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

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

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

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.[1] *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.

[1] 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.

Dew v. Kelly, Case No. 4:11CV2486
2019 U.S. Dist. LEXIS 90692

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

May 30, 2019, Filed

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

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.

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.[1]

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.[2]

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.[3]

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).[4] The appellate court denied that application and a request for reconsideration. The Ohio Supreme Court denied petitioner's appeal.

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[1] 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).

[2] 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 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.

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

[4] 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.

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 jurisdiction. The United States Supreme Court denied petitioner's application for certiorari.

Meanwhile, on June 5, 2014, petitioner, pro se, filed a motion for delayed reconsideration, or, in the alternative, a delayed application for reopening his direct appeal. The appellate court denied the application as untimely, holding, inter alia, that the petitioner had failed to establish good cause for the untimeliness. On December 3, 2014, the Ohio Supreme Court declined to accept jurisdiction of petitioner's appeal.

At which point, the petitioner returned to this court — more than three years after first undertaking to exhaust [*6] his state court remedies. The Magistrate Judge granted his pro se motion for leave to amend his habeas petition. Counsel withdrew after filing the amended petition. The amended petition asserts twelve grounds for relief:

1. Actual innocence;

2. Denial of due process due to denial of motion for relief from improper joinder;

3. Denial of due process — conviction based on insufficient evidence;

4. Denial of due process — conviction based on illegally seized evidence;

5. Denial of due process based on improper jury instructions;

6. Denial of due process due to "fixing of [sic or] packing of the jury representative of a cross-section of the community;

7. Denial of due process — trial court lacked subject matter jurisdiction due to pretrial ruling that original indictment had charged a later version of the offense;

8. Denial of effective assistance of counsel;

9. Denial of due process - bias on the part of the trial judge;

10. Denial of due process - prosecution did not provide defense counsel with a true, accurate and usable copy of unredacted copy of consensually recorded phone conversation;

11. Denial of due process — denial of access to grand jury transcripts; and

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]

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.

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[5] 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).

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.

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 state[6] 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.

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

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.[7]

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] 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).

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[7] 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.

[8] 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).

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.

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 ben 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

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 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) 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
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 herby 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
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 herby 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

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

GREGORY DEW,	Case No. 4:11 CV 2486
Petitioner,	Judge James G. Carr
v.	Magistrate Judge James R. Knepp, II
WARDEN BENNIE KELLY,	
Respondent.	REPORT AND RECOMMENDATION

INTRODUCTION

Pro se Petitioner Gregory Dew ("Petitioner"), a prisoner in state custody, filed an Amended Petition seeking a writ of habeas corpus under 28 U.S.C. § 2254 ("Amended Petition"). (Doc. 18). Respondent Charmaine Bracy[1], Warden of the Trumbull Correctional Institution ("Respondent") filed an Answer/Return of Writ (Doc. 27) and Petitioner filed a Reply/Traverse (Doc. 35). Petitioner has also filed several additional motions, *see* Docs. 24, 26, 30, 33, 34, 42, to which Respondent has responded, *see* Doc. 37, and Petitioner has replied, *see* Doc. 41. The district court has jurisdiction over the Petition under § 2254(a). This matter has been referred to the undersigned for a Report and Recommendation pursuant to Local Rule 72.2(b)(2). (Non-document entry dated November 14, 2017). For the reasons discussed below, the undersigned recommends the Petition be DENIED in its entirety. In an Order filed concurrently with this Report and Recommendation, the undersigned addresses Petitioner's pending motions (Docs. 24, 26, 30, 33, 34, 42).

1. Charmaine Bracy is currently the Warden of the Trumbull Correctional Institution. *See* Doc. 27, at 1 n.1. Warden Bracy is thus now the appropriate Respondent in this case.

FACTUAL BACKGROUND

For the purposes of habeas corpus review of state court decisions, findings of fact made by a state court are presumed correct and can only be contravened if the habeas petitioner shows, by clear and convincing evidence, erroneous factual findings by the state court. § 2254(e)(1); *Moore v. Mitchell*, 708 F.3d 760, 775 (6th Cir. 2013); *Mitzel v. Tate*, 267 F.3d 524, 530 (6th Cir. 2001). This presumption of correctness applies to factual findings made by a state court of appeals based on the state trial court record. *Mitzel*, 267 F.3d at 530. Here, the Ohio Seventh District Court of Appeals, Mahoning County, set forth the following facts:

> {¶ 3} On October 13, 2006, Gymnast A and Gymnast B contacted Boardman Township Police to report they had been sexually abused by Dew during the 1990's, when Dew served as their gymnastics coach. Gymnast B agreed to set up a phone call with Dew, which was secretly recorded by Boardman police. Dew also made both oral and written statements to police on March 15, 2007.
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> {¶ 4} On March 22, 2007, the Mahoning County Grand Jury indicted Dew on three counts of sexual battery, pursuant to R.C. 2907.03(A)(9)(B) with respect to Gymnast A. This indictment was subsequently dismissed because the version of the sexual battery statute under which Dew was charged was not in effect when the alleged acts were committed back in the early 1990's. However, prior to the dismissal of that indictment, the Grand Jury reconvened and issued a superceding indictment on May 10, 2007, charging Dew with three counts of rape, pursuant to R.C. 2907.02(A)(2)(B), involving Gymnast A; one count of corruption of a minor, pursuant to former R.C. 2907.04(A), involving Gymnast A, and, one count of gross sexual imposition, pursuant to R.C. 2907.05(A)(1), involving Gymnast B.
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> {¶ 5} During the course of the police investigation in Case No. 07–CR–378, three other women came forward with allegations against Dew: Patient A, Patient B, and Patient C. These allegations stemmed from Dew's more recent conduct while he was treating these women as their chiropractor. As a result of these allegations, in a case styled 07–CR–1262, the Grand Jury issued a superceding indictment, which, as amended, charged Dew with three counts of gross sexual imposition, pursuant to R.C. 2907.05(A)(1)(B) involving Patient B; twelve counts of gross sexual imposition, pursuant to R.C. 2907.05(A)(1)(B), involving Patient A, and, three counts of rape, pursuant to R.C. 2907.02(A)(2)(B), involving Patient C.
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> {¶ 6} The two cases were subsequently consolidated and joined for trial. Dew pled not guilty to the charges in both superceding indictments, and waived his speedy trial rights. Dew filed several pre-trial motions, among them, a motion to suppress

the recorded conversation between Gymnast B and Dew; a motion to suppress Dew's written and videotaped statements made to Boardman Police; and, a motion for relief from improper joinder, all of which were overruled, following a hearing.

{¶ 7} The following evidence was adduced at trial. Gymnast A testified she first met Dew in 1986 when she was eleven years old and Dew was twenty-six years old, when Dew began coaching her in gymnastics. Dew coached her for approximately five years, until 1992 when he moved to Iowa to attend a chiropractic college. Gymnast A spent a significant amount of time training at the YGC and explained that Dew controlled many aspects of her life, such as what she ate, drank, when she slept, and how she wore her hair and clothing. Outside of the gym, Dew would pay attention to her grades in school and chaperone school dances. Gymnast A said she trusted Dew and looked up to him. She stated that Dew liked when people called him "Mr. Wonderful," that everyone thought he was a "great person." Gymnast A testified that her parents separated in 1989–1990 after a twenty-two year marriage and that she looked to Dew as a confidant and often discussed the divorce with him.

{¶ 8} Gymnast A testified that, over time, as she progressed to a higher level of gymnastics, at the age of thirteen years old, she spent a lot of time with Dew and that he began to profess his love for her and comment about how he liked her body. This progressed to Dew telling Gymnast A about dreams and sexual fantasies he had about her. When Gymnast A was fifteen years old, Dew began telling her that the two of them were "in love" and that when you are in love you do certain things for the other person, including things of a sexual nature. Gymnast A stated that Dew would make these comments to her discreetly while she was at the YGC for practice. Gymnast A testified that Dew then started kissing her, touching her, and instructing her how to touch his penis. One time when Gymnast A went to Dew's home for lunch between practices, Dew attempted vaginal intercourse with her, but she stopped him because it hurt.

{¶ 9} Gymnast A stated that, at around that same time, Dew began performing oral sex on her and digitally penetrating her vagina. Gymnast A stated she would also perform oral sex on Dew. She stated that the oral sex and digital penetration took place at the YGC, at Dew's home in Boardman and in Dew's vehicle. Gymnast A stated that when these sexual acts occurred, Dew would tell her she was beautiful and try to reassure her that he loved her. Gymnast A also described a specific incident that occurred at a hotel when she was travelling for a competition. Due to space constraints, Dew shared a hotel room with Gymnast A and her mother, with the two women sharing the bed and Dew sleeping on the floor. Gymnast A stated that in the middle of the night, Dew reached under the covers, digitally penetrated her vagina and performed oral sex on her while she lie next to her sleeping mother. Gymnast A testified that at least one act of oral sex occurred between March 10, 1990 and December 31, 1990, that at least one act of oral sex occurred between January 1, 1991 and December 31, 1991, and that at least one act of oral sex

occurred between January 1, 1992 and September 1992, all in Mahoning County. She was never married to Dew.

{¶ 10} Gymnast A described an incident that took place in 1992 at Dew's Boardman home shortly before he departed for school in Iowa. She stated that Dew held a going-away party at his house and that she spent the night there along with fellow Gymnast B, who was a year younger than her. Gymnast A testified that Dew began kissing both her and Gymnast B and that this progressed to touching and grabbing. She testified that Dew told both girls how much he loved them and how great they were. Gymnast A testified that she was able to stay overnight at Dew's home because she told her parents she was staying the night at Gymnast B's home. According to Gymnast A, Dew's wife was not home that evening.

{¶ 11} Gymnast A said that she was intimidated by Dew because of his large build, and the fact that others saw him as a role model and respected him. She also felt intimidated because she knew that Dew carried a knife and a gun. Gymnast A stated that Dew did not directly threaten her with these weapons, but that he showed them to her, telling her he carried them for protection. Gymnast A stated she believed if Dew told her to do something, that it was the "right" thing to do.

{¶ 12} She decided to come forward with allegations to police because upon becoming a gymnastics coach herself, she realized the wrongfulness of Dew's conduct. Upon learning that Dew had moved back to Ohio and was in a position of authority over others, Gymnast A said she felt "really bad" that she had not come forward sooner.

{¶ 13} On cross, Gymnast A admitted she lied to her parents in order to stay overnight at Dew's house with Gymnast B for the going-away party. She admitted Dew told many people that he loved them, and that it was common for Dew to hug people. She admitted her parents owned the YGC, but said nonetheless she was alone with Dew often.

{¶ 14} Gymnast B testified she began gymnastics training at the YGC at the age of three, and met Dew when she was eight or nine years old, at which time he coached her part-time. By age thirteen, Dew became her full-time coach, and she spent about twenty hours per week training under him. Gymnast B also testified that many people called Dew "Mr. Wonderful." She said Dew told her what to do inside the gym and to some extent outside of the gym. She stated there was a disciplinary system in place at the gym, and that if gymnasts were not on-task they would have to do push-ups, conditioning or run laps.

{¶ 15} Gymnast B stated that over time her relationship with Dew began to change. She described one incident where she was standing on a four-foot high platform in the gym and Dew told her he would not let her down until she told him she loved him. She stated that at first she refused to say it, but that eventually she complied because, "he was a lot bigger than me and wasn't letting me down."

{¶ 16} Gymnast B explained that Dew began to tell her sexually-oriented stories and used sexual innuendos. Dew would also rub her abdominal muscles during practice and one time grazed her breast. Gymnast B stated this behavior made her feel awkward, because she knew it was wrong and weird; scared because Dew was her coach and she did not want to get him in trouble; but also special because of the additional attention she was receiving from Dew.

{¶ 17} One time at a hotel while travelling for a competition, Gymnast B went in a hot tub with Dew. She said that Dew placed his hand underneath her bikini bottom, at the top of her buttocks, and told her he liked her "fuzziness." She stated this made her feel awkward, scared, and uncomfortable.

{¶ 18} Gymnast B stated she did not feel comfortable telling her parents about Dew's conduct. She said she looked up to Dew, and did not want to get him in trouble, despite the fact that she knew his actions were wrong. Gymnast B testified that shortly before Dew moved to Iowa, when she was fifteen years old, she also learned about Dew's relationship with Gymnast A.

{¶ 19} Gymnast B described several other incidents where Dew touched her inappropriately. One time at a highway rest-stop Dew grabbed her and kissed her. Another time, while giving her a massage at her mother's condominium, Dew unhooked her bra and touched the sides of her breasts. Gymnast B stated she felt confused, scared, disappointed, and sickened by Dew's actions.

{¶ 20} Gymnast B described another incident where she kissed Dew in the aerobics room at the YGC. She remembered being so nervous that she was shaking. When Dew asked why she was shaking, she said she was nervous and scared because she did not feel the behavior was proper. She said Dew told her that as long as they loved each other, it was okay. Gymnast B described another incident at a graduation party when she went for a walk with Dew and kissed him. She stated Dew attempted to put his hand down her pants but that she resisted.

{¶ 21} Gymnast B also described the going-away party where she and Gymnast A stayed overnight at Dew's house. She testified that Dew would alternate between kissing her and kissing Gymnast A. Gymnast B stated that when Gymnast A left the room Dew had Gymnast B's shirt off and was touching her breasts and kissing her breasts. She said Dew told her and Gymnast A he loved them and that it was all okay. She said Dew had a way of convincing the two of them that as long as they all loved each other, "everything was fine no matter what we did." She said if Dew told them to do something, they would do it.

{¶ 22} Gymnast B testified that her home life at the time those incidents occurred was difficult. She said between ages eleven and thirteen her parents divorced and her mother remarried. She looked to Dew as a father-figure and spent a lot of time at the YGC with him, where she often discussed her parents' divorce. She stated

that all of the incidents she described occurred during the spring and summer of 1992.

{¶ 23} Gymnast B testified she kept in contact with Dew after he moved to Iowa at the end of the summer of 1992. Gymnast B kept the letters Dew sent her over the years, and these were subsequently admitted into evidence. Among other things, Dew asked Gymnast B to send "lovely pictures, refers to her "fuzzy butt cheeks." Gymnast B alleged that Dew also asked her to engage in a sort of pen-pal version of fellatio.

{¶ 24} After her senior year in high school, she met with Gymnast A and Dew when both were visiting the Youngstown area. Gymnast B testified that Dew explained to them that he knew his actions were wrong, that it should not have happened, that he told his wife, and that he had sought counseling. According to Gymnast B, at the end of that meeting Gymnast A told Dew she never wanted to see him again. Gymnast B subsequently saw Gymnast A on her own a few times while in college, and said that one time Gymnast A broke down crying. Gymnast B said both women then decided they could not maintain a friendship because it was too emotional for them both.

{¶ 25} Gymnast B testified she contacted Gymnast A in March 2006 because she wanted to see if Gymnast A was suffering from similar emotional issues due to her past relationship with Dew. Gymnast B said she decided to come forward because she did not want similar incidents with Dew to happen to anyone else. Gymnast B had also learned that Dew was a chiropractor in the Mahoning Valley and that kids from the YGC were seeking treatment from Dew, a situation Gymnast B perceived as unsafe.

{¶ 26} Gymnast B spoke to Boardman Police in 2006 to report Dew's conduct. Upon Detective Doug Flara's suggestion, she set up a phone call with Dew that would be secretly recorded by the police. A recording of that phone call was then played for the jury and was subsequently admitted into evidence over Dew's objection. During that conversation, Dew and Gymnast B discussed the going-away party at Dew's home. Dew recalled that when Gymnast A left the room, Gymnast B's shirt was off, but her pants were on. He stated that night where he "had her shirt off" was the only "physical contact" between them that he could remember. He stated that the "physical thing I did with you guys was 100% wrong." Dew also discussed his relationship with Gymnast A. He stated that Gymnast A started the affair by kissing him, and that he tried to stop it four or five times to no avail. He stated that he and Gymnast A never had sexual intercourse. When Gymnast B responded that "even oral sex is sex," Dew remarked that "yeah, that's why I said *intercourse*." He stated he was only "physical" with Gymnast A about eight or ten times, most of which occurred after he married in November 1990. He admitted he had "oral contact" with Gymnast A. Later, Dew specifically admitted having "oral sex" with Gymnast A.

{¶ 27} On cross-examination, Gymnast B stated that after Dew moved to Iowa, she felt he retained some control over her, even though he was no longer her coach. She agreed this control could have been "in her mind" at that point. When asked about the platform incident that occurred at the YGC, Gymnast B agreed she physically could have dismounted from the platform without Dew's assistance. She agreed that Dew said "I love you" to a lot of people. She admitted that, prior to contacting police, she had researched whether Dew's conduct constituted a crime and whether the statute of limitations had run. She agreed she has seen a therapist and that she has had troubled relationships with men. She testified that although she did refer to Dew as a "father figure," she also probably had a crush on him at one time.

{¶ 28} Gymnast B admitted that "to a degree" she was jealous of Gymnast A, because Gymnast A was older, a better gymnast and had more of Dew's attention. When asked if Dew ever forced her to do anything, she stated: "Physically? * * * No." She admitted that the letters between her and Dew never specifically mentioned any sexual acts between the two of them, other than kissing. She admitted she also wrote letters to Judy, Dew's wife. She agreed that she asked Dew for a letter of recommendation in 2000.

{¶ 29} On redirect, Gymnast B agreed that although Dew never "held a gun to her head," she was a teenager, and Dew was an adult in a position of authority, and therefore she did what he wanted her to do.

{¶ 30} Carole Corrigan, a gymnastics coach at the YGC from 1983 to 1998 testified about the role of gymnastics coaches generally, and stated that coaches are responsible for the safety of the students, and that if a coach instructs a student to do something, that they do it. She worked with Dew at the YGC and said his duties included teaching the students the various gymnastics elements, doing drills with them, and ensuring their safety with various skills. She stated Dew would also travel with the gymnasts to competitions and prepare them for competitions. She conceded she never saw anything improper happen between Dew and Gymnast A. On cross, Ms. Corrigan agreed that Gymnast A's mother owned and operated the YGC and that it was a very busy place.

{¶ 31} Patient C testified she received chiropractic care from Dew at his clinic in Mahoning County. She said the first few times she was treated by Dew she received a "normal adjustment" on her back, which did not really relieve her pain because the problem was actually with her tailbone. After receiving several treatments, Dew told Patient C that he could perform an internal coccyx adjustment that could help with the tailbone pain. Patient C said she was familiar with this type of procedure because her late sister had it successfully performed on her. Patient C described the internal coccyx adjustment as an adjustment of the tailbone (coccyx) that is performed "digitally through the rectum."

{¶ 32} Patient C said Dew performed the first internal coccyx adjustment on her in May 2005, and that it was quick and not really painful. However, the second or

third time Dew performed the procedure she experienced more pain and bled from her rectum for several days thereafter. She said a chaperone was always present during these procedures, and Dew's finger was always gloved. Over objections, she stated that she now believes that incident constituted abuse, although she did not realize it at the time. However, Patient C said she continued to allow Dew to perform the procedure even after the painful experience.

{¶ 33} Patient C then described three occasions where Dew placed his finger inside her vagina while performing the internal coccyx adjustment procedure. The first occurrence happened at the beginning of 2006. She testified she presented for the internal coccyx adjustment and lie face-down on the examination table, draped with a gown. Instead of placing his finger in her rectum as usual, Dew very quickly placed his finger inside her vagina, then removed the finger, placed it inside her rectum, and performed the internal coccyx adjustment as usual, all without comment.

{¶ 34} The second incident happened at a subsequent appointment after Dew had attempted to perform the coccyx adjustment rectally. Patient C testified that Dew informed her "I can't get it. I'll have to go up the other way." Patient C said she then consented to Dew performing the adjustment through her vagina, because she trusted him. She stated Dew proceeded to do the adjustment vaginally, but that he did not change his glove in between. Patient C testified that the third incident happened much like the second, and that it "felt kind of like a gynecologist exam," and was slightly painful. She stated that Dew "just poked around a little and I thought he was using a different method to get my tailbone lined up."

{¶ 35} She stated she decided to come forward after seeing a story on the news about Dew's arrest. She said she then realized she had been abused. She testified it took her a while to come forward because she was embarrassed and because she felt bad for Dew's family.

{¶ 36} On cross, Patient C agreed Dew always afforded her the opportunity to decline or accept the procedures. She also agreed she had been experiencing tailbone pain for twenty-five years and that the internal coccyx procedure was the only thing that helped her. She testified that Dew treated her for approximately two years, and she continued to voluntarily seek treatment from Dew even after the incidents of vaginal penetration. She explained she had some concerns about those incidents at the time but dismissed them because of the presence of the chaperone and because she thought Dew was a nice guy.

{¶ 37} Patient B testified she received chiropractic treatment from Dew between September 2006 and January 25, 2007 to treat her back, neck and hip problems. She stated that several times she was treated by Dew directly after performing physical therapy exercises and that Dew commented that he liked it when she got all sweaty. She testified that one time when Dew was performing a massage on her, he pulled down her underwear to massage her buttocks and commented that she

was wearing matching undergarments and she must have done so for his benefit. She stated these comments began in November or December 2006 and that she initially found them weird and unprofessional. However, she said she trusted Dew, that he was doing a good job on her back, and that he was "pretty much in charge," so she figured she could deal with his "strangeness." She then began having problems with her hips due to spending a lot of time on airplanes, and Dew treated her by massaging her bare buttocks. At the time she felt okay about that particular treatment because she knew Dew held a degree permitting him to perform massages.

