

Dew v. Eppinger, 2020 U.S. App. LEXIS 25468

Court: 6th Circuit Court of Appeals

Date: August 11, 2020

United States Court of Appeals for the Sixth Circuit

No. 20-3413

Prior History: State v. Dew, 2009-Ohio-6537, 2009 Ohio App. LEXIS 5461 (Ohio Ct. App., Mahoning County, Dec. 1, 2009)

Judges: Before: WHITE, Circuit Judge.

Opinion

ORDER

Gregory Dew, an Ohio prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. This court construes his notice of appeal as an application for a certificate of appealability (COA). See Fed. R. App. P. 22(b).

In 2008, a jury convicted Dew of various sexual assault charges stemming from his conduct as the gymnastics coach of two high school students in the early 1990s and his conduct with adult patients while practicing as a chiropractor from 2005 to 2007. With respect to Gymnast A, the jury convicted him of three counts of rape, in violation of Ohio Revised Code § 2907.02(A)(2)(B), and one count of corrupting a minor, in violation of Ohio Revised Code § 2907.04(A). With respect to Gymnast B, the jury convicted him of one count of gross sexual imposition, in violation of Ohio Revised Code § 2907.05(A)(1). The jury also convicted him of one count of rape and one count of gross sexual imposition concerning his actions with his chiropractic patients. The trial court sentenced him to ten years of imprisonment [*2] for each rape count and eighteen months of imprisonment for each gross sexual imposition count, all to run consecutively. The Ohio Court of Appeals vacated the patient-related convictions, but otherwise affirmed. State v. Dew, No. 08 MA 62, 2009-Ohio-6537, 2009 WL 4756342 (Ohio Ct. App. Dec. 1, 2009), perm. app. denied, 124 Ohio St. 3d 1510, 2010-Ohio-799, 922 N.E.2d 972 (Ohio 2010).

Dew then filed an untimely pro se application to reopen his direct appeal, pursuant to Ohio Rule of Appellate Procedure 26(B). The Ohio Court of Appeals denied the application because it was filed almost two years beyond the deadline for doing so, and Dew had not shown cause to excuse the untimeliness. State v. Dew, No. 08 MA 62, 2012-Ohio-434, 2012 WL 368451 (Ohio Ct. App. Jan. 31, 2012) (per curiam). The Ohio Supreme Court dismissed the appeal as not involving a

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substantial constitutional question. *State v. Dew*, 132 Ohio St. 3d 1516, 2012- Ohio 4021, 974 N.E.2d 114 (Ohio 2012) (table).

Dew filed multiple post-conviction motions in the trial court and requested leave to file a motion for a new trial. The trial court initially ruled that it lacked jurisdiction to consider his motions, but the Ohio Court of Appeals vacated in part, ruling that the trial court did have jurisdiction to rule on whether to grant Dew leave to file a motion for a new trial under Ohio Criminal Rule 33 based on newly discovered evidence. *State v. Dew*, No. 12 MA 18, 2013-Ohio-2549, 2013 WL 3179093 (Ohio Ct. App. June 17, 2013). The Ohio Supreme Court declined to accept [*3] jurisdiction. *State v. Dew*, 136 Ohio St. 3d 1560, 2013- Ohio 4861, 996 N.E.2d 987 (Ohio 2013) (table).

Meanwhile, Dew filed his initial § 2254 petition on November 15, 2011, but the district court stayed the case while he continued to exhaust his claims in state court. Pursuant to the Ohio Court of Appeals' earlier remand, Dew then filed his delayed motion for a new trial. Following a hearing, the trial court denied the motion as meritless and ruled that the issues should have been or had been raised on direct appeal. The Ohio Court of Appeals affirmed. *State v. Dew*, No. 13 MA 174, 2016-Ohio-274, 2016 WL 373694 (Ohio Ct. App. Jan. 21, 2016). The Ohio Supreme Court declined to accept jurisdiction. *State v. Dew*, 146 Ohio St. 3d 1417, 2016- Ohio 3390, 51 N.E.3d 660 (Ohio 2016) (table). Dew again sought to reopen his appeal, but the Ohio Court of Appeals denied the second application as untimely. *State v. Dew*, No. 08 MA 62, 2014-Ohio-4042, 2014 WL 4627787 (Ohio Ct. App. Sept. 5, 2014) (per curiam). The Ohio Supreme Court declined to accept jurisdiction. *State v. Dew*, 140 Ohio St. 3d 1523, 2014- Ohio 5251, 20 N.E.3d 730 (Ohio 2014) (table).

Returning to federal court, Dew filed an amended § 2254 petition raising twelve claims for relief. A magistrate judge determined that Claims (1), (2), (5), (6), (7), (8), (9), (10), (11), and (12) were procedurally defaulted and that Claims (3) and (4) lacked merit. Over Dew's objections, the district court adopted the report and recommendation, denied the petition, and denied a COA. The district court denied Dew's [*4] motion for reconsideration.

To obtain a COA, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the denial of a motion is based on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). To satisfy this standard, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931

(2003). When the district court has denied a habeas petition on procedural grounds, the prisoner can satisfy § 2254(c)(2) by establishing 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.

Procedural Default of Claims

A federal court may not grant habeas relief to a person in custody pursuant to a state court judgment "unless it appears that the applicant has exhausted the remedies available in the courts of [*5] the State." 28 U.S.C. § 2254(b)(1)(A). In order to exhaust a claim, the petitioner "must 'fairly present' [the] claim in each appropriate state court . . . thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) (quoting *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995)). When a petitioner has failed to fairly present his claims to the state courts and no remedy remains, his claims are considered procedurally defaulted. See *Gray v. Netherland*, 518 U.S. 152, 161-62, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996).

