No. 20-7066

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

WILLIAM ECHOLS, — PETITIONER
(Your Name)

vs.

DOUGLAS FENDER, WARDEN — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT/NORTHERN DISTRICT OF OHIO/EASTERN DIV.
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

WILLIAM ECHOLS, #A663-205
(Your Name)

501 THOMPSON ROAD/P.O. BOX 8000
(Address)

CONNEAUT, OHIO 44030
(City, State, Zip Code)

N/A
(Phone Number)

CONSTITUTIONAL QUESTION(S)

I. WHETHER ECHOLS WAS DENIED A FAIR AND IMPARTIAL TRIAL DUE TO SEVERAL MAJOR CONSTITUTIONAL AND DUE PROCESS VIOLATIONS THAT INCLUDED AN IMPROPER JOINER OF CASES TOTALLY INDEPENDENT OF EACH OTHER?

II. WHETHER THERE WAS INSUFFICIENT EVIDENCE TO CONVICT ECHOLS OF THE CRIMES FOR WHICH HE WAS CONVICTED OF HEREIN?

III. WHETHER ECHOLS WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT JIS ACCUSER AT TRIAL?

IV. WHETHER ECHOLS WAS CONVICTED AND SENTENCED FOR ALLIED OFFENSES DENYING ECHOLS HIS CONSTITUTIONAL AND DUE PROCESS RIGHT TO A FAIR TRIAL?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

See the Table of Authorities attached hereto and incorporated by reference herein.

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TABLE OF AUTHORITIES CITED

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STATUTES & RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is Sixth Circiut Court of Appeals of the United States

[X] reported at 2020 U.S. App. LEXIS 27868; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2019 U.S. Dist. LEXIS 211691; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was September 1, 2020.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[x] An extension of time to file the petition for a writ of certiorari was granted to and including 150 days (date) on March 19, 2020 (date) in Application No. A_____. Order List: 589 U.S.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Note: Order List: 589 U.S. (Pursuant to COVID-19 (Public Health Concerns).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> 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 defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> **Sec. 1. [Citizens of the United States.]** 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.

STATEMENT OF CASE

I. PROCEDURAL HISTORY

A. Factual findings of the Ohio Court of Appeals

Respondent submitted the factual findings of the Ohio Court of Appeals, Eighth Appellate District, Cuyahoga County as the Procedural History of the instant case & therefore should be the binding factual findings as true & accurate herein.

Plaintiff agrees for the most part with the aforementioned Procedural History, but asserts that the Court of Appeals interpretation on the Procedural History is in conflict with the transcripts of this current case. The Aforementioned conflict is paramount to Petitioner's instant Federal Habeas claims.

The State's first witness Kimberly Ann Corney ("Ms. Corney"), one of the alleged victims in this matter. Ms. Corney testified that on June 7,1994 she was sexually assaulted while walking home at 2:00A.M. (Tr.at 558-563). She specifically testified she had been over a friend's house braiding hair. (Tr.at 554). But the police report indicates she originally stated she was coming home from a beverage store. (Tr.at 758). She testified she was six months pregnant at the time of the assault. (Tr.at 582). But medical records pertaining to her emergency room visit indicate she was, in fact, not pregnant. (Tr.at 590). She further testified she was wearing panties at the time of the assault. (Tr.at 564). But she originally told investigators she was not wearing any underwear. (Tr.at 758). Ms. Corney further testified that assailant bent her over before engaging in intercourse. (Tr.at 587). But the police report indicates she initially stated the assailant laid her on the ground before

engaging in intercourse. (Tr.at 758). She further testified that after the assault the assailant ran away. (Tr.at 587). But she originally stated the assailant fled in a car. (Tr.at 761). And Ms. Corney admitted she had an extensive criminal history, including offenses of drug possession, receiving stolen property, & burglary. (Tr.at 555).

Considering the aforementioned conflict between the Respondent's submitted Procedural History of this case & the transcripts of this case, Petitioner objects to the presumption of correctness asserted by the Respondent as it relates to the aforementioned stated conflict herein & asserts that the sworn certified trabscripts of this case is the true & accurate record of facts of this matter.

B. State Conviction

Petitioner does not dispute the respodent's submitted State conviction assertion thereby the presumption of correctness is established herein.

C. Direct Appeal

Petitioner does not dispute the Respondent's Direct Appeal assertion therefore, the presumption of correctness is established herein. Petitioner has exhausted all his State legal remedies & has presented his Federal Habeas claim properly & timely before this Honorable Court.

D. Resentence

Petitioner does not dispute Respondent's Resentence Assertion therefore, the presumption of correctness is established herein. Petitioner has exhausted all his State legal remedies & has presented his Federal Habeas claim properly & timely before this Honorable Court.

REASONS FOR GRANTING THE PETITION

LAW AND ARGUMENT IN SUPPORT OF PETITIONER'S WRIT OF CERTIORARI

A. Ground One

Petitioner contends that the joinder of the offenses involving the June 7,1994 incident & the May 8,1999 incident was prejudiced & improperly influenced the jury. Improper joinder does not, by itself, violate the federal constitution. **United States v. Lane,** 474 U.S.438,446(1986).

The Supreme Court in **Lane** suggested in passing that misjoiner could rise "to the level of a constitutional vio;lation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial."

Ohio Crim.R.13 provides that a trial court may order two or more indictments to be tried together "if the offenses or the defendants could have been joined in a single indictment." **Ohio Crim.8(A)** governs the joinder of offenses in a single indictment. Under **Ohio Crim.R.8(A)**, two or more offenses may be charged together if the ofeenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

The law favors joining multiple offenses in a single trial if the requirements of **Ohio Crim.R.8(A)** are satisfied. **State v. Diar,** 120 Ohio St.3d 460,2008-Ohio-6266,900 N.E.2d 565,¶94. "Joinder & the avoidance of multiple trials is favored for many reasons, among which are conserving time & expense, diminishing the inconvenience to witness & minimizing the possibility of incongruous results in successive trials before different juries. **State v. Torres,** 66 Ohio

St.2d 340,421 N.E.2d 1288(1981). See also **State v. Schiebel,**55 Ohio St.3d 71,86-87, 564 N.E.2d 54(1990); **State v. Schaim,**65 Ohio St.3d 51,58,600 N.E.2d 661(1992).

Under **Ohio Crim.R.14,** however, the trial court may grant a severance if it appears that the defendant would be prejudiced by the joinder. The defendant bears the burden of proving prejudice. **State v. Brinkley,**105 Ohio St.3d 231,2005-Ohio-1507,824 N.E.2d 959, ¶29.

The state may refute the defendant's claim of prejudice under two methods. Under the first method, the state must show that the evidence from the other case could have been introduced pursuant to the "other acts" test of **Evid.R.404(B);** under the second method (referred to as the "joinder test"), the state does not have to meet the stricter "other acts" admissibility test but only need to show the evidence of each crime joined at trial is "simple & direct." **State v. Lott,**51 Ohio St.3d 160,163,555 N.E.2d 293(1990). "When simple & direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of avidence of these crimes as "other acts" under **Evid.R.404(B)." Id.**

"Simple & direct evidence means the evidence of each crime is "so clearly eparate & distinct as to prevent the jury from considering evidence of [one crime] as corroborative as the other." **State v. Quinones,**11 Dist.Lake No.2003-L-015, 2005-Ohio-6576, ¶48. See also **State v. Varney,**4th Dist. Hocking Nos.07CA18 & 07AP18, 2008-Ohio-5283 (the purpose of the "joinder test" is to prevent the finder of fact from confusing the offenses).