{¶ 38} Patient B testified that at a visit on January 25, 2007, Dew "crossed the line" with her. Dew undid her clothing and gave her a massage while she was strapped down on the table. She said that Dew ran his fingertips along the sides of her bare breasts in a tickling motion. She said she was scared and froze, afraid to move. She stated that she started to sweat out of fright, and that Dew told her he could tell she was getting all excited because she was sweaty. She said Dew then told her: "if you roll over, I can take care of the rest of your problems for you." Patient B stated that she was literally so scared she could not move, and in fact, did not move until Dew put her clothes back on and readjusted her bra. She said Dew then manipulated her neck, and when he was done she left the office, and never returned for another appointment.

{¶ 39} Patient B admitted she has a civil suit pending against Dew. She stated she first went to police and reported the incident but was told by the detective that other unrelated charges were pending against Dew and therefore criminal charges resulting from her allegations might not go forward. Thus, Patient B said she decided to commence the civil suit against Dew to make sure he "paid" for his conduct in some way. She stated she was really affected by Dew's actions and that she did not sleep for weeks. She said she was worried because Dew knew where she lived and knew she had children. She said she was afraid Dew would come after her. Patient B testified she never went back to Dew's office after the incident that took place on January 25, 2007.

{¶ 40} On cross, Patient B agreed that nobody ever heard the "weird" statements Dew made to her. Patient B agreed that when Dew had her strapped down on the examination table, the strap was only around her ankles and that it would have been easy to slip it on or off. She agreed that Dew's office was very busy and there were always a lot of people there. When defense counsel asked her if she was aware that the "tickling" she described was actually a legitimate procedure called "nerve stoking" or "effleurage," Patient B stated: "What he was doing was not nerve stroking. You don't make comments like that when you're nerve stroking."

{¶ 41} Patient B agreed that a guilty verdict in this case would likely be helpful to her civil suit against Dew. She agreed that for several months prior to her initiation of treatment with Dew she had been suffering from mental and emotional problems,

in therapy and taking sleep and anxiety medications, which could cause side-effects.

{¶ 42} Two employees at Dew's clinic, Crystal Moisson and Jennifer Schaffer testified that after Dew was suspended from practicing there, Dew called them to request that his lab coat be retrieved or washed. Ms. Schaffer testified that Dew was talking very quickly, and that she had heard him talk that way in the past once before, when he was unprepared for something and trying to get out of trouble.

{¶ 43} Dr. Thomas Montgomery, a chiropractic physician from Cortland, Ohio testified as an expert for the State. He first discussed Dew's treatment of Patient C. He characterized the internal coccyx adjustment procedure as "pretty rare," and "very painful," and generally performed on the patient only once. He said he performed it only two times in twenty-eight years of practice. Based on a review of Patient C's medical records he did not believe that that the repeated use of the internal coccyx adjustment procedure was warranted.

{¶ 44} Dr. Montgomery testified that within his discipline to a reasonable degree of chiropractic certainty, the internal coccyx adjustment procedure would never be performed vaginally. He said he is familiar with many schools of chiropractic thought and had never heard of the vaginal procedure. He stated that mechanically speaking it would "make no sense" to perform the internal coccyx adjustment through the vagina, because "you'd only be moving further away from the problem, not closer." He further stated that a chiropractor's finger would never end up in a patient's vagina relative to an internal coccyx adjustment or any other chiropractic procedure.

{¶ 45} With regard to Patient B's treatment, Dr. Montgomery testified that based on a review of her records he saw no indication of a condition warranting a massage of the lower buttocks. He testified that to a reasonable degree of chiropractic certainty, there would never be a need to stroke the sides of a patient's breasts. He said he is familiar with a technique called effleurage, which consists of light stroking of the skin, and that it can be part of a chiropractic continuum of care. However, he stated the use of that procedure on the sides of the breasts would not be indicated by Patient B's medical records, and that it constituted inappropriate treatment.

{¶ 46} On cross, Dr. Montgomery conceded that it would be possible to manipulate the coccyx through the vagina. Dr. Montgomery testified that although he personally would not perform a massage on a patient like Patient B, that it could be done and would not be totally inappropriate. He agreed that chiropractors are taught in school to use skin-on-skin manipulation, that it would not be inappropriate to ask a patient to remove a garment, and that it is possible during treatment that the doctor's hand might accidently graze the breast areas. Dr. Montgomery testified that he was unaware of vaginal coccyx adjustment procedures being taught in chiropractic schools or being legal in some states.

{¶ 47} Detective Doug Flara of the Boardman Police Department testified about his investigation of the allegations against Dew. He said he was involved in the recording of the telephone conversation between Gymnast B and Dew. Upon Det. Flara's request, Dew came to the station for questioning, of his own free will, and made two written statements, which were subsequently admitted into evidence. Det. Flara read the following passage from Dew's written statement regarding Gymnast B and Gymnast A:

{¶ 48} "I was the gymnastics coach for Gymnast A and Gymnast B in 1990. During that time, there were several instances where I touched Gymnast A inappropriately. There was a time when I touched Gymnast B inappropriately as well. I touched Gymnast A in the chest and groin region. At one time I tried digital penetration, but stopped due to the causing her discomfort. I touched Gymnast B's chest. This interaction was consensual. The incidents with Gymnast A occurred over a period—a prolonged period of months, and mainly included hugging and kissing. I do not recall significant oral sexual contact occurring with either person."

{¶ 49} Det. Flara's conversation at the station that day with Dew was recorded and was played for the jury at trial. During the interview, Dew gave a clinical explanation of his treatment of Patient B. He denied any misconduct, and attempted to explain Patient B's allegations by stating she had misconstrued the treatment, perhaps because she was overworked, depressed, and had a history of sexual abuse.

{¶ 50} When questioned about Gymnast A, Dew admitted he had a relationship with her, and said it consisted of mainly kissing and hugging. However, he also admitted touching Gymnast A's chest and genitalia. He claimed he never had intercourse with Gymnast A, and never penetrated her. When asked about the going-away party at his house, Dew admitted he touched Gymnast A's genital regions and touched both girls' chests. When asked about having oral sex with Gymnast A, Dew first said he could not remember if that happened. Subsequently, he stated it was possible that oral sex occurred, but he could not recall a specific time and place where it occurred. Dew then stated that if oral sex did occur, it was short and brief—nothing ongoing. Dew admitted he possibly penetrated Gymnast A's vagina with his finger, but denied penetrating her with his penis. When confronted with Gymnast A's statement that he had attempted vaginal intercourse with her, Dew stated that perhaps she mistook his finger for his penis. He admitted to "rubbing Gymnast B's chest" at the going-away party. Notably, Dew also told Det. Flara that when you coach someone in gymnastics, you are "saving their lives on a daily basis," meaning they are counting on you to physically save them, because they perform "death-defying stunts." Dew stated this "creates a huge bond of trust" between the coach and the gymnast.

{¶ 51} On cross, Det. Flara agreed he made several comments to "soften Dew up" during his the interview, namely, that "you know how teenage girls can be," and that Gymnast B and Gymnast A told him they consented to the sexual activity

(when in fact they never said that). Det. Flara said he made the consent comment in an effort to inspire more conversation and to get Dew to tell the truth.

{¶ 52} The State then rested its case, and Dew made a Crim.R. 29 motion as to all counts, which was subsequently overruled.

{¶ 53} Dew's wife Judy testified in her husband's defense. She met Dew when she was a teacher at the YGC. She stated Dew often hugged people and told everybody he loved them. She said she knew Gymnast A and observed Gymnast A being very "possessive" of Dew, meaning Gymnast A was always near him and wanted his attention. Judy stated this behavior worsened after she married Dew. Judy testified she knew Gymnast B and never suspected anything improper happening between her husband and Gymnast B. Judy testified she knew Dew corresponded with Gymnast B after their move to Iowa, and that she herself wrote to Gymnast B, as well. Judy claimed she was at home with her young son the night of the going-away party with Gymnast A and Gymnast B, and recalled Dew taking the girls back to the YGC the following morning. She recalled getting up in the middle of the night several times to tell them to be quiet and to breastfeed her son. She said she consented to Gymnast A and Gymnast B coming over that night, but was not happy about it because she and Dew were scheduled to move to Iowa the next morning. Judy testified she loves her husband very much, but would not lie for him. She stated her family is very religious, and that their church holds them to very high standards, meaning they do not smoke, drink alcohol, drink caffeine or watch R- or X-rated films. She stated she does not believe any of the allegations against Dew are true.

{¶ 54} Doreen Stanley, who was a receptionist at Dew's clinic for almost two years, testified that she never heard complaints of a sexual nature while working for Dew, and that she never felt uncomfortable with him as a patient. She remembered Patient C, and stated she never observed Patient C uncomfortable or unhappy. She recalled that another employee would always accompany Patient C into the exam room with Dew for treatment. She characterized Dew's office as "a zoo," with people constantly coming in and out for various treatments. On cross, Ms. Stanley agreed she never went into the exam rooms with Dew, and that she was at the front desk most of the time. She stated she would often interrupt Dew to ask him to sign paperwork or answer a question. She stated she would not believe it if she was told Dew had sexual relations with a fifteen-year-old girl, and that she thought Dew was "truly a nice guy."

{¶ 55} Dew also testified in his own defense. He first talked about his relationship with Gymnast A. Dew testified that beginning in 1990, Gymnast A became "aggressive towards [him] physically." He said this behavior began when one night at the gym Gymnast A "threw both her arms around [him] and kissed [him] on the mouth." He stated that approximately one week later Gymnast A told him it was a good thing he did not tell her mother what happened because her mother would fire him if she found out. Dew alleged that Gymnast A was very unhappy about his

marriage and his wife's pregnancy, and that she became very possessive of him after these events occurred. However, Dew denied ever leading Gymnast A to believe there was a relationship between them. Dew agreed he told Gymnast A he loved her, and stated he tells that to everyone.

{¶ 56} He claimed there was never time nor opportunity for him to sneak away with Gymnast A during practice, and that her allegations that any inappropriate conduct took place in his car or at his home were untrue. He further stated he did not live in Boardman during the summer of 1990, and that therefore nothing could have happened there at that time. His bank statements from this time period were later entered into evidence, in an apparent attempt to prove his residence. Further, Dew denied that Gymnast A ever touched his penis, sat on his lap, or engaged in oral sex with him. He denied inappropriately touching Gymnast A in the hotel room while her mother lay asleep next to her.

{¶ 57} He agreed he would comment about Gymnast A and Gymnast B's bodies, but claimed this is something a gymnastics coach must do. Dew claimed he never told gymnasts what to eat or how much to sleep. He said he was never authoritarian, never disciplined gymnasts, and did not keep a knife or gun in his car. He admitted he kept a pocketknife in his gym bag, but stated: "it was not a weapon," rather a "cool tool." He said he never gave Gymnast A any reason to believe that if she did not have sexual relations with him of any sort that he would somehow endanger her safety at the YGC.

{¶ 58} Dew then attempted to explain some of the statements he made during the tape-recorded conversation with Gymnast B. He said when he stated he had relations with Gymnast A eight or nine times that he meant hugging and kissing, more specifically incidents where Gymnast A would jump on him and kiss him. He described the difference in his mind between "oral sex" and "oral contact." He said "oral sex" means mouth contact on the genital regions. By contrast he said that the "oral contact" (to which he referred during the taped conversation) meant any oral contact on areas of the body between the knees and the neck. He claimed that in his religious training growing up such so-called oral contact was forbidden.

{¶ 59} Dew went on to describe one incident of inappropriate "oral contact" with Gymnast A, which he said occurred in 1991 at a hotel room when they were travelling for a competition. He said the gymnasts were at the hotel pool and that Gymnast A came up to his room to ask if she could use some towels from his bathroom. He said that Gymnast A then told him she wanted him to be the first person to have sex with her and that she "jumped up on [him] and pulled her bathing suit aside and kind of pushed her chest into [his] face." Dew stated he pushed Gymnast A off of him and told her to leave.

{¶ 60} Dew then talked more about his interview with Det. Flara. He stated he did not sleep the night before and did not eat breakfast that morning. He said he was up researching so he would be prepared to discuss Patient B's allegations. He said he

did not expect to be questioned about Gymnast A and Gymnast B. He said he had never been in trouble before, never been in a police station and had never been interrogated by police. He said he agreed to talk to Det. Flara about Gymnast B and Gymnast A because he was brought up to respect authority figures. He claimed that despite all of his advanced education, he did not really realize the ramifications of making a statement to police. Dew claimed that when he spoke to Det. Flara about other instances of inappropriate contact, he meant kissing. Dew stated that sometimes Gymnast A would go through bouts of depression and he would "let her kiss [him]."

{¶ 61} Dew then spoke about the going-away party at his house. He stated he allowed Gymnast B and Gymnast A to come over that night because they wanted to see him one last time before he moved away. He testified his wife and son were both present that night, and that it was his understanding that both Gymnast A and Gymnast B's parents knew of their whereabouts. He stated that after Judy left the living room, Gymnast A kissed him, in front of Gymnast B. Dew testified he felt uncomfortable about this, but did not ask the girls to leave because he did not want to hurt their feelings. Instead, Dew said he decided to kiss Gymnast B, in an attempt to make Gymnast A upset and stop her advances towards him. He said that at the end of the night, when the lights were out, Gymnast A went to the bathroom and he went to the kitchen. He said that unbeknownst to him, Gymnast B had removed her shirt while he was out of the room. He said he only realized her shirt was off when he went to kiss her good-night and his hand accidently cupped her bare breast.

{¶ 62} Dew denied the other allegations made by Gymnast B. He admitted giving her massages in the context of coaching, but denied touching her breasts during the massages. He provided explanations for some of the comments he made to Gymnast B in his letters to her. For example, he said that by asking for "lovely pictures" he did not mean nude photographs.

{¶ 63} With regard to Patient C, Dew testified he tried several less invasive procedures before attempting the internal coccyx adjustment. He stated he initially advised Patient C of the nature of this procedure and that she gave him permission to adjust her by inserting his finger in her rectum. He stated a chaperone was always in the room during these procedures and his finger was always gloved. He discussed the one incident where Patient C had pain and bleeding after one of the adjustments. He stated that prior to that day he had performed several internal coccyx adjustments and that they had only produced short-term relief. He stated that in order to have more long-term improvement, he felt he would need to "go a little bit deeper" into the rectal cavity. He stated that when he attempted to go deeper, his knuckles pushed into Patient C's pelvic floor, which is what caused the pain. Nonetheless, he felt Patient C did improve after that treatment, and said that from September 2005 to January 2006, Patient C did not need to come in for treatment.

{¶ 64} Dew testified that in January 2006, Patient C slipped on some ice in her driveway and reinjured her tailbone, which caused her to resume treatment. Dew

said he started to perform the internal coccyx adjustment again, but with little success. Dew testified he told Patient C that he was going to attempt the adjustment vaginally, and that she consented. Dew stated his reasoning for performing the adjustment vaginally was to avoid putting too much pressure on Patient C's pelvic floor, which could (and did in the past) cause her pain. Dew then opined that as a practical matter a woman cannot always tell the difference between something being inserted in the vagina versus something being inserted in the rectum, since the two openings are so close in proximity. Dew stated Patient C did improve after the vaginal adjustment and that he continued to treat her thereafter with the rectal adjustments. He stated that based upon Patient C's long history of pain, it made sense to treat her this way. Dew agreed that an internal coccyx adjustment procedure is rare, but said he was taught it in school and it is his understanding the procedure is still being taught there. He testified it is lawful for him to perform the internal coccyx adjustment in Ohio.

{¶ 65} On cross, Dew agreed that his chiropractic practice requires him to tell patients what to do, and that the patients comply with his directives. He also agreed that as a gymnastics coach one of his functions was to protect the gymnasts from injury. He testified he was up all night researching and preparing for police questioning about Patient B's allegations, but that he was unprepared to discuss the allegations made by Gymnast A and Gymnast B. He also agreed he had over a year to prepare his testimony on the stand, but conceded the truth does not have to be rehearsed. He claimed it was within the scope of his practice, both as a chiropractor and a physician's assistant, to examine a woman's breasts and adjust a woman's tailbone by inserting a finger into the vaginal cavity.

{¶ 66} Dew agreed that his relationship with Gymnast A lasted from 1990–1992, and that Gymnast A was fourteen years old when he was twenty-eight years old. When asked if it would be "pretty gross" if he carried on a sexual relationship with young girls, he responded: "Define 'gross.' " Dew testified that he is six feet one inch tall and that both Gymnast A and Gymnast B are small in stature. He agreed he was always the adult in the relationship with them. Further, Dew conceded that during his interview with Det. Flara he never mentioned the incident where Gymnast A supposedly jumped on him and put her chest in his face. He testified that at the going-away party with Gymnast A and Gymnast B he did not intend to touch Gymnast B's breast, that it was purely accidental. He alleged that Patient B's motivation in bringing allegations against him was a large financial stake in the civil suit.

{¶ 67} Dew was then asked about a former patient named Patient D. He agreed that in 2006 he wrote a letter regarding Patient D, which he then sealed with instructions that no one should open it without his permission. Dew said he wrote this letter to explain his treatment of Patient D in case she ever came forward with allegations of misconduct against him. After a discussion outside the presence of the jury, the court allowed this letter in for impeachment purposes, over objections from the defense. Dew agreed that he wrote in this letter that Patient D would jump her pelvis

towards his hand during examinations. On redirect, Dew read the text of this letter in its entirety.

{¶ 68} Hannah Kirk, a massage therapist who worked for Dew at his Boardman clinic, testified she performed massages on Patient B and that Patient B never seemed anxious, fearful or uncomfortable about her treatments with Dew. She stated she was sometimes present as a chaperone during Patient C's internal coccyx adjustments, and that she never noticed anything inappropriate about the procedures. Ms. Kirk testified she was also Dew's patient and never felt uncomfortable with him. On cross, Ms. Kirk agreed there would be no reason to stoke the sides of a woman's breasts when performing the effleurage massage technique. On redirect, she agreed that effleurage can feel like tickling.

{¶ 69} Dr. Fred Edge, a licensed chiropractor and medical doctor from Pennsylvania with 32 years of experience testified as an expert witness for the defense. Like Dew, he attended Palmer College of Chiropractic. Dew also worked for Dr. Edge's Pennsylvania clinic for ten years, and Dr. Edge said he never received any complaints about Dew. Dr. Edge admitted that twenty years ago his license was suspended, but then stayed, after he was found guilty of several tax violations. On cross, Dr. Edge admitted that in addition to the currency reporting transaction violations and tax evasion charges, he was also convicted of four counts of using a false Social Security Number with the intent to defraud

{¶ 70} Dr. Edge said he reviewed Patient C's and Patient B's treatment records. He opined, based on his professional experience, Dew properly treated Patient B. He agreed that fondling a patient's breast would never be appropriate, but stated a doctor's hand could accidently graze the patient's breast during treatment. He agreed effleurage might feel like tickling. He testified that it might be significant if a patient were taking medication and did not disclose that to the chiropractor. He also agreed that if a patient had a history of sexual abuse it might make chiropractic treatment uncomfortable.

{¶ 71} Dr. Edge testified he performed an internal coccyx adjustment procedure before, but agreed it is not a procedure performed frequently. He stated both he and Dew were taught about the internal coccyx adjustment at Palmer College. Dr. Edge stated he is not licensed in Ohio, but it is his understanding that both in Ohio and Pennsylvania a chiropractor may perform any procedure taught in school unless it is specifically prohibited by state law. He opined Dew had followed all protocols when performing the procedure on Patient C. He stated it is his understanding that the internal coccyx adjustment procedure, either through the rectum or through the vagina, is not prohibited in the state of Ohio. The defense then introduced a copy of a current Washington State Statute which permits vaginal coccyx adjustments under certain circumstances.

{¶ 72} On cross, Dr. Edge agreed it is possible for someone with a history of sexual abuse, like Patient B allegedly had, to have no problems with chiropractic

> treatment. He testified he would be surprised to learn that as of 2003 vaginal coccyx adjustments are not recommended. However, he conceded that vaginal adjustments are "always the lowest order and [have] always been taught that way." Further, he agreed that he was Dew's boss and that Dew's actions as an employee reflects upon him.
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> {¶ 73} The defense then rested its case and counsel and the court discussed jury instructions. The defense objected to the court's choice of jury instructions for the "force" element of the crimes. After closing arguments and the jury charge, the jury began deliberations. Ultimately, the jury found Dew guilty of three counts of rape and one count of corruption of a minor with respect to Gymnast A; one count of gross sexual imposition with regard to Gymnast B; one count of gross sexual imposition with respect to Patient B; and, one count of rape with respect to Patient C. The jury acquitted Dew of all twelve counts of gross sexual imposition with respect to Patient A; two counts of gross sexual imposition with respect to Patient B; and, two counts of rape of Patient C.
>
> {¶ 74} After a sentencing hearing, the trial court sentenced Dew to an aggregate term of forty-three years imprisonment: 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. The trial court merged the corruption of a minor with the rape conviction, and accordingly imposed no sentence for that charge. Further, Dew was classified as a Tier III sexual offender. Subsequently, Dew's motion for bond pending outcome of the present appeal was denied by the trial court and then denied by this court.

State v. Dew, 2009 WL 4756342, at *1-16 (Ohio Ct. App.). Petitioner asserts he can show by clear and convincing evidence some of these facts are incorrect. *See* Doc. 35, at 20-22. The undersigned has reviewed the facts Petitioner asserts he can contradict by clear and convincing evidence and finds that they either rely on facts outside the record, or any asserted error in the factual findings would not affect the outcome herein.

