Exhibit A-2

No. 22-3483

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 27, 2022
DEBORAH S. HUNT, Clerk

CLIFTON B. MAYS,

Petitioner-Appellant,

v.

KENNETH BLACK, Warden,

Respondent-Appellee.

ORDER

Before: SUHRHEINRICH, Circuit Judge.

Clifton B. Mays, an Ohio prisoner proceeding pro se, appeals the district court's denial of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Currently pending are Mays's application for a certificate of appealability (COA), motion to proceed in forma pauperis on appeal, and two motions for default.

In 2018, Mays was tried by a jury on charges of attempted murder, felonious assault, kidnapping, domestic violence, endangering children, aggravated menacing, and having weapons while under a disability. The charges arose out of a series of violent acts committed by Mays against his domestic partner over the course of three days in March 2018. The victim, Arian Akhir, testified about Mays's repeated verbal and physical assaults against her, which occurred in the home where they lived with her four children, including an infant she shared with Mays. Akhir explained that, after three days of abuse, she was able to convince Mays to take her and the children to University Hospital in Cleveland. Once there, she sought refuge with her children but refused treatment. Akhir and the children then took a cab to the Greyhound bus station and boarded the first bus to Toledo. Once in Toledo, Akhir reported the incident to the Cleveland Police Department, and an investigation ensued. During a search of Mays's home, officers found firearms that, according to Akhir, Mays had used during the assaults. The jury convicted Mays of all

charges but attempted murder. Mays was also found guilty of the specifications attached to the felonious-assault and kidnapping counts. The trial court sentenced Mays to a total term of 24 years' imprisonment.

Mays filed a direct appeal through counsel. After briefing, Mays sought to have his attorney removed and to proceed pro se. Mays asked the court to stay the appeal and for an extension of time to "re-submit a corrected and amended appeal to include several claims appointed counsel omitted and refused to submit." The Ohio Court of Appeals granted Mays's request to proceed pro se and ordered that he file his pro se brief by July 15, 2019. On July 31, 2019, after Mays failed to file his brief, the appellate court dismissed the appeal pursuant to Ohio Rule of Appellate Procedure 18(C). Mays filed motions for reconsideration and for the appointment of new counsel, along with other motions, all of which the appellate court denied. Mays did not appeal to the Ohio Supreme Court.

In the meantime, Mays moved for a new trial. The trial court denied the motion in November 2019. Mays did not appeal.[1]

Mays then filed his § 2254 petition, claiming (1) his "90 days speedy trial rights were violated, judicial misconduct, prosecutorial misconduct, police misconduct, witness misconduct"; (2) "ineffective assistance of trial counsel . . . conspiracy with the prosecutors[,] the police, and the judge"; (3) "the court failed to send out [his] subpoenas when [he] was representing [him]self . . . judicial misconduct"; and (4) "a forged fraudulent complaint by Detective Thelemor Powell[] that lacked probable cause, essential facts, supporting affidavit, and judicial review." In response, the State argued that all of Mays's claims were procedurally defaulted due to his failure to pursue his direct appeal in the Ohio Court of Appeals and the Ohio Supreme Court and to appeal the denial of his motion for a new trial. Upon the recommendation of a magistrate judge and over Mays's objections, the district court denied the petition, concluding that all four claims were procedurally defaulted. The court declined to issue a COA.

---

[1] Mays filed several other motions and proceedings in the state courts, including a petition for a writ of procedendo and a petition for a writ of prohibition. None are relevant to his federal habeas proceeding.

Mays 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). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Where the district court has denied a petition on procedural grounds, the petitioner must demonstrate that reasonable jurists "would find it debatable whether the petition states a valid claim of the denial of a constitutional right and . . . would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

In deciding whether a habeas petitioner procedurally defaulted a federal claim in state court, a federal court must consider whether "(1) the petitioner failed to comply with a state procedural rule; (2) the state courts enforced the rule; [and] (3) the state procedural rule is an adequate and independent state ground for denying review of a federal constitutional claim." *Jalowiec v. Bradshaw*, 657 F.3d 293, 302 (6th Cir. 2011). A procedural default can also result from a petitioner's failure to exhaust his federal claims in state court. The exhaustion requirement is deemed satisfied when the "highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). As a general rule, a petitioner must present his claims to both the state court of appeals and the state supreme court for the claim to be considered exhausted. *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009). When a petitioner did not fairly present his claims to the state courts and no remedy remains, his claims are procedurally defaulted. *See Gray v. Netherland*, 518 U.S. 152, 161-62 (1996). To overcome a procedural default, a petitioner must show cause for his failure to raise the claims and prejudice arising therefrom, or that failing to review the claims would result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Reasonable jurists would not debate the district court's determination that Mays's claims are procedurally defaulted. On direct appeal, the Ohio Court of Appeals specifically cited Mays's failure to file a brief under Rule 18(C) as its reason for dismissing the appeal. And Rule 18 is an adequate and independent rule upon which to deny relief. *Normand v. McAninch*, No. 98-3747, 2000 WL 377348, at *4-5 (6th Cir. Apr. 6, 2000). Additionally, Mays never appealed the dismissal of his appeal to the Ohio Supreme Court. *See Rayner v. Mills*, 685 F.3d 631, 643 (6th Cir. 2012) ("Proper exhaustion requires that a petitioner present every claim in the federal petition to each level of the state courts, including the highest state court to which the petitioner is entitled to appeal."); *see also O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."). To the extent that Mays's petition raises claims that he first raised in his motion for a new trial, those claims are procedurally defaulted due to his failure to appeal that ruling in the Ohio Court of Appeals and the Ohio Supreme Court. *See Rayner*, 685 F.3d at 643.