Generally, this court has outlined a four-part test to determine whether a claim has been procedurally defaulted in state court. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). First, the court must determine whether a state procedural rule applies to the petitioner's claim and whether the petitioner failed to comply with that rule. *Id.* Second, the court determines whether the state courts actually enforced the procedural sanction. *Id.* Third, the procedural rule must be an adequate and independent ground on which the state can rely to foreclose review of a federal constitutional claim. *Id.* Fourth, a defaulted claim cannot be considered unless the petitioner shows "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). A fundamental [*6] miscarriage of justice requires a showing of actual innocence. See *Dretke v. Haley*, 541 U.S. 386, 393, 124 S. Ct. 1847, 158 L. Ed. 2d 659 (2004).

(a) Claim (1). Dew first claimed that he was actually innocent because he newly discovered that a recording with one of the victims had allegedly been redacted to exclude exculpatory information. The district court first noted that free-standing actual innocence claims are not independently cognizable on federal habeas review. See *Herrera v. Collins*, 506 U.S. 390, 400, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993). And to the extent that Claim (1) asserted a constitutional violation for tampering with evidence, the district court determined that Dew had not presented this claim to the state courts until his application to reopen his appeal, which the Ohio Court of Appeals denied for untimeliness. The district court noted that these alleged issues with the recording were either known or readily ascertainable at the time of trial and therefore

Dew could have asserted them then or on direct appeal, and Ohio's res judicata rule prevented him from bringing claims that could have been raised on direct appeal. See *Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012); *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104, 108 (Ohio 1967). Dew did argue in his application to reopen his appeal that appellate counsel performed ineffectively by failing to argue the ineffectiveness of trial counsel for not raising the claim, but [*7] this did not preserve the analytically distinct underlying substantive claim that he presents in this petition. See *Davie v. Mitchell*, 547 F.3d 297, 312 (6th Cir. 2008). Reasonable jurists could not debate the district court's conclusion that Claim (1) was procedurally defaulted.

Dew cannot show cause to excuse the default of Claim (1) because he acknowledged that he had a copy of the full audio recording before trial and therefore could have raised the claim on direct appeal. And he cannot use ineffective assistance of trial counsel or appellate counsel for cause because those claims were themselves defaulted, as discussed below. See *Edwards v. Carpenter*, 529 U.S. 446, 453, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Reasonable jurists could not debate the district court's conclusion that Dew had not shown cause to excuse the default of Claim (1).

(b) Claim (2). In his second claim, Dew asserted that his right to a fair trial was violated by the state courts' failure to sever the trial for the separate offenses and victims. The district court noted that Dew had argued improper joinder on direct appeal, but that the claim had been presented solely on state-law grounds. Although he used the words "due process of law," he did not cite federal case law, did not phrase the claim in terms "sufficiently particular to allege [*8] a denial of a specific constitutional right," or allege "facts well within the mainstream of constitutional law." *Whiting v. Burt*, 395 F.3d 602, 613 (6th Cir. 2005). "[G]eneral allegations of the denial of rights to a fair trial and due process do not fairly present claims that specific constitutional rights were violated." *Blackmon v. Booker*, 394 F.3d 399, 400 (6th Cir. 2004). Because Dew did not fairly present the claim on federal grounds on direct appeal, Ohio's res judicata rule barred him from raising it later. Accordingly, reasonable jurists could not debate the district court's determination that Claim (2) was procedurally defaulted. Dew also did not show cause to excuse the default of this claim.

(c) Claims (5), (6), (7), (9), (10), (11), and (12). Dew raised claims that (5) the trial court gave erroneous jury instructions; (6) his jury venire did not represent a fair cross-section of the community; (7) the trial court lacked subject-matter jurisdiction due to a pretrial ruling that the indictment had charged a later version of the offense; (9) the trial judge was biased against him; (10) the State did not provide him with an accurate audio copy of his interrogation; (11) he was denied access to grand jury transcripts; and (12) his prosecution was improperly steered towards a [*9] specific judge in order to benefit the State. The district court concluded that these were all claims that were available to him at the time of direct appeal and therefore should have been

_____ raised then or were now barred by Ohio's res judicata rule. They are therefore procedurally defaulted. _____

Dew argued that Claims (5), (6), (10), and (12) were based on evidence outside of the record because the Ohio Court of Appeals had allowed him to file a motion for a new trial raising the claims, and they were thus not defaulted. The trial court and the Ohio Court of Appeals ultimately denied these claims, however, because they could have been raised on direct appeal but were not. Dew, 2016-Ohio-274, 2016 WL 373694, at *1, *9. As explained by the Ohio Court of Appeals, just because he had been granted leave to file a motion for a new trial did not mean that the claims he brought in the motion could not have been raised on direct appeal or could not be found to have been procedurally defaulted.

Ineffective assistance of trial counsel cannot serve as cause to excuse the default of these claims because such a claim was itself defaulted. See *Goldberg v. Maloney*, 692 F.3d 534, 537 (6th Cir. 2012). These claims did not rely on newly discovered evidence as determined by the Ohio Court of Appeals, and [*10] Dew's pro se, incarcerated status cannot serve as cause to excuse a procedural default. See *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004) (per curiam). These claims do not deserve encouragement to proceed further.

(d) Claim (8). Dew argued that appellate counsel performed ineffectively by failing to: (1) ensure that the entire record was filed, including the alleged unredacted version of the recording; (2) argue ineffective assistance of trial counsel; (3) argue malicious prosecution; (4) argue the denial of the grand jury transcripts; and (5) provide "complete arguments" on direct appeal. Under Ohio law, claims of ineffective assistance of appellate counsel must be raised in an application to reopen an appeal under Ohio Rule of Appellate Procedure 26(B). See *Carter v. Mitchell*, 693 F.3d 555, 564 (6th Cir. 2012). Dew attempted to do so, but the Ohio Court of Appeals concluded that the application was untimely by nearly two years and that Dew had not shown good cause to excuse the untimeliness. Dew, 2012-Ohio-434, 2012 WL 368451, at *2. This court has held that the timeliness requirement of Ohio Appellate Rule 26(B) is an adequate and independent state ground for a procedural default. See *Parker v. Bagley*, 543 F.3d 859, 862 (6th Cir. 2008). Reasonable jurists could not debate the district court's conclusion that this claim was procedurally defaulted.