Petitioner asserts that there was significant risk of unfair

prejudice, the June 7,1994 incident (offense), should not have been joined with the May 8,1999 incident (offense). The state claims that even if there was a risk of prejudice, the evidence of the other offense would have been allowed in the trial of the opposite offense pursuant to **Evid.R.404(B).** Petitioner strongly disagrees with the state's position.

In this present case, for judicial economy the court combined four (4) offenses, two offenses occurring in 1994 & the other two (2) 1999 into one trial. Despite the charges on the two dates being the same offenses (Rape & Kidnapping) if believed perpetrated by the same individual, the **modus operandi** is totally different thereby creating a prejudicial joiner that could create a miscarriage of justice that would turn into a manifest injustice.

For the reasons stated above, Petitioner moved the trial court for relief from prejudicial joiner & for separate trials as to Counts One & Two, & Three & Four, respectively. The trial denied Petitioner's motion. The evidence of the multiple violent rapes, however, when presented in a single trial, necessarily portrayed Petitioner as a violent, quasi-serial rapist, & the jury was permitted to infer his guilt for the multiple & separate offenses from this improper portrayal. As such, the trial court erred as a matter of law.

Here, Petitioner was greatly prejudiced. The testimony involving the two, discreete & separate sexual assaults was hughly graphic & salacious. It is undisputed that the two separate sexual assaults did not include a similar **modus operandi.** As such, there was a high likelihood the jury would misuse the evidence of multiple

violent sexual assaults & create a hostile & unfavorable opinion of the Petitioner in their minds prior to hearing any evidence. See **State v. Echols,** 128 Ohio App.3d 677,696,716 N.E.2d 728(1st Dist. 1998)(holding that trial court erred by failing to sever counts where the evidence of the offenses failed to demonstrate a modus operandi, & where the likelihood that the jury would misuse the evidence was substantial).

The evidence of each separate crime was not simple & direct. Indeed, the State called multiple witnesses with advanced degrees to testify at great lenght as to the complex procedures involved in conducting **DNA** analysis. This testimony attempted to provide clarity into the scientific rigor involved in comparative analysis of **DNA** profiles. Stated differently: evidence that requires testimony from an expert witness with an advanced degree is necessarily anything but simple & direct.
Therefore, the State cannot rebut Petitioner's showing of prejudicial joinder as to the separate & discrete sexual assaults as charged in the indictment. The trial court, then, erred as a matter of law when it denied Petitioner's motion for separate trials.

In this present case, the evidence is not simple & direct. The offenses involved different alleged victims, & the cats committed against each alleged victim were separate in time & location from each other. The state's presentation of the evidence with respect to each of the charges are indirect & complicated **(DNA)** evidence, as well as one (1) alleged victim being deceased with only medical records to support the state's theory of the incident, thus making it difficult for a jury to independently separate the proof for

B. Ground Two

The Sixth Amendment of the United States Constitution provides, in pertinent part, that: "In all criminal prosecutions, the accused shall enjoy the right***to be confronted with the witness against him." The Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, & the defendant had a prior opportunity for cross-examination." **State v. Lewis,** 1st Dist. Hamilton Nos. C-050989 & C-060010,2007-Ohio-1485,¶29.

In **Crawford v. Washington,**541 U.S.36,124 S.Ct.1354,158 L.Ed.2d 177(2004), the Supreme Court held that the Confrontation Clause bars the admission of "testimonial statements of witness absent from trial." **Id.** at 59. The court explained that "where testimonial statements are at issue, the only indicuim of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes." This means that the state may not introduce "testimonial" hearsay against a criminal defendant, regardless of whether such statements are deemed reliable, unless the defendant has an opportunity to cross-examine the declarent. **Id.** at 53-54,68.

However, the Crawford court also held that the Confrontation Clause only requires exclusion of "testimonial" as opposed to nontestimonial" evidence. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause." **Davis v. Washington,**547 U.S.813,821,126 S.Ct.2266,165 L.Ed.2d 224(2006). If a statement is not testimonial, the principlesembodied in the Confrontation Clause do not apply.

each offense without the prjudice factor running into the other offense.

Our justice system is based on the fundamental principle that the major function deprived from the constitution & due process rights is to ensure that a fair & just legal proceeding occurs.

All American Citizens accused of a crime, is guaranteed their constitutional right to due process & that right will be protected. A breakdown of the aforementioned fundamental principles of justice will cause a miscarriage of justice that would create a manifest injustice that the outcome of the jury verdict that no American Citizen could trust.

Therefore, for the trial court not to separate the offenses at least by time & location to ensure that no prejudice would spill over from an offense to another is a total abuse of discretion.

Petitioner, through his assignment of error, argues that his right to confront the victim was violated because she was deceased at the time of trial. Specifically, Petitioner argues that the trial court erred by admitting into evidence the statements made by the deceased victim to a medical provider & further erred by allowing the narrative from the victim's medical records into evidence.

Defense counsel argued the victims statements were not excited utterances & admission of her statements would violate Petitioner's right to confront witness within the meaning of **Crawford v. Washington,**541 U.S.36, 124 S.Ct.1354,158 L.Ed.2d 177(2004). Therefore, Petitioner is entitled to the Habeas Corpus relief he seeks herein.

Whorton v. Bockting, 549 U.S.406,420,127 S.Ct.1173,167 L.Ed.2d 1 (2007).

Although the **Crawford** Court did not specifically define the term "testimonial," it explained that hearsay statements are implicated by the Confrontation Clause when they are "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." **Crawford at 52.**

In **Davis at 822,** decided two years after **Crawford,** the court held that "statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." By contrast, statements are testimonial when the circumstances indicate that there "is no such ongoing emergency, & that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." **Davis at Id.** See also **State v. Siler,** 116 Ohio St.3d 39,2007-Ohio-5637,876 N.E.2d.534, paragraph one of the syllabus.

In the matter now before this Court, the trial court permitted the State of Ohio to use the medical records of Marnie Macon to present a narrative surrounding her alleged sexual assault, notwithstanding that mush, if not all, of the narrative had no relationship to any putative medical diagnosis. The trial court further permitted the State's witness to testify to these medical records & read the narrative contained therein. The above violated Petitioner's Sixth Amendment right to confrontation.

As appellate reviews issues concerning Confrontation Clause violations **de novo.** See **State v. Babb,** 8th Dist. Cuyahoga No.86294, 2006-Ohio-2209. Pursuant to the Sixth Amendment to the United States Constitution, out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable & the defendant was given a prior opportunity fro cross-examination. **Crawford v. Washington,** 541 U.S.36,52,124 S.Ct.1354,158 L.Ed.2d 177(2004).

