No. 20-3500

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD BRANDON,

Petitioner-Appellant,

v.

JAY FORSHEY, Warden,

Respondent-Appellee.

ORDER

Before: WHITE, Circuit Judge.

Ronald Brandon, a pro se Ohio prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. The court construes his notice of appeal as an application for a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. 22(b)(2). Brandon also moves to proceed in forma pauperis.

A jury convicted Brandon of one count of cocaine trafficking, three counts of drug possession (cocaine, methamphetamine, and delta-9-tetrahydrocannabinol), and one count of engaging in a pattern of corrupt activity, and the trial court also convicted him of having a weapon under disability. The trial court sentenced him to fifteen years of imprisonment. The Ohio Court of Appeals affirmed, *State v. Brandon*, No. CT2017-0081, 2018 WL 4382069 (Ohio Ct. App. Sept. 7, 2018), and Brandon did not seek review by the Ohio Supreme Court. He filed an Ohio Rule of Appellate Procedure 26(B) motion to reopen his appeal, which the Ohio Court of Appeals denied, and the Ohio Supreme Court declined jurisdiction.

Brandon then filed this § 2254 petition raising these five claims: (1) his appellate counsel was ineffective for failing to raise meritorious issues; (2) his trial counsel was ineffective for failing to advance an affirmative defense; (3) the indictment was insufficient; (4) the trial court violated the Confrontation Clause by permitting evidence from a non-testifying co-defendant, without

which the State did not prove the pattern-of-corrupt-activity charge; and (5) the trial court violated his rights to due process and equal protection by using his juvenile record to support the imposition of consecutive sentences . A magistrate judge recommended denying Brandon's first claim on the merits and the others as procedurally defaulted. *Brandon v. Buchanan*, No. 2:19-CV-2487, 2020 WL 362962 (S.D. Ohio Jan. 22, 2020). The district court adopted that recommendation over Brandon's objections, denied his petition, and declined to issue a COA. *Brandon v. Buchanan*, No. 2:19-CV-2487, 2020 WL 1242901 (S.D. Ohio Mar. 16, 2020).

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court has denied the petition on procedural grounds, the petitioner must show that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

To obtain federal habeas relief, a petitioner must have first exhausted his state-court remedies by properly presenting his claim through "one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *see* 28 U.S.C. § 2254(b)(1)(A). When a petitioner has failed to do so, and when state law now prevents him from doing so, his habeas claim is procedurally defaulted. *O'Sullivan*, 526 U.S. at 848. A federal habeas court will not review a procedurally defaulted claim unless the petitioner can show either cause for the default and actual prejudice from the alleged constitutional violation, or that failure to consider the claim would create a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Brandon did not raise claims two through five in his direct appeal, and, in any event, did not seek Ohio Supreme Court review of his direct appeal. Because Ohio principles of res judicata now prevent him from returning to state court to raise these claims, *see Lundgren v. Mitchell*, 440 F.3d 754, 765 n.2 (6th Cir. 2006), the district court held that he had procedurally defaulted them. In Brandon's first claim, however, which he did litigate through the Ohio courts in his Rule 26(B) motion, he alleged that his attorney was ineffective for not raising these claims in his direct appeal, and appellate counsel's ineffectiveness in failing to raise a meritorious issue can be the cause to excuse procedural default. *See Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). That raises the question, then, whether Brandon's claims two through five are meritorious. Yet no reasonable jurist could debate the district court's determination that they are not.

The district court held that Brandon had abandoned his second claim by not presenting arguments about it in his objections to the magistrate judge's report and recommendation. *Brandon*, 2020 WL 1242901, at *2. Whether or not counsel was ineffective for failing to raise the substantive claim on direct appeal, no reasonable jurist could debate the district court's decision that Brandon abandoned the claim. *See Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012).

Brandon next claimed that the indictment was insufficient because it did not state that the methamphetamine charge was a third-degree felony, and that the trial court constructively amended the indictment by including the third-degree language in the jury instructions. *See, e.g.*, *Geboy v. Brigano*, 489 F.3d 752, 763 n.7 (6th Cir. 2007) (explaining constructive amendment). The district court held that Brandon had not shown that, under state law, the degree of the offense and the corresponding specific statutory provision must be included in the indictment. The district court also held that the indictment satisfied due process because it contained all the elements of the offense—including the amount of methamphetamine, which determined the offense degree under Ohio law. And because the indictment contained that element, the district court held that the jury instructions did not amount to a constructive amendment. Thus, because the district court determined that the indictment was adequate, the court held that Brandon's attorney was not

ineffective for failing to raise these arguments on appeal. *Brandon*, 2020 WL 1242901, at *3-4. The magistrate judge also noted that, in Ohio, an inadequate-indictment claim may not be raised for the first time on direct appeal, that Brandon's trial counsel did not object to the indictment, and thus that appellate counsel was not ineffective for failing to raise an unpreserved claim on appeal. *Brandon*, 2020 WL 362962, at *6. Given that the indictment stated the elements of the offense, gave Brandon adequate notice of the charge, and protected him from double jeopardy, *see Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005), and because Ohio law does not require more detail, Brandon has not made a substantial showing that his counsel was ineffective for not raising these arguments on appeal.

