No. __-____

IN THE SUPREME COURT OF THE UNITED STATES

MARK GERTH,
Petitioner,

v.

WARDEN, ALLEN OAKWOOD CORRECTIONAL INSTITUTION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0242p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARK GERTH,

Petitioner-Appellant,

v.

WARDEN, ALLEN OAKWOOD CORRECTIONAL INSTITUTION,

Respondent-Appellee.

No. 17-4091

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:16-cv-00598—Susan J. Dlott, District Judge.

Decided and Filed: September 16, 2019

Before: DONALD, LARSEN, and NALBANDIAN, Circuit Judges.

COUNSEL

ON BRIEF: Kort W. Gatterdam, CARPENTER, LIPPS & LELAND, LLP, Columbus, Ohio, for Appellant. Mary Anne Reese, OFFICE OF THE OHIO ATTORNEY GENERAL, Cincinnati, Ohio, for Appellee.

OPINION

NALBANDIAN, Circuit Judge. An Ohio jury convicted Mark Gerth of a dozen counts related to his theft of an SUV and high-speed escape from police, which ended when he plowed into a taxicab in downtown Cincinnati and killed its two occupants. Gerth now seeks federal habeas relief, alleging that his appellate counsel failed to argue that the trial court improperly

denied his request to proceed pro se. Because Gerth procedurally defaulted his claim, we AFFIRM the district court's denial of his habeas petition.

I.

A.

In the early morning of March 16, 2011, a Cincinnati police officer on patrol in the city's Over-the-Rhine neighborhood spotted a red Toyota SUV and ran its license plate number, only to discover that it had been reported stolen.[1] The SUV stopped after the officer activated his police cruiser's emergency lights. But when the officer stepped out of his cruiser to speak with the driver, the SUV sped away. Officers pursued the SUV through residential streets while the SUV weaved around traffic and blazed through traffic signals.

The pursuit ended tragically. Speeding over 75 miles-per-hour, the SUV raced through a red light in downtown Cincinnati before swiping the front end of a vehicle and then slamming into a taxicab. The SUV finally came to rest after hitting a parking meter and catching fire. The SUV's driver took off on foot, leaving his passenger, who sustained fractures to his leg, inside the burning vehicle. Rescue workers ultimately freed the passenger from the SUV, and he survived, but the taxicab's occupants fared worse. The driver, Mohamed Sidi, died instantly, and his passenger, Tonya Hairston, died on her way to the hospital.

Officers apprehended the SUV's driver shortly after he fled on foot and later identified the man as Mark Gerth. Although Gerth suffered only minor injuries, police took him to a hospital, where a toxicology test revealed that he had alcohol, marijuana, and cocaine in his system. At trial, a forensic toxicologist testified that the amount of cocaine in Gerth's bloodstream would have undermined Gerth's ability to drive.

The State charged Gerth with a dozen counts related to the crash: two counts of felony murder, four counts of aggravated vehicular homicide, one count each of aggravated vehicular assault and of vehicular assault, two counts of leaving the scene of the accident, one count of

[1]These facts come from the last reasoned decision on Gerth's underlying conviction, *State v. Gerth*, No. C–120392, 2013 WL 1820817 at *1-3 (Ohio Ct. App. May 1, 2013).

failure to comply with the order or signal of a police officer, and one count of receiving stolen property.

B.

A half-dozen attorneys have represented Gerth throughout his criminal trial, appeals, and collateral attacks on his conviction and sentence. In August 2011, months before his April 2012 trial date, Gerth moved to replace his first court-appointed attorney. The court granted Gerth's motion and appointed new trial counsel, but in October 2011, Gerth moved to replace that attorney too. The court denied Gerth's motion, explaining, "we do have to move this case along. It has been delayed and really been delayed by continuances and all that, most of or all of which are at the request of the defendant." (R. 5-4, Tr. at PageID #482.)

That ruling did not deter Gerth. When the court held a December 2011 evidentiary hearing, Gerth interrupted as soon as the proceeding began and stated, "I would like to fire [his counsel]." (R. 5-5, Tr. at PageID #490.) Despite the court's attempts to proceed with the hearing, Gerth continued to interrupt until he "voluntarily absented" himself from the courtroom. (*Id.* at PageID #493–94.) Gerth then filed another motion to remove his counsel, and things came to a head when the court addressed that motion at a March 12, 2012 hearing. After extensive crosstalk between the court and Gerth, the court denied the motion, explaining that "[w]e're not continuing the case." (R. 5-7, Tr. at PageID #555.) Gerth then responded, "I would rather represent myself than allow this man to represent me." (*Id.* at PageID #556.) The court denied that request.

After that hearing adjourned, Gerth filed a motion requesting to proceed pro se. The court permitted Gerth to read aloud the motion on April 2, the day of jury selection, and then denied the motion on two grounds. First, the court described Gerth's mental illness, for which Gerth had been hospitalized. (R. 5–8, Tr. at PageID #582–83.) Second, the court explained that Gerth's pro se request was untimely and "an attempt . . . to further delay this trial." (*Id.* at PageID #584.) The court noted that Gerth "had been disruptive in the past hearings," so much so that the court "had to eject him . . . because, again, he attempted to interfere with the administration of justice." (*Id.*) The court found that while Gerth was competent to stand trial,

he was "not competent to make a knowing[], intelligent[] and voluntary waiver of his counsel." (*Id.* at PageID #585.) So Gerth's second court-appointed attorney represented him at trial.

The jury convicted Gerth on all twelve counts, and the trial court sentenced him to 582-months to life in prison. A new attorney represented Gerth on appeal and argued that insufficient evidence supported Gerth's convictions for felony murder and receiving stolen property. But the Ohio Court of Appeals affirmed Gerth's convictions, *Gerth*, 2013 WL 1820817, at *3, and the Ohio Supreme Court declined to exercise discretionary review of that decision, *State v. Gerth*, 994 N.E.2d 464 (Ohio 2013) (table). The trial court then denied Gerth's untimely pro se petition for post-conviction relief, and the Ohio Court of Appeals affirmed that decision as well.

Gerth then filed his first application to reopen his appeal under Ohio R. App. P. 26(B). Proceeding pro se, Gerth alleged that his appellate counsel was ineffective by not raising three arguments: (1) that the trial court failed to conduct an inquiry under *Faretta v. California*, 422 U.S. 806 (1975), to determine whether Gerth made his pro se request knowingly, intelligently, and voluntarily, and then improperly denied Gerth's request; (2) that trial counsel rendered ineffective assistance by failing to adequately investigate the case and oppose his consecutive sentences; and (3) that the trial court erred by imposing sentences on both of his two convictions for leaving the scene of the accident. The Ohio Court of Appeals, which reviewed Gerth's application, discussed only the third assignment of error and ordered a reopened appeal. The court appointed new appellate counsel and instructed counsel to "present in the appellant's brief an assignment of error concerning the matter identified here as a ground for reopening, along with any other nonfrivolous assignment of error or argument not previously considered." (R. 5, Ex. 39, Order Grant'g Appl. to Reopen Appeal at PageID #263.)

As instructed, Gerth filed a timely brief addressing three assignments of error. The first two assignments related to the third ground for reopening the appeal: Gerth alleged that his first appellate counsel failed to argue that his convictions and sentences for leaving the scene of the accident should have merged. And Gerth identified a new assignment of error that he did not previously address in his Rule 26(B) application, contending that his first appellate counsel failed

to make a Confrontation Clause argument. But Gerth's brief did not mention *Faretta* or the trial court's denial of his request to proceed pro se.

Although the Ohio Court of Appeals rejected the Confrontation Clause assignment of error, it sustained the first two assignments of error, vacated Gerth's sentence, and remanded the matter to the trial court to resentence Gerth on just one count of leaving the scene of the accident. *State v. Gerth*, No. C-120393, 2014 WL 5306631, at *3 (Ohio Ct. App. Oct. 17, 2014). The trial court then resentenced Gerth to a term of 546-months to life in prison. Gerth appealed his resentencing with a different appellate attorney and alleged that the findings in the record did not support the sentence. That appeal did not succeed.

After his resentencing, Gerth filed another application to reopen his appeal under Rule 26(B), again through new counsel. This time, Gerth argued that his second appellate counsel—that is, his appellate counsel on the reopened appeal—rendered ineffective assistance by failing to raise six additional arguments on the reopened appeal. Only one is relevant here: his second appellate counsel's failure to argue that the trial court neglected to conduct a *Faretta* inquiry and improperly denied Gerth's request to proceed pro se.

The Ohio Court of Appeals denied Gerth's second application to reopen his appeal, noting that Ohio law "makes no provision for a successive application" and holding that res judicata barred all of Gerth's claims. (R. 5, Ex. 50, Order Den. Appl. to Reopen Appeal at PageID #393.) Gerth appealed the denial to the Ohio Supreme Court, but that court declined to review the appeal. *State v. Gerth,* 36 N.E.3d 190 (Ohio 2015) (table).

C.

With nowhere to turn in state court, Gerth petitioned for a writ of habeas corpus in federal court under 28 U.S.C. § 2254, raising three grounds for relief from his state court conviction. Relevant to this appeal, Gerth alleges that his appellate counsel rendered ineffective assistance by not arguing that the trial court failed to conduct a *Faretta* inquiry and improperly denied his request to proceed pro se.[2] The magistrate judge filed an initial report and

[2]We call this claim Gerth's "*Faretta* argument."

recommendation, which concluded that although Gerth had preserved the *Faretta* argument for review, it should be dismissed with prejudice. Nonetheless, the magistrate judge issued a supplemental report recommending that the district court grant a certificate of appealability on Gerth's *Faretta* argument. The district court adopted the recommendations and denied the petition with prejudice while also granting a certificate of appealability on the *Faretta* argument. Gerth appeals the denial of his petition.

II.

We review de novo the district court's denial of a habeas petition. *Babick v. Berghuis*, 620 F.3d 571, 576 (6th Cir. 2010). Because the district court neither conducted an evidentiary hearing nor made factual findings of its own, we defer to the state court's factual findings and presume that they are correct, absent a showing of clear and convincing evidence to the contrary. *Hodgson v. Warren*, 622 F.3d 591, 598 (6th Cir. 2010).

Before we reach the merits of a habeas petition, however, we review whether the petitioner has satisfied the state procedural requirements for litigating his federal claim in state court. *Bickham v. Winn*, 888 F.3d 248, 250–51 (6th Cir. 2018) (citing *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000)). If he has not satisfied those requirements—and procedurally defaulted his claim—he cannot present the claim in federal court. *Id.* at 251. We review de novo whether the petitioner has procedurally defaulted his claim. *Id.*

A.

A petitioner seeking a writ of habeas corpus must comply with two procedural requirements, both grounded in the interests of comity and federalism, before a federal court may review the petitioner's claim. First, the petitioner must exhaust all available opportunities to pursue his claim in state court before he may litigate that claim in federal court. 28 U.S.C. § 2254(b)(1)(A). This exhaustion requirement "is designed to avoid the 'unseemly' result of a federal court 'upset[ting] a state court conviction without' first according the state courts an 'opportunity to . . . correct a constitutional violation.'" *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (quoting *Rose v. Lundy*, 455 U.S. 509, 518 (1982)) (alterations in original). Second, and relatedly, the procedural default doctrine bars our review if the petitioner has not followed the

state's procedural requirements for presenting his claim in state court. *Coleman v. Thompson*, 501 U.S. 722, 732 (1991). Thus, a federal court will not review a habeas petition if "the last state-court judgment denying relief on the claim rests on a procedural state-law ground that is 'independent of the federal question and is adequate to support the judgment.'" *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013) (quoting *Coleman*, 501 U.S. at 729–30).

The government argues that these doctrines preclude us from reviewing Gerth's ineffective assistance of counsel claim. But Gerth argues that the government itself has forfeited these arguments. After Gerth filed his habeas petition alleging several examples of ineffective assistance of appellate counsel, the government filed an answer, in which it argued both that Gerth had procedurally defaulted his *Faretta* argument and that the argument was meritless. The magistrate judge disagreed with the government's procedural default argument, finding that the claim was "preserved for review under 28 U.S.C. § 2554(d)(1)," but nevertheless recommended dismissing the claim on the merits. (R. 14, R. & R. at PageID #1190.) The government did not object to the magistrate judge's rejection of its procedural default argument, either after the initial report and recommendation or after the supplemental report and recommendation. So Gerth contends that the government cannot raise the argument on appeal.

A party may forfeit its ability to raise an issue that the magistrate judge has rejected if the party did not timely object to the magistrate judge's findings and recommendations. *See* Fed. R. Civ. P. 72(b)(2); *United States v. Walters*, 638 F.2d 947, 949–50 (6th Cir. 1981). But that rule is not absolute. For one, we have held that when a party substantially prevails before a magistrate judge, it "does not waive the right to appeal secondary issues resolved against him by failing to object to the recommendation." *Souter v. Jones*, 395 F.3d 577, 586 (6th Cir. 2005). And in the habeas context, we have considered the government's procedural default argument on appeal—even when a magistrate judge recommended denying a habeas petition on the merits and the government did not object to the implicit rejection of its procedural default argument. *Vanwinkle v. United States*, 645 F.3d 365, 371 (6th Cir. 2011). In *Vanwinkle*, we explained that after the magistrate judge had ruled in the government's favor on the merits, "the government merely chose not to object to this finding by raising an alternative ground for finding in its favor." *Id.*

We said it would be "illogical" to require the government to raise an objection in that posture. *Id.* That same reasoning applies here.

B.