PROCEDURAL HISTORY

State Court Conviction

On March 22, 2007, Petitioner was indicted by a Mahoning County, Ohio grand jury on three counts of sexual battery in violation of O.R.C. § 2907.03(A)(9)(B) (Case No. 07 CR 378). (Ex. 1, Doc. 6-2, at 1-2). Petitioner filed a motion to dismiss the indictment because the statutory

section used to indict Petitioner did not exist at the time of the alleged offense, and Petitioner could not have been found to have violated the statute at issue based upon his status as a coach. (Ex. 2, Doc. 6-2, at 3-9). Petitioner's motion to dismiss was sustained. (Ex. 3, Doc. 6-2, at 10); *see also* Doc. 33-2, at 2-10. In the meantime, the grand jury issued a superseding indictment, charging Petitioner with three counts of rape, and one count each of corruption of a minor and gross sexual imposition, O.R.C. §§ 2907.02(A)(2)(B), 2907.04(A), and 2907.05(A)(1), respectively. (Ex. 4, Doc. 6-2, at 11-12). Petitioner plead not guilty to the charges in the superseding indictment. (Ex. 5, Doc. 6-2, at 13-15). Prior to trial, Petitioner filed a motion for notice of the state's intention to use evidence (Ex. 6, Doc. 6-2, at 16-19), which was sustained (Ex. 7, Doc. 6-2, at 20). The state also filed an amended bill of particulars. (Doc. 33-3). On July 31, 2007, Petitioner filed a motion to inspect grand jury proceedings (Ex. 8, Doc. 6-2, at 21-31), which the state opposed (Ex. 9, Doc. 6-2, at 32-37). The trial court ordered the grand jury proceedings be transcribed, sealed, and delivered to the trial court judge for inspection. (Ex. 10, Doc. 6-2, at 38). After inspection, the trial court ruled there was no indication of misconduct by the prosecuting attorney or the grand jury, and ordered the transcripts resealed and returned to the court reporter to maintain as an exhibit for appeal, if necessary. (Ex. 11, Doc. 6-2, at 39). The court also noted it had previously determined that Petitioner failed to demonstrate a particularized need for the transcripts. *Id.*

On October 11, 2007, Petitioner was indicted again, by secret indictment, on fifteen counts of gross sexual imposition, in violation of O.R.C. § 2907.05(A)(1)(B) (Case No. 07 CR 1262) for conduct similar to that alleged in Case No. 07 CR 378 (Ex. 12, Doc. 6-2, at 40-44). These charges related to alleged acts between Petitioner and gymnasts. On November 20, 2007, a superseding indictment was filed in Case No. 07 CR 1262, charging Petitioner with fifteen counts of sexual imposition, in violation of O.R.C. § 2907.05(A)(1)(B) and three counts of rape, in violation of

O.R.C. § 2907.05 (A)(2)(B). (Ex. 13, Doc. 6-2, at 45-50). These charges related to acts between Petitioner and chiropractic patients.

On November 26, 2007, in Case No. 07 CR 378, Petitioner filed a motion to suppress evidence – a recorded telephone conversation between himself and a victim – and requested a statement of essential factual findings. (Ex. 14, Doc. 6-2, at 51-57). Petitioner also filed a motion to dismiss that case due to the time lapse since the alleged violations. (Ex. 15, Doc. 6-2, at 58-71). In addition, Petitioner filed a motion for relief from improper joinder. (Ex. 16, Doc. 6-2, at 72-82). The state opposed each motion. (Exs. 17-19, Doc. 6-2, at 83-98). The trial court held a suppression hearing (Doc. 6-5), and subsequently overruled all three motions. (Ex. 20, Doc. 6-2, at 99-100).

On February 28, 2008, the state filed a motion to introduce other acts evidence in both cases. (Ex. 21, Doc. 6-2, at 101-10), which Petitioner opposed (Ex. 22, Doc. 6-2, at 111-15). After a pre-trial and exchange of discovery, the trial court overruled the state's motion to introduce other acts. (Ex. 23, Doc. 6-2, at 116). The State also filed: 1) a motion to correct a clerical error in the indictment; 2) a notice of intent to use specified evidence; and 3) a notice of supplemental authority regarding the motion to amend the indictment. (Ex. 24-26, Doc. 6-2, at 117-52).

A jury trial commenced and upon the state resting, Petitioner moved for acquittal. (Ex. 27, Doc. 6-2, at 153). The trial court overruled the motion. *Id.* In Case No. 07 CR 378, Petitioner was found guilty of three counts of rape, one count of corruption of a minor, and one count of gross sexual imposition. (Ex. 28, Doc. 6-2, at 154-56). In Case No. 07 CR 1262, Petitioner was found guilty of one count of gross sexual imposition and one count of rape. *Id.* On April 1, 2008, Petitioner was sentenced to an aggregate term of 43 years' incarceration. *Id.*

Direct Appeal

Petitioner filed a timely notice of appeal to the Seventh District Court of Appeals in Mahoning County ("Case No. 08 MA 62"). (Ex. 29, Doc. 6-2, at 157). In his appellate brief, represented by new counsel, Petitioner presented three assignments of error:

1. The Indictment and Prosecution of the Case Against Appellant were Predicated upon Evidence Gained in Violation of the Fourth Amendment to the United States Constitution. The Trial Court Erred in Overruling Appellant's Motion to Suppress Illegal Wiretap Evidence.

2. 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.

3. Appellant's Conviction Was Not Supported by Sufficient Evidence and Against the Manifest Weight of the Evidence.

(Ex. 30, Doc. 6-2, at 158-98). The State filed a brief in opposition (Ex. 31, Doc. 6-2, at 199-238), and Petitioner filed a reply (Ex. 32, Doc. 6-2, at 239-55).

On July 23, 2009, the court of appeals issued a judgment entry remanding the case to the trial court to issue a time-stamped sentencing entry in compliance with *State v. Baker*, 119 Ohio St.3d 97. (Ex. 33, Doc. 6-2, at 256-57). On July 27, 2009, the trial court issued a sentencing entry complying with *Baker*, sentencing Petitioner to an aggregate term of 43 years' incarceration. (Ex. 34, Doc. 6-2, at 258-60).

The court of appeals then issued an opinion finding Petitioner's first two assignments of error without merit, but Petitioner's third assignment of error (sufficiency) meritorious as it pertained to the patient-related convictions. (Ex. 35, Doc. 6-2, at 261-300); *Dew*, 2009 WL 4756342. Specifically, the appellate court held: 1) the trial court properly denied the motion to suppress as Ohio law allows police to record a phone conversation between a consenting informant and a non-consenting defendant without a warrant; and 2) the trial court did not abuse its discretion

by denying Petitioner's motion for relief from improper joinder, since the evidence of each set of crimes was simple and direct; but the appellate court reversed and vacated Petitioner's convictions in Case No. 07 CR 1262 because they were not supported by sufficient evidence. *Id.* Reconsideration was also denied. *See* Exs. 36-38, Doc. 6-2, at 301-46.

On January 14, 2010, Petitioner filed a timely notice of appeal, through his direct appeal counsel, to the Ohio Supreme Court. (Ex. 39, Doc. 6-2, at 347-48). In his memorandum in support of jurisdiction, Petitioner presented three propositions of law:

1. An Individual has been Denied Due Process of Law when the Court allows the Admission of Illegally Obtained Wiretap Evidence.

2. An Individual has been Denied Due Process of Law when the Trial Court Denied his Motion for Relief from Improper Joinder and the Appellate Court Refused to Remand the Case Even after Reversing and Vacating Convictions on the Unrelated Charges.

3. An Individual has been Denied Due Process of Law when His Conviction was Based upon Insufficient Evidence and was against the Manifest Weight of the Evidence.

(Ex. 40, Doc. 6-2, at 350). The state filed a waiver of memorandum in response. (Ex. 41, Doc. 6-2, at 369). On March 10, 2010, the Ohio Supreme Court denied leave to appeal and dismissed the appeal as not involving any substantial constitutional question. (Ex. 42, Doc. 6-2, at 370).

Petitioner then filed a timely petition for writ of certiorari in the United States Supreme Court (Ex. 43, Doc. 6-2, at 371), which was denied (Ex. 44, Doc. 6-2, at 372).

First Application to Reopen (Ohio App. R. 26(B))

On November 14, 2011, Petitioner filed an untimely *pro se* application to reopen his direct appeal pursuant to Ohio App. R. 26(B) and raised two assignments of error:

1. Appellate counsel failed to appeal ineffective assistance of trial counsel, violating Appellant's rights under Amendments V, VI, and XIV of the US Constitution and Article I, Sections 2, 5, 9, 10, and 16 of the Ohio Constitution and Crim.R. 16.

2. Appellate counsel was ineffective for not appealing the abuse of discretion of the trial court in violation of Appellant['s] rights under Amendments VI and XIV of the US Constitution and Article 1, Sections 10 and 16 of the Ohio Constitution.

(Ex. 45, Doc. 6-2, at 375, 382) (capitalization altered).[2]

On January 31, 2012, the state court of appeals denied Petitioner's application to reopen because Petitioner failed to demonstrate good cause for his untimely appeal, which was filed two years after the deadline expired. (Ex. 46, Doc. 6-2, at 423-26). Petitioner then filed an application for reconsideration of the order denying his application to reopen, *see* Doc. 27, at 23[3], which the appellate court denied (Ex. 127, Doc. 27-2, at 362-64).

On June 15, 2012, Petitioner appealed to the Ohio Supreme Court. (Ex. 66, Doc. 12-1, at 1). He raised two propositions of law in his memorandum in support of jurisdiction:

1. The Ohio Administrative Code denies access to the court as it has no utilized, uniform policy that allows incarcerated Defendants to obtain, access or review evidence in the form of audio recordings, compact discs, or DVDs at critical stages of litigation involving liberty interests. This denial creates severe prejudice resulting in the violation of Due Process and a denial of the right to fair adjudication of issues presented to the Court.

2. Defendant was compliant with the requirements for filing in his Application for Reopening Pursuant to App.R. 26(B) under App.R. 26(B)(2)(b) to allow the Appellate Court to proceed to issues in the Application under App.R. 26(B)(5) where he provided the Appellate Court good cause for filing beyond the ninety day period allowed by the Rule, that has been denied through a misconstruing and misquoting of case law in Ohio courts, and did not abuse the time frame that good cause existed in the instant case pursuant to the ruling in *State v. Gumm* (2004), 2004-Ohio-4755, citing *State v. Fox* (1998.) 83 Ohio St.3d 514, 516.

2. This filing was also entitled a "Motion for Reconsideration". (Ex. 45, Doc. 6-2, at 373).
3. Respondent asserts (Doc. 27, at 23), and Petitioner agrees (Doc. 35, at 23), that this filing is unavailable.

(Ex. 67, Doc. 12-1, at 11). The Ohio Supreme Court denied and dismissed the appeal, initially and on reconsideration, as not involving any substantial constitutional question (Ex. 69, 71, Doc. 12-1, at 32, 37).

Motion for New Trial (Ohio Crim. R. 33(B))

In November 2011, Petitioner *pro* se motion in the trial court for grand jury transcripts,[4] for recusal, and for an evidentiary hearing. *See* Ex. 128, Doc. 27-2, at 380 (docket sheet). He also requested an order finding he had been unavoidably prevented from discovering the evidence upon which he relied in his motion for a new trial, and requested leave to file a motion for new trial. (Ex. 49, Doc. 6-2, at 448-51). Specifically, Petitioner claimed he was prevented from obtaining a professional evaluation of jury venire, grand jury transcripts, and a forensic comparison of interrogation recordings. *Id.* He alleged this evidence showed entitlement to a new trial. *Id.* The state filed responses in opposition to Petitioner's motions to obtain grand jury transcripts, for recusal, and for an evidentiary hearing. *See* Exs. 50-52, Doc. 6-2, at 469-83. Petitioner filed replies. (Ex. 53-55, Doc. 6-2, at 484-575)

The trial court ruled it lacked jurisdiction to rule on Petitioner's motions because Petitioner already appealed the case and such issues should have been raised on appeal. (Ex. 56, Doc. 6-2, at 576). On January 17, 2012, in its judgment entry, the trial court noted "[Petitioner's] arguments may be meritorious, however, again, this [c]ourt believes it is without jurisdiction to grant Defendant to relief he has prayed for." (Ex. 57, Doc. 6-2, at 577).

On February 2, 2012, Petitioner, through new counsel, filed a notice of appeal from the trial court judgment entries denying Petitioner's motions on the basis of lack of jurisdiction ("Case

4. Petitioner later filed an amended motion to obtain grand jury transcripts in December 2011. *See* Ex. 128, Ex. 27-2, at 380 (docket sheet reflecting motion).

No. 12 MA 18"). (Ex. 58, Doc. 6-2, at 578). On February 13, 2012, the court of appeals granted Petitioner 30 days to file supporting memorandum as to whether the two orders were final appealable orders of the trial court, thus permitting it to exercise jurisdiction of the appeal. (Ex. 59, Doc. 6-2, at 581-82). Petitioner did so (Ex. 61, Doc. 6-2, at 585-89); and the State responded (Ex. 62, Doc. 6-2, at 590-92). Petitioner also filed a *pro se* brief, wherein he raised a single issue for review:

> 1. Does the Trial Court have jurisdiction pursuant to the Rules of Criminal Procedure as determined by the Ohio Supreme Court to hear the post-trial motions listed previously that were properly filed with the Trial Court? Did the Trial Court abuse its discretion when it claimed it could not rule on the motions due to the lack of jurisdiction?

(Ex. 72, Doc. 27-1, at 9).[5] In April 2012, the appellate court defined the scope of Petitioner's appeal and ordered the appeal to continue only on the issue of the trial court's denial of his motion for grand jury transcripts. (Ex. 63, Doc. 10-1; Ex.65, Doc. 10-3).

In July 2012, Petitioner, through appellate counsel, filed a merit brief in which he raised one assignment of error:

> 1. The trial court erred to the prejudice of Appellant by denying his motion to obtain the grand jury transcripts.

(Ex. 73, Doc. 27-1, at 35-41). The state filed an answer brief (Ex. 74, Doc. 27-1, at 42-50), and Petitioner replied (Ex. 75, Doc. 27-1, at 51-57). On November 9, 2012, the appellate court modified its April 2012 judgment to allow Petitioner to supplement his brief to also argue the issue of the trial court's jurisdiction to rule on Petitioner's motion for leave to file a delayed motion for new trial. (Ex. 76, Doc. 7-1, at 58-61). Because Petitioner did not file a supplemental brief in accordance with the court's order, the appellate court noted it would proceed only on the issue raised in his

5. Petitioner also filed a *pro se* Notice of Appeal. (Ex. 60, Doc. 6-2, at 583-84). That appeal was dismissed as it was duplicative. *See* Ex. 132, Doc. 27-2, at 429.

original brief. (Ex. 77, Doc. 27-1, at 62). However, the appellate court then recognized that Petitioner's previously-filed *pro se* brief, filed in Case No. 12 MA 25, had been consolidated with the appeal, and therefore the court would "consider Dew's *pro se* arguments regarding the trial court's ruling on the motion for leave to file a delayed Crim R. 33 motion for new trial." (Ex. 78, Doc. 27-1, at 67).

On June 17, 2013, the appellate court affirmed the trial court's judgment in part (holding that Petitioner's complaint alleging the denial of grand jury transcripts was barred by *res judicata*), and reversed and remanded in part (holding that the trial court had jurisdiction to rule on the motion for leave to file a Criminal Rule 33 motion based on newly discovered evidence). (Ex. 78, Doc. 27-1, at 63-74). Petitioner's motion for reconsideration (Ex. 79, Doc. 27-1, at 75-89) was denied (Ex. 81, Doc. 27-1, at 93-94).

Petitioner, again through counsel, filed a timely notice of appeal to the Ohio Supreme Court. (Ex. 82, Doc. 27-1, at 95-96). In his memorandum in support of jurisdiction, Petitioner set forth a single proposition of law:

> 1. Res judicata does not bar a defendant's request for a grand jury transcript when the defendant's post-conviction claims involve the withholding of evidence and prosecutorial misconduct.

(Ex. 83, Doc. 27-1, at 98-116). The state filed a waiver of memorandum in response. (Ex. 84, Doc. 27-1, at 117). On November 6, 2013, the Ohio Supreme Court declined to accept jurisdiction of the appeal pursuant to S. Ct. Prac. R. 7.08(B)(4). (Ex. 85, Doc. 27-1, at 118).

Initial Federal Habeas Corpus Proceedings

On November 15, 2011, when he was simultaneously pursuing state post-conviction relief, Petitioner initiated the instant federal action seeking a writ of habeas corpus pursuant 28 U.S.C. § 2254. (Doc. 1). He asserted five grounds for relief:

GROUND ONE: Defendant was denied due process of law at trial when the court allowed admission of illegally obtained wiretap evidence.

Supporting Facts: An Ohio law officer used a wiretap to illegally record a conversation between persons outside of the legal jurisdiction of the state of Ohio. The wiretap was between two parties, one in California, the other in Pennsylvania, which was intercepted/recorded without a warrant. Both CA and PA law require the consent of all parties or a warrant to perform a wiretap. PA law specifically prohibits any law enforcing officer to use an informant to surreptitiously record conversations without a warrant.

GROUND TWO: Dew was denied due process of law when the trial court denied a motion for relief of improper joinder of cases at trial.

Supporting Facts: Dew was charged in two separate cases for crimes of a sexual nature. Evidence in the cases failed inclusion under Evid. R. 404(B). Cases were joined in violation of Ohio's rape shield law and against the rulings in several precedent setting cases. All charges in case 07 CR 1262 were dismissed in initial appeal, rendering them as being unable to be presented in Case 07 CR 378 if the cases were tried separately.

GROUND THREE: Dew was denied due process as his conviction was based on insufficient evidence and the manifest weight of the evidence.

Supporting Facts: Dew was originally charged on a statute that presupposes willing partners in Case 07 CR 378. All discovery prior to trial was consistent with consensual relationships. The charges were elevated requiring the element of force or threat of force with no new evidence to support this element being provided to Dew to justify the new and elevated charges. All charges related to case 07 CR 1262 were dismissed. Timeline and other evidence negate validity of all charges in case 07 CR 378.

GROUND FOUR: Dew was prejudiced by ineffective assistance of counsel for not appealing ineffective assistance of trial counsel and abuse of discretion in trial court.

Supporting Facts: Appellate counsel failed to raise significant, meritorious issues on initial appeal. I have reviewed the records and have filed an application of ineffective assistance of appellate counsel for these issues.

GROUND FIVE: Dew is entitled 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.

Supporting Facts: Professional evaluation and analysis of evidence in my case prove beyond a reasonable doubt that evidence was withheld and

> tampered with, my jury was not chosen from a "representative cross section of the community" as required by the U.S. Constitution, and my case(s) were "steered" to Judge Krichbaum for a real or perceived benefit to the prosecution.

(Doc. 1). Respondent filed an Answer/Return of Writ, noting, *inter alia*, the Petition was a mixed petition, containing both exhausted and unexhausted claims. *See* Doc. 6. Petitioner replied. (Doc. 8). On February 4, 2013, the court stayed the case pending exhaustion. (Doc. 14).

Motion to Disqualify

Subsequently, Petitioner, *pro se*, filed a motion to disqualify the trial judge from presiding over any further proceedings. (Ex. 89, Doc. 27-1, at 126-73). The Ohio Supreme Court denied the disqualification request, ruling Petitioner had "waived his right" to object to the trial judge because he had filed his disqualification affidavit too late, and that Petitioner had nothing pending before the trial judge. (Ex. 90, Doc. 27-1, at 174-75). Petitioner's motion for reconsideration of that decision was also denied. (Ex. 91, Doc. 27-1, at 177-79).

Affidavit Charging the Offense Committed

In August 2012, Petitioner filed an "Affidavit Charging the Offense Committed Pursuant to R.C. 2935.09" with the Mahoning County Clerk of Courts. (Doc. 33-4). In it, he sought to have charges brought against a detective and prosecutor involved in his case. *Id.*

Return to Motion for New Trial (Ohio Crim. R. 33(B))

Pursuant to the appellate court's remand, *see* Ex. 78, Doc. 27-1, at 63-74, on June 24, 2013, Petitioner filed his delayed motion for new trial. *See* Ex. 92, Doc. 27-1, at 180 (trial court order granting Petitioner leave to file his motion for new trial). In his memorandum in support, Petitioner, *pro se*, presented four issues:

1. Dew is entitled to a new trial due to the State of Ohio's violation of Crim R. 16 and R.C. 2921.12.

2. Dew is entitled to a new trial resulting from the prosecution's "fixing" or "packing"; of the jury, as the jury venire was not a representative cross-section of the community in which the crime was alleged to have occurred in violation of Amendments VI and XIV to the U.S. Constitution.

3. Dew is entitled to a new trial or other remedy due to "judge shopping" and "case steering" by the Mahoning County Prosecutor's office, Magistrate Dennis Sarisky or other person(s) in violation of Amendment XIV U.S. Constitution and Section 1, Article 10 of the Ohio Constitution.

4. Trial court gave inaccurate and inappropriate instructions to the jury that were an abuse of discretion resulting in prejudicial and plain error.

(Ex. 93, Doc. 27-1, at 181-228). The trial court held a hearing on August 26, 2013, at which Petitioner appeared with counsel. *See* Doc. 28-6 (transcript of hearing). At the hearing, the trial court overruled Petitioner's first three issues as *res judicata*, *id.*, at 68-72, but requested additional briefing on the fourth issue, *id.* at 71-73. The parties submitted post-hearing briefs. (Exs. 94-97, Doc. 27-1, at 389-472; Ex. 98, Doc. 27-2, at 1-10).

On October 31, 2013, the trial court overruled Petitioner's motion for a new trial. (Ex. 99, Doc. 27-2, at 11-12). The court held that Petitioner had failed to establish the merits of his claims, and that all of the issues "should have been or were raised on direct appeal and, as such, said issues may not now be presented." *Id.* at 11.

