

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: September 09, 2021

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Mr. Anthony Suggs
Mansfield Correctional Institution
P.O. Box 788
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Re: Case No. 21-3281, **Anthony Suggs v. Tim McConahay**
Originating Case No. : 5:18-cv-00743

Dear Sir or Madam,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/C. Anthony Milton
Case Manager
Direct Dial No. 513-564-7026

cc: Ms. Sandy Opacich

Enclosure

No mandate to issue

No. 21-3281

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUITFILED
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DEBORAH S. HUNT, Clerk

ANTHONY SUGGS,)	
)	
Petitioner-Appellant,)	
)	
v.)	<u>O R D E R</u>
)	
TIM MCCONAHA Y, Warden,)	
)	
Respondent-Appellee.)	
)	

Before: McKEAGUE, Circuit Judge.

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

Suggs was indicted for aggravated robbery, aggravated burglary, kidnapping, felonious assault, possession of cocaine, obstructing official business, and resisting arrest. *See State v. Suggs*, Nos. 27812/27865/27866, 2016 WL 4649486, at *1 (Ohio Ct. App. Sept. 7, 2016). A jury found him guilty of all of those charges, except that it convicted him of assault as a lesser-included offense of felonious assault. The trial court sentenced him to a total term of imprisonment of twelve years. The same day, it also sentenced him in two other cases: In one case he had violated the community control he was under for a previous offense and was sentenced to two years of imprisonment; in the other, he was sentenced to three years of imprisonment for trafficking in cocaine and heroin. The trial court ordered Suggs to serve his prison terms in each of the three cases consecutively, for a total of seventeen years.

Suggs appealed, arguing that he was sentenced for a first-degree felony when the verdict form only supported a second-degree felony; the trial court erred by denying his motion for a

No. 21-3281

- 2 -

mistrial based on prosecutorial misconduct; counsel provided ineffective assistance; his kidnapping conviction was against the manifest weight of the evidence; and he was improperly sentenced. *See id.* at *1-5. The Ohio Court of Appeals rejected his arguments and affirmed the judgment of the trial court. *Id.* at *6.

Suggs, proceeding pro se, filed a motion for leave to file a delayed appeal in the Ohio Supreme Court. On March 15, 2017, the court granted his motion and ordered him to file a memorandum in support of jurisdiction within thirty days of the date of the order. *State v. Suggs*, 71 N.E.3d 297 (Ohio 2017) (table). Suggs failed to file the memorandum in accordance with the order, and on April 20, 2017, the Ohio Supreme Court dismissed his appeal for failure to prosecute. *State v. Suggs*, 72 N.E.3d 659 (Ohio 2017) (table). Suggs also filed other state postconviction actions that are not relevant to this appeal.

Suggs then filed his habeas petition, raising the following claims: (1) prosecutorial misconduct; (2) ineffective assistance of counsel; (3) insufficient evidence to support his kidnapping conviction; and (4) sentencing errors. His petition acknowledged that he had not exhausted all of his claims by presenting them to the Ohio Supreme Court because that court dismissed his delayed appeal, but he explained that he did not have access to the prison law library. The warden filed a response, asserting that all the claims raised in Suggs's petition were procedurally defaulted. Suggs filed a reply, arguing that his default should be excused as the result of the ineffective assistance of appellate counsel and the Ohio Supreme Court's erroneous dismissal of his appeal.

A magistrate judge reviewed the parties' pleadings and agreed that Suggs's claims were procedurally defaulted. The magistrate judge explained that Suggs's four habeas claims corresponded to claims that he raised on direct appeal, but that the claims were defaulted because the Ohio Supreme Court dismissed his case for a procedural reason—failure to prosecute. The magistrate judge acknowledged Suggs's arguments in favor of cause and prejudice to excuse his default—that the prison law librarian quit and Suggs was denied access to the law library, and the ineffective assistance of appellate counsel—but concluded that those arguments were insufficient.

No. 21-3281

- 3 -

Finally, the magistrate judge determined that Suggs had failed to establish actual innocence that would allow the court to review his defaulted claims. The magistrate judge therefore recommended dismissing Suggs's habeas petition.

Suggs filed objections. He did not dispute that his claims were procedurally defaulted, but he reasserted his contention that the law library's closure constituted cause for the default—i.e., an objective factor external to his defense that prevented his compliance with the state's procedural rule that he file a memorandum in support of jurisdiction in the Ohio Supreme Court. He also argued that he established prejudice to excuse his default because several constitutional errors occurred at his trial that must be addressed.