We turn now to the government's argument that Gerth procedurally defaulted his habeas claim. Gerth's federal claim is that he received ineffective assistance of counsel because his appellate counsel did not raise the *Faretta* argument to overturn his state court conviction. But Gerth, of course, has had several appeals and still more attorneys, so to orient ourselves, we review the history of Gerth's trial and appeals.

Gerth's first opportunity to raise the *Faretta* argument was on the direct appeal of his criminal conviction, although his appellate counsel did not do so. After the Ohio Court of Appeals affirmed his conviction, Gerth sought to reopen his appeal under Rule 26(B), a post-conviction mechanism to challenge the adequacy of appellate counsel. When a criminal defendant applies to reopen his appeal under Rule 26(B), he must present:

> One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[.]

Ohio R. App. P. 26(B)(2)(c). The Ohio Court of Appeals, which considers Rule 26(B) applications, must grant the application "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." Ohio R. App. P. 26(B)(5). And if the Ohio Court of Appeals grants the application, the case "shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered." Ohio R. App. P. 26(B)(7).

Gerth filed two applications under Rule 26(B). In his first application, Gerth identified three assignments of error, alleging that his appellate counsel: (1) failed to raise the *Faretta* argument; (2) failed to conduct a meaningful investigation into the facts and law of his case; and (3) failed to argue that the trial court improperly sentenced him on two counts of leaving the scene of an accident. Although the Ohio Court of Appeals granted Gerth's application and reopened the appeal, it never addressed the *Faretta* argument. Instead, the court focused

exclusively on Gerth's third assignment of error and concluded that Gerth "demonstrated a genuine issue as to whether he was denied the effective assistance of counsel." (R. 5, Ex. 39, Order Grant'g Appl. to Reopen Appeal at PageID #263.) And then the court instructed Gerth's new appellate counsel to present in his brief an assignment of error about the sentencing issue, as well as "any other nonfrivolous assignment of error or argument not previously considered." (*Id.*)

Adopting the magistrate judge's recommendations, the district court determined that the Ohio Court of Appeals silently rejected Gerth's *Faretta* argument as a basis for reopening the appeal. The government asks us to draw the same conclusion—and Gerth does not argue otherwise. Although their instincts are correct, their precise conclusion here is not. True, when a party presents a federal claim before a state court and the claim goes unaddressed, we "must *presume* that the federal claim was adjudicated on the merits." *Ross v. Pineda*, 549 F. App'x 444, 455 (6th Cir. 2013) (quoting *Johnson v. Williams*, 568 U.S. 289, 301 (2013)). But we do not draw that inference here because the Ohio Court of Appeals was not adjudicating the issues in Gerth's Rule 26(B) application on the merits. Instead, the Ohio Court of Appeals had to determine whether *any* of the issues Gerth raised warranted reopening his appeal, and it found that Gerth's third assignment of error did. As soon as the Ohio Court of Appeals identified one assignment of error as grounds for reopening the appeal, it could stop its analysis without addressing Gerth's other assignments of error. Thus, we cannot infer that the Ohio Court of Appeals rejected Gerth's *Faretta* argument.

When the Ohio Court of Appeals granted Gerth's 26(B) application, it also appointed Gerth new appellate counsel and instructed Gerth to bring *any* nonfrivolous assignment of error that it had not previously considered. That instruction opened the door for Gerth to raise his *Faretta* argument, but he did not do so. Instead, he raised three different assignments of error on the reopened appeal; the Ohio Court of Appeals sustained two of the three assignments and remanded the case to the trial court for resentencing. *Gerth*, 2014 WL 5306631, at *3.

After the district court resentenced him, Gerth filed his second Rule 26(B) application, this time alleging that his *second* appellate counsel—*i.e.*, his attorney on the reopened appeal—rendered ineffective assistance. In that application, Gerth identified six assignments of error,

including that his second appellate counsel failed to raise the *Faretta* argument on the reopened appeal. The Ohio Court of Appeals, however, did not address whether any of those alleged errors created a genuine issue of whether Gerth received effective assistance of counsel. Rather, the court explained that Rule 26(B) "makes no provision for a successive petition" and that, in any case, "the challenges that Gerth advances here to his appellate counsel's effectiveness in prosecuting his appeal either were or could have been raised in his first application." (R. 5, Ex. 50, J. at PageID #393–94.) Thus, the court held that the "doctrine of res judicata bars him from presenting these challenges in this successive application" and denied Gerth's 26(B) application. (*Id.* at PageID #394.) Gerth appealed the Ohio Court of Appeals' decision to the Ohio Supreme Court, but that court declined to review the appeal.

That leaves us with the following question: does Ohio's res judicata doctrine act as a procedural bar to our review of Gerth's federal claim? To answer that question, we apply the four-part test from *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986) and decline to review Gerth's claim if: (1) Gerth failed to comply with Ohio's res judicata doctrine; (2) Ohio courts enforce that doctrine; (3) res judicata is an adequate and independent state ground for denying review of a constitutional claim; and (4) Gerth cannot show cause and prejudice excusing the default. *See Webb v. Mitchell*, 586 F.3d 383, 397 (6th Cir. 2009) (citing *Maupin*, 785 F.2d at 138).

We consider first whether Gerth has complied with Ohio's res judicata doctrine. The Ohio Supreme Court has described res judicata as the rule:

> [T]hat a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

State v. Davis, 894 N.E.2d 1221, 1223 (Ohio 2008) (internal quotation marks omitted). That doctrine applies to 26(B) proceedings. Indeed, the Ohio Supreme Court has repeatedly held that "[o]nce ineffective assistance of counsel has been raised and adjudicated, *res judicata* bars its relitigation." *State v. Twyford*, 833 N.E.2d 289, 290 (Ohio 2005) (quoting *State v. Williams*, 790 N.E.2d 299, 300–01 (Ohio 2003)). When the Ohio Court of Appeals granted Gerth's first

26(B) application, appointed Gerth counsel, and reopened Gerth's appeal, Gerth could have raised all of the alleged deficiencies in his representation on direct appeal, including that his first appellate counsel rendered ineffective assistance by not raising the *Faretta* argument. But Gerth's second appellate counsel never raised the *Faretta* argument on the reopened appeal, and that decision precludes Gerth from raising the argument again in state court. That Gerth's second appellate counsel may have erred by not raising the *Faretta* argument does not change this underlying fact: res judicata bars Gerth from raising the *Faretta* argument in a second 26(B) application when he could have raised that argument on the reopened appeal.

The second *Maupin* factor asks us to determine whether Ohio courts enforce res judicata. They do. *See Twyford*, 833 N.E.2d at 290; *Williams*, 790 N.E.2d at 300–01; *State v. Cheren*, 652 N.E.2d 708, 708–09 (Ohio 1995). And under the third *Maupin* factor, we must consider whether res judicata is an adequate and independent state ground to foreclose our review of Gerth's federal claim. We have repeatedly said that it is. *See, e.g.*, *Landrum v. Mitchell*, 625 F.3d 905, 934 (6th Cir. 2010) ("The Ohio Court of Appeals's reliance on *res judicata* was an adequate and independent state ground to foreclose *habeas* relief in federal court."); *Fautenberry v. Mitchell*, 515 F.3d 614, 633 (6th Cir. 2008); *Williams v. Bagley*, 380 F.3d 932, 967 (6th Cir. 2004); *Martin v. Mitchell*, 280 F.3d 594, 604 (6th Cir. 2002).

Our analysis turns on the fourth *Maupin* factor: whether Gerth can show cause and prejudice to excuse his default. In *Murray v. Carrier*, the Supreme Court explained that a petitioner seeking to show cause must identify "some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule." 477 U.S. 478, 488 (1986). One such example is "attorney error rising to the level of ineffective assistance of counsel." *Hargrave-Thomas v. Yukins*, 374 F.3d 383, 388 (6th Cir. 2004); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (citing *Murray*, 477 U.S. at 488–89).

Gerth argues that his second appellate counsel rendered ineffective assistance by not raising the *Faretta* argument on the reopened appeal—and that the deficient representation serves as cause for his procedural default. Gerth's argument has merit only if his attorney's ineffectiveness amounted to a constitutional violation. *Coleman*, 501 U.S. at 754. And that turns on whether Gerth had a constitutional right to counsel on the reopened appeal: there can be no

constitutional violation if Gerth had no constitutional right to counsel at the stage of the proceeding allegedly tainted by ineffective assistance. *See Carter v. Mitchell*, 693 F.3d 555, 565 (6th Cir. 2012). So we must determine whether Gerth had a constitutional right to counsel after the Ohio Court of Appeals granted his first Rule 26(B) application and reopened his appeal.

There is no dispute that Gerth had a constitutional right to counsel on direct appeal. *See, e.g.*, *Evitts v. Lucey*, 469 U.S. 387, 393–94 (1985); *Douglas v. California*, 372 U.S. 353 (1963). But it is equally well-settled that Gerth *did not* have a constitutional right to counsel when he applied to reopen his appeal before the Ohio Court of Appeals. The Supreme Court has explained that a defendant has "no constitutional right to an attorney in state post-conviction proceedings" and therefore "cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman*, 501 U.S. at 752. And sitting en banc, we concluded that the 26(B) application is "part of the collateral, postconviction process rather than direct review" and held that a defendant who applies to reopen his appeal under Rule 26(B) has no constitutional right to counsel *at the application stage*. *Lopez v. Wilson*, 426 F.3d 339, 351 (6th Cir. 2005) (en banc). But *Lopez* does not answer our question: whether Gerth had a constitutional right to counsel after the Ohio Court of Appeals granted his 26(B) application, appointed Gerth counsel, and *reopened the appeal*.

We hold that a reopened appeal under Rule 26(B) is also part of the collateral, postconviction process—and that Gerth therefore did not have a constitutional right to counsel at that stage of the proceeding. Rule 26(B)'s text makes clear that a reopened appeal is not simply a do-over of the direct appeal. For one, the rule limits the arguments that the petitioner can raise on the reopened appeal. The court itself may "limit its review to those assignments of error and arguments not previously considered [on direct appeal]." Ohio R. App. P. 26(B)(7). And although the rule states that "[i]f the application is granted, the case shall proceed as on an initial appeal," *id.*, the petitioner cannot make *just any* legal argument on the reopened appeal. Rather, the Ohio Court of Appeals "shall vacate its prior judgment and enter the appropriate judgment" only if it "finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency." Ohio R. App. P. 26(B)(9). "If the court does not so find, the court shall issue an order confirming its prior judgment." *Id.* These rules tell us that the

petitioner must present all arguments on the reopened appeal within the framework of a claim for ineffective assistance of appellate counsel. Rather than simply identify trial court errors as he would on direct appeal, the petitioner must show that his appellate counsel made an objectively unreasonable decision by not raising the trial court error and that he suffered prejudice because of that decision. *See Webb*, 586 F.3d at 399.[3]

Our conclusion that a reopened appeal is a collateral proceeding matches the Ohio Supreme Court's precedents. In *Morgan v. Eads*, the Ohio Supreme Court described Rule 26(B) as creating a "separate collateral opportunity to raise ineffective-appellate-counsel claims" and explained that a successful application "was never intended to constitute part of the original appeal." 818 N.E.2d 1157, 1158 (Ohio 2004). The *Morgan* court carefully studied the rule, distinguishing the Ohio Court of Appeals' jurisdiction on the reopened appeal from that court's jurisdiction over direct appeals and providing several reasons why Rule 26(B) proceedings are collateral. First, the court explained that the petitioner must submit additional information outside the trial court record to support his ineffective assistance of counsel claim; on direct appeal, the appellate court may consider only the trial record. *Id.* at 1159. Second, the court noted that the Ohio Court of Appeals ordinarily lacks jurisdiction to alter or amend its judgment if an appeal is pending before the Ohio Supreme Court. But the Ohio Court of Appeals can reopen an appeal under Rule 26(B), even as the direct appeal is pending before the Ohio Supreme Court. *Id.* at 1159–60. Third, the court held that when the Ohio Court of Appeals grants the 26(B) application and reopens the appeal, the original appellate decision "remains in effect until vacated." *Id.* at 1160. Thus, the 26(B) application "does not start the appeal process all over again," just as a successful postconviction petition under Ohio Rev. Code § 2953.21 "is not equivalent to a new trial." *Id.* Finally, the court clarified that although the Ohio Court of Appeals must appoint counsel when it reopens an appeal, the United States Constitution does not

[3]Decisions from the Ohio Court of Appeals also underscore that the petitioner must present his substantive arguments on the reopened appeal within the ineffective assistance of counsel framework. That court has declined to consider assignments of error that a petitioner presented on the reopened appeal because the assignments failed to allege ineffective assistance of appellate counsel. *See, e.g.*, *State v. Hamilton*, No. 96 CA 15A, 2000 WL 1591117, at *2 (Ohio Ct. App. Oct. 23, 2000). Indeed, the court explained that those assignments "are not properly before us in accordance with [Rule] 26(B)." *Id.*; *see also State v. Jones*, No. 96-A-0009, 1999 WL 689944, at *2 (Ohio Ct. App. Aug. 27, 1999) (Rule 26(B) requires petitioner to challenge appellate counsel's effectiveness rather than simply identify trial court errors). Under these decisions, the reopened appeal is procedurally and substantively distinct from the direct appeal.

compel that outcome. That Ohio appoints counsel in such cases reflects a policy choice rather than a constitutional mandate. *Id.* at 1160–61. For those reasons, the Ohio Supreme Court described the reopened appeal as "an attack on the outcome of [the direct] appeal, not a part of the appeal," and we find that conclusion persuasive. *Id.* at 1160. Because Gerth had no constitutional right to counsel on the reopened appeal, his attorney's performance cannot excuse the procedural default of the *Faretta* argument.