In **State v. Stahl,** 111 Ohio St.3d 186,2006-Ohio-5482. The Supreme Court of Ohio adopted the "objective witness" test when analyzing whether statements made to non-law enforcement officials violated the Confrontation Clause, & further defined testimonial statements as those made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Statements made to medical personnel for purposes of diagnosis or treatment are not inadmissible under **Crawford.** **State v. Muttart,** 116 Ohio St.3d. 5,2007-Ohio-5267; compare **State v. Arnold,** 126 Ohio St.3d.290,2010-Ohio-2742(holding statements that serve primarily a forensic or investigative purpose are testimonial & are inadmissible pursuant to the Confrontation Clause when the declarant is unavailable for cross-examination).

State v. Arnold, 126 Ohio St.3d.290,2010-Ohio-2742 is particularly instructive. **Arnold** statements made by a child sexual assault victim to a social worker at a hospital. The court in **Arnold** held that the interview of the child served dual purposes: 1) to elicit information to assist in the investigation & prosecution of an offender. **Id.** at **¶33.** Accordingly the court held that those statements pertaining to where the victim was touched on his body

were necessary for proper medical diagnosis & treatment & were therefore not testimonial. **Id.** at ¶22. But the court further found many of the statements were not necessary for medical diagnosis thereby serving to further an investigation. **Id.** at 23 (finding statements that defendant shut & locked the bedroom door before raping her & description of defendant's boxer shorts were not necessary for medical diagnosis & were therefore testimonial.)

Here, the statements contained in the medical records of Marine Macon, just like the involved statements in **Arnold**, served dual purposes. When asked by the State how Dr. Abumeri & other official and other officials at St. Michael's approached victims of sexual assault, that testified as follows:

> Q: Just generally, before we get into what you did for Ms. Macon, a patient on this date, just generally, what sort of things are you--what sort of information are you trying to get from victims of sexual assault, & what can you do for them?
>
> A: Basically, we like to know how the incident happened, their injury & the physical evidence, & also how to treat them, how to prevent pregnancy, prevent sexually transmitted diseases, & to help themmentally & physically. **And we always have a police report, you know, done.**
>
> Q: All right. So you're saying if a victim of sexual assault comes in & tells you that they had been raped, **you would notify police if they hadn't already been?**
>
> A: Yes, the nurse eill notify.

(Tr. at 664)(emphasis added). Dr. Abumeri, then, acknowledged that the policy of St. Michael's in regard to seeing victims of sexual assaults was, in part, to further some investigatory purpose. As such, the trial court should have conducted an **in camera** review of the medical report & made findings as to what statements were for the purpose of a medical diagnosis & what statements served

an investigatory purpose.

Dr. Abumeri read into the record the narrative contained in Marnie Mason's medical report describing the circumstances of Manie Macon's assault. (Tr. at 673). Of note, many of the statements contained in the narrative were not necessary for any medical diagnosis and/or treatment & were therefore testimonial. These statements included, "a man pulled up in his car & told [Ms. Corney] to get in the car or he would break her head***she became afraid of whether he had a weapon***." (Tr. at 673). As such, & per the authority in **Arnold**, these statements should have never been admitted.

The **Confrontation Clause** of the **Sixth Amendment** to the United States Constitution, made applicable to the states through the **Fourteenth Amendment**, provides that in all criminal prosecutions, the accused shall enjoy the right***to be confronted with the witnesses against him. **State v. Issa,** 93 Ohio St.3d.49,752 N.E.2d 904(2001).

The **Confrontation Clause** prohibits the admission of an out-of-court statement of a witness who does not appear at trial if the statement is testimonial, unless the defendant has had an opportunity to cross-examine the witness. **Crawford v. Washington,** supra. Therefore, in this case, Petitioner strongly asserts that his right to confront Marnie Macon (decease) violated his right to receive a fair & impartial trial because Petitioner could not cross-examine the witnesses to impeach her credibility thereby violating Petitioner's **Sixth Amendment** right to the United States Constitution.

Petitioner is entitled to the habeas corpus relief pursuant to **28 U.S.C.§2254** because of the aforementioned argument creating

an irreversible prejudice, thereby running afoul of the United States Supreme Court's holding in **Crawford v. Washington,** supra. And the Petitioner's Due Process Rights the **Sixth Amendment** of the United States Constitution.

C. Ground Three

When assessing a challege of sufficiency of the evidence, a reviewing court examines the evidence admitted at trial & determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. **State v. Jenks,** 61 Ohio St.3d.259,574 N.E.2d.492(1991), paragraph two of the syllabus. "The relevant inquiry 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 proven beyond a reasonable doubt." **Id.** A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed the evidence against a defendant would support a conviction." **State v. Thompkins,** 78 Ohio St.3d.380,390,678 N.E.2d.541(1997).

While the test for sufficiency of the evidence requires a determination whether the state has met its burden of persuasion. **Thompkins** at 390, 678 N.E.2d.541. Also unlike a challenge to the sufficiency of the evidence, a manifest weight challenge raises a factual issue.

> "The court, reviewing the record, weighs the evidence & all reasonable inferences, considers the credibility of witnesses & determines whether in resolving conflicts in the evidence, the jury clearly lost its way & created such a manifest miscarriage of justice that the conviction must be reversed & a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."

Id. at 387,678 N.E.2d.541, quoting **State v. Martin,**20 Ohio App.3d.175 485 N.E.2d.717(1st Dist.1983). A finding that a conviction was supported by the manifest weight of the evidence, however, necessarily includes a finding of sufficiency. **State v. Howard,** 8th Dist. Cuyahoga No.97695,2012-Ohio-3459,2012 WL3133244,¶14, citing **Thomkins,** at 388,678 N.E.2d.541.

Petitioner was found guilty of Counts Three & Four, which alleged, **inter alia**, that Petitioner used force or the threat or force. Petitioner's conviction, however, is not supported by sufficient evidence.

Sufficiency is a legal standard applied to determine whether the evidence admitted at trial is legally sufficient to support the verdict as a matter of law. **State v. Thompkins,**78 Ohio St.3d 380,678 N.E.2d.541 (1997). A criminal conviction is not supported by sufficient evidence when the prosecution has failed to "prove beyond a reasonable doubt every fact necessary to constitute ant crime for which it prosecutes a defendant." **State v. Robinson,**47 Ohio St.2d 103,108,1 N.E.2d 88(1976). As previously stated, the test for whether determining whether a criminal conviction is supported by sufficient evidence is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." **State v. Jenks,**61 Ohio St.3d 259, 574 N.E.2d 492(19991), paragraph two of the syllabus. Where a criminal conviction is not supported by sufficient evidence, due process requires that the conviction be reserved. **Jackson v. Virginia,**443 U.S.307,99 S.Ct.2781,61 L.Ed.2d 560(1979).

In Count Three, Petitioner was convicted of rape in violation of **R.C.§2907.02(A)(2)**, which provides "no person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat." In Count Four, Petitioner was convicted of kidnapping in violation 0f **R.C.§2905.01(A)(4)**, which provides noe person, by force, threat, or deception***shall remove another from the place where the other person is found or restrain the liberty of the other person***to engage in sexual activity, as defined in section **2907.01** of the Revised Code, with the victim against the victims will." To sustain a conviction for the above offenses, then, the State must show Petitioner used force or the threat of force.