In his objections to the report and recommendation, Mays asserted that he appealed the denial of a motion for a new trial to the Ohio Court of Appeals and the Ohio Supreme Court but pointed to nothing in the record to support this assertion. Instead, he accused the district court of not docketing his proof of exhaustion in furtherance of a conspiracy. He also pointed to other proceedings he initiated in the state courts, such as his "State Civil Rule 60B(5)," but these miscellaneous actions did not exhaust his constitutional claims through Ohio's "established appellate review process." *O'Sullivan*, 526 U.S. at 845.

Mays also asserted that his speedy trial claim "cannot be procedurally defaulted." Mays is mistaken. A defendant can procedurally default a constitutional speedy trial claim by failing to exhaust the claim in state court. *See, e.g.*, *Creech v. Shoop*, No. 20-3935, 2021 WL 867125, at *4 (6th Cir. Feb. 3, 2021).

In his objections, Mays suggested that the procedural default of his claims could be excused due to the ineffectiveness of his appellate attorney. He stated that appellate counsel "improperly

abandoned" his case and that counsel and the state appellate court "never got a proper waiver of counsel in writing" and never sent him trial transcripts or the state court record. But any claim of ineffective assistance of appellate counsel is itself procedurally defaulted because Mays never pursued that claim in state court. As a result, it cannot be used to demonstrate cause. *See Edwards v. Carpenter*, 529 U.S. 446, 451-52 (2000). And any assertion that the state appellate court improperly allowed him to proceed without counsel is belied by the record. Mays sought an extension of time to file a pro se brief on appeal and at no point indicated that he wanted new counsel. He only sought the appointment of new counsel *after* his appeal was dismissed. In any event, even if counsel's alleged abandonment of his appeal and the failure to appoint new counsel could explain his failure to file a brief in the Ohio Court of Appeals, they do not explain his failure to seek review of the dismissal of his appeal in the Ohio Supreme Court.

Reasonable jurists also would not debate the district court's determination that Mays did not demonstrate that failing to consider his constitutional claims would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice requires a showing of actual innocence. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004). Mays made no such showing. He referred to evidence that he claimed would show that "[t]he prosecutors created fraudulent Greyhound bus tickets via a computer and used them to convict [him]" and "hid the exculpatory University Hospital ER videos." But his arguments about this alleged evidence appear to be based entirely on speculation. Indeed, as Mays seems to acknowledge, there is no available surveillance footage from the hospital on the night of Akhir's visit. Thus, he cannot show that this evidence is, in fact, exculpatory. And with respect to the Greyhound bus tickets, there is nothing in the record to show that any bus tickets were introduced into evidence by the State. And even if he had produced any new evidence in this regard, it would fall far short of what is required to show actual innocence. *See Sawyer v. Whitley*, 505 U.S. 333, 349 (1992) (noting that newly discovered impeachment evidence "will seldom, if ever," establish a habeas petitioner's actual innocence).

For the foregoing reasons, Mays's application for a COA is **DENIED**. His motions for default are **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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

CLIFTON B. MAYS,	)	CASE NO. 1:20-CV-01402-JRK
	)	
Plaintiff,	)	JUDGE JAMES R. KNEPP, II
	)	UNITED STATES DISTRICT JUDGE
v.	)	
	)	MAGISTRATE JUDGE
WARDEN KENNETH BLACK, [1]	)	CARMEN E. HENDERSON
	)	
Defendant,	)	**REPORT & RECOMMENDATION**
	)	

I. Introduction

Petitioner, Clifton B. Mays, seeks a writ of habeas corpus under 28 U.S.C. § 2254. Mays is an Ohio prisoner who is currently serving a twenty-four-year sentence for felonious assault, kidnapping, domestic violence, endangering children, aggravated menacing, and having weapons under disability. Mays asserts four grounds for relief. (ECF No. 1). Respondent, Warden Kenneth Black, filed a return of writ on July 1, 2021 (ECF No. 49) and Mays filed a traverse on July 23, 2021 (ECF No. 51).[2]

This matter was referred to me under Local Rule 72.2 to prepare a report and recommendation on Mays' petition and other case-dispositive motions. Mays's grounds for relief are all procedurally defaulted; thus, I recommend that the Court deny his motion for an evidentiary

1 The Court has updated the caption in this matter to reflect the current warden of the facility in which Petitioner is incarcerated.

2 Much as he did throughout his state court proceedings, Mays filed a litany of motions, letters, and writs following the filing of his petition. As none of these filings impact the undersigned's analysis, they are not recounted in detail.

hearing, deny his petition in its entirety, and not grant him a certificate of appealability. Additionally, Mays's motion for the appointment of counsel is denied.

II. Relevant Factual Background

Ordinarily, the facts found by the appellate court of record "shall be presumed to be correct," and the petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. §2254(e)(1); *Warren v. Smith*, 161 F.3d 358, 360-61 (6th Cir. 1998), cert. denied, 527 U.S. 1040 (1999). However, Mays never successfully completed a direct appeal from his convictions. Accordingly, the undersigned has summarized the factual background of Mays' conviction through a review of his trial transcript.[3]

Mays's convictions stem from a weekend during which he repeatedly assaulted the victim, a woman that lived with Mays along with her four children including an infant to whom Mays was the father. The victim and Mays were in a romantic relationship for roughly seven years. (ECF No. 49-5 at 5). In March of 2018, the relationship began to deteriorate, and the victim made plans to move out of the shared home by April 30, 2018. (ECF No. 49-5 at 6-7). On a Saturday near March 9, 2018, Mays returned to the home and went through the victim's phone and Facebook account. (ECF No. 49-5 at 7-8). Mays, apparently unhappy with the content of the messages, began to verbally abuse the victim. (ECF No. 49-5 at 8). While the verbal abuse continued, Mays transitioned to physical abuse the next day. He began by shoving the victim into a wall and purposely stomping on her foot. (ECF No. 49-5 at 13). While the victim was nursing the infant, Mays stood over her and began punching her. (ECF No. 49-5 at 14). The victim curled herself

3 Based upon the Court's resolution of this petition, any disagreement over the underlying facts is immaterial.

around the infant for protection, and Mays proceeded to punch and kick her in the shoulder, arm, thighs, butt, and ribs. (ECF No. 49-5 at 15).

