No. 21-3138

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 28, 2021
DEBORAH S. HUNT, Clerk

KYLE KURTZ,

Petitioner-Appellant,

v.

DAVID W. GRAY, Warden,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, CLAY, and NALBANDIAN, Circuit Judges.

Kyle Kurtz, a pro se Ohio prisoner, petitions this Court to rehear its order of July 14, 2021, denying his application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

This court denied Kurtz's COA application because he did not make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2).

After careful consideration, we conclude that the Court did not overlook or misapprehend any point of law or fact when it denied Kurtz's COA application. *See* Fed. R. App. P. 40(a)(2).

Accordingly, we **DENY** Kurtz's petition for rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 21-3138

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KYLE KURTZ,

Petitioner-Appellant,

v.

DAVID W. GRAY, Warden,

Respondent-Appellee.

ORDER

Before: WHITE, Circuit Judge.

Kyle Kurtz, a pro se Ohio prisoner, appeals the district court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Kurtz moves to proceed in forma pauperis ("IFP"). *See* Fed. R. App. P. 24(a)(5). This court construes the attachment to Kurtz's IFP motion as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b).

Rejecting Kurtz's claim of self-defense with respect to the shooting death of Brandon Brown, a jury convicted Kurtz of aggravated robbery, kidnapping, aggravated murder, murder, and firearm specifications. The trial court merged the murder counts and sentenced Kurtz to an aggregate sentence of twenty-six years to life in prison. The Ohio Court of Appeals affirmed the trial court's judgment. *State v. Kurtz*, No. 17AP-382, 2018 WL 4677567 (Ohio Ct. App. Sept. 27, 2018). On November 26, 2018, the Ohio Supreme Court declined to file Kurtz's untimely notice of appeal and advised him of the procedure for filing a delayed appeal. On October 25, 2019, Kurtz moved for a delayed appeal and explained that he had been awaiting court decisions on the retroactivity of "House Bill 228," passed on December 28, 2018, which amended Ohio's self-defense law set forth at Ohio Revised Code § 2901.05, effective March 28, 2019. The Ohio Supreme Court denied his motion on December 31, 2019. *State v. Kurtz*, 137 N.E.3d 102 (Ohio 2019) (table).

In his § 2254 petition, Kurtz asserted that: (1) House Bill 228 rendered his convictions void; (2) he was required to establish self-defense at trial by a preponderance of the evidence, in violation of his rights to due process and equal protection and House Bill 228; (3) each of his convictions resulted from erroneous jury instructions; (4) his convictions resulted from structural error; (5) he was convicted and sentenced in violation of the Eighth Amendment; and (6) he was unconstitutionally convicted "under a now deficient presumption of self-defense."

A magistrate judge recommended denying Kurtz's § 2254 petition as procedurally defaulted. When Kurtz failed to file objections, the district court dismissed the action. Kurtz thereafter notified the district court that he had not received the magistrate judge's report. The district court ordered that Kurtz be served with the report and granted him leave to file objections.

In his objections, Kurtz argued that prison officials failed to timely mail his notice of appeal to the Ohio Supreme Court, that he had raised all of his claims in his motion for a delayed appeal, and that he was actually innocent. The district court overruled his objections, denied his § 2254 petition, and declined to issue a COA.

An individual seeking a COA is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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 (2003).

When the appeal concerns a district court's procedural ruling, a COA should issue if the petitioner demonstrates "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 v. McDaniel*, 529 U.S. 473, 484 (2000). A prisoner must "demonstrate substantial underlying constitutional claims." *Id.* To determine if this standard is satisfied, a court must make "a modest assessment of the merits of the claim[s]." *Dufresne v. Palmer*, 876 F.3d 248, 254 (6th Cir. 2017) (per curiam).