As noted, .s. Macon did not testify at trial. Her testimony, however, was included through the admission of her medical records. As stated herein, the admission of her medical records violated Petitioner's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution & should have not been admitted. Since there was no additional testimony adduced at trial showing the Petitioner used force and/or the threat of force towards Ms. Macon, Petitioner's convictions are not supported by sufficient evidence & therefore record herein clearly shows that the verdict was not supported by the evidence.

Sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law. In a sufficiency inquiry, an appellate court does not assess whether the state's evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction.

State v. Starks, 8th Dist. Cuyahoga No.91682,2009-Ohio-3375, citing **Thompkins** at 387.

> "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a raesonable doubt." State v. Jenks, supra; Jackson v. Virginia, 443 U.S.307,99 S.Ct.271,61 L.Ed 2d 560.

In this present case, viewing this evidence in a light most favorable to the prosecution, no rational trier of fact could find that the Petitioner used force and/or the threat of force towards Ms. Macon to support the Petitioner's conviction herein.

Petitioner is entitled to the habeas corpus relief pursuant to **28 U.S.C.§2254** because of the aforementioned averment creating an irreversible prejudice, thereby running afoul of the United States Supreme Court's holding in Jackson v. Virginia, 443 U.S.307,99 S.Ct. 271,61 L.Ed.2d 560.

It must be noted that Petitioner has always maintained his **actual** innocence of the crimes for which he now stands convicted, but constantly & consistently fights to overturn these convictions.

D. Ground Four

In this present case, the Trial Court found the Rape & Kidnapping offenses set forth in Counts One & Two & Counts Three & Four were not allied offenses of similar import. Counsel for Petitioner objected to the trial court's findings at sentencing. Because the kidnappings were incidental to the rape offenses, however, the trial court erred in not finding the same to be allied offenses of similar import & merge them accordingly. Petitioner timely appealed to the Eighth District Court of Appeals of Ohio presenting this very

issue as one of the issues presented on appeal. The Court of Appeals found Counts One & Two to be allied offenses, while Counts Three & Four were not allied offenses, because Petitioner asserts that one & two as well as three & four are allied offenses, Petitioner presents this argument to this Honorable Court for a **De novo** review of the issue.

A defendant may be indicted & tried for allied offenses of similar import, but may be sentenced on only one of the allied offenses. **State v. Brown,** 119 Ohio St.3d 447,2008-Ohio-4569,895 N.E. 2nd 149. Because **R.C.§2941.25(A)** protects a defendant from being punished for allied offenses, the determination of the defendant's guilt for committing allied offenses remain intact, both before & after the merger of allied offenses. **State v. Whitfield,** 124 Ohio At.3d 319,2010-Ohio-2,922 N.E.182; City of **Parma Heights v. OWCA,** (8th Dist.2017), 2017-Ohio-179; & **State v. Jevon Prieto,** (7th Dist. 2016), 2016-Ohio-8480.

In **State v. Johnoson,** the Ohio Supreme Court modified the test for determining whether offenses are **Allied Offenses** of similar import. 128 Ohio St.3d 153,2010-Ohio-6314,942 N.E.2d 1061. The court directed us to look at the elements of the offenses in question & determine whether or not it is possible to commit one offense & commit the other with the same conduct. If the answer to each question is in the affirmative, the court must then determine whether or not the offenses were comitted by the same conduct. If the answer to the above two (2) questions is yes, then the offenses are allied offenses of similar import & will be merged. If however, the court determines that commission of one offense will never result in

the commission of the other, or if there is a separate animus for each offense, then the offenses will not merge according to **Johnson**, supra. 2015 U.S.Dist.Lexis 5934::**Thomas v. Jenkins::**May 6,2015.

Regarding Merger of Allied Offenses of similar import, **R.C.§2941.25** provides:

> (A) Where the same conduct by defendant can be construed two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, 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 offense, & the defendant may be convicted of all of them.

As set forth in **State v. Johnson,**128 Ohio St.3d 153, 2010-Ohio-6314,942 N.E.2d 1061, the test for whether offenses are allied offenses of similar import inder **R.C.§2941.25** is two-fold. First, the court must determine "whether it is possible to commit one offense & commit the other with the same conduct." **Id. ¶48.** Second, the court must determine "whether the offenses were committed by the same conduct, i.e., a single act, committed with a single state of mind." **Id. at ¶49,** quoting **State v. Brown,**119 Ohio St.3d 447,2008-Ohio-4569, 895 N.E.2d 149 ¶50. "If the answer to both questions is yes, then the offenses are allied offenses of similar import & will be merged." **Id. at ¶50.**

Recently the Supreme Court of Ohio expounded upon its holding in **Johnson**, stating:

> As a practical matter, when determining whether offenses are allied offenses of similar import within the meaning of **R.C.§2941.25**, courts must ask three questions when a defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in support or significance? (2) Were they committed separately? (3) Were they committed with separate animus or

motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, & the import must all be considered. State v. Ruff, 143 Ohio ST.3d 114, 2015-Ohio-995, 34 N.E.3d 114.

In this present case, the ends of justice require that the Petitioner, Echols' writ of certiorari should be granted to address the constitutional and due process violations that occurred within this instant case and/or at least a review of the facts and evidence that Echols can and will present to this Honorable Court.

CONCLUSION

Petitioner-Appellant, Echols was convicted and sentence for some very serious crimes herein in which Petitioner, Echols was sentenced to a very lengthy sentence (41 years). Considering the foregoing arguments and case laws, Petitioner, Echols has made a substantial showing of the denial of his constitutional and due process rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Therefore, this instant petition for a writ of certiorari should be granted in the interest of law, justice, equity and good conscience and to prevent a manifest miscarriage of justice. Echols contends that this instant petition for a writ of certiorari should be granted.

Respectfully submitted,

William Echols, #A663-205
Petitioner-Appellant, pro se
Lake Erie Correctional Inst.
501 Thompson Rd./P.O. Box 8000
Conneaut, Ohio 44030

DATE: December 30, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM ECHOLS, PETITIONER, vs. BRIGHAM SLOAN, Warden, RESPONDENT.	)	CASE NO. 1:17CV859 JUDGE SARA LIOI MEMORANDUM OPINION AND ORDER

Before the Court is the Report and Recommendation of Magistrate Judge David A Ruiz (Doc. No. 13 ["R&R"]) recommending dismissal of this petition for writ of habeas corpus filed under 28 U.S.C. § 2254. *Pro se* petitioner William Echols ("Echols") filed objections to the R&R. (Doc. No. 14 ["Obj."].)

In accordance with 28 U.S.C. § 636(b)(1) and *United States v. Curtis*, 237 F.3d 598, 602–03 (6th Cir. 2001), this Court has made a de novo determination of the magistrate judge's R&R. For the reasons stated below, the Court overrules Echols' objections, adopts the R&R in its entirety, and dismisses Echols' petition for a writ of habeas corpus.

I. BACKGROUND

Echols filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on April 21, 2017. (Doc. No. 1 ["Pet."].) Echols seeks relief from the sentence issued by the state trial court following a jury trial in which the jury returned guilty verdicts against Echols for two counts of rape, in violation of Ohio Rev. Code § 2907.02(A)(2), and two counts of kidnapping,

in violation of Ohio Rev. Code § 2905.01(A)(4). (R&R at 1174[1].) The magistrate judge summarized the factual predicate for these offenses, as determined by the state appellate court, as well as Echols' efforts to appeal his convictions in the state courts. Echols does not challenge the accuracy of the magistrate judge's summary of the procedural history, and the Court will accept the magistrate's summary, as if rewritten herein. (*See id.* at 1174–76; *see also* Obj. at 1191.)