As cause for failing to file his application [*11] to reopen his appeal in a timely manner, Dew argued that he was hindered by his incarcerated status and need to gather outside evidence and that he did not learn of appellate counsel's failure to file the complete record (including the alleged unredacted audio recording) until he appealed the denial of his motion for a new trial, and he also pointed out that he labelled his motions for reopening as motions for reconsideration. The district court first concluded that a prisoner's incarceration and pro se status did not provide

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him with sufficient cause to excuse the default. See *Bonilla*, 370 F.3d at 498. Second, the Ohio Court of Appeals determined that even if Dew had not discovered the alleged error of appellate counsel until he appealed the denial of his motion for a new trial, he still delayed another four months. See *Dew*, 2014-Ohio-4042, 2014 WL 4627787, at *2. And whether his application to reopen should have been construed as a motion for reconsideration was a matter of state law that the Ohio courts construed differently. Reasonable jurists could not debate the district court's determination that Dew had not shown cause to excuse the default of Claim (8).

(e) Actual Innocence. Dew asserted that his procedural defaults should be excused because [*12] he can show that he is actually innocent. See *Dretke*, 541 U.S. at 393. He based this claim primarily on an interview between the police and one of the victims that he alleged was redacted prior to trial and would have shown that his sexual interactions with Gymnasts A and B were consensual. A federal court "may consider an otherwise defaulted claim if it concludes that the petitioner has shown that the 'constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Jells v. Mitchell*, 538 F.3d 478, 489 (6th Cir. 2008) (quoting *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)). To meet this exception, the petitioner must establish, in light of "new reliable evidence," that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 324, 327. Reasonable jurists could not debate the district court's conclusion that Dew did not meet this high standard.

The Ohio Court of Appeals determined on direct appeal that, under Ohio law, when "the defendant holds some position of authority over the victim, the force may be more subtle or psychological in nature." *Dew*, 2009-Ohio-6537, 2009 WL 4756342, at *22. Thus, a grooming relationship, such as the one that Dew had with Gymnasts A and B, can be sufficient to demonstrate that the victim's will was overcome by fear or duress. This [*13] court cannot interfere with that determination of state law. See *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Assuming, for the sake of argument, that the redacted portions of the interview contain what Dew claimed that they do, that evidence would have been merely cumulative of testimony from the victims at trial that Dew had never physically forced them to do anything and that they loved and respected him at the time of the incidents. The similar statements that he alleged were redacted simply are not new reliable evidence that would make it more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. Reasonable jurists could not debate the district court's conclusion that Dew had failed to demonstrate his actual innocence so as to excuse his procedural defaults.

Merits

The district court rejected Claims (3) and (4) on the merits. When reviewing a district court's application of the standards of review of 28 U.S.C. § 2254(d) after a state court has adjudicated a

claim on the merits, this court asks whether reasonable jurists could debate whether the district court erred in concluding that the state-court adjudication neither (1) "resulted in a decision that was contrary to, or involved an unreasonable application [*14] of, clearly established Federal law, as determined by the Supreme Court of the United States"; nor (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); see *Miller-El*, 537 U.S. at 336.

(a) Claim (3). In his third claim, Dew contended that insufficient evidence supported his convictions and that the trial court gave improper jury instructions. When evaluating the sufficiency of the evidence, this court must determine "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, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The inquiry involves two layers of deference: one to the jury's verdict under *Jackson*, and a second to the state court's decision under § 2254(d). See *Coleman v. Johnson*, 566 U.S. 650, 651, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012) (per curiam). When assessing the sufficiency of the evidence, this court does not weigh the evidence, assess the credibility of witnesses, or substitute its judgment for that of the jury. *United States v. Wright*, 16 F.3d 1429, 1440 (6th Cir. 1994). "All reasonable inferences and resolutions of credibility are made in the jury's favor." *United States v. Washington*, 702 F.3d 886, 891 (6th Cir. 2012).

The Ohio Court of Appeals concluded that the trial court's jury instructions concerning [*15] "force" and the fact that it could be more subtle or psychological in nature when the defendant holds a position of authority over the victim were proper, and this court cannot interfere with that determination of state law. *Dew*, 2009-Ohio-6537, 2009 WL 4756342, at *22; see *Estelle*, 502 U.S. at 67-68. The Ohio Court of Appeals then noted the testimony from Gymnasts A and B that Dew was an authority figure over them, had control over many aspects of their lives, was bigger and older than the girls, and had manipulated and groomed them over time. Gymnast A also testified that she was intimidated by Dew because of his size and her belief that he carried weapons, and Gymnast B testified about an incident where Dew would not let her down from a gym platform unless she professed her love for him. *Dew*, 2009-Ohio-6537, 2009 WL 4756342, at *22-23. Reasonable jurists could not debate the district court's conclusion that the Ohio Court of Appeals did not unreasonably apply *Jackson* or unreasonably determine the facts in light of the evidence presented. This claim does not deserve encouragement to proceed further.

(b) Claim (4). In his fourth claim, Dew argued that the recording by the police of a phone call between himself and one of the victims in which he made incriminating statements should have been suppressed [*16] because it was in violation of state laws and his constitutional rights. The Ohio Court of Appeals determined that the recording of the phone call with the victim's consent was fully compliant with Ohio law. The Ohio Court of Appeals further rejected his contention that California and Pennsylvania law should have applied because the location of the

interception, rather than the location of the callers, was determinative under Ohio law.¹Link to the text of the note Dew, 2009-Ohio-6537, 2009 WL 4756342, at *17-18.