Jurists of reason would agree that Kurtz procedurally defaulted his claims because the Ohio Supreme Court's denial of his motion to file a delayed appeal was a procedural ruling. *See Stone v. Moore*, 644 F.3d 342, 348 (6th Cir. 2011); *Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir. 2004). This is so because the procedure for filing a motion for a delayed appeal before the Ohio Supreme Court requires the movant to set forth the reasons for the delay but does not require a merits brief and does not "appear to contemplate decisions on the merits of the claims raised in the underlying appeal." *Smith v. Ohio Dep't of Rehab. & Corr.*, 463 F.3d 426, 431-32 n.3 (6th Cir. 2006) (discussing version of Ohio Supreme Court Practice Rule 7.01(A)(4) previously codified as Rule II § 2(A)(4)(a)).

Jurists of reason also would agree that Kurtz failed to establish cause and actual prejudice to excuse his default or that a miscarriage of justice would occur if his claims were not examined. *See Dufresne*, 876 F.3d at 255-56. With respect to his claims concerning House Bill 228, Kurtz could not have raised them in a timely appeal before the Ohio Court of Appeals or the Ohio Supreme Court because the bill had not yet been passed. Kurtz nonetheless did not demonstrate cause for his procedural default because he did not show that an "objective factor external to the defense" impeded his efforts to file claims concerning House Bill 228 in a motion for a delayed appeal for ten months after its passage. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). His assertion that he was waiting for Ohio courts to issue a decision on the bill's retroactivity is unpersuasive because he himself could have litigated the issue of retroactivity. Additionally, Kurtz cannot establish prejudice because the bill does not apply retroactively when the prisoner was convicted before its enactment. *See State v. Koch*, 146 N.E.3d 1238, 1266 (Ohio Ct. App. 2019) (direct appeal); *see also State v. Whitman*, No. 2019CA00094, 2019 WL 4942414, at *2 (Ohio Ct. App. Oct. 7, 2019) (collateral proceeding), *perm. app. denied*, 137 N.E.3d 108 (Ohio 2019).

With respect to Kurtz's claims that do not concern House Bill 228, jurists of reason would agree that the prison officials' alleged failure to timely mail his original appeal did not constitute cause to excuse his own failure to file his motion for a delayed appeal for another eleven months.

Finally, jurists of reason would agree that Kurtz did not make a substantial showing that a miscarriage of justice would occur if his claims were not examined. Kurtz did not present any new reliable evidence in support of his assertion of innocence. *See Dufresne*, 876 F.3d at 255-56.

Accordingly, the court **DENIES** Kurtz's COA application and **DENIES** his IFP motion as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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

KYLE KURTZ,

Petitioner,

CASE NO. 2:19-CV-5186
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

v.

WARDEN, BELMONT CORRECTIONAL INSTITUTION,

Respondent.

REPORT AND RECOMMENDATION

Petitioner, a state prisoner, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the Petition, Respondent's Return of Writ, Petitioner's Traverse, and the exhibits of the parties. For the reasons that follow, it is **RECOMMENDED** that this action be **DISMISSED.**

I. BACKGROUND

Petitioner challenges his February 10, 2017 convictions after a jury trial in the Franklin Court of Common Pleas on aggravated robbery, kidnapping, murder, and aggravated murder. The trial court imposed a term of twenty years to life plus six years on firearm specifications. The state appellate court summarized the facts and procedural history of the case as follows:

> {¶ 2} In 2015, Jeanette Hampton lived at a residence on North James Road near Broad Street on the near east side of Columbus, Ohio. She lived there with her children, a 16-year old daughter, T.C., and a 12-year old son. Hampton's boyfriend was Brandon Brown, the victim in this case. There is no dispute that Hampton sold marijuana from her home and that appellant's friend, Jim Rose, had been a frequent customer for the previous 2 years. Appellant testified that he uses marijuana on a daily basis and that he had been to Hampton's home on approximately 40 occasions to buy marijuana from Hampton prior to June 26, 2015. Appellant estimated that he was accompanied by Rose on roughly 20 of his 40 prior drug buys from Hampton.

{¶ 3} Hampton testified in the early evening of June 26, 2015, she received a telephone call from appellant on her home phone. According to Hampton, appellant was angry and hostile on the phone, and he claimed that Brown owed him money. Hampton testified that Brown took the phone from her and that he began arguing with appellant over the phone and telling appellant that he did not owe him money. Hampton heard Brown repeating what appellant was saying to him over the phone. She heard Brown say "you going to come over here and shoot me with what?" (Tr. Vol. II at 105.) Hampton heard Brown say to appellant to "come on." (Tr. Vol. II at 106.).