Echols raised four grounds for relief in his habeas petition. In the R&R, the magistrate judge recommended that the Court reject all grounds on the basis that they were procedurally defaulted and that there was no excuse for the default. (R&R at 1183–87.) Echols filed timely objections to the R&R.

II. STANDARD OF REVIEW

Under 28 U.S.C. § 636(b)(1), "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *See Powell v. United States*, 37 F.3d 1499 (Table), 1994 WL 532926, at *1 (6th Cir. Sept. 30, 1994) ("Any report and recommendation by a magistrate judge that is dispositive of a claim or defense of a party shall be subject to de novo review by the district court in light of specific objections filed by any party.") (citations omitted). "An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context." *Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004); *see also* Fed. R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."); L.R. 72.3(b) (any objecting party shall file

[1] All page numbers refer to the page numbers generated by the Court's electronic docketing system.

"written objections which shall specifically identify the portions of the proposed findings, recommendations, or report to which objection is made and the basis for such objections"). After review, the district judge "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

When undertaking its de novo review of any objections to the R&R, this Court must be additionally mindful of the standard of review applicable in the context of habeas corpus. "Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, a federal court may grant habeas relief only when a state court's decision on the merits was 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by' decisions from [the Supreme] Court, or was 'based on an unreasonable determination of the facts.' 28 U.S.C. § 2254(d)." *Woods v. Donald*, -- U.S.--, 135 S. Ct. 1372, 1376, 191 L. Ed. 2d 464 (2015) (per curiam). This standard is "intentionally difficult to meet." *Id.* (internal quotation marks and citations omitted). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2001)).

III. ECHOLS' OBJECTIONS

Echols does not challenge the magistrate judge's determination that his federal habeas claims are procedurally defaulted. Generally, a federal court will not review a procedurally defaulted claim on habeas corpus review "[o]ut of respect for finality, comity, and the orderly

administration of justice[.]" *Dretke v. Haley*, 541 U.S. 386, 388, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004). "This is a corollary to the rule that 'federal courts will not disturb state court judgments based on adequate and independent state law procedural grounds.'" *Nelloms v. Jackson*, 129 F. App'x 933, 936 (6th Cir. 2005) (quoting *Dretke*, 541 U.S. at 392)). "The only exceptions to this rule are when a state prisoner can demonstrate cause for the procedural default and prejudice as a result of the alleged constitutional violation, or can demonstrate that failure to review the constitutional claim will result in a fundamental miscarriage of justice." *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 749–50, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)); *see Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998) (citations omitted).

Echols relies on the latter exception and "asserts that it would be truly a miscarriage of justice to allow a procedural bar to prevent" the Court from reaching the merits of his habeas claims. (Obj. at 1192–93.) A prisoner can establish a fundamental miscarriage of justice by showing that "'in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.'" *Bousley*, 523 U.S. at 623 (quoting *Schlup v. Delo*, 513 U.S. 298, 327–28, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)); *see Souter v. Jones*, 395 F.3d 577, 589–90 (6th Cir. 2005) (a prisoner must "'present[] evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error'") (quoting *Schlup*, 513 U.S. at 316). In other words, he must demonstrate that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent[.]'" *See Schlup*, 513 U.S. at 324 (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). "To be credible, [a claim of actual

innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.* at 324.

Echols fails to present any new, reliable evidence that was not available at his trial showing that he is actually innocent of the crimes for which he is convicted. Instead, Echols relies on his merits arguments by reproducing, virtually verbatim, portions of his traverse relating to his claims of improper joinder, insufficiency of the evidence, alleged Confrontation Clause violations, and failure to merge allied offenses at sentencing. (Obj. at 1194–20.) But "'[a]ctual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623. Echols' complaints about the sufficiency of the trial evidence and the legitimacy of the sentence and underlying complaint do not demonstrate that this is the "extraordinary case where the petitioner demonstrates his actual innocence." *Carter v. Mitchell*, 443 F.3d 517, 538 (6th Cir. 2006) (citing, among authority, *Murray*, 477 U.S. at 496); *see, e.g., Malcum v. Burt*, 276 F. Supp. 2d 664, 677 (E.D. Mich. 2003) (sufficiency of the evidence argument insufficient to invoke the actual innocence exception to the procedural default doctrine); *see also Schlub*, 513 U.S. at 316 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.").

The fact that Echols repackages these merits arguments alongside unsupported conclusions that "clearly a miscarriage of justice has occurred in [the] present case" does not change the Court's analysis. (*See, e.g.*, Obj. at 1193.) *See Sweet v. Delo*, 125 F.3d 1144, 1152 n.9 (8th Cir. 1997) (conclusory allegations of actual innocence insufficient to excuse procedural

default). At the federal habeas level, the burden is on Echols to demonstrate a credible actual innocence claim, and his unsupported representations fail to satisfy this burden. *See Floyd v. Alexander*, 148 F.3d 615, 618 (6th Cir. 1998); *see also House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) ("A petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence . . . any reasonable juror would have reasonable doubt.").

Because Echols failed to meet his burden of advancing a credible actual innocence claim, the Court agrees with the magistrate judge that the grounds asserted in Echols' habeas petition are procedurally barred. Echols' objections to the R&R are OVERRULED.

IV. CONCLUSION

For the foregoing reasons, the R&R is ACCEPTED and the petition for a writ of habeas corpus is DISMISSED. Further, for the same reasons, the Court CERTIFIES that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: December 9, 2019

HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM ECHOLS,	)	CASE NO. 1:17CV859
	)	
	)	
PETITIONER,	)	JUDGE SARA LIOI
	)	
vs.	)	
	)	JUDGMENT ENTRY
	)	
BRIGHAM SLOAN, Warden,	)	
	)	
	)	
RESPONDENT.	)	

For the reasons set forth in the contemporaneously filed memorandum opinion and order, the report and recommendation of the magistrate judge (Doc. No. 13) is ACCEPTED and the petition for a writ of habeas corpus (Doc. No. 1) is DISMISSED. Further, for the same reasons, the Court CERTIFIES that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: December 9, 2019

HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

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

WILLIAM ECHOLS, Petitioner, v. BRIGHAM SLOAN, Warden, Respondent.	)	CASE NO. 1:17 CV 859 JUDGE SARA LIOI MAGISTRATE JUDGE DAVID A. RUIZ **REPORT AND RECOMMENDATION**

INTRODUCTION

Petitioner William Echols, a prisoner in state custody, has filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his convictions and sentences in *State v. Echols*, Case No. CR-13-580261-A. (R. 1.) Respondent Warden Brigham Sloan[1] has filed a return of writ. (R. 9.) Echols has filed a traverse. (R. 12.) This matter is before the undersigned pursuant to Local Rule 72.2 for preparation of a report and recommendation on Echols' petition or other case-dispositive motions. For the reasons stated below, the court recommends Echols' petition be denied.