During the initial physical assault, Mays retrieved a black revolver. (ECF No. 49-5 at 16). Mays then loaded one bullet into the firearm and told the victim, "I'm going to ask you some questions and if you don't answer or I don't like it, I'm going to pull the trigger." (ECF No. 49-5 at 16-17). Mays then asked the victim whether she had cheated on him (ECF No. 49-5 at 17). The victim denied any infidelity, and Mays followed through with his threat and pulled the trigger. (ECF No. 49-5 at 17). Mays repeated another variation of the same question, the victim responded in the same manner, and Mays again pulled the trigger of the revolver with the gun pressed against the victim's temple. (ECF No. 49-5 at 17-18). Unsatisfied with the victim's level of fear, Mays informed her, "I'm about to put the fear of God in you, bitch." (ECF No. 49-5 at 18). Mays then retrieved a shotgun and placed one bullet in it. (ECF No. 49-5 at 18). Mays then forced the barrel of the shotgun into the victim's mouth and informed her to suck on the barrel. (ECF No. 49-5 at 19). Eventually, Mays fell asleep and the victim retreated to the room where her other three children were asleep and attempted to sleep herself. (ECF No. 49-5 at 21-22).

Mays woke the victim early the next morning and instructed her to go downstairs to a different living area. (ECF No. 49-5 at 23). Mays then closed and locked the door behind the pair. (ECF No. 49-5 at 23). At that point, Mays resumed his physical assault by punching the victim. (ECF No. 49-5 at 23). When the victim asked permission to leave, Mays responded, "bitch, you not going nowhere." (ECF No. 49-5 at 23). This assault went on for several hours and included Mays choking the victim and knocking her to the floor on numerous occasions. (ECF No. 49-5 at 24-25). Mays then forced the victim to leave the house and drove her to numerous areas. (ECF No. 49-5 at 26-27). During this drive, Mays highlighted all the places that he could leave the

victim's body. (ECF No. 49-5 at 27). Mays then returned home with the victim and acted as though nothing had occurred. (ECF No. 49-5 at 28). A short while later, Mays agreed to take the victim to the hospital with all of the children. (ECF No. 49-5 at 30). The victim, with the assistance of hospital staff, took a taxi from the hospital directly to a bus station and left the area.

As a result of the above, Mays was indicted on April 3, 2018 for attempted murder, felonious assault, kidnapping, domestic violence, endangering children, aggravated menacing, and having weapons under disability. (ECF No. 49-1, PageID #: 763-771). Following a jury trial, Mays was convicted of felonious assault, kidnapping, domestic violence, endangering children, aggravated menacing, and having weapons while under disability. (ECF No. 49-1, PageID #: 898). Mays received an aggregate sentence of twenty-four years in prison for his convictions. (ECF No. 49-1, PageID #: 901).

III. Relevant Procedural History

Much like his filing history in this matter, it would be difficult to recount all of the numerous filings that Mays submitted throughout his state court proceedings. Instead, this Court focuses on those directly relevant to the resolution of this petition.

Following his conviction, Mays, through counsel, filed a direct appeal with the Eighth District Court of Appeals. (ECF. No. 49-1, PageID #: 903). After a brief was filed by counsel in the appeal, Mays sought to remove his counsel and proceed *pro se*. (ECF. No. 49-1, PageID # 978-979). In his *pro se* motion, Mays noted that he "will collaterally move to seek to 'stay' all appeal proceedings immediately (with a time extension) to re-tool his appeal and submit all of his silenced claims." (ECF. No. 49-1, PageID #: 980-981). The Eighth District granted Mays' request to proceed without counsel and ordered his brief to be filed by July 15, 2019. (ECF. No. 49-1, PageID #: 987). Mays did not file a brief, and the appeal was dismissed pursuant to Ohio App. R. 18(C)

on July 31, 2019. (ECF. No. 49-1, PageID #: 989). Mays did not appeal this dismissal to the Ohio Supreme Court.

On November 21, 2018, Mays filed a motion for a new trial. (ECF No. 49-1, PageID #: 1122). The motion and its subsequent supplement filed on March 1, 2019 (ECF No. 49-1, PageID #: 1129) were denied on November 25, 2019 without opinion. (ECF No. 49-1, PageID #: 1230). Mays did not appeal from the denial.[4]

IV. Federal Habeas Corpus Petition

On July 5, 2018, Mays petitioned *pro se* that this Court issue a writ of habeas corpus. (ECF No. 1). Mays asserted the following grounds for relief:

> GROUND ONE: 90 days speedy trial rights were violated, judicial misconduct, prosecutorial misconduct, police misconduct, witness misconduct.
>
> GROUND TWO: Ineffective assistance of trial counsel, Michael J. Cheselka, conspiracy with the prosecutors, the police, and the judge.
>
> GROUND THREE: The Court failed to send out my subpoenas when I was representing myself according Criminal Rule 44, judicial misconduct.
>
> GROUND FOUR: A forged fraudulent complaint by Detective Thelemor Powell that lacked probable cause, essential facts, supporting affidavit, and judicial review.

(ECF No. 1). Respondent filed the return of the writ on July 1, 2021 (ECF No. 49), and Mays filed his traverse on July 23, 2021 (ECF. No. 51).

V. Legal Standards

A. Jurisdiction

4 Mays filed a multitude of post-dismissal motions in his original direct appeal, a petition for a writ of procedendo, a petition for a writ of prohibition, and a plethora of post-conviction motions that had no basis in law. As none of these filings impact the disposition of this matter, they are not recounted in detail.

