No._____

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES WYCUFF,
Petitioner,

vs.

ED SHELDON, Warden
Respondent.

APPLICATION TO SUPREME COURT JUSTICE FOR AN EXTENSION OF TIME TO FILE A WRIT OF CERTIORARI IN THE SUPREME COURT OF THE UNITED STATES.

NOW COMES, Pro Se.-Petitioner Charles Wycuff, pursuant to S.C.R. 13.5, 22, and 30 and asks this Court to extend the time for Petitioner to file his Writ of Certiorari in this COurt by sixty(60) days and states the following colloquy in support thereof.

On November 29, 2021 the United States Court of Appeals SIxth Circuit denied Petitioner's timely Petition for Rehearing wherefore Petitioner's Writ of Certiorari is due in this Court or before February 28, 2 022.

Petitioner now states thát Allen Correctional Institution has enacted quarantine protocols due to COVID infections which have restricted prisoner movement, including access to the institutional law library to comprehensively complete his Petition for Writ of Certiorari.

Due to this unforeseen circumstance Petitioner for good cause asks this Justice to extend this filing by sixty(60) days to allow

Charles Wycuff #719867
Allen Correctional Institution
2338 N. West St.
Lima, OH 45801

Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

January 31, 2022

RE: Case No. 21-3025, Charles Wycuff v Ed Sheldon, Warden
Allen Correctional Institution.
Originating Case No. 2:19-cv-3549

Dear Clerk,

For filing with the Justice of this Court please find "Petitioner's Application for an Extension of Time to File a Writ of Certiorari".

Please forward Petitioner a "time Stamp" copy of this filing.

Sincerely,
Charles Wycuff

Charles Wycuff

No. 21-3025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES WYCUFF,

Petitioner-Appellant,

v.

ED SHELDON, Warden,

Respondent-Appellee.

ORDER

Before: LARSEN, Circuit Judge.

Charles Wycuff, an Ohio prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. This court construes Wycuff's timely notice of appeal as an application for a certificate of appealability (COA). *See* Fed. R. App. P. 22(b)(2). Wycuff has filed a motion to proceed in forma pauperis on appeal.

In October 2015, a jury convicted Wycuff of rape, gross sexual imposition, and sexual battery, with sexually violent predator specifications. The trial court sentenced Wycuff to an aggregate sentence of life plus 105 years. The Ohio Court of Appeals affirmed the trial court's judgment, *State v. [C.W.]*, No. 15AP-1024, 2018 WL 1807294, at *1 (Ohio Ct. App. Apr. 17, 2018), and the Ohio Supreme Court declined to accept jurisdiction of the appeal, *State v. [C.W.]*, No. 2018-0716 (Ohio Aug. 15, 2018).

In June 2017, while his direct appeal was pending, Wycuff filed in the trial court a motion to vacate or set aside the judgment of conviction and sentence, raising a claim that one of his attorneys at trial was ineffective due to mental illness (Alzheimer's disease). There is no indication in the record that the trial court ever ruled on this motion.

In June 2018, Wycuff filed an application to reopen his direct appeal pursuant to Ohio Appellate Rule 26(B), asserting that appellate counsel was ineffective for failing to raise a claim

that trial counsel's mental illness rendered him ineffective. The Ohio Court of Appeals denied Wycuff's application, and the Ohio Supreme Court declined to accept jurisdiction of the appeal.

In August 2019, Wycuff filed a § 2254 petition in the district court, raising the following grounds for relief: (1) the trial court denied him his rights to due process and a fair trial when it allowed the State to introduce evidence of prior bad acts; (2) the trial court denied him his rights to due process and a fair trial when it allowed the State to cross-examine him on prior bad acts that were previously determined to be cumulative and prejudicial; (3) trial counsel was ineffective for failing to object to the prior-bad-acts evidence, failing to request limiting instructions, and failing to object to improper language used in the verdict forms; and (4) his convictions on multiple counts that concerned the same conduct violated his right to be free from double jeopardy.

After the State filed a response to the petition, Wycuff filed a motion for a stay and abeyance of the proceedings. Wycuff explained that he had recently filed in the trial court a motion for a new trial based on newly discovered evidence and ineffective assistance of trial counsel. A review of the trial court's docket reveals that Wycuff filed this motion on December 18, 2019. In the motion, Wycuff asserted that counsel provided ineffective assistance due to his mental illness. He explained that, in April 2019, he learned that one of his trial attorneys had passed away due to Alzheimer's disease and dementia. The trial court has not yet ruled on this motion. Wycuff asked the district court to hold his § 2254 petition in abeyance pending a ruling on this motion from the trial court.