In his fourth claim, Brandon alleged that the trial court permitted evidence from a non-testifying co-defendant in violation of the Confrontation Clause and that, without that evidence, the State did not prove the pattern-of-corrupt-activity charge. The allegedly offending evidence was text messages between Brandon and another individual showing that the drug transactions were for more than $1000. The district court held that, because his trial counsel did not object to the evidence, his appellate counsel was not ineffective for failing to raise the unpreserved argument. *Brandon*, 2020 WL 1242901, at *5. Even so, the district court also held that the text messages did not contravene the Confrontation Clause because they were not testimonial. *Id.*; *see also United States v. Boyd*, 640 F.3d 657, 665 (6th Cir. 2011) (holding that "statements to a companion" were nontestimonial because "a reasonable person in [the speaker's] position would not have anticipated the use of the statements in a criminal proceeding"). Because the claim was unpreserved and unmeritorious, Brandon has not made a substantial showing that his appellate attorney was ineffective for not raising that argument on appeal.

In his final claim, Brandon asserted that the trial court violated his rights to due process and equal protection by using his juvenile record to support the imposition of consecutive sentences. Brandon cited *State v. Hand*, 73 N.E.3d 448, 459 (Ohio 2016), which held that a prior juvenile conviction cannot be used to enhance "either the degree of or the sentence for a subsequent offense committed as an adult." He later cited *Alleyne v. United States*, 570 U.S. 99, 117 (2013),

which held that any fact that increases a statutory minimum sentence must be found by a jury beyond a reasonable doubt. The district court rejected these arguments because Brandon's sentence was not enhanced and his statutory minimum was not increased on account of his juvenile record; rather, the trial court merely chose "within the range of available sentences" for his offenses based on several factors, including his juvenile record. *Brandon*, 2020 WL 1242901, at *5. Because Brandon did not make a substantial showing that the trial court's sentence was improper, no reasonable jurist could debate the district court's determination that counsel was not ineffective for failing to raise that claim on appeal.

In sum, Brandon has not made a substantial showing that his appellate attorney was ineffective for not raising on direct appeal his second, third, fourth, and fifth habeas claims. Thus, no reasonable jurist could debate the district court's denial of those claims as procedurally defaulted.

Accordingly, Brandon's COA application is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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

RONALD BRANDON,

Petitioner, : Case No. 2:19-cv-2487

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

TIM BUCHANAN, Warden,
Noble Correctional Institution,

:

Respondent.

OPINION AND ORDER

This habeas corpus case is before the Court on Petitioner's Objections (ECF No. 15) to the Magistrate Judge's recommendation that the case be dismissed with prejudice (Report and Recommendations ("Report", ECF No. 14). As required by Fed.R.Civ.P. 72(b), the District Judge has reviewed *de novo* those portions of the Report to which specific objection has been made and rules on those objections as follows.

Litigation History

In March 2017 Petitioner was indicted by the Muskingum County grand jury on charges of trafficking in drugs (cocaine)(Count One:); possession of drugs (cocaine)(Count Two); possession of drugs (methamphetamine)(Count Three); possession of drugs (delta-9-tetrahydrocannabinol)(Count Four); engaging in a pattern of corrupt activity (Count Five); and

having a weapon under disability (Count Six)(State Court Record, ECF No. 10, PageID 49-50). A jury convicted Brandon on the first five counts and the trial judge found him guilty on the weapons charge after a bench trial (State Court Record, ECF No. 10, PageID 53-54). He was sentenced to concurrent terms of thirty months and eleven months for the drug charges, ten years consecutive for the pattern of corrupt activity charge, and a further thirty months for the weapons charge, for an aggregate prison term of fifteen years. *Id.* at PageID 56.

Brandon appealed to the Ohio Fifth District Court of Appeals raising as his sole assignment of error that the record did not support consecutive sentences. The Fifth District affirmed. *State v. Brandon*, 2018-Ohio-3701 (Ohio App. 5th Dist. Sept. 7, 2018). It then also denied Brandon's motion to file a supplemental brief *pro se* (State Court Record, ECF No. 10, PageID 108). Brandon did not appeal to the Supreme Court of Ohio.

On October 17, 2018, Brandon filed an application under Ohio R. App. P. 26(B) to reopen his direct appeal to assert as ineffective assistance of appellate counsel the omission of the following assignments of error:

> 1. The[] appellant received ineffective assistance of trial counsel pursuant to the failure to advance the affirmative defense of consent, as to Count One of the indictment.
>
> 2. The indictment failed to charge a third-degree possession of drugs for Count Three.
>
> 3. Appellant was denied due process of law, which is inalienable under the Fifth Amendment, when he was convicted of engaging in a pattern of corrupt activity without proof of every element beyond a reasonable. [*sic*].
>
> 4. Use of appellant's juvenile record to support the imposition of consecutive sentences denied due process and equal protection of the law, thereby constituting a reversible constitutional error.

(State Court Record, ECF No. 10, PageID 112-17). The Fifth District denied the application, *id.*

at PageID 127-28, and the Supreme Court of Ohio declined review. *Id.* at PageID 158.

Brandon then filed the instant habeas corpus petition pleading the following grounds for relief:

> **Ground One:** A criminal defendant is denied effective assistance of appellate counsel where counsel fails to raise "dead-bang" winners that would have strongly changed the outcome of appeal.
>
> **Ground Two:** A criminal defendant receives ineffective assistance of trial counsel where a failure to advance an affirmative defense substantially prejudices him to conviction without sufficient evidence.
>
> **Ground Three:** An indictment is sufficient in charging an offense if it recites the language of the relevant criminal statute, but fails to aggravate an offense if it lacks the degree of the offense and specific numerical designation.
>
> **Ground Four:** When evidence gained from a non-testifying co-defendant is used against the accused, any conviction underscored by this evidence must be reversed pursuant to the Confrontation Clause of the 6th U.S.C.A.
>
> **Ground Five:** Use of a criminal defendant's juvenile record to support imposition of consecutive sentences denies due process and equal protection of the law.

