No. 20-3541

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 30, 2020
DEBORAH S. HUNT, Clerk

TANELLE M. JEFFERSON,

Petitioner-Appellant,

v.

STATE OF OHIO,

Respondent-Appellee.

ORDER

Before: LARSEN, Circuit Judge.

Tanelle M. Jefferson, a pro se Ohio prisoner, appeals from the district court's judgment dismissing his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. This court construes Jefferson's notice of appeal as an application for a certificate of appealability ("COA"). Jefferson also moves for permission to proceed in forma pauperis ("IFP").

In 2016, an Ohio jury convicted Jefferson of felonious assault with a firearm specification and having weapons while under disability, and the trial court sentenced him to twelve and a half years of imprisonment. On direct appeal, the Ohio Court of Appeals affirmed his convictions and sentence, *State v. Jefferson*, No. L-16-1182, 2017 WL 3575607 (Ohio Ct. App. Aug. 18, 2017), and the Ohio Supreme Court denied further review.

While his direct appeal was pending before the Ohio Supreme Court, Jefferson filed an application to reopen his direct appeal with the Ohio Court of Appeals. However, that court denied his application as untimely, and Jefferson did not appeal that decision.

Jefferson then filed a post-conviction petition in the trial court, but the court denied his petition. Jefferson also did not appeal that decision. Instead, Jefferson proceeded to file several additional motions and petitions in the trial court, which that court denied. Again, Jefferson filed no appeal.

In 2018, Jefferson filed a § 2254 petition in the district court, alleging: (1) ineffective assistance of trial counsel; (2) insufficient evidence to support his convictions; (3) prosecutorial misconduct; and (4) improper search and seizure. Over Jefferson's objections, the district court adopted the magistrate judge's report and recommendation, *Jefferson v. Ohio*, No. 3:18-cv-00779, 2019 WL 9359722 (N.D. Ohio May 15, 2019), and dismissed the petition. *Jefferson v. Ohio*, No. 3:18cv779, 2020 WL 1983065 (N.D. Ohio Apr. 27, 2020). Additionally, the district court denied Jefferson a COA to appeal its decision.

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. A petitioner satisfies this standard by demonstrating that reasonable jurists "could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a claim is denied on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Jefferson first raises several claims of ineffective assistance of counsel, but the district court determined that he procedurally defaulted these claims in state court. To have presented his claims properly to the state courts, Jefferson would have needed to provide the Ohio courts a full opportunity to resolve his constitutional issues by invoking one complete round of the State's established appellate review process. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Since some of Jefferson's ineffective-assistance claims are based on the trial record, Ohio law required that he raise these claims on direct appeal. *See Hill v. Mitchell*, 842 F.3d 910, 936 (6th Cir. 2016); *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 751 (6th Cir. 2013). Jefferson did not raise these claims on direct appeal with the Ohio Court of Appeals. Although he did raise them when he sought additional review with the Ohio Supreme Court, "[p]roper exhaustion requires that a petitioner present every claim in the federal petition to each level of the state courts, including

the highest state court to which the petitioner is entitled to appeal." *Rayner v. Mills*, 685 F.3d 631, 643 (6th Cir. 2012). A habeas petitioner usually must present his claims to both the intermediate state court of appeals and the state supreme court for the claim to be considered exhausted. *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009). Jefferson's failure to present these claims to the Ohio Court of Appeals left them unexhausted. Further, Jefferson had no remaining state court avenues for raising these claims because the Ohio courts would have dismissed any attempt to raise them again as barred by the doctrine of res judicata. *See Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006). Consequently, reasonable jurists could not disagree with the district court's conclusion that Jefferson did not properly exhaust and procedurally defaulted these ineffective-assistance claims on direct appeal.

In attempting to excuse his procedural default, Jefferson argues that his appellate counsel rendered ineffective assistance by failing to raise these claims with the Ohio Court of Appeals. Ineffective assistance of appellate counsel can constitute cause to excuse a petitioner's procedural default. *Bennett v. Brewer*, 940 F.3d 279, 286 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 2534 (2020). But the substantive ineffective-assistance-of-appellate-counsel claim must itself be exhausted and not procedurally exhausted in state court. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). Jefferson did attempt to raise this claim of ineffective assistance of appellate counsel in an application to reopen his appeal filed with the Ohio Court of Appeals; however, the court denied his application as untimely. That is an adequate and independent state procedural ground resulting in default of his ineffective-assistance-of-appellate-counsel claim. *See Parker v. Bagley*, 543 F.3d 859, 862 (6th Cir. 2008). To the extent that Jefferson argues that his pro se and incarcerated status, as well as his ignorance of the law, prevented him from timely filing his application to reopen, this argument does not provide cause to excuse his procedural default. *See Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004). Additionally, Jefferson did not appeal the intermediate appellate court's denial of his application to the Ohio Supreme Court, which constitutes a separate procedural default of this claim. *See O'Sullivan*, 526 U.S. at 845.

In his habeas petition, Jefferson also raised ineffective-assistance-of-trial-counsel claims that rely on evidence outside the trial record. Ohio law recognizes that these claims generally should be raised for the first time in a state post-conviction petition. *Hill*, 842 F.3d at 936; *McGuire*, 738 F.3d at 751. Jefferson did raise these claims in his first post-conviction petition filed in the trial court, and that court denied his petition. However, Jefferson failed to appeal the denial, which results in a procedural default of these claims. *See O'Sullivan*, 526 U.S. at 845. In an attempt to demonstrate cause excusing this default, Jefferson alleges that he never received notice of the trial court's denial of this petition, and the record reveals that some mail from the court's clerk to Jefferson was returned because of an insufficient address.

Even if this court assumes that Jefferson has made a substantial showing of cause to excuse the procedural default of these ineffective-assistance-of-counsel claims, he still must show that jurists of reason would find it debatable whether the district court was wrong to have found a lack of prejudice. *See Slack*, 529 U.S. at 484. Jefferson argues that his trial counsel rendered ineffective assistance by failing to call several witnesses. However, as the district court noted, Jefferson has made no showing regarding the alleged content of their testimony; consequently, he has not shown how he was prejudiced by the failure to call them at trial. Reasonable jurists would not find it debatable whether the district court was wrong to find insufficient prejudice to excuse default.

For his second claim, Jefferson alleges a lack of sufficient evidence to support his convictions. The magistrate judge concluded that Jefferson had procedurally defaulted this claim as it applied to his weapons-under-a-disability conviction. Jefferson did not challenge that conclusion in his objections to the magistrate judge's report, and the district court relied on this failure to object to determine that he had waived any argument for this part of the claim. A party who does not make specific objections to a magistrate judge's report forfeits his right to appeal those aspects of the report to which he failed to object. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Frontier Ins. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006).

Jefferson also contends that insufficient evidence existed to support his felonious assault conviction. In reviewing the sufficiency of the evidence, "the relevant question is whether, after

viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). In doing so, the court does not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute its judgment for that of the jury. *Thomas v. Stephenson*, 898 F.3d 693, 698 (6th Cir. 2018); *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). On habeas review, even if the federal court would conclude that a rational trier of fact could not have found the petitioner guilty beyond a reasonable doubt, it must defer to the state appellate court's sufficiency of the evidence determination if it was not unreasonable. *Thomas*, 898 F.3d at 698; *Brown*, 567 F.3d at 205. Under Ohio law, a defendant may be convicted of felonious assault for knowingly causing or attempting to cause physical harm to another by means of a deadly weapon. Ohio Rev. Code § 2903.11(A)(2); *State v. Howard*, ___ N.E.3d ___, 2020 WL 4249953, at *13 (Ohio Ct. App. July 24, 2020). "Firing a gun in a person's direction is sufficient evidence of felonious assault." *State v. Markley*, No. 9-14-39, 2015 WL 2354569, at *8 (Ohio Ct. App. May 18, 2015) (quoting *State v. Jordan*, No. 73364, 1998 WL 827588, at *12 (Ohio Ct. App. Nov. 25, 1998)); *see also State v. Henderson*, 2014 WL 4378751, at *5 (Ohio Ct. App. Sept. 5, 2014).

Jefferson has not made a substantial showing that insufficient evidence supports his felonious assault conviction. While Jefferson argues that this conviction is based only on circumstantial evidence, a conviction may be upheld even if it is based upon nothing more than circumstantial evidence. *See Stewart v. Wolfenbarger*, 595 F.3d 647, 656 (6th Cir. 2010). Jefferson also maintains that the testimony of a key witness against him was not credible. However, this court does not "re-evaluate the credibility of witnesses" in determining whether sufficient evidence supports the defendant's convictions. *Smith v. Nagy*, 962 F.3d 192, 205 (6th Cir. 2020).

For his third claim, Jefferson alleged that his convictions resulted from prosecutorial misconduct. The magistrate judge concluded that Jefferson procedurally defaulted this claim, and Jefferson did not challenge this conclusion in his objections to the magistrate judge's report. The district court again relied on this failure to object to determine that Jefferson had waived any

argument for this claim. Consequently, Jefferson forfeited his right to appeal that part of the magistrate judge's report. *See Thomas*, 474 U.S. at 155; *Frontier Ins.*, 454 F.3d at 596-97.

Lastly, Jefferson asserts that the police unlawfully seized him and searched his property. However, since it is undisputed that Jefferson had a full and fair opportunity to litigate this Fourth Amendment claim in the Ohio courts, it is not cognizable in this federal habeas proceeding. *See Stone v. Powell*, 428 U.S. 465, 482 (1976); *Good v. Berghuis*, 729 F.3d 636, 639 (6th Cir. 2013).

Accordingly, Jefferson's application for a COA is **DENIED**. His IFP motion is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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

Tanelle Jefferson, **Case No. 3:18CV779**

Petitioner,

-vs- **JUDGE PAMELA A. BARKER**

Magistrate Judge Kathleen Burke

State of Ohio,

Respondent **JUDGMENT ENTRY**

For the reasons stated in the Memorandum Opinion and Order issued this date, Petitioner Tanelle Jefferson's Objections are overruled. The Magistrate Judge's Report & Recommendation (Doc. No. 34) is ADOPTED as set forth herein, and the Petition is DISMISSED. In addition, Jefferson's Motion for Emergency Release (Doc. No. 36) is DENIED.

Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), 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(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

s/Pamela A. Barker
PAMELA A. BARKER
U. S. DISTRICT JUDGE

Date: April 27, 2020

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

Tanelle Jefferson,

Petitioner,

-vs-

State of Ohio,

Respondent

Case No. 3:18cv779

JUDGE PAMELA A. BARKER

Magistrate Judge Kathleen Burke

MEMORANDUM OPINION AND ORDER

Petitioner Tanelle Jefferson, proceeding *pro se*, seeks a writ of habeas corpus under 28 U.S.C. § 2254 concerning his state court conviction in the matter of *State v. Jefferson*, Lucas County Court of Common Pleas Case No. G4801-CR-0201601280. (Doc. Nos. 1, 22.) This matter is before the Court upon the Report & Recommendation ("R&R") of Magistrate Judge Kathleen Burke (Doc. No. 34), which recommends that the Petition be denied. Magistrate Judge Burke also recommends that Petitioner's Motions for Appointment of Counsel (Doc. No. 16), for Discovery (Doc. Nos. 17, 25), and to Expand the Record (Doc. Nos. 24, 31) be denied.

Petitioner has filed Objections to the R&R. (Doc. No. 35.) In addition, Petitioner has filed a Motion for Emergency Release due to the COVID-19 pandemic. (Doc. No. 36.)

For the following reasons, Petitioner's Objection (Doc. No. 35) is OVERRULED and the Magistrate Judge's Report & Recommendation (Doc. No. 34) is ACCEPTED as set forth herein. Petitioner's Motion for Emergency Release (Doc. No. 36) is DENIED.

I. Relevant Procedural History[1]

The Court of Appeals for the Sixth District of Ohio (hereinafter "state appellate court") summarized the facts underlying Jefferson's state court conviction as follows:

> {¶ 2} On February 12, 2016, appellant was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(2) and (D), a felony of the second degree, and one count of having weapons while under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. Based upon the allegation that appellant committed the felonious assault while in possession of a firearm, a firearm specification was attached to the felonious assault under R.C. 2941.145.
>
> {¶ 3} Thereafter, appellant entered pleas of not guilty to the aforementioned charges, and the matter proceeded to discovery. Following pretrial proceedings and motion practice, a two-day jury trial commenced on July 18, 2016.
>
> {¶ 4} At trial, the state first presented the testimony of appellant's wife, Jeanette Ervin. Ervin and appellant were married in December 2015. According to Ervin, the marriage "started out fun," but eventually became abusive. Specifically, Ervin stated: "Well, after being together for a while, I noticed some changes in [appellant]. He would always grab on my clothes, rough me up, and he had that temper about [himself] and I would have to fight him off." Due to the abuse that was existent within their marriage, appellant and Ervin resided separately.
>
> {¶ 5} Three months into the marriage, Ervin decided that it was time to end her relationship with appellant. After Ervin informed appellant of her decision to end the marriage, appellant asked Ervin to come to his house so that they could talk about possibly staying together. Ervin noticed that appellant was drinking from a bottle of Hennessy brandy when she arrived at his house. During the discussion, Ervin also noticed a handgun sitting on a nearby table.
>
> {¶ 6} When Ervin informed appellant that she was leaving him, he told her that she was not going anywhere. Ervin then attempted to exit appellant's home. At trial, Ervin recounted the ensuing incident as follows:
>
> > And as I'm trying to get out the door, the front door, he's blocking me. So I break and run through the dining room to the kitchen to go down these steps to get away from him. And he put his foot on the back door and said, you're not going anywhere.

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[1] The Court's recitation of the relevant procedural history is not intended to be exhaustive. Rather, the Court will set forth only that procedural history necessary to a resolution of the pending Objections.

> All of a sudden he [started] screaming and hollering and I'm just begging him, please. I called him Tee Jay. Tee Jay, let me go. I want to go home, leave me alone. I don't want to be here with you anymore. Let me go.
>
> He kept saying, no, screaming and hollering, still got ahold of my clothes, to my clothes. I go back up the steps to the kitchen and the voice that came out of him was something like I've never heard before, like demons. He was just screaming and hollering at me.
>
> And I knew at that point something bad is getting ready to happen because I already knew he had that gun.
>
> So I tried to keep quiet and not say anything and I'm—he got me backed up there against this thing and I'm like Tee Jay, let me go; I want to go home.
>
> So I managed—he kept telling me I wasn't going to go. I managed to get around him, go through the dining room. He's going to grab me again. Still got my clothes. By that time this weapon, this gun, hits the floor. I say, it's time for me to break and run for my life.
>
> I ran out that door so fast. I was trembling. I was scared to death. I feared for my life.
>
> As I'm running out the door going down the steps I hear a pow. I'm like, oh, my God, he done shot at me, am I shot? I run around to my car. I'm shaking. I'm trembling. I'm falling down to my knees. The [key is] dropping out of my hand. I'm trying to get in my car to get away and I look through my car window to see where he was at after he shot at me. He's standing on this porch like it's nothing. He [turns] around and he walks back in the house.

{¶ 7} Upon further questioning, Ervin acknowledged that she did not actually witness appellant shoot at her because she was running away from him at the time. Nonetheless, appellant was insistent that she heard appellant fire a shot from where he was standing on the front porch of his home. When asked how she could be certain that appellant fired a shot at her, Ervin stated: "Because I heard the pow and I knew he had a gun. And he was angry."

{¶ 8} As its next witness, the state called Brian Heath. Heath and his partner, Scott Bruhn (whom the state called as its third witness), were the first officers to arrive on the scene after Ervin called 911. Initially, Heath set up a perimeter around appellant's house. Meanwhile, Bruhn questioned Ervin, who informed him that appellant had just shot at her and was still inside the home. Eventually, Heath and Bruhn took appellant

into custody. Upon further questioning, Ervin explained to Bruhn that appellant had shot at her from the front porch of the home.

{¶ 9} After learning that appellant fired a shot at Ervin from his front porch, Bruhn alerted the detective bureau and began searching the area around the porch for a shell casing. Bruhn was accompanied by another officer, Michael Watson. Ultimately, Watson discovered one Hornady .25 ACP caliber spent shell casing on top of the grass five to six feet from the edge of the front porch. According to Watson, the location of the shell casing was consistent with Ervin's contention that appellant fired at her while standing on the front porch.

{¶ 10} For its fourth witness, the state called Nathaniel Sahdala. Sahdala also responded to the scene after Ervin called 911. After appellant was arrested and taken into custody, Sahdala entered appellant's home. Upon entry, Sahdala entered the dining room, where he observed a portion of carpet that was folded over with the rear half of a handgun visible underneath the carpet. Sahdala then rolled back the rest of the carpet that was folded and discovered two additional firearms, both of which were loaded. Thereafter, Sahdala retrieved the firearms and unloaded the ammunition. One of the firearms was a .25 caliber handgun, which contained Hornady .25 ACP ammunition matching the shell casing that Watson discovered next to the front porch.

{¶ 11} As its final witness, the state called detective Sherri Wise. Wise arrived at appellant's residence and was involved in the removal of the firearms from the dining room. Wise eventually interviewed appellant at the police station, where appellant admitted to having fired a weapon earlier in the day. Initially, appellant insisted that he shot a possum. However, the type of animal that was allegedly shot changed several times during the course of Wise's interrogation of appellant. Further, appellant claimed that he shot the animal with a Winchester rifle, which was not located at the residence. Ultimately, the three handguns that were removed from the residence were tested and found to be operable. Notably, Wise corroborated the previous testimony that the .25 caliber handgun that was removed contained ammunition matching the spent shell casing found on the lawn adjacent to the front porch.

{¶ 12} At the close of the state's case-in-chief, appellant moved for an acquittal under Crim.R. 29, arguing that the state failed to provide sufficient evidence as to the felonious assault count. After hearing arguments, the court denied appellant's motion. The court then provided instructions to the jury, and deliberations began. Ultimately, the jury found appellant guilty of felonious assault and having weapons while under disability, as well as the attendant firearm specification. The court immediately proceeded to sentencing, ordering appellant to serve 7 years in prison for the felonious assault count and 30 months in prison for the having weapons while under disability count. The court ordered the sentences to be served consecutive to one another, and consecutive to the mandatory 3–year sentence imposed pursuant to the firearm

> specification, for a total prison sentence of 12.5 years. Appellant's timely appeal followed.