{¶ 4} Though Hampton wanted to avoid a confrontation and asked Brown to leave, he insisted on staying to "make sure that nobody else that was in the house was harmed." (Tr. Vol. II at 107.) Hampton testified that a series of phone calls between Brown and appellant took place between 6:00 and 6:45 p.m. Brown told Hampton he was going to wait outside for appellant with a gun because appellant was coming there to shoot him.

{¶ 5} Hampton stated that about 15 minutes after Brown went outside, she looked out the window to her side door and she saw Brown standing right outside the door and she saw his gun laying on the hood of her vehicle just in front of the windshield wipers. She saw appellant standing about 6 feet in front of Brown, pointing a gun at Brown and repeatedly ordering him to get down on the ground. Hampton testified about what she saw as follows:

> [W]hen I looked out my window [Brown] was directly in front of my window. The gun was sitting on my front of my car on this (indicating) side of him. The gun was basically in the back of him so he wasn't even in front of the gun, I mean, where he could reach it.

(Tr. Vol. II at 123.)

{¶ 6} When Hampton went to get her phone to call police, she heard gunshots. When she looked out the window again, she saw Brown on his knees with his arms out and appellant walking back to his vehicle which was parked in the driveway. As Hampton started to go out the door to help Brown, she stopped when she saw appellant come back to retrieve his car keys he had left on top of the recycling bin near the side door to the house. When she next looked out, she noticed that Brown's gun was no longer on the hood of her vehicle.

{¶ 7} Hampton's daughter, T.C., testified that she ran to her upstairs bedroom window when she heard Brown and appellant yelling at each other outside. She first saw Brown and appellant pointing guns at one another. When appellant told Brown to get on the ground, T.C. heard Brown say "no," but she also saw Brown place his gun down on the hood of the vehicle and then put his hands up. T.C. heard Brown utter words to the effect of "you really going to shoot me?" (Tr. Vol.

II at 224.) For the next one and one-half minutes, appellant continued to yell at Brown and then T.C. watched as appellant shot Brown in the face. As Brown staggered back out of her view, T.C. saw appellant continue to shoot in his direction. T.C. then saw appellant take Brown's gun from the hood of the vehicle and walk back to his vehicle. She also saw him return to get his keys off the recycle bin.

{¶ 8} One of Hampton's neighbors heard the gunshots and saw appellant drive away. She got the license plate and called police. Other neighbors testified that they saw appellant walking away from the scene and then briefly returning before getting in his vehicle and driving away. Whitehall police officer Kendall Tiega arrived at the scene about ten minutes after the shooting while Brown was still alive.

According to Tiega, Brown was able to tell her that a man named Kyle had shot him.

{¶ 9} Appellant's vehicle was spotted shortly thereafter by another Whitehall police officer, and when appellant stopped at a tobacco store, he was taken into custody without incident. Two handguns were recovered from appellant's vehicle: a 9mm semi-automatic pistol with a 15-round magazine that was fully loaded and operable but had not been fired, and appellant's 9mm semi-automatic pistol with a 14-round magazine that contained 2 rounds. Ten shell casings matching appellant's pistol were recovered from the scene.

{¶ 10} The evidence shows that Brown was shot ten times, once through the front of his eye, twice through his forearm, and seven more times in his back. The coroner's report lists "[m]ultiple gunshot wounds" as the cause of death. (State's Ex. E, Coroner's Report at 2.)

{¶ 11} On July 6, 2015, a Franklin County Grand Jury indicted appellant on charges of aggravated robbery, in violation of R.C. 2911.01, a felony of the first degree; kidnapping, in violation of R.C. 2905.01, a felony of the first degree; two counts of aggravated murder, in violation of R.C. 2903.01, an unspecified felony; two counts of murder, in violation of R.C. 2903.02, an unspecified felony; and tampering with evidence, in violation of R.C. 2921.12, a felony of the third degree. With the exception of the tampering with evidence charge, each of the charges in the indictment was accompanied by a firearm specification.