As always, there is an exception to the rule. Although the Supreme Court held in *Coleman* that ineffective assistance of counsel in a postconviction proceeding cannot qualify as cause to excuse the petitioner's procedural default, 501 U.S. at 752, the Court has since identified a "narrow exception" to that general rule. *Martinez v. Ryan*, 566 U.S. 1, 9 (2012). In *Martinez*, the Court considered whether a petitioner could show cause to excuse his procedural default in a post-conviction proceeding where—critically—that proceeding presented his first opportunity to allege ineffective assistance of trial counsel. *Id.* at 5. The Court remarked that because Arizona prohibited criminal defendants from raising ineffective assistance of trial counsel arguments on direct appeal, the post-conviction proceeding "is in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim." *Id.* at 11. Finding it "necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as a cause to excuse a procedural default," the Court announced a "narrow exception" to *Coleman*: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." *Id.* at 9.

The Court's holding in *Martinez* does not, however, dictate a similar outcome here. Indeed, the Court's recent decision in *Davila* forecloses any support that *Martinez* may have offered to excuse Gerth's procedural default. In *Davila*, the petitioner argued that his state-appointed postconviction counsel failed to raise his ineffective assistance of appellate counsel claim in his state habeas petition—and that the error provided cause to excuse his procedural default. 137 S. Ct. at 2063. Much like the petitioner in *Martinez*, the petitioner in *Davila* could not raise his ineffective assistance of appellate counsel claim until the postconviction, state habeas proceeding. The Court, however, distinguished *Martinez*, which "was principally

concerned about *trial errors*—in particular, claims of ineffective assistance of *trial* counsel"—from the "distinct context of ineffective assistance of appellate counsel." *Id.* at 2066–67. So out of "respect [for] that judgment," the Court declined to expand *Martinez* to procedurally defaulted claims of ineffective assistance of appellate counsel. *Id.*

Because Gerth had no constitutional right to counsel on the reopened appeal, he cannot excuse his procedural default. *See Coleman*, 501 U.S. at 752.

III.

For these reasons, we AFFIRM the district court's denial of Gerth's petition for habeas corpus.

APPENDIX B

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

MARK GERTH,

Petitioner, : Case No. 1:16-cv-598

- vs - District Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

JAMES HAVILAND, Warden,
Correctional Institution,

:

Respondent.

DECISION AND ORDER

This habeas corpus case is before the Court on Petitioner's Objections (ECF Nos. 17 & 20) and the Warden's Objections (ECF No. 21) to the Magistrate Judge's original Report and Recommendations (ECF No. 14) and Supplemental Report and Recommendations on recommit (ECF No. 19). Petitioner has responded to the Warden's Objections (ECF No. 22).

Pursuant to Fed. R. Civ. P. 72(b)(3), the Court has reviewed de novo all portions of the Reports and Recommendations to which specific objection was made. Gerth's "General Objection" does not qualify as an objection under Fed. R. Civ. P. 72.

Ground for Relief One: Right to a State Court Remedy for Ineffective Assistance of Counsel on a Reopened Appeal

The Magistrate Judge concluded Gerth's First Ground for Relief was without merit

because there is no United States Supreme Court precedent holding, as a matter of due process of law, that a State must provide a forum to raise a claim of ineffective assistance of appellate counsel. Gerth's Objections do not cite any such precedent. Instead, Gerth relies on *Evitts v. Lucey*, 469 U.S. 387 (1985), for the proposition that if a State provides an appeal at all, that appellate process must accord with the Due Process Clause. That proposition is unexceptionable. If a State provides a direct appeal process, then the appellant is entitled to effective assistance of counsel on that appeal. For example, counsel must be appointed on appeal of right for indigent criminal defendants. *Douglas v. California*, 372 U.S. 353 (1963); *Anders v. California*, 386 U.S. 738 (1967); *United States v. Cronic,* 466 U.S. 648 (1984). When it does provide a right to appeal, the State cannot discriminate against the poor by failing to provide the necessary transcript. *Griffin v. Illinois*, 351 U.S. 12 (1956). These are all aspects of due process that the Supreme Court has held are required if a State decides to have direct appeals at all.

But the Supreme Court has never held that a State must, as a matter of due process, provide a forum in which to raise a claim of ineffective assistance of appellate counsel, much less a second opportunity to raise such a claim. Gerth says the Magistrate Judge's

> holding ignores the procedural history in this case because Gerth is not seeking a second opportunity or second forum to raise ineffective assistance of his original appellate counsel , but instead sought an initial opportunity to raise ineffective assistance of appellate counsel representing him in the reopened appeal.

(Objections, ECF No. 20, PageID 1233.) On the contrary, the Magistrate Judge recognized that was what Gerth was seeking and held that Ohio law, as enunciated by the First District in this very case, does not provide a forum to raise that claim (Report, ECF No. 14, PageID 1182;

Supplemental Report, ECF No. 19, PageID 1221).

Even if this Court believed that the Due Process Clause of the Fourteenth Amendment required States to provide a forum every time an appellant claims ineffective assistance of appellate counsel, Mr. Gerth's First Ground for Relief would be without merit because this Court is not empowered to set aside a conviction in habeas corpus unless the state court's decision is contrary to or an objectively unreasonable application of Supreme Court precedent. 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 412 (2000). In other words, we cannot declare a new constitutional right in a habeas case.

Gerth's Objections as to Ground One are overruled.

Ground Two: Omitted Assignments of Error Two Through Six

The First District Court of Appeals found these five assignments of error barred by res judicata because they could have been but were not raised previously. Gerth objects that "[i]n Ohio, the doctrine of res judicata does not always bar relitigation of certain issues, making it an inadequate ground for denying habeas relief." (Objections, ECF No. 20, PageID 1240). However, the Sixth Circuit has repeatedly held to the contrary *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000); *Rust v. Zent,* 17 F.3d 155, 160-61 (6th Cir. 1994).

Ground Two: Omitted *Faretta* Assignment

Because most of Gerth's pre-trial complaints about his appointed attorneys were in support of requests for replacement, rather than to proceed *pro se*, the Magistrate Judge concluded his *Faretta* assignment of error was not so strong as to make it ineffective assistance of appellate counsel to fail to raise it, but concluded this was a sufficiently close question to merit a certificate of appealability (Supplemental Report, ECF No. 19). Gerth objects on the merits and the Warden objects to the grant of a certificate of appealability.

Having reviewed the matter *de novo*, the Court concludes neither objection is well-taken. The question on the merits is not whether the trial court conducted an error-free *Faretta* determination, but whether the issue was a likely winner on appeal. Because the trial judge relied in part on a psychiatric determination of Gerth's competence and in part on his prior disruption of proceedings, the Magistrate Judge correctly determined that the *Faretta* issue was not a likely winner on appeal. Because the question is close, reasonable jurists could disagree on its resolution. The Warden's Objection reiterates Respondent's claims on the merits, but does not demonstrate that the issue is not at least debatable among reasonable jurists.

Ground Three: Legally Insufficient Evidence

For the reasons given by the Magistrate Judge, this Ground is procedurally defaulted.

Conclusion

The Court OVERRULES the Objections of both Petitioner and the Respondent. The Clerk will enter judgment dismissing the Petition with prejudice. Petitioner is GRANTED a certificate of appealability on his *Faretta* claim, but a certificate of appealability is DENIED on all other claims. Petitioner has leave to appeal *in forma pauperis*.

October 6, 2017.

S/Susan J. Dlott
Susan J. Dlott
United States District Judge

APPENDIX C

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

MARK GERTH,

Petitioner, : Case No. 1:16-cv-598

- vs - District Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

JAMES HAVILAND, Warden,
Correctional Institution,

:

Respondent.

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This is a habeas corpus case brought by Petitioner with the assistance of counsel pursuant to 28 U.S.C. § 2254. The case is before the Court on Petitioner's Objections (ECF No. 17) to the Magistrate Judge's Report and Recommendations ("Report," ECF No. 14) which recommended dismissal with prejudice. District Judge Dlott has recommitted the matter to the Magistrate Judge for reconsideration in light of the Objections (ECF No. 18). The Warden had the right under Fed. R. Civ. P. 72(b)(2) to respond to the Objections by September 11, 2017, but has filed no response.

General Objection

Petitioner begins with a General Objection which reads in its entirety "Gerth objects to each and every finding of fact and conclusion of law in the Order [sic] and Report and

Recommendation which is adverse to Gerth's claims for relief." (ECF No. 17, PageID 1197.) This general objection should be ignored by the Court. Only specific objections are preserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987). The district court need not provide *de novo* review where objections to a magistrate judge's report and recommendations are frivolous, conclusive, or general. Parties have a duty to pinpoint portions of the report that the Court should consider. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). If a party files a general objection and incorporates other papers by reference and that approach undermines the purposes of the Magistrate's Act, that party will have waived the right to appeal. *Neuman v. Rivers*, 125 F.3d 315 (6th Cir. 1997).

Ground One

Petitioner's First Ground for Relief reads:

> When an Ohio Court of Appeals reopens a direct appeal pursuant to Ohio App. R. 26(b)(5) and proceeds pursuant to Ohio App. R. 26(b)(7) as on an initial appeal with new appellate counsel representing the criminal defendant, the defendant is constitutionally entitled to the effective assistance of new appellate counsel.

(Petition, ECF No. 1, PageID 2.) In the Report, the Magistrate Judge wrote that this abstract proposition of law was correct. Indeed, Respondent did not contest it (Report, ECF No. 14, PageID 1180).

The difficulty with Petitioner's position is he alleges Ohio violated his right to the effective assistance of appellate counsel when it did not give him a forum in which to raise ineffective assistance of appellate counsel claims as to his second appellate attorney.

After his first direct appeal was unsuccessful, he filed an application for reopening under Ohio R. App. P. 26(B) which was granted. His new attorney then did not raise all the assignments of error he believes should have been raised on the reopened appeal. To raise claims of ineffective assistance of appellate counsel regarding his second attorney on his first appeal, he filed a second 26(B) application which the appellate court refused to consider, holding that "App. R. 26(B) makes no provision for a successive application." *State v. Gerth*, Case No. C-120392 (1st Dist. Apr. 13, 2015)(unreported, copy at State Court record ECF No. 5, PageID 393-94), citing *State v. Twyford*, 106 Ohio St. 3d 176 ((2005), and *State v. Peeples*, 73 Ohio St. 3d 149 (1995).

The question of whether or not Ohio law provides a litigant with a second opportunity to raise ineffective assistance of appellate counsel claims is just that – a question of Ohio law, not federal law. In the Petition, Gerth's counsel spend considerable effort distinguishing the Ohio Supreme Court cases on which the First District relied (ECF No. 1, PageID 22-23). But whether the First District was right or wrong in its application of Ohio precedent is a matter of Ohio law. A federal habeas court is bound by state court decisions on questions of state law, even if they are made in the very case in which relief is sought. "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Railey v. Webb*, 540 F.3d 393 (6th Cir. 2008), *quoting Bradshaw v. Richey*, 546 U.S. 74, 76 (2005)("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Maldonado v. Wilson*, 416 F.3d 470 (6th Cir. 2005); *Vroman v. Brigano*, 346 F.3d 598 (6th Cir.

2003); *Caldwell v. Russell*, 181 F.3d 731, 735-36 (6th Cir. 1999); *Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986).

It is unquestionably true that a criminal defendant has the right to effective assistance of counsel on his or her first direct appeal of right. But Gerth's argument goes further to assert Ohio was obliged to provide him with a forum in which to raise that right (Petition, ECF No. 1, PageID 24, citing *Evitts v. Lucey*, 469 U.S. 387 (1985)). That is not the holding of *Evitts*. As the Report notes, Petitioner has failed to cite any clearly established Supreme Court precedent that holds a State must provide a forum in which to raise ineffective assistance of appellate counsel claims at all, much less a second opportunity to raise such claims (ECF No. 14, PageID 1182). In fact, the Supreme Court has repeatedly held that the States need not provide even for direct appeal at all. *McKane v. Durston*, 153 U.S. 684 (1894), cited as still good law in *Lopez v. Wilson*, 426 F.3d 339, 355 (6th Cir. 2005); *Halbert v. Michigan*, 545 U.S. 605 (2005). "Due process does not require a State to provide appellate process at all." *Goeke v. Branch*, 514 U.S. 115, 120 (1995).

The fact that Gerth is without a state forum to raise his ineffective assistance of appellate counsel claims does not mean he is without a remedy. Federal habeas corpus remains available to any prisoner who is deprived of his or her liberty pursuant to a conviction infected with constitutional error, including ineffective assistance of appellate counsel. Indeed, when the state courts refuse to entertain such claims, the habeas court considers them *de novo*.

Gerth's Objections point to no clearly established Supreme Court precedent that would compel a State to provide a forum for ineffective assistance of appellate counsel claims, even a first opportunity. In response to the Report's claim that Gerth's unheard ineffective assistance of

appellate counsel claims can be raised in habeas, Gerth notes that the Report recommends dismissing Ground Two on omitted assignments of error Two through Six as procedurally defaulted (Objections, ECF No. 17, PageID 1202). But the Report did not suggest that those claims were not cognizable in habeas or that this Court's review would not be *de novo*. The fact that a litigant has an available forum does not eliminate affirmative defenses to claims raised in that forum.

It is therefore again respectfully recommended that the First Ground for Relief be dismissed for failure to state a claim upon which habeas corpus relief can be granted.

Ground Two

First Objection: Omitted Assignments of Error Two through Six

In his Second Ground for Relief, Gerth asserts he received ineffective assistance of appellate counsel when his second appellate attorney failed to raise "six meritorious assignments of error." (Petition, ECF No. 1, PageID 24.) The Report found that merits review of omitted assignments of error two through six was barred by Gerth's failure to present them to the First District in his first 26(B) application (Report, ECF No. 14, PageID 1184).