State v. Jefferson, 2017 WL 3575607 at ** 1-3 (Ohio Ct. App. 6th Dist. Aug. 18, 2017).

Jefferson challenged his conviction and sentence on direct appeal, raising the following two grounds for relief:

> I. The trial court erred to the prejudice of appellant by denying his Rule 29 motion upon completion of the State's case in chief.
>
> II. Appellant's conviction was against the manifest weight of the evidence produced at trial.

(Doc. No. 28-1, Exh. 9.) On August 18, 2017, the state appellate court affirmed Jefferson's conviction and sentence. *See State v. Jefferson*, 2017 WL 3575607 (Ohio Ct. App. 6th Dist. Aug. 18, 2017).

On October 2, 2017, Jefferson, proceeding *pro se*, filed a notice of appeal with the Supreme Court of Ohio. (Doc. No. 28-1, Exh. 12.) In his memorandum in support of jurisdiction, Jefferson raised the following propositions of law:

> I. Due Process
>
> II. Ineffective Assistance of Counsel

(Doc. No. 28-1, Exh. 13.) The Supreme Court of Ohio declined to accept jurisdiction on January 31, 2018. (Doc. No. 28-1, Exh. 14.)

Meanwhile, on December 1, 2017, Jefferson filed a *pro se* Application to Reopen his Appeal in the state appellate court pursuant to Ohio App. R. 26(B). (Doc. No. 28-1, Exh. 15.) Therein, Jefferson argued that his appellate counsel was ineffective for not raising ineffective assistance of trial counsel and violation of due process of law. (*Id.*) On January 11, 2018, the state appellate court

denied Jefferson's Application to Reopen on the grounds that it was untimely and Jefferson had not demonstrated good cause for the untimely filing. (Doc. 28-1, Exh. 16.)

The record reflects Jefferson did not appeal from the state appellate court's denial of his 26(B) Application.

Jefferson then proceeded to file several *pro se* petitions to vacate or set aside judgment of conviction and sentence, as well as various post-judgment motions. In his first Petition to Vacate or Set Aside Judgment of Conviction, Jefferson raised the following two claims:

> 1. Statement of constitutional claim:
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> Fifth and Fourteen Amendments, U.S. Constitution; Section 16, Article 1, Ohio Constitution Due Process right was violated my trial and prosecution. Trial – Transcripts of Proceeding (TP) Vol 1/2.
>
> Short statement of facts supporting the claim:
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> A prosecutor is required to prove every element of the crime with which a defendant is charged beyond a reasonable doubt. The Winship "Beyond a reasonable doubt." Sullivan v. La, 508 U.S. 275, 278 (1993). Count 1 Felonious assault with a gun specification means a person knowingly attempt to or did cause harm to a person. There is no physical proof or evidence that indicated I could harm or actually harm Jeanette Ervin on the night of February 3rd, 2016 besides her testimony, in which she testified I roughed her up 2 months before her surgery in May, 2016 (TP Vol 1/2 p173) and Lucas County Correctional's records have actual fact that was impossible for me to do because I was in custody. Its unconstitutional for a prosecutor to make presumptions in criminal prosecution. Estelle v. McGuire, 502 U.S. 62, 72 (1991) Sandstrom v. Mont., 442 U.S. 510, 514 (1979). State witness, expert of the law, Toledo police officer Mr. Brian Heath stated (TP Vol. 1/2 p212 line 3-5) "Initially there was nobody outside. If I can recall correctly, the victim-caller was in her car and come to the location once we arrived." This fact that supports my story she wasn't there at 2055 Elliott at the time she call 9-1-1 meaning her accusations is false also and it was proven in court I didn't reside or have ownership to 2055 Elliott Ave another violation, Miranda v. Arizona, prosecutorial misconduct significant judicial error and claims of insufficient evidence.
>
> 2. Statement of constitutional claim:

> Sixth Amendment Right to Effective assistance of counsel. Right to Expert Witness Testimony. (U.C. Const., Ohio Const.) Palacios v. Burgue, 589 F.3d 347, 352-53 (5th Cir. 2010).
>
> Short statement of facts supporting the claim:
>
> Mr. Daniel Arnold refused summon Mr. Jefferson's eye witness (Ward v. Dretke) LaShanna Haney and he sent 3 of Mr. Jefferson's witness in court on the first of trial. Also, Mr. Arnold failed summon Medical and Ballistic experts.

(Doc. No. 28-1, Exh. 17.) The State of Ohio opposed Jefferson's Petition. (Doc. No. 28-1, Exh. 19.) The state trial court subsequently appointed counsel, who filed a reply in support of Jefferson's Petition. (Doc. No. 28-1, Exhs. 20, 21.)

On December 20, 2017, the trial court denied Jefferson's Petition, as follows:

> The court construes Defendant's petition as a motion for post-conviction relief. As such, claims which have been or could have been adjudicated by the appellate court are barred. Defendant claims his convictions are against the-manifest weight of the evidence, and provides nothing outside the record in support of this contention. The appellate court rejected Defendant's manifest weight challenge in direct appeal. Defendant claims further that his counsel was ineffective, but again provides nothing outside the record to support this contention. Finally, Defendant's request for a ballistics expert is not well taken because even if the shell casing is found not to have come from Defendant's gun, that does not automatically mean Defendant did not shoot at the victim.

(Doc. No. 28-1, Exh. 22.) The record reflects Jefferson did not appeal the trial court's ruling.

Jefferson then filed a Motion to Obtain New Evidence and, shortly thereafter, a Successive Petition to Vacate or Set Aside Judgment, in the state trial court. (Doc. No. 28-1, Exhs. 23, 24.) The trial court denied Jefferson's Successive Petition as untimely and not subject to exception, and also denied his Motion to Obtain New Evidence. (Doc. No. 28-1, Exh. 26.) Jefferson filed a Motion for Reconsideration, as well as several additional post-conviction motions. (Doc. No. 28-1, Exhs. 27, 29, 30, 31.) The trial court denied Jefferson's motions on October 31, 2018. (Doc. No. 28-1, Exh. 33.) Jefferson did not appeal the trial court's ruling.

On March 17, 2018,[2] Jefferson filed a *pro se* Petition for Writ of Habeas Corpus in this Court. (Doc. No. 1.) Several months later, he filed a Motion to Amend his Petition, as well as a Motion for a Stay until post-conviction proceedings were exhausted. (Doc. Nos. 6, 7.) While these motions were still pending, the State filed a Return on Writ. (Doc. No. 9.) Jefferson then filed Motions to Supplement the Petition, for Appointment of Counsel, and for Discovery. (Doc. Nos. 14, 16, 17.)

On October 29, 2018, the Magistrate Judge issued an Order granting Jefferson's Motion to Amend Petition. (Doc. No. 18.) On that same date, the Magistrate Judge also issued an Interim Report & Recommendation, in which she recommended that Jefferson's Motion to Stay be denied. (Doc. No. 19.) The Magistrate Judge's Interim Report & Recommendation was later adopted by then-assigned District Judge Benita Pearson. (Doc. No. 29.)

Meanwhile, on November 26, 2018, Jefferson filed an Amended Petition under 28 U.S.C. § 2254, in which he asserted the following grounds for relief:

I. Ineffective Assistance of Counsel

II. Insufficient Evidence

III. Prosecutorial Misconduct

IV. Search and Seizure

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[2] Under the mailbox rule, the filing date for a *pro se* petition is the date that a petitioner delivers it to prison authorities. *See Houston v. Lack*, 487 U.S. 266 (1988). While the Petition herein did not arrive at the Court for filing until April 6, 2018, Jefferson states that he placed it in the prison mailing system on March 17, 2018. (Doc. No. 1 at 15.) Thus, the Court will consider the Petition as filed on March 17, 2018.

(Doc. No. 22.)[3] The State filed a Return of Writ on January 11, 2019, and Jefferson filed his Traverse on February 1, 2019. (Doc. Nos. 28, 30.) Several months later, on April 4, 2019, Jefferson filed a Motion to Expand the Record (Doc. No. 31), which the State opposed.

On May 15, 2019, the Magistrate Judge issued an R&R, in which she recommends that the Petition be denied. (Doc. No. 34.) The Magistrate Judge also recommends that Jefferson's Motions for Appointment of Counsel (Doc. No. 16), for Discovery (Doc. Nos. 17, 25), and to Expand the Record (Doc. Nos. 24, 31) be denied.

This matter was re-assigned to the undersigned on July 1, 2019 pursuant to General Order 2019-13.

Jefferson has filed Objections to the R&R. (Doc. No. 35.) In addition, on April 20, 2020, Jefferson filed a Motion for Emergency Release due to the COVID-19 pandemic. (Doc. No. 36.) The State filed a Brief in Opposition the next day. (Doc. No. 37.)

II. Standard of Review

Parties must file any objections to a report & recommendation within fourteen days of service. Fed. R. Civ. P. 72(b)(2). Failure to object within this time waives a party's right to appeal the district court's judgment. *See Thomas v. Arn*, 474 U.S. 140, 145 (1985); *United States v. Walters*, 638 F.2d 947, 949-950 (6th Cir. 1981).

"When a district judge reviews a magistrate judge's resolution of a non-dispositive matter, it is not a *de novo* review, as it is in relation to a magistrate judge's recommendation as to a dispositive matter." *Inhalation Plastics, Inc. v. Medex Cardio-Pulmonary, Inc.*, 2013 WL 992125 at *6 (S.D. Oh.

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[3] The supporting facts underlying these claims are set forth in the Magistrate Judge's May 15, 2019 R&R (Doc. No. 34 at pp. 16-18) and will not be repeated herein.

Mar. 13, 2013). Rather, the Magistrate Judge's decision is subject to review under Rule 72(a) and reversal when it "is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A). *See Alvarado v. Warden, Ohio State Penitentiary*, 2018 WL 5783676 at * 1 (N.D. Ohio Nov. 5, 2018); *Phillips v. LaRose*, 2019 WL 5729919 at * 2 (N.D. Ohio Nov. 5, 2019).

The clearly erroneous standard applies to factual findings, while legal conclusions are reviewed under the contrary to law standard. *E.E.O.C. v. Burlington N. & Santa Fe Ry. Co.*, 621 F.Supp.2d 603, 605 (W.D. Tenn. 2009). As the Sixth Circuit has explained, "'[a] [factual] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Bisig v. Time Warner Cable, Inc.*, 940 F.3d 205, 219 (6th Cir. 2019) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An order is 'contrary to the law' when it 'fails to apply or misapplies relevant statutes, case law, or rules of procedure.'" *Id.* (quoting *United States v. Winsper*, 2013 WL 5673617 at *1 (W.D. Ky. Oct. 17, 2013)).

When a petitioner objects to a magistrate judge's resolution of a dispositive matter, the district court reviews those objections *de novo*. Fed. R. Civ. P. 72(b)(3). Specifically, a district judge:

> must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Id. "A party who files objections to a magistrate [judge]'s report in order to preserve the right to appeal must be mindful of the purpose of such objections: to provide the district court 'with the opportunity to consider the specific contentions of the parties and to correct any errors immediately.'" *Jones v. Moore*, 2006 WL 903199 at * 7 (N.D. Ohio April 7, 2006) (citing *Walters*, 638 F.2d at 949–50).

III. Analysis

A. Non-Dispositive Matters

Jefferson objects to the Magistrate Judge's denial of his Motions for Appointment of Counsel, Discovery, and Expansion of the Record. (Doc. No. 35 at pp. 1-3.) As these matters are non-dispositive, the Court reviews Jefferson's Objections under the clearly erroneous or contrary to law standard, set forth above.

1. Motion for Appointment of Counsel (Doc. No. 16.)

Jefferson first objects to the Magistrate Judge's denial of his Motion for Appointment of Counsel. (Doc. No. 35 at pp. 1.) He asserts that his Motion should have been granted because the Sixth Amendment right to counsel applies to the instant habeas proceedings. (*Id.*)

Jefferson's objection is without merit. As the Magistrate Judge correctly noted, it is well established that a habeas corpus proceeding is civil in nature and the Sixth Amendment right to counsel afforded for criminal proceedings does not apply. *See Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) (citing *McCleskey v. Zant*, 499 U.S. 467, 495 (1987)). *See also Stockman v. Berghuis*, 627 Fed. Appx. 470, 475 (6th Cir. 2015); *Ross v. Coleman*, 2019 WL 8333533 at * 11 (N.D. Ohio July 1, 2019).

Moreover, Jefferson has not argued or shown that any other circumstances exist that would render the Magistrate Judge's denial of his Motion for Appointment of Counsel clearly erroneous or contrary to law. A district court must appoint counsel for an indigent petitioner when an evidentiary hearing is required or when necessary for the petitioner's effective utilization of discovery.[4] *See*

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[4] In addition, an indigent petitioner seeking to vacate or to set aside a death sentence has a statutory right to appointed counsel, as well as expert and investigative services. 18 U.S.C. § 3599(a)(2). Here, however, Jefferson is not seeking to vacate or set aside a death sentence.

Habeas Rule 6(a).[5] In all other circumstances, a district court has considerable discretion in deciding whether to appoint counsel. The Sixth Circuit has noted, however, that appointment of counsel in non-capital habeas proceedings is justified only in "exceptional" circumstances. *See Stockman*, 627 Fed. Appx. at 475 (stating the privilege of appointment of counsel in habeas proceedings is justified "only in exceptional circumstances.") (citing *Lavado v. Keohane*, 992 F.2d 601, 605–06 (6th Cir.1993)).

Here, Jefferson does not articulate any specific reasons explaining why he believes he is entitled to appointment of counsel. Jefferson has not argued in his Objection that an evidentiary hearing is warranted and, as discussed *infra,* the Court finds that the Magistrate Judge did not err in denying Jefferson's Motion for Discovery. Lastly, Jefferson has not otherwise shown that this is an exceptional case warranting the appointment of counsel. Jefferson does not assert that he labors under disabilities unusual for a *pro se* petitioner; nor are the issues raised in his Petition unusually complex. Indeed, as the Magistrate Judge noted, Jefferson has shown that he is capable of representing himself in these proceedings, having filed multiple motions herein including seeking (and receiving) leave to file an Amended Petition.

Accordingly, the Court finds that the Magistrate Judge's denial of Jefferson's Motion for Appointment of Counsel is neither clearly erroneous or contrary to law. Jefferson's Objection is without merit and overruled.

2. Motions for Discovery (Doc. Nos. 17, 25)

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[5] *See* 28 U.S.C. § 2254(h) ("Appointment of counsel under this section shall be governed by section 3006A of title 18."). 18 U.S.C. § 3006A(a)(2)(B) provides in part: "Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who . . . is seeking relief under [§ 2254]."

Jefferson next objects to the Magistrate Judge's denial of his Motion for Discovery (Doc. No. 17) and Motion to Subpoena Toledo Police Report[6] (Doc. No. 25.) *See* Doc. No. 35 at p. 2-3. Jefferson asserts that he "never had his discovery or seen all the evidence" and, therefore, he has been unfairly prejudiced in his ability to defend himself in this case. (Doc. No. 35 at p. 2.) It is not entirely clear what exactly Jefferson seeks to obtain in discovery, but he does state generally that "the discovery police report, ballistic results, as well as the weapon's backgrounds, Brady Act—the background on the weapons are relevant to [his] case." (*Id.*) Jefferson also suggests that he never received a DVD of an interrogation conducted of him by Detective Wise. (*Id.*)

"[U]nlike the usual civil litigant in federal court, [a habeas petitioner] is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Pursuant to Rule 6 of the Rules Governing Section 2254 Cases, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." *See* Rule 6(a) of the Rules Governing Section 2254 Cases. "Good cause" for discovery exists only "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is...entitled to relief." *Bracy,* 520 U.S. at 908–09 (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)) (ellipsis in original). "The burden of demonstrating the materiality of the information requested is on the moving party." *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004) (quoting *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001)). Habeas Rule 6 does not "sanction fishing expeditions based on a petitioner's conclusory

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[6] The Toledo Police Report sought by Jefferson is dated December 2, 2015, two months prior to the offense for which he was convicted. According to Jefferson, this Reports relates to a call he made to the police asking for help because Ms. Ervin was attacking him and he was unable to get away. (Doc. No. 25.) In his Motion to Subpoena Toledo Police Report, Jefferson argued that this Report is relevant because it shows that "Ervin was the violent person and . . . Jefferson was the victim who was physically impaired and needed help from her." (*Id.*)

allegations." *Williams,* 380 F.3d at 974. Instead, a habeas petitioner must show good cause for discovery through "specific allegations of fact." *Id.*

The Court finds that the Magistrate Judge's denial of Jefferson's Motions for Discovery and for the Toledo Police Report (Doc. Nos. 17, 25) was not clearly erroneous or contrary to law. Jefferson has not sufficiently demonstrated that the discovery he seeks is material, or otherwise set forth specific allegations showing that, if the facts are fully developed, he may be entitled to relief. Moreover, to the extent Jefferson is arguing that the requested discovery is relevant to his sufficiency of the evidence claim relating to his felonious assault conviction, this claim was considered on the merits by the state courts. As the Magistrate Judge correctly noted, the United States Supreme Court has held that "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, 182-183 (2011). To the extent any of the evidence Jefferson now seeks was not before the state courts, it could not be considered in these habeas proceedings with respect to his sufficiency of the evidence claim.

Accordingly, the Court finds that the Magistrate Judge's denial of Jefferson's Motions for Discovery (Doc. Nos. 17, 25) is neither clearly erroneous or contrary to law. Jefferson's Objection is without merit and overruled.

3. Motions to Expand the Record (Doc. Nos. 24, 31)

Jefferson objects generally to the Magistrate Judge's denial of his Motions to Expand the Record. (Doc. No. 35 at pp. 3-4.) In particular, he directs this Court's attention to the documents attached to his April 4, 2019 Motion to Expand (Doc. No. 31), which appear to consist of a letter from his counsel (Daniel Arnold) to Jefferson, records from the Toledo Municipal court, an incident detail report dated February 3, 2016, a record of property search, and what appear to be attorney

notes. (Doc. No. 31-1.) It is not entirely clear but Jefferson appears to argue that these documents are relevant to Ms. Ervin's credibility.