{¶ 12} Appellant did not deny shooting and killing Brown, but he claimed that he did so in self-defense. A jury found appellant guilty of all charges and specifications with the exception of the count and specification for aggravated murder with prior calculation and design and tampering with evidence.

{¶ 13} The trial court convicted appellant and sentenced him to a prison term of 20 years to life, plus an aggregate consecutive prison term of 6 years for the

> firearm specifications.FN1 Appellant timely appealed to this court from the judgment of conviction and sentence.
>
> FN1: The trial court merged the counts in the indictment charging appellant with murder for purposes of conviction and sentence. (Jan. 22, 2018 Sentencing Hearing Tr. at 36.)
>
> ASSIGNMENT OF ERROR
>
> {¶ 14} Appellant assigns the following as trial court error:
>
> THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF AGGRAVATED MURDER; MURDER; KIDNAPPING; AND AGGRAVATED ROBBERY AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

State v. Kurtz, 10th Dist. No. 17AP-382, 2018 WL 4677567, at *1-2 (Ohio Ct. App. Sept. 27, 2018). On September 27, 2018, the appellate court affirmed the trial court's judgment. *Id.* Petitioner did not file a timely appeal. On November 12, 2019, he filed a motion for a delayed appeal. (Doc. 10, PAGEID # 159). On December 31, 2019, the Ohio Supreme Court denied the motion for a delayed appeal. *State v. Kurtz*, 57 Ohio St.3d 1523 (Ohio 2019).

In October and December 2019, Petitioner filed requests for the appointment of counsel for the filing of a state post-conviction petition and motion for expert assistance. (Doc. 10, PAGEID # 198, 203, 217). However, although Petitioner indicates that he has a post-conviction petition pending in the state trial court (Doc. 1, PAGEID # 3, 10), the record does not show that Petitioner has pursued state post-conviction relief.

On November 25, 2019, Petitioner filed this pro se habeas corpus petition pursuant to 28 U.S.C. § 2254. He asserts that retroactive application of House Bill 228 on Ohio's law regarding self-defense renders his convictions void (claim one); that he unconstitutionally had to

establish he acted in self-defense by a preponderance of the evidence (claim two); that his convictions result from erroneous jury instructions on aggravated robbery, aggravated murder, kidnapping, aggravated robbery, the definition of theft, use of deadly force, preponderance of evidence, and the duty of retreat (claims three through ten, and twelve); that his convictions are based on structural error (claim eleven); his convictions violate the Eighth Amendment (claim thirteen); and that he was unconstitutionally convicted on a now deficient presumption of self-defense (claim fourteen).

II. PROCEDURAL DEFAULT

Congress has provided that state prisoners who are in custody in violation of the Constitution or laws or treaties of the United States may apply to the federal courts for a writ of habeas corpus. 28 U.S.C. § 2254(a). In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required to present those claims to the state courts for consideration. 28 U.S.C. § 2254(b), (c). If the prisoner fails to do so, but still has an avenue open to present the claims, then the petition is subject to dismissal for failure to exhaust state remedies. *Id.; Anderson v. Harless*, 459 U.S. 4, 6 (1982) (*per curiam*) (citing *Picard v. Connor*, 404 U.S. 270, 275–78 (1971)). Where a petitioner has failed to exhaust claims but would find those claims barred if later presented to the state courts, "there is a procedural default for purposes of federal habeas." *Coleman v. Thompson*, 501 U.S. 722, 735 n.1 (1991).