To the extent that Dew claimed that the admission of the recording violated state laws, the district court correctly determined that such a claim is not cognizable on federal habeas review. See *Estelle*, 502 U.S. at 67-68. The district court further concluded habeas review of an alleged violation of the Fourth Amendment is generally not available to a state prisoner who, like Dew, received "the opportunity for full and fair consideration" of his claims in state court. *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); see *Good v. Berghuis*, 729 F.3d 636, 637 (6th Cir. 2013). Dew has also not shown that the recording of a telephone conversation in which one of the participants consents violates the Fourth Amendment. See *United States v. White*, 401 U.S. 745, 752, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971). This claim does not deserve encouragement to proceed further.

Dew has failed to make a substantial showing of the denial of a constitutional right. Accordingly, the application for a COA is [*17] DENIED.

Footnotes

¹Link to the location of the note in the document

The victim was located in California during the phone call, and Dew claimed that he was driving through Pennsylvania when he received the call. Dew, 2009-Ohio-6537, 2009 WL 4756342, at *16.

United States District Court for the Northern District of Ohio, Eastern Division

May 30, 2019, Filed

Case No. 4:11CV2486

Reporter

2019 U.S. Dist. LEXIS 90692 * | 2019 WL 2304678

Gregory Dew, Petitioner, v. Warden Bennie Kelly, Respondent.

Prior History: Dew v. Kelly, 2018 U.S. Dist. LEXIS 225949 (N.D. Ohio, Mar. 13, 2018)

Counsel: [*1] Gregory Dew, Petitioner, Pro se, Leavittsburg, OH.

For Warden Bennie Kelly, Respondent: Stephanie L. Watson, LEAD ATTORNEY, Office of the Attorney General - Criminal Justice Section, Columbus, OH; Richard Michael DeWine, Office of the Attorney General - East Broad Street, State of Ohio-INVALID ADDRESS, Columbus, OH.

For Charmaine Bracy, Respondent: Stephanie L. Watson, Office of the Attorney General - Criminal Justice Section, Columbus, OH.

Judges: James G. Carr, Senior United States District Judge.

Opinion by: James G. Carr

Opinion

ORDER

This is a state prisoner habeas corpus case in which Magistrate Judge James R. Knepp, II, has filed a Report & Recommendation. (Doc. 44). Having conducted de novo review of the R&R in light of the petitioner's objections, and for the reasons that follow, I adopt the Magistrate Judge's R&R as the order of this court, deny the petition, and decline to issue a certificate of appealability.

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Background

The R&R contains a lengthy excerpt, which I need not re-copy here, from the state appellate court's summary of the evidence leading to the petitioner's conviction in the Mahoning County, Ohio, Court of Common Pleas. His convictions stemmed from various sexual assault charges committed first [*2] in the early 1990s in his capacity as a gymnastics coach against two high school students and later, from 2005 until 2007, in his capacity a chiropractor against three adults patients.1Link to the text of the note

Following a trial, at which the petitioner vigorously contested the evidence against him, the jury found him guilty of: as to Gymnast A, three counts of rape and one count of corruption of a minor; as to Gymnast B, one count of gross sexual imposition; as to Patient B, one count of gross sexual imposition; and as to Patient C, one count of rape. The jury acquitted petitioner of: twelve counts of gross sexual imposition as to Patient A; two counts of gross sexual imposition as to Patient B; and, two counts of rape as to Patient C.2Link to the text of the note

The court sentenced the petitioner to a total term of forty-three years imprisonment. He received ten years on each of the four rape counts and eighteen months for each of the two gross sexual imposition counts, with all sentences to run consecutively.3Link to the text of the note

On direct appeal, the court reversed on the basis of insufficiency of the evidence as to the patient-related convictions. It otherwise affirmed. The Ohio Supreme Court denied leave to appeal; it dismissed the petitioner's appeal [*3] as not involving any substantial constitutional question. The United States Supreme Court denied petitioner's petition for a writ of certiorari.

Thereafter, the petitioner filed an untimely pro se application to reopen his direct appeal pursuant to Ohio App. R. 26(B).4Link to the text of the note The appellate court denied that application and a request for reconsideration. The Ohio Supreme Court denied petitioner's appeal.

Petitioner pro se next filed an original motion and then an amended motion in the trial court for grand jury transcripts, for recusal, and for an evidentiary hearing. He also sought an order finding he had been unavoidably prevented from discovering the evidence on which his motion for a new trial had relied. He further requested leave to file a motion for new trial. The trial court ruled it lacked jurisdiction to rule on the motions.

~~Petitioner, through counsel, filed a notice of appeal from the trial court's ruling.~~
After a series of intermediate procedural orders, the appellate court affirmed the trial court's judgment in part (finding that res judicata barred petitioner's motion for grand jury transcripts), but that the trial court had jurisdiction, based on the petitioner's allegations of newly discovered [*4] evidence, to rule on the motion for leave to file a new trial motion under Ohio R. Crim. P. 33. The Ohio Supreme Court declined to accept jurisdiction of petitioner's appeal of the appellate court's res judicata ruling as to the grand jury transcripts.

Meanwhile, on November 15, 2011, as he was seeking state court post-conviction relief, petitioner filed the instant federal habeas petition. He asserted five grounds for relief, namely:

1. Denial of due process when the court admitted illegally obtained wiretap evidence;
2. Denial of due process when the trial court denied a motion for relief from improper joinder;
3. Denial of due process - conviction was based on insufficient evidence;
4. Petitioner was prejudiced by failure of appellate counsel to challenge ineffectiveness of trial counsel; and
5. Entitlement to a new trial due to withholding and tampering with evidence, jury "packing" or "fixing" and case steering[,] denial of due process and Sixth Amendment.