Under the Rules Governing Section 2254 Cases, a respondent has discretion to attach to his Answer parts of the record that he considers relevant. *See* Rule 5(c) of the Rules Governing Section 2254 Cases. Pursuant to Habeas Rule 5, a district court may thereafter "order that the respondent furnish other parts of the existing transcripts or that parts of untranscribed recordings be transcribed or furnished." *Id.* Moreover, Habeas Rule 7 provides that "[i]f the petition is not dismissed, the judge may direct the parties to expand the record by submitting additional materials relating to the petition." *See* Rule 7(a) of the Rules Governing § 2254 Cases. Habeas Rule 7 "permits federal habeas corpus courts to direct the parties to supplement the state court record with materials relevant to the Court's resolution of the petition." *Lynch v. Hudson*, 2010 WL 2076925 at * 2 (S.D. Ohio May 24, 2010). Interpreting these Rules, the Sixth Circuit has recognized that expansion of the record in habeas cases "is not mandatory...and is left to the discretion of the trial judge." *Ford v. Seabold*, 841 F.2d 677, 691 (6th Cir. 1988). *See also Beuke v. Houk*, 537 F.3d 618, 653 (6th Cir. 2008); *Bates v. Warden, Chillicothe Correctional Institution*, 2015 WL 5299454 at * 5 (S.D. Ohio Sept. 10, 2015).

As an initial matter, the Court notes that Jefferson does not articulate any specific objection to the Magistrate Judge's denial of his November 26, 2018 Motion to Expand (Doc. No. 24.) The Magistrate Judge denied that Motion as moot on the grounds that the records Jefferson sought to include were subsequently included in the state court record filed by the State with the Return of Writ. (Doc. No. 34 at p. 5.) Jefferson does not object to or otherwise challenge this finding. Accordingly, the Court agrees with and adopts the Magistrate Judge's denial of Jefferson's November 2018 Motion to Expand.

With respect to Jefferson's April 4, 2019 Motion to Expand, the Magistrate Judge denied the Motion on the grounds that "Jefferson has failed to demonstrate that the records he seeks to introduce could establish a basis upon which federal habeas relief is warranted." (Doc. No. 34 at p. 6.) This Court agrees. In his Objection, Jefferson does not sufficiently explain how the evidence attached to his Motion is relevant to resolution of the instant Petition. Nor does he otherwise articulate any specific basis for the Court to conclude that the Magistrate Judge's decision to deny his April 2019 Motion to Expand was either clearly erroneous or contrary to law.

Accordingly, the Court finds that the Magistrate Judge's denial of Jefferson's Motions to Expand the Record (Doc. Nos. 24, 31) is neither clearly erroneous or contrary to law. Jefferson's Objection is without merit and overruled.

B. Dispositive Matters

Jefferson also objects to the Magistrate Judge's recommendations that the Court (1) dismiss Grounds One and Three of the Petition as procedurally defaulted; (2) dismiss the portion of Ground Two relating to Jefferson's weapons under disability conviction as procedurally defaulted; (3) deny the portion of Ground Two relating to his felonious assault conviction on the merits; and (4) dismiss Ground Four on the basis of *Stone v. Powell*, 428 U.S. 465 (1976).

As these objections relate to dispositive matters, the Court will conduct a *de novo* review.

1. Ground One—Ineffective Assistance of Trial Counsel

In Ground One, Jefferson asserts that his trial counsel was constitutionally ineffective because he (1) improperly advised Jefferson to reject a plea deal and proceed to trial; (2) did not follow procedures for renewing a Criminal Rule 29(c) motion; (3) did not raise as an issue the fact that Jefferson told his trial counsel that he realized he knew one of the jurors; (4) did not properly cross-

examine the victim, Jeanette Ervin, and did not make sure that Ms. Ervin was advised of her Fifth Amendment rights; and (5) overlooked relevant evidentiary matters, including the need to obtain forensic testing, the need to subpoena an eye witness and present testimony from certain other witnesses sent home from the trial, the need to introduce the DVD of Detective Wise's interrogation, and the need to subpoena medical records. (Doc. No. 22.)

The Magistrate Judge recommends that this Ground be dismissed as procedurally defaulted because, even though Jefferson could have raised the above alleged instances of ineffective assistance of trial counsel on direct appeal, he failed to do so. (Doc. No. 34 at p. 23.) The Magistrate Judge further found that, to the extent that presenting these claims in his first post-conviction proceeding was the proper avenue for seeking review of those claims, the state trial court denied Jefferson's post-conviction petition as untimely and Jefferson failed to appeal that ruling. (*Id.*) The Magistrate Judge concluded that "with no state court remedies still available to him, Jefferson has defaulted the claims." (*Id.* at p. 24.)

The Magistrate Judge then found that Jefferson had failed to show cause or prejudice to excuse the default. (*Id.*) Specifically, the Magistrate Judge found that Jefferson could not rely on ineffective assistance of appellate counsel to excuse the default of Ground One because Jefferson's ineffective assistance of appellate counsel claims are themselves defaulted. (*Id.* at p. 25.) In this regard, the Magistrate Judge noted that the state appellate court denied Jefferson's 26(B) Application as untimely; Jefferson failed to appeal that ruling to the Supreme Court of Ohio; and there was no procedural avenue for him to now exhaust the claims raised in his Application. (*Id.*)

The Magistrate Judge then found that Jefferson could not demonstrate cause or prejudice to excuse the default of his ineffective assistance of *appellate* counsel claims. (*Id.* at p. 26.) The

Magistrate Judge found that, to the extent Jefferson was seeking to excuse his untimely 26(B) Application on the grounds of lack of legal training and/or mental or physical issues caused by his epilepsy, Jefferson had failed to show that either of these issues prevented him from timely filing his 26(B) Application or appealing the denial of his 26(B) Application to the Supreme Court of Ohio. (*Id.*)

The Magistrate Judge went on to find that "to the extent Jefferson claims that his failure to appeal the denial of his post-conviction petition (that included claims of ineffective assistance of trial counsel (Doc. 28-1, p. 126)) should be excused because his post-conviction counsel, who was appointed by the trial court, belatedly notified him of the trial court's denial of his post-conviction petition due to the trial court having an incorrect office address for his post-conviction counsel (Doc. 28-1, pp. 156-158), his claim should fail." (*Id.* at p. 27.) In this regard, the Magistrate Judge noted that the December 2017 Order denying his first post-conviction petition was also sent directly to Jefferson, as was a copy of the docket. (*Id.*)

Lastly, the Magistrate Judge found that Jefferson's procedural default of Ground One could not be excused on the basis of actual innocence because Jefferson has not presented any evidence showing factual innocence. (*Id.* at p. 28.)

In his Objection, Jefferson argues that "[a]ll three counsel's performance prejudiced Jefferson's outcome in these proceedings." (Doc. No. 35 at p. 6.) He claims that his trial counsel violated the Ohio Rules of Professional Conduct when he advised Jefferson to reject the State's three-year plea deal. (*Id.*) Jefferson then asserts as follows:

> Jefferson's appeal counsel failed to challenge ineffective assistance of trial on direct appeal but the Sixth District Court of Appeals denied it as untimely. North Central Correctional Complex's mailroom failed to timely mail . . . Jefferson's 26(B) Petition due to lack of funds in his account. *Dorn v. Lafler*, 601 F.3d 439, 444-445 (6th Cir.

> 2010). Lucas County Clerk of Court mailed this judgment to Jefferson's post-conviction counsel not him. *Cambell v. U.S.*, 686 F.3d 353, 360 (6th Cir. 2012). Jefferson have learned more about law and legal procedurals now then he knew during his direct appeal and post-conviction so that [is] why Jefferson is able [to] file motions and challenge his constitutional rights. There is no procedural bar because Jefferson failed to raise Ineffective Assistance of Counsel on direct appeal or to the appeal court when Jefferson is actually innocent.

(*Id.* at p. 7-8.)

Federal courts will not consider the merits of procedurally defaulted claims, unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or where failure to review the claim would result in a fundamental miscarriage of justice. *See Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006). A claim may become procedurally defaulted in two ways. *Id.* First, a petitioner may procedurally default a claim by failing to comply with state procedural rules in presenting his claim to the appropriate state court. *Id.; see also Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). If, due to petitioner's failure to comply with the procedural rule, the state court declines to reach the merits of the issue, and the state procedural rule is an independent and adequate grounds for precluding relief, the claim is procedurally defaulted. *Id.*

Second, a petitioner may also procedurally default a claim by failing to raise and pursue that claim through the state's "ordinary appellate review procedures." *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999). If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, it is procedurally defaulted. *Engle v. Isaac*, 456 U.S. 107, 125 n. 28 (1982); *see also Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991); *Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013) ("a claim is procedurally defaulted where the petitioner failed to exhaust state court remedies, and the remedies are no longer available at the time the federal petition is filed because of a state procedural rule.")

A petitioner's procedural default, however, may be excused upon a showing of "cause" for the procedural default and "actual prejudice" from the alleged error. *See Maupin*, 785 F.2d at 138–39. "Demonstrating cause requires showing that an 'objective factor external to the defense impeded counsel's efforts to comply' with the state procedural rule." *Franklin v. Anderson*, 434 F.3d 412, 417 (6th Cir. 2006) (quoting *Murray v. Carrier*, 477 U.S. 478, 488). Prejudice does not occur unless petitioner demonstrates "a reasonable probability" that the outcome of the trial would have been different. *See Mason v. Mitchell*, 320 F.3d 604, 629 (6th Cir. 2003) (citing *Strickler v. Greene*, 527 U.S. 263, 289 (1999)).

For the following reasons, the Court finds that Jefferson's first habeas ground for relief is procedurally defaulted. In this ground, Jefferson raises numerous claims of alleged ineffective assistance of trial counsel. To the extent one or more of these claims rely on evidence in the trial record, Jefferson defaulted these claims because he failed to properly raise them on direct appeal. As noted above, Jefferson did not raise any ineffective assistance of trial counsel claims in his direct appeal to the state appellate court. While he did assert an ineffective assistance of trial counsel claim in the next step of his direct appeal to the Supreme Court of Ohio, this does not save his claims from being barred as procedurally defaulted. *See e.g., Smith v. Warden*, 2010 WL 3075166 at * 14 (S.D. Ohio April 14, 2010) (finding claims defaulted where, although petitioner raised claims to Ohio Supreme Court on direct appeal, he failed to first present them to the state appellate court);[7] *Tharp v.*

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[7] The court in *Smith, supra* succinctly summarized the law on this issue as follows: "Although petitioner raised these claims in his appeal to the Ohio Supreme Court, that action in itself did not preserve the claims for habeas review. 'The Ohio Supreme Court has stated that it will not consider constitutional claims not raised and preserved in the Ohio Court of Appeals. *State v. Phillips*, 27 Ohio St.2d 294, 272 N.E.2d 347, 352 (1971); *State v. Lynn*, [5 Ohio St.2d 106, 214 N.E.2d 226, 229 (1966).]" *Leroy v. Marshall*, 757 F.2d 94, 99 (6th Cir.1985) (quoting *Fornash v. Marshall*, 686 F.2d 1179, 1185 n. 7 (6th Cir.1982), *cert. denied,* 460 U.S. 1042, 103 S.Ct. 1439, 75 L.Ed.2d 796 (1983)). Since petitioner failed to raise the claims set forth in Grounds Two, Three, Four, Five, Eight, and Nine in the Ohio Court of Appeals, these claims were not preserved for appeal to the Ohio Supreme Court. *Leroy,* 757 F.2d at 99. District courts within the Sixth

Eppinger, 2019 WL 7494383 at * 7 (N.D. Ohio Dec. 9, 2019) (same). Because Jefferson has not argued or shown that state law would now permit him to raise these claims, the Court finds that they are defaulted. *See Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).

In his Objection, Jefferson appears to argue that his default of these on-the-record ineffective assistance of trial counsel claims should be excused on the basis of ineffective assistance of appellate counsel. The Court rejects this argument. While ineffective assistance of appellate counsel may serve as "cause" to excuse a procedural default, it may only do so if the ineffective assistance of appellate counsel claim is not itself defaulted. *See Edwards v. Carpenter*, 529 U.S. 446, 450-451 (2000); *Wogenstahl v. Mitchell,* 668 F.3d 307, 321 (6th Cir. 2012). Because the state appellate court denied Jefferson's 26(B) Application on procedural grounds and Jefferson failed to appeal that denial, the ineffective assistance of appellate counsel claims raised therein are themselves procedurally defaulted and may not serve as "cause" to excuse the default of Jefferson's on-the-record ineffective assistance of trial counsel claims.

Jefferson then appears to argue that the default of his ineffective assistance of appellate counsel claims should be excused because "North Central Correctional Complex's mailroom failed to timely mail . . . Jefferson's 26(B) Petition due to lack of funds in his account." (Doc. No. 35 at p. 7.) The Court rejects this argument. Even assuming *arguendo* that the alleged failure of the prison to mail Jefferson's 26(B) Application could serve as cause to excuse this default, Jefferson offers no explanation for his further failure to timely appeal the state appellate court's denial of that

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Circuit 'have consistently found Ohio's procedural rule requiring claims to be presented in the lower appellate court prior to being presented to the Ohio Supreme Court to be an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim.' *Shank v. Mitchell*, No. 2:00–cv–17, 2008 WL 4449567, at *43 (S.D. Ohio Sept.30, 2008) (Marbley, J.) (citations omitted). Thus, Grounds Two, Three, Four, Five, Eight, and Nine of the petition are procedurally defaulted." *Smith*, 2010 WL 3075166 at * 14.

Application. Because Jefferson has not demonstrated cause to excuse the default of his ineffective assistance of appellate counsel claims occasioned by his failure to appeal the state appellate court's ruling, he cannot use ineffective assistance of appellate counsel to excuse the default of his on-the-record ineffective assistance of trial counsel claims.

Several of Jefferson's ineffective assistance of trial counsel claims set forth in Ground One could be construed as relying on evidence outside the trial record. To the extent these claims could have been properly raised in a post-conviction petition, the Court finds they are also procedurally defaulted. As detailed above, Jefferson raised certain ineffective assistance of trial counsel claims in his first post-conviction, filed October 4, 2017. (Doc. No. 28-1, Exh. 17.) Specifically, Jefferson raised the following ineffective assistance of trial counsel claims:

> Mr. Daniel Arnold refused [to] summon Mr. Jefferson's eye witness (Ward v. Dretke) LaShanna Haney and he sent 3 of Mr. Jefferson's witness[es] in court on the first of trial [sic]. Also, Mr. Arnold failed [to] summon Medical and Ballistic experts.

(*Id.* at PageID#1084) The three witnesses are identified in the Post-Conviction Petition as "eyewitnesses" Tyra Clemmons, Sierra Dotson, and Vaughan Hoblet, CNP. (*Id.*) No affidavits from either Ms. Haney, Ms. Clemmons, Ms. Dotson, or Nurse Hoblet are attached to Jefferson's Post-Conviction Petition.

The state trial court appointed counsel, Autumn Adams, to assist Jefferson with his Petition. Ms. Adams subsequently filed a Reply Brief in support of Jefferson's Petition. (Doc. No. 28-1, Exhs. 20, 21.) That Reply did not contain any further information regarding what Ms. Haney, Ms. Clemmons, Ms. Dotson, or Nurse Hoblet would have testified to, nor did it attach any affidavits or other evidence from or relating to these individuals. (*Id.*)

The state trial court denied Jefferson's Petition on December 20, 2017. (Doc. No. 28-1, Exh. 22.) Jefferson did not appeal the state court's ruling and may no longer do so, as Ohio does not permit delayed appeals in post-conviction proceedings.[8] *See Wright v. Lazaroff*, 643 F. Supp.2d 971, 987 (S.D. Ohio 2009) ("The Supreme Court of Ohio has specifically held that "a delayed appeal pursuant to App. R. 5(A) is not available in the appeal of a post-conviction relief determination ...") (citing *State v. Nichols*, 463 N.E.2d 375, 378 (1984)); *Carley v. Hudson*, 563 F. Supp.2d 760, 775 (N.D. Ohio 2008) (same); *Scott v. Warden, Pickaway Correctional Inst.*, 2014 WL 29514 at * 6 (S.D. Ohio Jan. 3, 2014) (finding claim procedurally defaulted because petitioner failed to appeal the trial court's denial of his post-conviction petition and petitioner could no longer appeal because "Ohio does not permit delayed appeals in post-conviction proceedings.") *See also Nesser v. Wolfe*, 2010 WL 1141006 at *4 (6th Cir. March 25, 2010) (holding that "Ohio does not permit delayed appeals in postconviction proceedings, and this is an adequate and independent ground upon which to deny relief."). Thus, the Court finds that the outside-the-record ineffective assistance of trial counsel claims that were raised in Jefferson's first Post-Conviction Petition are procedurally defaulted.

In his Objection, Jefferson appears to assert that the default of these claims should be excused because the "Lucas County Clerk of Court mailed this judgment to Jefferson's post-conviction counsel not him." (Doc. No. 35 at p.7.) He also appears to implicitly assert that his post-conviction counsel did not timely inform him of the denial of his petition. (*Id.*)

Even assuming *arguendo* that Jefferson could establish cause to excuse the default of these outside-the-record ineffective assistance of trial counsel claims, these claims are nonetheless barred

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[8] The Magistrate Judge's R&R suggests that Jefferson could have taken steps to seek leave to file a delayed appeal from the denial of his post-conviction, citing Ohio App. R. 5. (Doc. No. 34 at p. 27.) This Court respectfully disagrees and does not adopt that portion of the Magistrate Judge's R&R.

because Jefferson has not demonstrated that he was prejudiced. *See Wade v. Timmerman-Cooper*, 785 F.3d 1059, 1076 (6th Cir. 2015) ("In order to overcome a procedural default, a habeas petitioner must demonstrate both cause for the default and actual prejudice from the alleged error of federal law.") (citing *Coleman*, 501 U.S. at 750)). As the Sixth Circuit has explained, "[p]rejudice, for purposes of procedural default analysis, requires a showing that the default of the claim not merely created a possibility of prejudice to the defendant, but that it worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions." *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002). *See also Fautenberry v. Mitchell*, 515 F.3d 614, 629 (6th Cir. 2008). Habeas petitioners cannot rely on conclusory assertions of prejudice to overcome procedural default; rather, "they must present affirmative evidence or argument as to the precise . . . prejudice produced." *Lundgren,* 440 F.3d at 764 (citing *Tinsley v. Million*, 399 F.3d 796, 806 (6th Cir. 2005)).