The term "procedural default" has come to describe the situation where a person convicted of a crime in a state court fails (for whatever reason) to present a particular claim to the highest court of the State so that the State may have a fair chance to correct any errors made

in the course of the trial or the appeal before a federal court intervenes in the state criminal process. This "requires the petitioner to present 'the same claim under the same theory' to the state courts before raising it on federal habeas review." *Hicks v. Straub*, 377 F.3d 538, 552–53 (6th Cir. 2004) (quoting *Pillette v. Foltz*, 824 F.2d 494, 497 (6th Cir. 1987)). One of the aspects of "fairly presenting" a claim to the state courts is that a habeas petitioner must do so in a way that gives the state courts a fair opportunity to rule on the federal law claims being asserted. That means that, if the claims are not presented to the state courts in the way in which state law requires, and consequently, the state courts do not decide the claims on their merits, neither may a federal court. *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (holding that "contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure" also cannot be resolved on their merits in a federal habeas case—that is, they are "procedurally defaulted").

To determine whether a habeas petitioner has procedurally defaulted a claim, courts consider whether: (1) the petitioner failed to comply with a state procedural rule; (2) the state courts enforce that rule; (3) the rule is an adequate and independent state ground for denying review of a petitioner's federal constitutional claim; and (4) the petitioner can show cause and prejudice excusing the default. *Williams v. Burt*, 949 F.3d 966, 972–73 (6th Cir. 2020) (citing *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (*en banc*)); *see also Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir.1986) (outlining the four-factor *Maupin* test).

a. Application

Petitioner failed to raise any of his claims on direct appeal. "It is well-settled that '[c]laims appearing on the face of the record must be raised on direct appeal, or they will be waived under Ohio's doctrine of *res judicata*.'" *Mason v. Warden, Noble Corr. Inst.*, No. 2:19-

cv-4695, 2020 WL 3972497, at *3 (S.D. Ohio July 14, 2020) (citing *Teitelbaum v. Turner*, No. 2:17-cv-583, 2018 WL 2046456, at *15 (S.D. Ohio May 2, 2018)). Thus, Petitioner violated the *res judicata* rule set forth in *State v. Perry*, 10 Ohio St.2d 175 (1967), when he failed to raise his claims on direct appeal, and consequently satisfied the first prong of the *Maupin* test.

With respect to the second *Maupin* factor, Ohio courts have consistently refused, in reliance on the doctrine of *res judicata*, to review the merits of procedurally barred claims. *See, e.g., State v. Cole,* 2 Ohio St.3d 112 (1982). Further, the Sixth Circuit has held that Ohio's doctrine of *res judicata* is an independent and adequate ground for denying federal habeas relief. *See, e.g., Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006); *Coleman v. Mitchell*, 268 F.3d 417, 427–29 (6th Cir. 2001); *Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000); *Byrd v. Collins*, 209 F.3d 486, 521–22 (6th Cir. 2000); *Norris v. Schotten*, 146 F.3d 314, 332 (6th Cir. 1998). Accordingly, the Court is satisfied from its own review of relevant case law that the *res judicata* rule articulated in *Perry* is an adequate and independent ground for denying relief.

Moreover, Petitioner failed to file a timely appeal in the Ohio Supreme Court. To the extent that Petitioner now argues that the evidence is constitutionally insufficient to sustain his convictions or that his convictions were against the manifest weight of the evidence (*see*, Doc. 18), he likewise thereby has waived these issues for review here.[1] *See Hayward v. Warden, Grafton Corr. Inst.*, No. 2:19-cv-1313, 2019 WL 2058628, at *7 (S.D. Ohio May 9, 2019) (citing *Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir. 2004)).

Further, Petitioner has failed to establish cause for his procedural defaults. "'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot fairly be attributed to him[,] '. . . some objective factor external to the defense [that]

[1] Petitioner's manifest weight claim does not, in any event, provide a basis for federal habeas relief. *See Hayward*, 2019 WL 2058628, at * 8 (citations omitted).

impeded ... efforts to comply with the State's procedural rule.'" *Coleman*, 501 U.S. at 753 (quoting *Murray*, 477 U.S. at 488). It is Petitioner's burden to show cause and prejudice. *Hinkle v. Randle,* 271 F.3d 239, 245 (6th Cir. 2001) (citing *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999) (internal citation omitted)). A petitioner's *pro se* status, ignorance of the law, or ignorance of procedural requirements are insufficient bases to excuse a procedural default. *Bonilla*, 370 F.3d at 498. Instead, to establish cause, a petitioner "must present a substantial reason that is external to himself and cannot be fairly attributed to him." *Hartman v. Bagley*, 492 F.3d 347, 358 (6th Cir. 2007). Petitioner has failed to meet this burden here.