Gerth objects by again distinguishing the Ohio Supreme Court precedent on which the First District relied in dismissing the second 26(B) application (Objections, ECF No. 17, PageID 1205-07). He notes that in Ohio res judicata does not always bar relitigation of issues. *Id.* at PageID 1206-07, citing Ohio case law, largely unpublished. Again, the question of whether

Ohio res judicata law applies to assignments of error raised for the first time in a second 26(B) application is a question of Ohio law, not federal law. If the First District was wrong that Ohio res judicata law applied here, Gerth was free to raise that claim on appeal to the Ohio Supreme Court or indeed to the First District on a request for reconsideration.

The Report found omitted assignments of error two through six procedurally defaulted by a straightforward application of the analysis required by the Sixth Circuit:

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen,* 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
>
> Third, the 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.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under Sykes that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986); *accord, Hartman v. Bagley*, 492 F.3d 347, 357 (6th Cir. 2007), *quoting Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002). Ohio has a relevant procedural rule, the res judicata doctrine established by *State v. Perry*, 10 Ohio St. 2d 175 (1967). The res judicata rule was enforced by the First District on *Gerth* in this case, and has been repeatedly upheld as an adequate and independent state ground of decision by the Sixth Circuit. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486,

521-22 (6th Cir. 2000); *Rust v. Zent*, 17 F.3d 155, 160-61 (6th Cir. 1994)(citation omitted); *Van Hook v. Anderson*, 127 F. Supp. 2d 899, 913 (S.D. Ohio 2001). Although a procedural default can be excused by showing cause and prejudice, Gerth has made no such showing, In particular, he cannot excuse his failure to include these omitted assignments of error in his first 26(B) application by claiming ineffective assistance of appellate counsel since he was not entitled to the assistance of counsel in preparing that application.

Second Objection: Omitted Assignment of Error One

In his First Omitted Assignment of Error which was raised in his first 26(B) application, Gerth asserts trial court error in denying him the right to self-representation and ineffective assistance of appellate counsel for failing to present this claim on direct appeal. In his Petition, Gerth claimed he never received a decision on this claim on the merits. The Report disagreed, reasoning that the claim had been plainly presented to the First District and that Supreme Court precedent required us to read the First District's silence on the claim as having rejected it (Report, ECF No. 14, PageID 1186). The Report then analyzed the merits of Gerth's *Faretta* claim and concluded it was not so strong as to have been a sure winner and therefore the First District's silent denial of Gerth's claim of ineffective assistance of appellate counsel for failure to raise the *Faretta* claim was not an objectively unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at PageID 1189-90.

In his Objections, Gerth emphasizes the many ways in which he expressed his dissatisfaction with his appointed trial attorney and his desire to have him replaced. But it was

only in close proximity to trial that Gerth coupled that with a request to represent himself. The Report observed that granting the self-representation request would have required a trial continuance when the case had already been pending long past the Ohio statutory speedy trial limit. Gerth objects that he would not have objected to a trial continuance (Objections, ECF No. 17, PageID 1212). That is what he says now, but there is no record reference to his having said that at the time. He also objects to Judge Nadel's having relied on one incident of disruptive behavior and claims he did not act disruptively at the March 12, 2012, hearing. *Id.* If a trial judge is face with disruption at one short hearing and non-disruption at another short hearing, which should he project is likely at a trial where it is likely witnesses will say things the defendant will find upsetting?

The Report also noted that Judge Nadel had some information regarding Gerth's psychiatric condition on which he relied to find Gerth was not competent to waive representation (ECF No. 14, PageID 1190). The Objections argue that Judge Nadel's reasoning on this point is misleading. The Objections also fault Judge Nadel for not conducting a proper *Faretta* hearing and the Report for not taking this into account (ECF No. 17, PageID 1213).

The question before this Court is not whether Judge Nadel conducted a flawless *Faretta* proceeding. Instead, the question is whether an appellate victory on this issue was so likely that failure to include it constituted ineffective assistance of appellate counsel. In the Magistrate Judge's opinion, it did not. What the trial judge experienced was a last-minute demand for self-representation made by a person who had been volatile and disruptive in the courtroom. Under these circumstances, it seems very unlikely the First District would have reversed for failure to ask the formulaic questions suggested for a *Faretta* inquiry. This question is sufficiently close,

however, that Gerth should be granted a certificate of appealability on it.

In sum, it is again respectfully recommended that the Second Ground for Relief be dismissed with prejudice, but that Gerth be granted a certificate of appealablity on his *Faretta* claim.

Ground Three: Insufficient Evidence

In his Third Ground for Relief, Gerth claims he was convicted on constitutionally insufficient evidence. The Report notes that the asserted factual bases of this claim were failure to prove essential elements of several of the crimes of which Gerth was convicted.

An allegation that a verdict was entered upon insufficient evidence states a claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970); *Johnson v. Coyle*, 200 F.3d 987, 991 (6th Cir. 2000); *Bagby v. Sowders*, 894 F.2d 792, 794 (6th Cir. 1990)(en banc). In order for a conviction to be constitutionally sound, every element of the crime must be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364.

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt . . . . This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts.

Jackson, 443 U.S. at 319; *United States v. Paige*, 470 F.3d 603, 608 (6th Cir. 2006); *United States v. Somerset*, 2007 U.S. Dist. LEXIS 76699 (S.D. Ohio 2007). To put it another way, there

must be sufficient evidence on every element of the offense of conviction; absence of sufficient evidence on even one element of the crime will defeat the conviction.

In his Petition, Gerth asserted the absence of sufficient evidence on particular elements of the crimes of conviction. For example, Gerth was convicted of receiving stolen property because the SUV he was driving when the fatal accident occurred was not his. He claimed in this Ground for Relief there was no proof the SUV was stolen. The Report concluded this sub-claim was procedurally defaulted because it was never raised anywhere in the state courts. Gerth concedes on this sub-claim (Reply, ECF No. 10, PageID 1155); (Objections, ECF No. 17, PageID 1214).

Gerth had argued in the First District that he could not have been convicted of knowingly acting during the course of his criminal conduct because he was intoxicated. The First District ruled against him on this claim and the Report found he did not pursue it in the Ohio Supreme Court, meaning this sub-claim was procedurally defaulted. In his Reply, Gerth had responded to the procedural default defense by claiming he preserved this claim (that he did not act knowingly) by asserting in the Ohio Supreme Court that the victims would not have been killed but for (1) the mechanical failure(s) of the SUV and (2) the improper police chase. The Report rejected this argument, reasoning that presenting a claim of lack of causation is not the same presenting a claim that one did not act knowingly (Report, ECF No. 14, PageID 1191-92).

Gerth objects by quoting at length from his Memorandum in Support of Jurisdiction in the Ohio Supreme Court:

> In this case, it is not the actions of the Appellant alone which caused the victim's deaths. If it had not been but for the mechanical failure resulting from the improper Police chase, no deaths would have occurred. . . .

> Imagine a picture in which all the participants of this case were lined up at the edge of a cliff, the victims at the edge, the Appellant in the middle, and the Toyota Motor Corporation and Cincinnati Police at the rear. What has occurred in this case is tantamount to the Police and Toyota pushing this Appellant into the Victims, who then fell to their deaths.

(Objections, ECF No. 17, PageID 1215, quoting Memorandum in Support of Jurisdiction, State Court Record, ECF No. 5, Ex. 24, PageID 164-66.) This is an argument about lack of proof of causation, not lack of proof of the element of acting knowingly. Arguing to the Ohio Supreme Court on the causation element does not preserve the claim of lack of proof of acting knowingly.

It is therefore again respectfully recommended that the Third Ground for Relief be dismissed with prejudice.

Conclusion

Based on the foregoing analysis, it is again recommended that the Petition be DISMISSED WITH PREJUDICE. Because reasonable jurists would not disagree with this conclusion, Petitioner should be denied a certificate of appealability except as to his *Faretta* claim. He should be permitted to proceed *in forma pauperis* on appeal.

September 14, 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. 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).

APPENDIX D

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

MARK GERTH,

Petitioner, : Case No. 1:16-cv-598

- vs - District Judge Susan J. Dlott
Magistrate Judge Michael R. Merz

JAMES HAVILAND, Warden,
Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

This is a habeas corpus case brought by Petitioner with the assistance of counsel pursuant to 28 U.S.C. § 2254. Petitioner seeks relief from his conviction in the Hamilton County Common Pleas Court and consequent confinement in Respondent's custody.

Upon initial review of the Petition (ECF No. 1), Magistrate Judge Bowman ordered Respondent to file an answer (ECF No. 2). The Attorney General then filed the State Court Record ("SCR", ECF No. 5) and a Return of Writ (ECF No. 6). Gerth filed a Reply (ECF No. 10) and, with Court permission, Respondent filed a Response to the Reply (ECF No. 12). The reference was later transferred to the undersigned to help balance the Magistrate Judge workload in the Western Division (ECF No. 13).

Factual Context

The First District Court of Appeals on direct appeal provides the factual context for this case:

> **[*P1]** While fleeing from police in a stolen vehicle at high speeds, Mark Gerth crashed into a taxicab, killing its driver and passenger.
> . . .
>
> **[*P2]** Officer Mark McChristian was on routine patrol in Over-the-Rhine, when he saw a red Toyota Rav4. He ran the plates for the Rav4, and discovered it had been reported stolen two days earlier. He followed the vehicle, while awaiting additional units to respond to the area. When he activated his emergency lights, the driver of the Rav4 pulled over to the curb. As Officer McChristian stepped out of his cruiser, the Rav4 took off.
>
> **[*P3]** A high-speed chase ensued. Police in marked cruisers, with their emergency lights activated, chased the Rav4 at speeds ranging from 50 to 60 m.p.h. through residential streets with posted speed limits of 25 to 35 m.p.h. The pursuit lasted several minutes. During that time, the Rav4 sped through every stop sign and every red light, crossed left of center, and weaved in and out of cars.
>
> **[*P4]** Ultimately, the Rav4, which had accelerated its speed and was traveling in excess of 75 m.p.h., ran a red light and crashed into two vehicles at the intersection of Eighth and Sycamore Streets in downtown [**4] Cincinnati. The Rav4 hit the front end of the first vehicle before crushing a taxicab. It then hit a parking meter and caught fire. The driver, later identified as Mr. Gerth, rolled out of the Rav4 and attempted to flee from police on foot. But he was quickly apprehended and taken into custody. After being placed in custody, Mr. Gerth volunteered that his passenger did not know that the vehicle had been stolen.
>
> **[*P5]** In the meantime, police had found the cab driver, Mohamed Ould Mohamed Sidi, who was still wearing his seat-belt, dead behind the wheel. His passenger, Tonya Hairston, had been ejected from the cab by the force of the impact. She was lying on the street underneath the cab. Ms. Hairston was transported from the scene by ambulance, but she died enroute to the hospital.

> **[*P6]** Mr. Gerth's passenger in the Rav4, Donald Evans, was injured and slumped over in the Rav4. He was pulled out of the vehicle and transported by ambulance to the hospital. Mr. Evans sustained fractures to his leg requiring surgery during his eight-day hospitalization.
>
> **[*P7]** Mr. Gerth, who had sustained injuries to his forehead, was also transported to the hospital. A blood test revealed he had alcohol, marijuana, and cocaine [**5] in his system. A forensic toxicologist with the Hamilton County Coroner's Office testified that the amount of cocaine in Mr. Gerth's system would have affected his ability to drive. He noted that studies had shown that individuals with cocaine in their systems similar to the amount of cocaine in Mr. Gerth's system had been linked to high-risk driving behavior, including speeding, cutting off other drivers, and darting in and out of traffic.

State v. Gerth, 2013-Ohio-1751, 2013 Ohio App. LEXIS 1645 (1st Dist. May 1, 2013).

Procedural History

Gerth was indicted by a Hamilton County grand jury on March 24, 2011, on two counts of murder, four counts of aggravated vehicular homicide, one count of aggravated vehicular assault, one count of vehicular assault, one count of failure to comply with an order or signal of a police officer, two counts of failure to stop and identify after an accident, and one count of receiving stolen property (Indictment, SCR, ECF No. 5, PageID 53). Gerth was appointed counsel twice. On March 22, 2012, he moved to discharge successor counsel and proceed pro se at trial, but the motion was denied. The jury found Gerth guilty on all charges and he was sentenced to a term of 48.5 years to life imprisonment.

Gerth's conviction was affirmed on direct appeal. *State v. Gerth*, 2013-Ohio-1751 (1st Dist. May 1, 2013), appellate jurisdiction declined, 136 Ohio St. 3d 1494 (2013). Gerth filed a

pro se petition for post-conviction relief under Ohio Revised Code § 2953.21, raising a claim of ineffective assistance of trial counsel with a number of sub-claims. The trial court denied relief and Gerth appealed. The First District found the trial court was without jurisdiction to entertain the post-conviction petition and dismissed the appeal. *State v. Gerth*, Case No. C-130062 (1st Dist. Feb. 19, 2014)(unreported, copy at SCR, ECF No. 5, PageID 221 et seq.). Gerth did not appeal to the Ohio Supreme Court.

Gerth filed a pro se application to reopen his direct appeal on July 25, 2013. The First District granted the application and appointed counsel who filed a brief on reopening on June 27, 2014, raising three assignments of error. The First District sustained the first two and rejected the third, remanding the case for resentencing. *State v. Gerth*, 2014-Ohio-4569, 2014 WL 4306631 (1st Dist. Oct. 17, 2014). Neither party appealed. On resentencing the trial court imposed a sentence of 45.5 years. Gerth appealed, the First District affirmed, and Gerth did not appeal further to the Ohio Supreme Court.