Due to the presence of unexhausted claims, this court stayed proceedings on February 4, 2013, pending exhaustion.

The petitioner, pro se, moved to disqualify the trial judge from presiding over any further proceedings. The Ohio Supreme Court denied [*5] the disqualification motion on the basis, inter alia, of waiver due to untimeliness.

Pursuant to the appellate court's remand, petitioner filed his delayed pro se motion for new trial. Following a hearing the trial court denied the petitioner's new trial motion as meritless. It also ruled that all issues should have been or had been raised on direct appeal and thus were no longer subject to review. The state appellate court affirmed, holding the res judicata barred each assignment of error. That court denied reconsideration. The Ohio Supreme Court declined to accept

12. Denial of due process "when [*7] his case was steered to a specific judge for a real or perceived benefit to the State.⁵[Link to the text of the note](#)

Standard of Review

Under the Antiterrorism and Effective Death Penalty Act of 1996, habeas relief is available only where a petitioner proves that the state court's adjudication of a 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 upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d).

Relief thus can occur only where the petitioner shows that the state court's conclusion is contrary to a Supreme Court decision of law or the state court decided the case differently than a case, indistinguishable on the facts, that the Supreme Court had decided. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The touchstone is whether the state decision was "objectively unreasonable" and not merely erroneous or incorrect. *Id.* at 409-11.

In addition, state court determinations of state law are not reviewable or cognizable on habeas corpus. The Supreme Court made this principle clear in *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991):

[I]t is not the province of a federal habeas court [*8] to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.

Moreover, federal habeas courts will not consider the merits of procedurally defaulted claims, unless the petitioner demonstrates either: 1) cause for and prejudice from the default; or 2) the 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) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)).

A petitioner may procedurally default on a claim where he either: 1) fails to present his claims during a complete round of state court review; or 2) if the state court declines, due to the petitioner's noncompliance with a state procedural rule, to reach

the merits of the claim and the procedural rule is an independent and adequate ground of decision. Id.

Discussion

On review of the petitioner's lengthy and multitudinous objections (Doc. 50), a few things are manifestly apparent: 1) the petitioner misapprehends the very limited standards, set forth immediately above, under which a federal court reviews a habeas claims of federal constitutional error; 2) the petitioner does not understand [*9] that a federal court does not review errors of state law, and that state court determinations of state procedural, evidentiary, and substantive law are generally dispositive; and 3) meeting the actual innocence standard requires more — much more — than simply arguing that the jury should and would have reached a different result had it viewed the evidence differently or had other evidence before it.

Respondent asserted in the Return of Writ (Doc. 27) that petitioner had procedurally defaulted Grounds One, Two, Five, Six, Seven, Eight, Nine, Ten, Eleven, and Twelve, and that he cannot show cause, prejudice, or actual innocence to excuse those defaults.

Respondent also contends Grounds Three and Four fail on the merits, and that, in the alternative to a finding of default as to Ground Two, that ground likewise fails on the merits. The Magistrate Judge agreed. I do too.

I deal with the petitioner's objections to the Report & Recommendation in the sequence in which he presents them, and enumerate my discussion accordingly.

Objection One: Magistrate Judge's Errors

The petitioner claims the Magistrate Judge applied the wrong set of charges to a case number. Something of such slight magnitude, [*10] having nothing whatsoever to do with the gist of petitioner's claims, is irrelevant and immaterial. There is no merit to Objection One.

Objection Two: Actual Innocence

Petitioner claims the Magistrate Judge applied the wrong standard in determining whether he had defaulted on a claim within his broader actual innocence claim — namely, that the State had improperly redacted part of the petitioner's phone call with Gymnast B.

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The Magistrate Judge did not err in his conclusion. Petitioner contends that the State presented a redacted version of his consensually recorded phone conversation with Gymnast B. He also contends that the State withheld portions of her recorded interview with the Boardman Police Department. The redacted versions, he contends, contain exculpatory evidence that would have provided the new evidence he needs — but lacks — to head in the direction of a viable actual innocence claim.

The problem for the petitioner is that these circumstances were either known or were readily ascertainable at trial. With regard to the phone call, he was a participant, and able to inform counsel that portions were missing; counsel could then have sought and received an unredacted version (assuming [*11] she did not already have it) for whatever use seemed worthwhile. But the petitioner has failed to claim that he ever notified his lawyer that exculpatory redactions existed. Without that assertion, he cannot fault his lawyer — or the State — for any unawareness on the lawyer's part about possibly useful redacted material.

With regard to the allegation that Gymnast B's interview contains undisclosed exculpatory material, petitioner's trial counsel was well aware of the contents of the interview and in the best position to use, or refrain from using, the alleged exculpatory evidence to aid in her extremely vigorous challenge to the State's case. Indeed, it appears that trial counsel agreed that the complained-of portions of the interview ought to be redacted because their admission into evidence would have violated Ohio's rape shield law. (Doc. 28-1, PageID 2310-11).

But even assuming trial counsel failed to develop the circumstances on which petitioner bottoms his actual innocence claim — existence of exculpatory redactions in recorded conversations — at worst trial counsel failed to perform adequately at trial. Or appellate counsel failed to perform adequately on appeal. But, as discussed [*12] *infra* procedural default bars any such challenges here.

For these reasons and those set forth in the Report & Recommendation, the Magistrate Judge correctly rejected petitioner's actual innocence claim, as well as the predicate claim alleging improper redaction or withholding of various statements by the victims.

Objection Three: Misjoinder

In Ground Two petitioner claims he was "denied due process of law when the trial court denied his motion for relief from improper joinder and the appellate court refused to sever and remand the case even after reversing and vacating convictions on the unrelated charges." The Magistrate Judge agreed with the respondent that

petitioner had failed fairly to present his challenge to joinder as a federal constitutional claim.