III. DISPOSITION

Therefore, it is **RECOMMENDED** that this action be **DISMISSED.**

Procedure on Objections

If any party objects to this *Report and Recommendation*, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(B)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo,* and also operates as a waiver of the right to appeal the decision of

the District Court adopting the *Report and Recommendation. See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

The parties are further advised that, if they intend to file an appeal of any adverse decision, they may submit arguments in any objections filed, regarding whether a certificate of appealability should issue.

IT IS SO ORDERED.

Date: August 19, 2020

/s/Kimberly A. Jolson
KIMBERLY A. JOLSON
UNITED STATES MAGISTRATE JUDGE

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

KYLE KURTZ,

Petitioner,

v.

WARDEN, BELMONT CORRECTIONAL INSTITUTION,

Respondent.

CASE NO. 2:19-CV-5186
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

OPINION AND ORDER

On August 19, 2020, the Magistrate Judge issued a Report and Recommendation recommending that the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed. (ECF No. 19.) Petitioner did not file any objections. On September 14, 2020, Judgment was entered dismissing this action. Petitioner now has filed an Objection, and indicates that he could not earlier do so, because he did not receive timely notification of the Magistrate Judge's recommendation of dismissal. (ECF Nos. 22, 24.) In view of Petitioner's representations, Judgment of dismissal of this action (ECF No. 21) is **VACATED** for consideration of Petitioner's Objection.

Pursuant to 28 U.S.C. § 636(b), this Court has conducted a de novo review. For the reasons that follow, Petitioner's Objection (ECF No. 24) is **OVERRULED**. The Report and Recommendation (ECF No. 19) is **ADOPTED** and **AFFIRMED.** This action is hereby **DISMISSED.**

The Court **DECLINES** to issue a certificate of appealability.

Petitioner challenges his February 10, 2017 convictions after a jury trial in the Franklin County Court of Common Pleas on aggravated robbery, kidnapping, murder, and aggravated

murder. He asserts that retroactive application of House Bill 228 on Ohio's law on self-defense renders his convictions void (claim one); that he unconstitutionally had to establish he acted in self-defense by a preponderance of the evidence (claim two); that his convictions result from erroneous jury instructions (claims three through ten and twelve); that his convictions are based on structural error (claim eleven); his convictions violate the Eighth Amendment (claim thirteen); and that he was unconstitutionally convicted on a now deficient presumption of self-defense (claim fourteen). The Magistrate Judge recommended dismissal of these claims as procedurally defaulted.

Petitioner objects to that recommendation. Petitioner maintains that he preserved his claims for review by presenting them to the Ohio Supreme Court in a motion for a delayed appeal. As cause for his untimely appeal, he states that prison officials at the Belmont County Correctional Institute failed to timely mail his appeal to the Ohio Supreme Court. He asserts that he is actually innocent and that this case involves a manifest miscarriage of justice. (ECF No. 24, PAGEID # 1410-11, 1424-25.)

Petitioner procedurally defaulted all of his claims by failing to raise them on direct appeal. It is well-settled that "[c]laims appearing on the face of the record must be raised on direct appeal, or they will be waived under Ohio's doctrine of res judicata." *Hill v. Mitchell*, No. 1:98-CV-452, 2006 WL 2807017, at *43 (S.D. Ohio Sept. 27, 2006) (citing *State v. Perry*, 10 Ohio St.2d 175 (1967)). Moreover, the Ohio Supreme Court does not ordinarily consider claims that were not raised in the appellate court below. Thus, even had Petitioner pursued a timely appeal to the Ohio Supreme Court, he would not thereby have preserved his claims for review in these proceedings. *See Jones v. Warden, Lebanon Corr. Inst.*, No. 2:14-cv-01218, 2015 WL 7829145, at *1 (S.D. Ohio Dec. 4, 2015) (citing *Brown v. Voorhies*, 2:07-cv-00014, 2009 WL

