No. 19-3904

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE R. YOUNG,

Petitioner-Appellant,

v.

WANZA JACKSON-MITCHELL, Warden,

Respondent-Appellee.

ORDER

Before: McKEAGUE, Circuit Judge.

George R. Young, an Ohio prisoner proceeding pro se, appeals the denial of his 28 U.S.C. § 2254 petition and applies for a certificate of appealability. *See* Fed. R. App. P. 22(b)(1). He has also moved to proceed in forma pauperis on appeal.

After a 2016 bench trial, the state trial court sentenced Young to eleven years in prison for the 1993 rape and kidnapping of a thirteen-year-old girl.[1] Young appealed, the state court of appeals affirmed, and the state supreme court did not accept Young's appeal for review. *State v. Young*, No. 104627, 2017 WL 3432655 (Ohio Ct. App. Aug. 10, 2017), *perm. app. denied*, 90 N.E.3d 951 (Ohio 2018).

[1] Young was not charged earlier because, when the victim gave a statement in 1993, she "did not know Young's last name or where he lived" and because the evidence from the rape kit was not tested until years later. *State v. Young*, No. 104627, 2017 WL 3432655, at *1 (Ohio Ct. App. Aug. 10, 2017). The investigation reopened after "an unknown male DNA profile was developed that matched two different rape kits" in November 2012. *Id.* Young was identified as the assailant after he "was incarcerated as a result of an unrelated case" and his "DNA sample was entered into the CODIS system, which revealed a possible match between Young and the DNA profile in [the victim's] rape kit" in June 2013. *Id.* at *1-2.

Young next filed his § 2254 petition arguing that the trial court should have dismissed the indictment based on the twenty-year delay between the offense and the indictment (ground one), should have dismissed the indictment based on a six-year statute of limitations (ground two), should have dismissed the indictment based on a twenty-year statute of limitations (ground three), should not have allowed the prosecution to amend the indictment to add his name after the expiration of the statute of limitations (ground four), and should have granted his motion to dismiss due to the lack of a speedy trial (ground five). The magistrate judge recommended that the district court deny grounds one and two on the merits and either deny the remaining grounds or dismiss them as non-cognizable (grounds three and four) or unexhausted (ground five). Although Young filed objections, the district court concluded that his objections rehashed his previous arguments and were not entitled to de novo review, so it dismissed Young's case and declined to issue a certificate of appealability.

Young's application appears to seek a certificate of appealability concerning each of the five grounds for relief raised in his § 2254 petition. This court will issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, a petitioner must show "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A petitioner challenging a procedural ruling must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

Young has arguably waived his right to appeal by failing to file specific objections to the magistrate judge's report and recommendation, as the district court noted. *See Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995); *see also Cole v. Yukins*, 7 F. App'x 354, 356 (6th Cir. 2001) ("The filing of vague, general, or conclusory objections does not meet the requirement of specific objections and is tantamount to a complete failure to object."). Even when afforded a liberal

construction, *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), Young's objections merely rehashed arguments he previously made, making them general objections having the same effect as a failure to object. *See, e.g.*, *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991).

Although this court may depart from the waiver rule in the interest of justice upon a showing of exceptional circumstances, *see, e.g.*, *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012), Young has not shown that his case presents any exceptional circumstances warranting departure from the rule. In any event, none of his grounds for relief merits a certificate of appealability.

Ground One

The district court denied Young's first ground for relief – a due-process violation based on the twenty-year delay between the offense and his indictment – on the merits. For preindictment delay to implicate due-process concerns, there must be actual prejudice to the defendant and improper reasons for the delay. *United States v. Lovasco*, 431 U.S. 783, 789-90 (1977); *United States v. Schaffer*, 586 F.3d 414, 424 (6th Cir. 2009). The state court found that, despite the length of the delay, that delay was not the result of the state attempting to gain a tactical advantage. Instead, the police were given an incorrect last name at the time of the offense and Young was not identified until DNA evidence became available years later. Reasonable jurists would not disagree with the district court's rejection of this claim.

Ground Two

In this ground for relief, Young argues that the state courts erred in retroactively applying Ohio's twenty-year statute of limitations for rape, rather than the six-year statute of limitations that was in effect in April 1993, when he committed the rape. The Ohio Court of Appeals found that, because the six-year limitations period on Young's offense had not yet expired at the time the twenty-year limitations period came into effect in March 1999, the longer limitations period applied. *See* Ohio Rev. Code § 2901.13 (eff. Mar. 9, 1999). *Cf. Stogner v. California*, 539 U.S. 607, 632-33 (2003) ("[A] law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a *previously time-barred*

prosecution." (emphasis added)). Reasonable jurists would not disagree with the district court's resolution of this ground for relief.

Ground Three

Young next claims that his indictment should have been dismissed based on the twenty-year statute of limitations. He presented that issue to the state courts on state-law grounds only. Because he failed to present the issue as a federal constitutional claim, the district court determined that it was not cognizable in federal habeas corpus. *See Estelle v. McGuire*, 502 U.S. 62, 68 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). The district court's dismissal of this ground for relief is not debatable among jurists of reason.

Ground Four

The district court determined that this ground for relief, challenging the state's amendment of the indictment to substitute his name for "John Doe" after the statute of limitations had expired, was also an issue of state law that was non-cognizable in federal habeas corpus. And the Ohio Court of Appeals' brief citation to *United States v. Lovasco* 431 U.S. 783, 791 (1977), does not alter that conclusion and does not, in any event, support Young's case. This ground does not warrant a COA.

Ground Five

In ground five, Young argued that the trial court erred by denying his motion to dismiss based on the lack of a speedy trial. Again, Young relied primarily on state law in presenting this ground for relief to the state courts. The district court determined that, insofar as Young challenged the state court's interpretation of state speedy trial statutes, the issue is non-cognizable on federal habeas review. *See McGuire*, 502 U.S. at 68; *Jeffers*, 497 U.S. at 780. The district court further determined that, insofar as Young presented a federal constitutional claim, he failed to demonstrate a constitutional violation based on the length of time between either the issuance of the amended indictment or his arrest on that indictment and his arraignment, a period of less than one month.

Young has failed to make a substantial showing of the denial of a constitutional right. Accordingly, his application for a certificate of appealability is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGE R. YOUNG,	)	**Case No. 1:18-cv-01398**
	)	
Petitioner	)	**Judge Dan Aaron Polster**
	)	
v.	)	**OPINION AND ORDER**
	)	
WARDEN CHAE HARRIS,	)	
	)	
Respondent.	)	
	)	

This case is before the Court on the Report and Recommendation ("R & R") of Magistrate Judge Kathleen B. Burke, Doc #: 18. The Magistrate Judge recommends that the Court dismiss Petitioner George Young's 28 U.S.C. § 2254 Petition for Writ of Habeas Corpus by a Person in State Custody, Doc. #: 1. On August 29, 2019, Young timely filed Objections to Judge Burke's R & R. Doc #: 2. The Court has carefully reviewed the R & R and Young's Objections, and hereby **OVERRULES** Young's Objections and **ADOPTS** the R & R in full.

Young is currently incarcerated at Warren Correctional Institution, having been found guilty of rape and kidnapping. *State of Ohio v. Young*, Case No. 573242-13-CR (Cuyahoga County). Young filed his habeas corpus petition on June 20, 2018, asserting five grounds for relief:

> **GROUND ONE**: The trial court erred when it failed to dismiss the indictment due to pre-indictment delay, resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at trial. Has been exhausted.
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> **GROUND TWO**: The trial court erred in failing to dismiss the indictment as having been time-barred by the six year statute of limitations in violation of his due

process rights, resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This issue has been exhausted, ripe for review. Citing State v. Tolliver, 146 Ohio App.3d 186 (2001). No. 78786.

GROUND THREE: The trial court erred in failing to dismiss the indictment as having been time-barred by the twenty year statute of limitations, (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This issue has been exhausted ripe for review Sub. S.B. No. 15.

