de novo review. The Court is unable to discern the basis for Petitioner's objections. As discussed by the Magistrate Judge, the Court likewise cannot determine the nature of Petitioner's claims for relief. Further, the record reflects that this action plainly is time-barred.

Therefore, Petitioner's Objection, ECF No. 6, is **OVERRULED**. The Report and Recommendation, ECF No. 5, is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

The Clerk is **DIRECTED** to mail Petitioner a copy of the form for filing an appeal. Petitioner's request for a copy of the form for filing a request for a certificate of appealability, ECF No. 7, is **DENIED**, as moot.

The Court **DECLINES** to issue a certificate of appealability.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court now considers whether to issue a certificate of appealability. "In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court." *Jordan v. Fisher*, —U.S. —, 135 S.Ct. 2647, 2650 (2015); 28 U.S.C. § 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal).

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)). When a claim has been denied on procedural grounds, a certificate of appealability may issue if the petitioner establishes that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.*

The Court is not persuaded that reasonable jurists would debate the dismissal of Petitioner's claims. The Court therefore **DECLINES** to issue a certificate of appealability.

The Court certifies that the appeal would not be in good faith and that an application to proceed *in forma pauperis* on appeal should be **DENIED**.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

STEPHEN BUSH,

Petitioner,

v.

**WARDEN, BELMONT CORRECTIONAL
INSTITUTION,**

Respondent.

CASE NO. 2:18-CV-01107

JUDGE GEORGE C. SMITH

Magistrate Judge Kimberly A. Jolson

REPORT AND RECOMMENDATION

This is an action pursuant to 28 U.S.C. § 2254 for a writ of habeas corpus. (Doc. 4). Petitioner seeks release from confinement imposed as part of the judgment of a State court in a criminal action. The case has been referred to the Undersigned pursuant to 28 U.S.C. § 636(b) and Columbus General Order 14-1 regarding assignments and references to United States Magistrate Judges.

This matter is before the Court on its own motion under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (“Rule 4”). Pursuant to Rule 4, the Court conducts a preliminary review to determine whether “it plainly appears from the face of the petition and any attached exhibits that the petitioner is not entitled to relief . . .” If it does so appear, the petition must be dismissed. *Id.* With this standard in mind, and for the reasons that follow, these are the circumstances here. It is therefore **RECOMMENDED** that this action be **DISMISSED**.

I. FACTS AND PROCEDURAL HISTORY

Petitioner challenges his March 31, 2014¹ conviction pursuant to his guilty plea in the Gallia County Court of Common Pleas on rape. The trial court imposed a term of fifteen years to life. According to the Petition, the Ohio Fourth District Court of Appeals affirmed Petitioner's conviction and sentence, and the Ohio Supreme Court subsequently declined to accept jurisdiction of the appeal. Specifically, the website of the Gallia County Clerk indicates that Petitioner waited until September 1, 2017, to file a Notice of Appeal. On December 11, 2017, the appellate court dismissed the appeal, because it "was not filed until three years after the deadline" and the appellate court therefore lacked jurisdiction to consider the appeal. On May 29, 2018, the Ohio Supreme Court declined review. *State v. Bush*, 152 Ohio St.3d 1465 (Ohio 2018).

On September 19, 2018, Petitioner initially filed this action in the United States District Court in Cincinnati under the provision of 42 U.S.C. § 1983.² (Doc. 1). After the case was transferred to this Court, on December 13, 2018, the Court issued an Order directing the Petitioner to resubmit his claims as properly raised on the form for filing an action under 28 U.S.C. § 2254, and advising him that he could withdraw or amend his pleadings to include any additional claims for relief, because the recharacterization of this action under § 2254 may adversely affect his ability to seek future relief. (Doc. 3, PAGEID # 18). On December 31, 2018, Petitioner resubmitted his claims on the form for filing an action under 28 U.S.C. § 2254. (Doc. 4). He asserts the following claims, repeated here verbatim:

1. Ejusdem generis, "Force or threat of force of 20-7.02(A)(1)(b)(2)[.]"

¹ Petitioner indicates that he was convicted in April 2013; however, the website of the Gallia County Clerk indicates that he pleaded guilty and was sentenced on March 31, 2014.