Petitioner, *pro se*, filed a timely notice of appeal. (Ex. 100, Doc. 27-2, at 13). In his *pro se*[6] merit brief, Petitioner raised three assignments of error:

1. Appellant did not receive a hearing before an unbiased, unprejudiced and disinterested judge in violation of his constitutional right to due process.

2. Trial court abused its discretion when appellant was denied the opportunity to present witnesses at his hearing in violation of his constitutional right to due process.

6. Petitioner's counsel withdrew. *See* Exs. 101-03, Doc. 27-2, at 19-22.

3. Trial court abused its discretion when it denied issues in appellant's motion for new trial on the merits.

(Ex. 104, Doc. 27-2, at 29). The State filed an Answer Brief (Ex. 105, Doc. 27-2, at 91-128), and Petitioner filed a Reply (Ex. 106, Doc. 27-2, at 129).

On January 21, 2016, the state appellate court affirmed the trial court's decision holding each of Petitioner's arguments barred by *res judicata*. (Ex. 107, Doc. 27-2, at 156-74). Petitioner filed a motion for reconsideration. (Ex. 108, Doc. 27-2, at 175-207). The State filed a response. (Ex. 109, Doc. 27-2, at 208-15). On March 4, 2016, the appellate court denied reconsideration. (Ex. 110, Doc. 27-2, at 216-26).

On March 29, 2016, Petitioner, *pro se*, filed a timely notice of appeal to the Ohio Supreme Court. (Ex. 111, Doc. 27-2, at 227-28). In his memorandum in support of jurisdiction, Petitioner set forth five proposition of law:

1. Is due process violated when a defendant is granted a "motion for an[d] order finding the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely" pursuant to Crim R. 33, and the appellate court rules this was not a finding that the defendant was unavoidably prevented from the discovery of said evidence?

2. Are appellant's right to due process violated when he does not receive a hearing before an unbiased, unprejudiced and disinterested judge?

3. Does a trial court err in violation of due process when appellant is denied the opportunity to present witnesses at his hearing where the trial court was unclear on the issues before him?

4. Does a trial court err when it denies relief for issues of constitutional violations determined to have been unavoidably undiscoverable in appellant's motion for new trial that show egregious violations of due process and support misconduct by the state constituting manifest injustices?

   A. Appellant is entitled to a new trial due to the State of Ohio's withholding and tampering with evidence in violation of Due Process afforded by the U.S. Constitution.

B. Appellant is entitled to a new trial resulting from the prosecution's "fixing" or "packing" of the jury, as the jury venire was not a representative cross-section of the community in which the crime was alleged to have occurred in violation of Amendments VI and XIV to the U.S. Constitution.

C. Appellant is entitled to a new trial or other remedy due to "judge shopping" and "case steering" by the State or other person§ in violation of Due Process and Amendment XIV, U.S> Constitution and Section I, Article 10 of the Ohio Constitution.

D. The jury instructions at Dew's trial mislead [sic] the jury and violated due process,

5. Does the trial court lose jurisdiction when two indictments are pending related to identical actions and the first indictment on the lesser-included offense is dismissed based on a Constitutional violation and the defendant's innocence making his convictions void and a violation of due process?

(Ex. 112, Doc. 27-2, at 229-77) (capitalization altered). The State filed a waiver of memorandum in response. (Ex. 113, Doc. 27-2, at 278). On June 15, 2016, the Ohio Supreme Court declined to accept jurisdiction of the appeal pursuant to S. Ct. Prac. R. 7.08(B)(4). (Ex. 114, Doc. 27-2, at 279).

Second Application to Reopen (Ohio App. R. 26(B))

Meanwhile, on June 5, 2014, Petitioner, *pro se*, filed a motion for delayed reconsideration, or in the alternative, a delayed application for reopening his direct appeal. (Ex. 115, Doc. 27-2, at 280-96). In it, he alleged appellate counsel was ineffective for "failure to ensure the preservation of the original recording of a wiretap, improperly redacted at trial and timely objected by defense counsel, for the trial/appellate record in Appellant's direct appeal." *Id.* at 280. The State filed a response (Ex. 116, Doc. 27-2, at 297-304), and Petitioner filed a reply (Ex. 117, Doc. 27-2, at 305-09). On September 5, 2014, the appellate court denied the application. (Ex. 118, Doc. 27-2, at 310-13). Therein, the appellate court held that Petitioner's motion for delayed reconsideration: was meritless; was a second application for reopening (which the rules did not provide for); and that

he had failed to establish good cause for his untimeliness. *Id.* Petitioner's motion for reconsideration (Ex. 119, Doc. 27-2, at 314-18), was denied. (Ex. 122, Doc. 27-2, at 326-27).

Petitioner filed, *pro se*, a timely notice of appeal to the Ohio Supreme Court. (Ex. 123, Doc. 27-2, at 328-29). In his memorandum in support of jurisdiction, Petitioner advanced five propositions of law:

1. Does the failure to preserve material, exculpatory evidence for the trial and appellate record after a timely, specific objection is made as stated in *State v. Gilmore*, 28 Ohio St. 3d 190 violate Due Process as required under the Ohio and U.S. Constitutions, Art. 1, § 16 and the 5th, 6th & 14th Amendments, respectively?

2. Does the improper omission of material, exculpatory evidence violate Due Process as required under the Ohio and U.S. Constitutions, Art. I, § 16 and the 5th, 6th & 14th Amendments, respectively?

3. Does the appellate court abuse its discretion when it fails to correct the appellate record when the evidence is material and exculpatory when the court was properly requested to do so under App.R. 9(E), and does that failure violate Due Process as required under the Ohio and U.S. Constitutions, Art. I, § 16 and the 5th, 6th & 14th Amendments, respectively?

4. Does appellate counsel render effective assistance required by the 6th Amendment to the U.S. Constitution when he fails to ensure that material, exculpatory evidence is included in the record, and that failure prevents him from reviewing the evidence and presenting related issues on appeal that present a reasonable probability of changing the outcome of the proceedings and does this failure also represent deficient performance?

5. Is it an abuse of discretion and a violation of Due Process when an appellate court makes a decision contrary to its prior rulings when it denied Appellant's Motion and Application as being untimely and denied Appellant's arguments on the merits?

(Ex. 124, Doc. 27-2, at 336-59). The State filed a waiver of memorandum in response. (Ex. 125, Doc. 27-2 at 360). On December 3, 2014, the Ohio Supreme Court declined to accept jurisdiction of the appeal pursuant to S. Ct. Prac. R. 7.08(B)(4). (Ex. 126, Doc. 27-2, at 361).

Return to Federal Court

Following the Ohio Supreme Court's June 15, 2016 decision declining jurisdiction of Petitioner's final appeal, *see* Ex. 114, Doc. 27-2, at 279, Petitioner filed a notice of exhaustion of state court remedies, and motion for leave to amend his habeas petition. (Doc. 16). This district court granted the motion for leave. (Doc. 17). In his Amended Petition, filed *pro se*,[7] Petitioner presents twelve grounds for relief:

> **GROUND ONE**: Petitioner asserts a claim of actual innocence based on new evidence and the claim of actual innocence is also related to multiple Constitutional violations.
>
> > **Supporting Facts**: Petitioner received evidence from his family of improper alteration and redaction of evidence from a recording after his trial had concluded. The improper redaction of the evidence had been objected to at trial. There is no record of the State providing the defense with a copy of the altered recording prior to playing it at trial. The Clerk of Courts did not include the unredacted recording in the appellate record, preventing appellate counsel from its review. The altered evidence included the removal of a recorded interview with an alleged victim that exculpates Petitioner from the crimes for which he was convicted. The evidence shows that the alleged victim confirmed there was "nothing forcible" between him and the alleged victim and that Petitioner "never raped [the other alleged victim], or sexually abused her, even" and "would respect it" when he was told "no." Further exculpatory statements were made and excluded from the hearing of the jury. The evidence was improperly and intentionally removed from the recording prior to it being heard by the jury, impairing its value and misleading the jury and the court. The evidence was admittedly redacted by the State. The redacted portion of the recording also showed that an alleged victim admitted to "changing things" in the other alleged victim's mind prior to her testifying after she stated she was never raped or sexually abused, and convinced her that statutory rape had occurred when it was not, and could not, be charged in the case. The recording also identified the person who made the recording as one Detective Stepuk, who was not the person who verified the recording at trial. The evidence showed that the detectives and prosecutors knew about the exculpatory evidence, yet colluded to falsely elevate charges through the grand jury and convict Petitioner for crimes they knew

7. Petitioner initially had counsel in this case, but counsel moved to withdraw after the filing of the amended Petition. *See* Doc. 20 (motion to withdraw), Doc. 21 (marginal entry order granting motion).

he did not commit after originally indicting him on charges involving consensual interaction between Petitioner and an alleged victim, which were dismissed. Constitutional violations are related to acts that include, but are not limited to, ineffective assistance of counsel, tampering with and withholding evidence, witness tampering, obstruction of justice, perjury, confrontation, prosecutorial misconduct, malicious and vindictive prosecution, fraud, state interference, collusion and conspiracy.

GROUND TWO: Petitioner has been 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.

Supporting Facts: Petitioner was charged in two different cases involving sexual offenses that were to have occurred over a decade apart. The cases were joined for trial prejudicially. Petitioner was convicted for offenses in both cases. The Ohio Appellate court found that the jury erred and convicted Petitioner without sufficient evidence in the second case. Despite making this finding and knowing that the evidence from the second case would never have been allowed to be presented in the trials of separated, the Appellate Court refused to find the failure to sever violated Petitioner's rights. The Petitioner was severely prejudiced and did not receive a fair trial as required by the U.S. Constitution.

GROUND THREE: Petitioner has been denied due process of law afforded by the U.S. Constitution when his conviction was based upon insufficient evidence.

Supporting Facts: Petitioner asserts that the State never proved all of the elements of the offense and he is innocent of the charges for which he was convicted. The issues in both joined cases alleged offenses committed by Petitioner predicated on identical issues. Yet, the second case against Petitioner was dismissed due to insufficiency of the evidence. Additionally, the first case against Petitioner originally charged offenses based on consensual sexual interaction between an alleged victim and Petitioner, which were then elevated to offenses involving force or threat of force after Petitioner exercised a constitutional right and claimed actual innocence. A second charge was also added for a second alleged victim after the State failed to indict Petitioner for any charge for this person initially. The trial court dismissed the original charges and the State conceded there was no new evidence to justify the elevation of and addition to the charges. The original case was dismissed based on Petitioner's claims of violation of ex post facto law and his actual innocence. Improper jury instructions were utilized to mislead the jury on elements of force or threat of force.

GROUND FOUR: The indictment and prosecution of the case against Petitioner were predicated upon evidence gained in violation of the United States Constitution. An individual had been denied due process of law when the court allows the admission of illegally obtained wiretap evidence.

Supporting Facts: A local township officer from the State of Ohio, who was not a party to the conversation, intercepted and recorded a telephone conversation while the State's informant was in California and Petitioner was in Pennsylvania. Both CA and PA require consent from all parties prior to recording a conversation. The Ohio officer lacked jurisdiction to wiretap beyond state boundaries and seized Petitioner's conversation in violation of other state's laws without a warrant or authority, violating the U.S. Constitution. Petitioner was under the jurisdiction of PA law and the other party was under jurisdiction of CA law, Ohio law could not apply where jurisdiction did not exist.

GROUND FIVE: Petitioner suffered a violation of his right to due process when the trial court used improper jury instructions that were incorrect and consisted of ex post facto law and judicial decision-making.

Supporting Facts: The trial court improperly utilized jury instructions that equated the position of a coach with that of a parent. Petitioner's alleged offenses were to have occurred in 1990-92. The errant instructions utilized the expanded and relaxed standard found in State v. Eskridge in Petitioner's trial when the instruction was not expanded to persons who were not parents or step-parents until 1998 in State v. Dye, where the instructions were also limited to caregivers of victims under the statutory age of thirteen, which is inapplicable in this case. Other inapplicable case law was also improperly used[.] Trial court, after realizing he did not consider these issues at Petitioner's trial, received new evidence and briefing on the issue of jury instructions at the hearing on Petitioner's Motion for new Trial.

GROUND SIX: Petitioner suffered a violation of his constitutional right to a fair trial by the intentional fixing of packing of the jury as the jury venire was not a representative cross-section of the community in which the crime was alleged to have occurred in violation of Amendments VI and XIV to the U.S. Constitution.

Supporting Facts: After Petitioner's trial, Petitioner's family members requested a copy of the court record from his attorney. Petitioner's records revealed an inordinate amount of relatives of local police officers in his venire. The records of several jury selection were then obtained, pretrial and post-trial, which show tampering with the jury selection process by the manipulation of the jury pool through selection software. The numbers reflected a prima facie violation of Petitioner's right to a fair trial and due process.

GROUND SEVEN: Petitioner [sic] right to due process was violated when he was wrongfully convicted by a court that lacked subject matter jurisdiction due to the alleged conduct – the subject matter of the crime – was determined to be "not a crime" and "innocent when it occurred" by the trial court in a prior dismissal of the case, also resulting in a violation of Petitioner's right against double jeopardy and vindictive prosecution.

Supporting Facts: Petitioner was originally indicted for offenses involving consensual interaction with an alleged victim. The Petitioner filed a Motion to Dismiss the indictment based on a constitutional violation of ex post facto laws and actual innocence. Immediately after Petitioner filed the Motion to Dismiss, the State took the same evidence to a grand jury and obtained a superseding indictment on charges that were now to have involved force or threat of force, which were pending simultaneously with the original charges under the same case number. The trial court dismissed the case on Petitioner's Motion "for the reasons cited in Def't's [sic] Memorandum," which were a violation of ex post facto laws and actual innocence, finding the acts alleged by the State were "not a crime" and "innocent when they occurred." The State continued prosecuting Petitioner under the second indictment despite the dismissal of the case. The dismissal of the first indictment on the grounds of actual innocence were the same alleged acts that were to have provided the basis for the charges in the superseding indictment. The dismissal of the first indictment would also be a dismissal of the simultaneously pending superseding indictment based on the same alleged acts that constituted the subject matter of the case. The State provided no new evidence for the same alleged acts that constituted the subject matter of the case. The State provided no new evidence for the elevated and new charges and sought no additional indictment after the dismissal.

GROUND EIGHT: Petitioner did not receive the effective assistance of appellate counsel as required by the U.S. Constitution.

Supporting Facts: Appellate counsel for Petitioner did not investigate to ensure the record was properly filed with the Court, did not provide complete arguments on direct appeal, ineffective assistance of trial counsel, vindictive prosecution, grand jury transcripts, etc. Counsel was prevented from a proper review of the record because a complete trial record was not preserved, transcribed or filed for the appeal.

GROUND NINE: Petitioner did not have his trial, sentencing, or postconviction issues heard and presided over by an unbiased, disinterested and unprejudiced judge in violation of due process afforded by the U.S. Constitution, Amendments V and XIV, constituting structural error.

Supporting Facts: Petitioner's trial court made unreasonable, arbitrary, biased and prejudicial comments, rulings and findings during the proceedings of Petitioner's trial and post-conviction filings, to include the hearing on his Motion for New Trial. Trial court compared Petitioner to a doctor in a Nazi concentration camp at sentencing, threatened Petitioner's relief in the hearing on his Motion for New Trial due to his somehow being "offended" by Petitioner, and stated he wanted to use words against Petitioner that were forbidden to be used by the Appellate court, Trial Court also has stated in open court that he would not consider proper sentencing requirements and made other decisions and statements that were biased to the favor of the State and prejudicial to Petitioner.

GROUND TEN: Petitioner was denied due process when the State did not provide him nor the trial court a true, accurate and usable copy of this discovery in the form of his interrogation that showed violations of his Fifth Amendment and other substantive rights.

Supporting Facts: After Petitioner's trial, his family obtained the trial record and had a forensic evaluation performed on his recorded video interrogation with police. The Petitioner could never get the video to play properly. The video also could not be played by the State at trial. The State provided an audio only recording and misled defense counsel by claiming that it was true to the original. After Petitioner's trial, a family member discovered a forensic timeline on the video recording and had it compared to the audio by an expert witness. Approximately a one hour and fifteen minute difference was noted between the recordings by an expert witness evaluation. Petitioner has never been in possession of a complete and working recording of his interrogation. The partially recovered recording showed, minimally, that Petitioner unequivocally exercised his right to remain silent during his interrogation – which was ignored – that the detective knew who Petitioner's judge would be for his trial on the day of his arrest weeks prior to his arraignment supporting judge shopping, and that Petitioner's substantive right to not have his name released to the media was violated.

GROUND ELEVEN: Petitioner was denied due process when he was denied access to evidence in the form of his grand jury transcripts.

Supporting Facts: Petitioner was indicted initially for charges involving a consensual sexual relationship. The charges were elevated by going to a second grand jury without any new evidence after Petitioner filed a motion to dismiss the case based on a violation of his constitutional rights and actual innocence. The Petitioner filed a Motion to obtain grand jury proceedings both pretrial and post-trial due to a particularized need for the element of force or threat of force. The pretrial motion was denied and the transcripts were sealed by the trial court which prevented access by the

> Petitioner. The post-trial motion was made independent of Petitioner's direct appeal due to a change of circumstance. Failure to provide Petitioner with the transcripts post-trial was a deprivation of his right to due process.
>
> **GROUND TWELVE**: Petitioner was denied due process when his case was steered to a specific judge for a real or perceived benefit to the State in violation of Petitioner's right to a fair trial and due process.
>
> **Supporting Facts**: After Petitioner's trial, his family had a forensic evaluation performed on his recorded video interrogation with police. The Petitioner could never get the video to play properly. The State provided an audio only recording that it falsely claimed was true to the original prior to trial, misleading counsel. After Petitioner's trial, a family member had an expert witness evaluate the video due to discrepancies with the forensic timeline. The detective who interrogated Petitioner, after talking to the Mahoning County Prosecutor, knew who Petitioner's judge would be and mentioned the judge specifically by name during the interrogation. Petitioner was assigned to the aforementioned judge at an arraignment where neither he nor his counsel were present. The Supreme Court of Ohio also found improper judge assignment in Mahoning County at the time of Petitioner's case assignment. The judge was selected for a real or perceived benefit to the prosecution due to prior rulings on cases involving sex offenders.

(Doc. 18, at 5-19) (capitalization altered). Respondent filed an Answer/Return of Writ to the Amended Petition (Doc. 27), and Petitioner filed a Traverse / Reply. (Doc. 35).

Petitioner has also filed, since the filing of his Amended Petition several additional motions. Docs. 24, 26, 30, 33, 34, 42. Respondent filed a joint response to the first five motions (Doc. 37), and Petitioner replied (Doc. 41). These motions are addressed in an Order filed concurrently to this Report and Recommendation.

The undersigned therefore turns to the Amended Petition. (Doc. 18).

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") "dictates a highly deferential standard for evaluating state-court rulings which demands that state court decisions be given the benefit of the doubt." *Bell v. Cone*, 543 U.S. 447, 455 (2005). An application for habeas

corpus cannot be granted for a person in custody pursuant to a state conviction unless the adjudication "(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). Thus, a court may grant habeas relief if the state court arrives at a conclusion that is contrary to a decision of the Supreme Court on a question of law, or if the state court decides a case differently than did the Supreme Court on a materially indistinguishable set of facts. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

The appropriate measure of whether a state court decision unreasonably applied clearly established federal law is whether that state adjudication was "objectively unreasonable" and not merely erroneous or incorrect. *Williams*, 529 U.S. at 409-11; *see also Machacek v. Hofbauer*, 213 F.3d 947, 953 (6th Cir. 2000). "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). To obtain "habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 103.

DISCUSSION

Respondent contends Petitioner has procedurally defaulted Grounds One, Two, Five, Six, Seven, Eight, Nine, Ten, Eleven, and Twelve, and he cannot show cause, prejudice, or actual innocence to excuse those defaults. Respondent also contends Grounds Three and Four fail on the merits. Finally, Respondent contends Ground Two, in the alternative, also fails on the merits.

Petitioner, in reply, contends his grounds are not defaulted, and he can overcome any default through a showing of cause and prejudice or actual innocence. For the reasons discussed below, the undersigned recommends the Petition be denied in its entirety.

Procedural Default

Petitioners must exhaust state court remedies prior to raising claims in federal habeas corpus proceedings. *See* 28 U.S.C. § 2254(b), (c). This requirement is satisfied when a petitioner has given "the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the state's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999). Exhaustion requires a petitioner to "fairly present" federal claims so that state courts have a "fair opportunity" to apply controlling legal principles to the facts bearing upon a petitioner's constitutional claim. *See id.*; *Picard v. Connor*, 404 U.S. 270, 275-77 (1971). 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. *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). The claims must also be presented to the state courts as federal constitutional claims. *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984). In reviewing the state court proceedings to determine whether a petitioner has "fairly presented" a claim to the state courts, courts have looked to the petitioner's:

> (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law.

Whitings v. Burt, 395 F.3d 602, 613 (6th Cir. 2005).

Related to exhaustion is the issue of procedural default. 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. *Lundgren v. Mitchell,* 440 F.3d 754, 763 (6th Cir. 2006) (citing *Wainwright*

v. Sykes, 433 U.S. 72, 87 (1977)); *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. *Williams v. Anderson,* 460 F.3d 789, 806 (6th Cir. 2006). Second, a petitioner may procedurally default a claim by failing to raise the claim in state court, and pursue that claim through the state's "ordinary appellate review procedures." *Boerckel,* 526 U.S. at 847. To fairly present claims in the Ohio courts, a petitioner must raise his federal constitutional claims in direct or delayed appeals to the Ohio Court of Appeals and the Ohio Supreme Court. *See Clinkscale v. Carter,* 375 F.3d 430, 437 (6th Cir. 2004).