The Court finds that Jefferson has failed to sufficiently demonstrate prejudice. Jefferson has not articulated how he was prejudiced by trial counsel's failure to call Ms. Haney, Ms. Clemmons, Ms. Dotson, or Nurse Hoblet as witnesses. Jefferson does not direct this Court's attention to any affidavits or other documentary evidence indicating the nature of the testimony he believes these witnesses would have offered. Nor does he even describe the alleged content of any such testimony or evidence. In light of the above, the Court finds that Jefferson has failed to demonstrate prejudice to excuse the default of the outside-the-record ineffective assistance of trial counsel claims set forth in his first Post-Conviction Petition.

To the extent Jefferson raised additional outside-the record ineffective assistance of trial counsel claims in any of his successive post-conviction petitions and/or motions, these claims are also defaulted. As noted above, the state trial court denied Jefferson's Successive Post-Conviction

Petition and Motion to Obtain New Evidence in August 2018. (Doc. No. 28-1, Exh 26.) Jefferson did not appeal the trial court's ruling and cannot do so now, as Ohio does not permit delayed appeals in post-conviction proceedings. *See e.g., Wright*, 643 F. Supp.2d at 987; *Carley*, 563 F. Supp.2d at 775; *Scott*, 2014 WL 29514 at * 6. Moreover, Jefferson has not argued or demonstrated that there is either cause or prejudice to excuse the default of these claims.

Finally, Jefferson asserts, summarily, that the procedural default of Ground One should be excused on the basis of actual innocence. (Doc. No. 35 at p. 8.) A petitioner's procedural default may be excused where a petitioner is actually innocent in order to prevent a "manifest injustice." *See Coleman*, 501 U.S. at 749–50. In order to establish actual innocence, a habeas petitioner must show "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Conclusory statements are not enough—a petitioner must "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." *Schlup v. Delo*, 513 U.S. 298, 324 (1995). *See also Jones v. Bradshaw,* 489 F. Supp.2d 786, 807 (N.D. Ohio 2007); *Allen v. Harry*, 2012 WL 3711552 at * 7 (6th Cir. Aug. 29, 2012). A petitioner must show that, in light of the new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 327. "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." *Id.* at 316.

Here, while Jefferson repeatedly asserts that he is innocent, he fails to support this allegation with any new, reliable evidence that was not presented at trial. Jefferson argues generally that medical

records would prove that "his hands were not usable on or around February 3, 2016" and, therefore, he could not have shot a gun at Ms. Ervin. (Doc. No. 35 at p. 10.) Jefferson's conclusory allegation that his hands were "not usable" on the date of the offense, however, is not sufficient to demonstrate actual innocence. Moreover, as the state appellate court noted, during his interrogation by Detective Wise, Jefferson expressly admitted to having shot at a possum earlier in the day on February 3, 2016. *See State v. Jefferson*, 2017 WL 3575607 at *4. *See also* Doc. No. 28-1, Exh. 38 at Tr. 254. Accordingly, the Court finds that Jefferson has failed to demonstrate that the procedural default of Ground One should be excused on the basis of actual innocence.

For all the reasons set forth above, the Court finds that Jefferson's ineffective assistance of trial counsel claims set forth in Ground One of the Petition are procedurally defaulted. The Court further finds that Jefferson has not demonstrated cause, prejudice, or actual innocence to excuse the default of these claims.[9] Thus, Jefferson's Objection is overruled and Ground One is denied.

2. Ground Two—Sufficiency of the Evidence

In Ground Two, Jefferson contends that there was insufficient evidence to convict him of felonious assault and having weapons while under disability. (Doc. 22 at pp. 17-18.) He argues that no actual victim was injured; there was no eye witness testimony to prove that Jefferson actually shot a gun; there was no forensic testing to prove that Jefferson shot a firearm; and there was no evidence to prove that Jefferson was the owner or lease holder of the property at 2005 Elliott Ave. where the firearms were located. (*Id.*)

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[9] In his Objection, Jefferson does not argue that the default of Ground One should be excused due to his mental and/or physical health problems. Thus, the Court deems any such argument waived and does not address it herein.

In the R&R, the Magistrate Judge recommended the Court find that (1) the portion of this Ground relating to Jefferson's weapons under disability conviction should be dismissed as procedurally defaulted; and (2) the portion of this Ground relating to Jefferson's felonious assault conviction should be denied on the merits. (Doc. No. 34 at pp. 29-35.) Jefferson objects to both recommendations. (Doc. No. 35 at pp. 8-10.)

a. Weapons Under Disability Conviction

The Magistrate Judge concluded that Jefferson's weapons under disability sufficiency of the evidence claim is procedurally defaulted because Jefferson did not raise this particular argument in his direct appeal to the state appellate court. (Doc. No. 34 at p. 29.) The Magistrate Judge further found that Jefferson failed to demonstrate either cause or prejudice to excuse the default. (*Id.* at pp. 29-30.)

Jefferson does not address the issue of procedural default, cause or prejudice in his Objection. (Doc No. 35.) Rather, he argues that there was no evidence to prove that he committed the offense of weapons under disability because "Toledo police officers and detective testified at trial that Jefferson had no weapon in his possession and there was no physical proof Jefferson fired a weapon, such as ballistics, no gun shot residue test, no fingerprints and no projectile found, no evidence to support Jefferson violated this law by committing this offense." (*Id.* at p. 9.)

Because Jefferson did not object to the Magistrate Judge's determination that this claim is procedurally defaulted, the Court deems such argument waived. The Court also deems waived any argument that cause or prejudice exists to excuse default of this claim. Accordingly, and upon its own review, the Court agrees with the Magistrate Judge and adopts her recommendation that Jefferson's sufficiency of the evidence claim relating to his weapons under disability conviction is

procedurally defaulted and, further, that Jefferson has failed to demonstrate either cause or prejudice to excuse the default.

Liberally construed, Jefferson's Objection does appear to assert that the default of this claim should be excused on the basis of actual innocence. The Court rejects this argument. While Jefferson's Objection could be read to assert various legal theories as to why he should not have been convicted of this offense, he fails to come forward with any new, reliable evidence that he is factually innocent of the offense of weapons under a disability. Accordingly, the Court rejects Jefferson's Objection with respect to this claim.

Accordingly, the Court finds that Jefferson's sufficiency of the evidence claim relating to his weapons under disability conviction, as set forth in Ground Two of the Petition, is procedurally defaulted. The Court further finds that Jefferson has not demonstrated cause, prejudice, or actual innocence to excuse the default of this claim. Thus, Jefferson's Objection is overruled and this portion of Ground Two is denied.

b. Felonious Assault Conviction

In the R&R, the Magistrate recommends that the Court deny on the merits Jefferson's sufficiency of the evidence claim with respect to his felonious assault conviction. (Doc. No. 34 at pp. 31-34.) The Magistrate Judge concluded that, although there was no direct evidence that Jefferson shot a gun at Ms. Ervin, the jury heard a wealth of circumstantial evidence that Jefferson committed the offense, including Ms. Ervin's testimony and police officers' testimony regarding the recovery of several firearms inside the residence and the recovery of a shell casing lying on top of the grass next to the front porch. (*Id.*) In light of this testimony and evidence, the Magistrate Judge concluded that

the state appellate court reasonably concluded that the circumstantial evidence was sufficient to establish that Jefferson committed the offense of felonious assault. (*Id.*)

In his Objection, Jefferson insists that there is no evidence to support his conviction for this offense. (Doc. No. 35 at pp. 9-10.) He maintains that Ms. Ervin's testimony is not credible and notes that she was never harmed. (*Id.*) Jefferson also claims that he could not have committed the offense because his hands were "not usable" and, therefore, he could not have shot a gun on the night in question. (*Id.*)

Jefferson raised this claim in his direct appeal to the state appellate court. (Doc. No. 28-1, Exh. 9.) That court considered it on the merits and rejected it as follows:

> {¶ 17} Under R.C. 2903.11(A)(2), a defendant may be convicted of felonious assault for causing or attempting to cause physical harm to another by means of a deadly weapon. "Firing a gun in a person's direction is sufficient evidence of felonious assault." *State v. Jordan,* 8th Dist. Cuyahoga No. 73364, 1998 WL 827588, *12, 1998 Ohio App. LEXIS 5571, *31 (Nov. 25, 1998). According to appellant, the state failed to introduce sufficient evidence to establish that he fired a shot at Ervin as she was fleeing from the residence.
>
> {¶ 18} In denying appellant's Crim.R. 29 motion, the trial court characterized this case as a "close call." We agree. While the state did not introduce direct evidence as to whether appellant pointed his firearm at Ervin and pulled the trigger, we find that the circumstantial evidence was sufficient to establish that he did so.
>
> {¶ 19} During her testimony at trial, Ervin testified that she clearly heard a gunshot ring out from the area around the front porch as she was running out of the residence. Prior to this point, appellant was enraged at the thought of Ervin terminating the marriage, and had already violently reacted by biting Ervin and attempting to prevent her from leaving the residence. During the incident, Ervin observed a handgun sitting on a nearby table. After arriving at her vehicle following the gunshot, she looked back and saw appellant reentering the residence from the front porch.
>
> {¶ 20} During the ensuing investigation, authorities recovered several firearms inside the residence. One of these firearms contained ammunition that matched a .25 caliber spent shell casing that was discovered lying on top of the grass next to the front porch. Appellant attempted to explain the spent shell casing by admitting to having shot at a

> possum earlier in the day. However, according to detective Wise, appellant's story changed several times during the interrogation.
>
> {¶ 21} Construing the foregoing evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have found, beyond a reasonable doubt, that appellant attempted to cause Ervin serious physical harm by firing a shot in her direction as she attempted to escape the residence. Thus, the trial court properly denied appellant's Crim.R. 29 motion, and appellant's first assignment of error is not well-taken.

State v. Jefferson, 2017 WL 3575607 at *4.

A petitioner who claims that the evidence at trial was insufficient for a conviction must demonstrate that, "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *See also Scott v. Mitchell*, 209 F.3d 854, 885 (6th Cir. 2000). The role of the reviewing court in considering such a claim is limited:

> A reviewing court does not reweigh the evidence or redetermine the credibility of the witnesses whose demeanor has been observed by the trial court. It is the province of the factfinder to weigh the probative value of the evidence and resolve any conflicts in testimony. An assessment of the credibility of witnesses is generally beyond the scope of federal habeas review of sufficiency of evidence claims. The mere existence of sufficient evidence to convict therefore defeats a petitioner's claim.

Matthews v. Abramajtys, 319 F.3d 780, 788-89 (6th Cir. 2003) (internal citations omitted). Moreover, it is well established that '"attacks on witness credibility are simply challenges to the quality of the government's evidence and not to the sufficiency of the evidence.'" *Martin v. Mitchell*, 280 F.3d 594, 618 (6th Cir. 2002) (quoting *United States v. Adamo*, 742 F.2d 927, 935 (6th Cir.1984) *abrogated on other grounds by Buford v. United States*, 532 U.S. 59 (2001)).

Consistent with these principles, the Supreme Court has emphasized that habeas courts must review sufficiency of the evidence claims with "double deference:"

> We have made clear that *Jackson* claims face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference. First, on direct appeal, 'it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.' *Cavazos v. Smith*, 565 U.S. 1, ——, 132 S.Ct. 2, 4, 181 L.Ed.2d 311 (2011) (per curiam). And second, on habeas review, 'a federal court may not overturn a state court decision rejecting a sufficiency of the evidence challenge simply because the federal court disagrees with the state court. The federal court instead may do so only if the state court decision was 'objectively unreasonable.'" *Ibid.* (quoting *Renico v. Lett*, 559 U.S. 766, ——, 130 S.Ct. 1855, 1862, 176 L.Ed.2d 678 (2010)).

Coleman v. Johnson, 566 U.S. 650, 651 (2012). Under this standard, "we cannot rely simply upon our own personal conceptions of what evidentiary showings would be sufficient to convince us of the petitioner's guilt," nor can "[w]e ... inquire whether any rational trier of fact would conclude that petitioner ... is guilty of the offenses with which he is charged." *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). Rather, a habeas court must confine its review to determining whether the state court "was unreasonable in its conclusion that a rational trier of fact could find [petitioner] guilty beyond a reasonable doubt based on the evidence introduced at trial." *Id.*

Upon careful review of the trial transcript, the Court finds that Jefferson's felonious assault conviction is supported by substantial evidence. The state appellate court accurately summarized the trial testimony and evidence of record. As noted by the state court, Ms. Ervin testified that, on February 3, 2016, she went to see Jefferson at a residence located on Elliott Street to tell him that she was ending their marriage. (Doc. No. 28-1, Exh. 38 at Tr. 176-178.) While she was with Jefferson, she saw a gun on the table. (*Id.*) She testified that, during the course of their conversation, Jefferson became upset, bit her face, screamed and yelled, and attempted to block her from leaving. (*Id.*) She was able to run out of the house and then clearly heard a gunshot ring out:

> I ran out that door so fast. I was trembling. I was scared to death. I feared for my life. As I'm running out the door going down the steps I hear a pow. I'm like, oh, my God, he done shot at me, am I shot? I run around to my car. I'm shaking. I'm trembling. I'm falling down to my knees. The key's dropping out of my hand. I'm trying [to] get in my car to get away and I look through my car window to see where he was at after he shot at me. He's standing on this porch like it's nothing. He turn around and he walks back in the house. And I'm waiting to see am I shot.

(*Id.* at Tr. 178.)

The State later introduced testimony from Officer Sahdala that he responded to the scene, entered the house where Jefferson and Ervin had been talking, and discovered three handguns, all of which were loaded. (*Id.* at Tr. 226-228.) Officer Sahdala further testified that one of these guns was a .25 caliber weapon. (*Id.*)

Officer Watson then testified that he responded to the scene and searched the grass located near the front porch for shell casings. (*Id.* at Tr. 234-236.) Officer Watson testified that he found one .25 Hornady shell casing in the grass, approximately five to six feet from the front porch. (*Id.*) Officer Watson testified that the location of the shell casing was consistent with a shot having been fired from the front porch. (*Id.*) He further stated that two unspent rounds of Hornady .25 ACP ammo were found in the .25 caliber weapon recovered from the residence. (*Id.*)

In light of the above, the Court finds that the state appellate court reasonably concluded that sufficient evidence supported the jury's findings as to each element of felonious assault. The Court acknowledges that the evidence presented by the State was entirely circumstantial. The Supreme Court has held, however, that "[c]ircumstantial evidence ... is intrinsically no different from testimonial evidence," and that it is sufficient as long as the jury is convinced beyond a reasonable doubt. *See Holland v. United States*, 348 U.S. 121, 138-140 (1955). *See also Desert Palace, Inc. v. Costa,* 539 U.S. 90, 100 (2003) (stating that "we have never questioned the sufficiency of

circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required").

Jefferson nonetheless asserts that his conviction is not supported by sufficient evidence because Ervin's testimony is unreliable and contradictory. This argument is without merit. It is well established that the credibility of witness testimony was outside the scope of the state appellate court's consideration of Jefferson's claim of insufficient evidence. *See Martin*, 280 F.3d at 618. Rather, the state appellate court properly considered all of the evidence in the light most favorable to the State and determined there was sufficient evidence to convict him. The standard of review applied by the state appellate court coincides with the standard for sufficiency of the evidence set forth in *Jackson, supra*. Jefferson points to no federal legal precedent requiring the state appellate court, in the context of a challenge to the sufficiency of the evidence, to engage in the evidence-weighing that he requests.

Accordingly, Jefferson's Objection is without merit and overruled. Jefferson's sufficiency of the evidence claim relating to his felonious assault conviction is denied on the merits.

3. Ground Three—Prosecutorial Misconduct

In Ground Three, Jefferson argues that his due process rights were violated because the prosecutor improperly introduced bad character evidence at trial by using Jefferson's prior drug conviction from 2007. (Doc. 22 at pp. 19-20.) He asserts that the prosecutors violated his due process rights and the prosecutors violated the Brady rule when they failed to introduce and withheld from the jury the Detective Wise interrogation DVD from the night of February 3, 2016. (*Id.* at pp. 20-21.) Jefferson also argues that the prosecutors violated his rights because they did not introduce evidence sufficient to prove the elements of the offenses for which he was charged. (*Id.* at pp. 21-26.)

The Magistrate Judge recommends that this ground be dismissed as procedurally defaulted. (Doc. No. 34 at pp. 35-37.) She determined that Jefferson's claims would have been apparent from the face of the record and, therefore, he was required to raise them on direct appeal. (*Id.*) Jefferson, however, failed to do so and had not demonstrated that a state court remedy existed through which he could now exhaust these claims. (*Id.*) Lastly, the Magistrate Judge found that Jefferson could not establish either cause or prejudice for the default. (*Id.*)

In his Objection, Jefferson does not address the issues of procedural default, cause, or prejudice in his Objection. (Doc No. 35 at pp. 10-11.) Rather, he asserts generally that the State withheld Brady evidence and improperly vouched for Ms. Ervin during her testimony. (*Id.*) Jefferson also states that this claim should not be procedurally barred because he is actually innocent. (*Id.*)

Because Jefferson did not object to the Magistrate Judge's determination that this claim is procedurally defaulted, the Court deems such argument waived. The Court also deems waived any argument that cause or prejudice exists to excuse default of this claim. Accordingly, and upon its own review, the Court agrees with the Magistrate Judge and finds that Jefferson's prosecutorial misconduct claim is procedurally defaulted and, further, that Jefferson has failed to demonstrate either cause or prejudice to excuse the default.

Jefferson does argue that the default of this claim should be excused on the basis of actual innocence. The Court rejects this argument. As noted above, conclusory statements are not enough to show actual innocence. Rather, a petitioner must "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." *Schlup*, 513 U.S. at 324. Jefferson has failed to come forward with any new, reliable evidence that he is factually innocent.

Accordingly, the Court finds that Jefferson has not demonstrated that the procedural default of this claim should be excused on the basis of actual innocence.

The Court therefore finds that Jefferson's prosecutorial misconduct claim set forth in Ground Three of the Petition is procedurally defaulted. The Court further finds that Jefferson has not demonstrated cause, prejudice, or actual innocence to excuse the default of this claim. Thus, Jefferson's Objection is overruled and Ground Three is denied.