(Petition, ECF No. 1, PageID 3-6.)

Analysis

The Report concluded Grounds Two, Three, Four, and Five could have been raised on direct appeal and were procedurally defaulted because they had not been raised in that manner (Report, ECF No. 14, PageID 768-78.) Because the omitted assignments of error were without merit, the Report concluded that the Petition should also be dismissed on the merits.

Brandon raises three objections which are discussed in turn[1].

Insufficiency of Count Three of the Indictment

Brandon objects that his "conviction on Count three of the indictment did not constitute a third-degree felony, because key ingredients were missing and charge was constructively amended." (Objections, ECF No. 15, PageID 781. He asserts the "state appellate court never adjudicated the merits of this claim, and only summarily-denied ineffective assistance of appellate counsel claim. . ." *Id.*

Brandon is correct that this claim was not decided on the merits on direct appeal – because it was not assigned as error in that appeal. *Brandon*, 2018-Ohio-3701 (Ohio App. 5th Dist. Sept. 7, 2018); see also Merit Brief of Appellant (State Court Record, ECF No. 10, PageID 68). The Report is correct that this is a claim which could have been adjudicated on the face of the appellate record. Failure to raise it in that way therefore constitutes a procedural default which prevents merits consideration in habeas unless Brandon can show excusing cause and prejudice.

Brandon claims that omission of this as an assignment of error constituted ineffective assistance of appellate counsel and he raised that claim in the appropriate way under Ohio law, to wit, by filing an application to reopen under Ohio R. App. P. 26(B). Although the Fifth District's rejection of this claim was in summary form, it was a rejection on the merits and cited the relevant federal standard for ineffective assistance of appellate counsel under *Strickland v. Washington,* 466 U.S. 668 (1984)(Judgment Entry, State Court Record, ECF No. 10, PageID 127-28.)

As the Report points out, this Court is bound under Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA") to defer to a state court

[1] Brandon does not argue his claim that a consent defense should have been raised.

merits decision of a federal constitutional question unless that decision is objectively unreasonable (Report, ECF No. 14, PageID 771). The Report found the Fifth District's decision was completely reasonable because the omitted assignment of error was entirely without merit. *Id.* at PageID 774-76.

Brandon objects relying on *United States v. Cook*, 84 U.S. 168 (1872), and *United States v. Cruikshank*, 92 U.S. 542 (1875), for the proposition that "every ingredient [element] which composes the offense" must be in the charging instrument (Objections, ECF No. 15, PageID 781). Here he says

> Ohio law provides that the enhancement factors of the degree of the offence and specific statutory subsection must be listed in the text or body of the indictment, otherwise thee [sic] defendant has only been charged with the least degree of the offence. *State v. Fairbanks* (2007), 172 OApp3d 766, 1124. With these ingredients not being listed (Doc. #: 10, PAGEID#: 120-22), Brandon was only charged with a fifth-degree violation of O.R.C. §2925.11 in Count Three.

Id.

As the Report notes, Count Three of the Indictment reads:

> THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about 05/26/2016, in the County of Muskingum, Ohio, Ronald J. Brandon did knowingly obtain, possess, or use Methamphetamine, a Schedule II controlled substance, in an amount greater than the bulk amount but less than five (5) times the bulk amount; in violation of Ohio Revised Code, Title 29, Section 2925.11(A) and against the peace and dignity of the State of Ohio.

(Report, ECF No. 14, PageID 775, citing State Court Record, ECF No. 10, PageID 49.) The Indictment plainly charges Brandon with possession of greater than the bulk amount of methamphetamine but less than five times bulk and also alleges methamphetamine is a Schedule II drug. Ohio Revised Code § provides that a person who possesses a Schedule II controlled substance in that amount is guilty of a third-degree felony, but the face of the Indictment does not say that. The Magistrate Judge thus

understood Brandon's claim to be

> that the failure to state of the face of Count Three that it is for a third-degree felony and the failure to specify the Revised Code section that makes it so (Ohio Revised Code § 2925.11(C)(1)(b)) renders the Indictment void and appellate counsel should have raised that as an assignment of error.

Id. at PageID 775. Brandon's Objections confirm that this is in fact the claim he is making.

Brandon's claim is wrong even as a matter of Ohio law. The case on which he relies, *State v. Franklin*, 172 Ohio App. 3d 766 (12th Dist. 2007), held that the State may not amend an indictment on the morning of trial to add an element which elevates the degree of the offense from a misdemeanor to a felony. Doing so was held to violate the grand jury clause of the Ohio Constitution. The case does not hold that either the degree of the offense or the statutory citation must appear on the fact of the indictment, even as a matter of Ohio law.

There is no federal constitutional right to be indicted by a grand jury for a state felony offense. The Grand Jury Clause of the Fifth Amendment is not applicable to the States. *Hurtado v. California*, 110 U.S. 516 (1884); *Branzburg v. Hayes*,408 U.S. 665, 687-88 n. 25 (1972); *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Williams v. Haviland*, 467 F.3d 527 (6th Cir. 2006)(*Apprendi* does not change this result). "[T]here is no constitutional right in a state prosecution to a grand jury indictment with particular specificity." *Id.* at 534, citing *Rose v. Mitchell*, 443 U.S. 545, 557, n. 7 (1979).

Russell v. United States, 369 U.S. 749 (1962), holds the sufficiency of an indictment in federal court is to be measured by the following criteria:

> These criteria are, first, whether the indictment "contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet,'" and, secondly, "'in case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.'"