The district court adopted the magistrate judge's finding that all four of Suggs's claims were procedurally defaulted. Regarding Suggs's reasons to excuse the default, the district court first noted that Suggs's exhibits demonstrated that he had access to the law library at the time he received the Ohio Supreme Court's order and that he simply did not feel that he had "enough" access. Because limited access to a prison law library does not constitute cause to excuse a procedural default, the district court overruled his objection regarding access. Because the district court did not find cause, it did not address prejudice. The district court also noted that Suggs did not object to the magistrate judge's conclusion that he had not presented any new evidence of actual innocence that could excuse his procedural default and adopted that finding. The district court therefore overruled Suggs's objections, adopted the magistrate judge's report, denied the petition, and denied a COA.

Suggs now applies for a COA. To obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Where the district court denies an issue on procedural grounds without evaluating the merits of the underlying constitutional claim, a court should grant a COA only if two requirements are satisfied: first, the court must determine that

No. 21-3281

- 4 -

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

As the district court recognized, Suggs did not dispute that all four of his habeas claims were procedurally defaulted. Rather, he only disputed whether the default should be excused. In his COA application, Suggs asserts that his “legal position is simple.” He states that, because the law library did not have any workers during the time he was allowed to file his memorandum in support of jurisdiction, he was not afforded access to the courts, which was an objective factor external to his defense that demonstrated cause to excuse his default. Because he does not raise either ineffective assistance of appellate counsel as cause to excuse his default or actual innocence as a gateway to consideration of his defaulted claims, those arguments are forfeited. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

If a petitioner failed to present claims in state court pursuant to the state's procedural requirements, “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.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A habeas petitioner carries the burden of demonstrating cause and prejudice to excuse his procedurally defaulted claims. *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999).

In order to establish cause, a habeas corpus petitioner ordinarily must “show that some objective factor external to the defense” prevented the petitioner's compliance with a state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Although Suggs asserted that his limited access to the prison law library was such a factor, courts have held repeatedly that a petitioner's pro se status, limited access to a prison law library, or ignorance of the law and state

No. 21-3281

- 5 -

procedural rules do not constitute cause sufficient to excuse a procedural default. *See, e.g., Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir 2004) (citing *Hannah v. Conley*, 49 F.3d 1193, 1197 (6th Cir. 1995)).

Suggs's exhibits contained a grievance regarding his access to the law library, which explained that on March 20, 2017, he received the Ohio Supreme Court's order granting his delayed appeal and ordering him to file a memorandum in support of jurisdiction by April 14, 2017. He stated that "at the time I was going to the law library twice a week (Sat. and Sun.)"; he further explained that on March 25 he asked the legal aide for two additional days per week to research, but he never received a response. He also stated that the law librarian quit on April 1. After several other requests, he claimed that his request for four days per week was granted on April 11, the same day he mailed a request to the Ohio Supreme Court for an extension of time to file his memorandum. In an affidavit submitted to the district court, Suggs averred that he went to the library on March 25 but did not have access to the library after March 25, 2017, through April 13, 2017.

As the district court concluded, Suggs's exhibits demonstrated that he was not completely denied access to the law library during the time that his memorandum in support of jurisdiction was due. Rather, he at least had access on March 25. Further, the memorandum required by the Ohio Supreme Court must contain only a table of contents, an explanation why leave to appeal should be granted, a statement of the facts, and an argument in support of each claim. *See* Ohio St. S. Ct. Rule 7.02(C). All of this information was available to Suggs from his direct appeal. Suggs "d[id] not indicate why he required additional time to conduct legal research and how his limited law library time prevented him from filing" the memorandum. *Bonilla*, 370 F.3d at 498. Nor did he argue that the law library was inadequate. Without that explanation, reasonable jurists would not debate that the time limitation on his law library access was insufficient to establish cause to excuse his procedural default. And because Suggs did not demonstrate cause, this court need not consider prejudice. *See McCleskey v. Zant*, 499 U.S. 467, 502 (1991).

No. 21-3281

- 6 -

Reasonable jurists would not debate the district court's procedural ruling that Suggs's habeas claims were procedurally defaulted. Suggs's application for a COA is therefore **DENIED**. His motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ANTHONY SUGGS,)	CASE NO. 5:18CV743
Petitioner,)	JUDGE PAMELA A. BARKER
v.)	Magistrate Judge George J. Limbert
WARDEN EDWARD SHELDON, Mansfield Correctional Institution,)	<u>REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE</u>
Respondent.)	