Petitioner disputes this conclusion, claiming that he met the fair presentation requirement, but I disagree. On direct appeal the petitioner assigned as error that:

Appellant was Severely Prejudiced and Denied Due Process of Law When the Court Denied his Motion for Relief from Improper Joinder, Refused to Sever the Unrelated Charges, and Forced Appellant to Try the Cases Together Before One Jury.

(Ex. 30, Doc. 6-2, at 184); (see also [*13] Ex. 40, Doc. 6-2, at 350).

Petitioner claims that his passing and opaque reference to a denial of "due process of law" sufficed to call the appellate court's attention to a federal, rather than a state⁶Link to the text of the note constitutional challenge to the joinder of the separate indictments for trial.

The oblique reference to "due process of Law" failed to put the the tribunal on notice as to the possibility that petitioner was asking it to adjudicate his contentions on the basis of federal constitutional principles. In any event, the petitioner's argument in his appellate brief discussed solely state law and cases. Petitioner's arguments to the contrary in his objections are unavailing.

Objection Four: Sufficiency of the Evidence

The petitioner contends that the State's proof, especially with regard to the use of force vis a vis the rape convictions, was insufficient. He objects to the Magistrate Judge's determination that the appellate court's resolution of these issues was not contrary to, or an unreasonable application of, federal law.

Petitioner's objection argues at length that the evidence of record does not sustain a finding of force as to the rape convictions. The Magistrate Judge based his conclusions [*14] on a careful, comprehensive, and accurate review of the record. Despite the petitioner's extensive contentions, there is no flaw in those conclusions. I, too, am satisfied that the evidence of record was sufficient to enable a rational trier of fact to find that the State had proved the elements beyond a reasonable doubt.⁷Link to the text of the note

The petitioner vigorously called the jurors' attention to how they could view the evidence and, in particular, witness credibility in his favor. He does likewise in his objections. But that is not the issue on habeas review, where I must view the record most favorably to the verdict.

I find no error on the Magistrate Judge's handling of this issue or the result he reached.

Objection Five — Admission of "Wiretap" Evidence

For several reasons the Magistrate Judge found no merit to the admission of the consensually recorded phone conversation between petitioner and Gymnast B.

Each of those reasons was correct. Those reasons, with which I agree, were: 1) to the extent petitioner claims that the recording violated Ohio law, the claim was not cognizable;⁸ Link to the text of the note 2) the Supreme Court's decision in *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), precludes habeas review of Fourth Amendment claims; and 3) well-settled Supreme Court precedent upholds [*15] the lawfulness under the Fourth Amendment of one-party surreptitious consent recording of phone conversations.

As to the first basis: state court determinations of state law are not reviewable on habeas corpus. *Estelle, supra*, 502 U.S. at 67-68.

Second, in *Stone, supra*, the Supreme Court held that federal habeas corpus review is not available to state prisoners who received "the opportunity for full and fair consideration" of their claims in state court. 428 U.S. at 486. Petitioner received such opportunity in the trial court.

Moreover, as the Magistrate Judge correctly concluded, "whether an investigation violated the Fourth Amendment has no bearing on whether the defendant is guilty." *Good v. Berghuis*, 729 F.3d 636, 637 (6th Cir. 2013) (citing *Stone*, 428 U.S. at 490).

Finally, though I need not reach the issue, as the foregoing is dispositive of the petitioner's objection to the admission of the recorded conversation, there was, quite simply, no Fourth Amendment violation. E.g., *United States v. White*, 401 U.S. 745, 752, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971).

There is, accordingly, no merit to petitioner's Objection Five.

Objection Six: Jury Related Issues

In Ground Five petitioner asserts a due process violation based on: improper jury instructions, "ex post facto" decision making, and "packing and fixing." The Magistrate Judge found that procedural default barred these claims. The petitioner objects to his conclusion as to default.

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His [*16] decision was correct: each of the facts on which petitioner bases his jury-related claims was known at time of trial. The time to raise them was at trial and on direct appeal. Each could have been presented on direct appeal; because they were not, procedural default applies.

Moreover, though I need not proceed further, the general rule is that alleged errors in jury instructions, which, as here, involve interpretations of state law, not federal constitutional law, are not cognizable in a habeas corpus proceeding. E.g., *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 52 L. Ed. 2d 203 (1977). The same is true with regard to challenges to voir dire proceedings. See *Estelle*, supra, 502 U.S. at 67-68. Likewise, decisions as to exclusion of jurors, which petitioner's "packing" claim raises, are generally not cognizable in a habeas proceeding. *Ransom v. Davis*, 613 F. Supp. 430, 431 (D. Tenn. 1984).

There was no error with regard to the Magistrate Judge's conclusions as to Ground Five.

Objection Seven — Judicial Bias

Petitioner's Ground Nine alleges bias on the part of the trial judge. In his objection he contends that his various state court challenges to the trial judge's impartiality in the state courts were well-founded. Such unremedied bias, he asserts, deprived him of his due process right to a fair trial.

The Magistrate Judge found that petitioner, [*17] who was clearly aware of the instances of alleged bias while in the trial court, had procedurally defaulted on this claim. That is correct: the petitioner failed to raise the issue in a timely manner. Moreover, the state appellate court found his allegations of bias not well taken, with the appellate court dismissing the petitioner's claim on the basis of res judicata. *State v. Dew*, 2016-Ohio-274, ¶¶32-33 (Ohio App. 2016).

The Magistrate Judge's conclusion that the petitioner committed procedural default was correct.

Moreover, though I need not have done so in light of the default, I have reviewed the instances of putative bias that the petitioner sets forth in his objections. Neither singly nor in sum do those instances add up to a due process violation. While he may have perceived them as such, they were not violative of his right to a fair trial before an impartial tribunal.