369 U.S. at 763-64. While the right to grand jury indictment has not been extended to the States, these criteria are applicable as a matter of due process. *Valentine v. Konteh,* 395 F.3d 626, 631 (6th Cir. 2005), *citing De Vonish v. Keane,* 19 F.3d 107, 108 (2nd Cir. 1994); *Fawcett v. Bablitch,* 962 F.2d 617, 618 (7th Cir. 1992); see also *Isaac v. Grider,* 211 F.3d 1269, 2000 WL 571959, at *4 (6th Cir. 2000); *Parks v. Hargett,* 1999 U.S. App. LEXIS 5133, 1999 WL 157431, at *3 (10th Cir. 1999).

Neither the degree of the offense charged nor the citation to the statute that makes it a crime or prescribes the punishment is an "element" of the crime. As a matter of due process, every element of a crime must be proven beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979). In *Apprendi v. New Jersey,* 530 U.S. 466 (2000), the Supreme Court held that "element" includes every fact which must be proved to increase the maximum punishment to which a defendant is liable. In *Blakely v. Washington,* 542 U.S. 296 (2004), the Court held any fact which increases the sentence beyond a legislatively-mandated guideline, even if within a statutory maximum for the offense, must be pled as an element in the indictment and proved to the jury beyond a reasonable doubt. To the extent that *Cook* and *Cruikshank* stand for this proposition – that the charging instrument must contain all elements of the offense – they continue to be good law. But nothing in this line of cases suggests that the degree of the offense (as opposed to the facts that elevate a case to a particular degree) or the statutory citation must appear on the face of the indictment.

Brandon's claim that assigning a degree to the possession of methamphetamine in the jury instructions created a constructive amendment of the indictment (Objections, ECF No. 15, PageID 781) is also without merit. The element required to be proved to elevate Count Three from a fifth-degree felony to a third-degree felony was present on the face of the Indictment, to wit, that

Brandon possessed more than the bulk amount but less than five times bulk.

Because Count Three was sufficient to charge the crime of which Brandon was convicted, it was not ineffective assistance of appellate counsel to fail to claim otherwise. Ground Three of the Petition is without merit. For that reason, Ground One is also without merit.

Insufficiency of the Evidence to Prove Engaging in a Pattern of Corrupt Activity

In Ground Four Brandon claims that evidence from a non-testifying co-defendant should have been excluded under the Confrontation Clause and without this evidence, there was not enough evidence to convict him of engaging in a pattern of corrupt activity.

This claim, although available on direct appeal, was not raised there. Brandon asserted in his 26(B) Application that it was ineffective assistance of appellate counsel to fail to do so. The Report concluded that an assignment of error to that effect would not have been successful because there had been no contemporaneous objection to the asserted Confrontation Clause violation (Report, ECF No. 14, PageID 776-77).

Brandon objects first of all that the proper time to raise a Confrontation Clause objection is in a motion for judgment of acquittal rather than when the evidence is offered (Objections, ECF No. 15, PageID 782, citing *Glasser v. United States*, 315 U.S. 60 (1942). *Glasser* says nothing of the kind and did not involve a Confrontation Clause question. There is no exception in the Ohio contemporaneous objection rule to allow a defense attorney to withhold a Confrontation Clause objection until a Rule 29 motion; by that time the jury would have heard the offending evidence, defeating the purpose of the contemporaneous objection rule.

Brandon's Confrontation Clause objection, as the Court understands it, is that the jury

could not have made a finding of engaging in a pattern of corrupt activity without evidence from text messages he exchanged with April Jones showing drug purchases in excess of $1,000. As the Report found, because of a lack of contemporaneous objection, this claim would not have been heard on direct appeal and it was thus not ineffective assistance of appellate counsel to fail to raise this as an assignment of error (Report, ECF No. 14, PageID 777).

But even a contemporaneous objection on Confrontation Clause grounds would have been without merit. Although April Jones did not testify, the State did not rely on any out-of-court testimonial statement by her. Instead, the State proved the value of drugs Brandon sold Jones exceeded $1,000 by the content of text messages between the two of them about the prices of drugs Jones was buying (See Transcript, State Court Record, ECF No. 10-1, PageID 589-90). Although these are out-of-court statements offered for the truth of the content, they are not testimonial in nature[2] and would have been admissible as admissions against penal interest by Jones.

Read the back →

Use of Brandon's Juvenile Offenses Record to Support Imposition of Consecutive Sentences

Brandon's fourth omitted assignment of error was that appellate counsel did not plead that reliance by the sentencing judge on juvenile conviction to justify consecutive sentences was unconstitutional. The Report found that there was no authority for this proposition (Report, ECF No. 14, PageID 777-78.)

[2] That is, these are not recorded statements by Jones attempting to implicate Brandon. Rather, they are part of the drug transactions between the two of them. The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant has a prior opportunity for cross-examination..." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)(emphasis supplied). In *Ohio v. Clark*, 576 U.S. ___, 135 S. Ct. 2173, 192 L.Ed. 2d 306 (2015), the Supreme Court held a statement is testimonial if its primary purpose is to assist law enforcement.

Brandon objects because this reliance increases the sentencing range, it runs afoul of the holding in *Alleyne v. United States,* 570 U.S. 99 (2013), that any fact that makes a defendant eligible for the mandatory minimum sentence for an offense is an "element" which must be submitted to the jury (Objections, ECF No. 15, PageID 783). On the contrary, the existence of Brandon's juvenile record did not make him eligible for consecutives sentences; it was his multiple convictions that did that. The trial judge merely considered the juvenile record as a factor causing him to choose within the range of available sentences. Imposition of consecutive sentences for multiple offenses, based on facts found by the court rather than the jury, does not violate constitutional right to jury trial, since the jury historically played no role in determining consecutive or concurrent sentences and state had sovereign authority to administer its penal system. *Oregon v. Ice*, 555 U.S. 160 (2009).