On March 27, 2018, Petitioner Anthony Suggs (“Petitioner”) executed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, which was filed on April 2, 2018. ECF Dkt. #1. In his habeas corpus petition, Petitioner asserted four grounds of relief and requested the Court to release him from custody because his sentence is “void.” *Id.* at 5, 7-8, 10, 15. For the following reasons, the undersigned RECOMMENDS that the Court DISMISS Petitioner’s federal habeas corpus petition in its entirety with prejudice. ECF Dkt. #1.

L. FACTUAL HISTORY

The Ohio Ninth District Court of Appeals set forth the facts of this case on direct appeal. ECF Dkt. #7-1¹ at 119-29. These binding factual findings “shall be presumed to be correct,” and 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*, 119 S.Ct. 2403 (1999). As set forth by the Ninth District Court of Appeals, the facts are:

{¶2} According to Betty B., on July 24, 2015, Mr. Suggs, her ex-boyfriend, came to her house looking for her. When she went outside to talk to him, he immediately struck her, causing her to temporarily lose consciousness. When she came to, she was back inside her house, and Mr. Suggs was still attacking her. At some point, Mr. Suggs got a knife from the kitchen and held it to her throat. He then forced her upstairs and into the bathroom. He also allegedly reached into her bra and took money that she was

¹ Citations to the State Court Record, ECF Dkt. #7-1, will refer to the .PDF page numbers rather than to specific exhibits. This allows the Court and the parties to easily reference the transcript because the .PDF page numbers in the file containing the transcript (ECF Dkt. #7-1) correspond to the page numbers assigned when the transcript was filed in the CM/ECF system.

keeping there. By this time, however, police had responded to emergency calls placed by the others in the house. After kicking through the front door of the house, the responding officers came upstairs with their firearms drawn. Upon seeing the officers, Mr. Suggs attempted to crawl out the bathroom window, but they dragged him back inside. After handcuffing Mr. Suggs, they searched him and found cocaine.

ECF Dkt. #7-1 at 119-20. Petitioner does not contest these factual findings. ECF Dkt. #16 at 2.

II. PROCEDURAL HISTORY

A. State Trial Court

On March 13, 2012, the Summit County Grand Jury indicted Petitioner on one count of Robbery in violation of Revised Code (“R.C.”) 2911.02(A)(2) (Count 1), one count of Felonious Assault in violation of R.C. 2903.11(A)(1) (Count 2), one count of Domestic Violence in violation of R.C. 2919.25(A) (Count 3), and one count of Unlawful Restraint in violation of R.C. 2905.03 (Count 4) in Case Number 2012-03-0638. ECF Dkt. #7-1 at 5-6. On March 14, 2013, Petitioner retracted his former plea of not guilty and pleaded guilty to Felonious Assault and Domestic Violence, Counts 2 and 3 in the indictment. *Id.* at 7. The trial court dismissed the remaining charges of Robbery and Unlawful Restraint, Counts 1 and 4, upon recommendation of the State. *Id.* at 7-8. The trial court sentenced Petitioner to 2 years imprisonment with a mandatory period of 3 years of post release control and permitted Petitioner to file a motion for judicial release after serving 6 months imprisonment. *Id.* On December 6, 2013, the trial court granted Petitioner’s request for judicial release; it suspended the balance of his prison sentence and placed Petitioner on community control for a 2-year period. *Id.* at 9.

On April 4, 2014, the Summit County Grand Jury indicted Petitioner on one count of Trafficking in Heroin in violation of R.C.2925(A)(C)(6) (Count 1), one count of Trafficking in Cocaine in violation of R.C. 2925.03(A)(C)(4) (Count 2), one count of Possession of Heroin in violation of R.C. 2925.11(A)(C)(6) (Count 3), one count of Possession of Cocaine in violation of R.C. 2925.11(A)(C)(4) (Count 4), and one count of Illegal Use or Possession of Drug Paraphernalia in violation of R.C. 2925.14(C)(1) (Count 5) in Case Number 2014-03-0883. ECF Dkt. #7-1 at 11-14. Counts 1 through 4 carried a forfeiture specification. *Id.* Petitioner pleaded not guilty to these charges. *Id.* at 15.

The State charged Petitioner with violating the terms and conditions of community control due to the new charges. ECF Dkt. #7-1 at 16. On July 15, 2014, Petitioner waived his right to a hearing regarding the community control violation and admitted the violation. *Id.* at 17-18. As a result of plea negotiations in Case Number CR 2014-03-0883, Petitioner pleaded guilty to Trafficking in Heroin and Trafficking in Cocaine, Counts 1 and 2, and which were amended to remove certain language and became fourth degree felonies. *Id.* at 19-20. The Court accepted his guilty plea and dismissed the remaining charges in the indictment and all remaining criminal forfeiture specifications upon recommendation of the State. *Id.* at 20.