4. Ground Four—Search and Seizure

In Ground Four, Jefferson argues that the Toledo police unlawfully seized him and unlawfully searched the property at 2055 Elliott Ave. (Doc. 22 at pp. 27-28.)

The Magistrate Judge recommends that this claim be denied pursuant to *Stone v. Powell,* 428 U.S. 465, 494 (1976). In that case, the Supreme Court held that, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the grounds that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* The Sixth Circuit has explained that a Fourth Amendment claim is barred by *Stone* unless "the state provided no procedure by which the prisoner could raise his Fourth Amendment claim, or the prisoner was foreclosed from using that procedure...." *Good v. Berghuis*, 729 F.3d 636, 639 (6th Cir. 2013) (quoting *Willett v. Lockhart,* 37 F.3d 1265, 1273 (8th Cir. 1994) (en banc)). *See also Brown v. Nagy*, 2019 WL 7761722 at * 6 (6th Cir. Dec. 16, 2019).

Here, the Magistrate Judge found that the State of Ohio has a mechanism in place for resolving Fourth Amendment claims, including the opportunity to file a motion to suppress. (Doc. No. 34 at p. 38.) The Magistrate Judge further found that "there is no indication that Jefferson's presentation of

his Fourth Amendment claim was frustrated by a failure of Ohio's procedural mechanism," particularly given that he was represented by counsel and had the opportunity to file pretrial motions. (*Id.*) In this regard, the Magistrate Judge noted that Jefferson did, in fact, file a motion to suppress statements made during his interrogation by Detective Wise, which was decided by the trial court after a hearing. (*Id.*) The Magistrate Judge stated that Jefferson did not raise the Fourth Amendment claims raised in the instant habeas Petition, nor did he assert them on direct appeal. (*Id.*)

In his Objection, Jefferson does not address the applicability of *Stone v. Powell, supra*, nor does he otherwise assert that his ability to present his Fourth Amendment claims was frustrated as a result of the State's process for presentation of such claims. In addition, Jefferson does not argue that he, in particular, was foreclosed from raising the instant Fourth Amendment issues in the state trial court.

Accordingly, the Court agrees with the Magistrate Judge that Jefferson's Fourth Amendment habeas claim is barred by *Stone v. Powell, supra*. Jefferson's Objection is overruled and Ground Four of the instant Petition is denied.

Therefore, and for all the reasons set forth above, Jefferson's Objections are overruled. The Magistrate Judge's R&R (Doc. No. 34) is ADOPTED as set forth herein, and the Petition is DISMISSED. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), 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(c); Fed. R. App. P. 22(b).

IV. Motion for Emergency Release (Doc. No. 36)

On April 20, 2020, Jefferson filed a *pro se* Motion for Emergency Release due to the COVID-19 pandemic. (Doc. No. 36.) Therein, Jefferson states that he is at high risk due to his epilepsy and

bronchitis.[10] (*Id.*) He indicates that he fears for his life and asserts that forcing him to stay in custody under the present circumstances constitutes cruel and unusual punishment in violation of the Eighth Amendment. (*Id.*) Jefferson also states that, on April 10, 2020, he filed a "Motion for Judicial Release COVID-19 *pro se* package" in the state trial court.[11] (*Id.*)

Respondent filed a Brief in Opposition on April 22, 2020. (Doc. No. 37.) Therein, Respondent argues that Jefferson's Motion should be denied because it essentially challenges the conditions of his confinement, which is not a cognizable claim in federal habeas proceedings under § 2254. (*Id.*) Respondent further asserts that Jefferson has not demonstrated that he is entitled to release on bond because he has failed to establish likelihood of success on the merits and/or the presence of exigent circumstances. (*Id.*) Finally, Respondent argues that Jefferson's Motion should be denied because he has not shown that prison authorities are unable or unwilling to address the issue of coronavirus within prisons. (*Id.*)

As set forth at length above, the Court has exhaustively reviewed Jefferson's habeas Petition and dismissed each of his four grounds for relief. The Court has also certified, pursuant to 28 U.S.C. § 1915(a)(3), 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. Thus, having completed its review and dismissed the Petition, the Court is doubtful that it has the jurisdiction to grant Jefferson's Motion at this time.

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[10] Attached to Jefferson's Motion is a purported letter dated April 9, 2019 from the Warden of North Central Correctional (where Jefferson is currently housed) indicating that an inmate had tested positive for COVID-19. (Doc. No. 36-1.)

[11] According to the state court docket, that motion was docketed by the trial court on April 21, 2020 and remains pending as of the date of this decision.

Even assuming it retained such authority, the Court finds that Jefferson has not demonstrated that he is entitled to release. Construing Jefferson's Motion liberally, it appears that Jefferson is requesting that he be released on bond. "Release of a state prisoner pending consideration of the habeas corpus petition is reserved for the extraordinary case." *Greenup v. Snyder*, 57 Fed. Appx. 620, 621 (6th Cir. 2003) (citing *Lee v. Jabe*, 989 F.2d 869, 871 (6th Cir. 1993) ("Since a habeas petitioner is appealing a presumptively valid state conviction, both principles of comity and common sense dictate that it will indeed be the very unusual case where a habeas petitioner is admitted to bail prior to a decision on the merits in the habeas case.")). To receive bond pending a decision on the merits of a habeas corpus petition, a petitioner must show (1) a substantial claim of law based on the facts, and (2) exceptional circumstances justifying special treatment in the interest of justice. *See Lee*, 989 F.2d at 871 (quoting *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir.1990)). *See also Aronson v. May*, 85 S.Ct. 3, 5 (1964); *Nash v. Eberlin*, 437 F.3d 519, 526, n. 10 (6th Cir.2006). "There will be few occasions where a habeas petitioner meets this standard." *Dipofi v. Eichenlaub*, 2008 WL 2745143 at * 4 (E.D. Mich. July 14, 2008). *See also Dotson*, 900 F.2d at 79; *Smith v. Bergh*, 2018 WL 1399321 at * 3 (E.D. Mich. March 19, 2018).

For the reasons explained in the Court's analysis of Jefferson's Petition, the Court finds that Jefferson has not shown a substantial claim of law based on the facts. Moreover, although the Court is very aware of the serious threat to public health posed by COVID-19, Jefferson has not demonstrated that his particular circumstances constitute "exceptional circumstances justifying special treatment in the interests of justice." Although Jefferson emphasizes that he suffers from bronchitis and epilepsy, the Court finds that these conditions are not so unusual such that they would warrant the extraordinary measure of granting release.

Accordingly, and for all the reasons set forth above, Jefferson's Motion for Emergency Release (Doc. No. 36) is DENIED.[12]

V. Conclusion

For the foregoing reasons, Jefferson's Objections are overruled. The Magistrate Judge's Report & Recommendation (Doc. No. 34) is ADOPTED as set forth herein, and the Petition is DISMISSED. In addition, Jefferson's Motion for Emergency Release (Doc. No. 36) is DENIED.

Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), 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(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

s/Pamela A. Barker
PAMELA A. BARKER
U. S. DISTRICT JUDGE

Date: April 27, 2020

[12] To the extent Jefferson's Motion could be construed as a request to amend his Petition to raise a claim of cruel and unusual punishment under the Eighth Amendment, this request is denied. The instant proceedings are far too advanced to allow amendment. Moreover, the Court agrees with Respondent that Petitioner's motion challenges, in essence, the conditions of his confinement. Such claims are not cognizable in habeas cases. *See Hodges v. Bell*, 170 Fed. Appx 389, 393 (6th Cir. 2006) ("a habeas corpus proceeding does not extend to the conditions of confinement"). *See also Nelson v. Campbell,* 541 U.S. 637, 643 (2004) (finding that, generally, a federal court's authority in a habeas proceeding under § 2254 extends only to determining the legality of a petitioner's state-court conviction and sentence, and not to addressing the conditions of his confinement.)

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

TANELLE M. JEFFERSON,	)	CASE NO. 3:18-cv-00779
	)	
Petitioner,	)	JUDGE BENITA Y. PEARSON
	)	
v.	)	MAGISTRATE JUDGE
	)	KATHLEEN B. BURKE
STATE OF OHIO,	)	
	)	
	)	**REPORT AND RECOMMENDATION**
	)	
Respondent.	)	

Petitioner Tanelle M. Jefferson ("Petitioner" or "Jefferson"), proceeding pro se, filed this habeas corpus action pursuant to 28 U.S.C. § 2254. His petition is deemed filed on March 18, 2018, the date he placed it in the prison mailing system.[1] Doc. 1, p. 15. Thereafter, Jefferson sought and was granted leave to file an amended petition. Docs. 6 & 18. Jefferson filed an amended petition on November 26, 2018 (hereinafter referred to as "Petition"). Doc. 22. Jefferson challenges the constitutionality of his convictions and sentences in *State of Ohio v. Jefferson*, Case No. G4801-CR-0201601280 (Lucas County). Docs. 1 & 22.

In July 2016, following a jury trial, Jefferson was found guilty of one count of felonious assault with a firearm specification and one count of having weapons while under disability. Doc. 28-1, pp. 20, 66-67. The trial court sentenced Jefferson to a total of 12.5 years in prison. Doc. 28-1, pp. 20, 66-67.

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

This matter has been referred to the undersigned Magistrate Judge pursuant to Local Rule 72.2.

For the reasons set forth below, the undersigned recommends that the Court **DISMISS and/or DENY** Jefferson's Petition.

I. Pending Motions

Also pending before the Court are the following motions filed by Petitioner: (1) Motion for Appointment of Counsel (Doc. 16); (2) Motion for Discovery (Doc. 17); (3) Motion to Expand the Records (Doc. 24); (4) Motion to Subpoena Toledo Police Report (Doc. 25); and (5) Motion to Expand Records (Doc. 31). Petitioner's pending motions are resolved as follows:[2]

A. Petitioner's Motion for Appointment of Counsel (Doc. 16)

It is well established that a habeas corpus proceeding is civil in nature and the Sixth Amendment right to counsel afforded for criminal proceedings does not apply. *See, e.g., Cobas v. Burgess*, 306 F.3d 441, 444 (6th Cir. 2002) (citing *McCleskey v. Zant*, 499 U.S. 467, 495, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991)); *Douglas v. Maxwell*, 357 F.2d 320, 321 (6th Cir. 1966); (there is no Sixth Amendment right to appointed counsel in habeas cases since a habeas corpus proceeding is not a criminal proceeding). The Rules Governing § 2254 Cases ("Habeas Rules") provide situations when a federal habeas court must appoint counsel but do not otherwise set a standard for when the court may appoint counsel. *See, e.g.,* Rule 8 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254 (counsel must be appointed if evidentiary hearing is warranted).

When not required by rule, the appointment of counsel for federal habeas petitioners who, like Petitioner, have filed pursuant to § 2254, is governed by the Criminal Justice Act, 18

[2] Some of Petitioner's motions pertain to similar matters and therefore are addressed together.

U.S.C. § 3006A. *See* 28 U.S.C. § 2254(h). Pursuant to 18 U.S.C. § 3006A, the decision to appoint counsel for a federal habeas petitioner is within the court's discretion, and representation may be provided when "the interests of justice so require." 18 U.S.C. § 3006A(a)(2); *Mira v. Marshall,* 806 F.2d 636, 638 (6th Cir. 1986) ("The decision to appoint counsel for a federal habeas petitioner is within the discretion of the court and is required only where the interests of justice or due process so require."). "Appointment of counsel is only justified in 'exceptional circumstances,' and is unnecessary where claims are 'relatively straightforward' and arise under settled law." *U.S. v. Pullen*, 2012 WL 116035, * 1 (N.D. Ohio Jan. 13, 2012) (denying motion for appointment of counsel in habeas proceeding filed pursuant to 28 U.S.C. § 2255) (citing *Gilbert v. Barnhart*, 2009 WL 4018271, *1 (E.D. Mich. Nov. 19, 2009) (§ 2254 proceeding) and *Bookstore v. Addison*, 2002 WL 31538688, at *2 (10th Cir. Nov. 6, 2002) (§ 2254 proceeding)).

Petitioner contends that appointment of counsel is warranted because he "lack(s) the professional skills and knowledge of law and legal procedure." Doc. 16, p. 1. However, he has filed multiple motions on his own behalf and sought and received leave to file an amended petition. Petitioner has failed to show that exceptional circumstances exist warranting the appointment of counsel. Accordingly, Jefferson's motion for appointment of counsel (Doc. 16) is **DENIED**.

B. Petitioner's Motion for Discovery (Doc. 17) and Petitioner's Motion to Subpoena Toledo Police Report (Doc. 25)

In Doc. 17, Jefferson generally requests that he be provided with "all the evidence in this case." Doc. 17, p. 1. In his reply brief, Jefferson states he never received a DVD of an interrogation conducted of him by Detective Sherri Wise. Doc. 23, p. 1.

In Doc. 25, Jefferson seeks a Toledo Police Report from on or about December 2, 2015, asserting that he called the Toledo Police non-emergency line asking for help because Jeanette

Ervin[3] was attempting to attack him with objects and he was in an air-cast and unable to get away from her. Doc. 25, p. 2. Jefferson further states that the report shows:

> Jeanette Ervin was the violent person and shows Jefferson was the victim who was physically impaired and needed help from her. On February 3, 2016, Jefferson was injured more than he was on December 2, 2015, because he had two badly injured hands and this broken leg as well. These injuries made it impossible for Jefferson to fight anyone or defend his self from anyone with his physical impairments plus his Epilepsy.

Doc. 25, p. 2.

In state post-judgment proceedings, Jefferson sought this same record but his request was denied. Doc. 25, p. 1, Doc. 28-1, pp. 151, 178.

Under Rule 6 of the Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254, "[a] judge *may, for good cause*, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." (emphasis supplied). However, Jefferson has not shown good cause to authorize discovery in this habeas case. Additionally, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Moore v. Mitchell*, 708 F.3d 760, 781 (6th Cir. 2013) (quoting *Cullen v. Pinholster*, — U.S. —, 131 S.Ct. 1388, 1398 (2011)). A federal habeas petition is not intended to allow for a "retrial" of a state proceeding. *Moore*, 708 F.3d at 781.

For the reasons discussed herein, Jefferson's motions for discovery (Docs. 17 & 25) are **DENIED**.

C. Petitioner's Motion to Expand the Records (Docs. 24 & 31)

1. Doc. 24

[3] Jeanette Ervin, Jefferson's wife, was the victim in the criminal case underlying this federal habeas proceeding. Doc. 28-1, pp. 67-71, ¶¶ 4-11.

In Doc. 24, Jefferson seeks to have included in the record before this Court state court records or partial or incomplete copies of state court records. Doc. 24-1 (portion of court docket); Doc. 24-2 (October 31, 2018, trial court order denying pro se motion for summary judgment and motion to subpoena witnesses); Doc. 24-3 (portions of State's opposition to Defendant's (1) Motion for Summary Judgment; and (2) Motion to Subpoena Witnesses).

When Respondent filed its Return of Writ on January 11, 2019, Respondent filed the state court record as an exhibit thereto. Doc. 28-1. Included in that record is a copy of the October 31, 2018, trial court order denying Jefferson's motion for summary judgment and motion to subpoena witnesses (Doc. 28-1, p. 266) and a complete copy of the State's opposition to Defendant's (1) Motion for Summary Judgment; and (2) Motion to Subpoena Witnesses (Doc. 28-1, pp. 263-265). Additionally, Respondent has filed copies of various state court dockets pertaining to Jefferson's state court proceedings. Doc. 28-1, pp. 268-282, 283-288, 289, 290.

Considering the foregoing, Jefferson's Motion to Expand the Records (Doc. 24) is moot and is **DENIED**.

2. Doc. 31

In Doc. 31, Jefferson seeks to expand the record to include "evidence that is within Case No. CR16-1280 records that court appointed Daniel Arnold recently sent Jefferson on or around March 21, 2019." Doc. 31, p. 1. The records include a letter from Attorney Arnold to Jefferson, records from the Toledo Municipal Court, an incident detail report, a record of a property search, and purported attorney notes. Doc. 31, Doc. 31-1, pp. 1-17. Jefferson asserts that these various records will prove certain matters. Doc. 31. For example, he asserts that the records prove that Detective Sherri Wise was aware of certain matters; that he and his wife Jeanette Ervin did not really know each other; and that there was no evidence introduced to prove Jeanette Ervin's

claim that that Jefferson was intoxicated on February 3, 2016. Doc. 31, pp. 1-2. In essence, Jefferson is arguing that the records could be used as impeachment evidence.

Expansion of the record in a habeas proceeding is discretionary. *See* Rule 7 of the Rules Governing § 2254 Cases, 28 U.S.C.A. foll. § 2254 (". . . the judge *may* direct the parties to expand the record . . .) (emphasis supplied). There is no indication that the various records that Jefferson seeks to have included in the record before this Court were presented to the state court or that Jefferson sought to have the records considered by the state court. And, as noted above, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Moore*, 708 F.3d at 781. Further, Jefferson has failed to demonstrate that the records he seeks to introduce could establish a basis upon which federal habeas relief is warranted. For the foregoing reasons, Jefferson's Motion to Expand the Records (Doc. 31) is **DENIED**.

II. Factual Background

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

> {¶ 2} On February 12, 2016, appellant was indicted on one count of felonious assault in violation of R.C. 2903.11(A)(2) and (D), a felony of the second degree, and one count of having weapons while under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. Based upon the allegation that appellant committed the felonious assault while in possession of a firearm, a firearm specification was attached to the felonious assault under R.C. 2941.145.

{¶ 3} Thereafter, appellant entered pleas of not guilty to the aforementioned charges, and the matter proceeded to discovery. Following pretrial proceedings and motion practice, a two-day jury trial commenced on July 18, 2016.

{¶ 4} At trial, the state first presented the testimony of appellant's wife, Jeanette Ervin. Ervin and appellant were married in December 2015. According to Ervin, the marriage "started out fun," but eventually became abusive. Specifically, Ervin stated: "Well, after being together for a while, I noticed some changes in [appellant]. He would always grab on my clothes, rough me up, and he had that temper about [himself] and I would have to fight him off." Due to the abuse that was existent within their marriage, appellant and Ervin resided separately.