Title 28, United States Code Section 2254(a) authorizes district courts to entertain an application for a writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a State court." A state prisoner may file a § 2254 petition in the "district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him." 28 U.S.C. § 2241(d). The Court of Common Pleas of Cuyahoga County sentenced Mays, and Cuyahoga County is within this Court's geographic jurisdiction. Accordingly, this Court has jurisdiction over Mays's § 2254 petition.

B. Cognizable Federal Claim

Under 28 U.S.C. § 2254(a), a state prisoner may challenge his custody "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." A petitioner's claim is not cognizable on habeas review if it "presents no federal issue at all." *Bates v. McCaughtry*, 934 F.2d 99, 101 (7th Cir. 1991). Thus, "errors in application of state law ... are usually not cognizable in federal habeas corpus." *Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir. 2007) (citing *Walker v. Engle*, 703 F.2d 959, 962 (6th Cir. 1983)); *see also Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions.").

A federal habeas court does not function as an additional state appellate court; it does not review state courts' decisions on state law or procedure. *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988) (citing *Oviedo v. Jago*, 809 F.2d 326, 328 (6th Cir. 1987)). Instead, "federal courts must defer to a state court's interpretation of its own rules of evidence and procedure" in considering a habeas petition. *Id.* (quoting *Machin v. Wainwright*, 758 F.2d 1431, 1433 (11th Cir. 1985)). Moreover, "the doctrine of exhaustion requires that a claim be presented to the state courts under

the same theory in which it is later presented in federal court." *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998)

C. Exhaustion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs Mays's petition for writ of habeas corpus. *See Lindh v. Murphy*, 521 U.S. 320, 326–27 (1997) (holding that the AEDPA governs petitions filed after April 24, 1996); *Murphy v. Ohio*, 551 F.3d 485, 493 (6th Cir. 2009). Under the AEDPA, state prisoners must either exhaust all possible state remedies or have no remaining state remedies before a federal court can review a petition for writ of habeas corpus. 28 U.S.C. § 2254(b) and (c); *see also Rose v. Lundy*, 455 U.S. 509, 515–19 (1982). This entails giving 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); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990) ("The highest court in the state in which the petitioner was convicted [must have] been given a full and fair opportunity to rule on the petitioner's claims.").

D. Procedural Default

Procedural default is a related but "distinct" concept from exhaustion. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). It occurs when a habeas petitioner fails to obtain consideration of a federal constitutional claim by state courts because he failed to: (1) comply with a state procedural rule that prevented the state courts from reaching the merits of the petitioner's claim; or (2) fairly raise that claim before the state courts while state remedies were still available. *See generally Wainwright v. Sykes*, 433 U.S. 72, 80, 84-87 (1977); *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982); *Williams*, 460 F.3d at 806. In determining whether there has been a procedural default, the federal court again looks to the last explained state-court judgment. *Ylst v.*

Nunnemaker, 501 U.S. 797, 805 (1991); *Combs v. Coyle*, 205 F.3d 269, 275 (6th Cir. 2000). When a state court declines to address a prisoner's federal claims because the prisoner failed to meet a state procedural requirement, federal habeas review is barred as long as the state judgment rested on "independent and adequate" state procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). To be independent, a state procedural rule and the state courts' application of it must not rely in any part on federal law. *Id.* at 732-33. To be adequate, a state procedural rule must be "'firmly established' and 'regularly followed'" by the state courts at the time it was applied. *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009).

A petitioner procedurally defaults a claim by failing to "fairly present" the claim in state court when he does not pursue that claim through the state's "'ordinary appellate review procedures,'" and, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim. *Williams*, 460 F.3d at 806 (quoting *O'Sullivan*, 526 U.S. at 848); *see also Baston v. Bagley*, 282 F. Supp. 2d 655, 661 (N.D. Ohio 2003) ("Issues not presented at each and every level [of the state courts] cannot be considered in a federal habeas corpus petition."). Under these circumstances, while the exhaustion requirement is technically satisfied because there are no longer any state-court remedies available to the petitioner, the petitioner's failure to have the federal claims fully considered in the state courts constitutes a procedural default of those claims, barring federal habeas review. *Williams*, 460 F.3d at 806 ("Where state court remedies are no longer available to a petitioner because he or she failed to use them within the required time period, procedural default and not exhaustion bars federal court review."); *see also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996) ("Because the exhaustion requirement 'refers only to remedies still available at the time of the federal petition,' ..., it is satisfied 'if it is clear that [the

habeas petitioner's] claims are now procedurally barred under [state] law' ...." (internal citations omitted)).

Furthermore, to "fairly present" a claim to a state court, a petitioner must assert both its legal and factual basis. *Williams*, 460 F.3d at 806 (citing *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000)). Most importantly, a "'petitioner must present his claim to the state courts as a federal constitutional issue – not merely as an issue arising under state law.'" *Id.* (quoting *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984)). A petitioner can overcome a procedural default by demonstrating cause for the default and actual prejudice that resulted from the alleged violation of federal law, or that there will be a "fundamental miscarriage of justice" if the claim is not considered. *Coleman*, 501 U.S. at 750. "'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to him." *Id.* "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Id.* "A fundamental miscarriage of justice results from the conviction of one who is 'actually innocent.'" *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006) (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

E. Standard of Review

The AEDPA provides in relevant part as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

To determine whether relief should be granted, the Court must use the "look-through" methodology and look to the "last explained state-court judgment" on the petitioner's federal claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) ("The essence of unexplained orders is that they say nothing. We think that a presumption which gives them no effect—which simply 'looks through' them to the last reasoned decision—most nearly reflects the role they are ordinarily intended to play."); *Wilson v. Sellers*, 138 S. Ct. 1188, 1193 (2018) ("We conclude that federal habeas law employs a 'look through' presumption.").