GROUND FOUR: The trial court erred by allowing the state to amend the indictment by adding petitioner's name after the expiration of the statute of limitations had expired, and thereby denying petitioner his right to presentation to the grand jury, resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This issue has been exhausted and is ripe for review. State v. Headly (1983).

GROUND FIVE: The trial court erred in denying petitioner's motion to dismiss for lack of speedy trial, (1) resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This issue has been exhausted and is ripe for review. See pro se motion to dismiss for lack of speedy trial attached.

Doc. 1, pp 3-4.

The Court has reviewed the record carefully and agrees with Magistrate Judge Burke's conclusion that each ground should be denied because Young failed to show any act in any ground that is contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence presented at state court. To the extent that Grounds Three, Four, and Five seek a review of the state court's interpretation of state law, the grounds are dismissed as not cognizable on federal habeas review.

In his Objections, Young re-states the arguments he has previously made in his Petition and Traverse. The Federal Magistrates Act requires a district court to conduct a de novo review of those portions of the R & R to which an objection has been made. 28 U.S.C. § 636(b)(1). However, an Objection to an R & R is not meant to be simply a vehicle to rehash arguments set forth in the petition, and the Court is under no obligation to review de novo objections that are merely an attempt to have the district court reexamine the same arguments set forth in the petition and briefs. *Roberts v. Warden, Toledo Correctional Inst.*, No. 1:08-CV-00113, 2010 U.S. Dist. LEXIS 70683, at *22, 2010 WL 2794246, at *7 (S.D. Ohio Jul. 14, 2010) (citation omitted); *see Sackall v. Heckler*, 104 F.R.D. 401, 402 (D.R.I. 1984) ("These rules serve a clear and sensible purpose: if the magistrate system is to be effective, and if profligate wasting of judicial resources is to be avoided, the district court should be spared the chore of traversing ground already plowed by the magistrate . . . ."); *O'Brien v. Colvin*, No. CIV.A. 12-6690, 2014 WL 4632222, at *3, 2014 U.S. Dist. LEXIS 129179, at *7–8 (E.D. Pa. Sept. 16, 2014) (collecting cases); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991) ("A general objection to the entirety of the magistrate's report has the same effects as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless. The functions of the district court are effectively duplicated as both the magistrate and the district court perform identical tasks. This duplication of time and effort wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act."). The Court need not afford de novo review to objections which merely rehash arguments presented to and considered by the magistrate judge. Because Young's objections are simple recitations of his previous arguments, the Court finds Young's Objections not well-taken.

Accordingly, the Court **OVERULES** Petitioner's Objections, Doc #: 20, and **ADOPTS IN FULL** Magistrate Judge Burke's Report and Recommendation, Doc #: 18. The above-captioned case is hereby **DISMISSED AS FINAL.**

IT IS SO ORDERED.

***s/Dan Aaron Polster* 9/5/2019**
Dan Aaron Polster
United States District Judge

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

GEORGE R. YOUNG,	)	CASE NO. 1:18-cv-01398
	)	
Petitioner,	)	JUDGE DAN AARON POLSTER
	)	
v.	)	MAGISTRATE JUDGE
	)	KATHLEEN B. BURKE
WARDEN CHAE HARRIS,	)	
	)	
	)	**REPORT AND RECOMMENDATION**
	)	
Respondent.	)	

Petitioner George R. Young ("Petitioner" or "Young"), proceeding pro se, filed this habeas corpus action pursuant to 28 U.S.C. § 2254. His petition is deemed filed on June 11, 2018, the date he placed it in the prison mailing system.[1] Doc. 1, p. 8. Young challenges the constitutionality of his convictions and sentences for rape and kidnapping in *State of Ohio v. Young*, Case No. 573242-13-CR (Cuyahoga County). Young's convictions arise from offenses occurring in 1993. In April 2016, Young waived his right to a jury trial. Doc. 12-1, pp. 162-163. Following trial, Young was found guilty on one count of rape and one count of kidnapping (Counts 1 and 2).[2] Doc. 12-1, pp. 164-165. The trial court merged Counts 1 and 2 and sentenced Young to a total of 11 years in prison consecutive to his sentence in another case (Case No. CR 566461). Doc. 12-1, p. 166.

[1] "Under the mailbox rule, a habeas petition is deemed filed when the prisoner gives the petition to prison officials for filing in the federal courts." *Cook v. Stegall,* 295 F.3d 517, 521 (6th Cir. 2002) (citing *Houston v. Lack,* 487 U.S. 266, 273 (1988)). Young's petition was docketed in this Court on June 20, 2018. Doc. 1.

[2] Young was also charged with offenses occurring in 1996 that involved a different victim. Doc. 12-1, pp. 5-7. He was found not guilty as to those counts and found not guilty as to one count of kidnapping arising from the 1993 incidents. Doc. 12-1, p. 165.

This matter has been referred to the undersigned Magistrate Judge pursuant to Local Rule 72.2. For the reasons set forth below, the undersigned recommends that the Court DISMISS and/or DENY Young's Petition.

I. Factual Background

In a habeas corpus proceeding instituted by a person in custody pursuant to the judgment of a state court, the state court's factual determinations are presumed correct. 28 U.S.C. § 2254(e)(1). The petitioner has the burden of rebutting that presumption by clear and convincing evidence. *Id.*; *see also Railey v. Webb*, 540 F. 3d 393, 397 (6th Cir. 2008) *cert. denied,* 129 S. Ct. 2878 (2009). The Eighth District Ohio Court of Appeals summarized the facts underlying Young's convictions as follows:

> {¶ 2} This appeal arises from an incident that occurred in 1993. On April 21, 1993, K.A., who was 13 years old at the time, stayed home unbeknownst to her mother, who had left for work that morning. K.A. and her mother lived on Central Avenue in Cleveland, Ohio. At approximately 2:30 p.m., K.A. heard someone using a key to enter the home. She hid in her closet, thinking it was her mother. Mother had given her boyfriend, who K.A. knew by the name of "Randy," a key to the house. Randy was later identified as the defendant, George Randy Young.
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> {¶ 3} Young came upstairs with a little boy who began playing video games with K.A. in her bedroom. Thereafter, K.A. decided to change her clothing so she could play outside. Young was in her mother's bedroom, when she went in there to get some socks. While K.A. was standing by the dresser, Young grabbed her from behind and pushed her onto the bed. He punched her in the head and forcefully performed oral sex on her. He then penetrated her vagina with his penis. K.A. was able to grab something from the headboard and hit Young with it, which allowed her to jump up and run out of the house. She ran to a neighbor's house and told her neighbor that she had been raped. Her neighbor called the police, and K.A. was taken to the hospital by ambulance. A sexual assault examination was performed at the hospital.
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> {¶ 4} K.A. gave a statement to Cleveland Police on May 1, 1993. In the statement, her assailant is identified as "Randy Spivey," but K.A. had no recollection at trial of making the statement or how the name "Spivey" became associated with Randy. Mother also testified that she was not sure how the name "Spivey" came to be associated with Randy. She did not know Young's last name or where he lived.

Mother testified that she was surprised to see investigators in 2013 because she thought the case was closed.

{¶ 5} Investigators contacted K.A. and her mother because the evidence from the rape kit was tested by the Bureau of Criminal Investigation ("BCI") as part of the Attorney General's incentive to have the BCI test its backlog of untested rape kits. In November 2012, an unknown male DNA profile was developed that matched two different rape kits.

{¶ 6} In response to the November 2012 notification, Cleveland police reopened their investigation and attempted to locate and identify "Randy Spivey." In March 2013, investigators showed K.A. and her mother a "Randy Spivey" photo lineup. Neither K.A., nor her mother were able to identify anyone from the array. During this same time, Young was incarcerated as a result of an unrelated case in the Cuyahoga County Common Pleas Court.