To overcome procedural default a petitioner must establish: 1) "cause for the default," and 2) "actual prejudice from it." *Hall v. Vasbinder,* 563 F.3d 222, 236 (6th Cir. 2009). "To show cause for the default, a petitioner must show more than mere error, he must establish a substantial reason to excuse the default." *Id.* Cause "must be something external to the petitioner, something that cannot fairly be attributed to him[;] . . . some objective factor external to the defense [that] impeded . . . efforts to comply with the State's procedural rule." *Coleman v. Thompson,* 501 U.S. 722, 753 (1991).

Ground One

In Ground One, Petitioner alleges "a claim of actual innocence based on new evidence and the claim of actual innocence is also related to multiple Constitutional violations." (Doc. 18, at 5-6). Respondent contends Ground One is procedurally defaulted.

First, as Respondent points out (Doc. 27, at 42), and Petitioner seemingly acknowledges (Doc. 25, at 34-35), a free-standing claim of actual innocence is not independently cognizable in a habeas case. *See Herrera v. Collins,* 506 U.S. 390, 400 (1993). The undersigned will address

Petitioner's claim of innocence below as it relates to an excuse to overcome the default of his procedurally defaulted grounds.

Second, however, in the supporting facts, Petitioner elaborates that he is challenging the alleged improper redaction of a recording played for the jury. *See* Doc. 18, at 5-6 ("The evidence was improperly and intentionally removed from the recording prior to it being heard by the jury, impairing its value and misleading the jury and the court."). He alleges that the redacted portions of the recording – containing an interview between a victim and a police detective – contained exculpatory evidence. *Id.*

Petitioner did not present this claim during either his direct appeal, or in a post-conviction motion. Rather, he first presented the claim in his (untimely) Application to Reopen. *See* Ex. 45, Doc. 6-2, at 375 (arguing appellate counsel was ineffective for failing to raise an ineffective assistance of trial counsel claim regarding failure "to evaluate and object to playing an altered recording of a wiretap at trial after the State intentionally redacted exculpatory evidence"). *Id.* An ineffective assistance of appellate counsel claim to a state court does not, however, preserve the underlying claim raised. *See Davie v. Mitchell*, 547 F.3d 297, 312 (6th Cir. 2008). That is, even had Petitioner's application to reopen been timely, raising such a claim of ineffective assistance of appellate counsel would not have preserved the underlying ineffective assistance of trial counsel for failure to object to improper redacting / withholding of exculpatory evidence claim. Because this claim was not presented to the state courts on direct appeal, and he cannot now raise the claim under Ohio law, it is procedurally defaulted.

Ground Two

In Ground Two, Petitioner alleges 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". (Doc. 18, at 7). In his supporting facts, Petitioner contends he "was severely prejudiced and did not receive a fair trial as required by the U.S. Constitution." *Id.* Respondent contends Ground Two is defaulted because Petitioner did not "fairly present" it as a federal Constitutional claim before the state court.

On direct appeal, Petitioner presented a claim to the trial court regarding improper joinder: "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* Ex. 40, Doc. 6-2, at 350. Although Petitioner used the words "due process of law", the argument presented to the appellate court was presented entirely based on Ohio law, arguing the trial court abused its discretion, and violated Ohio Rule of Evidence 404(B), and Ohio Criminal Rules 8(A), 13, and 14. *Id.* at 184-88. The same was true in Petitioner's brief to the Ohio Supreme Court, which again argued joinder violated Ohio law. (Ex. 40, Doc. 6-2, at 362-64). In the conclusion of his brief to the Ohio Supreme Court, Petitioner stated that the joinder "was in violation of the Ohio Rules of Criminal Procedure, Appellant's constitutional rights, and established case law." *Id.* at 364.

The undersigned agrees with Respondent that this claim was not "fairly presented" to the state court as a federal constitutional claim. On appeal, Petitioner did not cite federal case law, phrase the claim in terms "sufficiently particular to allege a denial of a specific constitutional right", or allege "facts well within the mainstream of constitutional law." *Whitings*, 395 F.3d at 615. Although Petitioner did use the words "due process" and "constitutional rights", the Sixth Circuit has held that an "isolated allusion to 'constitutional rights to due process and a fair trial' . . . fail[] to afford the [state] courts adequate notice that [a petitioner] intended to invoke the Due Process Clause." *Katt v. Lafler*, 271 F. App'x 479, 482 (6th Cir. 2008); *see also Slaughter v.*

Parker, 450 F.3d 224, 236 (6th Cir. 2006) (where a petitioner alleged that he had been deprived of "due process and a fair trial by an impartial jury" and cited the Sixth and Fourteenth Amendments, he had not "fairly presented" a federal claim to the state courts); *Blackmon v. Booker,* 394 F.3d 399, 400 (6th Cir.2004) ("[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.") (internal citations omitted); *see also Riggins v. McGinnis,* 50 F.3d 492, 494 (7th Cir.1995) ("A lawyer need not develop a constitutional argument at length, but he must make one; the words 'due process' are not an argument."). Although Petitioner is correct that his trial counsel, in the original "Motion for Relief from Improper Joinder", cited federal constitutional law, *see* Ex. 16, Doc. 6-2, at 72-82, Petitioner's later filings did not alert the appellate courts to the constitutional nature of his claim. Petitioner contends he "further presented the issue as that of denying him a fair trial, which is the very core of the U.S. Constitution" (Doc. 35, at 41), but such an allusion to a "fair trial" is insufficient, *see, e.g., Blackmon,* 394 F.3d at 400. The state appellate court, when presented with Petitioner's claim of improper joinder, understandably analyzed that claim solely under state law without undertaking any constitutional analysis. Although Petitioner's constitutional claim arises out of the same circumstances as his state law claim, his failure to alert the state appellate courts to the constitutional ramifications of his improper joinder claim means that he did not fairly present that claim to the state court. *See Boerckel,* 526 U.S. at 842; *McMeans,* 228 F.3d at 681; *Koontz,* 731 F.3d at 368. Ground Two is therefore procedurally defaulted.

Grounds Five, Six, Seven, Nine, Ten, Eleven and Twelve

Ground Five asserts a due process violation based on improper jury instructions and "ex post facto" decision making. (Doc.. 18, at 10). Ground Six asserts a Sixth and Fourteenth Amendment violation based on "the intentional fixing or packing of the jury". *Id.* at 11. Ground

Seven asserts a due process violation because Petitioner was "wrongfully convicted by a court that lacked subject matter jurisdiction" and that he was vindictively prosecuted. *Id.* at 12. Ground Nine alleges bias on the part of the trial judge. *Id.* at 14-15. Ground Ten alleges the State failed to provide Petitioner or the trial court "a true, accurate and usable copy" of his discovery, namely the DVD recording of his interrogation. *Id.* at 16. Ground Eleven asserts Petitioner was denied due process when he was denied grand jury transcripts. *Id.* at 17-18. And Ground Twelve alleges a due process violation in the form of prosecutorial judge shopping. *Id.* at 18-19. Respondent contends these grounds are all procedurally defaulted due to Petitioner's failure to raise them on direct appeal.

Each of these claims was based on facts available to Petitioner at the time of his direct appeal, and thus, should have been raised in his direct appeal. *See Buell v. Mitchell*, 274 F.3d 337, 349 (6th Cir. 2001). As the *Buell* court explained:

> Ohio courts have set forth a default rule barring consideration of claims that should have been raised on direct appeal. *See Cole,* 443 N.E.2d at 171; *State v. Perry,* 10 Ohio St.2d 175, 226 N.E.2d 104, 108 (1967). Ohio courts have consistently held that claims that can be adjudicated based on facts in the record can only be presented on direct appeal. *See, e.g., State v. Lentz,* 70 Ohio St.3d 527, 639 N.E.2d 784, 785 (1994). This court has held that this rule is regularly and consistently applied by Ohio courts as required by the four-part *Maupin* test. *See Byrd,* 209 F.3d at 521–22.

Id. As discussed in greater detail below, Petitioner did not raise these claims on direct appeal, *see* Ex. 30, Doc. 6-2, at 158-98, and any attempt to raise them now would be barred by *res judicata*, *see Perry*, 10 Ohio St.3d at 175-76.

Grounds Five, Six, Ten, and Twelve

Petitioner raised several of these claims (Grounds Five, Six, Ten, and Twelve) for the first time in his Motion for New Trial. *See* Ex. 93, Doc. 27-2, at 181-228. Petitioner contends these claims were based on evidence outside the record and the state court, in granting him leave to file

his new trial motion, made a finding that he was "unavoidably prevented from discovering relevant evidence." *See* Doc. 35, at 45. He contends this is so because the appellate court could not grant him leave to file such a new trial motion *without* making such a finding. *Id.* The record reflects, however, that the state courts made the opposite finding.

In November 2011, Petitioner filed a motion for a new trial and requested an order finding he had been unavoidably prevented from discovering the evidence upon which he relied in his motion for a new trial. (Ex. 49, Doc. 6-2, at 448-51). The trial court initially held it lacked jurisdiction to consider Petitioner's motions (Ex. 56-57, Doc. 6-2, at 576-77), but the appellate court reversed, finding the trial court had jurisdiction, *see* Ex. 78, Doc. 27-1, at 63-69. Pursuant to the appellate court's remand, the trial court noted it was "compelled to sustain Defendant's Cr. Rule 33 'Motion for Leave to File a Delayed Motion for New Trial Based upon Newly Discovered Evidence[]'" and granted Petitioner leave to file his motion. (Ex. 92, Doc. 27-1, at 280).

Following briefing, the trial court held a hearing. (Doc. 28-6). At the hearing, the trial court specifically ruled on three of Petitioner's claims. First, the trial court ruled that Petitioner should have presented his "jury packing" claim earlier. *Id.* at 26 ("Court further finds pursuant to [C]riminal Rule 33(B) that the defendant was able to discover this prior to the impaneling of the jury and did not do that. This is not newly discovered evidence by the definition of newly discovered evidence in Criminal Rule 33."). Second, regarding Petitioner's jury instruction claim, the Court ruled it was a matter "that could have been and should have been raised on appeal but were not or . . . to some extent were raised on appeal." *Id.* at 68. Third, the court overruled Petitioner's claim of judge shopping, noting that Petitioner had presented no evidence. *Id.* at 69. Fourth, the court overruled Petitioner's claim of regarding the prosecution's withholding of a DVD of Petitioner's interrogation. *Id.*

Additionally, at the hearing, the court and counsel discussed if there had been a determination regarding whether Petitioner had been unavoidably prevented from discovering the evidence he attempted to submit:

THE COURT: . . . Criminal Rule 33 says application for a new trial shall be made by a motion within 14 days after the verdict. If there is newly discovered evidence established by clear and convincing evidence that the defendant was unavoidably prevented from filing his motion for new trial, in which case the motion shall be filed within seven days from the order of this Court finding that the defendant was unavoidably prevented from filing such motion in his time provided. Well, no such finding has ever been made and I can't - -

Mr. McGEE: Your Honor, I thought that was decided by the Court of Appeals that - -

THE COURT: Well, that's baloney.

Mr. McGEE: When this case was remanded back to you to conduct a hearing on this I thought that they had decided that Mr. Dew was unavoidably delayed in filing a motion. Wasn't that part of their words?

THE COURT: Well, if it is it's news to me.

MR. RIVERA: I didn't bring the order with me, Your Honor.

THE COURT: All their ruling was was that when I found I was without jurisdiction to rule on the defendant's motion, they said that I'm wrong and I do have jurisdiction to rule on whether or not to grant him leave. So I granted him leave to file the motion which he had already filed. So the motion is filed. That's all it is. We're here on his motion. They didn't make any finding that there was no evidence before them. How could they do that? They can't, they can't make up evidence and say there's clear and convincing evidence that he was unavoidably delayed. That's what this hearing is for.

MR. McGEE: This is a hearing on the motion for new trial. Isn't that what your words were?

THE COURT: Yeah.

MR. McGEE: So we're here presenting evidence through affidavits and testimony, if the Court will permit, to show - -

THE COURT: Well, I think you're going to do it by way of affidavit. I don't think you have any basis whatsoever . . .

(Doc. 28-6, at 66-68). The trial court then ordered briefing on whether Petitioner's conviction violated *ex post facto* principles. *Id.* at 71. After receiving post-hearing briefs regarding the *ex post facto* issue, the trial court overruled Petitioner's motion for a new trial in its entirety. (Ex. 99, Doc. 27-2, at 11) ("Defendant's entire Motion for New Trial involves issues that either should have been or were raised on direct appeal and, as such, said issues may not now be pursued.").

Moreover, the state court, on appeal, ultimately rested its decision on Petitioner's new trial motion on a procedural default. (Ex. 107, Doc. 27-2, at 157) ("As each of Appellant's arguments have been raised on direct appeal or should have been so raised, they are barred by *res judicata.*"); *id.* at 173 ("Each of Appellant's arguments within his Crim. R. 33 motion are barred by *res judicata.*"). On reconsideration, the appellate court explicitly addressed Petitioner's argument regarding newly discovered evidence:

> Next, Appellant contends the trial court must have determined that he was unavoidably prevented from discovering the evidence he sought to use to buttress his request for a new trial when it granted his motion for leave to file the motion. He contends, then, that it was improper for the trial court to later rule against him on that issue in deciding the merits of his Crim. R. 33 motion. Appellant is confused as to the concept of a motion for leave. A favorable decision on a motion for leave does not constitute a determination on the merits or issues raised within the motion. Since a motion for leave is merely used to seek permission from the court to file a substantive motion, in this case, a motion for a new trial, granting such a motion merely allows a defendant the opportunity to properly ask the court for a decision on the issues raised: a favorable decision does not speak in any way to a decision on the actual merits.
>
> On November 28, 2011, Appellant filed a motion seeking leave to file a Crim.R. 33 motion for a new trial. The trial court initially denied Appellant's motion for leave based on the court's belief that it lacked jurisdiction to entertain the motion. On appeal, we reversed the trial court's decision after finding that the trial court did have such jurisdiction. On June 24, 2013, the trial court granted

> Appellant's motion, allowing him to file a Crim.R. 33 motion. The trial court subsequently held a Crim.R. 33 hearing. On October 31, 2013, the trial court determined that Appellant actually did not rely on newly discovered evidence and that all of the issues raised within Appellant's motion were already raised, or should have been raised, on direct appeal. Hence, the court denied the motion based on *res judicata.*
>
> Contrary to Appellant's arguments, when the trial court granted his motion for leave, it merely granted him permission to file a motion seeking a new trial. The determination that a defendant clearly and convincingly proved that he was unavoidably prevented from discovering relevant evidence is not made until after the actual motion for a new trial is filed. *State v. Jackson*, 11th Dist. No. 2008-T-0077, 2015-Ohio-6, 26 N.E.3d 304.

Id. at 219-20.

Thus, Petitioner's contention that he somehow could not have presented these grounds on direct appeal is foreclosed by the state court determination. The state court unequivocally held that Petitioner's claims were barred by *res judicata*. Ohio's rules regarding *res judicata, see, e.g., State v. Perry*, 10 Ohio St.2d 175 (1967), have been consistently held to be an adequate and independent state law ground foreclosing federal habeas review. *See Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012); *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007); *Buell*, 274 F.3d at 349; *Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000).

Petitioner asserts, in essence, that the Ohio court's application of the procedural bar of *res judicata* was incorrect, because he supported these claims with evidence outside the record. Petitioner is correct that under Ohio law, post-conviction issues supported by evidence outside the record may not be subject to a *res judicata* bar. *See State v. Smith*, 17 Ohio St. 3d 98, 101, n.1 (1985). But, there is also "Ohio case law supporting the position that, in order to overcome the bar of *res judicata*, 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 (1998) and *State v. Lawson*, 103 Ohio App. 3d 307, 315 (1995)) (emphasis in original); *see also West v Bradshaw*, 2016 WL 8139591, at *18 (N.D. Ohio) ("All of the facts going to these issues were available to West prior to trial, so they could have been raised in a motion to suppress evidence. Any argument that trial counsel failed to raise them could have been made on direct appeal, making them res judicata."), report and recommendation adopted by 2017 WL 497611. As the district court in *Van Hook* explained: "[Petitioner] has not demonstrated, and it cannot seriously be argued, that this evidence [in the form of newspaper articles] was unavailable to him at the time of his trial." *Id.* Likewise here, the appellate court concluded Petitioner's evidence was not newly discovered, or unavailable on direct appeal. *See* Ex. 107, Doc. 27-2, at 219-20. As such, the undersigned concludes Petitioner has not shown the state court incorrectly applied the res judicata bar. Thus, these grounds are procedurally defaulted.

Grounds Seven, Nine, Eleven

Grounds Seven (trial court lacked subject matter jurisdiction / vindictive prosecution), Nine (judicial bias), and Eleven (denial of grand jury transcripts) were similarly based on facts available to Petitioner prior to his direct appeal, but were not included in that appeal. Ground Seven was raised to the appellate court after the denial of Petitioner's motion for new trial, Ex. 104, Doc. 27-2, at 23-88, Ground Nine was raised in the form of an affidavit to disqualify to the Ohio Supreme Court, and again on denial of Petitioner's motion for new trial. *See* Ex. 89, Doc. 27-1, at 126-73; .Ex. 104, Doc. 27-2, at 23-88. And Ground Eleven was raised first in a motion to obtain grand jury proceedings before trial. (Ex. 8, Doc. 6-2, at 21-31).

Because these claims were based on information available to Petitioner at the time of his direct appeal, but were not raised, they are procedurally defaulted, *Buell*, 274 F.3d at 349.

Ground Eight

In Ground Eight, Petitioner alleges ineffective assistance of appellate counsel for failing to: 1) ensure the entire record was properly filed (namely, the unredacted version of the audio recording); 2) argue ineffective assistance of trial counsel; 3) argue vindictive prosecution; 4) argue denial of grand jury transcripts; and 5) provide "complete arguments" on direct appeal. *See* Doc. 18, at 13-14. Under Ohio law, claims of ineffective assistance of appellate counsel must be filed under an Ohio Appellate Rule 26(B) "Application to Reopen" the appeal based on the ineffectiveness. *See Carter v. Mitchell*, 693 F.3d 555, 564 (6th Cir. 2012) (citing *State v. Murnahan*, 63 Ohio St. 3d 60 (1992)). Petitioner attempted to do so here, but failed to comply with Rule 26(B)'s timing requirement, which requires the application be filed "within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time." Ohio App. R. 26(B)(1). *See* Ex. 45, Doc. 6-2, at 375.

The appellate court dismissed Petitioner's application, finding it untimely, and holding he had not demonstrated good cause for the untimely filing. *See* Ex. 46, Doc. 6-2, at 423-26. The Sixth Circuit has recognized that the timeliness requirement of Ohio Appellate Rule 26(B) is an adequate and independent state ground. *Parker v. Bagley*, 543 F.3d 859, 862 (6th Cir. 2008); *see also Baker v. Bradshaw*, 495 F. App'x 560, 566 (6th Cir. 2012) ("[W]e have previously held that an untimely Rule 26(B) application is an adequate and independent state ground that results in a claim being procedurally defaulted."). Further, the Sixth Circuit has held an Ohio court's holding that a petitioner failed to establish good cause for purpose of Rule 26(B) is an adequate and independent state law ground foreclosing review of a federal constitutional claim. *Wilson v. Hurley*, 382 F. App'x 471, 475 (6th Cir. 2010); *Wogenstahl v. Mitchell*, 668 F.3d 307, 322 (6th Cir. 2012) ("Ohio law has provided sufficient guidance on what constitutes a 'good cause' for a

late filing under Rule 26(B) and the time constraints of Rule 26(B) [have been] firmly established and regularly followed.") (internal quotations and citations omitted) (alteration in original). Thus, Ground Eight is procedurally defaulted.

Cause and Prejudice

Ground Eight

As cause to excuse the default of Ground Eight, Petitioner alleges first, that his incarceration and need to gather evidence prevented him from timely filing. *See* Doc. 25, at 52 ("While Petitioner did state that he was incarcerated, his reasoning for delay was due to the Rule requiring affidavits, which required outside assistance."). Second, he asserts that he only learned of his appellate counsel's ineffectiveness (in failing "to ensure that a complete record was filed from the direct appeal") when he filed an appeal of the denial of his motion for new trial. *Id.* Finally, Petitioner asserts that the procedural bar should not apply because his motions were also labeled as "Motions for Reconsideration" under Ohio Appellate Rule 26(A). *See id.*

Preliminarily, a prisoner's "pro se status", "ignorance of the law and procedural requirements", or a "mistaken belief" about procedural requirements do not provide cause to excuse a procedural default. *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004).

As to Petitioner's contention that he only learned of appellate counsel's ineffectiveness when appealing the denial of his new trial motion, the state court explained:

> Even if this were the case, Dew has failed to explain why he did not file his delayed application to reopen his appeal . . . ninety days after he made the realization and filed his appeal . . . . Instead, he delayed filing his application for almost another four months without attempting to show good cause for that delay. Thus, even if Dew did have good cause for the initial delay, there is no indication of good cause to file four months after that discovery was made.

(Ex. 118, Doc. 27-2, at 313). Thus, this cannot serve as cause to excuse his default.

Petitioner's contention that the procedural bar should not apply because he also labeled his 26(B) applications as "motions for reconsideration" is similarly unavailing. It is up to the Ohio court to interpret Ohio law. And the Ohio court here clearly enforced the procedural timing bar. *See* Ex. 46, Doc. 6-2, at 423; Ex. 118, Doc. 27-2, at 311; *see also* Ex. 118, Doc. 27-2, at 312 ("The Appellate Rules make no provisions for successive motions for reconsideration; thus Dew's motion can be rejected on this basis alone.").