{¶ 5} Three months into the marriage, Ervin decided that it was time to end her relationship with appellant. After Ervin informed appellant of her decision to end the marriage, appellant asked Ervin to come to his house so that they could talk about possibly staying together. Ervin noticed that appellant was drinking from a bottle of Hennessy brandy when she arrived at his house. During the discussion, Ervin also noticed a handgun sitting on a nearby table.

{¶ 6} When Ervin informed appellant that she was leaving him, he told her that she was not going anywhere. Ervin then attempted to exit appellant's home. At trial, Ervin recounted the ensuing incident as follows:

And as I'm trying to get out the door, the front door, he's blocking me. So I break and run through the dining room to the kitchen to go down these steps to get away from him. And he put his foot on the back door and said, you're not going anywhere.

All of a sudden he [started] screaming and hollering and I'm just begging him, please. I called him Tee Jay. Tee Jay, let me go. I want to go home, leave me alone. I don't want to be here with you anymore. Let me go.

He kept saying, no, screaming and hollering, still got ahold of my clothes, to my clothes. I go back up the steps to the kitchen and the voice that came out of him was something like I've never heard before, like demons. He was just screaming and hollering at me.

And I knew at that point something bad is getting ready to happen because I already knew he had that gun.

So I tried to keep quiet and not say anything and I'm—he got me backed up there against this thing and I'm like Tee Jay, let me go; I want to go home.

So I managed—he kept telling me I wasn't going to go. I managed to get around him, go through the dining room. He's going to grab me again. Still got my clothes.

By that time this weapon, this gun, hits the floor. I say, it's time for me to break and run for my life.

I ran out that door so fast. I was trembling. I was scared to death. I feared for my life.

As I'm running out the door going down the steps I hear a pow. I'm like, oh, my God, he done shot at me, am I shot? I run around to my car. I'm shaking. I'm trembling. I'm falling down to my knees. The [key is] dropping out of my hand. I'm trying to get in my car to get away and I look through my car window to see where he was at after he shot at me. He's standing on this porch like it's nothing. He [turns] around and he walks back in the house.

{¶ 7} Upon further questioning, Ervin acknowledged that she did not actually witness appellant shoot at her because she was running away from him at the time. Nonetheless, appellant was insistent that she heard appellant fire a shot from where he was standing on the front porch of his home. When asked how she could be certain that appellant fired a shot at her, Ervin stated: "Because I heard the pow and I knew he had a gun. And he was angry."

{¶ 8} As its next witness, the state called Brian Heath. Heath and his partner, Scott Bruhn (whom the state called as its third witness), were the first officers to arrive on the scene after Ervin called 911. Initially, Heath set up a perimeter around appellant's house. Meanwhile, Bruhn questioned Ervin, who informed him that appellant had just shot at her and was still inside the home. Eventually, Heath and Bruhn took appellant into custody. Upon further questioning, Ervin explained to Bruhn that appellant had shot at her from the front porch of the home.

{¶ 9} After learning that appellant fired a shot at Ervin from his front porch, Bruhn alerted the detective bureau and began searching the area around the porch for a shell casing. Bruhn was accompanied by another officer, Michael Watson. Ultimately, Watson discovered one Hornady .25 ACP caliber spent shell casing on top of the grass five to six feet from the edge of the front porch. According to Watson, the location of the shell casing was consistent with Ervin's contention that appellant fired at her while standing on the front porch.

{¶ 10} For its fourth witness, the state called Nathaniel Sahdala. Sahdala also responded to the scene after Ervin called 911. After appellant was arrested and taken into custody, Sahdala entered appellant's home. Upon entry, Sahdala entered the dining room, where he observed a portion of carpet that was folded over with the rear half of a handgun visible underneath the carpet. Sahdala then rolled back the rest of the carpet that was folded and discovered two additional firearms, both of which were loaded. Thereafter, Sahdala retrieved the firearms and unloaded the ammunition. One of the firearms was a .25 caliber handgun, which contained Hornady .25 ACP ammunition matching the shell casing that Watson discovered next to the front porch.

> {¶ 11} As its final witness, the state called detective Sherri Wise. Wise arrived at appellant's residence and was involved in the removal of the firearms from the dining room. Wise eventually interviewed appellant at the police station, where appellant admitted to having fired a weapon earlier in the day. Initially, appellant insisted that he shot a possum. However, the type of animal that was allegedly shot changed several times during the course of Wise's interrogation of appellant. Further, appellant claimed that he shot the animal with a Winchester rifle, which was not located at the residence. Ultimately, the three handguns that were removed from the residence were tested and found to be operable. Notably, Wise corroborated the previous testimony that the .25 caliber handgun that was removed contained ammunition matching the spent shell casing found on the lawn adjacent to the front porch.

State v. Jefferson, 2017-Ohio-7272, ¶¶ 2-11, 2017 WL 3575607, ** 1-3 (Ohio Ct. App. Aug. 18, 2017); *see also* Doc. 28-1, pp. 67-71 (alterations in original).

III. Procedural Background

A. State conviction

On February 12, 2016, a Lucas County Grand Jury indicted Jefferson on (1) one count of felonious assault in violation of O.R.C. § 2903.11(A)(2) and (D), a felony of the second degree, with a firearm specification attached; and (2) one count of having weapons while under disability in violation of O.R.C. § 2923.13(A)(3), a felony of the third degree. Doc. 28-1, pp. 4-6, 67. At his arraignment, which was held on February 24, 2016, Jefferson entered a plea of not guilty. Doc. 28-1, p. 7.

Jefferson filed a motion to suppress, arguing statements he made should be suppressed because he was not advised of his right to remain silent prior to being questioned. Doc. 28-1, pp. 8-9. The State filed an opposition. Doc. 28-1, pp. 10-15. The trial court held a hearing on the motion to suppress on May 13, 2016. Doc. 28-1, p. 16. At that hearing, at the joint request of the parties, a DVD of questioning by the police was submitted to the court for its review. Doc. 28-1, pp. 16, 17. Also, at the hearing, Jefferson requested that new counsel be appointed. *Id.*

On May 17, 2016, the court denied the motion to suppress and Jefferson's motion for new counsel.[4] Doc. 28-1, pp. 17-18. The case was set for pre-trial on June 17, 2016. Doc. 28-1, p. 18. On June 17, 2016, counsel for Jefferson withdrew and the pre-trial was rescheduled to June 22, 2016. Doc. 28-1, pp. 271-272. New counsel was present at the June 22, 2016, pre-trial. Doc. 28-1, p. 272.

Jury trial commenced on July 18, 2016. Doc. 28-1, p. 273. Following a jury trial, on July 19, 2016, a jury found Jefferson guilty of felonious assault with firearm specification and having weapons while under disability. Doc. 28-1, pp. 20-21, 273-274. The trial court proceeded to sentence Jefferson to serve 7 years on count 1 and 30 months on count 2 and an additional mandatory and consecutive term of 3 years for the firearm specification for a total prison sentece of 12.5 years. Doc. 28-1, pp. 20-21, 71-72.

B. Direct appeal

On August 18, 2016, Jefferson, through new counsel, appealed to the Sixth District Court of Appeals. Doc. 28-1, pp. 22-24. In his appellate brief filed on January 28, 2017, (Doc. 28-1, pp. 25-43), Jefferson raised the following assignments of error:

1. The trial court erred to the prejudice of appellant by denying his Rule 29 motion upon completion of the State's case in chief.

2. Appellant's conviction was against the manifest weight of the evidence produced at trial.

Doc. 28-1, pp. 26, 33-37, 38-39. The State filed its appellate brief on February 7, 2017. Doc. 28-1, pp. 44-65. On August 18, 2017, the Sixth District Court of Appeals affirmed the judgment of the Lucas County Court of Common Pleas. Doc. 28-1, pp. 66-77.

[4] The court, noting Jefferson's statement that he had previously been shot in the head and his demeanor on the DVD and in court, ordered Jefferson to undergo a pretrial general psychological examination. Doc. 28-1, pp. 17-18. In his amended petition, Jefferson states that no psychological examination was conducted. Doc. 22, p. 7.

On October 2, 2017, Jefferson, pro se, filed a notice of appeal with the Supreme Court of Ohio. Doc. 28-1, pp. 78-79. In his memorandum in support of jurisdiction (Doc. 28-1, pp. 80-104), Jefferson presented the following propositions of law:

1. Due Process of Law.

2. Ineffective Assistance of Counsel.

Doc. 28-1, pp. 85-88. On January 31, 2018, the Supreme Court of Ohio declined to accept jurisdiction of Jefferson's appeal. Doc. 28-1, p. 105.

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

While his direct appeal was pending, on December 1, 2017, Jefferson filed with the Sixth District Court of Appeals an application to reopen his direct appeal pursuant to Ohio App. R. 26(B). Doc. 28-1, pp. 106-118. Jefferson argued that his appellate counsel was ineffective for not raising ineffective assistance of trial counsel and violation of due process of law. Doc. 28-1, p. 118. On January 11, 2018, the Sixth District Court of Appeals issued a decision and judgment denying Jefferson's application for reopening. Doc. 28-1, pp. 119-121. The court of appeals found that Jefferson's application was untimely and that Jefferson had not demonstrated good cause for the untimely filing. Doc. 28-1, p. 120. Jefferson did not appeal from the court of appeals' denial of his application to reopen.

D. Petition to vacate or set aside judgment of conviction or sentence

Also, while his direct appeal was pending, on October 4, 2017, Jefferson filed in the trial court a Petition to Vacate or Set Aside Judgment of Conviction or Sentence. Doc. 28-1, pp. 122-127. Jefferson raised the following two claims in his petition:

1. Statement of constitutional claim:

Fifth and Fourteen Amendments, U.S. Constitution; Section 16, Article 1, Ohio Constitution Due Process right was violated my trial and prosecution. Trial – Transcripts of Proceeding (TP) Vol 1/2.

Short statement of facts supporting the claim:

A prosecutor is required to prove every element of the crime with which a defendant is charged beyond a reasonable doubt. The Winship "Beyond a reasonable doubt." Sullivan v. La, 508 U.S. 275, 278 (1993). Count 1 Felonious assault with a gun specification means a person knowingly attempt to or did cause harm to a person. There is no physical proof or evidence that indicated I could harm or actually harm Jeanette Ervin on the night of February 3rd, 2016 besides her testimony, in which she testified I roughed her up 2 months before her surgery in May, 2016 (TP Vol 1/2 p173) and Lucas County Correctional's records have actual fact that was impossible for me to do because I was in custody. Its unconstitutional for a prosecutor to make presumptions in criminal prosecution. Estelle v. McGuire, 502 U.S. 62, 72 (1991) Sandstrom v. Mont., 442 U.S. 510, 514 (1979). State witness, expert of the law, Toledo police officer Mr. Brian Heath stated (TP Vol. 1/2 p212 line 3-5) "Initially there was nobody outside. If I can recall correctly, the victim-caller was in her car and come to the location once we arrived." This fact that supports my story she wasn't there at 2055 Elliott at the time she call 9-1-1 meaning her accusations is false also and it was proven in court I didn't reside or have ownership to 2055 Elliott Ave another violation, Miranda v. Arizona, prosecutorial misconduct significant judicial error and claims of insufficient evidence.

2. Statement of constitutional claim:

Sixth Amendment Right to Effective assistance of counsel. Right to Expert Witness Testimony. (U.C. Const., Ohio Const.) Palacios v. Burgue, 589 F.3d 347, 352-53 (5th Cir. 2010).

Short statement of facts supporting the claim:

Mr. Daniel Arnold refused summon Mr. Jefferson's eye witness (Ward v. Dretke) LaShanna Haney and he sent 3 of Mr. Jefferson's witness in court on the first of trial. Also, Mr. Arnold failed summon Medical and Ballistic experts.

Doc. 28-1, pp. 123-126. Jefferson also sought a ballistic expert (Doc. 28-1, p. 125) and filed a motion for appointment of counsel (Doc. 28-1, pp. 128-130). On November 8, 2017, the State opposed Jefferson's petition. Doc. 28-1, pp. 131-141. On November 20, 2017, the trial court granted Jefferson's motion for appointment of counsel and appointed counsel to handle Jefferson's petition. Doc. 28-1, pp. 142-143. On December 1, 2017, through appointed counsel, Jefferson filed a reply in support of his petition and request for expert assistance. Doc. 28-1, pp. 144-147. On December 20, 2017, the trial court denied Jefferson's petition and denied his request for expert assistance. Doc. 28-1, pp. 148-149. Jefferson did not appeal the trial court's December 20, 2017, order.

E. Successive petition to vacate or set aside judgment of conviction or sentence and other motions

On March 27, 2018, Jefferson, pro se, filed a Motion to Obtain New Evidence, requesting a December 3, 2015, Toledo Police Department report; a 9-1-1 call from February 3, 2016 from alleged victim's GPS or satellite location; and Detective Sherri Wise's full report and interrogation video. Doc. 28-1, pp. 151-155. That same day, Jefferson filed an affidavit and memorandum in support, stating that he had recently learned about the trial court's denial of his post-conviction petition because his post-conviction counsel informed him that the court had an incorrect address for her so she was not notified of the ruling until checking the docket on February 13, 2018. Doc. 28-1, pp. 156-158.

On April 13, 2018, Jefferson, pro se, filed a Successive Petition to Vacate or Set Aside Judgement of Conviction or Sentence. Doc. 28-1, pp. 159-166. In his successive petition, Jefferson asserted the following claims:

1. Prosecutorial misconduct which violates the (14) Fourteenth Amendment of the United States Constitution.

During trial the states prosecutors did not introduce the DVD of Detective Sherri Wise's interrogating Petitioner on February 3, 2016. Since State's prosecutors withheld this DVD, a major piece of evidence that could have proven the Petitioner's actual innocence. See Youngblood v. West Virginia 547 U.S. 867, 870, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006).

This DVD is already in evidence and is considered "NEW EVIDENCE" because prosecutors failed to present or introduce this at trial so it can be found and reviewed by the Court without being attached to this Petition. See. District Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 129 S.Ct. 2308, 2319, 174 L.Ed.2d 38 (2009). Prosecutors violated the Brady rule because all evidence such as finger prints, e-mails, test results, reports, recordings and notes should have been introduced at trial, U.S. v. Olsen, 704, F3d 1172, 1181-85 (9th Cir. 2013). This DVD recording will show the Petitioner was under duress and unable to use an ink pen due to his hand being injured so in this event, would have demonstrated that the would be no way how he could use his hands to pick up a gun.

2. Search and seizure Evidence obtained illegally was introduced at trial to prove guilt and because of this being presented in a matter which was unlawful, a reversal is due, Chapman v. California, 386 U.S. 18, 23-24 (1967). 4th Fourth Amendment violations through Mapp v. Ohio, 367 U.S., 232 U.S. 383. 398, (1914) evidence also violates the 5th Amendment.

Toledo police forced entry in 2055 Elliott Ave in Toledo, Lucas County, Ohio on February 3rd, 2016, and seized three guns after they seized the Petitioner outside of the house. Toledo Police told the Petitioner to step out and go to the Safety Building for questioning but handcuffed and slammed him on his face and then snatched his brace of his right hand and before transporting him to the Toledo Police Station without no MIRANDA rights being read or said or any reason given for arrest. Petitioner's case was dismissed in the Toledo Municipal Court on or about February 12, 2016 and should have been redeemed from custody but the State illegally kept him in custody and then on February 17, 2016, Petitioner was indicted and served his warrant, while in custody of the Lucas County Correctional Center.

Evidence supporting this claim is not attached because Petitioner needs the assistance of the Prosecutor's office to produce the evidence.

Doc. 28-1, pp. 160-161. On July 23, 2018, the State filed a motion for summary judgment/motion to dismiss Jefferson's second petition to vacate, motion to obtain new

evidence, and all remaining motions.[5] Doc. 28-1, pp. 167-177. On August 7, 2018, the trial court denied Jefferson's second petition for post-conviction relief as untimely and not subject to exception and the trial court denied Jefferson's other remaining motions. Doc. 28-1, pp. 178-179.

On August 14, 2018, Jefferson filed a motion to supplement the record with copies of his hospital records, arguing that the records prove that he could not have committed the offenses because of hand injuries. Doc. 28-1, pp. 180-256. On August 24, 2018, the State filed an opposition to Jefferson's motion to supplement the record. Doc. 28-1, pp. 257-258.

On September 7, 2018, Jefferson filed a Motion for Reconsideration wherein he requested that the trial court reconsider his case as a whole based on the medical records that he was seeking to have added to the record. Doc. 28-1, pp. 259-260. On October 22, 2018, Jefferson filed a Motion for Summary Judgment on his motion for reconsideration. Doc. 28-1, p. 261. On October 24, 2018, Jefferson filed a Motion to Subpoena witnesses to be present at a hearing. Doc. 28-1, p. 262. On October 30, 2018, the State opposed Jefferson's Motion for Summary Judgment and Motion to Subpoena witnesses. Doc. 28-1, pp. 263-265.

On October 31, 2018, the trial court ruled that, in his Motion for Summary Judgment, Jefferson was requesting that the court vacate his conviction. Doc. 28-1, p. 266. Thus, the court treated the motion as a motion for post-conviction relief and denied it as successive, untimely, and without exception. Doc. 28-1, pp. 266-267. The trial court also denied the request to subpoena witnesses, finding that the relief sought pertained to a hearing not provided for in law. Doc. 28-1, pp. 266-267. Jefferson did not file an appeal with the court of appeals.

[5] Although not contained in the record, the briefing filed in connection with Jefferson's various post-conviction motions indicates that another motion filed by Jefferson was a motion to subpoena a transcript of a phone interview involving an individual named Lashanna Haney. Doc. 28-1, pp. 167, 176.

F. Federal habeas corpus

Jefferson filed his federal habeas petition on March 18, 2018.[6] Doc. 1. Thereafter, Jefferson sought and was granted leave to file an Amended Petition. Docs. 6 & 18. Jefferson filed an amended petition on November 26, 2018. Doc. 22. Respondent does not seek to strike the amended petition but Respondent asserts that Jefferson's amended petition goes beyond the Court's authorization for leave to amend, noting that the Court granted Jefferson leave to amend "in a manner consistent with the proposed amendments identified in his motion to amend." Doc. 18, p. 2. While Jefferson's amended petition may go beyond the more specific amendments that Jefferson proposed in his motion to amend, considering Jefferson's pro se status and that Respondent has filed a Return of Writ in response to the amended petition, this Report and Recommendation addresses the Petition as amended on November 26, 2018 (Doc. 22). In his amended petition, Jefferson asserts four grounds for relief. Doc. 22, pp. 13-28. Due to the lengthy argument/supporting facts included in the amended petition with each ground for relief, undersigned has summarized the grounds for relief as follows:

1. **GROUND ONE**: Ineffective assistance of trial counsel in violation of the Sixth Amendment U.S. Constitutional right.