Objection Eight — New Trial Motion

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Petitioner's new trial motion was the first instance in which he raised the issues his petition presented as Grounds Six, Ten, and Twelve. The Magistrate Judge found that res judicata precluded federal habeas review as to those grounds. That decision was correct, despite the the petitioner's contentions in his objections that no [*18] such bar existed, so that his claims deserve review on the merits.

Petitioner contends that his claim of actual innocence negates the Magistrate Judge's conclusions. Given my finding supra as to his actual innocence claim, and the Magistrate Judge's thorough and correct disposition of that claim, petitioner cannot rely on that unsuccessful contention to support his claim as to denial of his new trial motion.

The petitioner's objections contend that the state courts misapplied state procedural law in denying his new trial motion. A claim that a state court erred in applying its own procedural rules is not cognizable on habeas review. *Gipson v. Haas*, ___ F. App'x ___, 2018 U.S. App. LEXIS 37123, 2018 WL 2251730, *3 (6th Cir. 2018).

Among other things, the Magistrate Judge properly concluded that the appellate court found, contrary to petitioner's contention, that he had not been unavoidably prevented from discovering relevant evidence. Petitioner contends that this was so because the appellate court could not grant him leave to file such a new trial motion without making such a finding.

The record reflects, however, that the state courts made the opposite finding. Indeed, the courts found as a matter of fact that the evidence that he claims was newly [*19] discovered was, or could have been, known to him during trial. The appellate court affirmed the dismissal of the new trial motion on the basis of procedural default.

Petitioner's objections contend that he produced "clear and convincing proof" that the state courts erred. They did not: their application of res judicata principles complied with Ohio law, see, e.g., *State v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967), which, in any event, is for the state courts, not a federal habeas court, to determine.

Petitioner continues to emphasize that, as to Ground Twelve, alleged spoliation of the evidence overcomes the procedural bar. As the Magistrate Judge correctly pointed out, however, it does not. The state courts having preclusively found petitioner had actual or constructive knowledge of the non-record evidence, the petitioner cannot overcome the res judicata bar because in Ohio, "evidence attached in support of a claim not raised on direct appeal must be relevant, material, and

unavailable to the petitioner in time to support his claim at trial or on direct appeal." Van Hook v. Anderson, 127 F. Supp. 2d 899, 918 (S.D. Ohio 2001) (citing State v. Scudder, 131 Ohio App. 3d 470, 475, 722 N.E.2d 1054 (1998) and State v. Lawson, 103 Ohio App. 3d 307, 315, 659 N.E.2d 362 (1995)) (emphasis in original in part and supplied in part).

There is no merit to petitioner's objections to the Magistrate Judge's conclusions as to the state court's [*20] res judicata rulings and the application of the default bar here.

Objection Nine — Trial Court Jurisdiction/ Vindictive Prosecution

Ground Seven of the petition asserts that the trial court lacked subject matter jurisdiction and raises a vindictive prosecution claim. As with other grounds, this habeas claim is based on facts available before petitioner's direct appeal, but were not included in that appeal. Because petitioner could have raised, but did not raise, these claims on direct appeal, the Magistrate Judge concluded they were procedurally defaulted.

That was clearly a correct decision.

The gravamen of this claim is that the first indictment charged petitioner on the basis of a revised statute that had not been enacted at the time of the events giving rise to his ultimate conviction. He successfully moved for dismissal, after which the grand jury returned a superseding indictment that cured that defect.

Petitioner claims that the original dismissal was on the basis of actual innocence — which it was not — and that the superseding indictment reflected prosecutorial vindictiveness. This background, he contends, left the trial court without subject matter jurisdiction.

Though all these [*21] facts were available for presentation on direct appeal, the petitioner did not raise them in that proceeding. This, as the Magistrate Judge correctly determined, constituted a procedural default barring review in this court. There is no merit to the petitioner's ninth objection.

Objection Ten — Ineffective Assistance of Appellate Counsel

Ground Eight of the petition claims that the petitioner was deprived of his right to effective assistance of counsel on direct appeal because the attorney failed to: 1) include the unredacted recording of his conversation with Gymnast B in the record; 2) raise ineffective assistance of trial counsel; 3) raise vindictive prosecution; 4) —

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raise denial of grand jury transcripts; and 5) submit "complete arguments" on direct appeal.

The Magistrate Judge found that procedural default — namely noncompliance with Oh. App. R. 26(B) — constituted a preclusive procedural default as to his motion for delayed appeal. The Magistrate Judge was correct.

To be sure, petitioner sought to take a delayed appeal under Oh. R. App. P. 26(B)(1), and he included this claim in his proposed appeal. But he did not do so within the mandatory time period under that Rule, namely "within ninety days from journalization of the [*22] appellate judgment unless the applicant shows good cause for filing at a later time."

The appellate court dismissed the application for untimeliness, holding that petitioner had not shown good cause for the late filing. This was, as the Magistrate Judge found, an adequate and independent state ground justifying a finding of default. This accords with Sixth Circuit law. See *Parker v. Bagley*, 543 F.3d 859, 862 (6th Cir. 2008); *Wilson v. Hurley*, 382 F. App'x 471, 475 (6th Cir. 2010) (unpublished); *Wogenstahl v. Mitchell*, 668 F.3d 307, 322 (6th Cir. 2012) (unpublished).

Instead of acknowledging the default and its preclusive effect, petitioner, as he does throughout his objections, focuses his arguments on the putative merits of his contentions. But those arguments are not relevant to a review of the Magistrate Judge's R&R.

The Magistrate Judge also found that petitioner had failed to meet his burden of showing cause for and prejudice from this procedural default. Petitioner's excuse was that his incarcerated status kept him from being able to obtain necessary affidavits and other evidence within Rule 26(B)(1)'s time period. This is not a sufficient basis for finding cause. E.g., *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004).