FACTUAL BACKGROUND

Ohio's Eighth District Court of Appeals set forth the following facts underlying Echols' convictions:

> {¶ 3} On June 7, 1994, K.C. was walking home late at night from a session of braiding a friend's hair. As she passed a large willow tree or shrub somewhere near

[1] Brigham Sloan is the warden of the Lake Erie Correctional Institution in Conneaut, Ohio, where Echols is incarcerated. (R. 9 at 1.)

> East 93rd Street and Woodland Avenue, a person jumped out from the tree and came up behind K.C. The individual held a knife to her throat and threatened her. He moved her from the sidewalk to behind the tree and raped her.
>
> {¶ 4} The victim of a second attack, M.M., was unavailable to testify because she was murdered in 2007. Her medical records documented her recounting of events that occurred on May 8, 1999. In the course of her medical treatment she relayed that she had been raped. She was walking home when a car pulled up and an unknown individual told her to get into the car or he would hurt her. She complied. She was hit in the head with a brick and raped. She was taken to the hospital by ambulance where she was treated and a sexual assault examination was performed.
>
> {¶ 5} Rape kits were collected from both victims and provided to Cleveland police. K.C.'s rape kit remained in the custody of Cleveland police until it was tested in 2012. M.M.'s rape kit was processed by forensic scientists in 1999, but a DNA profile was not developed at the time. In 2012, M.M.'s rape kit was processed and a DNA profile of her attacker was developed. Both DNA profiles resulted in matches to the same profile contained in a federal DNA database. As a result, investigators with the Ohio Bureau of Criminal Investigation interviewed K.C. and investigated the whereabouts of M.M. The investigators also obtained a sample of DNA from appellant, the individual whose DNA profile was returned as a possible match from the federal database. Two different forensic scientists testified that appellant's DNA profile was consistent with that of the attackers of M.M. and K.C., respectively. Both experts testified that appellant could not be excluded as the contributor of the DNA profile developed from the respective rape kits, and the probability of someone else being the contributor was one in 15 sextillion 610 quintillion.

State v. Echols, No. 102504, 2015 WL 8484088, at *1 (Ohio Ct. App. Dec. 10, 2015).

These facts "shall be presumed to be correct," and Echols has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998).

PROCEDURAL BACKGROUND

A. Trial Court

On December 6, 2013, the Cuyahoga County Grand Jury indicted Echols on the following charges: two counts of rape in violation of Ohio Rev. Code § 2907.02(A)(2) and two counts of kidnapping in violation of Ohio Rev. Code § 2905.01(A)(4). (R. 9-1, Ex. 1.) Echols entered pleas of not guilty to all charges. (R. 9-1, Ex. 2.)

On October 6, 2014, Echols filed a motion requesting separate trials for charges relating to the two victims, K.C. and M.M. (R. 9-1, Ex. 3.) The State opposed the motion (R. 9-1, Ex. 4), and the trial court denied it. *Echols*, 2015 WL 8484088, at *2. The case proceeded to a jury trial on October 8, 2014. (R. 9-2 at 2.) On October 17, 2014, the jury found Echols guilty of all charges. (R. 9-1, Exs. 5, 6.)

On December 19, 2014, the trial court held a sentencing hearing. (R. 9-1, Ex. 7.) It sentenced Echols to eleven years imprisonment for the rape charge and ten years imprisonment for the kidnapping charge relating to victim K.C.; and ten years imprisonment each for the rape and kidnapping charges relating to victim M.M. (*Id.*) The sentences were to be served consecutively, for an aggregate sentence of forty-one years in prison. (*Id.*)

B. Direct Appeal

On January 16, 2015, Echols, through new counsel, filed a timely notice of appeal to the Eighth District Court of Appeals. (R. 9-1, Ex. 8.) The court *sua sponte* struck his appellate brief because it failed to comply with a court rule prohibiting identification by name of victims of sexual assault. (R. 9-1, Ex. 9.) Echols then filed a replacement brief complying with the rule, which raised the following assignments of error:

1. The trial court erred in denying Appellant's motion for a separate trial, which resulted in prejudice to the Defendant and violated his constitutional right to a fair trial.

2. The trial court erred by admitting the medical records of M.M. in violation of Mr. Echols' Sixth Amendment right to confrontation and *Crawford.*

3. The evidence adduced at trial was insufficient as a matter of law to prove beyond a reasonable doubt Mr. Echols was guilty of rape and kidnapping as set forth in Counts Three and Four.

4. The trial court erred when it failed to find the rape and kidnapping offenses were allied offenses of similar import and merge them for sentencing purposes.

(R. 9-1, Ex. 11 (capitalization altered).)

On December 10, 2015, the Ohio appellate court affirmed in part and reversed in part the trial court's judgment. (R. 9-1, Ex. 12.) It affirmed Echols' convictions but found the trial court erred when it did not merge the kidnapping and rape counts relating to K.C., and remanded the case for execution of a new sentence. (R. 9-1, Ex. 12 at 95.)

On March 9, 2016, Echols, acting *pro se*, filed a notice of appeal of the December 2015 state appellate court's judgment and a motion for leave to file a delayed appeal in the Ohio Supreme Court. (R. 9-1, Exs. 19, 20.) The court denied Echols' motion for delayed appeal and dismissed the case on May 4, 2016. (R. 9-1, Ex. 21.)

C. Resentencing

Meanwhile, on March 31, 2016, the trial court resentenced Echols in accordance with the state appellate court's instructions. (R. 9-1, Ex. 13.) It merged the kidnapping and rape counts relating to K.C. and imposed a sentence of eleven years imprisonment for the rape charge. (*Id.*) It resentenced Echols to ten years imprisonment each for the rape and kidnapping charges relating

to M.M. (*Id.*) All sentences were to be served consecutively, for a new aggregate sentence of thirty-one years in prison. (*Id.*)

A review of the state appellate court's docket indicates that Echols did not appeal that judgment. *See* http://cpdocket.cp.cuyahogacounty.us.

D. Post-Conviction Review

On June 1, 2015, Echols, again acting *pro se*, filed a petition to vacate or set aside his conviction or sentence in the trial court. (Doc. 9-1, Ex. 14.) In his petition, he raised the following claims:

1. Ineffective assistance of counsel. . . . Counsel did not subpoena witnesses in time for trial, victim inconsistencies with statements.

2. Ineffective assistance of counsel. . . . Trial counsel told me that it was a felony of the forth [*sic*] degree on the table and that the prosecutor was trying to figure out what to charge me with all the way up until trial, the deal was offered to me in July by my counsel and never seeing him againe [*sic*] until trial.

(R. 9-1, Ex. 14 (capitalization altered).) The State opposed the petition and filed proposed findings of fact and conclusions of law. (R. 9-1, Exs. 15, 16.)

The court denied Echols' petition on July 2, 2015. (R. 9-1, Ex. 17.) A review of the state appellate court's docket indicates that Echols did not appeal that judgment either. *See* http://cpdocket.cp.cuyahogacounty.us.

FEDERAL HABEAS CORPUS

Echols filed the *pro se* petition for writ of habeas corpus now before this court on April 21, 2017. (R. 1.) He asserts the following grounds for relief:

1. The trial court erred by denying Petitioner's motion for a separate trial which resulted in prejudice to the Petitioner and violated his constitutional right to a fair trial.

