

No. 21-3595

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Feb 22, 2022  
DEBORAH S. HUNT, Clerk

LAMAR REESE,

Petitioner-Appellant,

v.

RICHARD BOWEN, Warden,

Respondent-Appellee.

ORDER

Before: LARSEN, Circuit Judge.

Lamar Reese, a pro se Ohio prisoner, appeals the district court's judgment denying his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Reese has filed an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(1). He also moves to proceed in forma pauperis on appeal. *See* Fed. R. App. P. 24(a)(5).

A jury convicted Reese of aggravated murder and aggravated robbery. As part of the evidence against him, the state introduced the results of a polygraph test that Reese had taken and failed. This evidence was introduced pursuant to a "Joint Request for Stipulation of Use of Polygraph Test." Per this stipulation, the parties agreed that Reese would submit to a polygraph test and, if he failed, the results would be admissible at trial. *State v. Reese*, No. 14-MA-116, 2016 WL 661710, at \*1 (Ohio Ct. App. Feb. 10, 2016). Following his conviction, the trial court sentenced him to a total term of imprisonment of 33 years to life.

Reese appealed, asserting that the trial court failed to comply with *State v. Souel*, 372 N.E.2d 1318 (Ohio 1978), when instructing the jury as to the admission of the polygraph test. *Id.* at \*2. He also asserted that the trial court plainly erred by allowing admission of a stipulated polygraph result absent a proper foundation under Ohio Rule of Evidence 702. *Id.* at \*4. The Ohio Court of Appeals determined that Reese had failed to object on this ground, found no plain

*Appendix A*

error, and affirmed. *Id.* at \*7. The Ohio Supreme Court denied leave to appeal. *State v. Reese*, 52 N.E.3d 1204 (Ohio 2016) (table).

Reese then filed a state post-conviction petition to set aside his conviction and sentence, arguing that his history of mental health issues should have prevented the use of a polygraph test and that he had been denied due process. The trial court dismissed the motion, and it does not appear that Reese appealed.

Reese then timely filed a habeas petition in the district court. He claimed that the state trial court plainly erred by allowing the polygraph results into evidence absent a proper foundation under the Ohio Rules of Evidence, which violated his right to due process. The warden responded that the claim was procedurally defaulted and that Reese could not establish a violation of his constitutional rights.

A magistrate judge issued a report and recommendation determining first that Reese's claim was procedurally defaulted and that he had not established cause and prejudice for the default. The magistrate judge next determined that Reese did not present his claim as a federal claim in the Ohio courts. Finally, the magistrate judge determined that Reese's claim failed on the merits because the admission of polygraph test results does not violate clearly established constitutional law and any violation of state law did not result in a denial of fundamental fairness. Over Reese's objections, the district court concluded that Reese's claim was both procedurally defaulted and meritless. The district court therefore denied his habeas petition and declined to issue a COA. Reese now seeks a COA from this court.

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). He may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where the district court denies an issue on procedural grounds, courts should grant a COA only if two requirements are satisfied: first, the court must determine that reasonable jurists would find the district court's procedural assessment debatable or wrong; and, second, the court

must determine that reasonable jurists would find it debatable or obvious that the petition states a valid underlying constitutional claim. *See Slack*, 529 U.S. at 484-85. “[A] COA does not require a showing that the appeal will succeed,” *Miller-El*, 537 U.S. at 337; it is sufficient for a petitioner to demonstrate that “the issues presented are adequate to deserve encouragement to proceed further.” *Id.* at 327 (citing *Slack*, 529 U.S. at 484).

We may address the merits of a claim without considering the procedural issues, particularly when, as here, the merits are more easily resolvable. *See Lambrix v. Singletary*, 520 U.S. 518, 525 (1997); *see also, e.g., Bales v. Bell*, 788 F.3d 568, 573 (6th Cir. 2015); *Brown v. Rewerts*, No. 19-1771, 2020 WL 8073624, at \*4 (6th Cir. Sept. 1, 2020) (applying *Lambrix* in COA context).

Reese presents one issue for review: whether his right to due process was violated when his polygraph test results were admitted in violation of Ohio’s evidentiary rules. The Ohio Court of Appeals determined that the State met the conditions for admissibility under Ohio Rule of Evidence 702, *Reese*, 2016 WL 661710, at \*6, and “it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). The Due Process Clause provides a remedy only when the admission of unduly prejudicial evidence renders a trial fundamentally unfair. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (citing *Darden v. Wainwright*, 477 U.S. 168, 179-183 (1986)). Reasonable jurists would therefore not debate the district court’s denial of Reese’s claim. *See Miller-El*, 537 U.S. at 327.

Moreover, the record establishes that Reese agreed to the admission of the polygraph test results. “When a petitioner invites an error in the trial court, he is precluded from seeking habeas corpus relief for that error.” *Fields v. Bagley*, 275 F.3d 478, 486 (6th Cir. 2001). For this reason as well, Reese’s claim does not deserve encouragement to proceed further.

Reese's application for a COA is **DENIED**. His motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", written in a cursive style.

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Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

LAMAR REESE,	)	CASE NO.: 4:17-cv-02098
	)	
Petitioner,	)	
	)	
v.	)	JUDGE JOHN R. ADAMS
	)	
STATE OF OHIO,	)	<b><u>MEMORANDUM OF OPINION AND</u></b>
	)	<b><u>ORDER</u></b>
Respondent.	)	

This matter is before the Court on Petitioner Lamar Reese's ("Reese") objections to the Magistrate Judge's Report and Recommendation ("R. & R."). (R. & R., ECF No. 18; Objections, ECF No. 23.) For the following reasons, Reese's objections are OVERRULED. This Court ADOPTS the Report and Recommendation of the Magistrate Judge and DENIES Reese's Petition for Habeas Corpus filed pursuant to 28 U.S.C. § 2254.