A magistrate judge denied Wycuff's motion for a stay and abeyance, explaining that the petition presented no unexhausted claims. The magistrate judge further explained that, although Wycuff had not presented his claim of ineffective assistance due to mental illness in his § 2254 petition, any such claim lacked merit. Next, the magistrate judge recommended that Wycuff's petition be denied, concluding that his claims were either procedurally defaulted or lacking in merit. Over Wycuff's objections, the district court adopted the magistrate judge's report and recommendation and denied the petition. The district court declined to issue a COA.

To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). 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 (2003). When the district court denies a habeas petition on a procedural ground without reaching the underlying constitutional claims, a COA should issue when 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). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), if a state court previously adjudicated a petitioner's claims on the merits, a district court may not grant habeas relief unless the state court's adjudication of the claim 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 "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 Harrington v. Richter*, 562 U.S. 86, 100 (2011). Where AEDPA deference applies, this court, in the COA context, must evaluate the district court's application of § 2254(d) to determine "whether that resolution was debatable amongst jurists of reason." *Miller-El*, 537 U.S. at 336.

Wycuff's first two claims concerned the admission of evidence of prior bad acts. In his first claim, he asserted that the trial court improperly allowed the State to present evidence of "unindicted acts of physical abuse" of the victim and failed to give limiting instructions during the testimony of each witness who testified to such prior bad acts and during its instructions to the jury. His second claim challenged the court's decision to allow the State to cross-examine him about prior acts of violence. On habeas review, the district court rejected both claims as procedurally defaulted and also concluded that they "lack[ed] viability as a basis for federal habeas corpus relief."

Reasonable jurists could not disagree with the district court's determination that Wycuff's first two grounds for relief failed to state viable habeas claims. To the extent Wycuff's claims alleged an error under state law, the claims are not cognizable on habeas review. *See Estelle v.*

McGuire, 502 U.S. 62, 67-68 (1991). Further, the admission of other acts evidence was not contrary to, nor did it involve an unreasonable application of, clearly established federal law, because "[t]here is no clearly established Supreme Court precedent which holds that a state violates due process by permitting propensity evidence in the form of other bad acts evidence." *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003); *see also Wagner v. Klee*, 620 F. App'x 375, 378 (6th Cir. 2015). Claims one and two do not deserve encouragement to proceed further.

Wycuff's third claim asserted that trial counsel failed to (1) object or request a limiting instruction when the State introduced evidence of prior bad acts, (2) object to certain prejudicial comments made by the prosecutor, and (3) object to the use of captions on the verdict forms to differentiate counts. To establish ineffective assistance of counsel, a defendant must show both that: (1) counsel's performance was deficient, i.e., "that counsel's representation fell below an objective standard of reasonableness"; and (2) the deficient performance resulted in prejudice to the defense. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). The test for prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Applying the standard set forth in *Strickland*, the state appellate court rejected these claims on the merits. First, the court found that counsel's choice not to object to the physical abuse evidence or request a limiting instruction was a tactical decision that did not support an ineffective-assistance claim, noting that the evidence was admissible under state law and that the defense relied on the physical abuse evidence to argue that the victim had a motive for fabricating the sexual abuse allegations. *See [C.W.]*, 2018 WL 1807294, at *9. No reasonable jurist would debate the district court's determination that this was not an unreasonable application of *Strickland*. Because the state appellate court deemed the physical abuse evidence admissible under state law, Wycuff cannot show that an objection would have been sustained. And counsel cannot be deemed

ineffective for failing to raise a meritless objection. *See Coley v. Bagley*, 706 F.3d 741, 752 (6th Cir. 2013). With respect to the alleged failure to request a limiting instruction, the record reflects that the court did give a limiting instruction to the jury the first time that the evidence was admitted. The state court thus reasonably concluded that a tactical decision not to request further limiting instructions so as to avoid drawing further attention to the evidence did not amount to ineffective assistance.

Second, the state appellate court concluded that trial counsel was not ineffective for failing to object to certain statements made by the prosecutor. Wycuff argued that counsel should have objected: (1) when the prosecutor said during his closing argument that the corroboration of the victim's testimony by other witnesses and Children's Services records "tells us . . . that we can count on [the victim] to give us reliable, accurate history"; (2) when the prosecutor argued that "every defense in a rape case is [that] the victim is lying" and the defendant then has to "try to scramble to figure out a reason why"; and (3) when, during cross-examination, the prosecutor asked Wycuff if he believed the victim's frequent vomiting and urinating himself in childhood was stress-related and then, in response to his answer that "[s]omething was going on," stated, "I would agree with that." The state appellate court held that counsel was not ineffective for failing to object to these statements because they amounted to nothing more than arguments or comments based on the evidence and did not express any belief regarding Wycuff's guilt. *See [C.W.]*, 2018 WL 1807294, at *10. The court also determined that, even if counsel had objected, Wycuff could not show a reasonable probability that the outcome of the trial would have been different. *See id.* Reasonable jurists would not debate the district court's determination that the state appellate court did not unreasonably apply *Strickland* or make an unreasonable determination of the facts when denying this claim.