Thus, Petitioner has failed to show cause and prejudice to overcome the procedural default of his ineffective assistance of appellate counsel claim. And, because Ground Eight is defaulted, this ineffective assistance of appellate counsel claim may also not provide cause and prejudice to overcome any other defaulted claim. *See Goldberg v. Money*, 692 F.3d 534, 537 (6th Cir. 2012) (citing *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000)).

Ground One

Although Petitioner presents several arguments regarding the allegedly-improper redacting of the recording played at trial, he offers no sufficient cause to overcome his procedural default of this claim. Petitioner concedes he had the full (unredacted) audio recording before trial. *See* Ex. 115, Doc. 27-2, at 282 ("In the filing of Dew's Appellant Brief . . . he included an exact copy of the original recording of the wiretap given to him in pretrial discovery and a copy of the parts of the recording that were played at trial[.]"); *see also* Doc. 18, at 6 (asserting only that "[t]here is no record of the state providing the defense with a copy of the *altered* recording prior to playing it at trial").[8] To the extent Petitioner seeks to assert ineffective assistance of trial counsel for failing to

8. In fact, in his Application for Reopening, Petitioner asserted as error his appellate counsel's failure to raise an ineffective assistance of trial counsel claim based on trial counsel's alleged failure to "evaluate and object to playing an altered recording of a wiretap at trial". (Ex. 45, Doc. 6-2, at 375).

object, or to introduce redacted portions of the tape at trial, such a claim was not raised on direct appeal, and thus cannot serve as cause. *See Edwards*, 529 U.S. at 453. And, even though Petitioner attempted to raise an ineffective assistance of appellate counsel claim for failure to raise an ineffective assistance of trial counsel claim on this basis, *see* Ex. 45, Doc. 6-2, at 375: 1) an ineffective assistance of appellate counsel claim does not preserve the underlying claim made, *Davie*, 547 F.3d at 312; *and* 2) Petitioner's ineffective assistance of appellate counsel claim is itself defaulted as discussed above. Thus, Petitioner has not shown cause to excuse the default of Ground One.

Grounds Ten and Twelve

As cause to excuse his default of Grounds Ten, and Twelve, Petitioner seemingly asserts ineffective assistance of trial counsel. *See* Doc. 35, at 58 ("Petitioner changed counsel prior to trial. New counsel was only provided the audio recording, having been told it was equivalent. Trusting the State, who has a duty to disclose the truth . . . trial counsel never reviewed the audio recording in comparison with the video."); *Id.* at 59 ("Counsel was placated and misled by the provision of a reduced and redacted audio recording, which defense counsel took at the word of the State to be equivalent when clearly it was not."). First, the state court found, in ruling on Petitioner's motion for new trial, that the DVD was provided to Petitioner before trial (acknowledging his argument that he was unable to open the file). (Ex. 107, Doc. 27-2, at 162). And, as the appellate court stated, "it was the defense's obligation at the time to inform the court if the video could not be viewed." *Id.* As discussed above with regard to Ground One, Petitioner never raised an ineffective assistance of trial counsel claim on direct appeal. And a never-presented, or defaulted claim of ineffective assistance of trial counsel cannot serve as cause to overcome the default of other grounds.

Goldberg, 692 F.3d 537 (citing *Edwards*, 529 U.S. at 453). As such, Petitioner cannot show cause to overcome the default of Grounds Ten, and Twelve.

Ground Five

As cause for to excuse the default of Ground Five (ex post facto jury instructions), Petitioner asserts that because the trial court accepted evidence on his Motion for New Trial, such a claim was necessarily new. *See* Doc. 35, at 60-61. But, as noted above, the state court found Petitioner had not relied upon "newly discovered evidence." And this "cause" does not explain Petitioner's failure to raise this issue on direct appeal, when it was based entirely on the jury instructions as they were read by the trial court. Thus, the undersigned finds Petitioner has not shown cause to excuse the default of Ground Five.

Ground Six

As cause to excuse the default of Ground Six—his challenge to the jury venire—Petitioner asserts that "public records had to be collected", "an expert witness for the statistical evaluation of the evidence had to be found and secured", and "monies raised to pay for the evaluation and affidavit as required for compliance by Crim.R. 33." (Doc. 35, at 61). But, a prisoner's *pro se* status and financial status cannot serve as cause as they are not external objective factors. Cause must be "a substantial reason to excuse the default," *Hall*, 563 F.3d at 236. And it "must be something external to the petitioner, something that cannot fairly be attributed to him[;] . . . some objective factor external to the defense [that] impeded . . . efforts to comply with the State's procedural rule." *Coleman*, 501 U.S. at 753. The reasons Petitioner asserts for not promptly raising this claim are not "substantial reasons" "external to the petitioner" but rather matters within his control. Moreover, Petitioner's asserted cause does not speak to the Ohio appellate court's finding that he had offered 'no explanation as to why he could not obtain [the evidence offered] from in a

more timely manner" and it was "implausible that it would take such a long period of time". (Ex. 107, Doc. 27-2, at 165).

Ground Seven

As cause to excuse the default of Ground Seven (lack of subject matter jurisdiction and vindictive prosecution), Petitioner asserts that subject matter jurisdiction may be raised at any time. *See* Doc. 18, at 12-13; Doc. 35, at 62. Petitioner is incorrect. For a claim to be addressed on federal habeas review, a Petitioner must first fairly present that claim to the state courts. *See Boerckel*, 526 U.S. at 842; *McMeans*, 228 F.3d at 681; *Koontz*, 731 F.3d at 368. The purpose of this requirement "is to 'provide the state courts with a "fair opportunity"' to apply controlling legal principles to the facts bearing upon his constitutional claim.'" *Duncan v. Henry*, 513 U.S. 364, 270 n.1 (1995) (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982)). Petitioner has not shown cause for the default of Ground Seven.

Ground Eleven

It is unclear what Petitioner asserts as cause for the default of Ground Eleven (due process violation from denial of grand jury transcripts). *See* Doc. 35, at 62-64.

To the extent this ground asserts an error of state law in denying Petitioner the transcripts, such a claim is not cognizable. *See Estelle*, 502 U.S. at 67-68. Moreover, to the extent Petitioner asserts the post-trial denial of the grand jury transcripts violated his due process rights, such a claim also fails. "There is no clearly established Supreme Court precedent recognizing a constitutional right to obtain access to grand jury transcripts under any circumstances." *Lang v. Bobby*, 2015 WL 1423490, at *56 (N.D. Ohio). "[M]isapplication of state law is not cognizable in a federal habeas proceeding unless a petitioner can prove that the error deprived him of a fair trial or proceeding." *Russell v. Anderson*, 2008 WL 4534144, at *6 (N.D. Ohio) (concluding that the

petitioner failed to establish a due process violation based on the trial court's denial of his request for grand jury transcripts). Additionally, to the extent he argues ineffective assistance of (trial or appellate) counsel, such otherwise-defaulted claims cannot serve as cause to excuse this default. *See Edwards*, 529 U.S. at 543.

Grounds Two and Nine

Petitioner does not appear to present any argument regarding cause to overcome his default of Grounds Two (improper joinder) or Nine (judicial bias). *See* Doc. 35, at 60 (arguing "Petitioner has already down that his second ground was presented as a constitutional claim in the state courts[.]"); Doc. 35, at 61-62 (re-arguing the alleged merits of Ground Nine).

Actual Innocence

Petitioner also asserts he can overcome any procedural default through a showing of "actual innocence". *See* Doc. 35, at 73-95. The undersigned finds, however, that Petitioner's actual innocence argument, arises primarily from Petitioner's mistaken contention as to the element of "force" or "threat of force" relevant to his crimes of conviction.

In support of his argument, Petitioner points to some evidence in the record, and other evidence he seeks to add to the record through a motion to expand. (Doc. 24). *See* Doc. 35, at 73-95. Specifically, Petitioner focuses on an interview between one of the victims and a police detective, which he alleges contains "highly exculpatory evidence", and which (as described earlier) he alleges the state improperly redacted for trial. Petitioner also focuses on the fact that the state sought a superceding indictment.

Respondent asserts that the recording is not new reliable evidence "that would demonstrate that no reasonable juror would have found him guilty had said 'new' evidence been considered at trial." (Doc. 27, at 56); *see also* Doc. 37, at 8-9. Moreover, Respondent contends the superseding

indictment provides no proof of innocence (Doc. 37, at 8); much of the evidence Petitioner alleges demonstrates the relationships were consensual was cumulative of that presented at trial, *id.*at 11; and former gymnast Ms. Morrow's affidavit is not proof of innocence, *id.* at 11-12. In conclusion, Respondent asserts: "That [Petitioner] seeks to admit more cumulative 'evidence showing that the gymnasts were not 'physically forced' to submit to him, or that they 'loved' and 'respected' him will not affect the jury's determination." *Id.* at 13.

A showing of actual innocence permits a federal habeas court to excuse the expiration of the statute of limitations and consider the merits of the petition. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) ("[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations."). "In other words, a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims . . . on the merits notwithstanding the existence of a procedural bar to relief." *Id.*

The Supreme Court has repeatedly counseled that actual innocence is an exception rarely granted, and only in the most extraordinary circumstances. *See Schlup v. Delo*, 513 U.S. 298 324 (1995) (because new reliable evidence is unavailable "in the vast majority of cases, claims of actual innocence are rarely successful"); *see also House*, 547 U.S. 518, 538 (2006) ("The *Schlup* standard is demanding and permits review only in the 'extraordinary' case.") (quoting *Schlup*, 513 U.S. at 327).

To make a showing of actual innocence, a habeas petitioner must show "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 327. In order to advance a credible actual innocence claim, however, the petitioner must support his allegations 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. In determining whether it is more likely than not that no rational juror would have convicted the petitioner in light of the new evidence, a court must assess the probative value of the new evidence and consider it in light of the evidence submitted at trial. *House*, 547 U.S. at 538. A court must consider all of the evidence "without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial,'" *id.* at 538 (quoting *Schlup*, 513 U.S. at 327-28), but must nevertheless pay "due regard to" the "unreliability of" any of the evidence, *Schlup*, 513 U.S. at 328 (internal quotation marks omitted). "Based on this total record, the court must make 'a probabilistic determination about what reasonable, properly instructed jurors would do.'" *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 329). The "'new evidence' need not be newly discovered evidence, however, but simply may be 'evidence that was not presented to the fact-finder during trial, i.e, newly presented evidence.'" *Aldridge v. Phillips*, -- F. App'x --, 2017 WL 5256221, at *1 (6th Cir.) (citing *Cleveland v. Bradshaw*, 693 F.3d 626, 622 (6th Cir. 2012)).

As the Supreme Court has stated, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). Similarly, a claim of legal innocence is insufficient to raise a miscarriage of justice claim. *Calderon v. Thompson*, 523 U.S. 538, 559 (1998) ("[T]he miscarriage of justice exception is concerned with actual as compared to legal innocence.") (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992)).

The undersigned finds Petitioner's argument is essentially a legal insufficiency argument presented as a factual innocence argument. The bulk of Petitioner's argument is that he was innocent of the rape and gross sexual imposition charges because there was no evidence of force. And, he contends, the redacted recording and other evidence bolster his claims that the interactions

were consensual and not forced. But, as discussed further below with regard to the sufficiency of the evidence claim, the appellate court's decision forecloses Petitioner's argument that proof of physical force was required for conviction.

And, he has not presented the type of "new reliable evidence" envisioned by *Schlup*, 513 U.S. at 324, such that no rational juror would have convicted him in light of the new evidence. *House*, 547 U.S. at 538. That is, he has not presented "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Id.*

Additionally, the fact that the State sought and received a superseding indictment is similarly not exculpatory evidence. According to Petitioner, "the State took the same evidence back to a grand jury and somehow coerced and misled them to vindictively elevate the the [sic] pending charges to rape, add the charge of corruption of a minor, and charge one count of GSI related to T.V." (Doc. 35 at 80). Most simply put, return of a superseding indictment does not, despite Petitioner's allegations to the contrary, equate to the State "falsely accusing and indicting" him. Nor does a superseding indictment filed after a motion to dismiss an original indictment, without more, prove vindictive prosecution.

As to the recording, Petitioner asserts the redaction withheld the truth from the jury – namely, that the victims allegedly consented. Petitioner claims in particular that in the redacted portion of the recording a victim had told the prosecution that she "loved and respected" him during the abuse period. (Doc. 35, at 126). Petitioner contends this statement was "exculpatory" evidence that the prosecutor withheld from him. *Id.* But, at Petitioner's trial, as he acknowledges, both victims testified that "they loved [him] and that he was respected by everyone who knew him." *See* Doc. 35, at 147. In addition, the victims testified that they did not feel petitioner "physically

forced" them to do anything, as he had never "held a gun to their head." *Dew*, 2009 WL 4756342, at *6. Moreover, Petitioner's attorney cross-examined the victims extensively. *See id.* at *3, *6.

Therefore, even assuming *arguendo* that the redacted portions of the interview recordings contain what Petitioner claims they do, the jury heard corresponding testimony from the victims directly during trial. Such evidence would merely be cumulative, and the undersigned finds that it – in conjunction with the other evidence Petitioner points to – would not show it to be more likely than not that no rational juror would have convicted Petitioner in light of such evidence.[9] As such, Petitioner's default of the above grounds cannot be excused by a showing of actual innocence.

Merits

Having determined that Grounds One, Two, Five, Six, Seven, Eight, Nine, Ten, Eleven, and Twelve are procedurally defaulted and Petitioner cannot show cause and prejudice to excuse the default, or actual innocence to overcome the default, the undersigned turns to the two remaining (non-defaulted) grounds: Grounds Three and Four. Finally, the undersigned also addresses the merits of Ground Two in the alternative.

Ground Three: Sufficiency of the Evidence

In Ground Three, Petitioner contends there was insufficient evidence to support his convictions because the state failed to prove the required element of force. Petitioner also contends, in conjunction, that the court gave an improper jury instruction. Petitioner properly raised and exhausted this claim on direct appeal, *see* Ex. 30, Doc. 6-2, at 158-98 & Exs. 39-40, Doc. 6-2, at 347-48, and thus it is preserved for federal habeas review. Respondent contends, however, that

9. As Respondent points out, the state appellate court also found Petitioner "groomed" and "manipulated" his victims over a period of years, and they acknowledged they didn't want to hurt him. *Dew*, 2009 WL 4756342, at *22-23. That is, the appellate court (and seemingly the jury) saw this evidence in a different light, further demonstrating the cumulative nature of the evidence Petitioner seeks to present.

this claim fails on the merits, as the state court decision was neither contrary to, nor an unreasonable determination of federal law under 28 U.S.C. § 2254.

The standard for sufficiency of evidence 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." *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Consistent with the deference given to the trier of fact's resolution of conflicts in evidence, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson,* 443 U.S. at 326; *see also Walker v. Engle*, 703 F.2d 959, 969–70 (6th Cir. 1983).

As such, the reviewing court is not permitted to reweigh evidence or in any way substitute its own opinion for that of the trier of fact. *United States v. Fisher*, 648 F.3d 442, 450 (6th Cir. 2011) (citing *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009)). "[T]he *Jackson* inquiry does not focus on 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*, 506 U.S. at 402 (emphasis in original). Due process is satisfied as long as such evidence is enough for a rational trier of fact to make a permissible inference of guilt, as opposed to a reasonable speculation that the petitioner is guilty of the charged crime. *Newman v. Metrish*, 543 F.3d 793, 796–97 (6th Cir. 2008).

Moreover, it is important to note the double deference applicable; first, the deference accorded to the trier of fact's verdict by *Jackson*, and second, the deference to the state court's

consideration of the verdict under AEDPA. *See Tucker v. Palmer,* 541 F.3d 652, 656 (6th Cir. 2008); *see also Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009) (finding even if a rational trier of fact could not have found petitioner guilty, the habeas court must defer to the state appellate court's sufficiency determination so long as it is reasonable). "[T]he *Jackson v. Virginia* standard is so demanding that '[a] defendant who challenges the sufficiency of the evidence to sustain his conviction faces a nearly insurmountable hurdle.' " *Davis*, 658 F.3d at 534 (quoting *United States v. Oros*, 578 F.3d 703, 710 (7th Cir. 2009)).

Further, generally speaking, a state court's interpretation of the propriety of a jury instruction under state law does not entitle a habeas claimant to relief. 28 U.S.C. § 2254(a); *Estelle v. McGuire,* 502 U.S. 62, 67–68 (1991) ("[T]he fact that the instruction was allegedly incorrect under state law is not a basis for habeas relief."). And, it is well-settled that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting on habeas review." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005); *see also Stumpf v. Robinson*, 722 F.3d 739, 746 n.6 (6th Cir. 2013) (reiterating the holding in *Bradshaw*). State courts are the final arbiters of state law and federal courts generally will not intervene in such matters. *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). The exception is when a jury instruction is so flawed as a matter of state law as to "infect[ ] the entire trial" in such a way that the conviction violates federal due process. *Henderson v. Kibbe,* 431 U.S. 145, 154 (1977).

The state appellate court addressed Petitioner's sufficiency claim and state-law manifest weight claims together (and therein addressed the jury instruction):

> **Sufficiency**
>
> {¶ 98} In Dew's third assignment of error, he asserts:
>
> {¶ 99} "Appellant's conviction was not supported by sufficient evidence and against the manifest weight of the evidence."

{¶ 100} This assignment of error has two sub-parts, each of which will be discussed in turn. In the first part of Dew's third assignment of error, he contends his rape and gross sexual imposition convictions are not supported by sufficient evidence because there was no evidence demonstrating force or threat of force. Dew also argues that the trial court's jury instructions with regard to force were flawed.

{¶ 101} "Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict." *State v. Smith* (1997), 80 Ohio St.3d 89, 113, 684 N.E.2d 668. Thus, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* "In reviewing the record for sufficiency, '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *Smith* at 113, 684 N.E.2d 668 (citation omitted).

{¶ 102} In this case, with the exception of the corruption of a minor count, all of the other crimes of which Dew was convicted require an element of force or threat of force. See R.C. 2907.02(A)(2) (rape) and R.C. 2907.05(A)(1) (gross sexual imposition). R.C. 2901.01(A)(1) defines the "force" element for both rape and gross sexual imposition as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." Further, the prosecution "need not prove physical resistance to the offender" in prosecutions for rape and gross sexual imposition. R.C. 2907.02(C), R.C. 2907.05(D).

{¶ 103} The Ohio Supreme Court has addressed the issue of "force" or "threat of force" several times. In *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, the Court held that the amount of force necessary to commit the offense "depends upon the age, size and strength of the parties and their relation to each other." *Id.* at paragraph one of the syllabus. Specifically, in cases involving the "filial obligation of obedience to a parent," a lesser showing of force may be sufficient. *Id.* Given the inherent coercion in parental authority when a parent abuses his or her child, the requisite force " 'need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the * * * victim's will was overcome by fear or duress, the forcible element * * * can be established.' " *Id.* at 58–59, 526 N.E.2d 304, quoting *State v. Fowler* (1985), 27 Ohio App.3d 149, 154, 27 OBR 182, 500 N.E.2d 390.

{¶ 104} In *Schaim,* 65 Ohio St.3d 51, 600 N.E.2d 661, the Court clarified its holding in *Eskridge* by stating that *Eskridge* was "based solely on the recognition of the amount of control that parents have over their children, particularly young children," and noting that "[e]very detail of a child's life is controlled by a parent, and a four-year-old child knows that disobedience will be punished, whether by corporal punishment or an alternative form of discipline. Because of the child's

dependence on his or her parents, a child of tender years has no real power to resist his or her parent's command, and every command contains an implicit threat of punishment for failure to obey. Under these circumstances, a minimal degree of force will satisfy the elements of forcible rape." *Schaim* at 55, 600 N.E.2d 661, citing *Eskridge*.

{¶ 105} Applying that logic, the Court in *Schaim,* found there was insufficient evidence of force where the defendant raped his adopted daughter, who was an adult at the time of the alleged rape, even though she alleged the defendant had also abused her while she was a child. The Court held that "[a] threat of force can be inferred from the circumstances surrounding sexual conduct, but a pattern of incest will not substitute for the element of force where the state introduces no evidence that an adult victim believed that the defendant might use physical force against her." *Id.* at 55, 600 N.E.2d 661.

{¶ 106} In *State v. Dye* (1998), 82 Ohio St.3d 323, 695 N.E.2d 763, the Supreme Court further held that the lesser showing of force principles established in *Eskridge* also applied to situations where a parent-child relationship was absent, but the adult defendant stood in a position of authority over the child-victim. In such a case, the Court found that force or threat of force could be met "without evidence of express threat of harm or evidence of significant physical restraint." *Id.*

{¶ 107} Applying the principles set forth in *Eskridge,* in *State v. Haschenburger,* 7th Dist. No. 05 MA 192, 2007–Ohio–1562, this court found there was sufficient evidence of force or threat of force to support rape convictions where the defendant was a close family friend, spent considerable time at the victim's home, and although had no disciplinary authority per se over the victim, was considerably bigger than she, had a bad temper and as a result, the victim was fearful of him. *Id.* at ¶ 59–63

{¶ 108} Courts have also applied *Eskridge* to situations involving physician-defendants and patient-victims. For example, in *State v. Pordash,* 9th Dist. No. 04CA008480, 2004–Ohio–6081, the court applied *Eskridge* to a case where a chiropractor was convicted of raping several patients. Specifically, the court stated:

{¶ 109} " 'As long as it can be shown that the rape victim's will was overcome by fear or duress, the forcible element of rape can be established.' *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59, 526 N.E.2d 304, citing *State v. Martin* (1946), 77 Ohio App. 553, 68 N.E.2d 807. In the instant case, each victim described in detail the intense fear they experienced during their encounters with Appellant at his office. While Appellant is correct that the doctor-patient relationship does not create an inference of force, that is not to say that it is entirely irrelevant. The relationship of the parties is a relevant fact when examining whether the element of force has been proven. *Eskridge,* 38 Ohio St.3d at 58, 526 N.E.2d 304. Appellant was a chiropractor, specializing in treatment of the spine. At the time of each rape, he was, just prior to committing the sexual act, acting in his capacity as each

victim's treating physician. Further, each victim knew of Appellant's extensive background in martial arts. As such, each victim testified that they feared that any resistance would lead to serious bodily harm. Accordingly, we cannot say that the jury lost its way in finding that the victims' wills had been overcome by fear, establishing the element of force." *Pordash* at ¶ 12.