In Ground One, Jefferson asserts that his trial counsel was constitutionally ineffective, arguing that his trial counsel: (1) was deficient in advising Jefferson to reject a plea deal and proceed to trial; (2) did not follow procedures for renewing a Criminal Rule 29(c) motion; (3) did not raise as an issue the fact that Jefferson told his trial counsel that he realized he knew one of the jurors; (4) did not properly cross-examine the victim, Jeanette Ervin, and did not make sure

[6] *See* FN 1 above.

that Ms. Ervin was advised of her Fifth Amendment rights; and (5) overlooked relevant evidentiary matters, including the need to obtain forensic testing, the need to subpoena an eye witness and present testimony from certain other witnesses sent home from the trial, the need to introduce the DVD of Detective Wise's interrogation, and the need to subpoena medical records. Doc. 22, pp. 13-17.

2. **GROUND TWO**: Insufficient evidence.

In Ground Two, Jefferson contends that there was insufficient evidence to convict him of felonious assault and having weapons while under disability. Doc. 22, pp. 17-18. He argues that no actual victim was injured; there was no eye witness testimony to prove Jefferson actually shot a gun; there was no forensic testing to prove Jefferson shot a firearm; there was no evidence to prove Jefferson was the owner or lease holder of the property at 2005 Elliott Ave. where the firearms were located. Doc. 22, pp. 17-18.

3. **GROUND THREE**: Prosecutorial misconduct.

In Ground Three, Jefferson argues that his due process rights were violated because the prosecutor improperly introduced bad character evidence at trial by using Jefferson's prior drug conviction from 2007. Doc. 22, pp. 19-20. He asserts that the prosecutors violated his due process rights and the prosecutors violated the Brady rule when they failed to introduce and withheld from the jury the Detective Wise interrogation DVD from the night of February 3, 2016. Doc. 22, pp. 20-21. He also argues that the prosecutors violated his rights because they did not introduce evidence sufficient to prove the elements of the offenses on which he was charged. Doc. 22, pp. 21-26

4. **GROUND FOUR**: Search and seizure.

In Ground Four, Jefferson argues that the Toledo police unlawfully seized him and unlawfully searched the property at 2055 Elliott Ave. Doc. 22, pp. 27-28.

III. Law and Analysis

A. Standard of review under AEDPA

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

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

28 U.S.C. § 2254(d). "A decision is 'contrary to' clearly established federal law when 'the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Otte v. Houk*, 654 F.3d 594, 599 (6th Cir. 2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000)). "A state court's adjudication only results in an 'unreasonable application' of clearly established federal law when 'the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Id.* at 599-600 (quoting *Williams*, 529 U.S. at 413). "The 'unreasonable

application' clause requires the state court decision to be more than incorrect or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). "The state court's application of clearly established law must be objectively unreasonable." *Id.*

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

B. Exhaustion and procedural default

A federal court may not grant a writ of habeas corpus unless the petitioner has exhausted all available remedies in state court. 28 U.S.C. § 2254(b)(1)(A). A state defendant with federal constitutional claims must fairly present those claims to the state courts before raising them in a federal habeas corpus action. 28 U.S.C. § 2254(b), (c); *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor*, 404 U.S. 270, 275–76 (1971); *see also Fulcher v. Motley*, 444 F.3d 791, 798 (6th Cir. 2006) (quoting *Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003)) ("[f]ederal courts do not have jurisdiction to consider a claim in a habeas petition that was not

'fairly presented' to the state courts"). In order to satisfy the fair presentation requirement, a habeas petitioner must present both the factual and legal underpinnings of his claims to the state courts.[7] *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). This means that the petitioner must present his claims to the state courts as federal constitutional issues and not merely as issues arising under state law. *See, e.g., Franklin v. Rose*, 811 F.2d 322, 324-325 (6th Cir. 1987); *Prather v. Rees*, 822 F.2d 1418, 1421 (6th Cir. 1987). Further, a constitutional claim for relief must be presented to the state's highest court in order to satisfy the fair presentation requirement. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845-48 (1999); *Hafley v. Sowders*, 902 F.2d 480, 483 (6th Cir. 1990).

Additionally, a petitioner must meet certain procedural requirements in order to have his claims reviewed in federal court. *Smith v. Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 430 (6th Cir. 2006). "Procedural barriers, such as . . . rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim." *Daniels v. United States*, 532 U.S. 374, 381 (2001). Although procedural default is sometimes confused with exhaustion, exhaustion and procedural default are distinct concepts. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). Failure to exhaust applies where state remedies are "still available at the time of the federal petition." *Id.* at 806 (quoting *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982)). In contrast, where state court remedies are no longer available, procedural default rather than exhaustion applies. *Williams*, 460 F.3d at 806.

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

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

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

Second, "a petitioner may procedurally default a claim by failing to raise a claim in state court, and pursue that claim through the state's 'ordinary appellate review procedures.'" *Williams*, 460 F.3d at 806 (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)); *see also Baston v. Bagley*, 282 F.Supp.2d 655, 661 (N.D.Ohio 2003) ("Issues not presented at each and every level [of the state courts] cannot be considered in a federal habeas corpus petition."); *see also State v. Moreland*, 50 Ohio St.3d 58, 62 (1990)(failure to present a claim to a state court of appeals constituted a waiver). "If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, the claim is procedurally defaulted." *Williams*, 460 F.3d at 806. While the exhaustion requirement is technically satisfied because there are no longer any

state remedies available to the petitioner, see *Coleman v. Thompson,* 501 U.S. 722, 732 (1991), the petitioner's failure to have the federal claims considered in the state courts constitutes a procedural default of those claims that bars federal court review. *Williams,* 460 F.3d at 806.

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

C. Jefferson's grounds for relief

1. Ground One should be DISMISSED

In Ground One, Jefferson asserts that his trial counsel was constitutionally ineffective, arguing that his trial counsel: (1) was deficient in advising Jefferson to reject a plea deal and proceed to trial; (2) did not follow procedures for renewing a Criminal Rule 29(c) motion; (3) did not raise as an issue the fact that Jefferson told his trial counsel that he realized he knew one of the jurors; (4) did not properly cross-examine the victim, Jeanette Ervin, and did not make sure that Ms. Ervin was advised of her Fifth Amendment rights; and (5) overlooked relevant evidentiary matters, including the need to obtain forensic testing, the need to subpoena an eye witness and present testimony from certain other witnesses sent home from the trial, the need to

introduce the DVD of Detective Wise's interrogation, and the need to subpoena medical records. Doc. 22, pp. 13-17.

Respondent contends that Ground One is subject to dismissal because Jefferson procedurally defaulted the claims asserted therein and is unable to overcome that default. Doc. 28, pp. 25-27. For the reasons discussed below, the undersigned agrees.

In his direct appeal, Jefferson argued that the trial court erred in denying his Crim. R. 29 motion and that his conviction was against the manifest weight of the evidence. Doc. 28-1, pp. 26, 33-37, 38-39. Even though the alleged instances of ineffective assistance of trial counsel could have been raised in Jefferson's direct appeal, he failed to raise them. Jefferson raised ineffective assistance of trial counsel in his first post-conviction petition. Doc. 28-1, p. 88. However, the trial court denied his petition, finding that claims which had been or could have been adjudicated by the appellate court were barred and that Jefferson provided nothing outside the record to support his claims. Doc. 28-1, pp. 148-149. Furthermore, Jefferson's post-conviction petition did not include all of the alleged ineffective assistance of counsel claims that he now seeks to be adjudicated in this federal habeas proceeding. And, Jefferson did not appeal either of the trial court orders denying his post-conviction petitions.

Jefferson failed to raise the alleged ineffective assistance of trial counsel claims through the state court's ordinary appellate review procedures. *See Williams*, 460 F.3d at 806 (citing *O'Sullivan*, 526 U.S. at 848). Further, to the extent that presenting his ineffective assistance of trial counsel claims in a state post-conviction proceeding was the proper avenue for seeking review of those claims, he failed to pursue an appeal of the state court's denial of his requests for post-conviction relief. Jefferson has not shown nor does he contend that he remains able to raise his ineffective assistance of trial counsel claims in state court. *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, 180 (Ohio 1967) (Ohio's *res judicata* rule precludes a defendant from raising for the first time in post-conviction proceedings a claim that was fully litigated or could have been fully litigated at trial or on direct appeal). With no state-court remedies still available to him, Jefferson has defaulted the claims. *See Williams*, 460 F.3d at 806 "If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, the claim is procedurally defaulted.") (citing *Engle*, 456 U.S. at 125, n. 28); *see also Baston*, 282 F.Supp.2d at 661 ("Issues not presented at each and every level [of the state courts] cannot be considered in a federal habeas corpus petition."); *see also Moreland*, 50 Ohio St.3d at 62 (failure to present a claim to a state court of appeals constituted a waiver).

To overcome the procedural fault, Jefferson must show cause for the default and actual prejudice that resulted from the alleged violation of federal law or that there will be a fundamental miscarriage of justice if the claims are not considered. *Coleman*, 501 U.S. at 750. "'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to him." *Id.* at 753. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* "A fundamental miscarriage of justice results from the conviction of one who is 'actually innocent.'" *Lundgren*, 440 F.3d at 764. A claim of actual innocence requires a showing of "new reliable evidence" and requires a showing of factual innocence, not mere legal insufficiency. *See Schulp v. Delo*, 513 U.S. 298, 324 (1995); *Carter v. Mitchell*, 443 F.3d 517, 538 (6th Cir. 2006) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998) for the

proposition that "actual innocence means factual innocence, not mere legal insufficiency") (internal quotations omitted).

To the extent that Jefferson argues that ineffective assistance of appellate counsel should excuse his procedural default of Ground One, his claim fails. "Attorney error that constitutes ineffective assistance of counsel is cause" to overcome procedural default. *Coleman v. Thompson*, 501 U.S. 722, 754 (1991). However, claims of ineffective assistance of counsel cannot provide cause for the procedural default of another claim if the ineffective assistance claim itself is procedurally defaulted. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). Although, "that procedural default may [] *itself* be excused if the prisoner can satisfy the cause-and-prejudice standard with respect to *that* claim." *Id.* (emphasis original).

Jefferson argued in an application to reopen his appeal that his appellate counsel was ineffective for failing to raise ineffective assistance of trial counsel in his direct appeal. Doc. 28-1, p. 118. However, he procedurally defaulted that claim because, as found by the state court of appeals, Jefferson failed to timely file his application and he failed to demonstrate good cause for the untimely filing. Doc. 28-1, p. 120. Moreover, Jefferson did not appeal the Sixth District Court of Appeals' denial of his application to reopen.[8] Thus, in order for alleged ineffective assistance of appellate counsel to serve as cause to excuse the procedural default, Jefferson must demonstrate cause and prejudice to excuse the procedural default of his ineffective assistance of appellate counsel claim.

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8 Jefferson's inclusion of a claim of ineffective assistance of appellate counsel in his discretionary appeal to the Supreme Court of Ohio does not save his ineffective assistance of appellate counsel claims from procedural default. *See e.g.*, *Ramirez v. Ross Correctional Inst.*, 2016 WL 5903231, ** 2-3 (N.D. Ohio Oct. 11, 2016) (finding that petitioner's discretionary appeal to the Supreme Court of Ohio did not preserve his ineffective assistance of appellate counsel claims where the Supreme Court of Ohio declined jurisdiction and the petitioner failed to appeal from the court of appeals' denial of petitioner's App. R. 26(B) application) (relying on *Goldberg v. Maloney*, 692 F.3d 534, 538 (6th Cir. 2012)).

With respect to "cause," Jefferson must demonstrate that an objective external factor prevented his ability to comply with App. R. 26(B) filing requirement. He has not done so.

In his Petition and Traverse, Jefferson appears to seek to excuse errors he may have made in pursuing the claims he now seeks to raise in this federal habeas proceeding due to lack of legal training and mental and physical issues caused by epilepsy. Doc. 22, p. 26 ("If in fact errors were made in any filing procedure with legal or law procedure Jefferson is a layman of the law and he has a chronic medical condition called Epilepsy that may impair him at times mentally and physically."); Doc. 30-1, p. 1 (asserting "I lack any legal training and I am a layman of the laws and legal procedures" and "my Epilepsy gave me some mental and physical set backs meaning memory problems and ability to opperate [sic] close to normal."). However, "a petitioner's lack of legal training, standing alone, is insufficient to establish cause." *Terry v. Jackson*, 2017 WL 5664915, * 2 (6th Cir. Jul 17, 2017) (unpublished) (citing *Bonilla v. Hurley,* 370 F.3d 494, 498 (6th Cir. 2004)). Moreover, the issue of whether a petitioner's mental limitations can serve as cause to excuse a procedural default has not been directly addressed by the Sixth Circuit. *Terry*, 2017 WL 5664915, * 2 (citing *Clark v. United States*, 764 F.3d 653, 660 n. 3 (6th Cir. 2014)). But, even if mental limitations could serve as cause to excuse a procedural default, Jefferson raises only a general claim that his medical condition may impair him at times. Doc. 30-1, p. 1. He makes no specific showing as to how his mental "set backs" prevented him from timely filing his application to reopen his appeal or his failure to file an appeal from the state court of appeals' denial of his application reopen. *See e.g. Terry*, 2017 WL 5664915, * 2 (finding petitioner was unable to excuse a procedural default where the petitioner "did not indicate in any clear way . . . how her mental illness prevented her from understanding relevant legal deadlines and obligations"); *see also Peterson v. Klee*, 2015 WL 4389785, * 7-8

(E.D. Mich. July 15, 2015) (concluding that petitioner was unable to demonstrate that his incompetence served as cause to excuse his procedural default); *Kanios v. Baker*, 961 F.2d 1577, 1 (6th Cir. 1992)(unpublished table decision) (rejecting petitioner's claim that his procedural default should be excused because he was on medication for depression following his conviction). Furthermore, Jefferson has demonstrated an ability to comply with other filing requirements and, notwithstanding his mental "set backs," has filed a multitude of other motions seeking relief in various courts. Thus, the undersigned is unable to conclude that his mental "set backs" were an objective factor external to him that prevented him from complying with state procedural rules for presenting his alleged ineffective assistance of counsel claims at every level of the state court proceedings.

Although not clearly raised as a basis to excuse his procedural default of Ground One, to the extent Jefferson claims that his failure to appeal the denial of his post-conviction petition (that included claims of ineffective assistance of trial counsel (Doc. 28-1, p. 126)) should be excused because his post-conviction counsel, who was appointed by the trial court, belatedly notified him of the trial court's denial of his post-conviction petition due to the trial court having an incorrect office address for his post-conviction counsel (Doc. 28-1, pp. 156-158), his claim should fail. The trial court's December 20, 2017, order denying his petition for post-conviction relief was sent by the trial court to Jefferson's counsel and also to Jefferson. Doc. 28-1, pp. 150, 279. Also, on December 27, 2017, a copy of the docket was sent to Jefferson as requested. Doc. 28-1, p. 279. And, even if Jefferson did not learn of the denial of his post-conviction petition until after the time for filing a notice of appeal had lapsed, Jefferson took no steps to seek leave to file a delayed appeal. *See* App. R. 5.

Considering the foregoing, the undersigned finds that Jefferson has failed to demonstrate "cause" sufficient to overcome the procedural default of his ineffective assistance of trial counsel claims in Ground One. Because Jefferson cannot establish "cause," the undersigned need not consider the "prejudice" prong of the procedural default analysis. *See, e.g., Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000).

A procedural default may also be excused by demonstrating a claim of actual innocence. A claim of actual innocence requires a showing of "new reliable evidence" and requires a showing of factual innocence, not mere legal insufficiency. *See Schulp v. Delo*, 513 U.S. 298, 324 (1995); *Carter v. Mitchell*, 443 F.3d 517, 538 (6th Cir. 2006) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998) for the proposition that "actual innocence means factual innocence, not mere legal insufficiency") (internal quotations omitted). .

Jefferson asserts that he is actually innocent. Doc. 22, p. 29. However, he has not presented evidence showing factual innocence. *See e.g., Malcum v. Burt*, 276 F.Supp.2d 664, 677 (E.D. Mich. 2003) ("[I]mpeachment evidence is . . . insufficient to justify invoking the fundamental miscarriage of injustice exception to the procedural default rule."); *Plaza v. Hudson*, 2008 WL 5273899, * 10 (N.D. Ohio Dec. 17, 2008) ("[I]mpeachment evidence of the victim's testimony . . . is insufficient to establish a gateway claim of actual innocence.").

For the foregoing reasons, the undersigned recommends that the Court DISMISS Ground One as procedurally defaulted.

2. Ground Two should be DISMISSED in part and DENIED in part

In Ground Two, Jefferson contends that there was insufficient evidence to convict him of felonious assault and having weapons while under disability. Doc. 22, pp. 17-18. He argues that no actual victim was injured; there was no eye witness testimony to prove Jefferson actually shot

a gun; there was no forensic testing to prove Jefferson shot a firearm; there was no evidence to prove Jefferson was the owner or lease holder of the property at 2005 Elliott Ave. where the firearms were located. Doc. 22, pp. 17-18.

Having weapons while under disability

Respondent argues that Jefferson's claim that there was insufficient evidence to convict him of having weapons while under disability should be dismissed because Jefferson procedurally defaulted that claim. Doc. 28, pp. 27-29. For the reasons explained below, the undersigned agrees.