² He indicates that he executed it on June 12, 2018. (Doc. 1-1, PAGEID # 10).

The expression of intention to hurt, destroy, punish, retaliation, intimidation was not comprehended by (JP) the victim during chambers of the Court. No recordings by "Legal Counsel for victim to state," comprehension of Force or Threat of Force, "was known and express nor was Legal counsel of Defendant-Petitioner of availing knowledge to my records of, "Chamber questions and answers."

2. Evidence to prove or disprove fact of allegation 2907.02(A)(1)(b)(2)[.]

No force of evidence by Plea negotiated in attempt to gain evidence, "sex, Force, threat of force existed," No evidence supports plea agreement as termed by, Plea agreement evidence to support acceptance by a court, the Probative value does not exist to support any decision of Chambers to trial allegation and accept a plea as only the court can.

3. Testimony of victim being admissible from Chamber Hearing.

Child (JP) has no legal counsel statement of verification, nor a Judges record as to fact of 2907.02(A)(1)(b)(2) with Rape to state Rape existed (not certain if statu[t]e is legal argument fact(s) must be in testimony for arrest and none is noted for rape.

4. Statute Procedure Error(s) Legal representative (J.P.S. victim; No recorded hearing of Chambers; Comprehension not known (JP)[.]

Victim (JP) gave no indication of force or threat of force or comprehension of legal proceeding, or prove representative to her allegation against petitioner. The errors are violation of amendment law to allow no compliance to statu[t]e to cause a[n] incarceration.

II. RULE 2, RULES GOVERNING SECTION 2254 CASES

Even liberally construing Petitioner's pleadings, as this Court is required to do, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972). (the allegations of a *pro se* complaint are to be held to less stringent standards than formal pleadings drafted by lawyers), the Court cannot decipher the nature of Petitioner's claims or the underlying constitutional violations that he alleges. Further, Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts provides that the Petitioner must specify the nature of his grounds for relief and state the facts in support of each ground. Dismissal under Habeas Rule 2(c) is appropriate in cases where

it is impossible to determine from the petitioner's pleadings the exact errors of fact or law raised for adjudication. *See Rice v. Warden*, No. 1:14-cv-732, 2015 WL 5299421, at *4 (S.D. Ohio Sept. 9, 2015) (dismissal under Rule 2(c) appropriate where pleadings contain unintelligible and conclusory allegations and statements) (citations omitted); *Accord v. Warden, Lebanon Corr. Inst.*, No. 2:12-cv-355, 2013 WL 228027, at *3 (S.D. Ohio Jan. 22, 2013) (while the court liberally construes a *pro se* prisoner's pleadings, it is not required to “conjure allegations” on the petitioner's behalf) (citations omitted)). These are the circumstances here. Thus, this action is subject to dismissal on this basis alone.

Moreover, this action plainly is time-barred.

III. STATUTE OF LIMITATIONS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which became effective on April 24, 1996, imposes a one-year statute of limitations on the filing of habeas corpus petitions. 28 U.S.C. § 2244(d). The statute provides:

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

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id.

A District Court is permitted, but not obligated, to sua sponte address the timeliness of a federal habeas corpus petition, *Day v. McDonough*, 547 U.S. 198 (2006), and may do so when conducting an initial review under Rule 4. See *Wogenstahl v. Charlotte*, No. 1:17-cv-298, 2017 WL 3053645, at *2 (S.D. Ohio July 19, 2017) (citing *McDonough*, 547 U.S. at 198). Here, Petitioner's judgment of conviction became final under the provision of § 2244(d)(1)(A) in April 2014, when the thirty day time period to file a timely appeal expired. See *Board v. Bradshaw*, 805 F.3d 769, 772 (6th Cir. 2015); Ohio App. R. 4(A). The statute of limitations expired one year later, in April 2015. Petitioner waited more than three years, until June 2018, to execute this habeas corpus Petition. His untimely Notice of Appeal did not toll the running of the statute of limitations under the provision of § 2244(d)(2), as the statute of limitations had already long since expired "The tolling provision does not ... 'revive' the limitations period (*i.e.*, restart the clock at zero); it can only serve to pause a clock that has not yet fully run." *Vroman v. Brigano*, 346 F.3d 598, 601 (6th Cir. 2003) (citing *Rashid v. Khulmann*, 991 F. Supp. 254, 259 (S.D.N.Y. 1998)).