Conclusion

Based on the foregoing analysis, the Court OVERRULES Petitioner's Objections and ADOPTS the Magistrate Judge's Report and Recommendations. The Petition herein will be dismissed with prejudice. The Clerk will enter judgment to that effect. Because reasonable jurists would not disagree with this conclusion, Petitioner is denied a certificate of appealability and the Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

March 16th
February ___, 2020.

Edmund A. Sargus, Jr.
United States District Judge

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

RONALD BRANDON,

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- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

TIM BUCHANAN, Warden,
Noble Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

This is a habeas corpus action brought *pro se* by Petitioner Ronald Brandon to obtain relief from his convictions in the Muskingum County Court of Common Pleas on charges of engaging in a pattern of corrupt activity, possession of and trafficking in drugs, and having weapons while under disability.

Upon filing of the Petition (ECF No. 1), Magistrate Judge Chelsey Vascura ordered Respondent to file an answer and the state court record (ECF No. 4). Respondent has done so (State Court Record, ECF No. 10; Return, ECF No. 11). Petitioner has now filed a Reply (ECF No. 12), rendering the case ripe for decision.

The Magistrate Judge reference in the case was recently transferred to the undersigned to help balance the Magistrate Judge workload in the District (Transfer Order, ECF No. 13). The case remains assigned to District Judge Sargus for final decision.

Litigation History

In March 2017 the Muskingum County grand jury indicted Brandon on six counts: Count One: trafficking in drugs (cocaine), a fifth-degree felony in violation of Ohio Revised Code § 2925.03(A)(1); Count Two, possession of drugs (cocaine), a fifth-degree felony in violation of Ohio Revised Code § 2925.11(A); Count Three, possession of drugs (methamphetamine), a third-degree felony in violation of Ohio Revised Code § 2925.11(A); Count Four, possession of drugs (delta-9-tetrahydrocannabinol), a fifth-degree felony in violation of Ohio Revised Code § 2925.11(A); Count Five, engaging in a pattern of corrupt activity, a first-degree felony in violation of Ohio Revised Code § 2923.32(A)(1); and Count Six, having a weapon under disability, a third-degree felony in violation of Ohio Revised Code § 2923.13(A)(3) (State Court Record, ECF No. 10, PageID 49-50).

Brandon tried the first five counts to a jury, which convicted him on all five. The trial judge found him guilty on Count Six, the weapons charge, after a bench trial (State Court Record, ECF No. 10, PageID 53-54). He was sentenced to concurrent terms of thirty months and eleven months for the drug charges, ten years consecutive for the pattern of corrupt activity charge, and a further thirty months for the weapons charge, for an aggregate prison term of fifteen years. *Id.* at PageID 56.

Brandon appealed to the Ohio Fifth District Court of Appeals raising as his sole assignment of error that the record did not support consecutive sentences. The Fifth District affirmed. *State v. Brandon*, 2018-Ohio-3701 (Ohio App. 5th Dist. Sept. 7, 2018). It then also denied Brandon's motion to file a supplemental brief *pro se* (State Court Record, ECF No. 10, PageID 108). Brandon did not appeal to the Supreme Court of Ohio.

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> 2. The indictment failed to charge a third-degree possession of drugs for Count Three.
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> 3. Appellant was denied due process of law, which is inalienable under the Fifth Amendment, when he was convicted of engaging in a pattern of corrupt activity without proof of every element beyond a reasonable. [*sic*].
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> 4. Use of appellant's juvenile record to support the imposition of consecutive sentences denied due process and equal protection of the law, thereby constituting a reversible constitutional error.

(State Court Record, ECF No. 10, PageID 112-17). The Fifth District denied the application, *id.* at PageID 127-28, and the Supreme Court of Ohio declined review. *Id.* at PageID 158.

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> by this evidence must be reversed pursuant to the Confrontation Clause of the 6th U.S.C.A.
>
> **Ground Five:** Use of a criminal defendant's juvenile record to support imposition of consecutive sentences denies due process and equal protection of the law.

(Petition, ECF No. 1, PageID 3-6.)

Analysis

Petitioner's Grounds Two, Three, Four, and Five were capable of adjudication on the record before the Fifth District on direct appeal, but none of them were raised in that forum. Based on these procedural facts, which Brandon does not contradict, all four of these claims are subject to procedural default.

The procedural default doctrine in habeas corpus is described by the Supreme Court as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see also Simpson v. Jones*, 238 F.3d 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional rights claim he could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107, 110 (1982). "Absent cause and prejudice, 'a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal

habeas corpus review.'" *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000), quoting *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996); accord: *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle*, 456 U.S. at 110; *Wainwright*, 433 U.S. at 87.

> [A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule. E.g., *Beard v. Kindler*, 558 U.S. 53, 55, 130 S.Ct. 612, 175 L.Ed.2d 417 (2009). This is an important "corollary" to the exhaustion requirement. *Dretke v. Haley*, 541 U.S. 386, 392, 124 S.Ct. 1847, 158 L.Ed. d 659 (2004). "Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address" the merits of "those claims in the first instance." *Coleman* [*v. Thompson*], 501 U.S. [722,] 731-732, 111 S.Ct. 2546, 115 L.Ed.2d 640 [(1991)]. The procedural default doctrine thus advances the same comity, finality, and federalism interests advanced by the exhaustion doctrine. See *McCleskey v. Zant*, 499 U.S. 467, 493, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991).