Third, Wycuff argued that counsel improperly failed to object to the use of captions on the verdict forms to identify which conduct was associated with each count. The state appellate court found, as a matter of state law, that the verdict captions were not improper. *See id.* at *11. Because the state court ruled that the captions did not violate Ohio law—a ruling to which a habeas court must defer, *see Davis v. Straub*, 430 F.3d 281, 291 (6th Cir. 2005)—Wycuff cannot show that an

objection by counsel would have been successful. It therefore follows that Wycuff cannot make a substantial showing that counsel's failure to object amounted to ineffective assistance. *See Coley*, 706 F.3d at 752. Wycuff's claims of ineffective assistance of trial counsel do not deserve encouragement to proceed further.

In his fourth and final claim, Wycuff argued that his convictions violate the Double Jeopardy Clause because some of the captions on the verdict forms allowed the jury to convict him on multiple counts for the same conduct and the trial court failed to merge the sentences for these counts. Reviewing the claim for plain error because Wycuff failed to object to the verdict forms at trial, the Ohio Court of Appeals concluded that, although there were some misstatements in the captioning, there was no plain error because there was separate conduct to support each count and the trial court merged the lesser-included offenses into the greater offenses and sentenced Wycuff on only the greater offenses. *See [C.W.]*, 2018 WL 1807294, at *11-14.

The district court concluded that this claim was procedurally defaulted. A procedural default can result from a petitioner's failure to exhaust his federal claims in state court. *See Hand v. Houk*, 871 F.3d 390, 407 (6th Cir. 2017). The exhaustion requirement is deemed satisfied when the "highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Id.* (quoting *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990)). As a general rule, a petitioner must present his claims to both the state court of appeals and the state supreme court for the claim to be considered exhausted. *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009). When a petitioner did not fairly present his claims to the state courts and no remedy remains, his claims are considered to be procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). To overcome a procedural default, a petitioner must show cause for his failure to raise the claims and prejudice arising therefrom, or that failing to review the claims would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991). A fundamental miscarriage of justice requires a showing of actual innocence. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004).

Wycuff raised claim four in his appeal to the Ohio Court of Appeals, but he failed to exhaust the claim by presenting it to the Ohio Supreme Court. *See O'Sullivan v. Boerckel*, 526

U.S. 838, 839-40 (1999); *Williams v. Anderson*, 460 F.3d 789, 806-07 (6th Cir. 2006). Because the claim could have been raised on direct appeal, Ohio's res judicata doctrine would bar him from raising it in a post-conviction proceeding. *See State v. Jackson*, 23 N.E.3d 1023, 1041 (Ohio 2014); *Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000). The claim is therefore procedurally defaulted. *See Gray*, 518 U.S. at 161-62; *O'Sullivan*, 526 U.S. at 848 ("Boerckel's failure to present three of his federal habeas claims to the Illinois Supreme Court in a timely fashion has resulted in a procedural default of those claims."); *Williams*, 460 F.3d at 806-07 (similar). In his objections to the report and recommendation, Wycuff argued that his pro se status and lack of access to legal assistance at his institution's law library excuses his procedural default. Reasonable jurists would not disagree with the district court's rejection of this argument. *See Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004) (per curiam). Nor would reasonable jurists debate the district court's determination that Wycuff failed to make a showing of actual innocence that would allow him to overcome the procedural default of this claim. Wycuff's claim four therefore does not deserve encouragement to proceed further.

Finally, reasonable jurists would not believe that the district court abused its discretion in denying Wycuff's motion for a stay and abeyance pending resolution of his motion for a new trial, in which he argued that trial counsel was ineffective due to his mental incapacity. Before filing a federal habeas petition, a state prisoner must exhaust his claims by presenting them to the courts at each level of the state judicial system. *See* 28 U.S.C. § 2254(b)(1)(A); *Wagner*, 581 F.3d at 414. A federal court cannot grant habeas relief if the petitioner still has state remedies available. *See* 28 U.S.C. § 2254(b)(1)(B); *Wagner*, 581 F.3d at 415. That rule applies to petitions that contain a mix of exhausted and unexhausted claims. In that situation, a district court has the discretion to:

> (1) dismiss the mixed petition in its entirety; (2) stay the petition and hold it in abeyance while the petitioner returns to state court to raise his unexhausted claims, (3) permit the petitioner to dismiss the unexhausted claims and proceed with the exhausted claims, or (4) ignore the exhaustion requirement altogether and *deny* the petition on the merits if *none* of the petitioner's claims has any merit.