Additionally, Petitioner does not allege, and the record does not reflect, any extraordinary circumstances that would justify equitable tolling of the statute of limitations. See *Holland v. Florida*, 560 U.S. 631, 649 (2010) (In order to obtain equitable tolling of the statute of limitations, a litigant must establish that he has been diligently pursued relief and that some extraordinary circumstance stood in his way of timely filing) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

IV. RECOMMENDED DISPOSITION

Accordingly, the Undersigned **RECOMMENDS** that this action be **DISMISSED**.

Procedure on Objections

If any party objects to this Report and Recommendation, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(B)(1).

The parties are specifically advised that failure to object to the Report and Recommendation will result in a waiver of the right to have the district judge review the Report and Recommendation de novo, and also operates as a waiver of the right to appeal the decision of the District Court adopting the Report and Recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The parties are further advised that, if they intend to file an appeal of any adverse decision, they may submit arguments in any objections filed, regarding whether a certificate of appealability should issue.

IT IS SO ORDERED.

Date: February 28, 2019

/s/ Kimberly A. Jolson
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE

U.S. District Court

Southern District of Ohio

Notice of Electronic Filing

The following transaction was entered on 2/28/2019 at 12:24 PM EST and filed on 2/28/2019

Case Name: Bush v. State of Ohio et al

Case Number: 2:18-cv-01107-GCS-KAJ

Filer:

Document Number: 5

Docket Text:

REPORT AND RECOMMENDATION: Magistrate Judge RECOMMENDS that this action be DISMISSED. Objections to R&R due by 3/14/2019. Signed by Magistrate Judge Kimberly A. Jolson on 2/28/2019. (ew)(This document has been sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.)

2:18-cv-01107-GCS-KAJ Notice has been electronically mailed to:

2:18-cv-01107-GCS-KAJ Notice has been delivered by other means to:

Stephen L. Bush

A699487

BELMONT CORRECTIONAL INSTITUTION

P.O. BOX 540

68518 BANNOCK ROAD

ST. CLAIRSVILLE, OH 43950

The following document(s) are associated with this transaction:

Document description:Main Document

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[STAMP dcecfStamp_ID=1040326259 [Date=2/28/2019] [FileNumber=6518859-0]
] [54a183eab0f04a95232b2075c2ea75e076fab615249079892b8218f4dd00a78bab2
46905b176b0ca19aced4ff2f5bf7ba539bd15375c37cbc6a537ade2776631]]

IN THE COURT OF COMMON PLEAS, GALLIA COUNTY, OHIO
GENERAL DIVISION

3961995

State of Ohio,

Case No. 12 CR 165

Plaintiff,

Honorable D. Dean Evans

-vs-

Stephen L. Bush,

Defendant.

JUDGMENT ENTRY

CLERK OF COURTS
GALLIA COUNTY, OHIO

2014 MAR 31 PM 3:24

This matter came before the Court on March 31, 2014. Present at the hearing were Daniel J. Breyer, Special Prosecuting Attorney, representing the State of Ohio; and the Defendant, Stephen L. Bush, represented by Barbara A. Wallen and Winston G. Woodyard.

The Defendant was afforded all rights pursuant to Criminal Rule 11 and 32.

The Defendant's attorney advised the Court that the Defendant wished to withdraw the previously entered plea of not guilty and now plead guilty to Rape, a violation of Section 2907.02(A)(1)(b) of the Ohio Revised Code and a felony of the first degree.

The Court advised the Defendant of his rights and possible penalties under the law. The State then proceeded to set forth the essential elements of the offense which the State expected to prove at the trial of this matter. The Defendant concurred in the statement of facts as set forth by the State.