2. The trial court erred by admitting the medical records of [M.M.] in violation of Petitioner's Sixth Amendment right to confrontation and *Crawford*[.]

3. The evidence adduced at trial was insufficient as a matter of law to prove beyond a reasonable doubt Petitioner was guilty of rape and kidnapping as set forth in count three and four[.]

4. The trial court erred when it failed to find the rape and kidnapping offenses were allied offenses of similar import and merge them for sentencing purposes[.]

(R. 1 at 5, 6, 8, 9.)

Respondent filed a Motion to Dismiss on August 3, 2017. (R. 9.) Echols filed a traverse on October 12, 2017. (R. 12.) The Honorable Judge Lioi construed Respondent's Motion to Dismiss as an answer to Echols' petition, or a return of writ, and ordered the undersigned to address the defenses and other issues presented in it, in due course.

STANDARDS OF REVIEW

A. AEDPA Review

Echols' petition for writ of habeas corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), as it was filed after the Act's 1996 effective date. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Murphy v. Ohio*, 551 F.3d 485, 493 (6th Cir. 2009). The Act "recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013). It therefore "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Id.*

One of AEDPA's most significant limitations on district courts' authority to grant writs of habeas corpus is found in § 2254(d). That provision forbids a federal court from granting habeas relief with respect to a "claim that was adjudicated on the merits in State court proceedings" unless the state-court decision either:

> 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).

Habeas courts review the "last *explained* state-court judgment" on the federal claim at issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991) (emphasis original). A state court has adjudicated a claim "on the merits," and AEDPA deference applies, regardless of whether the state court provided little or no reasoning at all for its decision. *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

"Clearly established Federal law" for purposes of § 2254(d)(1) "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). It includes "only the holdings, as opposed to the dicta, of [Supreme Court] decisions." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (internal quotation marks and citations omitted). The state-court decision need not refer to relevant Supreme Court cases or even demonstrate an awareness of them; it is sufficient that the result and reasoning are consistent with Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). A state-court decision is contrary to "clearly established Federal law" under § 2254(d)(1) only "if the state court arrives at a conclusion opposite to that reached by [the

Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). In addition, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

A state-court decision is an "unreasonable determination of the facts" under § 2254(d)(2) only if the court made a "clear factual error." *Wiggins v. Smith*, 539 U.S. 510, 528-29 (2003). The petitioner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." *Burt*, 134 S. Ct. at 15; *see also Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011). This requirement mirrors the "presumption of correctness" AEDPA affords state-court factual determinations, which only can be overcome by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The Supreme Court has cautioned, "'a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.'" *Burt*, 134 S. Ct. at 15 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

Indeed, the Supreme Court repeatedly has emphasized that § 2254(d), as amended by AEDPA, is an intentionally demanding standard, affording great deference to state-court adjudications of federal claims. A petitioner, therefore, "must show that the state court's ruling . . . 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. This is a very high standard, which the Court readily acknowledges: "If this standard is difficult to meet, that is because it is meant to be." *Id.* at 102.

B. Exhaustion and Procedural Default

Under AEDPA, state prisoners must exhaust all possible state remedies, or have no remaining state remedies, before a federal court will review a petition for a writ of habeas corpus. 28 U.S.C. § 2254(b) and (c); *see also Rose v. Lundy*, 455 U.S. 509 (1982). This entails giving the state courts "one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In other words, "the highest court in the state in which the petitioner was convicted [must have] been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990).

Procedural default is a related but distinct concept from exhaustion. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). Procedural default occurs when a habeas petitioner fails to obtain consideration of a federal constitutional claim by state courts because he failed to: (1) comply with a state procedural rule that prevented the state courts from reaching the merits of the petitioner's claim; or (2) fairly raise that claim before the state courts while state remedies were still available. *See, e.g., Wainwright v. Sykes*, 433 U.S. 72, 80, 84-87 (1977); *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982); *Williams*, 460 F.3d at 806. In determining procedural default, the federal court again looks to the last explained state-court judgment. *Ylst*, 501 U.S. at 805; *Combs v. Coyle*, 205 F.3d 269, 275 (6th Cir. 2000).

Where a state court declines to address a prisoner's federal claims because the prisoner has failed to meet a state procedural requirement, federal habeas review is barred as long as the state judgment rested on "independent and adequate" state procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). To be independent, a state procedural rule and the state

courts' application of it must not rely in any part on federal law. *Id.* at 732-33. To be adequate, a state procedural rule must be "'firmly established' and 'regularly followed'" by the state courts at the time it was applied. *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009).

A petitioner also may procedurally default a claim by failing to raise the claim in state court, and pursue the claim through the state's ordinary appellate review procedures, if, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim. *Williams*, 460 F.3d at 806 (quoting *O'Sullivan*, 526 U.S. at 848); *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."). Under these circumstances, while the exhaustion requirement is technically satisfied because there are no longer any state-court remedies available to the petitioner, the petitioner's failure to have the federal claims fully considered in the state courts constitutes a procedural default of those claims, barring federal habeas review. *Williams*, 460 F.3d at 806.

Furthermore, to "fairly present" a claim to a state court, a petitioner must assert both its legal and factual basis. *Id.* (citing *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000)). Most importantly, a "'petitioner must present his claim to the state courts as a federal constitutional issue - not merely as an issue arising under state law.'" *Williams*, 460 F.3d at 806 (quoting *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984)).

A petitioner may overcome procedural default by demonstrating 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 claim is 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.* "[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. Cognizability

To the extent that claims asserted in federal habeas petitions allege state-law violations, they are not cognizable on federal habeas review and should be dismissed on that basis. "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); *see also Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law."); *Engle*, 456 U.S. at 121 n.21 ("We have long recognized that a 'mere error of state law' is not a denial of due process.") (citation omitted)).

State-court rulings on issues of state law may, however, "rise to the level of due process violations [if] they 'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)). But they must be "so egregious that [they] result in a denial of fundamental fairness." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Fundamental fairness under the Due Process Clause is compromised where "the

action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' . . . and which define 'the community's sense of fair play and decency.'" *Dowling v. United States*, 493 U.S. 342, 353 (1990) (internal citations omitted). The Supreme Court, therefore, "ha[s] defined the category of infractions that violate 'fundamental fairness' very narrowly." *Id.* at 352.

ANALYSIS

Respondent argues that all of Echols' grounds for relief are procedurally defaulted because he did not fairly present them to the Ohio Supreme Court on direct review. (R. 9 at 8-11.) The court agrees.

As explained above, to exhaust claims in state courts and preserve them for federal habeas review, "the highest court in the state in which the petitioner was convicted [must have] been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). Echols raised virtually identical claims in the state court of appeals as he does here. (*See* R. 9-1, Ex. 11.) But he did not file a timely appeal, from the state appellate court's judgment denying those claims, to the Ohio Supreme Court; and the Ohio high court denied his motion for a delayed appeal. (*See* R. 9-1, Exs. 19-21.) The Ohio Supreme Court's summary denial of a motion for delayed appeal is presumed to be a procedural ruling sufficient to bar federal habeas review. *Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir. 2004) (per curiam).