Davila v. Davis, 137 S. Ct. 2058, 2064 (2017).

The Sixth Circuit Court of Appeals requires a four-part analysis ("*Maupin* test") when the State alleges a habeas claim is precluded by procedural default. *Barton v. Warden, S. Ohio Corr. Facility,* 786 F.3d 450, 464 (6th Cir. 2015), *Guilmette v. Howes,* 624 F.3d 286, 290 (6th Cir. 2010) (*en banc*); *Eley v. Bagley*, 604 F.3d 958, 965 (6th Cir. 2010); *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998), *citing Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

> First the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
>
> . . . .
>
> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).

> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim.
>
> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin, 785 F.2d at 138. A habeas petitioner can overcome a procedural default by showing cause for the default and prejudice from the asserted error. *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015).

When an issue that could have been decided on direct appeal is omitted from that proceeding, Ohio's criminal *res judicata* doctrine prevents Ohio courts from later consideration of that issue. That doctrine, enunciated in *State v. Perry,* 10 Ohio St. 2d 175 (1967), has repeatedly been held to be "an adequate and independent state ground barring federal habeas review." *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007) (collecting cases). The Ohio courts have consistently enforced the rule. *See, e.g.*, *State v. Cole*, 2 Ohio St. 3d 112 (1982); *State v. Ishmail*, 67 Ohio St. 2d 16 (1981).

One way to show excusing cause and prejudice for a procedural default is to show that the default was caused by the constitutionally ineffective assistance of counsel. Attorney error amounting to ineffective assistance of counsel can constitute cause to excuse a procedural default. *Murray v. Carrier,* 477 U.S. 478, 488 (1985); *Howard v. Bouchard,* 405 F.3d 459, 478 (6th Cir. 2005); *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999); *Gravley v. Mills,* 87 F.3d 779, 785 (6th Cir. 1996). However, *Murray* also holds that the exhaustion doctrine "generally requires that a claim of ineffective assistance of counsel be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default in federal habeas proceedings."

477 U.S. at 489.

In his effort to show excusing cause and prejudice regarding Grounds Two, Three, Four, and Five, Brandon claims those grounds were omitted on direct appeal because he received ineffective assistance of appellate counsel in that proceeding. Such a claim cannot be presented in federal court unless it has been previously exhausted in the state courts. *Edwards v. Carpenter*, 529 U.S. 446 (2000). Brandon did exhaust his ineffective assistance of appellate counsel claim in exactly the way required by Ohio law, to wit, by submitting an application for reopening the direct appeal under Ohio R.App.P. 26(B), Ohio's principal vehicle for adjudicating ineffective assistance of appellate counsel claims.

A state court decision on the merits of an ineffective assistance of appellate counsel claim is treated for habeas corpus purposes in the same way as any other state court decision on federal constitutional questions later presented in federal court. That is, such a decision is entitled to deference unless it is contrary to or any objectively unreasonable application of clearly established Supreme Court precedent. 28 U.S.C. § 2254(d)(1); *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 785 (2011); *Brown v. Payton,* 544 U.S. 133, 140 (2005); *Bell v. Cone*, 535 U.S. 685, 693-94 (2002); *Williams (Terry) v. Taylor,* 529 U.S. 362, 379 (2000). Deference is also due under 28 U.S.C. § 2254(d)(2) unless the state court decision was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Brandon included in his 26(B) Application the four omitted assignments of error quoted above in the Litigation History section. The Fifth District decided the 26(B) Application on the merits[1] (State Court Record, ECF No. 10, PageID 127-28). It applied the correct federal standard

[1] Brandon concedes the Rule 26(B) Application was decided on the merits, but asserts he was entitled to findings of fact and conclusions of law "[b]ecause App.R. 26(B) proceedings are the equivalent of post-conviction relief proceedings before a trial court[.]" (Reply, ECF No. 12, PageID 758.) That is incorrect. Post-conviction relief proceedings are governed by statute, Ohio Revised Code § 2953.21-.23, and it is the legislature that prescribed findings

for ineffective assistance of appellate counsel derived from *Strickland v. Washington,* 466 U.S. 668 (1984), which the Supreme Court has expressly held applies to ineffective assistance of appellate counsel claims. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Burger v. Kemp,* 483 U.S. 776 (1987). Although the Fifth District's decision was summary, it was clearly on the merits and not on some procedural issue. A state court decision can constitute an "adjudication on the merits" entitled to deference under 28 U. S.C. § 2254(d)(1) even if the state court does not explicitly refer to the federal claim or to relevant federal case law. In *Harrington v. Richter*, 562 U.S. 86 (2011), the Supreme Court held:

> By its terms § 2254(d) bars relitigation of any claim "adjudicated on the merits" in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2). There is no text in the statute requiring a statement of reasons. The statute refers only to a "decision," which resulted from an "adjudication." As every Court of Appeals to consider the issue has recognized, determining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state court's reasoning. *See Chadwick v. Janecka*, 312 F.3d 597, 605-606 (CA3 2002); *Wright v. Secretary for Dept. of Corrections*, 278 F.3d 1245, 1253-1254 (CA11 2002); *Sellan v. Kuhlman*, 261 F.3d 303, 311-312 (CA2 2001); *Bell v. Jarvis*, 236 F.3d 149, 158-162 (CA4 2000) (en banc); *Harris v. Stovall,* 212 F.3d 940, 943, n. 1 (CA6 2000); *Aycox v. Lytle,* 196 F.3d 1174, 1177-1178 (CA10 1999); *James v. Bowersox*, 187 F.3d 866, 869 (CA8 1999). And as this Court has observed, a state court need not cite or even be aware of our cases under § 2254(d). *Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam). Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief. This is so whether or not the state court reveals which of the elements in a multipart claim it found insufficient, for § 2254(d) applies when a "claim," not a component of one, has been adjudicated.