187830, at *8 (S.D. Ohio Jan. 26, 2009)) (claim waived by failure to present it to the Ohio Court of Appeals) (citing *Mitts v. Bagley*, 2005 WL 2416929 (N.D. Ohio Sept. 29, 2005)) (citing *Fornash v. Marshall*, 686 F.2d 1179, 1185 n. 7 (6th Cir. 1982)) (citing *State v. Phillips*, 27 Ohio St.2d 294, 302 (1971)). Moreover, the record indicates that the Clerk of the Ohio Supreme Court notified Petitioner in a letter dated November 26, 2018, that his appeal was untimely. It was due on November 13, 2018, and not received until November 26, 2018. The Clerk advised Petitioner of the process for the filing of a motion for a delayed appeal. (ECF No. 24, PAGEID # 1430.) Yet, Petitioner waited approximately one year, until November 12, 2019, to file a motion for a delayed appeal. (ECF No. 10, PAGEID # 157.) Thus, any delay by prison officials in mailing the appeal does not constitute cause for Petitioner's delay in filing a motion for a delayed appeal.

A claim of actual innocence may be raised "to avoid a procedural bar to the consideration of the merits of [a petitioner's] constitutional claims." *Schlup v. Delo*, 513 U.S. 298, 326–27 (1995). The actual innocence exception to procedural default allows a petitioner to pursue his constitutional claims if it is "more likely than not" that new evidence—i.e., evidence not previously presented at trial—would allow no reasonable juror to find him guilty beyond a reasonable doubt. *Souter v. Jones,* 395 F.3d 577 (6th Cir. 2005). The Court of Appeals for the Sixth Circuit has explained this exception as follows:

> The United States Supreme Court has held that if a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup,* 513 U.S. at 316, 115 S.Ct. 851, 130 L.Ed.2d 808. Thus, the threshold inquiry is whether "new facts raise[ ] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808. The Court has noted that "actual innocence means factual innocence, not

> mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)."To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup,* 513 U.S. at 324, 115 S.Ct. 851, 130 L.Ed.2d 808. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808.

Souter, 395 F.3d at 589–90 (footnote omitted).

Petitioner has failed to meet this standard here.

For these reasons and for the reasons discussed in the Magistrate Judge's Report and Recommendation, Petitioner's Objection (ECF No. 24) is **OVERRULED**. The Report and Recommendation (ECF No. 19) is **ADOPTED** and **AFFIRMED.** This action is hereby **DISMISSED.**

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court now considers whether to issue a certificate of appealability. "In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court." *Jordan v. Fisher,* 576 U.S. 1071, --, 135 S.Ct. 2647, 2650 (2015); 28 U.S.C. § 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal).

When a claim has been denied on the merits, a certificate of appealability may issue only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make a substantial showing of the denial of a constitutional right, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)). When a claim has been

denied on procedural grounds, a certificate of appealability may issue if the petitioner establishes 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. *Id.*

The Court is not persuaded that reasonable jurists would debate the dismissal of Petitioner's claims as procedurally defaulted. The Court therefore **DECLINES** to issue a certificate of appealability.

The Court certifies that the appeal would not be in good faith and that an application to proceed *in forma pauperis* on appeal should be **DENIED.**

IT IS SO ORDERED.

s/Edmund A. Sargus, Jr. 12/21/2020
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

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

KYLE KURTZ,

Petitioner,

CASE NO. 2:19-CV-5186
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

v.

WARDEN, BELMONT CORRECTIONAL INSTITUTION,

Respondent.

ORDER

On August 19, 2020, the Magistrate Judge issued a Report and Recommendation recommending that the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed. Although the parties were advised of the right to file objections to the Magistrate Judge's Report and Recommendation, and of the consequences of failing to do so, no objections have been filed.

The Report and Recommendation (ECF No. 19) is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED.**

Petitioner has waived his right to appeal by failing to file objections. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The Court therefore **DECLINES** to issue a certificate of appealability.

IT IS SO ORDERED.

s/Edmund A. Sargus, Jr. 9/14/2020
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

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