Moreover, because Echols' habeas claims arise out of the record of proceedings in the trial court, Ohio's *res judicata* doctrine now prohibits Echols from raising the claims in any state

post-conviction proceeding. *See Wong v. Money,* 142 F.3d 313, 322 (6th Cir. 1998) ("Under Ohio law, the failure to raise on appeal a claim that appears on the face of the record constitutes a procedural default under the State's doctrine of res judicata."); *State v. Perry*, 10 Ohio St. 2d 175 (Ohio 1967) (holding that *res judicata* bars a criminal defendant from raising in post-conviction proceedings those claims that could have been raised on direct appeal). And with no state-court remedies still available to him, Echols has procedurally defaulted these claims. *See, e.g., Gray v. Netherland*, 518 U.S. 152, 161–62 (1996) ("Because the exhaustion requirement 'refers only to remedies still available at the time of the federal petition,' . . ., it is satisfied 'if it is clear that [the habeas petitioner's] claims are now procedurally barred under [state] law' . . . ." (internal citations omitted)); *Alley v. Bell*, 307 F.3d 380, 385 (6th Cir. 2002) ("[I]f an unexhausted claim would be procedurally barred under state law, that claim is procedurally defaulted for purposes of federal habeas review.").

Echols argues, with no evidentiary support, that his delayed appeal to the Ohio Supreme Court and the resulting procedural default was caused by his transfer to another prison, which prevented him from receiving a letter from his attorney informing him of the appellate court decision until February 2016. (R. 12 at 7.) District courts have rejected similar unsubstantiated claims that a prison transfer constituted cause to excuse a procedural default. *See, e.g., Rahe v. Jackson*, No. 2:09 CV 98, 2010 WL 3656049, at *1 (S.D. Ohio Sept. 15, 2010) (finding "nothing in the record" supported petitioner's allegation that a loss of legal materials during a prison transfer, among other things, established cause to excuse a procedural default); *United States v. Muniz*, No. 91 C 1583, 1992 WL 82496, at *3 (N.D. Ill. Apr. 20, 1992) ("Had Muniz attempted to buttress this assertion with evidence that prison transfers had indeed prevented him from

receiving notice of the June 12, 1990 minute order, he might well have established cause excusing his procedural default.").

Nevertheless, even if Echols had provided evidence that the prison transfer prevented him from receiving his counsel's correspondence, and established cause for the default, he still could not demonstrate prejudice. Echols acknowledged in his motion for delayed appeal in the Ohio Supreme Court that his case manager provided him a copy of the state appellate court's decision eight days after it was issued, on December 18, 2015. (R. 9-1, Ex. 20 at 134.) In *Smith v. Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426 (6th Cir. 2006), the Sixth Circuit concluded that a habeas petitioner's appellate counsel's failure to inform him of a state appellate court's decision until three days before the deadline for filing an appeal of that decision constituted constitutionally deficient performance. *Id.* at 434-35. But it found no prejudice because the petitioner did not take action to appeal the decision until approximately five months after learning of the decision, well beyond the Ohio Supreme Court's forty-five-day appeal deadline. *Id.* at 435-36. The circuit court applied a:

> rebuttable presumption that if the period of time between when the defendant learned of the decision and when he or she attempted to appeal the decision is greater than the period allotted by state law for the timely filing of an appeal—here, forty-five days—the defendant fails to demonstrate that he or she "would have timely appealed" the decision but for the counsel's deficient failure to notify the defendant of the decision.

Id. at 435 ("In the absence of other circumstances hindering the defendant's ability to attempt to appeal the decision within this time frame, allowing a greater amount of time would generally bestow a windfall upon the defendant....").

Here, Echols admits he received notice of the state appellate court opinion eight days after it was issued, on December 18, 2015, leaving him thirty-seven days to perfect his appeal to the Ohio Supreme Court. He did not file his notice of appeal and motion for delayed appeal until March 9, 2016, eighty-two days later. Echols claimed in his delayed-appeal motion that he was further hampered in filing a timely appeal because the "inmate 'Law Clerks'" could not help him and he was forced to rely on "one of the inmates in the law library." (R. 9-1, Ex. 20 at 134.) However, just as there is no right to counsel beyond the first appeal of right, *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), there is no constitutional right to the effective assistance of fellow prisoners. The Supreme Court has held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds v. Smith*, 430 U.S. 817 (1977). But the *Bounds* decision "did not create an abstract, freestanding right to a law library or legal assistance." *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Furthermore, the Sixth Circuit repeatedly has rejected petitioners' attempts to fault their ignorance of the law or prison resources for failing to comply with procedural requirements for filing court pleadings. *See, e.g.*, *Bonilla,* 370 F.3d at 498 (finding a petitioner's *pro se* status, ignorance of the law and court procedural requirements, and limited time in a prison law library insufficient to excuse a procedural default). Echols, therefore, has failed to demonstrate that he "would have timely appealed" the decision but for the prison transfer, *Smith*, 463 F.3d at 435, and has not established cause and prejudice to excuse the procedural default of the claims he presents here.

Echols further contends that the default should be excused under the "fundamental miscarriage of justice," or "actual innocence," exception to the cause and prejudice requirement. (R. 12 at 7.) The Supreme Court has held that this "narrow exception" applies only where a constitutional violation has "probably resulted" in the conviction of one who is "actually innocent" of the substantive offense. *Dretke v. Haley*, 541 U.S. 386, 392 (2004). To demonstrate "actual innocence," a petitioner must show "'by clear and convincing evidence that, but for constitutional error, no reasonable juror would have found the petitioner [guilty] under the applicable state law.'" *Id.* (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)). The claim requires a showing of "new reliable evidence" and factual innocence, not mere legal insufficiency. *See Schulp v. Delo*, 513 U.S. 298, 324 (1995); *Bousley v. United States*, 523 U.S. 614, 623 (1998).

Echols presents no new evidence here to show he is actually innocent of the crimes for which he was convicted. This court finds, therefore, that each of Echols' claims is procedurally defaulted and recommends that the petition be denied on that basis.[2]

[2] In addition, Respondent argues (R. 9 at 16-17) that two of Echols' claims generally are not cognizable on federal habeas review: Ground One, regarding severance of the offenses, *see, e.g., Lamar v. Houk*, 798 F.3d 405, 428 (6th Cir. 2015) ("Misjoinder is unconstitutional only if it results in prejudice so great as to deny a defendant his due process right to a fair trial.") (citing *United States v. Lane*, 474 U.S. 438, 446 n.8 (1986)); and Ground Four, relating to sentencing, *see, e.g., Austin v. Jackson*, 213 F.3d 298, 300 (6th Cir. 2000) (observing that challenges to a state court's interpretation and application of state sentencing laws generally are not cognizable in federal habeas corpus). The court has not reached these alternative grounds, because it recommends dismissal based on procedural default.

CONCLUSION AND RECOMMENDATION

For the reasons stated above, the Court recommends that Petitioner William Echols' petition for writ of habeas corpus (R. 1) be denied in its entirety, because the claims raised are procedurally defaulted.

Date: October 22, 2018

s/ David A. Ruiz
David A. Ruiz
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Court 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 WAIVES the right to appeal the Magistrate Judge's recommendation. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).