"A decision is 'contrary to' clearly established federal law when 'the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.'" *Otte v. Houk*, 654 F.3d 594, 599 (6th Cir. 2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000)). "Clearly established Federal law for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *White v. Woodall*, 572 U.S. 415, 419 (2014) (quotations and citations omitted). "[U]nder the unreasonable application clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003). "The unreasonable application clause requires the state court decision to be more than incorrect or erroneous"—it must be "objectively unreasonable." *Id.*

Under § 2254(d)(2), "when a federal habeas petitioner challenges the factual basis for a prior state-court decision rejecting a claim, the federal court may overturn the state court's decision

only if it was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Burt v. Titlow*, 571 U.S. 12, 18 (2013) (quoting 28 U.S.C. § 2254(d)(2)). A state-court decision is an "unreasonable determination of the facts" under § 2254(d)(2) only if the trial court made a "clear factual error." *Wiggins v. Smith*, 539 U.S. 510, 528 (2003). A state court's factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Wood v. Allen*, 558 U.S. 290, 301 (2010). Even if "[r]easonable minds reviewing the record might disagree" about the finding in question, "on habeas review that does not suffice to supersede the trial court's ... determination." *Rice v. Collins*, 546 U.S. 333, 341-42 (2006). The prisoner bears the burden of rebutting the state court's factual findings "by clear and convincing evidence." *Burt*, 571 U.S. at 18 (citing 28 U.S.C. § 2254(e)(1)).

For state prisoners, the § 2254(d) standard "is difficult to meet... because it is meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This is because, "[a]s amended by AEDPA, § 2254(d) is meant only to stop short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Id.* 103. "It preserves authority to issue the writ in cases where there is no possibility [that] fairminded jurists could disagree that the state courts decision conflicts with this Court's precedents" and "goes no further." *Id.* Thus, in order to obtain federal habeas corpus relief, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.*

VI. Discussion

The undersigned recommends that the Court find that the entirety of Mays' petition has been procedurally defaulted. The failure of a state inmate to appeal a claim to the Supreme Court of Ohio constitutes a procedural default. *See Barkley v. Konteh*, 240 F.Supp.2d 708 (N.D. Ohio 2002). Mays not only failed to appeal *any* aspect of his case to the Ohio Supreme Court, but he also never completed a direct appeal of his convictions or the denial of his post-appeal motion for new trial. As a result, Mays has never "fairly presented" any of his claims to the state court through the ordinary appellate procedures. His issues, therefore, cannot be considered in this habeas proceeding. *Baston*, 282 F. Supp. 2d at 661.

Mays's initial attempt at a direct appeal was dismissed pursuant to Ohio App. R. 18(c). "If a state has a procedural rule that prevented the state courts from hearing the merits of a habeas petitioner's claim, that claim is procedurally defaulted when: (1) the petitioner failed to comply with the rule; (2) the state actually enforced the rule against the petitioner; and (3) the rule is an 'adequate and independent' state ground foreclosing review of a federal constitutional claim. *James v. Sheldon*, No. 1:17-CV-2095, 2021 WL 405522, at *4 (N.D. Ohio Feb. 5, 2021) (citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *Taylor v. McKee*, 649 F.3d 446, 450 (6th Cir. 2011)).

Mays failed to comply with the filing requirements of Ohio App. R. 18(c), which allows the court of appeals to dismiss an appeal when the appellant fails to file a brief in the time allowed by the rule or as extended by the court. Here, the court of appeals allowed Mays until July 19, 2019 to file his pro se brief after granting his motion to dismiss his appellate counsel and proceed pro se. Mays failed to file his brief by July 19, 2019, thus satisfying the first factor of the *Maupin* test. The second *Maupin* factor was satisfied when the state appellate court dismissed Mays's appeal for failing to file his brief by July 19, 2019. (ECF No. 7-1, PageID #: 200-201). Finally, Mays's

failure to comply with the filing requirements of Ohio App. R. 18(c) constitutes an adequate and independent state ground on which Ohio can rely to foreclose review of a federal constitutional claim. *Hall v. Clipper*, No. 1:10-CV-1340, 2011 WL 4808179, at *14 (N.D. Ohio Sept. 7, 2011), *report and recommendation adopted*, No. 1:10-CV-1340, 2011 WL 4827002 (N.D. Ohio Oct. 11, 2011) Accordingly, each of Mays's grounds is procedurally defaulted. *See Coleman*, 501 U.S. at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").[5]

Mays cannot establish "cause" for his procedural default since the dismissal of his appeal was due to his own failure to file a *pro se* brief after requesting to proceed in such a fashion. *See Gordon v. Bradshaw*, No. 104 CV 2299, 2007 WL 496367, at *14 (N.D. Ohio Feb. 12, 2007) (citing *Coleman*, 501 U.S. at 754) (holding that cause under the cause and prejudice test must be something external to the petitioner that cannot fairly be attributed to him).

Additionally, Mays's default cannot be excused under the "fundamental miscarriage of justice" exception since Mays has not come forward with new, reliable evidence. *See Coleman,* 501 U.S. at 749–50). "In the absence of cause and prejudice, a petitioner may demonstrate that the failure to consider the claims will result in a fundamental miscarriage of justice. A fundamental miscarriage of justice results from the conviction of one who is 'actually innocent.'" *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006) (quoting *Murray*, 477 U.S. at 496). "The 'fundamental

5 The Court also notes that Mays failed to appeal the appellate court's dismissal to the Ohio Supreme Court.

miscarriage of justice' gateway is open to a petitioner who submits new evidence showing that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.' " *Williams v. Bagley*, 380 F.3d 932, 973 (6th Cir. 2004) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). Actual innocence means "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." *Schlup*, 513 U.S. at 324.

Here, Mays claims to have discovered exculpatory evidence from the hospital videotape that proved the whole case against him was a lie and discovered records that proved his Greyhound bus tickets were fake. However, Mays himself acknowledges that this evidence was in fact available as of the time of trial. (*See* ECF No.49-1, PageID # 1128). Mays has failed to provide any new evidence demonstrating his "factual innocence."

This Court recommends dismissing Mays's petition as each claim has been procedurally defaulted.

VII. Motion for the Appointment of Counsel (ECF No. 51-17)

Petitioner requests assistance in obtaining federal counsel pursuant to "federal rule 60(B)-6". (ECF No. 51-17).[6] Petitioner does not assert that he needs assistance with the instant petition for habeas relief. Instead, Petitioner urges the court to appoint counsel in order to conduct discovery pertaining to this trial and conviction and review the filings in the state court matter. (*See* ECF No. 51-17).

6 Federal R. Civ. P. 60(b)(6) does not address the appointment of counsel for habeas claims, but rather, allows a motion for relief from a final judgment, order, or proceeding.

A district court has the discretion to appoint counsel in a civil proceeding. *See Dudley El v. Michigan Dep't of Corr.*, No. 17-2288, 2018 WL 5310761, at *3 (6th Cir. May 23, 2018); 28 U.S.C. § 1915(e)(1). It "is not a constitutional right and is justified only by exceptional circumstances." *Id.* (citations and internal quotation marks omitted). "When determining whether exceptional circumstances exist, courts generally examine the complexity of the factual and legal issues involved and the plaintiff's ability to represent himself. *Id.* (citations and internal quotation marks omitted). "Courts should not appoint counsel when the claims are frivolous or when the chances of success are extremely slim." *Cleary v. Mukasey*, 307 F. App'x 963, 965 (6th Cir. 2009) (citation and quotation marks omitted).

Petitioner's grounds for relief are each procedurally defaulted. The Court has carefully reviewed the relevant portions of the record and—seeing nothing exceptional about Petitioner's circumstances—finds nothing to justify appointment of counsel. Based on the filings, the Court perceives that Petitioner is capable of representing himself and pursuing, via appropriate mechanisms, relief under the law. The case is not particularly complex and Petitioner's submissions to the Court express awareness of relevant legal concepts and demonstrate that he is capable of invoking the judicial process and making reasoned arguments to support his claims.

Accordingly, the Court denies Petitioner's request for the appointment of counsel to represent him in this habeas petition.

VIII. Motion for Evidentiary Hearing

Mays also moved for an evidentiary hearing. When deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable the habeas petitioner to prove the petition's factual allegations, which, if true, would entitle the petitioner to federal habeas relief on his claim or claims. *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Under

the AEDPA, evidentiary hearings are not mandatory in habeas cases. *See Vroman v. Brigano*, 346 F.3d 598, 606 (6th Cir. 2003). An evidentiary hearing is not required where the record is complete or if the petition raises only legal claims that can be resolved without the taking of additional evidence. *Ellis v. Lynaugh*, 873 F.2d 830, 840 (5th Cir. 1989); *United States v. Sanders*, 3 F. Supp. 2d 554, 560 (M.D. Pa. 1998).

If the Court accepts the foregoing recommendation, the motion for an evidentiary hearing should be denied because each of Mays's claims is procedurally defaulted.

IX. Certificate of Appealability

A. Legal Standard

A habeas petitioner may not appeal the denial of his application for a writ of habeas corpus unless a judge issues a certificate of appealability and specifies the issues that can be raised on appeal. 28 U.S.C. § 2253(c) ("A certificate of appealability may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right."). The "'petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.'" *Tennard v. Dretke*, 542 U.S. 274, 282 (2004) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The granting of a certificate of appealability does not require a showing that the appeal would succeed on any claim. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

B. Analysis

Each of Mays's grounds for relief is procedurally defaulted. If the Court accepts the foregoing recommendation, then Mays has not made a substantial showing of a denial of a constitutional right. He would then not be entitled to a certificate of appealability. Thus, I recommend that the Court not issue a certificate of appealability.

VIII. Recommendation

Petitioner Mays has presented only procedurally defaulted claims. Thus, I recommend that the Court DENY Mays's petition, along with his motion for an evidentiary hearing, and not grant him a certificate of appealability.

DATED: January 18, 2022

s/ Carmen E Henderson
Carmen E. Henderson
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days after being served with a copy of this document. Failure to file objections within the specified time may forfeit the right to appeal the District Court's order. *Berkshire v. Beauvais,* 928 F.3d 520, 530-31 (6th Cir. 2019).

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

CLIFTON B. MAYS,	CASE NO. 1:20 CV 1402
Petitioner,	
v.	JUDGE JAMES R. KNEPP II
WARDEN KENNETH BLACK[1],	
Respondent.	**MEMORANDUM OPINION AND ORDER**

INTRODUCTION

Pro se Petitioner Clifton B. Mays ("Petitioner"), a prisoner in state custody, filed a Petition seeking a writ of habeas corpus under 28 U.S.C. § 2254. (Doc. 1).This case was referred to Magistrate Judge Carmen E. Henderson for a Report and Recommendation ("R&R") regarding the Petition under Local Civil Rule 72.2(b)(2). On January 18, 2022, Judge Henderson issued an R&R recommending the Petition be denied in its entirety and denying his motion for an evidentiary hearing. (Doc. 67). Petitioner has filed objections to the R&R. *See* Docs. 68, 70, 71, 72. He has also filed a Motion for Appeal Bond. (Doc. 69).

The Court has jurisdiction over the Petition under 28 U.S.C. § 2254(a). For the reasons set forth below, the Court OVERRULES Petitioner's Objections, ADOPTS the R&R, and DENIES Petitioner's habeas Petition and motion for an evidentiary hearing. The Court further DENIES Petitioner's Motion for Appeal Bond.

---

1. Petitioner is incarcerated at the Richland Correctional Institution in Mansfield, Ohio. The Court updates the caption of the case to reflect the current Warden of that Institution, Kenneth Black.

BACKGROUND

This habeas case, filed June 25, 2020[2], stems from Petitioner's jury trial conviction in the Cuyahoga County, Ohio Court of Common Pleas for domestic violence, attempted murder, felonious assault, kidnapping, endangering children, aggravated menacing, and having weapons under disability. *See* Doc. 1; Doc. 49-1, at 144-45. Petitioner is serving a 24-year prison sentence. (Doc. 1, at 1); Doc. 49-1, at 146-47.

Petitioner raises four grounds for relief in his Petition:

1. 90 days speedy trial rights were violated, judicial misconduct, prosecutorial misconduct, police misconduct, witness misconduct.

2. Ineffective assistance of trial counsel, Michael J. Cheselka, conspiracy with the prosecutors, the police, and the judge.

3. The court failed to send out my subpoenas when I was representing myself, according to Criminal Rule 44, judicial misconduct.

4. A forged fraudulent complaint by Detective Thelemon Powell that lacked probable cause, essential facts, supporting affidavit, and judicial review.

(Doc. 1, at 5-10).

In her R&R, Judge Henderson recommends the Court find the entirety of Petitioner's Petition procedurally defaulted. (Doc. 67, at 12-14). Further, she recommends the Court deny Petitioner's motion for an evidentiary hearing. *Id.* at 15-16.

STANDARD OF REVIEW

When a party objects to the Magistrate Judge's R&R, the district judge "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected

2. Petitioner correctly points out that the R&R incorrectly lists the filing date as July 5, 2018. *See* Doc. 68, at 12 (citing Doc. 67, at 5). However, this typographical error is immaterial to the R&R's substantive analysis.

to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).

This Court adopts all uncontested findings and conclusions from the R&R and reviews *de novo* those portions of the R&R to which specific objections are made. 28 U.S.C. § 636(b)(1); *Hill v. Duriron Co.*, 656 F.2d 1208, 1213–14 (6th Cir. 1981). To trigger *de novo* review, objections must be specific, not "vague, general, or conclusory." *Cole v. Yukins*, 7 F. App'x 354, 356 (6th Cir. 2001). This specific-objection requirement is meant to direct this Court to "specific issues for review." *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991). General objections, by contrast, ask this Court to review the entire matter *de novo*, "making the initial reference to the magistrate useless." *Id.*

"A general objection, or one that merely restates the arguments previously presented and addressed by the Magistrate Judge, does not sufficiently identify alleged errors in the [R&R]" to trigger *de novo* review. *Fondren v. American Home Shield Corp.*, 2018 WL 3414322, at *2 (W.D. Tenn. 2018); *see also Aldrich v. Bock*, 327 F. Supp. 2d 743, 747 (E.D. Mich. 2004) ("An 'objection' that does nothing more than state a disagreement with a magistrate's suggested resolution, or simply summarizes what has been presented before, is not an 'objection' as that term is used in this context."). General objections trigger only clear-error review. *Equal Employment Opportunity Comm'n v. Dolgencorp, LLC*, 277 F. Supp. 3d 932, 965 (E.D. Tenn. 2017), *aff'd*, 899 F.3d 428 (6th Cir. 2018).

DISCUSSION

The R&R specifically recommends the Court find Petitioner's four grounds for relief procedurally defaulted because Petitioner failed to raise them to the Ohio Appellate Court in

accordance with the time-limits set by that Court, and further because Petitioner did not appeal any appellate court's decision to the Ohio Supreme Court.

Petitioner's objections largely fall into three categories: (1) arguments against default; (2) arguments about the merits of his underlying claims and assertions that an evidentiary hearing would prove those claims; and (3) claims that Judge Henderson was biased against him, in part because he filed a Writ of Mandamus with the Sixth Circuit Court of Appeals.

Procedural Default

Petitioner makes two specific objections related to the R&R's procedural default analysis. First, he seemingly attempts to argue "cause" to overcome the default of claims raised on direct appeal by stating that "Appellate Counsel Cavallo . . . improperly abandoned [Petitioner's] case, because he or the 8th District Court of Appeals never got a proper waiver of counsel in writing nor did either of them send Mr. Mays trial transcripts or the state record." (Doc. 68, at 10-11). To the extent Petitioner is attempting to assert ineffective assistance of appellate counsel as cause, he cannot do so because he has not presented such a claim independently to the Ohio courts, and thus this claim itself is procedurally defaulted. *See Edwards v. Carpenter*, 529 U.S. 446, 453 (2000) (procedurally defaulted claim of ineffective assistance of appellate counsel cannot serve as "cause" for "cause and prejudice" to excuse a procedural default).

Second, Petitioner asserts he "proved that he appealed Motions for New Trial to the 8th District Court of Appeals, and Memorandum for Jurisdiction as it relates to his denial of direct appeal to the Ohio Supreme Court." (Doc. 68, at 11). He continues: "United States Certified Postage Receipts proves that these motions were sent to these courts, proving more misconduct. Mr. Mays submitted his evidence to the federal court. It is not Mr. Mays fault if the court did not docket them which proves conspiracy." *Id.* at 11-12. Petitioner does not provide any citation or

further elaboration in support of this statement. As Respondent pointed out in his Answer (Doc. 49, at 14), the R&R explained (Doc. 67, at 5, 12-13), and this Court has confirmed, the state court docket does not reflect either an appeal to the Ohio Supreme Court of the Ohio Appellate Court's dismissal of Petitioner's direct appeal, or an appeal to the Ohio Appellate Court of the trial court's denial of Petitioner's motion for a new trial. Petitioner's conclusory allegation that he attempted to do so does not change the R&R's analysis. In fact, although the Petition asserts Petitioner sought further review of his direct appeal, the proceeding he cites is an action for a Writ of Prohibition, not an appeal of the Ohio Appellate Court's procedural dismissal of the appeal. *See* Doc. 1, at 2-3 (citing Ohio Supreme Court case 2019-1625). That is, although Petitioner filed other actions and motions, these actions were not the proceedings necessary to exhaust his claim in state courts and avoid procedural default.[3]

Third, to the extent Petitioner is more broadly contending that he is innocent of the underlying crimes, the R&R correctly states that Petitioner has not satisfied the standard for excusing default based on the "fundamental miscarriage of justice" or "actual innocence" exception. *See* Doc. 67, at 13-14.