In his direct appeal, Jefferson challenged only the sufficiency of the evidence as to his conviction for felonious assault. Doc. 28-1, p. 33 ("Appellant argues that although the trial court termed it a 'close call' in denying his Crim.R.29 motion on the Felonious Assault count, insufficient evidence was introduced by the state on essential elements of this charged offense."). Since Jefferson failed to present his sufficiency of the evidence claim as to the having weapons while under disability conviction in his direct appeal, he has procedurally defaulted that claim. *See Williams*, 460 F.3d at 806 (citing *O'Sullivan*, 526 U.S. at 848); *see also Baston*, 282 F.Supp.2d at 661 ("Issues not presented at each and every level [of the state courts] cannot be considered in a federal habeas corpus petition."); *see also State*, 50 Ohio St.3d at 58 (failure to present a claim to a state court of appeals constituted a waiver). With no state-court remedies still available to him, Jefferson has defaulted the claim. *Williams,* 460 F.3d at 806.

As with Ground One, in order to overcome his procedural default, Jefferson must demonstrate cause and prejudice or a fundamental miscarriage of justice if his sufficiency of the evidence claim regarding his having weapons under disability claim is not heard. *Coleman*, 501 U.S. at 750. Jefferson offers no grounds upon which the Court should find that the procedural

default of his sufficiency of the evidence claim regarding having weapons while under disability claim should be excused. To the extent that he contends that the default should be excused because of ineffective assistance of appellate counsel and/or because of his mental or physical conditions (Doc. 22, p. 18), for the reasons discussed above regarding Ground One, the undersigned finds that Jefferson's ineffective assistance of appellate counsel claims were also procedurally defaulted and Jefferson cannot demonstrate cause to excuse said default. Also, Jefferson has not established a claim of actual innocence as to his having weapons while under disability such that not excusing his procedural default will result in a fundamental miscarriage of justice. His arguments are premised on legal insufficiency, not factual innocence. For example, he argues that there are no official records showing he owned or leased the property where he was on the evening of the incident and where the guns were located. *See e.g.*, Doc. 22, p. 17. Yet, whether or not Jefferson owned or leased the real property does not demonstrate actual innocence of the offense of having weapons while under disability. Moreover, as the state court of appeals found when analyzing Jefferson's sufficiency of the evidence claim regarding his felonious assault conviction, Jefferson changed his story several times during Detective Wise's interrogation and admitted to shooting a possum earlier in the day in an attempt to explain the .25 caliber spent shell casing. Doc. 28-1, p. 74, ¶ 20. Thus, Jefferson's claim that his sufficiency of the evidence claim as to the having weapons while under disability conviction should be heard in this federal habeas proceeding notwithstanding his procedural default of the claim because he is actually innocent of the charge is unavailing.

For the foregoing reasons, the undersigned recommends that the Court DISMISS the Ground Two sufficiency of the evidence claim regarding having weapons while under disability as procedurally defaulted.

Felonious assault

Respondent argues that Jefferson's sufficiency of the evidence claim with respect to the felonious assault conviction should be denied on the merits because the state court of appeals' determination regarding said claim was not contrary to or an unreasonable application of clearly established federal law. Doc. 28, pp. 27-37. For the reasons explained below, the undersigned agrees.

In reviewing a claim that a petitioner's conviction was not supported by sufficient evidence, 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 beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Under this standard, deference is due the jury's determination. *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009). The standard is not whether the trier of fact made the correct guilt or innocence determination but, rather, whether it made a rational decision to convict or acquit. *Herrera v. Collins*, 506 U.S. 390, 402 (1993). Thus, in making a determination as to sufficiency of the evidence, a court does "not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *Brown*, 567 F.3d at 205; *see also Matthews v. Abramajtys,* 319 F.3d 780, 788 (6th Cir. 2003). "Circumstantial evidence alone is sufficient to support a conviction, and it is not necessary for the evidence to exclude every reasonable hypothesis except that of guilt." *Johnson v. Coyle*, 200 F.3d 987, 992 (6th Cir. 2000) (internal quotations and citations omitted); *see also Durr v. Mitchell*, 487 F.3d 423, 449 (6th Cir. 2007) ("circumstantial evidence is entitled to equal weight as direct evidence").

On federal habeas review, an additional layer of deference applies. *Coleman v. Johnson*, 566 U.S. 650, 651, 132 S.Ct. 2060, 182 L.Ed.2d 978 (2012) (reaffirming that sufficiency of the

evidence claims under *Jackson* "face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference"). Accordingly, even if this Court were to conclude that a rational trier of fact could not have found petitioner guilty beyond a reasonable doubt, the Court "must still defer to the *state appellate court's* sufficiency determination as long as it is not unreasonable." *Brown*, 567 F.3d at 205 (citing 28 U.S.C. § 2254(d)(2)) (emphasis in original); *see also White v. Steele*, 602 F.3d 707, 710 (6th Cir. 2009).

In rendering its decision affirming Jefferson's conviction for felonious assault, the state court of appeals addressed the sufficiency claim, stating:

> {¶ 14} In appellant's first assignment of error, he argues that the trial court erred in denying his Crim.R. 29 motion as to his conviction for felonious assault.
>
> {¶ 15} A motion for acquittal under Crim.R. 29(A) is a challenge to the sufficiency of the evidence. *See State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 39. The denial of a motion for acquittal under Crim.R. 29(A) "is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." (Internal citations omitted.) *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In making that determination, the appellate court will not weigh the evidence or assess the credibility of the witnesses. *State v. Were*, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 132. Whether there is sufficient evidence to support a conviction is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).
>
> {¶ 16} Initially, the state argues that appellant waived his right to challenge the trial court's denial of the Crim.R. 29 motion by failing to renew his motion at the close of all of the evidence. In *State v. Messer*, 6th Dist. Lucas No. L-16-1109, 2017-Ohio-1223, we held that "a criminal defendant does not waive the right to challenge the sufficiency of the evidence or the denial of a Crim.R. 29(A) motion despite failing to renew the motion following the close of all evidence." *Id.* at ¶ 18. Thus, we reject the state's waiver argument.[1] Next, we consider whether the evidence presented by the state at trial was sufficient to support appellant's conviction for felonious assault.

> [FN 1] Additionally, we note that appellant did not present any evidence of his own in this case. Consequently, renewing his Crim.R. 29 motion would have been futile.
>
> {¶ 17} Under R.C. 2903.11(A)(2), a defendant may be convicted of felonious assault for causing or attempting to cause physical harm to another by means of a deadly weapon. "Firing a gun in a person's direction is sufficient evidence of felonious assault." *State v. Jordan*, 8th Dist. Cuyahoga No. 73364, 1998 WL 827588, *12, 1998 Ohio App. LEXIS 5571, *31 (Nov. 25, 1998). According to appellant, the state failed to introduce sufficient evidence to establish that he fired a shot at Ervin as she was fleeing from the residence.
>
> {¶ 18} In denying appellant's Crim.R. 29 motion, the trial court characterized this case as a "close call." We agree. While the state did not introduce direct evidence as to whether appellant pointed his firearm at Ervin and pulled the trigger, we find that the circumstantial evidence was sufficient to establish that he did so.
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> {¶ 19} During her testimony at trial, Ervin testified that she clearly heard a gunshot ring out from the area around the front porch as she was running out of the residence. Prior to this point, appellant was enraged at the thought of Ervin terminating the marriage, and had already violently reacted by biting Ervin and attempting to prevent her from leaving the residence. During the incident, Ervin observed a handgun sitting on a nearby table. After arriving at her vehicle following the gunshot, she looked back and saw appellant reentering the residence from the front porch.
>
> {¶ 20} During the ensuing investigation, authorities recovered several firearms inside the residence. One of these firearms contained ammunition that matched a .25 caliber spent shell casing that was discovered lying on top of the grass next to the front porch. Appellant attempted to explain the spent shell casing by admitting to having shot at a possum earlier in the day. However, according to detective Wise, appellant's story changed several times during the interrogation.
>
> {¶ 21} Construing the foregoing evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have found, beyond a reasonable doubt, that appellant attempted to cause Ervin serious physical harm by firing a shot in her direction as she attempted to escape the residence. Thus, the trial court properly denied appellant's Crim.R. 29 motion, and appellant's first assignment of error is not well-taken.

Jefferson, 2017-Ohio-7272, ¶¶ 14-21, 2017 WL 3575607, ** 3-4; *see also* Doc. 28-1, pp. 74-75 (alterations in original).

The focus of Jefferson's sufficiency argument is that there was no direct evidence that he committed the offense of felonious assault as charged and that the victim's testimony was not credible. Doc. 22, pp. 17-18, Doc. 30, pp. 5-7. However, "[c]ircumstantial evidence alone is sufficient to support a conviction, and it is not necessary for the evidence to exclude every reasonable hypothesis except that of guilt." *Johnson*, 200 F.3d at 992; *see also Durr*, 487 F.3d at 449 ("circumstantial evidence is entitled to equal weight as direct evidence"). Additionally, as discussed above, in making a determination as to sufficiency of the evidence, a court does "not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the [trier of fact]." *Brown*, 567 F.3d at 205; *see also Matthews v. Abramajtys,* 319 F.3d 780, 788 (6th Cir. 2003). The jury heard the testimony of the witnesses and evaluated the credibility of the witnesses' testimony, including that of Ms. Ervin. Having done so, the jury reached a guilty verdict.

Furthermore, as discussed above, on federal habeas review, two layers of deference apply. Accordingly, even if this Court were to conclude that a rational trier of fact could not have found petitioner guilty beyond a reasonable doubt, the Court "must still defer to the *state appellate court's* sufficiency determination as long as it is not unreasonable." *Brown*, 567 F.3d at 205 (citing 28 U.S.C. § 2254(d)(2)) (emphasis in original); *see also White v. Steele*, 602 F.3d 707, 710 (6th Cir. 2009). As found by the state court of appeals, the circumstantial evidence was sufficient to establish that Jefferson committed the offense of felonious assault. Jefferson has not shown that that the state court of appeals unreasonably concluded that there was sufficient evidence to convict Jefferson of felonious assault. Nor has he shown that the state court of appeals' sufficiency determination was contrary to or an unreasonable application of clearly established federal law, as required under AEDPA.

Based on the foregoing, the undersigned concludes that federal habeas relief is not warranted based on Jefferson's sufficiency of the evidence claim and, therefore, recommends that the Court DENY Jefferson's sufficiency of the evidence claim in Ground Two regarding the felonious assault conviction.

3. Ground Three should be DISMISSED

In Ground Three, Jefferson argues that his due process rights were violated because the prosecutor improperly introduced bad character evidence at trial by using Jefferson's prior drug conviction from 2007. Doc. 22, pp. 19-20. He asserts that the prosecutors violated his due process rights and the prosecutors violated the Brady rule when they failed to introduce and withheld from the jury the Detective Wise interrogation DVD from the night of February 3, 2016.[9] Doc. 22, pp. 20-21. He also argues that the prosecutors violated his rights because they did not introduce evidence sufficient to prove the elements of the offenses for which he was charged. Doc. 22, pp. 21-26.

Respondent argues that Ground Three should be dismissed as not cognizable on federal habeas review and/or due to procedural default. Doc. 28, pp. 16-18, 25-27. For the reasons discussed below, the undersigned finds that Ground Three should be dismissed due to procedural default.[10]

Although the alleged claims of prosecutorial misconduct would have been apparent from the face of the record, Jefferson did not present a prosecutorial claim in his direct appeal. In his

[9] Jefferson does not and cannot contend that prosecutors did not disclose the DVD to the defense prior to trial. As reflected in the record, the DVD was disclosed and, in fact, at the joint request of the prosecution and defense, the DVD was considered by the trial court in ruling on Jefferson's motion to suppress. Doc. 28-1, pp. 16-17.

[10] Respondent presents a thorough argument as to why the claim of prosecutorial misconduct premised on the prosecutor's reference to a 2007 drug conviction should be dismissed as not cognizable on federal habeas review. Doc. 28, pp. 16-18. Since the entirety of Ground Three is subject to dismissal due to procedural default, the Court need not separately address the alternative ground for dismissal.

application to reopen his direct appeal, Jefferson made a brief mention in his second assignment of error that the prosecutor mentioned a 2007 drug conviction. Doc. 28-1, p. 113. In his first petition for post-conviction relief, Jefferson mentions prosecutorial misconduct but it is not clear he in fact fairly presented a claim of prosecutorial misconduct. Doc. 28-1, p. 135 (State's opposition brief), Doc. 28-1, pp. 148-149 (trial court's order denying post-conviction petition finding that Jefferson raised a manifest weight of the evidence claim and ineffective assistance of counsel claim). In his second petition for post-conviction relief, Jefferson raised a prosecutorial misconduct claim, arguing misconduct because the prosecutors did not introduce all evidence, including the interrogation DVD at trial. Doc. 28-1, pp. 160-161.

Since Jefferson did not raise his prosecutorial misconduct claims in his direct appeal, his claims are procedurally defaulted. *See Wong*, 142 F.3d at 322 ("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."). Assuming arguendo that Jefferson raised ineffective assistance of appellate counsel based on a failure to raise prosecutorial misconduct in his direct appeal in his App. R. 26(B) application, to the extent he seeks to rely on ineffective assistance of appellate counsel as cause to excuse his procedural default of his Ground Three claims, his attempt to do so is futile. As discussed above, Jefferson procedurally defaulted his ineffective assistance of counsel claims by failing to timely file an App. R. 26(B) application and by failing to file an appeal from the state court of appeals' denial of his App. R. 26(B) application. Moreover, he is unable to demonstrate cause to excuse the procedural default of those ineffective assistance of counsel claims.

"The doctrine of exhaustion requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court." *Wong*, 142 F.3d at 322. To the

extent that Jefferson raised prosecutorial misconduct in his post-conviction petitions in the same manner he raises it in this federal habeas proceeding, since those claims would have been apparent from the face of the record, he was precluded by *res judicata* from raising such claims in post-conviction proceedings. *Perry*, 10 Ohio St. 2d at 180 (Ohio's *res judicata* rule precludes a defendant from raising for the first time in post-conviction proceedings a claim that was fully litigated or could have been fully litigated at trial or on direct appeal). The trial court denied Jefferson's first petition for post-conviction relief, indicating that "claims which have been or could have been adjudicated by the appellate court are barred" and finding that Jefferson provided nothing outside the record to support his arguments. Doc. 28-1, pp. 147-148. The trial court denied Jefferson's second petition for post-conviction relief as untimely. Doc. 28-1, p. 178. Jefferson failed to appeal the trial court's denial of his post-conviction petitions and, as discussed above, he has not demonstrated cause to excuse the procedural default. Also, Jefferson has not demonstrated that his procedural default should be excused based on a claim of actual innocence.

Based on the foregoing, the undersigned recommends that the Court DISMISS Ground Three as procedurally defaulted.

4. Ground Four should be DISMISSED

In Ground Four, Jefferson argues that the Toledo police unlawfully seized him and unlawfully searched the property at 2055 Elliott Ave. Doc. 22, pp. 27-28.

The Supreme Court has held, "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976). In *Riley v. Gray*, 674

F.2d 522, 526 (6th Cir. 1982), the Sixth Circuit "developed a two-step inquiry in assessing whether *Stone* applies to preclude federal habeas review of Fourth Amendment claims." *Shepherd v. Warden, Pickaway Correctional Inst.*, 2011 WL 3664442, * 6 (S.D. Ohio May 31, 2011), *report and recommendation adopted*, 2011 WL 3652615 (S.D. Ohio Aug. 18, 2011). First, "the district court must determine whether the state procedural mechanism in the abstract, presents the opportunity to raise a fourth amendment claim." *Riley*, 674 F.2d at 526. "Second, the court must determine whether presentation of the claim was in fact frustrated because of a failure of that mechanism." *Id.* The Sixth Circuit more recently clarified that "the *Powell* 'opportunity for full and fair consideration' means an available avenue for the prisoner to present his claim to the state courts, not an inquiry into the adequacy of the procedure actually used to resolve that particular claim." *Enyart v. Coleman*, 29 F.Supp.3d 1059, 1087 (N.D. Ohio Jul. 11, 2014) (discussing and quoting *Good v. Berghuis*, 729 F.3d 636, 639 (6th Cir. 2013)). Thus, when considering whether a petitioner has had a full and fair opportunity to litigate his Fourth Amendment claim, the Sixth Circuit directs that a court ask: "Did the state courts permit the defendant to raise the claim or not?" *Id.* (quoting *Good*, 729 F.3d at 640).

With respect to the first inquiry under *Riley*, Ohio has a mechanism in place for resolving Fourth Amendment claims. It provides a defendant, such as Jefferson, the opportunity to file a pretrial motion to suppress and the opportunity to take a direct appeal from the denial of the motion to suppress. *See Riley*, 674 F.2d at 526 (finding that Ohio criminal and appellate rules provide adequate procedural mechanisms for litigation of fourth amendment claims). With respect to the second inquiry under *Riley*, there is no indication that Jefferson's presentation of his Fourth Amendment claim was frustrated by a failure of Ohio's procedural mechanism. He was represented by counsel. He had an opportunity to file pre-trial motions and did in fact file a

pretrial motion to suppress statements he made, which was decided by the trial court following a hearing. Doc. 28-1, pp. 8-18. Jefferson did not present his Fourth Amendment claims in the trial court. Nor did not he present them in his direct appeal. It was not until he filed an untimely second petition for post-conviction relief on April 13, 2018, that he sought to raise his Fourth Amendment claims. Doc. 28-1, pp. 161-162.

Jefferson had the ability to litigate his search and seizure claim at the trial court and in his appeal. However, he did not. Jefferson fails to identify anything in the state court record to suggest that his ability to present his Fourth Amendment claims was frustrated as a result of the state court's process for presentation of such claims. Thus, the undersigned recommends that the Court DISMISS Ground Four as barred by *Stone v. Powell*. Alternatively, even if not barred by *Stone v. Powell*, the Court should DISMISS Ground Four as procedurally defaulted because, when Jefferson ultimately raised his search and seizure claim in his second post-conviction petition, the trial court denied his petition as untimely and Jefferson did not file an appeal from the trial court's denial. As discussed above, Jefferson is unable to demonstrate cause to excuse the procedural default or a claim of actual innocence.

IV. Recommendation

For the reasons stated herein, the undersigned recommends that the Court **DISMISS and/or DENY** Jefferson's Petition (Doc. 1/Doc. 22). Grounds One, Three and Four should be dismissed. Ground Two should be dismissed and/or denied.

/s/ Kathleen B. Burke

Dated: May 15, 2019

Kathleen B. Burke
United States Magistrate Judge

OBJECTIONS

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

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