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and conclusions in those proceedings. Ohio R.App.P. 26(B) is entirely the product of the Supreme Court of Ohio's rulemaking process under the Modern Courts Amendment. See *State v. Murnahan*, 63 Ohio St. 3d 60 (1992), superseded in part by Ohio R.App. 26(B) as recognized in *State v. Davis*, 119 Ohio St. 3d 422, 2008-Ohio-4608, ¶¶ 13-16.

Id. at 98. "This Court now holds and reconfirms that § 2254(d) does not require a state court to give reasons before its decisions can be deemed to have been 'adjudicated on the merits.'" *Id.* at 100. Petitioner's burden, then, is to show the Fifth District's decision on his ineffective assistance of appellate counsel claim is not entitled to deference under 28 U.S.C. § 2254(d)(1) or (2).

To evaluate a claim of ineffective assistance of appellate counsel, then, the court must assess the strength of the claim that counsel failed to raise. *Henness v. Bagley*, 644 F.3d 308, 317 (6th Cir. 2011), *citing Wilson v. Parker*, 515 F.3d 682, 707 (6th Cir. 2008). Counsel's failure to raise an issue on appeal amounts to ineffective assistance only if a reasonable probability exists that inclusion of the issue would have changed the result of the appeal. *Id.*, *citing Wilson.* The attorney need not advance every argument, regardless of merit, urged by the appellant. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." *Jones v. Barnes*, 463 U.S. 745, 751-752 (1983). Effective appellate advocacy is rarely characterized by presenting every non-frivolous argument which can be made. *Smith v. Murray*, 477 U.S. 527 (1986); *Joshua v. DeWitt*, 341 F.3d 430, 441 (6th Cir. 2003).

Brandon asserts his omitted assignments were "dead-bang winner[s]." (Reply, ECF No. 12, PageID 758). The strength of Brandon's omitted assignments of error will be evaluated in turn.

Ineffective assistance of trial counsel for failure to raise a defense of consent

Brandon first argued to the Fifth District that he received ineffective assistance of trial counsel when his trial attorney failed to pursue an affirmative defense of consent. He asserted that

the only person to whom he directly sold drugs consented to the sale, he could have used that consent as an affirmative defense. (State Court Record, ECF No. 10, PageID 112-13, citing *Sorrells v. United States,* 287 U.S. 435 (1932); *State v. Mehozonek,* 8 Ohio App. 3d 271 (8th Dist. 1983)).

In *Mehozonek* a manufacturer staged five fake thefts from its plant to test the loyalty of its security guards who were indicted for allowing the thefts to occur. The convictions were reversed because the property owner planned the crime. 8 Ohio App. 3d at 271-72. In essence, the employer consented to the taking of its property, and lack of consent of the owner has always been an element of theft. *Id.* at 274. *Sorrells* is an entrapment case; the Supreme Court held there was sufficient evidence of entrapment to submit that affirmative defense to the jury. 287 U.S. at 441.

Brandon does not argue that he presented any sufficient evidence of entrapment and he also presents no case authority holding that consent is a defense in a drug trafficking case. Such cases regularly involve willing buyers and sellers and it is unlawful both to sell and to buy controlled substances outside the prescription system. It cannot be ineffective assistance of trial counsel to fail to present a defense that the courts have never accepted. *A fortiori* it cannot be ineffective assistance of appellate counsel to fail to raise such an omission as ineffective assistance of trial counsel.

Ineffective Assistance of Trial Counsel to Fail to Raise a Claim that the Indictment Failed to Charge Third-Degree Possession of Drugs in Count Three

Brandon's argument is that the Indictment at Count Three, failed to declare a felony level [and] it didn't include the numerical designation for a violation of the third degree." He asserted

these omissions effectively deprive the trial court of subject matter jurisdiction. (State Court Record, ECF No. 10, PageID 114, citing *State v. Cimpritz,* 158 Ohio St. 490 (1953)).

Count Three of the Indictment reads:

> THE JURORS OF THE GRAND JURY of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that on or about 05/26/2016, in the County of Muskingum, Ohio, Ronald J. Brandon did knowingly obtain, possess, or use Methamphetamine, a Schedule II controlled substance, in an amount greater than the bulk amount but less than five (5) times the bulk amount; in violation of Ohio Revised Code, Title 29, Section 2925.11(A) and against the peace and dignity of the State of Ohio.

(State Court Record, ECF No. 10, PageID 49.) Ohio Revised Code § 2925.11(A) provides "No person shall knowingly obtain, possess, or use a controlled substance." Ohio Revised Code § 2925.11(B) provides exceptions. Ohio Revised Code § 2925.11(C) is the penalty provision and provides that if a person violates Ohio Revised Code § 2925.11(A) by possessing a Schedule I or II controlled substance (with exceptions not applicable here), the person is guilty of aggravated possession of drugs, a felony of the third degree, if the amount is greater than the defined bulk amount of the drug but less than five times bulk. Ohio Revised Code § 2925.11(C)(1)(b). Count Three of the Indictment plainly advised Brandon that he was charged with possession of great than a bulk amount of a Schedule II controlled substance, Methamphetamine, on a particular date. As the Magistrate Judge understands Brandon's argument, it is that the failure to state of the face of Count Three that it is for a third-degree felony and the failure to specify the Revised Code section that makes it so (Ohio Revised Code § 2925.11(C)(1)(b)) renders the Indictment void and appellate counsel should have raised that as an assignment of error.