{¶ 110} Also instructive with regard to the force element, is this court's opinion in *State v. Bajaj,* 7th Dist. No. 03CO16, 2005–Ohio–2931, a case where a physician was convicted of sexual battery of a patient, pursuant to R.C. 2907.03(A)(1), which prohibits "sexual conduct with another, not the spouse of the offender" when "the offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution." As this court noted, "sexual battery is rape with a lesser mens rea and 'coercion' rather than simply 'force .' " *Bajaj* at ¶ 21, citing *State v. Wilkins* (1980), 64 Ohio St.2d 382, 386–387, 415 N.E.2d 303; and *State v. Stricker,* 10th Dist. No. 03AP–746, 2004–Ohio–3557. In *Bajaj,* this court held that a doctor-patient relationship, standing alone, is insufficient to demonstrate the requisite coercion for sexual battery. *Bajaj* at ¶ 44–46. It can be extrapolated from this holding that a doctor-patient relationship, standing alone, also cannot establish the higher standard of "force or threat of force" required for rape and gross sexual imposition.

{¶ 111} Thus, in sum, force is "a relative term that depends on the totality of the circumstances in a certain case." *State v. Rupp,* 7th Dist. No. 05MA166, 2007–Ohio–1561, at ¶ 49. Although the case law holds that a somewhat lesser showing of force is required when the defendant stands in a position of authority over the victim, the focus of the inquiry is whether the victim's will was overcome by fear or duress. See, e.g., *Eskridge* at 58–59, 526 N.E.2d 304.

{¶ 112} As an initial matter, Dew challenges the trial court's jury instructions with regard to the force element. When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443. The term "abuse of discretion" means more than an error of law or judgment, but rather implies the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Clark* (1994), 71 Ohio St.3d 466, 470, 644 N.E.2d 331.

{¶ 113} In this case, the jury instructions do not constitute an abuse of discretion. Contrary to Dew's assertions, the trial court did not instruct the jury that the relationship between the defendant and victim, standing alone, could create the inference of force. Rather, the court properly stated the law as set forth above, which is that where the defendant holds some position of authority over the victim, the force may be more subtle or psychological in nature. Further, the court properly instructed the jury that to find force, it must find that the victim's will was overcome by fear or duress. Thus, we now turn to the sufficiency arguments.

{¶ 114} There was sufficient evidence of force or threat of force with regard to Dew's three rape convictions involving Gymnast A. Viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found this element proven beyond a reasonable doubt. Gymnast A testified that Dew had significant control over many aspects of her life, both in and out of the gym. She stated he told her what to wear, what to eat and drink, and how much to sleep. As Gymnast A's coach, Dew was certainly in a position of authority over her. Dew was also much bigger and older. Moreover, Gymnast A testified she was intimidated by Dew because due to his size and because he told her he carried a knife and a gun. The totality of the evidence shows that Dew groomed and manipulated Gymnast A over a period of years to succumb to his sexual demands, and, additionally, that Gymnast A was intimidated by Dew and knew that he carried weapons. Any rational trier of fact could have found beyond a reasonable doubt that Gymnast A's will was overcome by fear or duress.

{¶ 115} In addition, there was sufficient evidence of force with regard to Dew's gross sexual imposition conviction involving Gymnast B. Dew held a position of authority over Gymnast B as her coach, and exercised control over aspects of her life. Further, the evidence shows Dew manipulated Gymnast B over a period of many years, and was larger and older than her. Dew himself admitted during his interview with Det. Flara that his gymnasts placed a great deal of trust in him and relied on him to keep them safe, while they performed "death-defying stunts." Further, Gymnast B described an incident where Dew told her she could not come down a high platform at the gym until she professed her love for him. Gymnast B testified that Dew's conduct made her feel awkward and scared. And although she said Dew never physically forced her to do anything, she said that she relented to his demands because he was in a position of authority over her. Thus, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found beyond a reasonable doubt that Gymnast B's will was overcome by fear or duress.

{¶ 116} With regard to Dew's conviction of gross sexual imposition involving Patient B we must conclude there was insufficient evidence of force or threat of force. Patient B testified that Dew inappropriately touched the sides of her breasts during a chiropractic examination. She alleged that when Dew touched her she was extremely frightened and began to sweat. She said she could not move, that she was literally "scared stiff," and did not know what to do. After the incident, Patient B never again returned to Dew's office for treatment. She said she feared Dew would come after her, and that she was worried because he knew where she lived and knew she has children.

{¶ 117} Notably, however, Patient B never stated she believed Dew would cause her contemporaneous harm if she resisted his touching. As we stated in *Bajaj,* supra, a physician-patient relationship does not in and of itself act as a substitute for the requisite force element to sustain a rape or gross sexual imposition conviction. Similarly, neither does a chiropractor-patient relationship. See *Bajaj,* supra. The

scenario involving Patient B is distinguishable from that involved in the Ninth District's *Pordash* case. In *Pordash,* the court held there was sufficient evidence of force to support a chiropractor's rape convictions involving several patients where all of the victims testified that they knew the defendant had an extensive background in martial arts and they feared any resistance would lead to serious bodily harm. *Pordash* at ¶ 12. By contrast, Patient B did not testify that she feared resisting Dew would lead to immediate harm.

{¶ 118} That Patient B felt scared is insufficient, standing alone, to infer a threat of force, as this element involves more than merely a subjective component. See *Rupp,* supra. In other words, just because a person is too fearful to react does not mean the actor is purposefully compelling that person to submit by implicit threat of force. Rather, in addition to the victim professing that her will was overcome by fear or duress and the jury believing this, there must be objectively quantifiable behavior from the defendant which allows a rational person to infer that a threat of force was made. *Id.* at ¶ 41, 43, 51, 55, 644 N.E.2d 331.

{¶ 119} Here there were no objective actions performed by Dew which establish an implicit threat of force was used to overcome the victim's will by fear or duress. There was no evidence of an attempt to frighten Patient B or to imply that resistance would lead to force. Cf. *id.* at ¶ 52, 644 N.E.2d 331 (intent to instill fear and thus submission where defendant had just told the victim stories about shooting a store clerk in the head without remorse, helping his cop-killer friend to escape a national manhunt, and getting released on parole); *State v. Arias,* 9th Dist. No. 04CA008428, 2004–Ohio–4443, at ¶ 10 (intent to instill fear where the defendant told the victim that he had previously strangled a woman to death and that he suffocated a fellow inmate in prison).

{¶ 120} As such, the totality of the circumstances do not allow a rational person to find that Dew purposely compelled Patient B to submit by implicitly threatening force in a manner that overcame her will by fear or duress. Dew's gross sexual imposition conviction involving Patient B was not supported by sufficient evidence.

{¶ 121} With regard to Dew's rape conviction involving Patient C, we must also conclude there was insufficient evidence of force or threat of force. Patient C testified about three incidents where she felt she was improperly treated by Dew. The first time, Patient C presented for the internal coccyx adjustment procedure and lie face-down on the examination table, draped with a gown. She stated that instead of placing his finger in her rectum as usual, Dew very quickly placed his finger inside her vagina, then removed the finger, placed it inside her rectum, and performed the internal coccyx adjustment as usual, all without comment.

{¶ 122} The second incident happened at a subsequent appointment after Dew had attempted to perform the coccyx adjustment rectally. Patient C testified that Dew informed her "I can't get it. I'll have to go up the other way." Patient C said she

then consented to Dew performing the adjustment through her vagina, because she trusted him. She stated Dew proceeded to do the adjustment vaginally, but that he did not change his glove in between. Patient C testified that the third incident happened much like the second, and that it "felt kind of like a gynecologist exam," and was slightly painful. She stated that Dew "just poked around a little and I thought he was using a different method to get my tailbone lined up."

{¶ 123} However, Patient C testified that she consented to both the vaginal and rectal procedures. Notably, Patient C never said she feared Dew, was intimidated by him, or that she believed resistance would lead Dew to cause her harm. Dew's status as Patient C's treating chiropractor, standing alone, is insufficient to infer a threat of force. See *Bajaj,* supra. Notably, the State does not advance much of an argument about force with regard to the rape of Patient C, other than asserting that the "force" stems from the fact that Dew exceeded the scope of proper treatment. However, the State does not cite any case law in support of that assertion. The issue of whether Dew exceeded the scope of proper treatment relates more to the "sexual conduct" element of the crime, and not the "force" element. "Sexual conduct" includes "*without privilege to do so,* the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another." R.C. 2907.01(A) (emphasis added.)

{¶ 124} Thus, even viewing the evidence in the light most favorable to the prosecution, i.e., taking as true that the vaginal coccyx adjustment constituted improper treatment, the State has not provided sufficient evidence of force or threat of force. Although Dew may have used fraud or deception to secure Patient C's consent to the vaginal adjustment procedure, this does not satisfy the force element of rape.

{¶ 125} This is not to say that Dew's actions with regard to Patients B and C do not constitute some crime. Dew's conduct would likely fall squarely into the offense of sexual imposition, pursuant to R.C. 2907.06(A)(1), which states:

{¶ 126} "No person shall have sexual contact with another, not the spouse of the offender; * * * when any of the following applies:

{¶ 127} "(1) The offender knows that the sexual contact is offensive to the other person, * * * or is reckless in that regard.

{¶ 128} However, Dew was not charged with the crime of sexual imposition. He was charged with *gross* sexual imposition, and rape, both of which require proof of force or threat of force. And as explained above, the State has not provided sufficient evidence of force or threat of force to support Dew's convictions of these crimes. Accordingly, Dew's convictions of gross sexual imposition of Patient B, Count 13 of the indictment in Case No. 07–CR–1262, and rape of Patient C, Count 16 of the indictment in Case No. 07–CR–1262, are reversed and vacated.

Manifest Weight

{¶ 129} In the second part of his third assignment of error, Dew argues that even if this court finds sufficient evidence with respect to the force element of the crimes, his convictions on all counts are nonetheless against the manifest weight of the evidence. In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins,* supra at 387, 678 N.E.2d 541.

{¶ 130} "Weight of the evidence concerns the inclination of the *greater amount of credible evidence,* offered in a trial, to support one side of the issue rather than the other." *Id.* (emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.* However, a conviction will only be reversed as against the manifest weight of the evidence in exceptional circumstances. *Id.* This is so because the trier of fact is in a better position to determine credibility issues, since he personally viewed the demeanor, voice inflections and gestures of the witnesses. *State v. Hill* (1996), 75 Ohio St.3d 195, 204, 661 N.E.2d 1068; *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 39 O.O.2d 366, 227 N.E.2d 212.

*26 {¶ 131} Ultimately, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the factfinder lost its way.' " *State v. Pallai,* 7th Dist. No. 07MA198, 2008–Ohio–6635, at ¶ 31, quoting *State v. Woulard,* 158 Ohio App.3d 31, 2004–Ohio–3395, 813 N.E.2d 964, at ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke,* 7th Dist. No. 99CA149, 2002–Ohio–1152, at ¶ 13, citing *State v. Gore* (1999), 131 Ohio App.3d 197, 201, 722 N.E.2d 125.

{¶ 132} As an initial matter, since we are reversing for insufficient evidence Dew's convictions for gross sexual imposition involving Patient B, and rape involving Patient C we need not perform a manifest weight analysis for these counts. Turning then, to the remaining convictions, we hold they are not against the manifest weight of the evidence.

{¶ 133} With respect to Gymnast A, Dew was convicted of three counts of rape pursuant to R.C. 2907.02(A)(2), which states: "[n]o person shall engage in sexual conduct with another when the offender purposely compels another person to submit by force or threat of force." During the time-period when the rapes were alleged to have taken place, R.C. 2907.01 defined "sexual conduct" as including

vaginal and anal intercourse, and oral sex. See Former R.C. 2907.01. Gymnast A testified at least one act of oral sex occurred with Dew between March 10, 1990 and December 31, 1990, that at least one act of oral sex occurred between January 1, 1991 and December 31, 1991, and that at least one act of oral sex occurred between January 1, 1992 and September 1992. Dew admitted during his taped conversation with Gymnast B that he had "oral sex" with Gymnast A. During trial, Dew attempted to retract that statement somewhat, stating he meant something much more innocuous. Further, Dew attempted to portray Gymnast A as the aggressor, and described an incident where she allegedly jumped on him and shoved her chest in his face.

{¶ 134} In addition, while Dew maintained that the sexual acts were purely consensual, Gymnast A testified about the control that Dew maintained over many aspects of her life, both in and out of the gym. She also explained the manipulative techniques Dew used to facilitate the acts, and stated she was intimidated by Dew because he was bigger than her and she knew he carried a gun and a knife. Ultimately, Gymnast A's version of the events is more believable. Dew's convictions of three counts of rape with respect to Gymnast A are not against the manifest weight of the evidence.

{¶ 135} Correspondingly, Dew's conviction of one count of corruption of a minor relating to Gymnast A is not against the manifest weight of the evidence. At sentencing, the trial court merged the corruption of a minor conviction with the rape conviction. When a trial court dispatches with a count through merger, any error in the jury's verdict on the merged count is rendered harmless beyond a reasonable doubt. *State v. Powell* (1990), 49 Ohio St.3d 255, 263, 552 N.E.2d 191 (superseded by constitutional amendment on other grounds); see, also, *State v. Wolff*, 7th Dist. No. 07MA166, 2009–Ohio–2897, at ¶ 70. Therefore, even if Dew's conviction of corruption of a minor were erroneous, any error would be harmless beyond a reasonable doubt.

{¶ 136} Dew was also convicted of two counts of gross sexual imposition, one with respect to Gymnast B and one with respect to Patient B. Although these crimes occurred during different time periods, the definition of gross sexual imposition and its elements remained the same. R.C. 2907.05(A)(1) defines gross sexual imposition as "sexual contact with another, not the spouse of the offender, when * * * the offender purposely compels the other person, * * * to submit by force or threat of force." " 'Sexual contact' means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B)

{¶ 137} Gymnast B testified that Dew touched her breasts during the going-away party at his house with Gymnast A. She also testified that he touched her breasts while giving her a massage and touched her buttock while the two were in a hot-tub together. She stated that these incidents made her feel scared, and that Dew's

> position of authority over her as her coach caused her to succumb to his demands. Dew denied the massage and hot-tub incidents ever happened. However, during the recorded phone call, Dew admitted he "had her shirt off," during the going away party and further said that "physical thing I did with you guys was 100% wrong." In his written statement to police he stated: "[t]here was a time when I touched Gymnast B inappropriately as well. * * * I touched Gymnast B's chest." Dew also admitted "rubbing" Gymnast B's chest during his interview with Det. Flara.
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> {¶ 138} At trial, Dew claimed that this touching was not intentional; that he was unaware of Gymnast's B's nudity due to the darkness and accidently cupped her breast during an innocent hug. We conclude that Dew's version of events is much less believable than Gymnast's B's, especially considering the statements he made to her on tape and the suggestive comments he made to her in the letters. Thus, Dew's conviction of one count of gross sexual imposition with respect to Gymnast B is not against the manifest weight of the evidence.

Dew, 2009 WL 4756342, at *20-27.

First, as to the allegedly improper jury instruction, Petitioner has not shown the state court's decision to be contrary to or an unreasonable application of federal law, or that it rendered his trial unfair or amounted to a fundamental miscarriage of justice. The trial court instructed the jury:

> Force means any violations, compulsion or restraint physically exerted by any means upon or against another person or thing. The force and violence necessary to commit the crime of rape depends upon the age, size and strength of the parties and their relation to each other. When the relationship between the victim and the defendant is one of child and parent, for example, or child and coach, or other similar authority figure, or a person with temporary or occasional disciplinary control over the other person, the element of force need not be openly displayed or physically brutal. It can be subtle or slight or psychological or emotionally powerful. So evidence of an expressed threat of harm or evidence of significant physical restraint is not required. If you find beyond a reasonable doubt that under the circumstances in evidence the victim's will was overcome by fear or duress or some form of intimidation as it's just been explained to you then the element of force has been proved.
>
> Threat includes a direct threat or any indirect threat. The prosecution need not prove that the victim physically resisted the defendant in this - - in any of these three charges of rape. The law requires only that minimal force or threat of force be used in the commission of rape as it's charged in this case. Force need not be overt or physically brutal but can be subtle and psychological as long as it can be shown by fear or duress a forceable [sic] element of rape can be established.
>
> Sexual activity between a coach and a minor child is not comparable to sexual activity between two adults with a history of consensual intercourse. The youth and vulnerability of children coupled with the power inherent in a coach's or

> person, another person in a position of authority, can create a unique situation in which explicit threats and displays of force are not necessary to affect the abuser's purpose. So when a person in a position of authority over a child or when that situation exists, that person may be convicted of rape of that child with force without evidence of any expressed threat of harm or evidence of significant physical restraint.

(Doc. 28-5, Trial Tr. Vol V, at 903-05); *see also id.* at 911-13.

On direct appeal, Petitioner argued that the trial court's instruction allowed the jury to make an inference of force solely based the relationship between a coach and a gymnast, but the appellate court disagreed:

> Contrary to Dew's assertions, the trial court did not instruct the jury that the relationship between the defendant and victim, standing alone, could create the inference of force. Rather, the court properly stated the law as set forth above, which is that where the defendant holds some position of authority over the victim, the force may be more subtle or psychological in nature. Further, the court properly instructed the jury that to find force, it must find that the victim's will was overcome by fear or duress.

Dew, 2009 WL 4756342, at *22; *see also id.* ("Although the caselaw holds that a somewhat lesser showing of force is required when the defendant stands in a position of authority over the victim, the focus of the inquiry is whether the victim's will was overcome by fear or duress.").

Petitioner contends that the state court's reliance on the term "psychological force" is improper as it "is not found in Ohio law." (Doc. 35, at 112). But this argument asks the Court to delve into the interpretation of Ohio law. To the extent Petitioner contends the appellate court was incorrect as a matter of state law, such a claim is not cognizable on federal habeas review. *See Estelle*, 502 U.S. at 67-68. Because the state court held the instruction was correct under state law, 2009 WL 4756342, at *22, and that determination is binding on this court, *Bradshaw*, 546 U.S. at 76, Petitioner cannot demonstrate that the use of the instruction violated his rights under the federal constitution. *See Bagby v. Sowders*, 894 F.2d 792, 795 (6th Cir. 1990) ("[W]here, as here, the highest court of a state has reviewed a defendant's request for a lesser included offense instruction

and concluded that it is not warranted by the evidence elicited at trial, that conclusion is axiomatically correct, as a matter of state law. Accordingly, the circumstances that would induce a federal court to overturn the state court determination would need to be extraordinary, indeed."); *Compare Davis v. Morgan*, 89 F. App'x 932, 936 (6th Cir. 2003) ("Specifically, Davis argues that the Kentucky Supreme Court erred in determining that the jury instructions were proper because that determination was based on an incorrect interpretation of *Shannon* and an improper retroactive application of *Barbour*. It is not the province of this Court, however, to second-guess the Kentucky Supreme Court's interpretation of its own state law."); *Weissert v. Palmer*, 2015 WL 5680149, at *50 (W.D. Mich) (rejecting due process argument based on contention that jury instruction on element "was incorrect under state law, relying on the wrong set of Michigan cases" because "[t]he Michigan Court of Appeals held that, under Michigan law, the instruction . . . was correct" and it was "not the province of a federal habeas court to re-examine state-law determinations on state-law questions."); *Washington v. Burt*, 2015 WL 5162167, at *4 (E.D. Mich.) ("[I]t is not for this Court to decide whether a state court instruction constitutes a correct statement of the elements of a state offense under state law" and "[w]here a state appellate court has assessed the necessity and adequacy of a particular jury instruction under state law, a federal habeas court cannot question that finding.").

Here, the state court found the trial court's jury instruction accurately described state law requirements for a showing of force or threat of force. 2009 WL 4756342, at *22. The state appellate court's resolution of this issue was not contrary to, or an unreasonable application or federal law. *See* 28 U.S.C. § 2254(d).[10]

10. To the extent Petitioner continues to argue the jury instruction led to *ex post facto* decision making, as he asserts in Ground Five, *see* Doc. 18, at 10, such a claim is procedurally defaulted, as noted above. On direct appeal, Petitioner only argued that the jury instructions were improper

And, the undersigned finds the state court's determination regarding the sufficiency of the evidence on the element of force or threat of force was not contrary to, nor an unreasonable application of the federal law in *Jackson* and its progeny. First, the two victims testified. And, as the appellate court found, they testified as to Petitioner's status as an authority figure, control over their lives, comparatively larger stature, and manipulation and grooming over time. *See Dew*, 2016 WL 4756342, at *22-23. Moreover, Gymnast A testified that she was intimidated by Petitioner because of his size and because he told her he carried weapons. *Id.* at *22. And Gymnast B testified to an incident in which Petitioner would not let her down from a gym platform unless she professed her love. *Id.* at *23. Thus, the appellate court's conclusion that "[a]ny rational trier of fact could have found beyond a reasonable doubt" that each gymnast's "will was overcome by fear or duress", *id.* at 22 & 23, was supported by the record. This is so even though Petitioner cites to other evidence in the record he contends undermines this conclusion and shows consent, or a different interpretation of the evidence presented. *See* Doc. 35, at 113-48. It is not this Court's role to reweigh the evidence, or resolve conflicts in the evidence. *Jackson,* 443 U.S. at 326; *Brown*, 567 F.3d at 205.[11]

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because they allegedly permitted jurors to presume force from the coach-gymnast relationship status alone. *See* Ex. 30, Doc. 6-2, at 188-97; Ex. 40, Doc. 6-2, at 364-65. And, as discussed above, this is a question of state law resolved by the state court, which the Court here may not reassess.