Petitioner claims he only learned of appellate counsel's ineffectiveness when appealing the denial of his new trial motion. The state court found this contention unavailing, as, without [*23] explanation, petitioner had delayed filing the application for nearly another four months. In the court's view, even if petitioner had had good cause initially for missing the deadline, he had not shown cause for his additional delay.

Objection Eleven — Access to Grand Jury Transcripts

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-----The Magistrate Judge likewise found, as to Ground Eleven, that the petitioner could and should have included Ground Eleven, relating to the trial court's refusal to grant his request for grand jury transcripts, in his direct appeal. His failure to do so, the Magistrate Judge concluded, constituted procedural default. This was clearly so, as petitioner was well aware before trial that the trial court was rebuffing his efforts to procure the transcripts for use at trial.-----

That petitioner's objection contends that his actual innocence claim, as related to his ex post facto challenge to the original indictment (and the inter-related vindictive prosecution/lack of jurisdiction) claims excuse his default is unavailing. As previously discussed, the Magistrate Judge's conclusions as to those claims were correct. That being so, their putative merit has no bearing on the petitioner's default as to his Ground Eleven. [*24]

Conclusion

The Magistrate Judge's review of the entire record, the manifold pleadings and proceedings in the state courts and here, and consideration of the petitioner's petition and its twelve claims was careful and comprehensive. On de novo review of Report & Recommendation and the petitioner's objections thereto, I find that, in every respect, the Magistrate Judge's Report & Recommendation is correct.

It is, accordingly,

ORDERED THAT

1. The Magistrate Judge's Report & Recommendation (Doc. 44) be, and the same hereby is, adopted as the order of this court;
2. Petitioner's objections to the Report and Recommendation be, and the same hereby are, overruled;
3. The amended petition for a writ of habeas corpus (Doc. 18) be, and the same hereby is denied; and
4. No certificate of appealability will issue. See *Mullins v. McKee*, 2018 U.S. App. LEXIS 31120, 2018 WL 510134, *2 (6th Cir. 2018).

So ordered.

-- -- /s/ James G. Carr-----

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~~Sr. U.S. District Judge~~

JUDGMENT ENTRY

In accordance with the order filed contemporaneously with this judgment entry, it is hereby ORDERED THAT:

1. The Magistrate Judge's Report & Recommendation (Doc. 44) be, and the same hereby is, adopted as the order of this court;
2. Petitioner's objections to the Report and Recommendation be, and the same hereby are, overruled; [*25]
3. The amended petition for a writ of habeas corpus (Doc. 18) be, and the same hereby is denied; and
4. No certificate of appealability will issue. See *Mullins v. McKee*, 2018 U.S. App. LEXIS 31120, 2018 WL 510134, *2 (6th Cir. 2018).

So ordered.

/s/ James G. Carr

Sr. U.S. District Judge

Footnotes

1Link to the location of the note in the document

By time of trial, the petitioner faced two separate indictments, one as to the gymnast victims, the other as to the chiropractic victims. The court joined both indictments for trial. With reference to the gymnasts, the indictment charged; as to "Gymnast A," three counts of rape, pursuant to O.R.C. § 2907.02(A)(2)(B), and one count of corruption of a minor pursuant to former O.R.C. § 2907.04(A); as to "Gymnast B," one count of gross sexual imposition pursuant to O. R.C. § 2907.05(A)(1). With reference to the patients, the indictment charged: as to "Patient A," twelve counts of gross sexual imposition, pursuant to R.C. 2907.05(A)(1), (B); as to "Patient B," three counts of gross sexual imposition, pursuant to O.R.C. § 2907.05(A)(1), (B); and as to "Patient C," three counts of rape, pursuant to O.R.C. § 2907.02(A)(2)(B).

2Link to the location of the note in the document

The Magistrate Judge reviewed the facts that the petitioner asserted undercut the sustainability of his conviction. He found that the petitioner was either relying on

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~~_____ matters outside the record or that any asserted error in the factual findings would _____~~
not have affected the outcome. I agree, particularly in light of the doctrine that review on habeas takes a favorable view toward the jury's verdict.

3Link to the location of the note in the document

The court merged the corruption of a minor and the rape convictions, resulting in no additional sentence for the corruption charge.

4Link to the location of the note in the document

As discussed *infra*, the untimeliness of that motion led to the Magistrate Judge's conclusion, which I affirm, that, as to several of petitioner's habeas claims, he committed procedural default.

5Link to the location of the note in the document

Petitioner also filed several nondispositive motions. Having reviewed those motions and his orders, I affirm the Magistrate Judge's rulings. (Docs. 24, 26, 30, 33, 34, 42).

6Link to the location of the note in the document

I note that Art. I, §§ 1, 16 of the Ohio Constitution guarantee due process of law.

7Link to the location of the note in the document

I likewise agree that the appellate court's finding, as a matter of state law, that there was no error in the jury instructions, is binding on this court.

8Link to the location of the note in the document

In any event, "law enforcement consent surveillance," such as occurred here, is entirely lawful in Ohio. E.g., *State v. Geraldo*, 68 Ohio St. 2d 120, 429 N.E.2d 141 (1981).

No. 20-3413

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Apr 13, 2021

DEBORAH S. HUNT, Clerk

GREGORY DEW,

Petitioner-Appellant,

V.

LASHANN EPPINGER, Warden,

Respondent-Appellee.

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ORDER

Before: ROGERS, LARSEN, and READLER, Circuit Judges.

Gregory Dew, a pro se Ohio prisoner, petitions for panel rehearing of this court's order denying him a certificate of appealability. Also pending is Dew's fourth motion for an extension of time to file the petition for rehearing.

Upon consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a)(2).

We therefore **GRANT** Dew's motion for an extension of time and **DENY** the petition for rehearing.

ENTERED BY ORDER OF THE COURT

Rich L. Hunt

Deborah S. Hunt, Clerk

APPENDIX C