A judgment of conviction based on an indictment which does not charge an offense is, under Ohio law, void for lack of jurisdiction of the subject matter and may be successfully attacked either on direct appeal to a reviewing court or by a collateral proceeding. *State v. Cimpritz,* 185 Ohio St. 490, 490-91 (1953), paragraph six of the syllabus. However, in *Midling v. Perrini*, 14 Ohio St. 2d 106 (1968), the Supreme Court of Ohio overruled *Cimpritz* and held that failure to object that an indictment does not state an offense must be raised in the trial court and cannot be raised for the first time on appeal because it does not deprive the trial court of subject matter jurisdiction. *See, e.g., State v. Butcher*, No. 2019-P-0005, 2019-Ohio-3728, ¶ 26 (Ohio App. 11th Dist. Sept. 16, 2019).. Without attempting to determine if omitting the degree of any offense or the numerical designation of the appropriate penalty section constitutes omission of an "element" under Ohio law, the claim could not have been raised by appellate counsel because it was not raised in the trial court. Failure to raise on direct appeal a claim that is not cognizable on appeal is plainly not ineffective assistance of appellate counsel.

Conviction for Engaging in a Pattern of Corrupt Activity Without Proof of Every Element

Brandon's third omitted assignment of error was that he was convicted of engaging in a pattern of corrupt activity without proof of every element beyond a reasonable doubt (State Court Record, ECF No. 10, PageID 114-16). In his argument to the Fifth District, he somehow conflated the burden of proof argument with a denial of confrontation rights with April Jones. It appears that he is claiming that without evidence from text messages he exchanged with April Jones, the State did not prove the value of the drugs he sold her exceeded one thousand dollars (See Ohio Revised Code § 2923.31(I)(2)(c)). In his Reply in this Court, he argues "there is a nexus between

confrontation and sufficiency . . ." (ECF No. 12, PageID 760-61), but he does not state what that nexus is.

The jury returned a finding that that value of the contraband possessed, sold, or purchased by Brandon exceeded one thousand dollars (Trial Tr., ECF No. 10-1, PageID 709). Counsel made no objections to the jury instructions as given. *Id.* at PageID 705. The instruction on pattern of corrupt activity occurs at PageID 693-94 and requires the finding of two predicate acts including trafficking in cocaine, a felony of the first degree. Thus the jury was required to make—and did make—the finding Brandon says was necessary. If his claim is that they could not make that finding based on the evidence before them because of a violation of the Confrontation Clause, that claim is forfeited by lack of any contemporaneous objection. In other words, evidence admitted in arguable violation of the Confrontation Clause still "counts" toward the sufficiency of the evidence and the argument is lost if not made at the time of admission of the evidence.

Because there was no contemporaneous objection on Confrontation Clause grounds, it was not ineffective assistance of appellate counsel to fail to raise a Confrontation Clause claim on direct appeal, much less an insufficiency of the evidence claim which would have depended on success of the Confrontation Clause claim.

Use of Brandon's Juvenile Offenses Record to Support Imposition of Consecutive Sentences

In his fourth omitted assignment of error, Brandon claimed his constitutional rights to due process and equal protection were violated when the trial judge relied in part on his record of juvenile offenses to justify imposing consecutive sentences ((State Court Record, ECF No. 10, PageID 116-17, citing *State v. Hand,* 149 Ohio St. 3d 94, 2016-Ohio-5504).

Brandon fundamentally misreads Hand. In that case the Supreme Court of Ohio held that

Ohio Revised Code § 2901.08(A) violates both the Ohio and Federal Constitutions "because it is fundamentally unfair to treat a juvenile adjudication as a previous conviction that enhances either the degree of or the sentence for a subsequent offense committed as an adult—A juvenile adjudication cannot be used to increase a sentence beyond a statutory maximum or mandatory minimum." 2016-Ohio-5504, at ¶ 37. That is simply not what happened here. The trial judge did consider Brandon's record of juvenile offenses for the purpose of deciding what sentence to impose within the range of sentences authorized by the jury verdicts. He did not rely on the juvenile record to enhance the degree of any of the offenses of conviction.

Neither the *Hand* court nor any other court to the Magistrate Judge's knowledge has held that a juvenile offense record cannot be considered in choosing an appropriate sentence from among the sentences authorized by the jury verdicts. Brandon cited no such case law to the Fifth District and he adds nothing to his *Hand* citation in his Reply (ECF No. 12, PageID 761-62). Because an assignment of error based on *Hand* would have been unsuccessful, it cannot have been ineffective assistance of appellate counsel to fail to plead such an assignment.

Conclusion

As the foregoing analysis demonstrates, the Fifth District's decision on Brandon's Rule 26(B) Application was completely reasonable because it rejected four assignments of error that would not have been successful if raised. The Fifth District's Rule 26(B) decision is therefore entitled to deference under 28 U.S.C. § 2254(d)(1). Brandon has therefore failed to show cause and prejudice to excuse his procedural default in presenting Grounds for Relief Two, Three, Four, and Five to the state courts. By the same reasoning, his Ground One is without merit.

The Magistrate Judge therefore respectfully recommends that the Petition herein be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

January 22, 2020.

s/ *Michael R. Merz*
United States Magistrate Judge

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.