On January 13, 2015, through counsel who represents him in these habeas proceedings, Gerth filed a second application to reopen his direct appeal. The First District denied reopening (SCR, ECF No. 5, PageID 393 et seq.) and the Ohio Supreme Court declined jurisdiction. *State v. Gerth*, 143 Ohio St. 3d 1443 (2015).

Gerth filed his instant habeas petition on May 31, 2016, raising the following Grounds for Relief:

> **FIRST GROUND FOR RELIEF:** When an Ohio Court of Appeals reopens a direct appeal pursuant to Ohio App. R. 26(B)(5) and proceeds pursuant to Ohio App. R. 26(B)(7) as on an initial appeal with new appellate counsel representing the criminal

defendant, the defendant is constitutionally entitled to the effective assistance of new appellate counsel.

SECOND GROUND FOR RELIEF: Petitioner was denied the effective assistance of appellate counsel in violation of Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the Constitution.

I. The trial court erred, contrary to the Sixth and Fourteenth Amendments to the United States Constitution, in refusing to permit Petitioner to represent himself and in failing to conduct any inquiry as required under *Faretta v. California*, 422 U.S. 806 (1975).

II. The trial court erred in refusing to replace counsel contrary to Petitioner's rights to counsel and to due process of law as guaranteed by the Ohio and United States Constitutions.

III. The trial court improperly instructed the jury on causation in violation of Petitioner's due process rights guaranteed by the United States and Ohio Constitutions.

IV. Petitioner was denied the effective assistance of counsel during plea negotiations contrary to the Sixth and Fourteenth Amendments to the United States Constitution and corresponding rights under the Ohio Constitution.

V. The trial court erred in introducing statements and evidence that were obtained without a warrant and were not obtained knowingly, voluntarily, and intelligently contrary to the United States and Ohio Constitutions.

VI. Petitioner was deprived of the effective assistance of trial counsel in violation of Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Section 10 and 16, Article I of the Ohio Constitution.

THIRD GROUND FOR RELIEF: The convictions against Petitioner constitute a denial of due process because they are based on legally insufficient evidence.

(Petition, ECF No. 1.)

Analysis

Respondent asserts that all of Gerth's Grounds for Relief are procedurally defaulted for various reasons (Return, ECF No. 6, PageID 1090-1105).

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.*

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010)(*en banc*); *Eley v. Bagley*, 604 F.3d 958, 965 (6th Cir. 2010); *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998), *citing Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Lott v. Coyle*, 261 F.3d 594, 601-02 (6th Cir. 2001); *Jacobs v. Mohr*, 265 F.3d 407, 417 (6th Cir. 2001).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
>
> Third, the 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.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986); accord, *Hartman v. Bagley*, 492 F.3d 347, 357 (6th Cir. 2007), *quoting Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002).

First Ground for Relief: Right to a State Court Remedy for Ineffective Assistance of Counsel on a Reopened Appeal

Petitioner's First Ground for Relief states only an abstract proposition of law, to wit, that the constitutional right to effective assistance of appellate counsel on a first appeal of right extends to the situation under Ohio law where a first appeal has been reopened. The Court does not understand Respondent to disagree with that proposition and the Court accepts it. The question is whether that right was violated.

On direct appeal, represented by attorney Bruce Hust, Gerth raised only one assignment of error – insufficiency of the evidence – with two sub-claims: (1) the evidence was insufficient to show Gerth acted knowingly as to his conviction for felonious assault and (2) the evidence was insufficient to convict Gerth of receiving stolen property when there was no evidence as to how he came to possess the vehicle in question (Appellant's Brief, SCR ECF No. 5, PageID 127).

In his Application to Reopen the direct appeal, Gerth asserted that Attorney Hust provided ineffective assistance of appellate counsel when he omitted three assignments of error: (1) Trial court denial of the right of self-representation in violation of *Faretta v. California*, 422 U.S. 806, 812-13 (1975); (2) ineffective assistance of trial counsel in several respects, including "failure to oppose the imposition of consecutive sentences for offenses of similar import resulting from a single animus"; (3) trial court error in failing to "merge all offenses resulting from a single incident with a single animus" in violation of Ohio Revised Code § 2941.25 and Gerth's constitutional right not to be placed twice in jeopardy for the same offense. (Application, SCR, ECF No. 5, PageID 241, et seq.)

In its Entry Granting Application to Reopen Direct Appeal, the First District held that, on omitted assignment of error three, "Gerth has sustained his burden of demonstrating a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel." (Entry, SCR ECF No. 5, PageID 262.) The First District then reopened the direct appeal, appointed Attorney J. Thomas Hodges as counsel, and ordered briefing on (1) "the claim that prior appellate counsel's representation was prejudicially deficient," (2) "an assignment of error concerning the matter identified here as a ground for reopening," (3) "any other nonfrivolous assignment of error or argument not previously considered." *Id.* at PageID 263.

When Attorney Hodges filed Gerth's brief, he did not include the first two omitted assignments, i.e., the self-representation assignment or the ineffective assistance of trial counsel for failure to raise the similar import claim. Instead, he raised assignments of error (1) regarding the failure to merge issue (the assignment the First District had found colorable), (2) regarding consecutive sentencing, and (3) regarding denial of the right of confrontation (Brief, SCR, ECF No. 5, PageID 265-67)(the "First Set of Omitted Assignments of Error"). The First District sustained the first two assignments of error and overruled the third. *State v. Gerth*, 2014-Ohio-4569, 2014 WL 5306631 (1st Dist. Oct. 17, 2014).

Still believing that his first two omitted assignments of error had been omitted as the result of ineffective assistance of appellate counsel, Gerth filed a second Application to Reopen accusing Attorney Hodges of providing ineffective assistance of appellate counsel in omitting six assignments of error in the reopened appeal: (1) the *Faretta* issue, (2) trial court refusal to replace one of his trial attorneys, (3) improper jury instruction on causation, (4) ineffective assistance of trial counsel in plea negotiations, (5) admission of unconstitutionally obtained evidence, and (6) ineffective assistance of trial counsel in twelve different ways, but **not**

including omitted assignment of error two (Application for Reopening, SCR, ECF No. 5, PageID 323, et seq.)(the "Second Set of Omitted Assignments of Error").

The First District refused to entertain this second Application, holding

> [T]his is Gerth's second App. R. 26(B) application to reopen this appeal. But App.R. 26(B) makes no provision for a successive application. *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, 833 N.E.2d 289, ¶ 6; *State v. Peeples*, 73 Ohio St.3d 149, 150, 652 N.E.2d 717 (1995). Moreover, the challenges that Gerth advances here to his appellate counsel's effectiveness in prosecuting his appeal either were or could have been raised in his first application. Therefore, the doctrine of res judicata bars him from presenting these challenges in this successive application. *Twyford* at ¶ 6; *State v. Cheren*, 73 Ohio St.:1d 137, 138, 652 N.E.2d 707 (1995).

State v. Gerth, Case No. C-120392 (1st Dist. Apr. 13, 2015)(unreported; copy at SCR, ECF No. 5, PageID 393-94.) Gerth appealed to the Ohio Supreme Court, asserting as his first proposed Proposition of Law the claim he makes in Ground One, to wit, that he was entitled to effective assistance of counsel on his reopened appeal. His second proposed Proposition of Law asserted the First District erred when it refused to reopen the direct appeal on his second application (Memorandum in Support of Jurisdiction, SCR, ECF No. 5, PageID 398).

In his First Ground for Relief Gerth argues he was constitutionally entitled to a state court decision on the merits of his second Application to Reopen. The Court agrees with Petitioner that this claim is not procedurally defaulted. It was raised at the first opportunity Gerth had to raise it, when he filed his second Application. He then pursued it to the Ohio Supreme Court as detailed above.

However, the claim is without merit. Gerth points to no clearly established Supreme Court precedent which mandates that States provide criminal defendants with a second opportunity to raise ineffective assistance of appellate counsel claims. He relies generally on

Evitts v. Lucey, 469 U.S. 387 (1985)(Reply, ECF No. 10, PageID 1131), but *Evitts* contains no such holding. Rather, *Evitts* holds that an indigent criminal defendant is entitled to appointed counsel who must provide effective assistance. But one cannot infer from that holding that a defendant is entitled to a second state forum to raise ineffective assistance of appellate counsel claims. Indeed, the Supreme Court has held since *Evitts* that post-conviction state collateral review is not a constitutional right, even in capital cases. *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Indeed, the Court has held that there is no federal constitutional right to appeal criminal verdicts for error review. *McKane v. Durston*, 153 U.S. 684 (1894), cited as still good law in *Lopez v. Wilson*, 426 F.3d 339, 355 (6th Cir. 2005); *Halbert v. Michigan*, 545 U.S. 605 (2005). Gerth concludes that he "**must** have a remedy to vindicate his constitutional rights." (Reply, ECF No. 10, PageID 1131, emphasis sic.) That remedy in this case is a petition for habeas corpus relief in federal court. Because habeas corpus is available only to correct federal constitutional violations, 28 U.S.C. § 2254(a); *Wilson v. Corcoran*, 562 U.S. 1 (2010); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990); *Smith v. Phillips*, 455 U.S. 209 (1982); *Barclay v. Florida*, 463 U.S. 939 (1983), and a second bite at the ineffective assistance of appellate counsel claim in state court is not constitutionally mandated, this sub-claim is without merit.

Ground Two: Ineffective Assistance of Appellate Counsel

In his Second Ground for Relief, Gerth claims he received ineffective assistance of appellate counsel when his second appellate attorney, Mr. Hodge, did not raise all of the Second Set of Omitted Assignments of Error in the reopened direct appeal.

Omitted assignments of error two through six were pleaded as having been omitted as the result of ineffective assistance of appellate counsel in the second Application for Reopening. (SCR, ECF No. 5, PageID 323, et seq.) The First District did not reach the merits of the second application because it found Ohio law does not provide for a second application for reopening. Gerth argued to the First District as he argues here that this is a misinterpretation of Ohio App. R. 26(B) which nowhere "specifically bar[s] the filing of an application to reopen based on a claim of ineffective assistance of new appellate counsel in a previously reopened appeal." However, the interpretation of a state rule of procedure is purely a matter of state law and the state courts' interpretation is binding on the federal courts. "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Even state law announced in the decision being reviewed is binding. *Bradshaw v. Richey*, 546 U.S. 74 (2005). Here the First District relied on case authority from the Ohio Supreme Court. Ohio App. R. 26(B) makes no provision for successive applications. *State v. Richardson*, 74 Ohio St. 3d 235 (1996). Indeed, "there is no right to file successive applications for reopening" under App. R. 26(B). *State v. Twyford*, 106 Ohio St. 3d 176 (2005), *quoting State v. Williams,* 89 Ohio St. 3d 179, ¶ 12. Once the issue of ineffective assistance has been raised and adjudicated, *res judicata* bars its relitigation. *State v. Cheren*, 73 Ohio St. 3d 137 (1995), following *State v. Perry*, 10 Ohio St. 2d 175 (1967).

Omitted Assignments of Error Two through Six were not raised in the first 26(B) application although they were available to be raised at that time. Ohio has an applicable procedural rule and that rule was enforced against Gerth. Ohio's doctrine of *res judicata* in

criminal cases, enunciated in *State v. Perry*, 10 Ohio St. 2d 175 (1967), is an adequate and independent state ground. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell v. Mitchell*, 274 F.3d 337 (6th Cir. 2001); *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001); *Byrd v. Collins*, 209 F.3d 486, 521-22 (6th Cir. 2000); *Rust v. Zent*, 17 F.3d 155, 160-61 (6th Cir. 1994)(citation omitted); *Van Hook v. Anderson*, 127 F. Supp. 2d 899, 913 (S.D. Ohio 2001).

Gerth claims (Reply, ECF No. 10, PageID 1140) that the Sixth Assignment of Error was raised in the first 26(B) application. However, that claim is close to disingenuous. In the first application Gerth asserted his trial attorney provided ineffective assistance of trial counsel by not objecting to the failure to merge the hit-skip counts. In his second application, he claimed he received ineffective assistance of trial counsel in twelve different ways, none of which relates to the failure to merge.

Therefore Gerth's Second Ground for Relief is procedurally defaulted as it relates to Omitted Assignments Two through Six.

Omitted Assignment of Error One: The *Faretta* Issue

Gerth claims that he was unconstitutionally denied his right of self-representation at trial and his right to effective assistance of appellate counsel when his first appellate attorney omitted this assignment of error. This sub-claim was, of course, presented in the first 26(B) application. Gerth claims he never received a decision on the merits of this claim, but this Court reads the First District's decision on the first 26(B) application differently. All three omitted assignments of error were plainly presented to the First District under a standard that asked them to decide if they were colorable claims of ineffective assistance of appellate counsel. The First District only

discussed the third omitted assignment and found it to be colorable. It did not discuss omitted assignments one and two, but that does not mean it did not decide that they did not meet the standard for reopening, i.e., that they were not colorable.

When a federal claim is fairly presented but not addressed, "a federal habeas court must presume that the federal claim was adjudicated on the merits. . ." *Ross v. Pineda*, 2013 U.S. App. LEXIS 25481 (6th Cir. 2013), quoting *Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013).