**I. BACKGROUND**

In 2013, "[a] Mahoning County Grand Jury indicted [Reese] on one count of aggravated murder, a first-degree felony in violation of R.C. 2903.01(B)(F), and one count of aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(1)(C), both with firearm specifications." (State Court Record 56, ECF No. 8-1.) Before his trial, Reese and the State of Ohio "entered into a Joint Request for Stipulation of Use of Polygraph Test." (*Id.*) Accordingly, the parties stipulated that Reese would submit to a polygraph test where if he failed the results would be admissible at trial and if he passed the State of Ohio would dismiss all charges against him. (*Id.* at 56-57.) Reese failed the polygraph test. (*Id.* at 57.) The polygraph test results, among other evidence and witness testimony, were presented to a jury. (*Id.*)

On April 14, 2014 the jury found Reese guilty of one count of aggravated murder and one count of aggravated robbery, each with a firearm specification. (*Id.* at 10-11.) On July 22, 2014 the Mahoning County Court of Common Pleas sentenced Reese to a total of thirty-three years to life in prison. (*Id.*)

Reese timely appealed two issues to Ohio's Seventh District Court of Appeals: (1) "The trial court erred plainly in its instructions relative to the admission of polygraph testimony"; and (2) "The Court erred plainly in allowing into evidence a stipulated polygraph absent a proper foundation under Evidentiary Rule 702 for its admission." (*Id.* at 25.) Notably, Reese's appeal presented issues of Ohio law without reference to or discussion of the United States Constitution. (*See id.* at 19-34.) The Seventh District Court of Appeals found no plain error by the trial court and upheld Reese's conviction. (*Id.* at 55-65.)

During the time Reese's appeal was pending before the Seventh District Court of Appeals, Reese also filed a timely post-conviction motion to the Mahoning County Court of Common Pleas arguing he was denied his Sixth and Fourteenth Amendment due process rights under the United States Constitution when he was "subjected to a polygraphic examination" despite his history of mental illness. (*Id.* at 93-94.) The Mahoning County Court of Common Pleas dismissed Reese's post-conviction motion. (*Id.* at 111.) The record is devoid of evidence that Reese appealed this dismissal.

Reese did, however, timely appeal the Seventh District Court of Appeals' decision to the Supreme Court of Ohio with the following propositions of law:

Proposition of Law No. 1: If polygraph testimony comes in a trial, a judge must inform the jurors that it does not prove or disprove an element of the offense and that it is up to the jurors to assign it weight. Here, the trial court erroneously and prejudicially advised the jury that they could use the polygraph to establish that the defendant was lying.

Proposition of Law No. 2: Under Ohio law, even if the State and a defendant stipulate to the admissibility of a polygraph examination, the examination still must conform to the Rules of Evidence, particularly Rule 702 as to the admissibility of expert testimony. Here, there is no such evidentiary threshold, such to equal reversible error.

(*Id.* at 71.) Reese's arguments to the Supreme Court of Ohio presented issues of Ohio law without reference to or discussion of the United States Constitution. (*See id.* at 66-79.) The Supreme Court of Ohio declined to accept jurisdiction over Reese's appeal. (*Id.* at 92.)

Reese then timely filed a Petition for Habeas Corpus before this Court pursuant to 28 U.S.C. § 2254 raising one ground for relief: "The Court erred plainly in allowing into evidence a stipulated polygraph absent a proper foundation under Evidentiary Rule 702 for its admission. This violates my right to fair trial under due process of the 5th & 14th Amendment of the U.S. Constitution." (Petition 5, ECF No. 1.) After careful consideration, the Magistrate Judge issued a Report and Recommendation recommending this Court deny Reese's Petition given Reese's ground for relief is both procedurally defaulted and meritless. (R. & R. 4-14, ECF No. 18.) Reese submitted objections to the R. & R. (Objections, ECF No. 23.) For the following reasons, Reese's objections are OVERRULED and this Court ADOPTS the Magistrate Judge's Report and Recommendation that the Petition filed pursuant to 28 U.S.C. § 2254 be DENIED as procedurally defaulted and meritless.

## II. STANDARD OF REVIEW

When a party files written objections to the Magistrate Judge's R. & R., this Court must perform a *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate" judge. 28 U.S.C. § 636(b)(1)(C).

### III. LAW AND ANALYSIS

#### A. Procedural Default

Reese first objects to the Magistrate Judge's conclusion that his ground for relief is procedurally defaulted. (Objections 1-3, ECF No. 23.) For the following reasons, this Court **OVERRULES** Reese's objection.

As the Magistrate Judge outlined in the R. & R., procedural default may occur in two ways. Procedural default occurs if a petitioner fails "to raise a claim in state court, and pursue that claim through the state's 'ordinary appellate review procedures.'" *Thompson v. Bell*, 580 F.3d 423, 437 (6th Cir. 2009) (quoting *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006)). This rings true for claims under the United States Constitution – "[b]ecause state courts, like federal courts, are required to enforce federal law, including rights asserted under the Constitution, comity requires that the state courts should have the first opportunity to review the prisoner's federal claim and provide any necessary relief." *Whiting v. Burt*, 395 F.3d 602, 612 (6th Cir. 2005).