Whereupon the Court proceeded to ask the Defendant as to how he would plead to the charge. The Defendant orally entered a guilty plea to the charge and the Court accepted the same. The Court then proceeded to have the Defendant enter a written plea of guilty on the guilty plea form.

The Court finds that the Defendant's plea was knowingly, intelligently, and voluntarily made with a full awareness of the possible consequences of his plea.

The Court has considered the record, any oral statements, any victim impact statement, any plea agreement, any victim approval, and any pre-sentence report prepared, as well as the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors Ohio Revised Code Section 2929.12.

For reasons stated on the record, and after consideration of the factors under Ohio Revised Code Section 2929.12, the Court also finds that prison is consistent with the purposes of the Ohio Revised Code Section 2929.11 and the Defendant is not amenable to an available community control sanction.

IT IS THEREFORE, ORDERED that the Defendant be sentenced to the Ohio Department of Rehabilitation and Correction for a period of a minimum of fifteen (15) years and a maximum of life (life imprisonment with no parole eligibility until after 15 years) for Rape, a violation of Section 2907.02(A)(1)(b) of the Ohio Revised Code and a felony of the first degree.

Pursuant to the plea agreement, the Defendant shall be classified as a Tier III Sexually Oriented Offender/child victim offender. Defendant has a duty to register his residence, place of employment, school attending and place attaining higher education, provide change of address, to periodically verify address, to notify the Sheriff of any changes in his address. Failure to register, failure to verify residence or failure to provide notice of a change in residence as required is a crime and will result in criminal prosecution.

The Court has further notified the Defendant that post release control is mandatory in this case for (5) years with no reduction. The Ohio Adult Parole Board, for a violation of post release control, may send the violator back to prison for up to nine months, with the maximum for repeated violations being 50% of the stated prison term. For a new felony, the violator/offender may be sent back to prison for the remaining period of post release control, or twelve months, whichever is greater, in addition to a prison term for the new felony.

The additional periods of time imposed by another or even this Court because of a felony committed while on post release control in this case or by the Ohio Adult Parole Board for violations of this case while on post release control are a part of the sentence in this case and the Defendant is Ordered to serve.

The Court further notified Defendant that he may be eligible to earn days of credit under 2967.193 R.C. but that same is not automatic but must be earned pursuant to the manner specified by statute.

The Court advised the Defendant that he has a right to appeal this conviction. The Defendant was advised that if he is unable to pay the cost of an appeal, he has a right to appeal without payment; that if the Defendant is unable to obtain counsel for an appeal, counsel will be appointed without cost; that if the Defendant is unable to pay the costs of documents necessary to an appeal, the documents will be provided without cost; and Defendant has a right to have a notice of appeal timely filed on his behalf.

It is further Ordered that the Defendant be conveyed to the correctional facility. Defendant is credited for jail time served in the amount of thirty seven (37) days as of March 31, 2014, along with future custody days while the Defendant awaits transportation.

It is further Ordered that the Defendant have no contact with the person or property of the victim, Jane Doe.

It is further Ordered that the Defendant pay all costs of prosecution for which judgment is rendered and execution may issue. Pursuant to Ohio Revised Code 2947.23 (A)(1) the Defendant was advised that failure to pay the judgment of costs, supervisory fees or the like or

failure to timely make payments toward that judgment under a payment schedule approved by the Court, may result in the Court ordering the Defendant to perform community service in an amount of not more than forty hours per month until the judgment is paid or until the Court is satisfied that Defendant is in compliance with the approved payment schedule. Further, Defendant was advised that if ordered to perform the community service, credit will be received upon the judgment at a specified hourly credit rate per hour of community service performed and each hour of community service performed will reduce the judgment by that amount.

It is hereby ORDERED that any bond not already forfeited, heretofore posted is released after all fines, costs, payments required or permitted by law are fully satisfied, unless it shall have been posted by a person other than the Defendant, in which instance, said bond shall be released to such person, less any payments or charges required or permitted by law, due and owing to the Clerk of Courts.

Any finding herein deemed to be in conflict with State v. Foster, 109 Ohio St. 3d 1, is considered to be advisory by this Court.