> "A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fair-minded jurists could disagree" on the correctness of the state court decision," *Harrington v. Richter,* 562 U.S. 86, 101 (2011)(quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004). The state court decision must be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *White v. Woodall,* 572 U.S. ___, ___ (2014), slip op. at 4.
>
> When the claim at issue is one for ineffective assistance of counsel, moreover, AEDPA review is "doubly deferential," *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011), because counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Burt v. Titlow*, 571 U.S. ___, ___ (2013), slip op. at 9)(quoting *Strickland v, Washington*, 466 U.S. 668, 690 (1984); internal quotation marks omitted). In such circumstances, federal courts are to afford "both the state court and the defense attorney the benefit of the doubt." at ___ (slip op. at 1).

Woods v. Etherton, 578 U.S. ___, 136 S. Ct. 1149 (2016)(per curiam).

In arguing the merits of the *Faretta* claim, Gerth points first to his November 2, 2011, Motion to Dismiss his second court-appointed counsel, Norm Aubin (SCR, ECF No. 5, PageID 104). At no place in that document does he mention self-representation; instead, he asks for appointment of a third attorney. He moved again on December 14, 2011, to remove Aubin and again appoint new counsel. *Id.* at PageID 108, et seq. The first place at which he claims he requested self-representation is during a hearing on March 12, 2012. Gerth states he does not

want Aubin any longer, but "will be glad to take a public defender, Tim Cutcher or Daniel Burke." (SCR, ECF No. 5-7, PageID 551.) He repeats that request at PageID 552. Judge Nadel makes it clear that Gerth's issues with counsel have been discussed before. He noted that the last time there had been a hearing, Gerth had to be ejected from the courtroom for being disorderly. *Id*. at PageID 555. Only then does Gerth say "I would like to fire him and waive my right to counsel." *Id.* at PageID 555-56. At that time the case was set for trial on April 2, 2012, or about ten days later.

On the morning of trial after a jury was selected, Gerth said orally he wanted to exercise his "right under US versus Farretta to proceed pro se." *Id.* at PageID 564. However, Gerth proceeded to read a motion for evidentiary hearing and made it clear he was not prepared to proceed to trial at that time. (E.g., "this case, though ripe for an impartial evidentiary hearing, it not nearly ready for trial in the interests of justice." *Id*. at PageID 571.) He argued that because Judge Nadel would not replace Mr. Aubin, "the Judge Nadel leaves the defendant no alternative except to exercise defendant's constitutional right to voluntarily, knowingly and intelligently elect to proceed pro se." *Id.* at PageID 579.

Judge Nadel then proceeded to recite that the incident in suit had occurred over a year before. *Id.* at PageID 580. He noted that Mr. Aubin had replaced Attorney Bernard Mundy and was an extremely competent attorney who had handled capital cases. He noted that the case had been set for trial a number of times, including December 2011 and February 2012. *Id.* at PageID 581. He noted that self-representation would require a further continuance. Commenting on the Court Clinic's report, he noted that Gerth had been found to be paranoid, to have occasional hallucinations, and to have an anti-social personality disorder. He displayed poor impulse control and had a history of dyslexia and psychiatric hospitalizations. *Id*. at PageID 583. Gerth

had a history of substance abuse addiction and appeared to be "overly focused on the potential conspiracies in the court system." Judge Nadel found the request was not timely made and was "an attempt by the defendant to further delay this trial. . . . He has been disruptive in the past hearings." [At this point, Gerth attempted to interrupt.] The judge again noted the request was not timely made and found the defendant was not competent to waive counsel. *Id.* at PageID 585.

A criminal defendant is entitled to effective assistance of counsel on appeal as well as at trial, counsel who acts as an advocate rather than merely as a friend of the court. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Penson v. Ohio*, 488 U.S. 75 (1988); *Mahdi v. Bagley*, 522 F.3d 631, 636 (6th Cir. 2008). The *Strickland* test applies to appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Burger v. Kemp*, 483 U.S. 776 (1987). To evaluate a claim of ineffective assistance of appellate counsel, then, the court must assess the strength of the claim that counsel failed to raise. *Henness v. Bagley*, 644 F.3d 308 (6th Cir. 2011), *citing Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008). Counsel's failure to raise an issue on appeal amounts to ineffective assistance only if a reasonable probability exists that inclusion of the issue would have changed the result of the appeal. *Id.*, *citing Wilson*. If a reasonable probability exists that the defendant would have prevailed had the claim been raised on appeal, the court still must consider whether the claim's merit was so compelling that the failure to raise it amounted to ineffective assistance of appellate counsel. *Id., citing Wilson*. The attorney need not advance every argument, regardless of merit, urged by the appellant. *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983)("Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.") Effective appellate advocacy is rarely characterized by presenting every non-frivolous argument which can be made. *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir.

2003); *Williams v. Bagley*, 380 F.3d 932, 971 (6th Cir. 2004), *cert. denied,* 544 U.S. 1003 (2005); *see Smith v. Murray*, 477 U.S. 527 (1986).

The question facing this habeas corpus court on the *Faretta* issue is not whether Attorney Hodges provided ineffective assistance of appellate counsel by not raising it, but whether the First District's rejection of the claim is so erroneous as to be beyond disagreement among fair-minded jurists. *Harrington*, *supra*.

The right to self-representatdion is not absolute. *Martinez v. Ct. of Appeal of Cal., Fourth App. Dist.*, 528 U.S. 152, 161 (2000). The right can be forfeited by attempting to exercise it on the morning of trial because the state court found the request was untimely and granting it would have disrupted, unduly inconvenienced, and burdened the administration of the court's business. *Hill v. Curtin*, 792 F.3d 670 (6th Cir. 2015)(*en banc*). In this case the trial date was already well past Ohio's presumptive speedy trial limit of nine months and a jury had already been selected. In his current pleadings, Gerth does not dispute Judge Nadel's observation that allowing Aubin to withdraw would have required yet another continuance.

Secondly, Gerth had already shown himself to be disruptive and likely to act on impulse; indeed, he even interrupted Judge Nadel's ruling on his motion.

> [A] defendant wishing to represent himself may not use the right for the purpose of disrupting the proceedings, and must be willing to follow courtroom procedure and protocol. *Faretta*, 422 U.S. at 834 n.46; *United States v. Lopez-Osuna*, 232 F.3d 657, 665 (9th Cir. 2000) (holding defendant's request to represent himself may be denied when he is unable or unwilling to adhere to rules of procedure and courtroom protocol); *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (stating that "the *Faretta* right to self-representation is not absolute, and the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer"); *United States v. Brock*, 159 F.3d 1077, 1079 (7th Cir. 1998) (finding that "when a defendant's obstreperous behavior is so disruptive that the trial

> cannot move forward, it is within the trial judge's discretion to require the defendant to be represented by counsel").

Ahmed v. Houk, 2014 U.S. Dist. LEXIS 81971, *101-102 (S.D. Ohio 2014).

Third, Judge Nadel had psychiatric evidence supporting his conclusion that Gerth was not competent to waive counsel. In his Reply, Gerth mentions other evidence which cuts in the opposite direction, e.g., his GED in 1992 and the finding that he was competent to stand trial. However, a person competent to be tried is not necessarily competent to represent himself. *United States v. Carradine*, 621 F.3d 575, 578 (6th Cir. 2010), *citing Indiana v. Edwards*, 554 U.S. 164 (2008).

Considering all of these factors, competent appellate counsel could readily have decided that the *Faretta* issue was not a likely winner. The First District in viewing the same record could quite reasonably have decided the *Faretta* issue was not a colorable claim of ineffective assistance of appellate counsel.

Therefore the Faretta claim, although preserved for review under 28 U.S.C. § 2254(d)(1), is without merit and should be dismissed.

Ground Three: Insufficient Evidence

In his Third Ground for Relief, Gerth claims he was convicted on legally insufficient evidence. The factual basis of this Ground for Relief is stated in the Petition as follows:

> In this case, charges resulted from a single accident in which two people died. Four eyewitnesses described Gerth, who is white, to police as a black man. Evidence of Gerth purportedly being under the influence would have meant he could not knowingly appreciate the possible consequences of his conduct. Further, had it not been for an improper police chase, no accident would have occurred.

> Additionally, the SUV owner could only assume that her vehicle was stolen, and there was no evidence explaining how Gerth obtained the SUV. To conclude that the SUV was stolen and that Gerth somehow knew or should have known that when coming upon it requires believing an inference upon an inference. This was too great of a leap under the reasonable doubt standard.

(Petition, ECF No. 1, PageID 35.)

The Warden asserts this entire Third Ground for Relief is procedurally defaulted, noting that the only insufficient evidence claim made in the First District was that Gerth did not act knowingly so as to commit felony murder because he was intoxicated. That claim was rejected by the First District and not pursued in the Ohio Supreme Court where instead he blamed the crash on vehicle malfunction and an improper police chase (Return, ECF No. 6, PageID 1100-03). The second insufficient evidence claim is argued to be procedurally defaulted because Gerth argued in the First District that there was no evidence of how he came into possession of the vehicle.

Gerth admits that his second insufficient evidence claim is defaulted because it was never presented to the Ohio Supreme Court (Reply, ECF No. 10, PageID 1155).

On the other hand, Gerth argues his first insufficiency of the evidence claim was preserved in the Ohio Supreme Court by the argument he made there that it was not his actions alone that cause the deaths of the victims, but a combination of mechanical failure to the stolen vehicle and the improper high speed police chase that cause the malfunction (Reply, ECF No. 10, PageID 1156).

The Magistrate Judge disagrees. In the First District, he argued he did not act knowingly in committing these crimes because he was intoxicated. That is a long way from claiming the victims would not have been killed but for the fault of others, to wit, the vehicle designer and the

police.

Gerth attempts to excuse this procedural default by pointing out that the attorney who presented the intoxication claim was later found to have provided ineffective assistance of appellate counsel. While that is true, he was never found to have provided ineffective assistance in the way he pleaded the insufficiency of the evidence claim. Indeed, that was not alleged as a deficiency in his performance in either the first or the second 26(B) application. In order for ineffective assistance of appellate counsel to act as excusing cause for a procedural default, it must first be properly presented to a state court which can adjudicate that claim. *Edwards v. Carpenter*, 529 U.S. 446 (2000).

Conclusion

In accordance with the foregoing analysis, it is respectfully recommended that the Petition be dismissed with prejudice. 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*.

August 7, 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. 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).

APPENDIX
E

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-120392
Plaintiff-Appellee,	:	
vs.	:	*ENTRY DENYING APPLICATION FOR REOPENING.*
MARK GERTH,	:	
Defendant-Appellant.	:	

We consider this cause upon defendant-appellant Mark Gerth's App.R. 26(B) application to reopen this appeal.

In this appeal, in 2013, we affirmed Gerth's judgment of conviction. *State v. Gerth*, 1st Dist. Hamilton No. C-120392, 2013-Ohio-1751, *appeal not allowed*, 136 Ohio St.3d 1494, 2013-Ohio-4140, 994 N.E.2d 464. In 2014, we granted his application to reopen the appeal. In the reopened appeal, we affirmed the judgment of conviction in part, vacated his sentences in part, and remanded for resentencing. *State v. Gerth*, 1st Dist. Hamilton No. C-120392, 2014-Ohio-4569.

Thus, this is Gerth's second App.R. 26(B) application to reopen this appeal. But App.R. 26(B) makes no provision for a successive application. *State v. Twyford*, 106 Ohio St.3d 176, 2005-Ohio-4380, 833 N.E.2d 289, ¶ 6; *State v. Peeples*, 73 Ohio St.3d 149, 150, 652 N.E.2d 717 (1995). Moreover, the challenges that Gerth advances here to his appellate counsel's effectiveness in prosecuting his appeal either were or could have been raised in

his first application. Therefore, the doctrine of res judicata bars him from presenting these challenges in this successive application. *Twyford* at ¶ 6; *State v. Cheren*, 73 Ohio St.3d 137, 138, 652 N.E.2d 707 (1995).

Accordingly, the court denies the application.

To the clerk:

Enter upon the court's journal on APR 13 2015, by order of the court.

Presiding Judge

(COPIES SENT TO ALL PARTIES.)

APPENDIX F

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO


D108240599

STATE OF OHIO,	:	APPEAL NO. C-120392 TRIAL NO. B-1101792
Plaintiff-Appellee,	:	
vs.	:	*OPINION.*
MARK GERTH,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Sentences Vacated in Part, and Cause Remanded

Date of Judgment Entry on Appeal: October 17, 2014

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Philip R. Cummings*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

J. Thomas Hodges, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

HILDEBRANDT, Presiding Judge.

{¶1} Defendant-appellant Mark Gerth brings a second appeal of the judgment of the Hamilton County Court of Common Pleas convicting him of two counts of murder, one count of aggravated vehicular assault, one count of failing to comply with an order of a police officer, two counts of failing to stop after an accident, and one count of receiving stolen property.

{¶2} Gerth was convicted of the offenses after a jury trial. The trial court ordered the sentences for each of the convictions to be served consecutively, for an aggregate prison term of 48 and one-half years to life.

{¶3} Gerth appealed the convictions, and this court affirmed the judgment of the trial court in *State v. Gerth*, 1st Dist. Hamilton No. C-120392, 2013-Ohio-1751. Gerth then filed a motion, under App.R. 26(B), to reopen his direct appeal on the basis that he had been denied the effective assistance of appellate counsel.

{¶4} This court granted Gerth's motion, finding that there was a genuine issue as to whether appellate counsel had been ineffective for failing to argue that the two counts of failing to stop after an accident were allied offenses of similar import. Accordingly, we appointed new appellate counsel and ordered that counsel brief the issue of allied offenses and any other nonfrivolous assignments of error not previously considered.

{¶5} A complete statement of the facts in this case is set forth in our previous opinion. *See Gerth, supra*. Briefly, Gerth was driving a stolen car while intoxicated. He crashed into a taxicab and then fled. The crash resulted in the deaths of both of the taxi's occupants, and in severe injury to Gerth's passenger, Donald Evans.