{¶ 7} On April 9, 2013, which was prior to the expiration of the 20–year statute of limitations, the state indicted John Doe # 1, Unknown Male, and identified John Doe # 1 only by his DNA profile for the rape and kidnapping of K.A. A warrant for John Doe's arrest was issued the same day.

{¶ 8} Thereafter, in June 2013, Young's DNA sample was entered into the CODIS system, which revealed a possible match between Young and the DNA profile in K.A.'s rape kit. The BCI informed Cleveland police of the "hit notification" and requested another sample from Young to properly confirm the match. On September 12, 2013, investigators obtained a buccal swab from Young, who was in prison for charges in the unrelated case. On September 17, 2013, the BCI generated a lab report identifying Young as the subject, instead of "Randy Spivey." The BCI matched Young's DNA to that of the unknown male in K.A.'s vaginal swabs at the frequency of occurrence of 1 in 35,750,000,000,000,000,000 unrelated individuals.

{¶ 9} The state did not move to amend the indictment to change the name from John Doe # 1 to George Randy Young until January 31, 2014. A warrant was issued on that same day and Young was arraigned on February 11, 2014. After several motions and pretrials, the matter proceeded to a bench trial on April 25, 2016.

{¶ 10} Prior to trial, the defense filed several motions and numerous pretrials were conducted. A few weeks before trial, the trial court held a hearing on several of these motions. During the hearing, it was noted that Young's mother's name was written on a police report, but Young admitted that his mother would not have known who "Randy Spivey" was and would not have identified him as such. Young's name did not appear anywhere on the report. After the conclusion of the hearing, the trial court denied Young's motion to suppress, motion to dismiss for statute of limitations, motion to dismiss and objection to amended indictment,

> motion to dismiss for retroactive statute of limitations, and motion to dismiss for lack of speedy trial.
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> {¶ 11} Then on April 25, 2016, after numerous pretrials, defense motions (several of which were pro se), and several different attorneys, the matter proceeded to a bench trial. Before trial, Young renewed his motion to dismiss for preindictment delay. He argued that he suffered actual prejudice because he was not able to locate a witness who would be able to testify as to his whereabouts on April 21, 1993, at approximately 2:00 p.m. The trial court denied the motion, stating that
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> > [t]he Court has considered the arguments of counsel, but I do find that under Ohio law, the passage of time itself doesn't create the prejudice and the Court's finding is that no actual prejudice has been demonstrated.
> >
> > And even if there was, that the delay was justified by the State in bringing the indictment. So I'm going to deny that motion, and we can proceed to trial.

State v. Young, 2017-Ohio-7162, ¶¶ 2-11, 2017 WL 3432655, ** 1-2 (Ohio Ct. App. Aug. 10, 2017); *see also* Doc. 12-1, pp. 241-260.

II. Procedural Background

A. State conviction

On April 9, 2013, a Cuyahoga County Grand Jury indicted John Doe #1, an unknown mail with a specific DNA profile. Doc. 12-1, pp. 5-7. The indictment charged John Doe #1 with two counts of rape and four counts of kidnapping. *Id.* Counts 1 through 3 (one count of rape and two counts of kidnapping) related to offenses occurring on or about April 21, 1993 (Jane Doe I counts), and Counts 4 through 6 (one count of rape and two counts of kidnapping) related to offenses occurring on or about June 15, 1996 (Jane Doe II counts). *Id.* On January 31, 2014, the State filed a Motion to Amend Defendant's Name in Indictment from John Doe #1, an unknown male with specific DNA profile, to George Young. Doc. 12-1, pp. 10-13. The Motion to Amend was served on Young at Lake Erie Correctional Institution on that same date. Doc. 12-2, p. 11. The State's Motion to Amend was granted on February 10, 2014. Doc. 12-1, p. 16. On February 11, 2014, Young appeared in court and entered a plea of not guilty to the

indictment. Doc. 12-1, p. 18. Also, on February 11, 2014, by court order, the indictment was amended to include aliases, A.K.A. George R. Young and A.K.A. Randy Spivey. Doc. 12-1, p. 17.

Young, through counsel, filed various pre-trial motions, including a motion to suppress (Doc. 12-1, pp. 19-23), motion to dismiss based on lack of speedy trial (Doc. 12-1, pp. 33-46), motion to dismiss based on statute of limitations (Doc. 12-1, pp. 47-49), motion to dismiss counts one through three based on statute of limitations (Doc. 12-1, pp. 50-58), motion to dismiss statute of limitations objection to amended indictment and denial of grand jury presentment (Doc. 12-1, pp. 59-65), motion in limine and objection to introduction of other acts (Doc. 12-1, pp. 132-136), motion to sever counts and grant relief from joinder (Doc. 12-1, pp. 137-143), and motion to dismiss pre-indictment delay (Doc. 12-1, pp. 157-160).[3] Oral hearings were held on various motions prior to trial. Doc. 12-1, pp. 153, 154, 350, 352; Doc. 12-2, pp. 22-170, 171-245. The trial court denied Young's motion to suppress statements, motion to dismiss counts one through three, motion to dismiss statute of limitations objection to amended indictment and denial of grand jury presentation, motion to dismiss for pre-indictment delay, and motion to dismiss for lack of speedy trial. Doc. 12-1, pp. 153, 161, 350; Doc. 12-3, pp. 5-12. The trial court granted Young's motion in limine to exclude other acts and motion to sever and grant relief from joinder. Doc. 12-1, p. 153.

[3] Young also filed various pro se pretrial motions. *See e.g.*, Doc. 12-1, p. 357 (motion to quash indictment fatally defective); Doc. 12-1, p. 356 (motion that trial court lacks subject-matter jurisdiction); Doc. 12-1, p. 355 (motion requesting live photo array). Young filed a complaint for writ of mandamus, seeking an order requiring the trial judge to rule on three pro se motions that were filed in 2014 and 2016. *State ex rel. Young v. Miday*, 2018 WL 1975702 (Ohio Ct. App. Apr. 25, 2018). The court of appeals denied the writ for various reasons. *Id.* Among the court's reasons was that the trial court was not obligated to rule on pro se motions filed while he was represented by counsel because a defendant does not have a right to hybrid representation. *Id.*

Young requested new counsel and/or his counsel sought permission to withdraw as counsel multiple times prior to trial, which resulted in Young having five different attorneys from the time of his arraignment through trial. Doc. 12-1, pp. 354-362.

On April 25, 2016, Young waived his right to a jury trial and the case proceeded to trial that same date. Doc. 12-1, pp. 162-163; Docs. 12-3, 12-4, 12-5, 12-6. On April 29, 2016, the trial court rendered its verdict, finding Young guilty as to Counts 1 and 2 (rape and kidnapping) and not guilty as to Counts 3 through 6 (one count of rape and three counts of kidnapping). Doc. 12-1, p. 165; Doc. 12-6, pp. 152-153. On June 2, 2016, the trial court sentenced Young. Doc. 12-1, p. 166; Doc. 12-6, pp. 155-198. The trial court merged Counts 1 and 2 and sentenced Young to 11 years consecutive to the prison term Young was serving in Case No. CR 566461. Doc. 12-1, p. 166; Doc. 12-6, pp. 192-193.

B. Direct appeal

On June 20, 2016, Young, through appointed appellate counsel, filed a notice of appeal with the Eighth District Court of Appeals. Doc. 12-1, pp. 167-174. In his appellate brief filed on January 24, 2017 (Doc. 12-1, pp. 175-208), Young raised the following assignments of error:

1. The trial court erred when it failed to dismiss the appellant's indictment due to pre-indictment delay.

2. The trial court erred in failing to dismiss the indictment has having been time-barred by the six year statute of limitations in violation of his due process rights.

3. The trial court erred in failing to dismiss the indictment as having been time-barred by the twenty year statute of limitations.

4. The trial court erred by allowing the state to amend the indictment by adding the appellant's name after the expiration of the statute of limitations had expired, and thereby denying the appellant his right to presentation to the grand jury.