Fourth, Petitioner's contention that his "ninety . . . day speedy trial claim is a 6th Amendment federal constitutional issue that cannot be procedurally defaulted" (Doc. 68, at 12) is

3. Furthermore, the Court notes Petitioner did not raise this argument for "cause" to the Magistrate Judge in response to Respondent's arguments about procedural default. *See* Doc. 51-1 (Memorandum in Support of Reply/Traverse). And he has presented no "compelling reason" for his failure to do so. As such, this argument is waived. *See Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000) ("[W]hile the Magistrate Judge Act, 28 U.S.C. § 631 *et seq.*, permits . . . review by the district court if timely objections are filed, absent compelling reasons, it does not allow parties to raise at the district court stage new arguments or issues that were not presented to the magistrate.") (citing *United States v. Waters*, 158 F.3d 933, 936 (6th Cir. 1998) (citing *Marshall v. Chater*, 75 F.3d 1421, 1426-27 (10th Cir. 1996) ("issues raised for the first time in objections to magistrate judge's [decision] are deemed waived")).

simply incorrect. The ninety-day time period to which Petitioner refers is a state statutory requirement, not a federal constitutional one, and habeas relief will not lie for claimed violations of state law. *See* Ohio Rev. Code § 2945.71; *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). More fundamentally, however, a constitutional speedy trial claim – like any other habeas claim – can be procedurally defaulted. *See, e.g.*, *Creech v. Shoop*, 2021 WL 867125, at *4 (6th Cir.) ("Because the state appellate court enforced a procedural bar to deny review, the speedy trial claims are procedurally defaulted."); *Carley v. Hudson*, 563 F. Supp. 2d 760, 774 (N.D. Ohio 2008) (finding speedy trial claim procedurally defaulted).

Fifth, because Petitioner's claims are all procedurally defaulted, there is no need for the Court to reach his arguments regarding the underlying merits of his claims.

Evidentiary Hearing

Petitioner's objections also address the R&R's recommendation that an evidentiary hearing be denied. He contends such a hearing is necessary to prove the underlying merits of his grounds for relief.

But Petitioner's claims are procedurally defaulted and he has not shown cause and prejudice to overcome that default. His arguments for an evidentiary hearing go to the merits of those defaulted claims, and challenging the evidence presented in state court and validity of his underlying conviction. In these circumstances, an evidentiary hearing is not necessary. *See Werber v. Milligan*, 2012 WL 1458103, *23 (N.D. Ohio) (discovery seeking to develop new evidence as to defaulted claims would be futile); *Foster v. Brunsman*, 2010 WL 3604453, *1 (S.D. Ohio); *Judon v. Trombley*, 2008 WL 4279371, at *4 (E.D. Mich.) ("Because Petitioner's claims are procedurally defaulted and he has failed to establish cause or prejudice or a miscarriage of justice to excuse the default, he is not entitled to an evidentiary hearing on his claims.).

Claims of Bias

Finally, as to Petitioner's claims of bias or fraud which are repeated throughout his filing (*see* Doc. 68), the Court finds them not to be proper objections and to be entirely unfounded. The Court has carefully reviewed the R&R and finds it accurately summarizes the relevant underlying facts and legal standards applicable to Petitioner's claims. Plaintiff presents no evidence, aside from sweeping accusations and speculation, that the Magistrate Judge acted inappropriately when making her recommendation. The Court can find no such evidence in the record.

Motion for Appeal Bond

After Judge Henderson filed her R&R and Petitioner filed his objections, Petitioner also filed a "Motion for Appeal Bond According to Federal Rule 60-B(6)". (Doc. 69)[4]. Under limited circumstances, a prisoner may seek release pending the court's review of his habeas petition. *See Pouncy v. Palmer*, 993 F.3d 461, 463 (6th Cir. 2021). "In order to receive bail pending a decision on the merits [of a habeas petition], prisoners must be able to show not only a substantial claim of law based on the facts surrounding the petition but also the existence of 'some circumstance making [the motion for bail] exceptional and deserving of special treatment in the interests of justice.' " *Dotson v. Clark*, 900 F.2d 77, 79 (6th Cir. 1990) (quoting *Aronson v. May*, 85 S. Ct. 3, 5 (1964) (Douglas, J., in chambers)); *see also Nash v. Eberlin*, 437 F.3d 519, 526 n.10 (6th Cir. 2006). But "[t]here will be few occasions where a prisoner will meet this standard." *Dotson*, 900 F.2d at 79; *see also Pouncy*, 993 F.3d at 463.

For the reasons set forth in the R&R and above, the Court finds Petitioner has not shown a substantial claim of law based on the facts surrounding his Petition. As such, his Motion for Appeal Bond is denied.

4. Federal Civil Rule 60(b)(6) addresses motions for relief from judgment, not motions for bond.

CONCLUSION

For the foregoing reasons, good cause appearing, it is

ORDERED that Judge Henderson's R&R (Doc. 67) be, and the same hereby is, ADOPTED as the Order of this Court, and the Petition (Doc. 1) is DENIED as set forth therein and herein; and it is

FURTHER ORDERED that Petitioner's Motion for Appeal Bond (Doc. 69) be DENIED;

FURTHER ORDERED that, because Petitioner has not made a substantial showing of a denial of a constitutional right directly related to his conviction or custody, no certificate of appealability shall issue. 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 22(b); Rule 11 of Rules Governing § 2254 Cases. And the Court

CERTIFIES that an appeal from this decision could not be taken in good faith. 28 U.S.C. § 1915(a)(3).

s/ James R. Knepp II
UNITED STATES DISTRICT JUDGE