This means that typically, a federal court cannot "consider a claim in a habeas petition that was not 'fairly presented' to the state courts." *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000) (citing *Franklin v. Rose*, 811 F.2d 322, 324-25 (6th Cir. 1987)). "Fairly presented" in this context "requires that the state courts be given the opportunity to see both the factual and legal basis for each claim." *Wagner v. Smith*, 581 F.3d 410, 414-15 (6th Cir. 2009). To determine whether a petitioner fairly presented his claim to the state courts, this Court must determine whether the petitioner: "(1) relied upon federal cases employing constitutional analysis; (2) relied upon state cases employing federal constitutional analysis; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law." *Hand v. Houk*, 871 F.3d 390, 418



(6th Cir. 2017) (citing *McMeans*, 228 F.3d at 681). “While a petitioner need not cite ‘chapter and verse’ of constitutional law, ‘general allegations of the denial of rights to a “fair trial” and “due process” do not “fairly present claims” that specific constitutional rights were violated.’” *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006) (quoting *Blackmon v. Booker*, 394 F.3d 399, 400 (6th Cir. 2004)).

Despite Reese’s objections and arguments to the contrary, the record is clear the Reese did not fairly present his ground for relief currently before this Court to either Ohio’s Seventh District Court of Appeals or the Supreme Court of Ohio. Specifically, Reese’s claim before this Court is that his due process rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution were violated when his polygraph test results were admitted into evidence at his trial without proper evidentiary foundation under Ohio Rule of Evidence 702. However, this issue was only presented as one of Ohio law, devoid of the constitutional due process arguments, during Reese’s state court appeals. The issue presented to the Ohio state courts did not rely upon either federal cases or state cases utilizing federal constitutional analysis, were not phrased in terms of federal constitutional law, were not particularly phrased to allege a denial of a federal constitutional right, and did not allege facts within the mainstream of federal constitutional analysis.

Accordingly, the Ohio state courts were not provided an opportunity to review Reese’s federal constitutional claims and provide any necessary relief – the Ohio courts reviewed Reese’s claim that his polygraph test results were admitted into evidence at his trial without proper evidentiary foundation under Ohio Rules of Evidence, but not through the constitutional lens which Reese asks this Court to look. Because Reese’s federal constitutional claims were not fairly presented to the Ohio state courts, this Court lacks jurisdiction to consider his claim. In effect, Reese’s ground for

relief is procedurally defaulted and, therefore, in accordance with the recommendation from the Magistrate Judge, shall be DENIED.

Of note, procedural default also occurs if a petitioner fails to comply with a state procedural rule. This Court must conduct a four-step analysis when the state argues that a petitioner failed to observe a state procedural rule, precluding the petition for habeas corpus. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). Although Reese argues, in his objections, that this test is not applicable to his case, he is incorrect – the State of Ohio argued in its Return of Writ that Reese’s claim was procedurally defaulted given his failure to follow Ohio’s contemporaneous objection rule, triggering the application of the following test. (See Objections 3, ECF No. 23; Return of Writ 14-15, ECF No. 8.)

First, the court must determine that there is a state procedural rule that is applicable to the petitioner’s claim and that the petitioner failed to comply with the rule . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction . . . Third, the court must decide whether the state procedural forfeiture is an “adequate and independent” state ground on which the state can rely to foreclose review of a federal constitutional claim . . . [Finally,] the petitioner must demonstrate . . . that there was “cause” for him not to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

*Maupin*, 785 F.2d at 138.

In applying this test, this Court agrees with the Magistrate Judge’s conclusion that Reese’s claim that his polygraph test results were improperly admitted into evidence at his trial was procedurally defaulted when he failed to object to the admission of the polygraph evidence during his trial. Notably, Reese does not object to the Magistrate Judge’s analysis or conclusions regarding the first or third prongs of the *Maupin* test – Reese neither objects to the application of Ohio’s contemporaneous objection rule to this issue, disputes that he failed to object to the admission of the polygraph evidence during his trial, nor argues that failure to contemporaneously object is an adequate and independent state ground barring federal habeas review. See *Scott v.*

*Mitchell*, 209 F.3d 854, 873 (6th Cir. 2000) (explaining Ohio's contemporaneous objection rule is an adequate and independent state ground sufficient to bar federal habeas review of the claim). Therefore, this Court will not further analyze the first or third prongs of the *Maupin* test.

Reese does, however, disagree with the Magistrate Judge's conclusion that the state courts actually enforced a procedural sanction for the failure to object by reviewing Reese's appeal only for plain error rather than on the merits. (Objections 3, ECF No. 23.) In fact, Reese argues "the state court considered the error and reviewed it on its merits." (*Id.*) This, however, is incorrect. Ohio's Seventh District Court of Appeals clearly stated in its written opinion that Reese conceded the issues he appealed were to be reviewed "for plain error because there were not objections in the trial court to the issues he now raises." (State Court Record 57, ECF No. 8-1.) Plain error review does not save Reese's claim from being procedurally defaulted: "Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but it is not equivalent to a review of the merits." *Lundgren v. Mitchell*, 440 F.3d 754, 765 (citing *Scott*, 209 F.3d at 866-67). Accordingly, because Reese's claims on appeal were reviewed only for plain error, and were not reviewed on the merits, the state courts enforced the procedural sanction for Reese's failure to contemporaneously object to the admission of polygraph test evidence at his trial, satisfying the second prong of the *Maupin* test. Reese's objection to this prong is OVERRULED.