5. The trial court erred in denying the defendant's motion to dismiss for lack of speedy trial.

Doc. 12-1, p. 178. The State filed its appellate brief on December 14, 2016. Doc. 12-1, pp. 209-240. On August 10, 2017, the Eighth District Court of Appeals affirmed the judgment of the Cuyahoga County Court of Common Pleas. Doc. 12-1, pp. 241-260.

On September 22, 2017, Young, acting pro se, filed a notice of appeal with the Supreme Court of Ohio. Doc. 12-1, pp. 261-262. In his memorandum in support of jurisdiction (Doc. 12-1, pp. 263-302), Young presented the following propositions of law:

1. The Eighth District Court of Appeals erred by overruling Appellant's Assignment of Error No. I, claiming that the trial court erred when it failed to dismiss the Appellant's indictment due to pre-indictment delay.

2. The Eighth District Court of Appeals erred by overruling Appellant's Assignment of Error No. II, claiming the trial court erred by failing to dismiss the indictment as having been time-barred by the six-year statute of limitations in violation of his due process rights.

3. The Eighth District Court of Appeals erred by overruling Appellant's Assignment of Error No. III, claiming the trial court erred in failing to dismiss the indictment as having been time-barred by the twenty-year statute of limitations.

4. The Eighth District Court of Appeals erred by overruling Appellant's Assignment of Error No. IV, claiming the trial court erred by allowing the State to amend the indictment by adding the Appellant's name after the expiration of the statute of limitations had expired, and thereby denying the Appellant his right to presentation to the grand jury.

5. The Eighth District Court of Appeals erred by overruling Appellant's Assignment of Error No. V, claiming the trial court erred in denying the Defendant's motion to dismiss for lack of speedy trial.

6. Appellant's counsel on appeal was ineffective by virtue of his failure to raise dead bang winners in exchange for weaker claims, which had no chance of success.

Doc. 12-1, p. 264. On October 23, 2017, the State of Ohio filed a memorandum in response. Doc. 12-1, pp. 303-311. On January 31, 2018, the Supreme Court of Ohio declined to accept jurisdiction of Young's appeal. Doc. 12-1, p. 312.

C. Application to reopen direct appeal pursuant to Ohio App. R. 26(B)

On September 28, 2017, Young, acting pro se, filed with the Eighth District Court of Appeals an application to reopen his direct appeal pursuant to Ohio App. R. 26(B). Doc. 12-1, pp. 313-320. Young argued that he received ineffective assistance of appellate counsel during his direct appeal and raised the following assignment of error:

> 1. Appellant was denied effective assistance of counsel on appeal as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution, where appellate counsel omitted a dead bang winner, prejudicing the appeal from receiving a full review by the Court.
>
> A. Because of the inconsistent trial testimony of State's witnesses which contradicted out-of-court statements and other evidence, the verdicts were against the manifest weight of the evidence.

Doc. 12-1, pp. 314-318. The State of Ohio filed an opposition to Young's application to reopen. Doc. 12-1, pp. 321-326. Young then filed a reply. Doc. 12-1, pp. 327-338. On January 10, 2018, the Eighth District Court of Appeals denied Young's application to reopen. Doc. 12-1, pp. 339-345. No appeal was filed with the Supreme Court of Ohio.

D. Federal habeas corpus

In his federal habeas petition, Young asserts the following five grounds for relief:

> **GROUND ONE**: The trial court erred when it failed to dismiss the indictment due to pre-indictment delay, resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented at trial. Has been exhausted.

GROUND TWO: The trial court erred in failing to dismiss the indictment as having been time-barred by the six year statute of limitations in violation of his due process rights, resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This issue has been exhausted, ripe for review. Citing State v. Tolliver, 146 Ohio App.3d 186 (2001). No. 78786.

GROUND THREE: The trial court erred in failing to dismiss the indictment as having been time-barred by the twenty year statute of limitations, (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This issue has been exhausted ripe for review Sub. S.B. No. 15.

GROUND FOUR: The trial court erred by allowing the state to amend the indictment by adding petitioner's name after the expiration of the statute of limitations had expired, and thereby denying petitioner his right to presentation to the grand jury, resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This issue has been exhausted and is ripe for review. State v. Headly (1983).

GROUND FIVE: The trial court erred in denying petitioner's motion to dismiss for lack of speedy trial, (1) resulted in a decision contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the United States Supreme Court, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. This issue has been exhausted and is ripe for review. See pro se motion to dismiss for lack of speedy trial attached.

Doc. 1, pp. 3-4.

Throughout his voluminous Traverse, Young makes various statements alluding to other alleged constitutional violations. For example, he references violations of his right to confront witnesses (Doc. 15, p. 35); Fourth Amendment violations (Doc. 15, p. 35); violations of his right to counsel and right to effective counsel (Doc. 15, pp. 42, 46, 65-66); possible pretrial prejudicial publicity (Doc. 15, p. 44). However, said claims are not grounds for relief asserted in Young's

federal habeas petition and a court is not required to address a theory of relief asserted only in a traverse but not in the habeas petition. *See Tyler v. Mitchell*, 416 F.3d 500, 504 (6th Cir. 2005). Moreover, the other alleged violations scattered throughout Young's filings were not fairly presented or exhausted in state court. Thus, the undersigned has only considered the five grounds for relief set forth in Young's Petition.

III. Law and Analysis

A. Standard of review under AEDPA

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA"), apply to petitions filed after the effective date of the AEDPA. *Stewart v. Erwin*, 503 F.3d 488, 493 (6th Cir. 2007). In particular, the controlling AEDPA provision states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "A decision is 'contrary to' clearly established federal law when 'the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Otte v. Houk*, 654 F.3d 594, 599 (6th Cir. 2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000)). "A state court's adjudication only results in an 'unreasonable application' of clearly established federal law when 'the state court identifies the correct governing legal

principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Id.* at 599-600 (quoting *Williams*, 529 U.S. at 413). "The 'unreasonable application' clause requires the state court decision to be more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). "The state court's application of clearly established law must be objectively unreasonable." *Id.*

In order to obtain federal habeas corpus relief, a petitioner must establish that the state court's decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Bobby v. Dixon*, 132 S. Ct. 26, 27 (2011) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786–87 (2011). This bar is "difficult to meet" because "habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Richter*, 131 S. Ct. at 786 (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)). In short, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The petitioner carries the burden of proof. *Cullen v. Pinholster*, 131 S.Ct. 1388, 1398 (2011).

B. Exhaustion and procedural default

A federal court may not grant a writ of habeas corpus unless the petitioner has exhausted all available remedies in state court. 28 U.S.C. § 2254(b)(1)(A). A state defendant with federal constitutional claims must fairly present those claims to the state courts before raising them in a federal habeas corpus action. 28 U.S.C. § 2254(b), (c); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275–76 (1971); *see also Fulcher v. Motley*,

444 F.3d 791, 798 (6th Cir. 2006) (quoting *Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003)) ("[f]ederal courts do not have jurisdiction to consider a claim in a habeas petition that was not 'fairly presented' to the state courts"). In order to satisfy the fair presentation requirement, a habeas petitioner must present both the factual and legal underpinnings of his claims to the state courts.[4] *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). This means that the petitioner must present his claims to the state courts as federal constitutional issues and not merely as issues arising under state law. *See, e.g., Franklin v. Rose*, 811 F.2d 322, 324-325 (6th Cir. 1987); *Prather v. Rees*, 822 F.2d 1418, 1421 (6th Cir. 1987). Further, a constitutional claim for relief must be presented to the state's highest court in order to satisfy the fair presentation requirement. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845-48 (1999); *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990).

Additionally, a petitioner must meet certain procedural requirements in order to have his claims reviewed in federal court. *Smith v. Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 430 (6th Cir. 2006). "Procedural barriers, such as . . . rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim." *Daniels v. United States*, 532 U.S. 374, 381 (2001). Although procedural default is sometimes confused with exhaustion, exhaustion and procedural default are distinct concepts. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). Failure to exhaust applies where state remedies are "still available at the time of the federal petition." *Id.* at 806 (quoting *Engle v. Isaac*, 456 U.S. 107,

[4] In determining whether a petitioner presented his claim in such a way as to alert the state courts to its federal nature, a federal habeas court should consider whether the petitioner: (1) relied on federal cases employing constitutional analysis; (2) relied on state cases employing constitutional analysis; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law. *McMeans*, 228 F.3d at 681.

125 n.28 (1982)). In contrast, where state court remedies are no longer available, procedural default rather than exhaustion applies. *Williams*, 460 F.3d at 806.

Procedural default may occur in two ways. *Williams*, 460 F.3d at 806.

First, a petitioner procedurally defaults a claim if he fails "to comply with state procedural rules in presenting his claim to the appropriate state court." *Id.* In *Maupin v. Smith,* 785 F.2d 135, 138 (6th Cir. 1986), the Sixth Circuit provided four prongs of analysis to be used when determining whether a claim is barred on habeas corpus review due to a petitioner's failure to comply with a state procedural rule: (1) whether there is a state procedural rule applicable to petitioner's claim and whether petitioner failed to comply with that rule; (2) whether the state court enforced the procedural rule; (3) whether the state procedural rule is an adequate and independent state ground on which the state can foreclose review of the federal constitutional claim and (4) whether the petitioner can demonstrate cause for his failure to follow the rule and that he was actually prejudiced by the alleged constitutional error. *See also Williams*, 460 F.3d at 806 ("If, due to the petitioner's failure to comply with the procedural rule, the state court declines to reach the merits of the issue, and the state procedural rule is an independent and adequate grounds for precluding relief, the claim is procedurally defaulted.") (citing *Maupin*, 785 F.2d at 138).

Second, "a petitioner may procedurally default a claim by failing to raise a claim in state court, and pursue that claim through the state's 'ordinary appellate review procedures.'" *Williams*, 460 F.3d at 806 (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)); *see also Baston v. Bagley*, 282 F.Supp.2d 655, 661 (N.D.Ohio 2003) ("Issues not presented at each and every level [of the state courts] cannot be considered in a federal habeas corpus petition."); *see also State v. Moreland*, 50 Ohio St.3d 58, 62 (1990)(failure to present a claim to a state court of

appeals constituted a waiver). "If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, the claim is procedurally defaulted." *Williams*, 460 F.3d at 806. While the exhaustion requirement is technically satisfied because there are no longer any state remedies available to the petitioner, see *Coleman v. Thompson,* 501 U.S. 722, 732 (1991), the petitioner's failure to have the federal claims considered in the state courts constitutes a procedural default of those claims that bars federal court review. *Williams,* 460 F.3d at 806.

To overcome a procedural bar, a petitioner must show cause for the default and actual prejudice that resulted from the alleged violation of federal law or that there will be a fundamental miscarriage of justice if the claims are not considered. *Coleman*, 501 U.S. at 750. "'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to him." *Id.* at 753. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* "A fundamental miscarriage of justice results from the conviction of one who is 'actually innocent.'" *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006) (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

C. Young's grounds for relief

1. Ground One should be DENIED

In Ground One, Young contends that the 20-year delay between the 1993 offenses and commencement of prosecution caused substantial prejudice to the defense and therefore violated his due process rights. Doc. 1, p. 3; Doc. 15, p. 39. Respondent argues that Ground One should be denied on the merits because the state court of appeals' determination regarding said claim

was not contrary to or an unreasonable application of clearly established federal law. Doc. 12, pp. 14-17.

In rendering its decision with respect to Young's pre-indictment delay claim, the state court of appeals stated:

> {¶ 27} In the first assignment of error, Young argues he suffered actual prejudice when the state indicted him nearly 20 years after the incident occurred.
>
> {¶ 28} We note that courts reviewing a decision on a motion to dismiss for preindictment delay afford deference to the trial court's findings of fact, but engage in a de novo review of the trial court's application of those facts to the law. *Copeland*, 8th Dist. Cuyahoga No. 89455, 2008–Ohio–234, at ¶ 10, citing *State v. Henley*, 8th Dist. Cuyahoga No. 86591, 2006–Ohio–2728. The statute of limitations provides the "primary guarantee against bringing overly stale criminal charges." *Henley* at ¶ 5, citing *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).
>
> {¶ 29} The delay between the commission of an offense and an indictment can constitute a violation of due process of law guaranteed by the federal and state constitutions. *State v. Luck*, 15 Ohio St.3d 150, 153–154, 472 N.E.2d 1097 (1984), citing *Lovasco*. Courts apply a two-part test to determine whether preindictment delay constitutes a due process violation. The defendant has the initial burden to show substantial and actual prejudice as a result of the delay. *Luck* at 157–158. If the defendant meets the initial burden, then the second part of the test "requires that there be no justifiable reason for the delay in prosecution that caused this prejudice." *Id.* at 158, citing *Lovasco*.
>
> {¶ 30} "[P]roof of actual prejudice, alone, will not automatically validate a due process claim" as "the prejudice suffered by the defendant must be viewed in light of the state's reason for the delay." *Id.* at 154, citing *Lovasco*. Prejudice is not presumed solely because of a lengthy delay. *Copeland* at ¶ 13. "The determination of 'actual prejudice' involves 'a delicate judgment based on the circumstances of each case.'" *State v. Walls*, 96 Ohio St.3d 437, 2002–Ohio–5059, 775 N.E.2d 829, ¶ 52, quoting *United States v. Marion*, 404 U.S. 307, 325, 92 S.Ct. 455, 30 L.Ed. 2d 468 (1971).
>
> {¶ 31} This court has previously required a defendant to also establish that any missing evidence, lost witnesses, or physical evidence, adversely affected his ability to defend himself. Specifically, this court requires a defendant to demonstrate that missing evidence was nonspeculative and exculpatory. *State v. McFeeture*, 2015–Ohio–1814, 36 N.E.3d 689, ¶ 142 (8th Dist.); *State v. Clemons*, 2013–Ohio–5131, 2 N.E.3d 930, ¶ 15 (8th Dist.).

{¶ 32} In determining whether Young has demonstrated actual prejudice, we must look at the evidence that was unavailable as a result of the delay. *State v. Smith*, 8th Dist. Cuyahoga No. 104203, 2016–Ohio–8043, ¶ 13. Young claims that he was unable to find an alibi witness at the time of the rape. He was not able to show that could have been working on the day of the incident because his former employer is now closed and "no one [has] been able to articulate what [he] was doing on April 21, 1993, since so much time had passed." Young also argues the police investigation was insufficient. He claims the police did not follow up with determining the true identity of "Randy Spivey," in light of the name "Loreen Young" handwritten in the margin of an old copy of the police report. Loreen Young is the name of Young's mother.

{¶ 33} Young's claims are insufficient to establish substantial and actual prejudice. "[G]eneralized claims that witnesses' memories had faded over time is insufficient to establish actual prejudice." *Henley*, 8th Dist. Cuyahoga No. 86591, 2006–Ohio–2728, at ¶ 9, citing *State v. Cochenour*, 4th Dist. Ross No. 98CA2440, 1999 Ohio App. LEXIS 1054, 1999 WL 152127 (Mar. 8, 1999); *State v. Metz*, 4th Dist. Washington No. 96CA48, 1998 Ohio App. LEXIS 1874, 1998 WL 199944 (Apr. 21, 1998); *State v. Glasper*, 2d Dist. Montgomery No. 15740, 1997 Ohio App. LEXIS 583, 1997 WL 71818 (Feb. 21, 1997).

{¶ 34} Moreover, the record reflects that the police attempted to locate Randy Spivey throughout the investigation to no avail. It was not until Young's DNA was entered into the database that the police were able to locate K.A.'s assailant. The record is void of any evidence that the police ceased the investigation only to later resume prosecution on the same evidence that was available to it in 1993. As a result, Young fails to demonstrate that the state delayed the indictment to gain a tactical advantage.

{¶ 35} The evidence does demonstrate, however, that Young's DNA was in K.A.'s rape kit. The expected frequency of occurrence of Young's DNA from the vaginal swabs was 1 in 35,750,000,000,000,000,000 unrelated individuals. Therefore, based on the foregoing, we find that the trial court did not err when it denied his motion to dismiss for preindictment delay.

{¶ 36} Accordingly, the first assignment of error is overruled.

Young, 2017 WL 3432655, ** 4-6 (alterations in original).

Young has not demonstrated that denial of his motion to dismiss based on pre-indictment delay resulted in a decision that was contrary to, or involved, an unreasonable application of clearly established federal law or resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in state court.

The Ohio Court of Appeals applied the correct standard to Young's claim, observing that, when presented with a claim of pre-indictment delay, the due process inquiry requires a showing of actual prejudice and that there was no justifiable reason for the delay. *Young*, 2017 WL 3432655, * 4-5 (relying on cases citing *United States v. Lovasco*, 431 U.S. 783 (1977) and *United States v. Marion*, 404 U.S. 307 (1971)). As stated by the United States Supreme Court in *Lovasco*, "*Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Lovasco*, 431 U.S. at 790.

The Ohio Court of Appeals explained that Young could not show actual prejudice or that the state delayed its investigation to obtain a tactical advantage. The court of appeals explained that prejudice is not presumed because of a lengthy delay and Young's generalized claims of faded memories due to passage of time did not demonstrate actual prejudice. Further, the court of appeals explained that the state did not cease its investigation only to resume it later based on the same evidence available to it in 1993. To the contrary, there was DNA evidence not available to the state in 1993 which resulted in an identification of the assailant. Before this Court, Young's claims of prejudice are similar to those raised in state court, i.e., he asserts "there is a possibility the defense was impaired and, or the loss of exculpatory evidence, as Reserve Iron and Metal is no longer in business, preventing him from collecting relevant employment records." Doc. 15, p. 46; *see also* Doc. 15, p. 47. As indicated, the state court of appeals considered those arguments. Furthermore, Young has not shown that the Ohio Court of Appeals' decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103.

Based on the foregoing, the undersigned recommends that the Court DENY Ground One on the merits.

2. Ground Two and Three should be DISMISSED and/or DENIED

In Grounds Two and Three, Young contends that he is entitled to federal habeas relief because the trial court's failure to dismiss the indictment as time-barred under either the six-year statute of limitations (Ground Two) or twenty-year statute of limitations (Ground Three) violated his due process rights. Doc. 1, pp. 3-4; Doc. 15, p. 35. Respondent argues that Grounds Two and Three are not cognizable on federal habeas review and/or are without merit. Doc. 12, pp. 18-22.

When considering and ruling on Young's statute of limitations assignments of error, the state court of appeals stated:

> {¶ 14} In the second and third assignments of error, Young argues the trial court should have dismissed the indictment because the statute of limitations expired prior to the date the charges were brought against him.
>
> {¶ 15} Young first argues that the six-year statute of limitations for rape applies to his case. He further argues that the retroactive application of the 20–year statute of limitations for rape is an unconstitutional absurdity. We disagree.
>
> {¶ 16} By an amendment effective March 9, 1999, the Ohio General Assembly extended the statute of limitations for rape from 6 years to 20 years. R.C. 2901.13(A)(3)(a). The amendment applies retroactively to offenses committed prior to the effective date of the amendment, provided that the statute of limitations for such offenses had not yet expired by March 9, 1999. *State v. Pluhar*, 8th Dist. Cuyahoga No. 102012, 2016–Ohio–1465, ¶ 5–6; *State v. Copeland*, 8th Dist. Cuyahoga No. 89455, 2008–Ohio–234, ¶ 11.
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> {¶ 17} In the instant case, the criminal conduct occurred on April 21, 1993. The six-year statute of limitations at the time had not yet expired when the General Assembly's amendment of R.C. 2901.13 became effective in March 1999. As a result, the 20–year statute of limitations applies to Young's case.

{¶ 18} Young next argues that if the 20–year statute of limitations applies, it also expired because the state did not exercise reasonable diligence when executing the John Doe indictment.

{¶ 19} R.C. 2901.13(A)(1) provides that a prosecution shall be barred unless it is commenced within the applicable limitations period. The state bears the burden of establishing that prosecution was commenced within the applicable limitations period. *State v. Gulley*, 8th Dist. Cuyahoga No. 101527, 2015–Ohio–3582, ¶ 14, *discretionary appeal not allowed*, 144 Ohio St.3d 1505, 2016–Ohio–652, 45 N.E.3d 1050, citing *State v. King*, 103 Ohio App.3d 210, 212, 658 N.E.2d 1138 (10th Dist.1995).

{¶ 20} In the instant case, the applicable limitations period is 20 years. If reasonable diligence was used by law enforcement in its attempts to identify the defendant, and all attempts have failed, a John Doe–DNA indictment or warrant can toll the statute of limitations. *Gulley* at ¶ 15, citing *State v. Danley*, 138 Ohio Misc.2d 1, 2006–Ohio–3585, 853 N.E.2d 1224 (C.P.); *State v. Younge*, 2013 UT 71, 321 P.3d 1127; *Commonwealth v. Dixon*, 458 Mass. 446, 938 N.E.2d 878 (2010); *People v. Robinson*, 47 Cal.4th 1104, 104 Cal.Rptr.3d 727, 224 P.3d 55 (2010); *State v. Burdick*, 395 S.W.3d 120 (Tenn.2010); *People v. Martinez*, 52 A.D.3d 68, 855 N.Y.S.2d 522 (2008); *State v. Davis*, 2005 WI App. 98, 281 Wis.2d 118, 698 N.W.2d 823; *State v. Dabney*, 2003 WI App. 108, 264 Wis.2d 843, 663 N.W.2d 366; *See also* Bieber, *Meeting the Statute or Beating It: Using "John Doe" Indictments Based on DNA to Meet the Statute of Limitations*, 150 U.Pa.L.Rev. 1079, 1081–1086 (2002). "*Black's Law Dictionary,* (5[th] Ed.1979), at 412, defines 'reasonable diligence' as '[a] fair, proper and due degree of care and activity, measured with reference to the particular circumstances; such diligence, care, or attention as might be expected from a [person] of ordinary prudence and activity.' " *Sizemore v. Smith*, 6 Ohio St.3d 330, 332, 453 N.E.2d 632 (1983). "[W]hat constitutes reasonable diligence will depend on the facts and circumstances of each particular case." *Id.*

{¶ 21} In the instant case, the grand jury indicted John Doe # 1 on April 9, 2013, based on a specific DNA profile related to an unknown male that was obtained from BCI and a warrant was issued. Prior to the indictment, the case was stagnant from May 1, 1993 (when K.A. gave her statement to the police) until August 3, 2011 (when K.A.'s rape kit was submitted to BCI for testing). On November 27, 2012, the BCI found a match with the DNA profile in K.A.'s rape kit and another rape kit, but did not have a named suspect for that DNA profile. The Cleveland Police Department reopened the case in December 2012. Investigators attempted to locate and identify "Randy Spivey," but neither K.A. nor her mother could identify anyone in the photo array presented to them in March 2013.

{¶ 22} Meanwhile Young was incarcerated on March 28, 2013, as a result of a separate criminal case. On June 13, 2013, Young's DNA was entered into the CODIS system. This prompted a "hit notification" letter to be sent to the Cleveland

Police Department that informed them of a possible investigative lead. The June 18, 2013 letter instructed that any possible connection or involvement of Young to the case must be determined through further investigation. On June 21, 2013, investigators met with K.A. and presented a photo lineup containing Young's photo. K.A. was unable to identify him as her assailant. On June 28, 2013, investigators met with K.A.'s mother and presented a photo lineup containing Young's photo. She was also unable to identify him.

{¶ 23} On September 12, 2013, an investigator met with Young. The investigator advised Young of his rights and told him that the DNA found in K.A.'s rape kit appeared to match him. Young signed a waiver and verbally agreed to speak without an attorney present. The investigator advised Young that an indictment naming a DNA profile had already been filed. Young denied knowing the name "Spivey." Young was shown a photograph of K.A. He responded that he had never seen her before in his life. The investigator took a buccal swab from Young during their meeting.

{¶ 24} At this point in time, investigators had three possible suspects: Young, "Randy Spivey," and an unknown male. Young's DNA sample was submitted to BCI to be compared to the forensic samples in the rape kit. On September 17, 2013, a lab report was generated that changed the subject's name from "Randy Spivey" to George Young. Young could not be excluded as the source of semen. The expected frequency of occurrence of Young's DNA from the vaginal swabs was 1 in 35,750,000,000,000,000,000 unrelated individuals. On January 31, 2014, the state then moved to amend the indictment from John Doe # 1 to George R. Young, a.k.a. Randy Spivey, and issued a warrant the same day.

{¶ 25} While there was a near 20–year delay between the incident and the indictment, the record demonstrates that law enforcement used reasonable diligence in its attempts to identify the assailant based on the information it received. K.A. immediately reported the incident and identified the perpetrator as Randy. Cleveland police's attempts to locate Randy Spivey were unsuccessful. Once police received notice from BCI through the Attorney General's incentive to have the BCI test its backlog of untested rape kits that there was a match on K.A.'s rape kit, investigators again attempted to identify the assailant. The state then brought forth the charges against John Doe # 1 on April 9, 2013, which was before the 20–year statute of limitations expired.

{¶ 26} Accordingly, the second and third assignments of error are overruled.

Young, 2017 WL 3432655, **3-4 (alterations in original).

Ground Two

With respect to Ground Two, before the court of appeals, Young challenged the retroactive application of the twenty-year statute of limitations and argued that the six-year statute of limitations should apply. Doc. 12-1, pp. 187-188. As indicated, the state court of appeals rejected Young's claim and concluded that the March 9, 1999, amendment to R.C. 2901.13(A)(3)(a) extended the statute of limitations for rape from 6 years to 20 years applied retroactively to offenses committed prior to the effective date of the amendment, provided that the statute of limitations for such offenses had not yet expired by March 9, 1999. *Id.* Since the criminal conduct at issue occurred on April 21, 1993, the court of appeals found that the six-year statute of limitations had not yet expired when the amendment to R.C. 2901.13 became effective in March 1999. *Id.* Thus, the 20–year statute of limitations applied to Young's case. *Id.*

Other than his conclusory statements contained in his second ground for relief, Young fails to demonstrate how the state court of appeals' determination that the twenty-year statute of limitations applied retroactively resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. Thus, the undersigned recommends that the Court find that Young has waived the claims he seeks to present in Ground Two. *See McPherson v. Kelsey*, 125 F.3d 989, 995–996 (6th Cir. 1997) ("Issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones.") (internal citations omitted).

Furthermore, the undersigned finds no merit to Young's assertion that denial of his motion to dismiss based on the six-year statute of limitations resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. *See Warren v. Smith*, 2010 WL 2837001, ** 12-14 (N.D. Ohio Apr. 29, 2010) (rejecting federal habeas claim that R.C. 2901.13, increasing statute of limitations from six to twenty years, was unconstitutional), *report and recommendation adopted*, 2010 WL 2837002 (N.D. Ohio July 19, 2010). Thus, even if Ground Two is not deemed waived, the undersigned recommends that the Court DENY Ground Two on the merits.

Ground Three

With respect to Ground Three, Young fails to articulate how the state court of appeals' decision overruling his third assignment of error resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court. Thus, the undersigned recommends that the Court DENY Ground Three.

Furthermore, in the state court of appeals, Young's twenty-year statute of limitations claim was presented as an issue of state law. Doc. 12-1, pp. 189-194. Since Young failed to present Ground Three to the state courts as a federal constitutional claim, Ground Three is also subject to dismissal due to Young's failure to meet the fair presentation requirement required for federal habeas review.

Additionally, to the extent that Young seeks review of the court's state law determination that his indictment was time-barred by the state's twenty-year statute of limitations, the undersigned recommends that the Court DISMISS Ground Three as not cognizable on federal

habeas review because "it 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, 68 (1991) (citing 28 U.S.C. § 2241); s*ee also Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."); *Engle v. Isaac*, 456 U.S. 107, 121 n. 21 (1982) ("We have long recognized that a 'mere error of state law' is not a denial of due process.") (internal citation omitted)).

Based on the foregoing, the undersigned recommends that the Court DISMISS and/or DENY Grounds Two and Three.

3. Ground Four should be DISMISSED and/or DENIED

In Ground Four, Young contends that he is entitled to federal habeas relief because the trial court erred by allowing the state to amend the indictment to add his name after the statute of limitations had expired which resulted in a denial of his right to presentation to the grand jury. Doc. 1, p. 4; Doc. 15, pp. 50-59. Respondent argues that Ground Four is not cognizable and/or without merit. Doc. 12, pp. 22-25.

The state court of appeals considered the claim presented in Ground Four, stating:

> {¶ 37} In the fourth assignment of error, Young argues that the John Doe indictment itself and the amendment of the indictment was erroneous. Relying on *Gulley*, he also argues he was a known suspect at the time of the filing of the indictment.
>
> {¶ 38} John Doe indictments are typically used where the state has the DNA profile of the suspect, but has not yet determined the source of the DNA profile. The Ohio Supreme Court has stated:
>
> > An indictment * * * is an accusation * * * against a person, and not against a name. A name is not of the substance of an indictment. And a person may be * * * indicted, without the mention of any name, and designating him as a person whose name is to the grand jurors unknown. Or a person may be indicted by a name wholly imaginary and fictitious, as John Doe or Richard Doe[.]

Lasure v. State, 19 Ohio St. 43, 50, 1869 Ohio LEXIS 117 (1869).

{¶ 39} In the instant case, the state did not know who the DNA profile belonged to until June 2013, when Cleveland police received a hit notification letter from the BCI that Young was a possible match. The assailant was originally identified as "Randy Spivey." Prior to the hit notification letter, law enforcement was never able to match the DNA profile in K.A.'s rape kit to "Randy Spivey." Since the state was aware of the DNA profile of the suspect, but had not yet determined who the DNA profile belonged to, its use of the John Doe indictment itself was not erroneous.

{¶ 40} Young next contends that the state waited to amend the John Doe indictment to gain a tactical advantage. Crim.R. 7(D) permits a court to amend an indictment so long as there is no change to the name or identity of the crime charged. Here, the state confirmed that the DNA found in the rape kit belonged to Young and changed the name on the indictment well before trial. The name or identity of the crimes originally charged never changed.

{¶ 41} Furthermore, the state was not required to amend the indictment immediately upon finding out Young's DNA was a potential match to K.A.'s rape kit. As the United States Supreme Court stated:

> [P]rosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself."

Lovasco, 431 U.S. at 791, 97 S.Ct. 2044, 52 L.Ed.2d 752, quoting *United States v. Ewell*, 383 U.S. 116, 120, 86 S.Ct. 773, 15 L.Ed.2d 627 (1966).

{¶ 42} Young also argues that he was a known suspect in 1993, and under *Gulley* the indictment should have been dismissed. The dismissal in *Gulley* is distinguishable from the instant case because Young was not a known suspect at the time of the filing of the indictment. In *Gulley*, the defendant's correct name was given to the police at the time of the crime and the victim identified the defendant in a photo array prior to indictment. *Id.* at ¶ 3, 5. Here, unlike *Gulley*, K.A. and her mother did not know Young's true name in 1993 or any time thereafter, and neither K.A. nor her mother picked him out of a photo array. Therefore, Young was not a known suspect and the dismissal in *Gulley* is inapplicable to the matter before us.

{¶ 43} Accordingly, the fourth assignment of error is overruled.

Young, 2017 WL 3432655, ** 6-7 (alterations in original).

When presenting the claim Young now asserts in Ground Four to the state court of appeals, his argument was based on state statutory and state case law. Doc. 12-1, pp. 194-198. Thus, as explained with respect to Ground Three, to the extent that Young seeks to have this Court review the state court's interpretation of state law, the undersigned recommends that the Court DISMISS Ground Three as not cognizable on federal habeas review. *See e.g., Guerrero v. LaManna*, 325 F.Supp.3d 476, 483-484 (S.D. NY 2018) (finding petitioner's indictment and statute of limitations related claims not cognizable on federal habeas review because the claims were brought under state law).

Additionally, Young has not demonstrated that the state court of appeals' determination is contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence presented in state court. In reaching its decision, the state court of appeals relied on *Lovasco* when concluding that Young had not shown error based on the failure to immediately seek amendment. Young has not argued or demonstrated that the Court's decision is contrary to or an unreasonable application of *Lovasco* or any other clearly established federal law. Nor has he demonstrated that the state court of appeals' determination that Young was not a known suspect at the time of the filing of the indictment was an unreasonable determination of the facts in light of the evidence presented in state court.

Considering the foregoing, the undersigned concludes that Young has not shown that the Ohio Court of Appeals' determination "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Accordingly, even if Young is found to have

presented a cognizable federal habeas claim in Ground Four, the undersigned recommends that the Court DENY Ground Four on the merits.

4. Ground Five should be DISMISSED and/or DENIED

In Ground Five, Young argues that he is entitled to federal habeas relief because the trial court erred in denying his motion to dismiss due to lack of speedy trial. Doc. 1, p. 4; Doc. 15, pp. 60-70. Respondent notes that in arguing his speedy trial claim in state court Young relied primarily on state law with only general references to federal constitutional rights. Doc. 12, pp. 25-29. Respondent argues that, even if a federal constitutional claim was fairly presented to the state courts, applying deference under AEDPA, Ground Five should be denied on the merits. Doc. 12, pp. 27-29.

When assessing Young's speedy trial claim, the state court of appeals stated:

> {¶ 44} In the fifth assignment of error, Young argues the trial court erred when it denied his motion to dismiss for lack of speedy trial. Young's speedy trial concerns focus on the time frame of April 9, 2013 to January 1, 2014.
>
> {¶ 45} When an appellate court reviews an allegation of a speedy trial violation, it "should apply a de novo standard of review to the legal issues but afford great deference to any findings of fact made by the trial court." *State v. Barnes*, 8th Dist. Cuyahoga No. 90847, 2008–Ohio–5472, ¶ 17.
>
> {¶ 46} Ohio's speedy trial statute, R.C. 2945.71(C)(2), states that "[a] person against whom a charge of felony is pending * * * [s]hall be brought to trial within [270] days after the person's arrest." In accordance with the speedy trial provisions, the statutory time period begins to run on the date the defendant is arrested; however, the date of arrest is not counted when computing the time period. *State v. Jenkins*, 8th Dist. Cuyahoga No. 95006, 2011–Ohio–837, ¶ 15, citing *State v. Masters*, 172 Ohio App.3d 666, 2007–Ohio–4229, 876 N.E.2d 1007 (3d Dist.), *discretionary appeal not allowed*, 2007–Ohio–6803, 878 N.E.2d 33, citing *State v. Stewart*, 12th Dist. Warren No. CA98–03–021, 1998 Ohio App. LEXIS 4384, 1998 WL 640909 (Sept. 21, 1998). If the defendant is incarcerated following his arrest, each day spent in jail "on a pending charge" acts as three days toward speedy trial time. R.C. 2945.71(E).
>
> {¶ 47} If the defendant is not arrested for the offense, speedy trial time begins on the day he is served with the indictment. *Id.* at ¶ 16, citing *State v. Pirkel*, 8th Dist.

> Cuyahoga No. 93305, 2010–Ohio–1858. If a capias must be issued for the accused, speedy trial time is tolled for this time period. *Id.*, citing *State v. Ennist*, 8th Dist Cuyahoga No. 90076, 2008–Ohio–5100. *See also Marion*, 404 U.S. 307 at 313, 92 S.Ct. 455, 30 L.Ed.2d 468 (recognizing that the speedy trial guarantee under the federal constitution has no applicability to preindictment delays); *see also Ennist* at ¶ 19, citing *State v. Davis*, 7th Dist. Mahoning No. 05MA235, 2007–Ohio–7216; *State v. Weiser*, 10th Dist. Franklin No. 03AP–95, 2003–Ohio–7034.
>
> {¶ 48} Here, the period of time between the John Doe indictment and the state's motion to amend was almost nine months. During that time, Young was incarcerated on March 28, 2013, for his convictions in a separate case. Then, four months passed from the time the state was able to identify Young as the source of the DNA to when the state amended the indictment to include Young's name as the offender. On January 31, 2014, a warrant was issued, which was the same day the indictment was amended to include Young's name. Young was in custody for this case on February 7, 2014, and was arraigned on February 11, 2014. Since his speedy trial time began to run in February 2014, and not April 2013, we do not find that Young's rights to a speedy trial were violated during the time frame he challenges.
>
> {¶ 49} Therefore, the fifth assignment of error is overruled.

Young, 2017 WL 3432655, * 7 (alterations in original).

To the extent that Young seeks a redetermination of the state court's interpretation of state speedy trial statutes, for the reasons previously stated with respect to other grounds for relief, the undersigned recommends that the Court DISMISS those claims as not cognizable on federal habeas review.

To the extent that Young has presented a cognizable federal constitutional claim, as established by the United States Supreme Court, "[t]he speedy-trial right does not apply until the defendant is 'accused.'" *Brown v. Romanowski*, 845 F.3d 703, 712 (6th Cir. 2017) (citing *Marion*, 404 U.S. at 313). And, generally, "the right usually attaches when the defendant is arrested or indicted, whichever is earlier." *Id.* at 712-713.

Considering the foregoing and the deference afforded state court adjudications under AEDPA, the undersigned finds that Young has not demonstrated that the state court's

determination that Young's speedy trial time did not commence to run until February 2014, when Young was taken into custody based on the amended indictment, as opposed to alternative dates of April 9, 2013, the date the John Doe indictment was issued, or June 18, 2013, the date BCI informed the state there was an association between the DNA profile and the petitioner, was contrary to or an unreasonable application of clearly established federal law or an unreasonable determination of the facts in light of the evidence presented in state court. Furthermore, the undersigned finds that Young has not shown that the Ohio Court of Appeals' determination "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Thus, the undersigned recommends that the Court DENY Ground Five on the merits.

Additionally, to the extent that Young attempts to present additional speedy trial claims for periods of time other than those presented to the state courts, i.e., for periods other than April 9, 2013, through January 1, 2014, the undersigned recommends that the Court find that those claims were not fairly presented or exhausted in the state court and therefore are not properly before this federal habeas court.

IV. Recommendation

For the reasons stated herein, the undersigned recommends that the Court (1) DENY Ground One; (2) DENY Ground Two; (3) DISMISS and/or DENY Ground Three; (4) DISMISS and/or DENY Ground Four; and (5) DISMISS and/or DENY Ground Five.

/s/ Kathleen B. Burke
Kathleen B. Burke
United States Magistrate Judge

Dated: August 12, 2019

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days after the party objecting has been served with a copy of this Report and Recommendation. Failure to file objections within the specified time may waive the right to appeal the District Court's order. See *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).