Allied Offenses of Similar Import

{¶6} In his first assignment of error, Gerth contends that previous appellate counsel was ineffective in failing to assert that the two counts of failing to stop after an accident under R.C. 4549.02 were allied offenses.

{¶7} In a reopened appeal under App.R. 26, our inquiry is whether "the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency." App.R. 26(B)(9); *see State v. Haynes*, 1st Dist. Hamilton No. C-960794, 1999 Ohio App. LEXIS 809 (Mar. 5, 1999).

{¶8} In this case, we agree that appellate counsel was deficient. Under R.C. 2941.25, a defendant may be sentenced for only one of multiple counts of failing to stop after an accident even where there are multiple victims in a single collision, as "[t]he unit of prosecution [under R.C. 4549.02] is not the number of victims, but the number of collisions." *State v. Hundley*, 1st Dist. Hamilton No. C-060374, 2007-Ohio-3556, ¶ 15, *overruled on other grounds, State v. Moore*, 1st Dist. Hamilton No. C-070421, 2008-Ohio-4116. Our holding in *Hundley* was unaffected by the Ohio Supreme Court's adoption of a conduct-based test for determining allied offenses in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061. *See State v. Temaj-Felix*, 1st Dist. Hamilton No. C-120040, 2013-Ohio-4463, ¶ 10.

{¶9} Here, it was undisputed that the two counts of failing to stop related to the same collision, and the state concedes that the trial court erred in imposing multiple sentences for the offenses. Accordingly, we sustain the first assignment of error.

Consecutive Sentences

{¶10} In his second assignment of error, Gerth argues that appellate counsel was ineffective for failing to assign as error the trial court's failure to make the requisite statutory findings for imposing consecutive sentences.

{¶11} Under R.C. 2929.14(C)(4), the court must first find that consecutive sentences are necessary to protect the public or to punish the offender. Second, the court must find that consecutive sentences are not disproportionate to the offender's conduct and to the danger the offender poses to the public. Finally, the court must find that at least one of the following applies: (1) the offender committed one or more of the offenses while awaiting trial or sentencing, while under a community-control sanction, or on postrelease control; (2) at least two of the multiple offenses were committed as part of one or more courses of conduct and the harm caused by two or more of the offenses was so great or unusual that no single prison term would adequately reflect the seriousness of the offender's conduct; or (3) the offender's criminal history demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender. *See State v. Alexander*, 1st Dist. Hamilton Nos. C-110828 and C-110829, 2012-Ohio-3349, ¶ 15.

{¶12} Here, we agree with Gerth that previous appellate counsel was ineffective. At the sentencing hearing, the trial court made numerous comments about Gerth's abysmal criminal record, his lack of remorse, and other aggravating factors. But the court did not make any findings under R.C. 2929.14. We acknowledge that a "talismanic" recitation of the statutory findings is not required. *See State v. Roebuck*, 1st Dist. Hamilton No. C-130350, 2014-Ohio-1708, ¶ 3. Nonetheless, the comments in the instant case cannot be construed as sufficient.

{¶13} Moreover, during the pendency of this appeal, the Supreme Court of Ohio held that a trial court must not only make the statutory findings at the sentencing hearing, but must also incorporate those findings into its sentencing entry. *State v. Bonnell*, ___Ohio St.3d ___, 2014-Ohio-3177, ___ N.E.3d ___, syllabus. This court has applied *Bonnell* to pending appeals. *See, e.g., State v. Woods*, 1st Dist. Hamilton Nos. C-130413 and C-130414, 2014-Ohio-3892, ¶ 76.

{¶14} Consecutive sentences were certainly warranted in this case. But because the trial court did not adhere to R.C. 2929.14(C)(4), we must sustain the second assignment of error.

Gerth's Right of Confrontation

{¶15} In his third and final assignment of error, Gerth maintains that the trial court erred when it admitted into evidence the medical records of Donald Evans. Therefore, he contends that his previous appellate attorney was remiss in failing to raise the issue.

{¶16} We are not persuaded. The records were admissible under Evid.R. 803(6), the hearsay exception for business records, and under R.C. 2317.422, which provides that the records of a licensed medical facility may be authenticated without live testimony if properly endorsed by a qualified representative of the facility.

{¶17} But Gerth contends that, even if the admission of the records was proper under the rules of evidence and the statute, their admission still violated his right to confront his accusers.

{¶18} We find no merit in this argument. The Supreme Court of Ohio has held that the admission of medical records under R.C. 2317.422 does not violate a defendant's Sixth Amendment right of confrontation in light of the trustworthiness of such records. *See State v. Spikes*, 67 Ohio St.2d 405, 410, 423 N.E.2d 1122 (1981). We recognize that *Spikes* was decided long before the United States Supreme Court clarified the definition of a "testimonial" statement under the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). But in the case at bar, Gerth's trial counsel conceded that any testimonial statements of Evans had been redacted prior to the admission of the records into evidence. Accordingly, previous appellate counsel was not derelict in failing to raise the issue, and we overrule the third assignment of error.

Conclusion

{¶19} We vacate the sentences in part and remand the cause for the trial court to sentence Gerth, at the option of the state, on one count of failing to stop after an accident; to make the requisite findings for consecutive sentences; and to incorporate those findings into its sentencing entry. In all other respects, we affirm the judgment of the trial court.

Judgment affirmed in part, sentences vacated in part, and cause remanded.

HENDON and **DINKELACKER, JJ.**, concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

APPENDIX
G

ENTERED
FEB 13 2014

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-120392 TRIAL NO. B-1101792
Plaintiff-Appellee,	:	
vs.	:	*ENTRY GRANTING APPLICATION TO REOPEN DIRECT APPEAL.*
MARK GERTH,	:	
Defendant-Appellant.	:	

We consider this cause upon defendant-appellant Mark Gerth's App.R. 26(B) application to reopen this appeal and the state's opposing memorandum.

An application to reopen an appeal must be granted if the applicant establishes "a 'genuine issue' as to whether he has a 'colorable claim' of ineffective assistance of counsel on appeal." *State v. Spivey*, 84 Ohio St.3d 24, 25, 701 N.E.2d 696 (1998); App.R. 26(B)(5). The standard for determining whether an applicant was denied the effective assistance of appellate counsel is that set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *State v. Reed*, 74 Ohio St.3d 534, 535, 660 N.E.2d 456 (1996). The applicant must prove "that his counsel [performed deficiently in] failing to raise the issues he now presents and that there was a reasonable probability of success had [counsel] presented those claims on appeal." *State v. Sheppard*, 91 Ohio St.3d 329, 330, 744 N.E.2d 770 (2001), citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus.

D105211765

In his application, Gerth contends that his appellate counsel was ineffective in not presenting an assignment of error challenging, under R.C. 2941.25, the trial court's imposition of sentences on both of two counts of failure to stop after an accident. We conclude that, with this claim, Gerth has sustained his burden of demonstrating a genuine issue as to whether he has a colorable claim of ineffective assistance of appellate counsel.

The trial record shows that Gerth crashed the car that he was driving into a taxicab, killing the cabdriver and the cabdriver's fare, and then fled on foot. For his conduct in fleeing the scene of the accident without providing the required information to, or notifying the police concerning, the cabdriver and his fare, Gerth was convicted on both of two counts of failing to stop after an accident in violation of R.C. 4549.02.

In 2007, in *State v. Hundley*, 1st Dist. Hamilton No. C-060374, 2007-Ohio-3556, *overruled on other grounds, State v. Moore*, 1st Dist. Hamilton No. C-070421, 2008-Ohio-4116, ¶ 7, we held that, under R.C. 2941.25, a defendant may be sentenced for only one of multiple failure-to-stop counts pertaining to multiple victims in a single collision, because "[t]he unit of prosecution in [R.C. 4549.02] is not the number of victims, but the number of collisions." *Hundley* at ¶ 15. In 2013, we reaffirmed our holding in "*Hundley* as it pertains to the unit of prosecution in R.C. 4549.02," finding that holding to be unaffected by the Ohio Supreme Court's adoption in 2010, in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, of a conduct-based test for determining allied offenses of similar import under R.C. 2941.25(A). *State v. Temaj-Felix*, 1st Dist. Hamilton No. C-120040, 2013-Ohio-4463, ¶ 10.

Hundley was the law in this district in April 2012, when Gerth was sentenced on both of two failure-to-stop counts, each pertaining to one of two victims killed in a single collision. Therefore, an assignment of error arguing that Gerth could not, consistent with R.C. 2941.25, have been sentenced on both failure-to-stop counts would have presented a reasonable probability of success had counsel advanced it on appeal.

Gerth has thus demonstrated a genuine issue as to whether he was denied the effective assistance of appellate counsel. Accordingly, on the authority of App.R. 26(B)(5), we reopen this appeal. And because Gerth is indigent and is not currently represented by counsel, we appoint J. Thomas Hodges, Attorney Registration Number 0082511, to serve as counsel. *See* App.R. 26(B)(6)(a).

We also extend the time for filing appellate briefs: Gerth has until March 31, 2014, to file his brief; and the state has until May 1, 2014, to file its brief. For purposes of our disposition of the reopened appeal, we order the parties to address in their briefs the claim that prior appellate counsel's representation was prejudicially deficient. *See* App.R. 26(B)(7) and (B)(9). And we order newly appointed counsel to present in the appellant's brief an assignment of error concerning the matter identified here as a ground for reopening, along with any other nonfrivolous assignment of error or argument not previously considered. *See* App.R. 26(B)(7).

In all other respects, the case shall proceed as on an initial appeal in accordance with the Ohio Rules of Appellate Procedure. App.R. 26(B)(7).

To the clerk:

Enter upon the journal of the court on February 13, 2014 per order of the court.

By: _____
Presiding Judge

(Copies sent to all parties.)

APPENDIX H

No. 17-4091

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 24, 2019
DEBORAH S. HUNT, Clerk

MARK GERTH,

Petitioner-Appellant,

v.

WARDEN, ALLEN OAKWOOD CORRECTIONAL INSTITUTION,

Respondent-Appellee.

ORDER

BEFORE: DONALD, LARSEN, and NALBANDIAN, 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

*Judge Murphy recused himself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: October 24, 2019

Mr. Kort W. Gatterdam
Carpenter, Lipps & Leland
280 N. High Street
Suite 1300
Columbus, OH 43215

Re: Case No. 17-4091, *Mark Gerth v. Warden, Allen Oakwood Corr.*
Originating Case No.: 1:16-cv-00598

Dear Mr. Gatterdam,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Mary Anne Reese

Enclosure

APPENDIX
I

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions I through XX are contained in this document. For Notes of Decisions for subdivisions XXI through XXIX, see the second document for Amend. VI. For Notes of Decisions for subdivisions XXX through XXXIII, see the third document for Amend. VI.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 116-68.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV-Full Text

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV-Full Text, USCA CONST Amend. XIV-Full Text
Current through P.L. 116-68.

End of Document

Baldwin's Ohio Revised Code Annotated
Rules of Appellate Procedure (Refs & Annos)
Title III. General Provisions

Ohio App. R. Rule 26

App R 26 Application for reconsideration; application for en banc consideration; application for reopening

Currentness

(A) Application for Reconsideration and En Banc Consideration.

(1) *Reconsideration.*

(a) Application for reconsideration of any cause or motion submitted on appeal shall be made in writing no later than ten days after the clerk has both mailed to the parties the judgment or order in question and made a note on the docket of the mailing as required by App. R. 30(A).

(b) Parties opposing the application shall answer in writing within ten days of service of the application. The party making the application may file a reply brief within seven days of service of the answer brief in opposition. Copies of the application, answer brief in opposition, and reply brief shall be served in the manner prescribed for the service and filing of briefs in the initial action. Oral argument of an application for reconsideration shall not be permitted except at the request of the court.

(c) The application for reconsideration shall be considered by the panel that issued the original decision.

(2) *En Banc Consideration.*

(a) Upon a determination that two or more decisions of the court on which they sit are in conflict, a majority of the en banc court may order that an appeal or other proceeding be considered en banc. The en banc court shall consist of all full-time judges of the appellate district who have not recused themselves or otherwise been disqualified from the case. Consideration en banc is not favored and will not be ordered unless necessary to secure or maintain uniformity of decisions within the district on an issue that is dispositive in the case in which the application is filed.

(b) The en banc court may order en banc consideration sua sponte. A party may also make an application for en banc

consideration. An application for en banc consideration must explain how the panel's decision conflicts with a prior panel's decision on a dispositive issue and why consideration by the court en banc is necessary to secure and maintain uniformity of the court's decisions.

(c) The rules applicable to applications for reconsideration set forth in division (A)(1) of this rule, including the timing requirements, govern applications for en banc consideration. Any sua sponte order designating a case for en banc consideration must be entered no later than ten days after the clerk has both mailed the judgment or order in question and made a note on the docket of the mailing as required by App.R. 30(A). In addition, a party may file an application for en banc consideration, or the court may order it sua sponte, within ten days of the date the clerk has both mailed to the parties the judgment or order of the court ruling on a timely filed application for reconsideration under division (A)(1) of this rule if an intra-district conflict first arises as a result of that judgment or order and made a note on the docket of the mailing, as required by App.R. 30(A). A party filing both an application for reconsideration and an application for en banc consideration simultaneously shall do so in a single document.

(d) The decision of the en banc court shall become the decision of the court. In the event a majority of the full-time judges of the appellate district is unable to concur in a decision, the decision of the original panel shall remain the decision in the case unless vacated under App. R. 26(A)(2)(c) and, if so vacated, shall be reentered.