Finally, the last prong of the *Maupin* test requires that Reese demonstrate cause for failing to follow Ohio's contemporaneous objection rule and actual prejudice that resulted in order to overcome the procedural default. To demonstrate cause, Reese must demonstrate that "some objective factor external to the defense impeded counsel's efforts" to raise an objection to the admission of the polygraph evidence at Reese's trial. *McClesky v. Zant*, 499 U.S. 467, 493 (1991)

(quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)) (internal quotation marks omitted). To demonstrate prejudice, Reese “must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *United States v. Frady*, 456 U.S. 152, 170 (1982) (*emphasis* in original). In his objections, Reese fails to demonstrate that his counsel was objectively prevented from following Ohio’s contemporaneous objection rule or that the failure to object to the inclusion of the polygraph test at Reese’s trial infected his entire trial with substantial error of constitutional dimensions. Reese’s conclusory and unsupported statements regarding his innocence and that, but for the admission of the polygraph test, the jury would have found him not guilty do not meet the threshold necessary to demonstrate that Reese experienced an actual disadvantage of constitutional magnitude when his polygraph test was admitted in evidence at his trial.

Because the state court’s treatment of the issues raises in Reese’s appeals met the *Maupin* test and Reese failed to establish cause for the default or demonstrate prejudice rising to the level of constitutional dimensions, Reese’s claim before this Court is procedurally defaulted. Therefore, any of Reese’s objections or arguments surrounding procedural default are OVERRULED.

#### **B. Merits**

Although this Court has found Reese’s ground for relief to be procedurally defaulted for two independent reasons, necessitating the denial of Reese’s Petition, this Court will address Reese’s objections to the Magistrate Judge’s conclusion that his ground for relief is also meritless to achieve finality in this matter. (Objections 4-6, ECF No. 23.) For the following reasons, this Court OVERRULES Reese’s objections with respect to the merits of his ground for relief.

As the Magistrate Judge outlined in the R. & R., the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") review standard dictates that a writ of habeas corpus shall not be granted with respect to a state court adjudicated claim unless adjudication of the claim resulted in a decision: (1) contrary to clearly established federal law; (2) that involved an unreasonable application of federal law; or (3) "based on an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d). "Section 2254(d) reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington v. Richter*, 562 U.S. 86, 102-103 (2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979)). Accordingly, a petitioner "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." *Harrington*, 562 U.S. at 103. This is an intentionally high standard to meet. *Id.* at 102.

This Court agrees with the Magistrate Judge's conclusion that Reese's state court adjudicated claim was not adjudicated contrary to clearly established federal law or while utilizing unreasonable application of federal law given the United States Supreme Court has never definitively held the admission of polygraph evidence unconstitutional and allowed jurisdictions to individually decide whether polygraph evidence should be admitted. (R. & R. 11-12, ECF No. 18.) See *United States v. Scheffer*, 523 U.S. 303, 312 (1998). Reese's objection, however, does not focus on this conclusion but rather argues that the court's admission of the polygraph evidence at his trial violated Ohio Rule of Evidence 702, preventing him from confronting an adverse witness, ostensibly the polygraph examiner, and substantially affecting the jury verdict, all of which denied Reese fundamental fairness and due process. (Objections 4-6, ECF No. 23.)

State court evidentiary rulings “are usually not to be questioned in a federal habeas corpus proceeding.” *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000). In fact, “[a] state court evidentiary ruling will be reviewed by a federal habeas court only if it were so fundamentally unfair as to violate the petitioner’s due process rights.” *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001). State court evidentiary rulings, however, “cannot rise to the level of due process violations unless they ‘offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” *Seymour*, 224 F.3d at 552 (quoting *Montana v. Engelhoff*, 518 U.S. 37, 43 (1996)).

This Court agrees with the Magistrate Judge that the admission of polygraph evidence at Reese’s trial was not fundamentally unfair and did not rise to the level of a due process violation. (R. & R. 12-13, ECF No. 18.) This is particularly true given Reese himself stipulated to the admission of the polygraph test results into evidence at his trial, Reese’s counsel conducted a lengthy cross-examination of the polygraph examiner at trial, and, most importantly, after thorough analysis Ohio’s Seventh District Court of Appeals found that the trial court did not commit plain error in admitting the polygraph test results into evidence at Reese’s trial given the four conditions required by the Supreme Court of Ohio for admitting polygraph test results into evidence were met. (State Court Record 61-65, 155-170, ECF No. 8-1.) Reese’s conclusory assertions that fundamental fairness and his constitutional due process rights were violated, therefore, do not meet the high standard of demonstrating that the state court’s evidentiary ruling created an error of such magnitude and significance it lacked justification beyond fairminded disagreement. Accordingly, Reese’s objection to the conclusion that his ground for relief is meritless is OVERRULED. Because this Court concludes that Reese’s Petition for Habeas Corpus filed pursuant to 28 U.S.C. § 2254 is both procedurally defaulted and meritless, the Petition is hereby DENIED.

#### IV. CONCLUSION

For the foregoing reasons, Petitioner Lamar Reese's objections to the Magistrate Judge's Report and Recommendation are OVERRULED. This Court ADOPTS the Report and Recommendation of the Magistrate Judge and DENIES Reese's Petition for Habeas Corpus filed pursuant to 28 U.S.C. § 2254.

Furthermore, this Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith and there is no basis upon which to issue a certificate of appealability pursuant to 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

DATE: May 26, 2021

/s/ John R. Adams  
Judge John R. Adams  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

LAMAR REESE,	)	CASE NO.: 4:17-cv-02098
	)	
Petitioner,	)	
	)	
v.	)	JUDGE JOHN R. ADAMS
	)	
STATE OF OHIO,	)	<b><u>JUDGMENT ENTRY</u></b>
	)	
Respondent.	)	

For the reasons set forth in the Order filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Lamar Reese's Petition for a Writ of Habeas Corpus is hereby DENIED. Pursuant to 28 U.S.C § 1915(a)(3), the Court certifies that Petitioner may not take an appeal from the Court's decision in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Date: May 26, 2021

/s/ John R. Adams  
JUDGE JOHN R. ADAMS  
UNITED STATES DISTRICT JUDGE

*Appendix B*



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

**LAMAR REESE,**

Petitioner,

v.

**STATE OF OHIO,**

Respondent.

Case No. 4:17 CV 2098

Judge John R. Adams

Magistrate Judge James R. Knepp, II

**REPORT AND RECOMMENDATION**

**INTRODUCTION**

*Pro se* Petitioner Lamar Reese (“Petitioner”), a prisoner in state custody, filed a petition seeking a writ of habeas corpus under 28 U.S.C. § 2254 (“Petition”). (Doc. 1). Respondent Warden Ron Erdos<sup>1</sup> (“Respondent”) filed an answer (Doc. 8) and Petitioner filed a response in opposition (Doc. 13). 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 October 10, 2017). For the reasons discussed below, the undersigned recommends the Petition be denied.

**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. 28 U.S.C. § 2254(e)(1); *Moore v. Mitchell*, 708 F.3d 760, 775 (6th Cir. 2013); *Mitzel v. Tate*, 267 F.3d 524,

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1. Plaintiff filed suit against the State of Ohio. Ron Erdos is the Warden of the facility where Petitioner is currently incarcerated. Therefore, Warden Erdos is the proper respondent. *See* Rule 2(a) of the Rules Governing Section 2254 Cases (“[T]he petition must name as respondent the state officer who has custody.”).

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 set forth the following facts:

{¶ 4} A Mahoning County Grand Jury indicted appellant on one count of aggravated murder, a first-degree felony in violation of R.C. 2903.01(B)(F), and one count of aggravated robbery, a first-degree felony in violation of R.C. 2911.01(A)(1)(C), both with firearm specifications. Hudson was also indicted on aggravated murder and aggravated robbery charges with firearm specifications.

{¶ 5} Prior to trial, appellant and plaintiff-appellee, the State of Ohio, entered into a Joint Request for Stipulation of Use of Polygraph Test. Per this stipulation, the parties agreed that appellant would submit to a polygraph test. If appellant failed the polygraph test, then the results of the test would be admissible at trial. If, however, appellant passed the polygraph test, the state would dismiss all charges against him. Appellant took the polygraph test and failed.

{¶ 6} Consequently, the matter proceeded to a jury trial. The jury listened to testimony from numerous witnesses including Triplett, who implicated appellant and Hudson. The jury also heard the results of the polygraph test. The jury found appellant guilty as charged.

(Ex. 7, Doc. 8-1, at 56-57); *State v. Reese*, 2016 WL 661710, at \*1 (Ohio Ct. App.).

#### **PROCEDURAL HISTORY**

##### **State Court Conviction**

On April 14, 2014, in Mahoning County Common Pleas Court, a jury convicted Petitioner of one count of aggravated murder and one count of aggravated robbery, each with firearm specifications. (Ex. 3, Doc. 8-1, at 10-12). On July 22, 2014, the trial court sentenced Petitioner to a mandatory term of 20 years to life on the murder charge, ten years on the robbery charge, and three years on the firearm specification. *Id.* at 11. Thus, the trial court sentenced Petitioner to an aggregate sentence of 33 years to life in prison. *Id.*

Direct Appeal

Petitioner, represented by counsel, filed a timely notice of appeal to the Seventh District Court of Appeals, Mahoning County. (Ex. 4, Doc. 8-1, at 14). In his memorandum, Petitioner asserted two assignments of error:

1. The trial court erred plainly in its instructions relative to the admission of polygraph testimony.
2. The Court erred plainly in allowing into evidence a stipulated polygraph absent a proper foundation under Evidentiary Rule 702 for its admission.

(Ex. 5, Doc. 8-1, at 25).

On February 10, 2016, the Seventh District Court of Appeals affirmed Petitioner's conviction. (Ex. 7, Doc. 8-1, at 55).

On March 26, 2016, Petitioner, represented by counsel, filed a notice of appeal to the Ohio Supreme Court (Ex. 8, Doc. 8-1, at 57), and a memorandum in support of jurisdiction (Ex. 9, Doc. 8-1, at 69-79). Petitioner asserted two propositions of law:

1. If polygraph testimony comes in a trial, a judge must inform the jurors that it does not prove or disprove an element of the offense and that it is up to the jurors to assign it weight. Here, the trial court erroneously and prejudicially advised the jury that they could use the polygraph to establish that the defendant was lying.
2. Under Ohio law, even if the State and a defendant stipulate to the admissibility of a polygraph examination, the examination still must conform to the Rules of Evidence, particularly Rule 702 as to the admissibility of expert testimony. Here, there is no such evidentiary threshold, such to equal reversible error.

*Id.* at 71.

On June 29, 2016, the Ohio Supreme Court declined to accept jurisdiction of the appeal. (Ex. 10, Doc. 8-1, at 92).

Post-Conviction Petition

On March 23, 2015, while his direct appeal was pending, Petitioner, *pro se*, filed a timely petition to vacate or set aside judgment of conviction or sentence. (Ex. 11, Doc. 8-1, at 93). He claimed his history of mental health issues should have prevented a polygraph examination, and thus his Sixth and Fourteenth Amendment rights to due process were denied. *Id.* at 94. The State filed a motion to dismiss in response (Ex. 12, Doc. 8-1, at 100-01), which the trial court granted (Ex. 13, Doc. 8-1, at 111). No evidence in the record indicates Petitioner appealed this decision.

**FEDERAL HABEAS CORPUS**

The instant Petition was filed in October 2017 and challenges Petitioner's convictions. (Doc. 1). Petitioner raises one ground for relief:

**GROUND ONE:** The Court erred plainly in allowing into evidence a stipulated polygraph absent a proper foundation under Evidentiary Rule 702 for its admission. This violates my right to a fair trial under due process of the 5th & 14th amendment of the U.S. Constitution.

**Supporting Facts:** Under Ohio Law even if the state and a defendant stipulate to the admissibility of a polygraph examination, the examination still must conform to the Rules of Evidence particularly Rule 702 as to the admissibility of expert testimony. Here, there is no such evidentiary threshold.

There wasn't any foundation establishing the circumstances under w[h]ich a polygraph would or would not be reliable and this polygraph suffered from an obvious defect in reliability. The polygraph examiner asked me am I a citizen of Canada I said yes w[h]ich was obviously not true and this answer was found non deceptive.

*Id.* at 5.

**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 asserts Petitioner’s only ground for relief does not state a federal constitutional claim and, alternatively, was procedurally defaulted due to his failure to raise the claim at the trial court level. *See* Doc. 8. Specifically, Respondent argues there is no Supreme Court precedent

barring admission of polygraph evidence, and that evidentiary rulings do not form the basis for a Constitutional claim. *Id.* at 8-13. Additionally, Respondent argues Petitioner's claims are procedurally defaulted because the polygraph test's admission was agreed to by stipulation at trial. *Id.* at 14-17. Therefore, there was no objection at trial and the claim is waived as a result. *Id.* at 14-15. Finally, Respondent asserts Petitioner's claim is procedurally defaulted because he had not previously argued his due process rights were infringed, so this claim was not properly exhausted. *Id.* at 16-17.

Petitioner provides several cases to support his claim, and argues his claim is not procedurally defaulted. *See* Doc. 13.

For the following reasons, the undersigned recommends the Petition be denied.

#### Procedural Default

Respondent asserts Petitioner's sole ground for relief is procedurally defaulted for two independent reasons. (Doc. 8, at 14-17). First, Respondent asserts that, because the polygraph evidence was admitted by stipulation, no objection was raised during his trial, waiving the issue. *Id.* at 14-15. Second, Respondent argues Petitioner presents a different legal theory to this Court than he did during prior appeals. *Id.* at 16-17. Therefore, Respondent claims, the claim was not fairly presented as a federal claim to the Ohio courts. *Id.* Petitioner contends he did fairly present his claims in the state courts. (Doc. 13, at 8).<sup>2</sup>

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2. Petitioner filed two supplements to his Traverse on August 14, 2018 and August 23, 2018. (Docs. 16, 17). The undersigned denied Petitioner's motion to amend his Traverse weeks earlier. (Doc. 15). The supplements are untimely, and also meritless. Petitioner presents a Fifth Circuit case concerning a direct appeal to advance his claim that the undersigned ought to consider his claim under the "plain error" standard. *See* Doc. 16, at 1 (citing *U.S. v. Puckett*, 505 F.3d 377, 383 (5th Cir. 2007)). This case is not relevant here, however, as the standards for habeas review of state court decisions differ from the standards for direct review of federal criminal cases.

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). The doctrine of exhaustion “requires that a claim be presented to the state courts under the same theory in which it is later presented in federal court.” *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998). A claim cannot rest on a legal theory which is separate and distinct from the one previously considered and rejected in state court. *Id.*; *see also Williams v. Wolfenberger*, 513 F. App’x 466, 68 (6th Cir. 2013) (“To satisfy this requirement, the petitioner must argue his claim under the same legal theory that was presented to the state courts.”).

A procedural default occurs when a petitioner fails to fairly present his claims in a federal constitutional context to the highest state court. *O’Sullivan*, 526 U.S. at 842; *Anderson v. Harless*, 459 U.S. 4 (1982). In Ohio, “one complete round of the State’s established appellate review process” means a defendant must fairly present his constitutional claims, on the record, to the trial court, the court of appeals, and the Supreme Court of Ohio on direct appeal. *Caver v. Straub*, 349 F.3d. 340, 346 (6th Cir. 2003) (quoting *O’Sullivan*, 526 U.S. at 845). This is to “[alert] [the state court] to the fact that the prisoner[] [is] asserting claims under the United States Constitution.” *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995) (internal quotation marks omitted) (citations omitted). In order to accomplish this, a petitioner must fairly present the substance of his federal constitutional claims to the state courts before seeking habeas relief. *Whitings v. Burt*, 395 F.3d 602, 612 (6th Cir. 2005) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). Hence, “a habeas petitioner must present both the factual and legal underpinnings of his claims to the state courts.” *Id.* (quoting *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000)). Further, the claim must be

presented to the state courts as a federal constitutional issue, not merely as an issue arising under state law. *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984).

If the state argues a petitioner has procedurally defaulted his claims, the Court must conduct a four-step analysis to determine whether the petitioner has indeed defaulted and, if so, whether the procedural default may be excused:

1. The Court determines whether there is a procedural rule applicable to the claim at issue, and whether the petitioner in fact failed to follow it;
2. The Court then determines whether the state courts actually enforced their procedural sanction;
3. The Court then decides whether the state's procedural forfeit is an "adequate and independent ground" on which the state can rely to foreclose federal review; and
4. Finally, in order to avoid default, the petitioner can demonstrate that there was "cause" for him to neglect the procedural rule, and that he was actually prejudiced by the alleged constitutional error.

*Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

Demonstrating "cause" requires a petitioner to "show that 'some objective factor external to the defense' prevented the petitioner's compliance with a state procedural rule." *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)).

Demonstrating prejudice requires a petitioner to show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *U.S. v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).<sup>3</sup>

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3. A petitioner may also overcome a procedural default by demonstrating that not excusing the default "will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The Supreme Court has held that such an inquiry requires a petitioner "supplement[ ] a constitutional claim with a 'colorable showing of factual innocence.'" *McCleskey v. Zant*, 499 U.S. 467, 495 (1991) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986)). Maintaining this



For the following reasons, the undersigned recommends finding Petitioner's claims procedurally defaulted.

*Contemporaneous Objection*

The Ohio contemporaneous objection rule requires parties to preserve errors for appeal by objecting at the trial court level, when the error can be avoided or corrected. *State v. Glaros*, 170 Ohio St. 471, 475 (1960) ("It is a general rule that an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."). Petitioner, in his direct appeal, admitted he did not object to the polygraph evidence's admission during his trial. (Ex. 7, Doc. 8-1, at 57); *Reese*, 2016 WL 661710, at \*2. Ohio's contemporaneous objection rule requires that objection be made at the trial court level, thus Petitioner conceded the first step of the *Maupin* test by admitting he failed to follow the contemporaneous objection rule. *Conley v. Warden Chillicothe Corr. Inst.*, 505 F. App'x 501, 506 (6th Cir. 2012).

The state-court review for plain error does not save Petitioner from procedural default. *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006) ("Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits.") (citing *Scott v. Mitchell*, 209 F.3d 854, 866 (6th Cir. 2000)). Thus, in the present case, the state appellate court enforced the procedural sanction by reviewing

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exception to the rule against reviewing procedurally defaulted claims serves as "an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty". *Id.* (quoting *Stone v. Powell*, 428 U.S. 465, 492-93 (1976)). "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 v. Delo*, 513 U.S. 298, 324 (1995). Petitioner has presented no such evidence or argument.

Petitioner's appeal only for plain error, instead of on the merits. This satisfies the second step of the *Maupin* test.

Ohio's contemporaneous objection rule is an adequate and independent state ground, sufficient to bar habeas relief. *See, e.g., Wogenstahl v. Mitchell*, 668 F.3d 307, 335 (6th Cir. 2012) ("Failure to adhere to the 'firmly established Ohio contemporaneous objection rule' is 'an independent and adequate state ground' of decision.") (quoting *Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006)). Thus, the third step of the *Maupin* test is satisfied.

Finally, Petitioner presents no evidence to demonstrate "cause" or "prejudice" sufficient to avoid default under the fourth step of the *Maupin* test. Petitioner presents no "objective factor external to the defense" which prevented him from objecting to the polygraph's admission at trial *Bonilla*, 370 F.3d at 498 (internal citations omitted). Additionally, for the reasons detailed below, the alleged error could not have "infect[ed] his entire trial with error of constitutional dimensions" as Petitioner presents no constitutional error. *Fraday*, 456 U.S. at 170. Therefore, the undersigned recommends finding Petitioner's claim procedurally defaulted.

#### *Fair Presentation of Federal Claim*

Additionally, Respondent argues Ground One is procedurally defaulted because Petitioner did not present it as a federal claim to the Ohio courts. In the present case, Petitioner claims his right to a fair trial, guaranteed by the Fifth and Fourteenth Amendments, was violated by the admission of the polygraph evidence. He did not raise this as a federal constitutional issues in his direct appeal. *See* Ex. 5, Doc. 8-1, at 25 (arguing the admission of polygraph evidence violated Ohio law). Habeas relief is available for prisoners in custody in violation of the Constitution, and is generally not for reviewing state court decisions on matters of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court

determinations on state-law questions...a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”). Therefore, the claim was not exhausted in state courts, barring Petitioner from habeas relief on that legal theory. *Koontz*, 731 F.2d at 368 (“The exhaustion requirement is satisfied ‘once the federal claim has been fairly presented to the state courts . . .’”) (quoting *Picard v. Connor*, 404 U.S. 270, 275 (1971)). Any attempt to raise the claim now would be barred by Ohio’s *res judicata* rule. See, e.g., *State v. Cole*, 2 Ohio St. 3d 112 (1982). Therefore, Petitioner’s claim is procedurally defaulted for failure to fairly present it as a federal constitutional claim to the state court.

Petitioner contends he presented his federal claims at the appeal level, but the included record presents no evidence to support his assertion. See Doc. 13, at 8. Thus, the undersigned again recommends Ground One be found procedurally defaulted.

#### Merits

Petitioner contends the polygraph testimony, regardless of the stipulation, had to comply with the Rules of Evidence, which he alleges the evidence did not. (Doc. 13, at 5-7). Respondent argues there is no Supreme Court precedent to support Petitioner’s claim, and that federal habeas review does not extend to questions of state law. (Doc. 8, at 8-13). For the following reasons, the undersigned recommends Petitioner’s claim could alternatively be denied on the merits.

An application for habeas corpus can only be granted when a person’s state conviction “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”. *Williams*, 529 U.S. at 405. The Supreme Court has not held that the admission of polygraph testimony violates the Constitution. “Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted.” *U.S. v. Scheffer*, 523 U.S. 303, 312 (1998)

(holding that the Military Rules of Evidence *per se* prohibition on polygraph testimony did not raise constitutional concerns). Polygraph admissibility varies by jurisdiction, and the Supreme Court has denied attempts to create a blanket rule. *Masri v. U.S.*, 434 U.S. 907, 908 (1977) (White, J. dissenting) (noting different rules in different federal circuit courts about the admission of polygraph evidence and arguing the Supreme Court “should grant certiorari in such cases as this, where a defendant’s rights would be notably different depending upon the Circuit in which he is tried . . .”). As such, the mere admission of polygraph testimony does not violate a clearly established constitutional right.

In addition, Plaintiff claims the admission of the polygraph testimony violated Ohio state law, including its Rules of Evidence. Errors of state law, such as the application of state rules of evidence, are generally insufficient to grant a writ of habeas corpus. *Waters v. Kassulke*, 916 F.2d 329, 335 (6th Cir. 1990) (“[E]rrors in the application of state law, especially rulings regarding the admission or exclusion of evidence, are usually not to be questioned in a federal habeas corpus proceeding’ . . . Such errors will result in the granting of a writ of habeas corpus only if they result ‘in the denial of fundamental fairness, thereby violating due process.’”) (quoting *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988)). The category of infractions that violate “fundamental fairness” is narrow. *Dowling v. U.S.*, 493 U.S. 342, 352 (1990). In evaluating fundamental fairness, courts are to determine “only whether the action complained of . . . violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions’, and which define ‘the community’s sense of fair play and decency’”. *Id.* at 353 (quoting *U.S. v. Lovasco*, 431 U.S. 783, 790 (1977)) (internal citations omitted). Another judge in this district found the admission of polygraph testimony does not fall into this narrow category. *Horne v. Bunting*, 2014 U.S. Dist. LEXIS 178978, at \*61 (N.D. Ohio) (“The undersigned recommends that the Court find that the

admission of the testimony regarding the polygraph results does not fall within the very narrowly defined category of infractions that violates fundamental fairness.”), *report and recommendation adopted by Horne v. Bunting*, 2014 U.S. Dist. LEXIS 177916 (N.D. Ohio).<sup>4</sup> This Court agrees.

The state appellate court found, contrary to Petitioner’s assertion, that the polygraph test results were properly admitted under state law. (Ex. 7, Doc. 8-1, at 65); *Reese*, 2016 WL 661710, at \*7. (“In sum, the state met the four conditions for admissibility of polygraph test results. Therefore, plain error does not exist here.”). This Court presumes Ohio courts correctly interpreted Ohio law. *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.”). As previously discussed, there is no federal Supreme Court decision clearly establishing a right the Ohio court here violated. The lone case offered by Petitioner, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), does not advance his claim. *Daubert* holds that the federal, not state, rules of evidence superseded a prior Supreme Court decision regarding the admissibility of expert testimony, and provided guidance to the interpretation of those rules. *Id.* at 589. The *Daubert* decision did not change the law in Ohio governing the admissibility of polygraph tests. (Ex. 7, Doc. 8-1, at 64); *Reese*, 2016 WL 661710, at \*6 (“The Ohio Supreme Court set out the conditions for allowing polygraph test results in *Souel*. The [Supreme] Court has not modified or changed these conditions.”).

With no clearly-established federal Constitutional right implicated, this Court may only review the decision to admit polygraph testimony if it resulted in a denial of fundamental fairness, which is not present in this case. Petitioner stipulated to the admission of the polygraph examination. (Ex. 3, Doc. 8-1, at 7-9). His attorney cross-examined the polygraph examiner at

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4. In the previously-mentioned attempts to supplement his Traverse, Petitioner presented additional case law to support his arguments based on state law. (Docs. 16, 17). For the above-mentioned reasons, the undersigned will not consider Petitioner’s state law claims.

length. (Ex. 14, Doc. 8-1, at 155-70). The state appellate court found, contrary to Petitioner's argument, that the admission did not violate the state's rule of evidence concerning expert testimony. (Ex. 7, Doc. 8-1, at 64); *Reese*, 2016 WL 661710, at \*7. In brief, the admission of stipulated polygraph testimony did not cause Petitioner to suffer a denial of fundamental fairness during his trial. Additionally, there is no clearly established Constitutional right implicated by the admission of polygraph evidence in accordance with the relevant rules of evidence. For the abovementioned reasons, the undersigned recommends the Petition be denied.

#### CONCLUSION AND RECOMMENDATION

Following review, and for the reasons stated above, the Court recommends the Petition be denied. Ground One is both procedurally defaulted and meritless.

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).

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