SO ORDERED.


D. DEAN EVANS, JUDGE

The Clerk is directed to furnish a copy of the foregoing to Daniel J. Breyer, Special Prosecuting Attorney, Attorney General Office, 1600 Carew Tower, 441 Vine Street, Cincinnati, OH 45202; Barbara A. Wallen, Attorney for Defendant, P.O. Box 1006, Gallipolis, OH 45631; Winston G. Woodyard, 995 Jackson Pike, Gallipolis, OH 45631; Gallia County Sheriff's Department, Gallia County Courthouse, Locust Street, Gallipolis, Ohio 45631; Correctional Reception Center, P.O. Box 300, Orient, Ohio 43146; and Bureau of Sentencing Computation, P.O. Box 2650, Columbus, Ohio 43216.

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

STEPHEN BUSH,

Petitioner,

v.

WARDEN, BELMONT CORRECTIONAL
INSTITUTION,

Respondent.

CASE NO. 2:18-CV-01107
JUDGE GEORGE C. SMITH
Magistrate Judge Kimberly A. Jolson

ORDER

This matter is before the Court for consideration of Petitioner's Motion for Leave to Proceed *in forma pauperis*. (Doc. 1). Upon consideration, the Court finds the Motion is meritorious, and, therefore, it is **GRANTED**.

WHEREUPON, IT IS ORDERED THAT the Petitioner be allowed to prosecute his action without prepayment of fees or costs and that judicial officers who render services in this action shall do so as if the costs had been prepaid.

Petitioner has filed this action under the provision of 42 U.S.C. § 1983, challenging his underlying state court conviction on rape. He asserts, as his sole claim for relief, that his conviction cannot stand because no evidence exists that he used force or threat of force. This issue may be properly addressed in a petition for a writ of habeas corpus under 28 U.S.C. § 2254, which provides:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a 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 federal court may ignore the legal label used by a *pro se* litigant and recharacterize it where, as here, it is appropriate to do so. *See Roush v. Brewer*, No. 16-11645, 2018 WL 564234, at *2 (E.D. Mich. Jan. 26, 2018) (citing *Castro v. United States*, 540 U.S. 375, 381-82 (2003)).

Therefore, the Clerk is **DIRECTED** to provide Petitioner with a copy of the form for filing an action under 28 U.S.C. § 2254.

Petitioner is **DIRECTED**, within fourteen (14) days, to resubmit this action on the form for filing a § 2254 petition. He may withdraw or amend his pleading to include any additional claims he has for relief, and is advised that the recharacterization of this action under 28 U.S.C. § 2254 could adversely affect his ability to seek future relief under 28 U.S.C. § 2254 in any subsequent or successive § 2254 action. *See Foster v. Warden*, 522 F. App'x 319, 321 (6th Cir. 2013) (“A *pro se* pleading may not be recharacterized as a § 2254 habeas petition unless the movant is advised of the district court’s intention to recharacterize it, warned that the recharacterization could adversely affect the ability to seek future relief under § 2254, and allowed an opportunity to withdraw or amend the pleading.”) (citing *Castro*, 540 U.S. at 383). Thus, if Petitioner wishes to proceed, he should raise all of the issues challenging the constitutionality of his convictions that he intends to raise at this time.

IT IS SO ORDERED.

Date: December 13, 2018

/s/ Kimberly A. Jolson
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE

The Supreme Court of Ohio

FILED

MAY -9 2018

CLERK OF COURT
SUPREME COURT OF OHIO

State of Ohio

Case No. 2018-0112

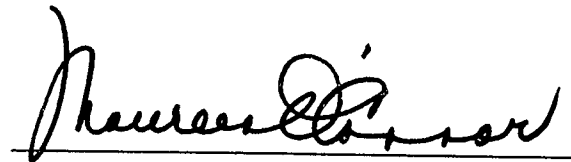
v.

ENTRY

Stephen L. Bush

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Gallia County Court of Appeals; No. 17CA12)



Maureen O'Connor
Chief Justice

**Additional material
from this filing is
available in the
Clerk's Office.**