(e) Other procedures governing the initiation, filing, briefing, rehearing, reconsideration, and determination of en banc proceedings may be prescribed by local rule or as otherwise ordered by the court.

(B) Application for Reopening.

(1) A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

(2) An application for reopening shall contain all of the following:

(a) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;

(b) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment.

(c) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate

counsel's deficient representation;

(d) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant to division (B)(2)(c) of this rule and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;

(e) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.

(3) The applicant shall furnish an additional copy of the application to the clerk of the court of appeals who shall serve it on the attorney for the prosecution. The attorney for the prosecution, within thirty days from the filing of the application, may file and serve affidavits, parts of the record, and a memorandum of law in opposition to the application.

(4) An application for reopening and an opposing memorandum shall not exceed ten pages, exclusive of affidavits and parts of the record. Oral argument of an application for reopening shall not be permitted except at the request of the court.

(5) An application for reopening shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.

(6) If the court denies the application, it shall state in the entry the reasons for denial. If the court grants the application, it shall do both of the following:

(a) appoint counsel to represent the applicant if the applicant is indigent and not currently represented;

(b) impose conditions, if any, necessary to preserve the status quo during pendency of the reopened appeal.

The clerk shall serve notice of journalization of the entry on the parties and, if the application is granted, on the clerk of the trial court.

(7) If the application is granted, the case shall proceed as on an initial appeal in accordance with these rules except that the court may limit its review to those assignments of error and arguments not previously considered. The time limits for preparation and transmission of the record pursuant to App.R. 9 and 10 shall run from journalization of the entry granting the application. The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency.

(8) If the court of appeals determines that an evidentiary hearing is necessary, the evidentiary hearing may be conducted by the court or referred to a magistrate.

(9) If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment.

CREDIT(S)

(Adopted eff. 7-1-71; amended eff. 7-1-75, 7-1-93, 7-1-94, 7-1-97, 7-1-10, 7-1-11, 7-1-12)

Ohio Rules App. Proc., Rule 26, OH ST RAP Rule 26
Current with amendments received through August 1, 2019.

End of Document

2903.02 Murder.

(A) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy.

(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

(C) Division (B) of this section does not apply to an offense that becomes a felony of the first or second degree only if the offender previously has been convicted of that offense or another specified offense.

(D) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Effective Date: 06-30-1998.

2941.25 Allied offenses of similar import - multiple counts.

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

Effective Date: 01-01-1974.

2953.21 Post conviction relief petition.

(A)

(1)

(a) Any person who has been convicted of a criminal offense or adjudicated a delinquent child and who claims that there was such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, any person who has been convicted of a criminal offense and sentenced to death and who claims that there was a denial or infringement of the person's rights under either of those Constitutions that creates a reasonable probability of an altered verdict, and any person who has been convicted of a criminal offense that is a felony and who is an offender for whom DNA testing that was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code provided results that establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death, may file a petition in the court that imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file a supporting affidavit and other documentary evidence in support of the claim for relief.

(b) As used in division (A)(1)(a) of this section, "actual innocence" means that, had the results of the DNA testing conducted under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the person's case as described in division (D) of section 2953.74 of the Revised Code, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or, if the person was sentenced to death, no reasonable factfinder would have found the petitioner guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.

(c) As used in divisions (A)(1)(a) and (b) of this section, "former section 2953.82 of the Revised Code" means section 2953.82 of the Revised Code as it existed prior to July 6, 2010.

(d) At any time in conjunction with the filing of a petition for postconviction relief under division (A) of this section by a person who has been sentenced to death, or with the litigation of a petition so filed, the court, for good cause shown, may authorize the petitioner in seeking the postconviction relief and the prosecuting attorney of the county served by the court in defending the proceeding, to take depositions and to issue subpoenas and subpoenas duces tecum in accordance with divisions (A)(1)(d), (A)(1)(e), and (C) of this section, and to any other form of discovery as in a civil action that the court in its discretion permits. The court may limit the extent of discovery under this division. In addition to discovery that is relevant to the claim and was available under Criminal Rule 16 through conclusion of the original criminal trial, the court, for good cause shown, may authorize the petitioner or prosecuting attorney to take depositions and issue subpoenas and subpoenas duces tecum in either of the following circumstances:

(i) For any witness who testified at trial or who was disclosed by the state prior to trial, except as otherwise provided in this division, the petitioner or prosecuting attorney shows clear and convincing evidence that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict. This division does not apply if the witness was unavailable for trial or would not voluntarily be interviewed by the defendant or prosecuting attorney.

(ii) For any witness with respect to whom division (A)(1)(d)(i) of this section does not apply, the petitioner or prosecuting attorney shows good cause that the witness is material and that a deposition of the witness or the issuing of a subpoena or subpoena duces tecum is of assistance in order to substantiate or refute the petitioner's claim that there is a reasonable probability of an altered verdict.

(e) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(d) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, within ten days after the docketing of the request, or within any other time that the court sets for good cause shown, the prosecuting attorney shall respond by answer or motion to the petitioner's request or the petitioner shall respond by answer or motion to the prosecuting attorney's request, whichever is applicable.

(f) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests postconviction discovery as described in division (A)(1)(d) of this section or if the prosecuting attorney of the county served by the court requests postconviction discovery as described in that division, upon motion by the petitioner, the prosecuting attorney, or the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from oppression or undue burden or expense, including but not limited to the orders described in divisions (A)(1)(g)(i) to (viii) of this section. The court also may make any such order if, in its discretion, it determines that the discovery sought would be irrelevant to the claims made in the petition; and if the court makes any such order on that basis, it shall explain in the order the reasons why the discovery would be irrelevant.

(g) If a petitioner, prosecuting attorney, or person from whom discovery is sought makes a motion for an order under division (A)(1)(f) of this section and the order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery as described in division (A)(1)(d) of this section. The provisions of Civil Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion, except that in no case shall a court require a petitioner who is indigent to pay expenses under those provisions.

Before any person moves for an order under division (A)(1)(f) of this section, that person shall make a reasonable effort to resolve the matter through discussion with the petitioner or prosecuting attorney seeking discovery. A motion for an order under division (A)(1)(f) of this section shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

The orders that may be made under division (A)(1)(f) of this section include, but are not limited to, any of the following:

(i) That the discovery not be had;

(ii) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(iii) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(iv) That certain matters not be inquired into or that the scope of the discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the court;

(vi) That a deposition after being sealed be opened only by order of the court;

(vii) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(viii) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(h) Any postconviction discovery authorized under division (A)(1)(d) of this section shall be completed not later than eighteen months after the start of the discovery proceedings unless, for good cause shown, the court extends that period for completing the discovery.

(i) Nothing in division (A)(1)(d) of this section authorizes, or shall be construed as authorizing, the relitigation, or discovery in support of relitigation, of any matter barred by the doctrine of res judicata.

(j) Division (A)(1) of this section does not apply to any person who has been convicted of a criminal offense and sentenced to death and who has unsuccessfully raised the same claims in a petition for postconviction relief.

(2) Except as otherwise provided in section 2953.23 of the Revised Code, a petition under division (A)(1) of this section shall be filed no later than three hundred sixty-five days after the date on which the trial transcript is filed in the court of appeals in the direct appeal of the judgment of conviction or adjudication or, if the direct appeal involves a sentence of death, the date on which the trial transcript is filed in the supreme court. If no appeal is taken, except as otherwise provided in section 2953.23 of the Revised Code, the petition shall be filed no later than three hundred sixty-five days after the expiration of the time for filing the appeal.

(3) In a petition filed under division (A) of this section, a person who has been sentenced to death may ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.

(4) A petitioner shall state in the original or amended petition filed under division (A) of this section all grounds for relief claimed by the petitioner. Except as provided in section 2953.23 of the Revised Code, any ground for relief that is not so stated in the petition is waived.

(5) If the petitioner in a petition filed under division (A) of this section was convicted of or pleaded guilty to a felony, the petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the Ohio Constitution or the United States Constitution because the sentence imposed upon the petitioner for the felony was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner's race, gender, ethnic background, or religion. If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.

(6) Notwithstanding any law or court rule to the contrary, there is no limit on the number of pages in, or on the length of, a petition filed under division (A) of this section by a person who has been sentenced to death. If any court rule specifies a limit on the number of pages in, or on the length of, a petition filed under division (A) of this section or on a prosecuting attorney's response to such a petition by answer or motion and a person who has been sentenced to death files a petition that exceeds the limit specified for the petition, the prosecuting attorney may respond by an answer or motion that exceeds the limit specified for the response.

(B) The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1)(d) of this section is filed shall docket the petition and the request and bring them promptly to the attention of the court. The clerk of the court in which the petition for postconviction relief and, if applicable, a request for postconviction discovery described in division (A)(1)(d) of this section is filed immediately shall forward a copy of the petition and a copy of the request if filed by the petitioner to the prosecuting attorney of the county served by the court. If the request for postconviction discovery is filed by the prosecuting attorney, the clerk of the court immediately shall forward a copy of the request to the petitioner or the petitioner's counsel.

(C) If a person who has been sentenced to death and who files a petition for postconviction relief under division (A) of this section requests a deposition or the prosecuting attorney in the case requests a deposition, and if the court grants the request under division (A)(1)(d) of this section, the court shall notify the petitioner or the petitioner's counsel and the prosecuting attorney. The deposition shall be conducted pursuant to divisions (B), (D), and (E) of Criminal Rule 15. Notwithstanding division (C) of Criminal Rule 15, the petitioner is not entitled to attend the deposition. The prosecuting attorney shall be permitted to attend and participate in any deposition.

(D) The court shall consider a petition that is timely filed under division (A)(2) of this section even if a direct appeal of the judgment is pending. Before granting a hearing on a petition filed under division (A) of this section, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition, the supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. The court reporter's transcript, if ordered and certified by the court, shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the dismissal of the petition and of each claim it contains.

(E) Within ten days after the docketing of the petition, or within any further time that the court may fix for good cause shown, the prosecuting attorney shall respond by answer or motion. Division (A)(6) of this section applies with respect to the prosecuting attorney's response. Within twenty days from the date the issues are raised, either party may move for summary judgment. The right to summary judgment shall appear on the face of the record.

(F) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues even if a direct appeal of the case is pending. If the court notifies the parties that it has found grounds for granting relief, either party may request an appellate court in which a direct appeal of the judgment is pending to remand the pending case to the court.

(G) A petitioner who files a petition under division (A) of this section may amend the petition as follows:

(1) If the petition was filed by a person who has been sentenced to death, at any time that is not later than one hundred eighty days after the petition is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(2) If division (G)(1) of this section does not apply, at any time before the answer or motion is filed, the petitioner may amend the petition with or without leave or prejudice to the proceedings.

(3) The petitioner may amend the petition with leave of court at any time after the expiration of the applicable period specified in division (G)(1) or (2) of this section.

(H) If the court does not find grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter judgment denying relief on the petition. If the petition was filed by a person who has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the denial of relief on the petition and of each claim it contains. If no direct appeal of the case is pending and the court finds grounds for relief or if a pending direct appeal of the case has been remanded to the court pursuant to a request made pursuant to division (F) of this section and the court finds grounds for granting relief, it shall make and file findings of fact and conclusions of law and shall enter a judgment that vacates and sets aside the judgment in question, and, in the case of a petitioner who is a prisoner in custody, shall discharge or resentence the petitioner or grant a new trial as the court determines appropriate. If the petitioner has been sentenced to death, the findings of fact and conclusions of law shall state specifically the reasons for the finding of grounds for granting the relief, with respect to each claim contained in the petition. The court also may make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail. If the trial court's order granting the petition is reversed on appeal and if the direct appeal of the case has been remanded from an appellate court pursuant to a request under division (F) of this section, the appellate court reversing the order granting the petition shall notify the appellate court in which the direct appeal of the case was pending at the time of the remand of the reversal and remand of the trial court's order. Upon the reversal and remand of the trial court's order granting the petition, regardless of whether notice is sent or received, the direct appeal of the case that was remanded is reinstated.

(I) Upon the filing of a petition pursuant to division (A) of this section by a person sentenced to death, only the supreme court may stay execution of the sentence of death.

(J)

(1) If a person sentenced to death intends to file a petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.

(2) The court shall not appoint as counsel under division (J)(1) of this section an attorney who represented the petitioner at trial in the case to which the petition relates unless the person and the attorney expressly request the appointment. The court shall appoint as counsel under division (J)(1) of this section only an attorney who is certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed. The ineffectiveness or incompetence of counsel during proceedings under this section does not constitute grounds for relief in a proceeding under this section, in an appeal of any action under this section, or in an application to reopen a direct appeal.

(3) Division (J) of this section does not preclude attorneys who represent the state of Ohio from invoking the provisions of 28 U.S.C. 154 with respect to capital cases that were pending in federal habeas corpus proceedings prior to July 1, 1996, insofar as the petitioners in those cases were represented in proceedings under this section by one or more counsel appointed by the court under this section or section 120.06, 120.16, 120.26, or 120.33 of the Revised Code and those appointed counsel meet the requirements of division (J)(2) of this section.

(K) Subject to the appeal of a sentence for a felony that is authorized by section 2953.08 of the Revised Code, the remedy set forth in this section is the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a criminal case or to the validity of an adjudication of a child as a delinquent child for the commission of an act that would be a criminal offense if committed by an adult or the validity of a related order of disposition.

Amended by 131st General Assembly File No. TBD, SB 139, §1, eff. 4/6/2017.

Amended by 130th General Assembly File No. TBD, HB 663, §1, eff. 3/23/2015.

Amended by 128th General AssemblyFile No.30, SB 77, §1, eff. 7/6/2010.

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