11. Petitioner contends he has "already shown that he has met the standard of insufficiency of the evidence by the dismissal of the patient-related case by the Seventh District Court of Appeals." (Doc. 35, at 110). It is true that the state court found insufficient evidence to support the element of "force or threat of force" in relationship to Patient B and Patient C. *See Dew*, 2009 WL 4756342, at *23-25. However, the state court here distinguished between the relationship of a coach to a teenage gymnast, and a doctor treating adult patients. And, as noted above, the relationship was not the only factor the state court relied upon to show the "force or threat of force" element satisfied Notably, with regard to Patient B, the appellate court noted "there were no objective actions performed by Dew which established an implicit threat of force was used to overcome the victim's will by fear or duress." *Id.* at *24. By contrast, as cited above, the court cited actions taken by Petitioner to manipulate and groom the gymnasts, combined with the relationship of the parties and other factors was sufficient to satisfy the "force or threat of force" element. *Id.* at *22-23.

Presuming here (as a habeas court must), that the jury resolved all conflicts in the record in favor of the prosecution, the state court's finding that there was sufficient evidence in the record to support the "force or threat of force" element of rape and gross sexual imposition—as defined by Ohio law—was not "far out of line with the very general standard set forth in *Jackson v. Virginia*" so as to require habeas relief. *Davis*, 658 F.3d at 535. Therefore, the undersigned finds that the state court decision was neither an unreasonable application of, nor contrary to, federal law regarding sufficiency of the evidence. This is particularly so given the "double deference" applicable to a sufficiency challenge under AEDPA.[12]

Ground Four: Due Process / "Wiretap" Evidence

In Ground Four, Petitioner contends his Due Process rights were violated when a "wiretap" recording of a phone call between Petitioner and the victim was used at his trial. Respondent contends this ground is not cognizable: 1) to the extent it asserts that the recording was improper under state laws; and 2) to the extent it raises a Fourth Amendment issue, under *Stone v. Powell*, 428 U.S. 465 (1976).

Before trial, and on direct appeal, Petitioner raised this issue under the Fourth Amendment. *See* Ex. 30, Doc. 6-2, at 173-74; Ex. 40, Doc. 6-2, at 359-62; *see also* Doc. 6-5 (transcript of suppression hearing). Petitioner also referenced "due process", "equal protection, and "full faith

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Thus, the sufficiency of the evidence on the patient-related charges and the gymnast-related charges are separate issues.

12. Petitioner also presents an argument about whether there was sufficient evidence to support that the sexual conduct occurred during the time frame charged. *See* Doc. 35, at 128-32. Although a sufficiency claim was presented to the state courts, it was presented solely on the issue of the element of force. Because the factual basis for this claim was not presented to the state courts, it is procedurally defaulted and may not be considered here. *See McMeans*, 228 F.3d at 681 (to satisfy the fair presentation requirement, a habeas petitioner must present *both* the factual and legal underpinnings of his claims to the state courts); *Boerckel*, 526 U.S. at 847 (claims not presented through state's ordinary review process are defaulted).

and credit", but presented his argument primarily under the Fourth Amendment. The state appellate court found no Fourth Amendment violation:

Motion to Suppress

{¶ 75} In his first assignment of error, Dew argues:

{¶ 76} "The indictment and prosecution of the case against appellant were predicated upon evidence gained in violation of the Fourth Amendment to the United States Constitution."

{¶ 77} Dew argues that the trial court erred by failing to suppress the tape-recorded phone conversation between Gymnast B and Dew. After coming forward with allegations against Dew, Gymnast B set up a phone call with him, which was to be monitored and recorded by Boardman Police. When Dew called Gymnast B on October 26, 2006, Gymnast B was already on the line with Boardman Police, and when she clicked over, a "three-way call" was created, allowing Boardman Police to record the entirely of the conversation, unbeknownst to Dew. Dew argues this recording should have been suppressed because it was obtained without a warrant.

{¶ 78} "Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact." *State v. Long* (1998) 127 Ohio App.3d 328, 332, 713 N.E.2d 1. "At a suppression hearing, the evaluation of evidence and the credibility of witnesses are issues for the trier of fact." *State v. Mills* (1992), 62 Ohio St.3d 357, 366, 582 N.E.2d 972. We are bound to accept the trial court's factual determinations made during the suppression hearing so long as they are supported by competent credible evidence. *State v. Harris* (1994), 98 Ohio App.3d 543, 546, 649 N.E.2d 7. Accepting these factual determinations as true, an appellate court must then "independently determine as a matter of law, without deference to the trial court's conclusion, whether the trial court erred in applying the substantive law to the facts of the case." *Id.*

{¶ 79} In this case, Dew moved to suppress the tape recording because he believed absent a warrant, the contents of the recording were inadmissible. He urged the court to apply Pennsylvania or California law to decide whether to suppress the recording. Dew argued that both California and Pennsylvania law require a warrant for the secret taping of a conversation, unless both parties to the conversation consent to the taping. Dew contended that either of those two states' laws should apply because he claimed he was driving through Pennsylvania when he made the call, while Gymnast B was undisputedly in California when she received the call. Dew claimed that the fact that the recording took place in Ohio was not enough to trigger the application of Ohio's wiretap statute, which is less strict than Pennsylvania's or California's in that it permits the secret recording of a phone conversation by police with consent of just one of the parties.

{¶ 80} After a hearing, where both sides presented legal arguments only, the trial court overruled the motion to suppress the tape recording, finding that the "applicable law requires only the permission of one of the parties to the conversation to allow interception of the conversation by a third party."

{¶ 81} On appeal, Dew argues that the secret recording of his phone conversation by police, done without a warrant, contravened his Fourth and Fourteenth Amendment rights and thus, the recording, through the operation of the exclusionary rule, should have been inadmissible at trial. The Fourth Amendment to the United States Constitution, as applicable to the states via the Fourteenth Amendment, protects individuals against unreasonable search and seizure. See, also, Section 14, Article I, Ohio Constitution. However, neither the federal constitution, nor the Ohio constitution requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and a non-consenting defendant. *State v. Geraldo* (1981), 68 Ohio St.2d 120, 22 O.O.3d 366, 429 N.E.2d 141, at syllabus, following *U.S. v. White* (1971), 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453.

{¶ 82} Nor does Ohio statutory law mandate suppression. Ohio's wiretap statute, R.C. 2933.53 governs and provides the following with regard to warrant requirements:

{¶ 83} "The prosecuting attorney of the county in which an interception is to take place or in which an interception device is to be installed, or an assistant to the prosecuting attorney of that county who is specifically designated by the prosecuting attorney to exercise authority under this section, may authorize an application for an interception warrant to a judge of the court of common pleas of the county in which the interception is to take place or in which the interception device is to be installed.* * * " R.C. 2933.53(A)

{¶ 84} The statute provides a specific exception to the interception warrant requirement where: "[t]he interception of a wire, oral, or electronic communication by a law enforcement officer if the officer is a party to the communication *or if one of the parties to the communication has given prior consent to the interception by the officer.*" R.C. 2933.53(F)(2) (emphasis added .)

{¶ 85} Dew contends that Ohio law is inapplicable to this case because it was undisputed that Gymnast B was in California when she made the call and Dew was allegedly in Pennsylvania when he received the call. We find this argument unpersuasive. The interception of the phone call took place in Ohio, and Dew was tried in an Ohio court. R.C. 2933.53 makes no mention of the location of the callers, but rather focuses on the location of interception. See R.C. 2933.53(A). Thus, we hold that the trial court was correct in applying Ohio law. And as indicated by the plain language of R.C. 2933.53(F)(2), a warrant is not required where one of the parties has given prior consent to the police interception. Here, it is undisputed that Gymnast B gave her consent for the taping.

> {¶ 86} Dew also argues that the warrantless recording of the conversation contravenes the "point and purpose" of the Federal Wiretap Act, Section 2511 Title 18, U.S.Code, et seq., since that statute prohibits the use as evidence of any illegally intercepted communications. However, Dew's argument is based on the false premise that the recording violated Ohio law. The trial court correctly overruled Dew's motion to suppress the tape recording. Accordingly, Dew's first assignment of error is meritless.

Dew, 2009 WL 4756342, at *17-18.

First, to the extent Petitioner alleges the telephone recording violates state law, such a claim is not cognizable in federal habeas proceedings. *See Estelle*, 502 U.S. at 67-68 ("[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United Sates."). Thus, to the extent Petitioner alleges the recording of the phone call violated California or Pennsylvania law, *see* Doc. 18, at 9 ("Both CA and PA require consent from all parties prior to recording a conversation."), or that the appellate court misapplied Ohio law, *see* Doc. 35, at 162 ("Ohio law violated and misapplied"), such a claim is not cognizable before this Court.[13]

Second, the Supreme Court's rule in *Stone v. Powell*, provides 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. 465, 486 (1976). The reasons behind this rule are two-fold. First, "the key purpose of federal habeas corpus is to free innocent prisoners.

13. Petitioner also argues the use of this evidence violated Article IV, the Full Faith and Credit Clause. *See* Doc. 35 at 156-58; *id.* at 165 ("the use of the evidence in Petitioner's trial was a violation of his rights and the rights of the States of California and Pennsylvania"). This is not, however, how Petitioner presented this argument to the Ohio appellate court. *See* Ex. 30, Doc. 6-2, at 173-84 (arguing a Fourth Amendment violation and violations of state law). Additionally, Petitioner fails to point to clearly established federal law holding that introduction of such a recording violates the Full Faith and Credit clause.

But 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). And second, "exclusion is a prudential deterrent prescribed by the courts, not a personal right guaranteed by the Constitution. Any deterrence produced by an additional layer of habeas review is small, but the cost of undoing final convictions is great" *Id.* (citing *Stone*, 428 U.S. at 493). *Stone* requires the district court to determine whether state procedure in the abstract provides full and fair opportunity to litigate, and Ohio procedure does. The district court must also determine if Petitioner's presentation of a claim was frustrated because of the failure of the state mechanism. Habeas relief is allowed if an unanticipated and unforeseeable application of a procedural rule prevents state court consideration of merits. *Riley v. Gray*, 674 F.2d 522 (6th Cir. 1982). The *Riley* court, in discussing the concept of a "full and fair opportunity", held:

> The mechanism provided by the State of Ohio for resolution of Fourth Amendment claims is, in the abstract, clearly adequate. Ohio R. Crim. P. 12 provides an adequate opportunity to raise Fourth Amendment claims in the context of a pretrial motion to suppress, as is evident in the petitioner's use of that procedure. Further, a criminal defendant, who has unsuccessfully sought to suppress evidence, may take a direct appeal of that order, as of right, by filing a notice of appeal. See Ohio R. App. P. 3(A) and Ohio R. App. P. 5(A). These rules provide an adequate procedural mechanism for the litigation of Fourth Amendment claims because the state affords a litigant an opportunity to raise his claims in a fact-finding hearing and on direct appeal of an unfavorable decision.

Id. at 526. The Sixth Circuit in *Good* further clarified the interpretation of *Stone*'s "opportunity" language: "[W]e make clear 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." *Id.* at 639. Here, Petitioner was given, and took advantage of, the full and fair proceedings in the Ohio courts to litigate his Fourth Amendment claims. He filed a motion to suppress (Ex. 14, Doc. 6-2, at 51-57), the trial court held a suppression hearing (Doc. 6-5), and Petitioner appealed this issue, *Dew*, 2009

WL 4756342, at *17-18. Accordingly, to the extent Petitioner alleges the recording violating his Fourth Amendment rights, such a claim is not cognizable and provides no basis for federal habeas relief.[14]

Third, although the Court need not reach the Fourth Amendment question because Petitioner had a full and fair opportunity to litigate his Fourth Amendment claim, *Stone*, 428 U.S. at 486, the undersigned notes that it is well established that "[a] telephone call can be monitored and recorded without violating the Fourth Amendment so long as one participant in the call consents to the monitoring." *United States v. Novak,* 531 F.3d 99, 101 (1st Cir. 2008) (O'Connor, J., sitting by designation); *see also United States v. Workman,* 80 F.3d 688, 694 (2d Cir.1996) ("Only a single participant in a conversation need agree to monitoring in order to satisfy the requirements of the Fourth Amendment."); *cf. United States v. White,* 401 U.S. 745, 752 (1970) (surreptitious recording of in-person conversation does not violate the Fourth Amendment where one party to the conversation consents to monitoring); *Manetta v. Macomb County Enforcement Team*, 141 F.3d 270, 276 (6th Cir. 1998) ("[N]either the United States Constitution nor any federal statute prohibits law enforcement officials from recording or listening to phone conversations so long as one of the parties to the conversation has consented."). Thus, the appellate court's determination that Petitioner's constitutional rights were not violated by the introduction of the recording—to which one party (the victim) consented—is not contrary to, or an unreasonable application of federal law.

The undersigned therefore recommends Ground Four of the Petition be denied.

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14. Petitioner cites several case in support of his argument for a Fourth Amendment violation. However, these cases address Fourth Amendment issues on *direct appeal*, which is a different issue than Fourth Amendment issues on *habeas*.

Ground Two: Improper Joinder

As described above, the undersigned finds Petitioner's claim regarding improper joinder was not fairly presented to the state courts, and therefore defaulted. Alternatively, the undersigned concludes the Ground may also be denied on the merits.

In Ground Two, Petitioner assets he was denied due process when the trial court denied his motion for relief from improper joinder. The state appellate court considered and rejected Petitioner's the claim under state law:

> {¶ 87} In his second assignment of error, Dew argues:
>
> {¶ 88} "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."
>
> {¶ 89} Dew contends that the trial court erred by denying his motion for improper joinder and failing to sever the gymnast-related charges from the patient-related charges. Pursuant to Crim.R. 13, the court may order two or more indictments be tried together, if the offenses could have been joined in a single indictment, and the procedure shall be the same as if the prosecution were under such single indictment. In accordance with Crim.R. 8(A), two or more offenses may be charged in the same indictment if the offenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Crim.R. 8(A). The law generally favors joinder pursuant to Crim.R. 8(A). See *State v. Torres,* 66 Ohio St.2d 340, 20 O.O .3d 313, 421 N.E.2d 1288.
>
> {¶ 90} However, if it appears the defendant is prejudiced by joinder, the trial court may order separate trials. Crim.R. 14. The defendant bears the burden of proving prejudice and of proving that the trial court abused its discretion in denying severance. *Torres* at syllabus.
>
> {¶ 91} A prosecutor can negate a defendant's claims of prejudicial joinder in several ways. *State v. Coley* (2001), 93 Ohio St.3d 253, 259, 754 N.E.2d 1129. First, the state could show the evidence regarding one of the joined offenses would be admissible in trial of the other offense due to the exceptions to other acts evidence contained in Evid.R. 404(B). *Id.* at 259–260, 754 N.E.2d 1129. Alternatively, the state can negate prejudicial joinder merely by showing that evidence of each crime (or as here, each set of crimes) is simple and direct. *Id.* at 260, 754 N.E.2d 1129, citing, e.g., *State v. Johnson* (2000), 88 Ohio St.3d 95, 109–

110, 723 N.E.2d 1054 (assaults against female neighbors); *State v. Franklin* (1991), 62 Ohio St.3d 118, 123, 580 N.E.2d 1 (burglaries in same neighborhood). See, also, *State v. Bell,* 7th Dist. No. 06–MA–189, 2008–Ohio–3959, at ¶ 21 (evidence of each rape was simple and distinct.)

{¶ 92} Dew argues that evidence of crimes pertaining to the gymnast-victims would not have been admissible, pursuant to Evid.R. 404(B), in a separate trial of the crimes pertaining to the patient-victims, and vice versa. Dew further contends that the evidence of each set of crimes was not simple and direct. With regard to his first argument, pursuant to Evid.R. 404(B), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The State contends that the other crimes/acts evidence would have been admissible to show a common scheme, or modus operandi on the part of Dew. However, applying that exception to this case would be tenuous at best.

{¶ 93} The Ohio Supreme Court rejected a similar argument in *Schaim,* supra. In *Schaim,* the defendant was indicted on two counts of forcible rape involving his adopted daughter, one count of gross sexual imposition involving his younger daughter, and two counts of gross sexual imposition involving an employee. Defense counsel moved to sever the counts into three groups for trial however the trial court denied the motion. The Ohio Supreme Court rejected the notion that evidence relating to each crime would have been admissible pursuant to Evid.R. 404(B)(4) had the trials been separated, simply because the defendant displayed a pattern of molesting women. *Id.* at 60–62, 600 N.E.2d 661.

{¶ 94} Similarly, in the instant case, Evid.R. 404(B) does not support joinder. As Dew points out, the gymnast-related crimes took place over a decade before the patient-related crimes. And while they both involve sexual abuse of women over whom Dew held a position of power or authority, this is insufficient to trigger one of the Evid.R. 404(B)(4) exceptions.

{¶ 95} However, we conclude that joinder was nonetheless proper in this case because evidence of each set of charges was simple and direct. "[W]hen simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as 'other acts' under Evid.R. 404(B)." *State v. Lott* (1990), 51 Ohio St.3d 160, 163, 555 N.E.2d 293. In this case, the evidence relating to the crimes against the gymnasts was separate and distinct from the evidence relating to the crimes against the patients. With respect to the set of charges relating to the gymnasts, both victims testified, and other evidence included Dew's written and oral statements to police, the recorded phone call between Gymnast B and Dew, and letters from Dew to Gymnast B. With respect to the case involving the patients, the evidence included the testimony of all victims, and that of competing expert witnesses. Although the crimes against the chiropractic

> patients and the gymnasts were of a similar nature, it is difficult to see how the jury would have had problems segregating the evidence. Further, the Ohio Supreme Court has held that where, as here, a jury acquits on some counts, this can demonstrate the jury's ability to segregate the evidence. *State v. Schiebel,* (1990), 55 Ohio St.3d 71, 88, 564 N.E.2d 54. Moreover, Dew fails to explain how he would have defended either case differently had the two cases not been joined. See *Franklin* at 123, 580 N.E.2d 1.
>
> {¶ 96} Dew's argues that the evidence of the two sets of crimes was not simple and direct, because the jurors had to apply different definitions of "sexual conduct" to decide the rape allegations involving Gymnast A and those involving Patient C, due to the varying time-frames. However, this argument is meritless because the focus of the analysis should be on whether the evidence of the two crimes was simple and direct, not whether the law was confusing. Moreover, the trial court clearly and concisely explained to the jury the differences between the "sexual conduct" definition applicable to Gymnast A, and that applicable to Patient C.
>
> {¶ 97} Thus, the trial court did not abuse its discretion by denying Dew's motion to sever trial on the two sets of charges. Accordingly, Dew's second assignment of error is meritless.

Dew, 2009 WL 4756342, at *18-20.

Improper joinder does not, by itself, violate the federal Constitution. *United States v. Lane,* 474 U.S. 438, 446, n. 8 (1986). The Supreme Court in *Lane* suggested in passing that misjoinder could rise "to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *Id.* The Sixth Circuit noted that this language in *Lane* concerning a court's failure to sever criminal charges is simply dicta and thus not clearly established federal law. *See Mayfield v. Morrow,* 528 F. App'x 538, 541-42 (6th Cir. 2013). Because "'clearly established Federal law' for purposes of § 2254(d)(1) refers to 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions [.],'" *id.* (quoting *Williams*, 529 U.S. at 412), the Sixth Circuit concluded a habeas petitioner could not rely on *Lane* to obtain habeas relief on his claim that he had been deprived of his right to a fair trial when the judge denied his motion to sever different rape charges. *Id.* The Ninth Circuit has likewise held that a habeas petitioner could not rely on the Supreme Court's dicta in *Lane* to obtain habeas relief on an improper

misjoinder claim, particularly where that dicta was merely mentioned as a comment in a footnote of the opinion. *See Collins v. Runnels*, 603 F.3d 1127, 1132 (9th Cir. 2010).

Given the lack of holdings by the Supreme Court on the issue of whether a state court violates a habeas petitioner's due process rights by joining together unrelated criminal charges in a single trial, the Ohio appellate court's rejection of Petitioner's improper joinder claim was not an unreasonable application of clearly established federal law. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008). As such, even if the Court were to find Petitioner had not defaulted Ground Two, such a claim fails on the merits. .

CONCLUSION AND RECOMMENDATION

Following review, and for the reasons stated above, the Court recommends the Petition be denied in its entirety. And, for the reasons stated in the Order filed concurrently with this Report and Recommendation, the undersigned GRANTS Petitioner's: Motion to Correct the Record (Doc. 33), and Motion to Amend Motion to Expand the Record (Doc. 34), and DENIES Petitioner's: Motion to Expand the Record Pursuant to Rules Governing 2254 Cases, Rule 7 (Doc. 24); Motion for Discovery Pursuant to Rules Governing 2254 Cases, Rule 6 (Doc. 26); Motion for an Order for the Production of Records (Doc. 30); and Motion for the Court to Take Judicial Notice (Doc. 42).

s/James R. Knepp, II
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen days of service of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985).

No. 20-3413

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GREGORY DEW,

Petitioner-Appellant,

v.

LASHANN EPPINGER, Warden,

Respondent-Appellee.

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

Deborah S. Hunt, Clerk