Harris v. Lafler, 553 F.3d 1028, 1031-32 (6th Cir. 2009) (citing *Rhines v. Weber*, 544 U.S. 269, 274-78 (2005)). The stay-and-abeyance procedure is available only if: (1) the unexhausted claims

are not "plainly meritless"; and (2) the petitioner had "good cause" for failing to present the claims to the state court. *Rhines*, 544 U.S. at 277.

For three reasons, the district court declined to apply the stay-and-abeyance procedure as requested by Wycuff. First, the court observed that Wycuff's petition presented only exhausted claims, explaining that the pendency of his separate claim of ineffective assistance in his motion for a new trial did not render his § 2254 petition "mixed." *See Bowling v. Haeberline*, 246 F. App'x 303, 306 (6th Cir. 2007). Second, the district court found that, even if Wycuff had presented the new ineffective-assistance claim in his habeas petition, he had not shown good cause for his failure to exhaust. And third, the court concluded that a stay and abeyance would not be appropriate in any event because the claim lacked any potential merit. *See Sueing v. Palmer*, 503 F. App'x 354, 357 (6th Cir. 2012) ("It [is] Petitioner's burden to demonstrate to the district court that he had good cause for failing to exhaust his claims in state court, [and] that his unexhausted claims were not plainly without merit[.]").

The district court's ruling was not an abuse of discretion. Wycuff has not explained how the district court addressing all of the claims in his petition might create a "risk of [him] forever losing [his] opportunity for any federal review of [his] unexhausted claim[]." *Rhines*, 544 U.S. at 275. Nor is there any indication that the court's election to "proceed with the exhausted claims" might "unreasonably impair [Wycuff]'s right to obtain federal relief." *Id.* at 278.[1] As a result, this court need not decide whether Wycuff's unexhausted claim might be "potentially meritorious" even were it raised in a "mixed petition." *Id.* That said, it appears that the Ohio state courts have

[1] As cause for his failure to exhaust, Wycuff alleged that his ineffective-assistance claim in the state courts was based on "newly acquired evidence" obtained in 2019. If that is true, and "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," then Wycuff will be permitted to file a second habeas petition asserting his new claim. 28 U.S.C. § 2244(b)(2)(B). But if the facts supporting his claim could have been discovered earlier through due diligence, then Wycuff would lack good cause for failing to exhaust. *See Hodge v. Haeberlin*, 579 F.3d 627, 638 (6th Cir. 2009); *see also Jalowiec v. Bradshaw*, 657 F.3d 293, 305 (6th Cir. 2011). Either way, then, the district court's refusal to stay the case was not an abuse of discretion. *See Rhines*, 544 U.S. at 277-78. Holding this case in abeyance would have only served to "frustrate[] AEDPA's objective of encouraging finality by allowing [Wycuff] to delay the resolution of the federal proceedings." *Id.* at 277.

already confronted and rejected a similar claim. In its decision denying Wycuff's Rule 26(B) application, the Ohio Court of Appeals concluded that the record failed to demonstrate that counsel was incapacitated by a mental illness or that he performed deficiently at trial. The court found that, contrary to Wycuff's assertions, this attorney, who was one of three representing Wycuff at trial and who presented only the character witnesses during the defense's case-in-chief, addressed each of the witnesses by name, inquired about their relationship to Wycuff, and asked each about Wycuff's reputation for truthfulness in the community. The court further concluded that, given the "overwhelming evidence" of Wycuff's guilt that was presented at trial, Wycuff "fail[ed] to demonstrate any prejudice resulting from [counsel]'s limited role in the trial." Taking the above considerations into account, reasonable jurists could not find that the district court abused its discretion in denying Wycuff's motion for a stay and abeyance.

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 21-3025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES WYCUFF,

Petitioner-Appellant,

v.

ED SHELDON, Warden,

Respondent-Appellee.

ORDER

Before: MOORE, GILMAN, and KETHLEDGE, Circuit Judges.

Charles Wycuff, an Ohio prisoner, petitions for rehearing of our August 9, 2021, order denying his motion for a certificate of appealability. We have reviewed the petition and conclude that this court did not overlook or misapprehend any point of law or fact in denying Wycuff's motion for a certificate of appealability. *See* Fed. R. App. P. 40(a)(2).

Accordingly, the petition for rehearing is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk