Exhibit #1

THE COURT: Good morning, everyone. Welcome to the comfy chair, Mr. Bednar.

All right. We're ready to proceed. The State of Ohio may call its next witness.

MS. WELSH: Thank you, your Honor. The State calls Jason Howell.

THE COURT: Will you please raise your right hand?

- - - - -

The STATE OF OHIO, to maintain the issues on its part to be maintained, called as a witness, **JASON HOWELL**, who being first duly sworn, was examined and testified as follows:

- - - - -

THE COURT: Please come have a seat. You can adjust the microphone.

MS. WELSH: May I inquire, your Honor?

THE COURT: You may.

- - - - -

DIRECT EXAMINATION OF JASON HOWELL

BY MS. WELSH:

Q. Thank you. Good morning, sir.

A. Good morning.

Trial Record Cuyahoga County, Ohio Court of Common Pleas

970

Exhibit #1

Q. Can you please state your full name and spell it for the record?

A. Yes. Jason Howell. H-O-W-E-L-L.

Q. Sir, are you employed?

A. Yes, I am.

Q. By whom are you employed?

A. I'm employed by the Cuyahoga County Prosecutor's Office, assigned to the Ohio Internet Crimes Against Children Task Force.

Q. Okay. And would it be appropriate if I refer to the Ohio Internet Crimes Against Children Task Force as ICAC?

A. Yes, it is.

Q. Okay. And can you explain to the ladies and gentlemen of the jury what ICAC is?

A. The ICAC task force in Ohio is one of 61 nationally charged with the investigation of Internet based crimes against children, which would be things such as enticement through social media and chat based platforms, and also the trading and production of child pornography also shared through the Internet.

Q. How long have you been employed with ICAC?

A. Since 2009 full-time.

Q. What is your position with ICAC?

A. I do digital forensics, mainly. Also do peer to

Trial Record Cuyahoga County, Ohio Court of Common Pleas

just receive items from agencies in northeast Ohio.

Q. Okay. Is the Cleveland Police Department one of those agencies that you receive devices from?

A. Yes.

Q. Okay. So, can you tell us when a police officer brings something to you to examine, what is your process?

Exhibit #1

A. They fill out a form to submit the evidence for examination, and they will include either a consent to search form, or the search warrant granting the search of the item that's being submitted, and also a synopsis and information about their case and what they're looking for on the evidence being submitted for examination.

Q. Sir, I want to draw your attention back to the summer of 2014. You were employed -- were you employed at ICAC in the same capacity as you are presently employed at ICAC?

A. Yes.

Q. Okay. Do you recall receiving a request from Detective Adkins who's now Detective Bazilius to examine devices involving an individual by the name of Anika George?

A. Yes, I do.

Q. Okay. And do you know -- did you conduct examinations with respect to those devices?

A. Yes, I did.

Q. And what steps, if any, do you take when you

examine devices to memorialize your findings?

A. I generate reports and the tools used to perform the examination of the digital media, and I gather those reports onto a report disk, and then also I make a narrative report or a summary of the findings from my tools.

Exhibit #1

Q. Okay. And did you do so in this case?

A. Yes, I did.

Q. Sir, showing you what's been marked as State's Exhibit 80, can you take a moment and look at that?

MS. WELSH: Just one moment, your Honor.

Q. Sir, that exhibit before you, we're going to refer to that as State's Exhibit 84 for the purposes of the record. Okay?

A. Okay.

Q. Have you had a moment to look over it?

A. Yes, I have.

Q. Do you recognize it?

A. Yes, I do.

Q. How do you recognize it?

A. This is my narrative summary report that I generate at the end of my examinations.

Q. Okay. And how many items were submitted to you for examination?

A. Nine.

Trial Record Cuyahoga County, Ohio Court of Common Pleas

Q. And what -- what is that?

A. That would be the phone number for that phone.

Q. Okay. Sir, I want to move on to Item number 4. What steps did you take with respect to this phone, and describe what it is so we're clear?

A. Item number 4 is the the Samsung model SGH-T499, smart phone. Again, I used the Cellebrite UFED system. This device did have a user lock on the screen.

The Cellebrite was able to bypass this lock through propriety mean as part of the software. And by bypassing that lock, I was then able to download the smart phone's memory, or data stored inside of it and examine that for evidence, similar to the other device.

It will pull evidence. Pictures, videos, text messages, phone call logs, the contacts list, web browsing history, but with smart cellphones, the Cellebrite also parses out data from other applications like Facebook, Twitter, social media apps of that nature.

Q. What images or videos were you able to extract from Item number 4?

A. There were several images of nude or partially nude females, and several images of the genitalia of elderly persons found on this device.

Q. Okay. Moving on to item Number 5. What steps did you take to examine this device?

Exhibit #1

Trial Record Cuyahoga County, Ohio Court of Common Pleas

A. Item number 5 was also examined with the UFED. That device was newer than Item 4.

It also had a user lock and at the time of the examination, the Cellebrite software was unable to bypass the user lock on that device because it was a new model. They had not figured out how to get around the lock yet.

So at that point, I wasn't able to download the internal memory of the device, so I removed the eight gigabit micro SD card and made an image of that which means I made a copy of it through what we call a write block device so my examination computer wouldn't alter the memory card after I removed it from the phone.

And then the image of the card, there was a copy, mirror copy of the SD card was examined with my picture and video analysis software called Net Clean, and that allowed me to review all the images and videos on the card and compile them into a report.

And on that card, I compiled nine videos of young males attempting to have sexual intercourse with a young female. And I also have several still images I do believe of the young males on this device, as well.

Q. Okay. Can you explain a little bit more detail what a write blocker is?

A. The write block device is a piece of hardware that

Exhibit #1

Trial Record Cuyahoga County, Ohio Court of Common Pleas

Supreme Court of Ohio Memorandum IN SUPPORT Case

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTION QUESTION.

~~This case involves three important issues for an accused person of a crime.~~ 1)Whether counsel was ineffective for failing to file motion to dismiss. 2)Whether the appellant's speedy trial rights were violated. 3)Whether trial court failed to make necessary findings to impose consecutive sentences. The court of appeals held that the appellant has not demonstrated that she was prejudiced by asserted failure. (see) paragraph 49 opinion Prejudiced requires a showing to a reasonable probability that, but for counsels unprofessional errors, the result of the proceeding would have been different. State v. Rankston, 8th District. Cuyahoga No. 92777 2010 Ohio 1576 paragraph 55. The court of appeals undermines the degree of control the accused have when filing an appeal. In many instances, counsel do not disclose pertinent information as to ineffectiveness, defieient performance, or misconduct. Regarding speedy trial rights, the court of appeals states, "we cannot and will not allow a defendant to purposefully manipulate our system of justice by refusing to cooperate in his or her own defense to invoke a dismissal of charges. The speedy trial right is not designed to serve as a sword to escape" pgh 38 opinion The court of appeals statement is based upon assumption and not the law. Speedy trial right affect thousands of people who are incarcerated and the court should have applied proper findings.

Exhibit 2

Supreme Court of Ohio Memorandum In Support

~~Also, there is the issue of unlawful detainment, in which, the appellant remains incarcerated to further police investigation. Due to the complexity of the issues in this case, it was difficult to work with defense counsels'. As a result, the appellant anddcodefendant did not receive a fair trial. The court of appeals analysis of this case is insufficient and there is a great need for a thorough review by the Ohio Supreme Court.~~

Exhibit 2

Supreme Court of Ohio Memorandum In Support

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

I. Ineffective counsel for failing to file Motion to dismiss II. Appellant was denied her right to speedy trial R.C. 2945.71. III. Trial court failed to make necessary findings to impose consecutive sentences.

A defendant's Sixth Amendment right to counsel is violated if 1) Counsel's representation fell below an objective standard of reasonableness. 2) Counsel's deficient performance prejudiced the defendant. I.d. at 687. Counsel states in appellant brief, "that the appellant was prejudiced by the joinder, thus giving counsel reason to file a motion to sever." The speedy trial time expired almost three years prior to codefendant being added, although the speedy trial time was tolled due to evaluations. Every assigned counsel failed to demand a dismissal. In this case a motion to sever is unreasonable since Ohio Cr. R. Procedures 14 discusses, "if a defendant is prejudiced by joinder... The court shall order separate trials, grant severance... or provide such relief. If a motion is granted the prosecuting attorney shall deliver any statements or confessions to the court -." The speedy trial rights were violated and had counsel filed to dismiss the outcome would have been significantly different. On 12/18/2015, the appellant appeared in court, but counsel faile -d to inform appellant the court ordered her sent to court psychiatric clinic. Again on 1/19/2016 the appellant appeared

Exhibit 2

Supreme Court of Ohio Memorandum IN Support

in court which was not journalized, and on 1/20/2016 the court ordered appellant transported to Northcoast Behavioral for an evaluation. Counsel failed to inform appellant. The appellant received information from a third party that the case had been closed since September 2014. The appellant was in process to reporting misconduct by the psychiatric director for psychological coercion. Appellant was reindicted on 2/18/2016 based upon the same facts. Tr. p.57. Forrallegatëons in a previous indictment th -e speedy trial period resumes it does not reset. An appellate court must construe the statutes strictly against the State of Ohio when reviewing the legal issues in a speedy trial claim. Moreover, in analyzing the procedural timeline record of a case, a court is required to strictly construe ambiguity in the record in favor of the accused. (see) e.g. State v. Blackburn 118 Ohio St. 3d 163. Regarding consecutive sentences, the court of appeals find that the appellant offers, "the trial court failed to make proportionality finding on the record that the imposition of consecutive sentences was not disproportionate to the seriousness of the conduct and the danger posed to the public." prgh 70 journal & opinion. The appellant received an aggregate sentence of 139 years with possibility of parole. The appellant have notprior criminal history, and at sentencing counsel on the record states, "the appellant had employment and received a college degree!"

Exhibit 2

Court of Appeals of Ohio

Exhibit 3

STATEMENT OF THE FACTS

Appellant Brief

Appellant was arrested on August 5, 2014. Throughout the pretrial process, Appellant had four different court appointed attorneys. Tr. p. 59. The State of Ohio, after discovering new evidence, re-indicted Appellant. Tr. p. 57. However, the re-indictment was based upon the same essential facts. The new evidence was the fruit of a forensic investigation of previously seized electronics. *Id.* The new indictment also included a previously unindicted co-defendant. *Id.* After years of pretrials, a trial date of January 23, 2017 was set. Tr. p. 49. The trial date was eventually continued to April 3, 2017. Tr. p. 56.

Prior to trial, counsel for Appellant filed a Motion to Dismiss based on the violation of Appellant's right to a speedy trial. Tr. p. 71. The trial court denied Appellant's motion on April 3, 2017. Tr. p. 78. The scheduled day of trial, Appellant's co-defendant, Andre Boynton, fired his counsel. Tr. p. 102. The trial court initially decided that Mr. Boynton's case would be continued so that he could obtain new counsel. Tr. p. 105. However, the court then decided that Appellant's case would also be continued, over the objection of counsel. Tr. p. 111. Trial was then scheduled for July 17, 2017.

Trial actually began on July 24, 2017. Prior to empaneling a jury, the court held a competency hearing relative to A.B., an underage victim named in the indictment. Tr. p. 170-82. The court ruled A.B. was incompetent to testify without objection from the State or Appellant. Tr. p. 182-3. A jury was selected and sworn in on July 26, 2017. Tr. p. 715. After the jury was in place, the State of Ohio moved to amend the indictment. Tr. p. 751. The State moved to amend the indictment so counts one through eighty-four had the same date range, which meant reducing the date range on some counts by one year. *Id.* The State also requested that counts 137 through 148 be amended to allege the incidents occurred in 2014, not 2013 as the initial

Exhibit 3 Court of Appeals of Ohio Appellant Brief

indictment indicated. Tr. p. 752. The court granted the State's motion over Counsel's objection. Tr. p. 752, 754.

The State's first witness was Detective Cynthia Bazilius of the Cleveland Police Department. Tr. p. 788. Detective Bazilius testified that once she was assigned the case, she spoke with all of the juvenile victims, as well as their parents or guardians. Tr. p. 791-3. She also testified that several of the victims led her to Appellant's home and identified Appellant's vehicle in the parking lot. Tr. p. 793-5. Detective Bazilius also detailed her investigation at Greenbrier Health Care Facility, Appellant's former place of employment, which began after photos of nude elderly persons were recovered from a device found in Appellant's residence. Tr. p. 840-1. Finally, the State played several phone calls for the Detective, wherein the Detective identified the parties of the calls to be Appellant and her co-defendant. *See* Tr. p. 847-58.

The State's second witness was Aaron Alexander, an investigator at North Central Correctional Complex. Tr. p. 872. Mr. Alexander testified that Ohio prisons use the phone provider Global Tel Link and that all inmates make phone calls by entering their identification numbers and assigned pins. Tr. p. 873-4. He stated that he was able to track phone calls based on these unique numbers and able to learn what number received the call and when through the records kept by Global Tel Link. Tr. p. 878-9. Throughout his testimony, Mr. Alexander identified several calls played for him by the State based on the records kept on the GTL system.

On cross-examination, Mr. Alexander admitted that all of the phone records with their identifying information were generated by Global Tel Link. Tr. p. 946. He also stated that all of the records he had testified to were, in fact, Global Tel Link Records, a company by which he had never been employed. Tr. p. 947-8. At the end of Mr. Alexander's testimony, counsel moved to strike the testimony as Mr. Alexander was not the custodian of Global Tel Link's

Court of Appeals of Ohio

Appelle Brief

Exhibit 3

On August 3, Appellant was deemed restored to competency and ordered back from Northcoast. On October 1, 2015, the State and the Defense stipulated to the restoration of competency report. On October 2, the Court granted the defendant's motion to disqualify counsel and a new attorney, Reuben Sheperd, was appointed to represent the defendant.

On December 18, 2015, defendant was again referred to the Court Psychiatric Clinic, this time for an evaluation as to sanity at the time of the act. On January 20, 2016, the Court journalized that the Appellant was not cooperative with the Court Psychiatric Clinic and she was again referred to Northcoast for restoration of competency. This tolled speedy trial time.

In the interim, Appellant was re-indicted in case number 603301. Appellant was re-indicted to include numerous offenses relating to child pornography that were discovered when searches were executed on her electronic devices. It was also discovered that Appellant had a co-conspirator, and new indictment included the co-defendant, Andre Boynton.

Counsel for the defendant demanded discovery via the web portal. The State filed its Notice of Receipt of Demand for Discovery on February 3, 2016. The State filed its response on March 25, 2016. The State also filed a Demand for Discovery on that date that went unanswered.

On July 13, counsel of record Reuben Sheperd was permitted to withdraw. On July 28, 2016, the court assigned attorney James McDonnell to represent Appellant. There were two pretrials set with the Appellant's new attorney and on September 1, 2016, a trial date of January 23, 2017, was set at the request of the defendant.

There are then numerous journal entries ordering the defendant transported to court by any means necessary. These were necessitated by the Appellant's refusal to come to court and to cooperate with her attorneys making it difficult to move the case forward even though the state

Exhibit 3 Court of Appeals of Ohio Appellee Brief

repeatedly asserted that it was ready to proceed to trial. See entries dated September 22, 2016, October 28, 2016.

A pretrial was scheduled for January 10, 2017. This pretrial was not held as counsel for the Appellant was engaged in trial. The matter was continued to February 2, 2017 and the January 23, 2017, trial date was continued at the request of the defense.

Thereafter attorney McDonnel withdrew from the case due to the breakdown of communication with Appellant and attorney Jaye Schlachet was appointed to represent the defendant. A new trial date of April 3, 2017, was at the request of the defense.

Appellant's own actions necessitated the delays in this matter. Appellant served twenty-nine days in jail before the first request for continuance. When Appellant went to trial, three years later, after the dozens of continuances at Appellant's request, the speedy trial clock had not exceeded the ninety-day limit.

Appellant argues the multiple continuances made by Appellant's counsel were objected to and not at her request. But, Appellant never asserted the right to represent herself, thus was represented by her appointed counsel. A motion for continuance is considered an effective trial strategy, especially when made for trial preparation, even if the continuance is filed without the defendant's consent. *State v. Wyley*, 8th Dist. Cuyahoga No. 102889, 2016-Ohio-1118, ¶ 35. In this case, although Appellant did not consent to every continuance made, it is clear they were made by counsel as a trial strategy. Counsel moved for continuances for ongoing discovery, psychiatric reports, and further defense investigation. Simply because Appellant did not consent to every continuance does not infringe on her speedy trial rights. Counsel advocated for Appellant diligently throughout the trial, despite the difficulty Appellant had with the multiple counsel that was appointed. Thus, Appellant's trial strategy began during the pretrial stages and was applied in

Exhibit 4

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: August 29, 2022

Anika George
Dayton Correctional Institution
P.O. Box 17399
Dayton, OH 45418

Re: Case No. 22-3168, *Anika George v. Shelbie Smith*
Originating Case No.: 1:20-cv-00957

Dear Mr. George,

The enclosed petition for rehearing en banc is being returned to you unfiled.

Neither the Federal Rules of Appellate procedure nor the Rules of the Sixth Circuit make any provision for filing successive petitions for rehearing. Your petition for rehearing en banc filed on July 28, 2022, is pending. Therefore, the enclosed petition for rehearing en banc is not accepted for filing.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Ms. Maura O'Neill Jaite

Exhibit 5

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: September 13, 2022

Anika George
Dayton Correctional Institution
P.O. Box 17399
Dayton, OH 45418

Re: Case No. 22-3168, *Anika George v. Shelbie Smith*
Originating Case No.: 1:20-cv-00957

Dear Ms. George,

The enclosed motion for reconsideration is being returned to you unfiled.

Neither the Federal Rules of Appellate Procedure nor the Rules of the Sixth Circuit make any provision for reconsideration of a letter returning an unfiled successive petition for rehearing en banc.

~~You may not receive any additional correspondence regarding this matter.~~

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

~~cc: Ms. Maura O'Neill Leite~~

Letter sent to court regarding clerical error
Returned by court unfiled

RECEIVED

SEP 1 2 2022

DEBORAH S. HUNT, Clerk

Exhibit 6

September 7, 2022

To: Office of the Clerk

Re: Case No: 22-3168 Anika George v. Shelbie Smith
Originating Case No.: 1:20-cv-00957

Enclosed is a copy of the letter that the court granted the motion for an extension of time to file a Petition for Panel Rehearing and/or rehearing en banc July 28, 2022. Your office received the petition for Panel Rehearing and/or Rehearing en banc on August 29, 2022 and was returned to the appellant unfiled. Please accept and file this petition received August 29, 2022 as the initial petition for review. Thank You

Respectfully submitted,

Anika George

Exhibit 7

General Docket
United States Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 22-3168 **Docketed:** 03/02/2022
Nature of Suit: 3530 Prisoner: Habeas Corpus **Termed:** 06/23/2022
Anika George v. Shelbie Smith
Appeal From: Northern District of Ohio at Cleveland
Fee Status: In Forma Pauperis

Case Type Information:
1) Prisoner
2) State
3) Habeas Corpus

Originating Court Information:
District: 0647-1 : 1:20-cv-00957
Trial Judge: James G. Carr, U.S. District Judge
Date Filed: 05/04/2020
Date Order/Judgment: 02/17/2022
Date NOA Filed: 02/28/2022

Prior Cases:
None

Current Cases:
None

ANIKA GEORGE (State Prisoner: #099190) Petitioner - Appellant	Anika George [NTC Pro Se] Dayton Correctional Institution P.O. Box 17399 Dayton, OH 45418
v.	
SHELBIE SMITH, Warden Respondent - Appellee	Maura O'Neill Jaite, Assistant Attorney General Direct: 614-466-1739 [COR LD NTC Retained] Office of the Attorney General of Ohio 30 E. Broad Street 23rd Floor Columbus, OH 43215

ANIKA GEORGE

Petitioner - Appellant

U.S. Court of Appeals for The Sixth Circuit

General Docket
U.S. Court of Appeals for The Sixth Circuit

Exhibit 7

v.

SHELBIE SMITH, Warden

Respondent - Appellee

	Document #	
03/02/2022	☐ 1 (2 pg, 92.28 KB)	Prisoner Case Docketed with certificate of appealability denied. Notice filed by Appellant Anika George. Transcript needed: n. (REO) [Entered: 03/02/2022 11:03 AM]
03/02/2022	☐ 2	The case manager for this case is: Ryan Orme (REO) [Entered: 03/02/2022 11:06 AM]
03/02/2022	☐ 3 (1 pg, 100.14 KB)	APPEARANCE filed for Appellee Shelbie Smith by Maura O'Neill Jaite. Certificate of Service: 03/02/2022. [22-3168] (MOJ) [Entered: 03/02/2022 11:30 AM]
03/16/2022	☐ 4 (3 pg, 418.79 KB)	CORRESPONDENCE: regarding certificate of appealability and pauper status by Anika George. (REO) [Entered: 03/16/2022 03:11 PM]
03/16/2022	☐ 5 (1 pg, 85.41 KB)	LETTER SENT to Anika George, regarding certificate of appealability and pauper status. (REO) [Entered: 03/16/2022 03:11 PM]
03/23/2022	☐ 6 (7 pg, 268.39 KB)	Appellant MOTION filed by Anika George to grant a certificate of appealability. (REO) [Entered: 03/24/2022 01:40 PM]
03/25/2022	☐ 7 (2 pg, 312.1 KB)	CORRESPONDENCE: regarding prison mail by Anika George. (REO) [Entered: 03/25/2022 02:18 PM]
03/30/2022	☐ 8 (11 pg, 203.91 KB)	RESPONSE in opposition filed regarding a motion, [6]; previously filed by Anika George. Response from Attorney Ms. Maura O'Neill Jaite for Appellee Shelbie Smith. Certificate of Service: 03/30/2022. [22-3168] (MOJ) [Entered: 03/30/2022 01:01 PM]
04/08/2022	☐ 9 (5 pg, 406.11 KB)	REPLY filed by Anika George regarding motion to grant a certificate of appealability. (REO) [Entered: 04/08/2022 02:36 PM]
04/13/2022	☐ 10 (2 pg, 201.92 KB)	CORRESPONDENCE: request for copies of previously filed document by Anika George. (REO) [Entered: 04/13/2022 04:06 PM]
06/23/2022	☐ 11 (5 pg, 192.89 KB)	ORDER filed denying a certificate of appealability. Danny J. Boggs, Circuit Judge. (REO) [Entered: 06/23/2022 11:10 AM]
06/23/2022	☐ 12 (1 pg, 44.91 KB)	ENTRY OF JUDGMENT. (REO) [Entered: 06/23/2022 11:17 AM]
07/18/2022	☐ 13 (3 pg, 186.33 KB)	TENDERED Late Petition for Rehearing En Banc. Received from Party Anika George. (REO) [Entered: 07/18/2022 03:21 PM]
* 07/25/2022	☑ 14 (5 pg, 199.7 KB)	Appellant MOTION filed to extend time to file petition for rehearing en banc. Certificate of service: 07/13/2022. (REO) [Entered: 07/25/2022 03:05 PM]

* Motion to extend time to file petition for rehearing en banc and Certificate of Service filed 7/25/2022 Document 14

U.S. Court of Appeals For The Sixth Circuit
General Docket

22-3168

Exhibit

07/28/2022	☐ 15 1 pg, 87.18 KB	RULING LETTER SENT granting motion to extend time to file en banc petition [14]. (REO) [Entered: 07/28/2022 02:26 PM]
* 07/28/2022	☑ 16 3 pg, 186.33 KB	PETITION for en banc rehearing filed by Anika George. Certificate of Service: 07/13/2022. (REO) [Entered: 07/28/2022 02:35 PM]
* 08/29/2022	☑ 17 20 pg, 1.08 MB	LETTER SENT to Anika George, returning unfiled petition for rehearing en banc. Petition for rehearing en bamc previously filed on 07/28/2022. (BLH) [Entered: 08/29/2022 01:45 PM]
* 08/31/2022	☑ 18 2 pg, 128.53 KB	ORDER filed regarding en banc petition. The panel adheres to its original decision. The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing. Entered by order of the court. (BLH) [Entered: 08/31/2022 02:50 PM]
* 09/13/2022	☑ 19 27 pg, 3.58 MB	LETTER SENT to Anika George, returning unfiled motion for reconsideration of the 08/29/2022 letter returning unfiled successive petition for rehearing en banc. (BLH) [Entered: 09/13/2022 07:23 AM]
* 09/15/2022	☑ 20 2 pg, 144.1 KB	ORDER filed denying petition for en banc rehearing [16] filed by Anika George. Jeffrey S. Sutton, Chief Circuit Judge; Ralph B. Guy, Jr. and R. Guy Cole, Jr., Circuit Judges. (BLH) [Entered: 09/15/2022 10:17 AM]
09/22/2022	☐ 21 2 pg, 201.15 KB	CORRESPONDENCE: requesting docket sheet by Anika George. (REO) [Entered: 09/22/2022 03:43 PM]

* Certificate of Service filed again on 7/28/2022 but was entered as Petition for en banc rehearing Document 16 3 pages

* Court returned petition for rehearing en banc unfiled 20 pages document 17 on 8/29/2022

8/31/2022 * Court issued order denying petition for rehearing en banc document 18

9/13/2022 * Court returned motion for reconsideration unfiled document 19

9/15/2022 * Court issued order denying petition for en banc rehearing, petition never was filed by the clerk. document 20

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANIKA GEORGE Plaintiff-Appellee	Case No.: 22-3168
v.	Originating Case No.: 1:20-cv-00957
WARDEN SHELBIE SMITH Defendant-Appellant	

MOTION TO GRANT CERTIFICATE OF APPEALABILITY

Anika George constitutes the following reasons for the United States Court of Appeals to grant a Certificate of Appealability.

Respectfully submitted,

Anika George

Anika George, pro se
Dayton Correctional Institution
P.O. Box 17399
Dayton, Ohio 45418

Exhibit #8

U.S. Court of Appeals

Motion To Grant Certificate of Appealability

On May 4, 2020 the plaintiff-appellee files a writ of habeas corpus for relief in the Northern District Court of Ohio. The district court determined George's Ground One claim of Unlawful Imprisonment under Color of Authority is procedurally defaulted because George did not raise it on direct appeal and George did not object to the Respondent's Return of Writ. February 17, 2022 the district court denied and dismissed, with prejudice the habeas petition. The district court's assumption is that the habeas claim is based on speedy trial violation. However, the habeas claim Unlawful Imprisonment under Color of Authority is based on facts that George has been wrongfully convicted. Therefore, the issue George raises to the U.S. Court of Appeals is her due process rights under the Fourteenth Amendment were violated. George has been prejudiced by the judicial system and has not been afforded the opportunity to demonstrate constitutional violations as a pro se individual. These are the facts of the case. George was arrested August 5, 2014. September 2, 2014, Thomas Shaughnessy is appointed as counsel. November 2014, George is advised by counsel to meet psychologist Dr. John Fabian to complete an evaluation. Counsel retained Dr. Fabian to obtain a confession from George who refused to answer the psychologist's inappropriate questions regarding the children in the case. May 25, 2015 trial court

Exhibit 8

orders George to be transported to NorthCoast Behavioral Health for competency to stand trial. September 2015, George completed the evaluation and is transported to the county jail. October 1, 2015, George and counsel appear at a hearing and Thomas Shaughnessy is disqualified. October 2, 2015 Reuben Sheperd is appointed as counsel George expressed concern to Mr. Sheperd regarding his representation on the case since Mr. Sheperd works in the same law office with Thomas Shaughnessy. Mr. Sheperd remained as counsel until July 13, 2016. December 18, 2015 the trial judge retires from the case. January 20, 2016 George is ordered to be transported to Northcoast Behavioral Health for restoration of competency. January 29, 2016 George meet psychiatric director Dr. Soliman for an evaluation. Dr. Soliman asked George to sign paperwork to transfer to another facility in Columbus, OH if George prefer not to complete the evaluation at NorthCoast Behavioral. George refused to sign the paperwork which she would have been voluntarily committed. on February 3, 2016 Dr. Soliman engages in unprofessional conduct by stating a derogatory remark about children to George after she refuses to complete his evaluation. George proceeded unsuccessfully to contact the Ohio Department of Mental Health to make a complaint against Dr. Soliman. George contacted her Power of Attorney Mrs. Hill to report the incident with Dr. Soliman. Mrs. Hill could not contact

Exhibit 8

US Court of Appeals
Motion To Grant Certificate of Appealability

a representative at the Ohio Department of Mental Health. George contacts another government entity in Cuyahoga County and is informed that the criminal case had been closed since September 2014. Another representative verified that the case in fact had been closed. George tells another patient at Northcoast Tatianna Johnson that the case is closed and George is being held illegally in jail. George met Ms. Johnson in Cuyahoga County Jail in 2015 and Ms. Johnson may have been a government witness. George witness another patient Ms. Cruz or Cruise state while on a phone conversation that George is gonna sue the Cleveland Police Department, Cuyahoga County Jail and the State of Ohio. Ms. Cruz OR Cruise was a government witness. February 23, 2016 Ms. Cruz sat next to George in the Cuyahoga County Jail after George returned from NorthCoast Behavioral. A female officer motioned to Ms. Cruz to walk away after Ms Cruz asked George her name. Ms. Cruz walked towards the officer who asked Ms Cruz if she got George's name. On February 3, 2016 counsel Reuben Sheperd filed a request for discovery. On February 18, 2016 George is reindicted on 150 counts and Andre Boynton is added as codefendant. Mr. Boynton was transported to the Cuyahoga County Jail in March 2016 from a state correctional facility where he had been incarcerated since 2009 or 2010. Assistant Prosecutor Kristen Karkutt was the prosecutor for Mr.

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Exhibit 8

Boynton's 2008 case in which George testified as a witness for the defense. Kristen Karkutt was the assistant prosecutor for the 2016 case when George was reindicted. February 3, 2016. George discovered the criminal case had been closed since September 2014 one month after her arrest. The State moves to issue a reindictment for George and added Boynton as a codefendant. Defense counsel Reuben Sheperd filed a request for discovery. Therefore, trial counsel's failure to provide a reasonable defense against prosecutorial misconduct resulted in the conviction of Anika George. George had been incarcerated for nearly three years awaiting trial and four attorneys had been appointed throughout this time period. January 24, 2017 James J. McDonnell is appointed as counsel and July 28, 2017 Jay Schlachet is appointed. Counsel never informed George that the criminal case had been closed. In July 2017, a male detective came to the jail pod where George resided to offer George a plea deal in exchange for testimony against the codefendant. George was inside the cell under camera inspection and did not respond to the offer. George contends to the United States Court of Appeals that her due process rights were violated. The district court abused its discretion to review the habeas petition in totality, rather than in isolation. November 26, 2019 The Supreme Court of

Exhibit 8

Motion To Grant Certificate of Appealability
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Ohio decline to accept jurisdiction without an opinion after George filed a Memorandum in Support of Jurisdiction raising three Constitutional issues 1) Ineffective Counsel for Failing to File a Motion To Dismiss. 2) Appellant was denied her Right to a Speedy Trial. 3) Trial Court Failed to Make Necessary Findings to Impose Consecutive Sentences. Therefore, the controversy surrounding the case have overshadowed the necessity to address the constitutional violations. The appellant have been prejudiced to present her claim(s) with merit. Therefore, the plaintiff-appellee sends this motion to grant a Certificate of Appealability.

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US Court of Appeals

United States Court of Appeals

ARGUMENT Petition FOR Rehearing en banc

1) Rhode v. United States

Ms. Anika George, the appellant claimed in her habeas 2254 petition that her conviction is the result of the misconduct in the criminal case. The Ground one claim of Unlawful Imprisonment Under Color of Authority of the United States was denied by the District Court without addressing all claims for relief raised in a petition for writ of habeas corpus prior to granting or denying relief. See Rhode v. United States, 583 F. 3d 1289, 1291 (11th Cir. 2009) Ms. George filed a motion to Grant a Certificate of Appealability in the U.S. Court of Appeals, claiming the district court's violation of Due Process Clause of the Fourteenth Amendment.

The district court states in its Report and Recommendation "George's Ground one claim is best construed as raising a substantive claim that her speedy trial rights were violated. George hasn't specified, however, whether she contends she's being held in violation of the Sixth Amendment guarantee to a speedy trial or whether she's being held in violation of Ohio's speedy trial statute (or both)." "Holding that an argument for relief based solely on a violation of Ohio's speedy trial statute... does not present a cognizable federal constitutional claims subject to review in this proceeding. George's Ground one claim is cognizable, however, to the extent she claims that the delay between her arrest and trial violated her speedy trial rights under the Sixth Amendment."

The law provides that under 28 U.S.C.S section 2254 (a). The Supreme Court, Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a person in custody pursuant to the judgment of a State Court only on the grounds that he is in custody in violation of the Constitution, or laws, or treaties of the United States.

In the habeas petition Ms. George states 'that she was incarcerated

Exibit 9

for nearly three years", for further prosecution. George was sent to Northcoast Behavioral Health January 2016 for a competency evaluation. While at the facility she contacted a government agency in her county and was informed by a representative that the criminal case have been closed since September 2014. A government witness informed the prosecution about this information regarding the case. Counsel for the defendant demanded discovery and the State filed its Notice of Receipt of Demand for Discovery February 3, 2016. M.S. George was reindicted in February 2016 on additional false charges not contained in the original indictment and on charges that were in the original indictment. The State contends, appellant was reindicted to include numerous offenses relating to child pornography that were discovered when searches were executed on her electronic devices.

An expert witness for the State testified at trial that he examined electronic devices involving the appellant in 2014 and found partially nude females, several images of the genitalia of elderly persons, nude photos of young males and images of young males attempting to have sex with a young female. However, the State issued the reindictment two and a half years later based upon false statements by the alleged victims and expert witness testimony to convict the appellant. See Pyle v. Kansas, 317 U.S. 213 . The State's next expert witness testified at trial that a detective contacted him to retrieve phone conversations between the appellant and codefendant who was added to the indictment in 2016. The witness work at the prison facility where the codefendant resided. The appellant's due process under the Fourteenth Amendment were violated for unlawful imprisonment for false statements and testimony. The appellant's right to effective counsel was violated under the Sixth Amendment for counsel's failure to provide an adequate defense against prosecutorial misconduct and counsel's own misconduct for abandonment at trial by failing to object to false testimony and evidence because all four defense counsels for the appellant, viewed the discovery before

Exhibit 9

process by first deciding its denial of a C.O.A based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction."

3) Werts v. Vaughn

Ms. George claimed in her Section 2254 petition that her conviction is unlawful under color of Authority of the United States. The district court denied her habeas petition as procedurally defaulted. The appellant filed a motion in this court for a certificate of Appealability. The panel found no further review is needed because her due process argument is procedurally defaulted.

In Werts v. Vaughn, 228 F. 3d 178 the court held: In the context of exhaustion of remedies in a habeas corpus matter, a petitioner who has raised an issue on direct appeals is not required to raise it again in a State post-conviction proceeding. The federal habeas claim must have been "fairly presented" to the state courts. See 28 U.S.C.S Section (b)(1)(A) In Werts, the Third Circuit explained: If the petitioner fails to demonstrate cause and prejudice for the default, the federal habeas court may still review an otherwise procedurally defaulted claim upon showing that failure to review the federal habeas claim will result in a "miscarriage of justice."

Ms. George presented her claim of unlawful detainment to the Supreme Court of Ohio under Ineffective Assistance of Counsel in which she was illegally held to further police investigation [which resulted in her conviction]. The Supreme Court declined to accept jurisdiction without opinion to address the constitutional violations. The appellant filed a timely habeas 2254 petition in the district court. (federal)

trial began.

The failure by the District court to address all constitutional violations is abuse of discretion. Statute 14 of the Judiciary Act I provides: Any incarcerated person who claims Unlawful Imprisonment Under Color of Authority of the United States has the fullest redress in the United States Courts, that such a person has a constitutional right to apply for relief from illegal confinement and that it is the duty of the federal courts to exhaust all of their power to enforce that application.

a) Buck v. Davis

Ms. George claimed in her section 2254 petition that her conviction unlawful. After the District Court denied her relief from confinement, Ms. George filed a Motion for Certificate of Appealability because the panel in this court found that she raised her due process argument for the first time in her C.O.A application and it was deemed as forfeited before this court. Ms. George declares that the panel's decision is in error because it is contrary to the United States Supreme Court precedent.

In Buck v. Davis 580 U.S. 100 (5th Cir. Feb. 22, 2017) the Supreme Court held that the Fifth Circuit exceeded the limited scope of the C.O.A. analysis. The Certificate of Appealability statute sets forth a two-step process: An initial determination whether a claim is reasonably debatable, and then if it is, an appeal in the normal course. Chief Justice Roberts held that the C.O.A. "inquiry is not coextensive with a merit analysis. The only question is whether the applicant has shown that jurists of reason could agree with the District Court's resolution of his constitutional claims or that jurists could conclude issues presented are adequate to deserve encouragement to proceed further... This question should be decided without full consideration of the factual or legal basis adduced in support of the claims, when a Court of Appeals sidesteps the C.O.A.

Exhibit 9

APPENDIX A

UNITED STATES COURT OF APPEALS JUDGMENT ORDER FOR CERTIFICATE OF APPEALABILITY FOR REVIEW

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-3168

ANIKA GEORGE,

Petitioner-Appellant,

v.

SHELBIE SMITH, Warden,

Respondent-Appellee.

Before: BOGGS, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Anika George for a certificate of appealability.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the application for a certificate of appealability is DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 22-3168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANIKA GEORGE,

Petitioner-Appellant,

v.

SHELBIE SMITH, Warden,

Respondent-Appellee.

ORDER

Before: BOGGS, Circuit Judge.

Anika George, a pro se Ohio prisoner, appeals the district court's judgment denying her petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. She has filed an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(1).

In August 2017, an Ohio jury convicted George and her longtime boyfriend of 117 charges related to the sexual abuse of five children. The trial court sentenced George to life imprisonment with the possibility of parole after 139 years. On direct appeal, George argued that (1) she was denied her right to a speedy trial under Ohio Revised Code § 2945.71, (2) trial counsel rendered ineffective assistance by not moving to sever her trial from her boyfriend's trial, (3) the admission of unauthenticated prison telephone calls and records violated her rights under the Sixth Amendment's Confrontation Clause, and (4) the trial court failed to make the necessary findings to impose consecutive sentences. The Ohio Court of Appeals affirmed George's convictions and sentence. *State v. George*, No. 106317, 2018 WL 6721245, at *11 (Ohio Ct. App. Dec. 20, 2018).

George did not attempt to timely appeal to the Ohio Supreme Court. However, in September 2019, the Ohio Supreme Court granted George leave to file a delayed appeal. She thereafter filed a memorandum in support of jurisdiction, in which she sought to claim that (1) trial counsel was ineffective for not filing a motion to dismiss the indictment on speedy-trial grounds;

(2) her speedy-trial rights were violated, and (3) the trial court failed to make the necessary findings to impose consecutive sentences. The Ohio Supreme Court declined to accept jurisdiction. *State v. George*, 134 N.E.3d 1212 (Ohio 2019) (table).

In April 2020, George filed a § 2254 petition, asserting that she is "Unlawful[ly] Imprison[ed] under Color of Authority of the United States." Although George did not specify on what basis her confinement is unlawful, she noted that she "had been incarcerated nearly three years before trial beg[a]n [on] July 24, 2017," and indicated that she had raised her habeas claim as an ineffective-assistance-of-trial-counsel claim in her memorandum in support of jurisdiction to the Ohio Supreme Court. The magistrate judge thus construed George's habeas petition as reasserting the speedy-trial claim that she had raised in the Ohio appellate courts. The magistrate judge recommended that George's petition be denied on the grounds that her construed claim was procedurally defaulted, non-cognizable, and without merit. George did not file objections to the magistrate judge's report and recommendation. The district court noted George's failure to object but reviewed the report and recommendation de novo. The district court adopted the report, denied George's habeas petition, and declined to issue her a COA.

George now seeks a COA from this court. A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To be entitled to a COA, the movant must demonstrate "that jurists of reason could disagree with the district court's resolution of [her] constitutional claims or that jurists could conclude [that] the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. When the district court's denial is based on a procedural ruling, the petitioner must demonstrate 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).

In her COA application, George argues that the district court misconstrued her sole habeas claim. The district court understood George to be asserting that her right to a speedy trial had been

violated. The district court determined that such a claim was not cognizable on federal habeas review to the extent that it was premised on section 2945.71's requirement that an accused held in jail in lieu of bail must be brought to trial within 90 days of her arrest. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). It further determined, in part, that George's claim was procedurally defaulted to the extent that she asserted a Sixth Amendment speedy-trial claim because she did not sufficiently apprise the Ohio Supreme Court of the federal constitutional nature of that claim.

George contends that she was actually arguing that she was "wrongfully convicted" in violation of her due-process rights under the Fourteenth Amendment. But George should have clarified the nature of her habeas claim below, specifically by filing written objections to the magistrate judge's report and recommendation when she was afforded the opportunity to do so. Because George raises her due-process argument for the first time in her COA application, it is forfeited before this court and need not be reviewed. *See Hall v. Warden, Lebanon Corr. Inst.*, 662 F.3d 745, 752-53 (6th Cir. 2011) (citing *United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006)).

In any event, George's due-process claim may not proceed further because it is procedurally defaulted. To obtain federal habeas relief, a prisoner must first exhaust her state-court remedies by "giv[ing] 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, 845 (1999); *see* 28 U.S.C. § 2254(b)(1). When a petitioner has failed to exhaust her state-court remedies, "either due to the petitioner's failure to raise that claim before the state courts while state-court remedies are still available or due to a state procedural rule that prevents the state courts from reaching the merits of the petitioner's claim, that claim is procedurally defaulted." *Seymour v. Walker*, 224 F.3d 542, 550 (6th Cir. 2000). George did not advance her due-process claim in the Ohio appellate courts despite having the ability to do so, so Ohio's res judicata doctrine would bar her from raising that claim in a post-conviction proceeding. *See State v. Jackson*, 23 N.E.3d 1023, 1041 (Ohio 2014). The claim is therefore procedurally defaulted. *Seymour*, 224 F.3d at 549-50; *O'Sullivan*, 526 U.S. at 848. Although a petitioner can

overcome a procedural default by showing either cause for the default and prejudice arising therefrom or that she is actually innocent. George failed to explain, much less establish, how either option excuses her procedural default. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004); *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Accordingly, George's COA application is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS JUDGMENT ORDER FOR REHEARING EN BANC FOR REVIEW

No. 22-3168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Aug 31, 2022
DEBORAH S. HUNT, Clerk

ANIKA GEORGE,

Petitioner-Appellant,

v.

SHELBIE SMITH, WARDEN,

Respondent-Appellee.

ORDER

Before: SUTTON, Chief Judge; GUY and COLE, Circuit Judges.

Anika George, a pro se Ohio prisoner, petitions the court to rehear en banc its order denying her a certificate of appealability. The petition has been referred to this panel, on which the original deciding judge does not sit, for an initial determination on the merits of the petition for rehearing. Upon careful consideration, the panel concludes that the original deciding judge did not misapprehend or overlook any point of law or fact in issuing the order and, accordingly, declines to rehear the matter. Fed. R. App. P. 40(a).

The Clerk shall now refer the matter to all of the active members of the court for further proceedings on the suggestion for en banc rehearing.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 22-3168

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANIKA GEORGE,

Petitioner-Appellant,

v.

SHELBIE SMITH, WARDEN,

Respondent-Appellee.

ORDER

Before: SUTTON, Chief Judge; GUY and COLE, Circuit Judges.

Anika George, a pro se Ohio prisoner, petitions for rehearing en banc of this court's order entered on June 23, 2022, denying her application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*Judge Murphy recused himself from participation in this ruling.

APPENDIX C

UNITED STATES DISTRICT COURT REPORT AND RECOMMENDATION FOR REVIEW

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

ANIKA GEORGE,	)	Case No. 1:20-cv-957
	)	
Petitioner,	)	JUDGE JAMES G. CARR
	)	
v.	)	MAGISTRATE JUDGE
	)	THOMAS M. PARKER
SHELBIE SMITH, WARDEN,	)	
	)	
Respondent.	)	**REPORT AND**
	)	**RECOMMENDATION**[1]

Between June 29, 2014 and her arrest on August 5, 2014, Anika George sexually abused, instigated the sexual abuse, and recorded the sexual abuse of five minor children. She'd also surreptitiously recorded patients under her care at a nursing home. Following a trial, George was found guilty on charges of human trafficking, conspiracy, rape, kidnapping, unlawful sexual conduct with a minor, endangering children, pandering sexually oriented matter involving a minor, illegal use of a minor in nudity-oriented material or performance, and voyeurism. And George was sentenced to 139 years to life imprisonment.

George, pro se, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 (ECF Doc.1) raising one ground for relief: "Unlawful Imprisonment under Color of Authority of the United States." ECF Doc. 1 at 5-9. Respondent, Warden Shelbie Smith, filed a return of writ. ECF Doc. 10. George moved for appointment of counsel, which the court denied. ECF Doc. 11;

[1] This matter is before me by an automatic order of reference under Local Rule 72.2 for preparation of a report and recommendation pursuant to Local Rule 72.1.

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

ANIKA GEORGE,	)	Case No. 1:20-cv-957
	)	
Petitioner,	)	JUDGE JAMES G. CARR
	)	
v.	)	MAGISTRATE JUDGE
	)	THOMAS M. PARKER
SHELBIE SMITH, WARDEN,	)	
	)	
Respondent.	)	**REPORT AND**
	)	**RECOMMENDATION**[1]

Between June 29, 2014 and her arrest on August 5, 2014, Anika George sexually abused, instigated the sexual abuse, and recorded the sexual abuse of five minor children. She'd also surreptitiously recorded patients under her care at a nursing home. Following a trial, George was found guilty on charges of human trafficking, conspiracy, rape, kidnapping, unlawful sexual conduct with a minor, endangering children, pandering sexually oriented matter involving a minor, illegal use of a minor in nudity-oriented material or performance, and voyeurism. And George was sentenced to 139 years to life imprisonment.

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[1] This matter is before me by an automatic order of reference under Local Rule 72.2 for preparation of a report and recommendation pursuant to Local Rule 72.1.

ECF Doc. 13. Having not received any response from George to the warden's return of writ, the court established a "final deadline" for George to file her traverse, which has long since passed without a traverse being filed. ECF Doc. 14.

Because George's claim is procedurally defaulted, noncognizable, and/or lacks merit, I recommend that her claim be DISMISSED and that her petition for writ of habeas corpus be DENIED. I further recommend that George not be granted a certificate of appealability.

I. State Court History

A. Trial Court

On August 27, 2014, a Cuyahoga County, Ohio, grand jury issued a 97-count indictment, charging George with: (i) 27 counts of rape of a minor under the age of 13; (ii) 14 counts of rape of a person whose ability to resist or consent was substantially impaired because of a mental or physical condition; (iii) 14 counts of rape by threat or use of force; (iv) 1 count of gross sexual imposition of a minor under the age of 13; (v) 5 counts of kidnapping; (vi) 2 counts of compelling prostitution; (vii) 10 counts of trafficking in persons; (viii) 6 counts of unlawful sexual conduct with a minor; and (iv) 18 counts of endangering children. ECF Doc. 10-1 at 18-66. On September 2, 2014, George was appointed counsel, arraigned, and pleaded not guilty. ECF Doc. 10-1 at 67-68.

On September 4, 2014, George filed a request for a bill of particulars and a request for discovery. ECF Doc. 10-1 at 69-70, 309. On September 11, 2014, the state filed a bill of particulars, responded to George's request for discovery, and filed its own request for discovery. ECF Doc. 10-1 at 72-103. On November 11, 2014, George moved for the appointment of a psychologist to assist in her defense. ECF Doc. 10-1 at 108-09. Meanwhile, George's pretrial

conference (originally scheduled for September 5, 2014) was repeatedly continued – at George's request – until March 26, 2015. ECF Doc. 10-1 at 67-68, 71, 104-07, 110, 112-16, 119-22.

On March 26, 2015, the court held a pretrial conference, at which the court referred George to the psychiatric clinic for a competency determination. ECF Doc. 10-1 at 123. The pretrial conference was extended twice more at George's request, until May 11, 2015. ECF Doc. 10-1 at 124-25. On April 27, 2015, the psychiatric clinic issued its report. ECF Doc. 10-1 at 126. On May 11, 2015, the parties stipulated to the report and the trial court referred George to Northcoast Behavioral Healthcare for restoration of competency treatment. ECF Doc. 10-1 at 126.

On August 31, 2015, the trial court was informed that George's competency had been restored and the court scheduled a pretrial conference for September 3, 2015. ECF Doc. 10-1 at 127-28. The conference was continued at George's request until October 1, 2015. ECF Doc. 10-1 at 128-31. On October 1, 2015, the parties stipulated to George's competency to stand trial. ECF Doc. 10-1 at 132.

On October 2, 2015, George moved to disqualify counsel. ECF Doc. 10-1 at 133. The trial court granted the motion, appointed new counsel, and granted a continuance of the pretrial conference until October 6, 2015. ECF Doc. 10-1 at 133. On October 5, 2015, George filed a second request for a bill of particulars. ECF Doc. 10-1 at 134-35. The pretrial conference was also continued at her request until December 17, 2015. ECF Doc. 10-1 at 136-40.

On December 18, 2015, the trial court referred George to the psychiatric clinic a second time to determine her competency to stand trial and her sanity at the time of the offense. ECF Doc. 10-1 at 141. On January 7, 2016, the examining doctor issued his report, stating that he was unable to render an opinion because George would not cooperate with the evaluation. ECF

Doc. 10-1 at 142. On January 21, 2016, the court referred George to Northcoast Behavioral Health for an inpatient competency evaluation. ECF Doc. 10-1 at 142. The pretrial conference was continued at George's request until March 1, 2016. ECF Doc. 10-1 at 144.

On February 3, 2016, George filed a request for discovery. ECF Doc. 10-1 at 310. On February 18, 2016, a Cuyahoga County, Ohio, grand jury issued a new, 150-count indictment, charging George with: (i) 1 count of trafficking in persons; (ii) 2 counts of conspiracy; (iii) 28 counts of rape of a minor under the age of 13; (iv) 12 counts of rape of a person whose ability to resist or consent was substantially impaired by a mental or physical condition; (v) 15 counts of rape by use or threat of force; (vi) 1 count of gross sexual imposition of a minor under the age of 13; (vii) 19 counts of kidnapping; (viii) 7 counts of unlawful sexual conduct with a minor; (ix) 1 count of endangering children; (x) 8 counts of pandering sexually-oriented matter involving a minor; (xi) 42 counts of illegal use of a minor in nudity-oriented material or performance; (x) 12 counts of voyeurism; (xi) 1 count of drug possession; and (xii) 1 count of possessing criminal tools. ECF Doc. 10-1 at 145-209. The new indictment also named Andre Boynton as a codefendant. The trial court then granted George another continuance to the pretrial conference until April 4, 2016. ECF Doc. 10-1 at 213-14.

On March 25, 2016, the state responded to George's request for discovery, filed a bill of particulars, and filed a reciprocal request for discovery. ECF Doc. 10-1 at 215-54. On April 4, 2016, the trial court held a competency hearing and granted George a continuance until April 19, 2016. ECF Doc. 10-1 at 255. On April 6, 2016, the court held another competency hearing and determined that George was competent to stand trial. ECF Doc. 10-1 at 256-57. On April 19, 2016, the trial court granted the state's request to dismiss all of George's charges on the first

competent and proceeded to trial. ECF Doc. 10-1 at 330; ECF Doc. 10-3 at 39. The jury returned a verdict of not guilty on the drug possession count and guilty on 117 counts: (i) 1 count of trafficking in persons; (ii) 2 counts of conspiracy; (iii) 21 counts of rape of a minor under the age of 13; (iv) 1 count of endangering children; (v) 6 counts of kidnapping; (vi) 6 counts of unlawful sexual conduct with a minor; (vii) 9 counts of rape by use or threat of force; (viii) 8 counts of rape of someone with diminished capacity; (ix) 8 counts of pandering sexually-oriented matter involving a minor; (x) 42 counts of illegal use of a minor in nudity-oriented material or performance; (xi) 12 counts of voyeurism; and (xii) 1 count of possessing criminal tools. ECF Doc. 10-1 at 332. The court dismissed the remaining charges pursuant to the state's motion. ECF Doc. 10-1 at 331-32. And on August 25, 2017, the court sentenced George to an aggregate sentence of 139 months to life imprisonment. ECF Doc. 10-1 at 343-44.

B. Direct Appeal

On August 29, 2017, George timely appealed her convictions. ECF Doc. 10-1 at 346. Through new counsel, George filed a merits brief, asserting four assignments of error:

> 1. George was denied her right to a speedy trial under Ohio Rev. Code § 2945.71. ECF Doc. 10-1 at 352, 367-68.
>
> 2. Trial counsel was ineffective when he failed to file a motion to sever. ECF Doc. 10-1 at 352, 369-70.
>
> 3. George's confrontation rights were violated when the trial court admitted prison phone calls between her and Boynton and corresponding phone records. ECF Doc. 10-1 at 352, 371-72.
>
> 4. The trial court failed to make the required statutory findings before imposing consecutive sentences. ECF Doc. 10-1 at 352, 372-74.

Relevant to her current petition is George's first assignment of error, in support of which she argued that her speedy trial rights were violated because more than 270 days transpired between her initial arrest on August 5, 2014 and her trial on July 24, 2017. ECF Doc. 10-1 at

indictment. ECF Doc. 10-1 at 258. The court then granted George a continuance of the pretrial conference until July 28, 2016. ECF Doc. 10-1 at 259-60.

On June 15, 2016, counsel moved to withdraw, which the court granted on July 13, 2016. ECF Doc. 10-1 at 261-63. On July 28, 2014, George was appointed new counsel and she filed a demand for discovery. ECF Doc. 10-1 at 264-68. The court then granted George a continuance of the pretrial conference until September 22, 2016. ECF Doc. 10-1 at 268-71. At the September 22, 2016 conference, the court scheduled trial for January 23, 2017 and continued the conference at George's request until October 28, 2016. ECF Doc. 10-1 at 272.

On December 2, 2016, George, pro se, filed a motion "for discharge of defendant," based on an alleged violation of her speedy trial rights. ECF Doc. 10-1 at 273-79. The court did not rule on the motion until November 14, 2019, when it denied the motion as moot. ECF Doc. 10-1 at 286.

On January 5, 2017, the court set a "first" pretrial conference for January 10, 2017. ECF Doc. 10-1 at 287. The court then granted George a continuance, resetting the trial for April 3, 2017. ECF Doc. 10-1 at 288-89. On January 24, 2017, George's attorney moved to withdraw, and new counsel was appointed. ECF Doc. 10-1 at 290. The court set the pretrial conference for February 2, 2017. ECF Doc. 10-1 at 290.

On January 25, 2017, George filed a demand for discovery and a bill of particulars. ECF Doc. 10-1 at 291-95. The state filed its response on February 17, 2017, with supplements filed on March 23 and 24, 2017. ECF Doc. 10-1 at 296-302. On March 27, 2017, George filed a motion to compel discovery. ECF Doc. 10-1 at 303-04.

On March 29, 2017, George filed a counseled motion to discharge the indictment under Ohio's speedy trial statute (Ohio Rev. Code § 2945.73(B)). ECF Doc. 10-1 at 305. George

argued that she'd been in jail since July 5, 2014 and still hadn't gone to trial. ECF Doc. 10-1 at 306-07. On April 3, 2017, the state filed its response, arguing that George was instead arrested on August 4, 2014 and that it was George's actions or neglect that necessitated the delays in the case, such that the speedy trial time had not been exhausted. ECF Doc. 10-1 at 308-11. The state noted that the case had been continued at George's request and that George had not responded to any of the state's discovery requests. ECF Doc. 10-1 at 309-11.

On April 3, 2017, the trial court held a hearing on George's speedy trial motion. ECF Doc. 10-2 at 75-84. The court denied the motion, noting that all the continuances were made at George's request. ECF Doc. 10-1 at 317; ECF Doc. 10-2 at 84. Boynton's counsel moved to withdraw, which the court granted. ECF Doc. 10-2 at 110. The court then, on its own motion, declared that it would try both defendants together and, over George's objection, continued to the case in order to appoint Boynton counsel. ECF Doc. 10-1 at 313; ECF Doc. 10-2 at 118. The next day, the court appointed Boynton new counsel and, at the defendants' request, continued the pretrial conference until April 12, 2017 and the trial date to July 17, 2017. ECF Doc. 10-1 at 314.

On May 23, 2017, the state filed a supplemental response to discovery. ECF Doc. 10-1 at 315-16. On July 11, 2017, the state filed a motion for a hearing on the competency of one of the victims. ECF Doc. 10-1 at 318-20. The court granted the motion and continued the trial until July 18, 2017. ECF Doc. 10-1 at 321-22. The Court granted George additional continuances, extending trial to July 24, 2017. ECF Doc. 10-1 at 323-25. On July 20 and 21, 2017, the state filed another supplement to discovery. ECF Doc. 10-1 at 326-29.

On July 24, 2017, the trial court held a competency hearing pursuant to the state's July 11, 2017 motion. ECF Doc. 10-1 at 330. The court determined that the victim was not

367-68. She argued that although many continuances were granted at her request, she did not consent to the continuances made on her behalf and she never signed a waiver of speedy trial time. ECF Doc. 10-1 at 368. George further argued that, if not already violated, her speedy trial rights were violated when the trial court continued the April 3, 2017 trial date over her objections for another 90 days. ECF Doc. 10-1 at 368. The state filed an appellee brief. ECF Doc. 10-1 at 376-98.

On December 20, 2018, the Ohio Court of Appeals overruled George's assignments of error and affirmed her convictions. ECF Doc. 10-1 at 399-426; *State v. George*, 2018-Ohio-5156 (Ohio Ct. App. Dec. 20, 2018). In overruling George's first assignment of error, the court reasoned:

> {¶15} George was arrested on August 5, 2014. On August 27, 2017, a 97-count indictment was returned by the grand jury. *** George was arraigned on September 2, 2014. Counsel was appointed, and a motion for discovery was filed on September 14, 2014. At this point, George had been incarcerated for 31 days.
>
> {¶16} Also on September 4, George requested a bill of particulars. The state responded on September 11, 2014, and concurrently served George with a discovery demand. George failed to respond to the discovery, tolling the time for speedy trial purposes pursuant to R.C. 2945.72(D) and (H). This fact alone is sufficient to toll the time as we stated in *State v. Mitchell*, ... 2007-Ohio-6190, finding that a defendant's failure to respond to discovery tolled the speedy trial time until trial. *Id.* at ¶ 35.
>
> {¶17} The defense requested pretrial continuances on September 2, 8, 18, and October 2, 15, and 29, 2014. On November 18, 2014, George's motion for appointment of a defense psychologist was granted. From November 18, 2014, to March 15, 2015, the defense requested nine consecutive pretrial continuances.
>
> {¶18} At the March 26, 2015 pretrial, the trial court referred George to the court psychiatric clinic pursuant to R.C. 2945.71 to determine her competency to stand trial and set the next pretrial date for April 10, 2015. A trial court's order for a competency examination tolls the speedy trial time. "The express language of R.C. 2945.72(B) is broadly worded to include any period in which the accused's mental competency is being determined." *State v. Cook*, 2016-Ohio-2823 ... ¶ 85 (5th Dist.), citing *State v. Palmer*, 84 Ohio St.3d 103, 106 ... (1998).

{¶19} The April 10, 2015, and April 27, 2015 pretrials were continued at the request of the defense. George was still undergoing psychiatric evaluation, and on May 11, 2015, the parties stipulated to the court psychiatric report and George was transferred to Northcoast Behavioral Health ("NBH") for treatment. On August 31, 2015, the court was informed that George had been restored to competency and ordered her transferred from NBH. However, the scheduled hearing was continued due to an ongoing psychiatric evaluation. On October 1, 2015, George appeared and the parties stipulated to competence.

{¶20} A new attorney was appointed for George at the October 2, 2015 pretrial, and the pretrial was continued at the request of the defense due to ongoing discovery. From October 2, 2015 to December 18, 2015, six consecutive pretrials were continued at the request of the defense.

{¶21} On December 18, 2015, the trial court again referred George to the court psychiatric clinic to determine competency to stand trial. On January 21, 2016, George was again transferred to NBH for inpatient treatment due to her refusal to cooperate with the court psychiatric clinic. The February 10, 2016 and March 1, 2016 pretrials were continued at the request of the defense. The latter request was due to a new indictment. The matter was then continued to March 23, 2016.

{¶22} The March 23, 2016 pretrial was continued at the request of the defense. On March 26, 2016, the state responded to a defense request for discovery and served discovery on George that was not responded to. An April 6, 2016 nunc pro tunc entry indicates that a competency hearing was held on April 4, 2016, and George was declared competent to stand trial. The defense requested a pretrial continuance to April 19, 2016. These events tolled the speedy trial period. R.C. 2945.72.

{¶23} At the April 19, 2016 pretrial, the trial court granted the state's request to dismiss all counts due to George's reindictment in the instant case on February 18, 2016. *** The reindictment contained 150 counts against George, and Boynton was added to the indictment. *** The pretrial was continued to May 10, 2016, at the request of the defense. The June 8, 2016 pretrial was continued to July 28, 2016, at the request of the defense. On June 15, 2016, defense counsel filed a motion to withdraw. The motion was granted on July 13, 2016. A defense motion for discovery was filed on July 14, 2016. These events tolled the speedy trial period. R.C. 2945.72.

{¶24} At the July 30, 2016 pretrial, new defense counsel was appointed, and the defense sequentially requested pretrial continuances to August 11, 2016, August 22, 2016, and September 1, 2016. The next pretrial was set for September 22, 2016, and the sheriff was ordered to transport George to the hearing using all necessary means. The tolling of George's speedy trial period continued.

{¶25} At the September 22, 2016 pretrial, defense counsel informed the trial court of George's refusal to meet with him. *** The pretrial was continued to October 28, 2016, at the request of the defense. The sheriff was again ordered to transport George by any means necessary.

{¶ 26} George continuously refused to meet with defense counsel after the September 22, 2016 hearing. George also refused to attend the October 28, 2016 pretrial hearing where the parties were to review the evidence. Defense counsel met with George in the holding room and explained the purpose of the hearing, but George refused to review the evidence. George still refused to cooperate and on December 2, 2016, filed a pro se "demand for discharge of defendant." The trial was originally scheduled for January 23, 2017. The trial court set a pretrial for January 10, 2017, and scheduled trial for April 3, 2017. The pretrial was rescheduled to February 2, 2017, at the request of the defense. Defense counsel moved to withdraw on January 24, 2017, and new defense counsel was assigned.

{¶27} A fourth defense counsel was assigned on January 24, 2017, who filed a discovery demand on January 25, 2017. The February 2, 2017 pretrial was continued to February 3, 2017, at the request of the defense. The state filed supplemental discovery responses on February 17, 2017, March 22, 2017, and March 23, 2017.

{¶28} George and codefendant Boynton filed motions to dismiss on March 29, 2017 for violation of their speedy trial rights that was entertained at a hearing on April 3, 2017. The current defense counsel for George advised that George had consistently refused to communicate with him "in any way shape or form." *** The trial court denied the speedy trial motions observing that all motions for continuances were made at the request of the defense.

{¶29} The April 4, 2017 pretrial was continued to April 12, 2017, at the request of the defense, and trial was moved to July 17, 2017. The state filed an additional supplemental response to discovery on May 23, 2017, and a motion for a competency hearing on July 11, 2017. The trial court ordered the sheriff to bring the still uncooperative George to a July 14, 2017 hearing on the motion by any means necessary. The trial court continued on July 17, 2017, to obtain an HIV test as requested several months earlier.

{¶30} Three more continuances were granted at the request of the defense. The jury trial finally commenced on July 24, 2017. George was disruptive during the proceedings and repeatedly addressed the trial court directly without permission. George was removed from the courtroom after warnings on July 25, 2017, and requested removal on July 26, 2017, choosing not to be present.

{¶31} The record is replete with continuances requested by the defense for reasons including George's ongoing refusal to communicate with assigned

counsel requiring a total of four counsel appointments. R.C. 2945.72(C), *State v. Rodriguez*, *** 2005-Ohio-6485, ¶ 12.

{¶32} The speedy trial time was also tolled for George's multiple periods of psychiatric examination and treatment due to mental incompetence. R.C. 2945.72(B). *State v. Bethea*, *** 2006-Ohio-4758, ¶ 16, citing *State v. Palmer*, 84 Ohio St.3d 103[.]

{¶33} Further tolling the time period were impediments posed by George's refusal to communicate or cooperate with any of the assigned counsel, her disruptions at hearings as a result of those refusals, and repetitive assertions of irrelevant defenses resulting in trial court continuances. *Sate v. Garner*, *** 2016-Ohio-2623, ¶ 17, citing R.C. 2945.72(D) and (H).

{¶34} The trial court properly journalized the disruptions, competency issues and other grounds for continuances, and identified the requesting party. *State ex rel. Bradley v. Astrab*, *** 2012-Ohio-4610, ¶5, citing *State v. Mincy*, 2 Ohio St.3d 6 *** (1982).

{¶35}George [argues] that the speedy trial time began to run upon the first indictment and continued through the subsequent indictment because it was based on the same facts. ***

{¶37} George was arrested on August 5, 2014, and indicted on August 27, 2014. The current indictment was issued on February 18, 2016[.] The additional charges in the second indictment were based on child pornography discovered on George's electronic devices after the initial indictment, and Boynton was added as a codefendant.

{¶38} The record demonstrates that George's lack of cooperation was ongoing and strategic, so much so that the trial court was required to advise George at the inception of the trial that her behavior would not be tolerated and that the trial would move forward even if George had to be removed from the courtroom. We agree with the state's calculation and find that 31 days accrued for speedy trial purposes during the 1,085 days of incarceration attributable to George's purposeful ongoing refusal to cooperate with defense counsel, periods of incompetence, and numerous requested continuances. We will not and cannot allow a defendant to purposefully manipulate our system of justice by refusing to cooperate in his or her own defense to invoke a dismissal of the charges. The speedy trial right is designed to serve as a shield for the defendant's protection and is not to be used as a sword to escape. *People v. Tetter*, 42 Ill.2d 569, 576 *** (1969).

{¶39} We also find that *Baker*, 78 Ohio St.3d 108 ***, applies in this case, and the speedy trial period was not exceeded.

ECF Doc. 10-1 at 405-14.

George did not attempt a timely appeal to the Ohio Supreme Court. However, on September 3, 2019, the Ohio Supreme Court granted George leave to file a delayed appeal. ECF Doc. 10-1 at 468. George filed, pro se, a memorandum in support of jurisdiction, in which she sought to raise three issues:

> 1. Whether trial counsel was ineffective for failing to file a motion to dismiss.
>
> 2. Whether George's speedy trial rights were violated.
>
> 3. Whether the trial court failed to make necessary findings to impose consecutive sentences.

ECF Doc. 10-1 at 470, 473. In support, George argued that "[e]very assigned counsel failed to demand a dismissal." ECF Doc. 10-1 at 473. She argued that her speedy trial rights were violated and had counsel filed a motion to dismiss, it likely would have been granted. ECF Doc. 10-1 at 473-74. She argued that the new indictment did not reset the speedy trial time because the new indictment was based on the same facts as her first one. ECF Doc. 10-1 at 474.

On November 26, 2019, the Ohio Supreme Court declined to accept jurisdiction. ECF Doc. 10-1 at 480.

II. Discussion

A. Habeas Rule 2

Warden Smith argues that George's petition should be dismissed because it does not comply with Rule 2 of the Rules Governing Section 2254 Cases. ECF Doc. 10 at 26. Warden Smith argues that George hasn't identified a specific constitutional violation sufficient to place the respondent on notice of the ground(s) upon which George seeks federal habeas relief. ECF Doc. 10 at 28.

Habeas Rule 2(c) requires, among other things, that a petition for writ of habeas corpus must specify the grounds upon which the petitioner seeks federal habeas relief and state the facts supporting each ground. Rules Governing Section 2254 Cases, R.2(c)(1)-(2). This rule is more demanding than the pleading requirements of Fed. R. Civ. P. 8(a). *Mayle v. Felix*, 545 U.S. 644, 655 (2005). "Dismissal under Rule 2(c) is appropriate in cases where . . . it is impossible to determine from the petitioner's pleadings the exact errors of fact or law raised for adjudication." *Reynolds v. Warden, Lebanon Corr. Inst.*, No. 2:19-CV-3495, 2019 WL 4862060, at *2 (S.D. Ohio Sept. 9, 2019); *see also Roberts v. Wainwright*, No. 1:18 CV 2228, 2019 WL 2341200, at *2 (N.D. Ohio June 3, 2019).

I agree with Warden Smith that George's Ground One claim is vague, but I nevertheless do not recommend dismissal under Rule 2(c). George's Ground One claim asserts "Unlawful Imprisonment under Color of Authority of the United States." ECF Doc. 1 at 5. George's supporting facts don't specify on what basis she claims that she is unlawfully confined. Instead, George recites a series of events, beginning with her arrest and concluding with the imposition of her sentence. *See* ECF Doc. 1 at 5-8. Reading only the facts, it is very difficult discern the specific basis upon which George contends she is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

However, the nature of George's Ground One claim becomes clearer when read in context. George states in her petition that she attempted to raise her Ground One claim as a claim of ineffective assistance of trial counsel in her memorandum in support of jurisdiction to the Ohio Supreme Court. ECF Doc. 1 at 9. George's facts supporting her Ground One claim are substantially similar to facts she recited in her memorandum in support of jurisdiction to the Ohio Supreme Court. ECF Doc. 1 at 5-8; ECF Doc. 10-1 at 473-74. There, as here, George

recited facts supporting her contention that trial counsel was ineffective for not having moved to dismiss on speedy trial grounds. ECF Doc. 10-1 at 473-74. Read in context, and with the degree of liberality afforded pro se litigants[2], George's Ground One claim is best read as asserting that she is in custody unlawfully because her speedy trial rights were violated. Thus, I find that George to has met the minimum requirements of Habeas Rule 2(c).

B. Cognizability

Warden Smith argues that George's Ground One claim is noncognizable to the extent she contests her conditions of confinement or asserts claims under state law. ECF Doc. 10 at 29.

As discussed above, George's Ground One claim is best construed as raising a substantive claim that her speedy trial rights were violated. George hasn't specified, however, whether she contends she's being held in violation of the Sixth Amendment guarantee to a speedy trial or whether she's being held in violation of Ohio's speedy trial statute (or both). *See generally* ECF Doc. 1. Her memorandum in support of jurisdiction to the Ohio Supreme Court also didn't specify whether her ineffective-assistance claim was premised on counsel's failure to raise a speedy trial issue under the Constitution or under Ohio law. *See generally* ECF Doc. 10-1 at 472-75. To the extent George's Ground One claim asserts that her Ohio speedy trial statutory rights were violated, it is noncognizable. *E.g.*, *Chappell v. Morgan*, No. 4:15 CV 882, 2016 WL 8259330, at *12 (N.D. Ohio Nov. 30, 2016); *Boynton v. Sheets*, No. 1:11 CV 2810, 2013 WL 1747717, at *2 (N.D. Ohio Apr. 23, 2013); *Kelly v. Wilson*, No. 1:07 CV 2856, No. 2009 WL 185947, at *10 (N.D. Ohio Jan. 26, 2009); *see also Younker v. Warden, Chillicothe Corr. Inst.*, No. 1:10-cv-875, 2011 WL 2982589, at *10 (S.D. Ohio June 24, 2011) (holding that an

[2] "The allegations of a pro se habeas petition, though vague and conclusory, are entitled to liberal construction. The appropriate level of liberal construction requires active interpretation in some cases to construe a pro se petition to encompass any allegation stating federal relief." *Franklin v. Rose*, 765 F.2d 82, 84-85 (6th Cir. 1985) (citations and quotation marks omitted).

argument for relief "based solely on a violation of Ohio's speedy trial statute ... does not present a cognizable federal constitutional claim subject to review in this proceeding.").

George's Ground One claim *is* cognizable, however, to the extent she claims that the delay between her arrest and trial violated her speedy trial rights under the Sixth Amendment. *See* 28 U.S.C. § 2254(a).

C. Procedural Default

Warden Smith argues that George procedurally defaulted all potential federal constitutional claims by not fairly presenting them to the Ohio courts. ECF Doc. 10 at 30-31. Warden Smith argues that George procedurally defaulted by not timely appealing to the Ohio Supreme Court, which "denied George leave to file a delayed appeal." *Id.* Alternatively, Warden Smith argues that the Ohio Court of Appeals reasonably determined that George's Sixth Amendment speedy trial rights were not violated. ECF Doc. 10-1 at 48-50

Procedural default is "a critical failure to comply with state procedural law," *Trest v. Cain*, 522 U.S. 87, 89 (1997), resulting in a bar to federal habeas review unless the petitioner has a sufficient basis for having the default excused, *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Procedural default occurs when: (1) the state courts didn't review the petitioner's claim on the merits because she didn't comply with some state procedural rule; or (2) she failed to fairly present the claim to the state courts while state court remedies were still available. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).

A claim is fairly presented when it has been asserted – as a federal constitutional issue – at every stage of the state court review process. *Thompson v. Warden, Belmont Corr. Inst.*, 598 F.3d 281, 285 (6th Cir. 2010); *Williams*, 460 F.3d at 806. The fair-presentment requirement can be satisfied in one of four ways:

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

Beach v. Moore, 343 F. App'x 7, 10 (6th Cir. 2009) (quotation marks omitted).

Procedural default can be excused and will not preclude consideration of a claim on federal habeas review, however, if the petitioner can demonstrate: (1) "cause for the default and actual prejudice as a result of the alleged violation of federal law;" or (2) "failure to consider the claim will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. A "fundamental miscarriage of justice" can occur only when the procedurally defaulted claim – supported by new reliable evidence not presented at trial – would establish that the petitioner was "actually innocent" of the offense. *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006).

I agree with Warden Smith that George's Ground One claim is procedurally defaulted, albeit on different grounds. Warden Smith contends that George's Ground One claim is procedurally defaulted for failure to comply with a state procedural rule (timely filing a notice of appeal). ECF Doc. 10 at 30. But contrary to Warden Smith's assertion, the Ohio Supreme Court *granted* George's motion for leave to file a delayed appeal. ECF Doc. 10-1 at 468.

Nevertheless, George's Ground One claim is procedurally defaulted because she did not raise it at each and every stage of Ohio's review process. *Wagner v. Smith*, 581 F.3d 410, 418 (6th Cir. 2009). On direct appeal, George argued that her speedy trial rights were violated under Ohio's speedy trial statute. ECF Doc. 10-1 at 367. Although based primarily on state law, George also quoted the Sixth Amendment and cited *State v. Broughton*, in which the Ohio Supreme Court applied

No. 17-106317, docket entry dated 11/07/2017. George cannot show that she was prevented from discovering the facts underlying her claim, given that she raised the speedy trial issue to the Ohio Court of Appeals. Ohio Rev. Code § 2953.23(A)(2)(b). And George's Ground One claim would nevertheless be barred under Ohio's res judicata doctrine. *State v. Cole*, 2 Ohio St. 3d 112, 113 (Ohio 1982).

George also cannot overcome her procedural default. She contends that she raised her claim in terms of ineffective assistance of counsel because "[t]he Supreme Court of Ohio suggests any new issues [be] raised under ineffective counsel." ECF Doc. 1 at 9. Effectively, she argues that she made a conscious choice to frame her Ground One claim in terms of ineffective assistance of counsel rather than as a substantive claim. Thus, she has not established that some external factor impeded her ability to raise the issue. *See Murray v. Carrier*, 477 U.S. 478, 487 (1986) ("[T]he existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded [her] efforts to comply with the State's procedural rule."). And her pro se status and ignorance of the law would be insufficient to establish "cause." *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004). George's inability to establish cause makes it unnecessary to consider whether he has shown prejudice. *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007) ("The cause-and-prejudice analysis is a conjunctive one, requiring a petitioner to satisfy both prongs to excuse a procedural default."). And George does not argue that she is actually innocent of the offense. *See generally* ECF Doc. 1.

I therefore recommend that George's Ground One claim be DISMISSED as procedurally defaulted.

the federal constitutional analysis to determine whether a state prisoner's Sixth Amendment speedy trial rights were violated. ECF Doc. 10-1 at 367; 62 Ohio St.3d 253, 256-57 (Ohio 1991). Thus, I find that George fairly presented her Ground One claim on appeal to the Ohio Court of Appeals. *See Beach*, 343 F. App'x at 10.[3]

But George's Ground One claim was *not* fairly presented in her appeal to the Ohio Supreme Court. As George states in her § 2254 petition, she raised her Ground One claim as an ineffective assistance of trial counsel claim in her memorandum in support of jurisdiction. ECF Doc. 1 at 9. "[B]ringing an ineffective assistance claim in state court based on counsel's failure to raise an underlying claim does not preserve the underlying claim for federal habeas review because the two claims are analytically distinct." *Davie v. Mitchell*, 547 F.3d 297, 312 (6th Cir. 2008) (quotation marks omitted). Although George's Ohio Supreme Court memorandum in support of jurisdiction asserted that her speedy trial rights were violated, because of her vague, narrative presentation it isn't clear whether she attempted to raise that issue separate and apart from her ineffective-assistance claim. *See* ECF Doc. 10-1 at 473-75. Thus, I find that George did not fairly present her Ground One claim to the Ohio Supreme Court. *See Wagner*, 581 F.3d at 418. George cannot return to state court to raise her Ground One claim in a postconviction petition because more than a year has passed since her transcript was filed with the Ohio Court of Appeals. Ohio Rev. Code § 2953.21(A)(2)(a); *see* Docket for Ohio App. Ct., 8th Dist. Case

[3] In at least one case, this court previously determined that "because an Ohio court decision on an Ohio statutory speedy trial claim also necessarily includes a federal constitutional dimension, a speedy trial argument based on the Ohio statue fairly presents a federal constitutional claim." *Hill v. Sheldon*, No. 1:11CV2603, 2014 WL 700024, at *13 (N.D. Ohio Feb. 21, 2014). However, several cases in and out of this court have rejected the argument that a claim under Ohio's speedy trial statute is the effective equivalent of a Sixth Amendment claim. *See, e.g.*, *Hyde v. Warden, Pickaway Corr. Inst.*, 2:14-CV-02725, 2016 WL 1594596, at *9 (S.D. Ohio Apr. 21, 2016); *Heft v. Warden, Madison Corr. Inst.*, No. 2:11-CV-103, 2012 WL 1902467, at *12 (S.D. Ohio May 25, 2012); *see also Howes v. Bobby*, No. 5:11 CV 912, 2012 WL 2505925, at *5 (N.D. Ohio May 11, 2012).

D. Merits

Even if George's Ground One claim were not procedurally defaulted, I would nevertheless recommend that the claim be dismissed as meritless.

1. AEDPA Deference

Because the Ohio Court of Appeals addressed George's speedy trial claim on the merits, the claim is subject to a heightened standard under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254. *Taylor v. Patel*, No. 20-1381, ___ F. App'x ___, 2021 WL 3520819, at *4 (6th Cir. 2021) (unreported); *see Chappell*, No. 4:15 CV 882, 2016 WL 825933, at *12 n.10. Under that standard, habeas relief is only available when the state court's decision: (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the record before the state court. 28 U.S.C. § 2254(d). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quotation marks omitted). The petitioner must show that the state court's "decision 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.

2. Speedy Trial

As stated above, the Sixth Amendment guarantees the right to a speedy trial. U.S. Const. amend VI; *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967) (enforcing the Sixth Amendment against the states under the Fourteenth Amendment). Whether that right has been violated isn't measured against specific days or months. *Barker v. Wingo*, 407 U.S. 514, 523 (1972). Instead, the Supreme Court prescribed in *Barker* a balancing test, under which courts

consider: (i) the length of the delay; (ii) the reasons for the delay; (iii) the defendant's assertion of her right; and (iv) prejudice to the defendant. *Id.* at 530. The "triggering mechanism" for the *Barker* test is length of the delay. *Id.* Unless the delay exceeds the point at which it becomes presumptively prejudicial (one year starting from the earlier of the arrest or indictment), the court need not inquire into the other factors. *Id.*; *Maples v. Stegall*, 427 F.3d 1020, 1026 (6th Cir. 2003). None of the factors on its own is dispositive. *Barker*, 407 U.S. at 523. "Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Id.*

Ohio has implemented the Sixth Amendment guarantee to a speedy trial by statute, Ohio Rev. Code § 2945.71 *et seq.* *State v. O'Brien*, 34 Ohio St. 3d 7, 9 (Ohio 1987). "[A]ny time an Ohio court reviews the implementation of a speedy trial statute, it is guided not just by those provisions, but also by the dictates of the Sixth Amendment whether or not it expressly applies the factors laid out in *Barker*." *Brown v. Bobby*, 656 F.3d 325, 331 (6th Cir. 2011).

3. Analysis

The Ohio Court of Appeals' denial of George's Ground One claim was not contrary to *Barker*. 28 U.S.C. § 2254(d)(1). Although the Ohio Court of Appeals didn't cite *Barker* or expressly apply the *Barker* factors, it considered the tolling factors outlined in Ohio Rev. Code § 2945.72 and determined on the basis of those factors that George's speedy trial rights were not violated. As the Sixth Circuit held in *Brown*, a state court's consideration of the § 2945.72 factors is consistent with *Barker*, such that the Ohio Court of Appeals' decision was not contrary to clearly established law, as established by the Supreme Court. 28 U.S.C. § 2254(d)(1); *Brown*, 6565 F.3d at 330-32; *see also Hill v. Sheldon*, No. 1:11CV2603, 2014 WL 700024, at *13 (N.D. Ohio Feb. 21, 2014).

The Ohio Court of Appeals' denial of George's Ground One claim also did not involve an unreasonable application of *Barker*. 28 U.S.C. § 2254(d)(1). The Ohio Court of Appeals determined that George's speedy trial rights were not violated because: (i) the primary reasons for the delay were George's requests for continuances and disruptive behavior and the need to assess George's competency; and (ii) the February 18, 2016 indictment was based on additional and different facts than her August 27, 2014 indictment. ECF Doc. 10-1 at 411-14. In *Barker* terms, the Ohio Court of Appeals determined that George's speedy trial rights were not violated because although George was in jail for 1,085 days (length), George was responsible for 1,054 of those days (reasons for the delay). And in reaching that conclusion, the court considered George's assertion of her rights and her use of disruptive behavior to undermine the purposes of the speedy trial protection. *See Barker*, 407 U.S. at 532 (identifying the interests that speedy trial was designed to protect).

Fairminded jurists could disagree on the correctness of the Ohio Court of Appeals' findings. *See Harrington*, 562 U.S. at 102-03. The court reasonably determined that the second *Barker* factor weighed heavily against George, given that: (i) the initially scheduled September 5, 2014 pretrial was repeatedly continued at George's request until May 11, 2015; (ii) between May 11, 2015 and August 31, 2015, George was undergoing treatment to restore her competency to stand trial; (iii) the September 3, 2015 pretrial conference was repeatedly continued at George's request until December 17, 2015; (iv) between December 18, 2015 and February 10, 2016, George was under psychiatric evaluation; (v) after George was determined competent on April 4, 2016, the pretrial conference was repeatedly continued at George's request until April 3, 2017; and (vi) despite George's objection to the trial court's *sua sponte* continuance at the April 3, 2017 hearing, the trial date was repeatedly pushed back at the request of the defense until July

24, 2017. ECF Doc. 10-1 at 405-12; *see also* ECF Doc. 10-1 at 67-68, 71, 104-07, 110, 112-33, 137-44, 213-14, 255, 259-60, 268-72, 287-90, 313-14, 321-25.

The record corroborates the Ohio Court of Appeals' finding that George's disruptive behavior delayed proceedings. Specifically: (i) George impeded her competency evaluations by refusing to participate in the evaluations; (ii) George did not respond to the state's discovery requests; and (iii) George refused to meet and cooperate with her attorneys, which was noted at various hearings held between September 22, 2016 and July 14, 2017. ECF Doc. 10-1 at 412; ECF Doc. 10-2 at 49-50, 56-58, 61-65, 83-84, 112, 114, 135, 149-51. George has not rebutted by clear and convincing evidence the state court's factual finding that her February 18, 2016 indictment was based on new facts discovered after issuance of the August 27, 2014 indictment. 28 U.S.C. § 2254(e)(1); ECF Doc. 10-1 at 412; ECF Doc. 10-2 at 62. And as the Ohio Court of Appeals observed, George first asserted her speedy trial rights on December 2, 2016 – by which time she already had been in custody for 851 days. ECF Doc. 10-1 at 410; ECF Doc. 10-1 at 273-79. Although the trial court didn't rule on George's motion for discharge, it wasn't required to because the right was asserted in a pro se filing while she was represented by counsel. *See State v. Vance*, 2018-Ohio-1313, ¶27 (Ohio Ct. App. 2018) ("Ohio courts need not address pro se motions when the defendant enjoys the benefit of counsel."). George did not again assert her speedy trial rights until March 29, 2017 – until she'd been in custody for 967 days. ECF Doc. 10-1 at 305; *see Barker*, 407 U.S. at 531 ("The more serious the deprivation, the more likely a defendant is to complain.").

On balance, the Ohio Court of Appeals was reasonable in its determination that the delay in bringing George to trial did not violate her rights under the Sixth Amendment. Although the length of the delay was greater than one year, George did not timely assert her rights. The state

court reasonably determined that George bore the greater blame for the delay. And although the state court did not expressly address prejudice, George has not shown that her defense at trial was impaired by the delay or that she suffered oppressive pretrial incarceration. *Barker*, 407 U.S. at 532; *Brown*, 656 F.3d at 337; *see generally* ECF Doc. 1; ECF Doc. 10-1 at 367-68, 470-75.

Thus, I find that the Ohio Court of Appeals' denial of George's Ground One claim was neither contrary to, nor an unreasonable application of, *Barker*. 28 U.S.C. § 2254(d). Should the Court prefer to dispose of George's Ground One claim on this basis, it could be dismissed as meritless.

E. Ineffective Assistance

To the extent that George's Ground One claim could be read as reasserting her argument that trial counsel was ineffective for not moving to dismiss her case on speedy trial grounds, it would be procedurally defaulted because George did not raise it on direct appeal. *See* ECF Doc. 10-1 at 351-75. By not doing so, she failed to fairly present her ineffective-assistance-of-trial counsel claim at every stage of the state review process. *Wagner*, 581 F.3d at 418. She cannot return to state court to raise an ineffective-assistance-of-trial-counsel claim because it would be barred by res judicata, given that she raised a substantive speedy trial challenge on direct appeal. Ohio Rev. Code § 2953.21(A)(1)(i); *State v. Combs*, 652 N.E.2d 205, 209 (Ohio Ct. App. 1994). And she cannot establish cause to overcome her procedural default. George could fault her appellate counsel for not raising the claim on direct appeal, but that contention would itself be procedurally defaulted; and George has not established cause or prejudice for her appellate counsel's failure to raise the claim. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). George's failure to establish cause makes it unnecessary to consider prejudice. *Matthews*, 486 F.3d at 891.

Moreover, any argument that trial counsel was ineffective for not moving to dismiss the case on speedy trial grounds would be meritless. The last of George's attorneys moved to dismiss on that basis, and the trial court denied it. ECF Doc. 10-1 at 305, 317; ECF Doc. 10-2 at 84. The Ohio Court of Appeals also addressed George's substantive speedy trial argument on the merits and determined no speedy trial violation occurred. ECF Doc. 10-1 at 407-14. George would, therefore, be unable to show prejudice resulting from counsel's alleged failure to seek dismissal on speedy trial grounds because the claim she alleges should have been asserted lacks merit. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "No prejudice results from failing to bring a defective claim." *Smith v. Warden, Toledo Corr. Inst.*, No. 20-3472/3496, ___ F. App'x ___, 2022 WL 95162, at *3 (6th Cir., January 10, 2022) (unreported) (citing *United States v. Mahbub*, 818 F.3d 213, 231 (6th Cir. 2016); *United States v. Holder*, 657 F.3d 322, 332 (6th Cir. 2011); *United States v. Jones*, 489 F.3d 243, 255 (6th Cir. 2007)).

III. Certificate of Appealability

A. Legal Standard

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that "[t]he district court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to the applicant." Rule 11(a), 28 U.S.C. foll. § 2254. The rule tracks the requirement of § 2253(c)(3) that any grant of a certificate of appealability "state the specific issue or issues that satisfy the showing required by § 2253(c)(2)," Rule 11(a). In light of the Rule 11 requirement that the Court either grant or deny the certificate of appealability at the time of its final adverse order, a recommendation regarding the COA issue is included here.

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a COA for an issue raised in a §2254 habeas petition only if the petitioner has made a substantial showing of the denial of a

federal constitutional right. *Cunningham v. Shoop*, 817 F. App'x 223, 224 (6th Cir. 2020). A petitioner satisfies this standard by demonstrating that reasonable jurists "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." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quotation marks omitted); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a claim is denied on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

B. Analysis

If the Court accepts my recommendations, George will not be able to show that the Court's rulings on her claim are debatable among jurists of reason. George's Ground One claim is noncognizable in part, procedurally defaulted, and meritless. And any ineffective-assistance-argument she attempted to raise through her Ground One claim would also be procedurally defaulted and meritless. Because jurists of reason would find neither conclusion to be debatable, I recommend that no COA issue in this case.

IV. Recommendation

Because George's claim is procedurally defaulted, noncognizbale, and/or lacks merit, I recommend that George's claim be DISMISSED and that her petition for writ of habeas corpus be DENIED. I further recommend that George not be granted a COA.

Dated: January 12, 2022

Thomas M. Parker
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT JUDGMENT ORDER HABEAS 2254 PETITION FOR REVIEW

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

Anika George

Petitioner,

v.

Warden Shelbie Smith

Respondent.

Case No.: 1:20-cv-957

ORDER

This is a *pro se* state prisoner habeas corpus proceeding under 28 U.S.C. § 2254(d). I referred the petition to the Honorable Magistrate Judge Thomas M. Parker for a Report & Recommendation, which the Magistrate Judge has filed (Doc. 15). In the Report & Recommendation, the Magistrate Judge has duly notified the petitioner of the deadline for filing objections. That time has passed without the petitioner having filed timely objections.

On *de novo* review, I find the Report & Recommendation well-taken in all respects.

Accordingly, it is hereby

ORDERED THAT:

The Magistrate Judge's Report & Recommendation (Doc. 15) be, and the same hereby is, adopted as the order of this court, and the petition be, and the same hereby is, denied and dismissed, with prejudice. No Certificate of Appealability shall issue as jurists of reason could

not disagree with this decision.

So ordered.

/s/ James G. Carr
Sr. U.S. District Judge