On August 4, 2014, the Summit County Grand Jury indicted Petitioner on one count of Aggravated Robbery in violation of R.C. 2911.01(A)(1) (Count 1), one count of Aggravated Robbery in violation of R.C. 2911.01(A)(3) (Count 2), one count of Aggravated Burglary in violation of R.C. 2911.11(A)(1) (Count 3), one count of Aggravated Burglary in violation of R.C. 2911.11(A)(2) (Count 4), one count of Kidnapping in violation of R.C. 2905.01(A)(2)/(A)(3) (Count 5), one count of Felonious Assault in violation of R.C. 2903.11(A)(1) (Count 6), one count of Felonious Assault in violation of R.C. 2903.11(A)(2) (Count 7), one count of Possession of Cocaine in violation of R.C. 2925.11(A)(C)(4) (Count 8), one count of Obstructing Official Business in violation of R.C. 2921.31(A) (Count 9), and one count Resisting Arrest in violation of R.C. 2921.33(A) (Count 10) in Case Number 2014-07-2219. ECF Dkt. #7-1 at 21-25. Petitioner pleaded not guilty to all 10 counts. *Id.* at 26.

His latest case, Case Number 2014-07-2219, proceeded to a jury trial on April 8, 2015. ECF Dkt. #7-1 at 40. During the State's closing argument, Petitioner objected to the prosecutor's comments that Petitioner was going to kill Miss Bittner as prejudicial since Petitioner was not charged with attempted murder, which the trial court overruled. ECF Dkt. #7-6 at 113-14. Petitioner also moved for a mistrial, which the trial court denied. *Id.* at 114. On April 10, 2015, the jury found Petitioner not guilty of the offense of both Aggravated Robbery counts (Counts 1-2), both Aggravated Burglary counts (Counts 3-4), and both Felonious Assault counts (Counts 6-7). ECF Dkt. #7-1 at 29-39. However, the jury found Petitioner guilty of Kidnapping (Count 5), a lesser

included offense of Assault in violation of R.C. 2903.13(A) (Count 6), Possession of Cocaine (Count 8), Obstructing Official Business (Count 9), and Resisting Arrest (Count 10). *Id.*

On April 23, 2015, the trial court sentenced Petitioner in Case Number CR-2014-07-2219 to a definite term of imprisonment of 11 years for Count 5, 180 days of imprisonment for lesser included Count 6, a definite term of 1 year of imprisonment for Count 8, 90 days of imprisonment for Count 9, and 90 days of imprisonment for Count 10. ECF Dkt. #7-1 at 40-41. The court also ordered the sentences imposed on Count 5 and 8 to be served consecutively with each other and ordered the sentences imposed in Counts 6, 9, and 10 to be served concurrently with each other and concurrently with Counts 5 and 9². *Id.* at 41. The trial court further ordered that the sentence imposed in Case Number CR-2014-07-2219 to be served consecutively with the sentence imposed in Case Numbers CR-2012-03-0638 and CR-2014-03-0883. *Id.*

The trial court in Case Number CR-2012-03-0638 revoked Petitioner's community control and imposed a 2-year prison term for Count 2, to be served consecutively with the sentences imposed in his other two cases. ECF Dkt. #7-1 at 43. The trial court in Case Number CR-2014-03-0883 sentenced Petitioner to 18 months imprisonment for amended Count 1 and 18 months imprisonment for amended Count 2, to be served consecutively with each other and with the sentences imposed in his other two cases. *Id.* at 45.

B. Direct Appeal

On May 19, 2015, Petitioner, through appellate counsel, appealed to the Court of Appeals of Summit County, Ninth Appellate District in Case Number CR-2014-07-2219. ECF Dkt. #7-1 at 47. On July 8, 2015, Petitioner's counsel filed a notice of appeal and a notice of delayed appeal in Case Number CR-2012-03-0638. *Id.* at 48-49. On July 8, 2015, Petitioner's counsel filed a notice of appeal and notice of delayed appeal in Case Number CR-2014-03-0883. *Id.* at 51. The appellate court granted the delayed filings and consolidated the three appeals, which neither party opposed. *Id.* at 54-57.

² The trial court may have meant Count 8 rather than Count 9. ECF Dkt. #7-1 at 41.

In his appellate brief filed on March 9, 2016, Petitioner, through appellate counsel, raised the following assignments of error:

1. The trial court erred by entering a judgment of conviction as to Count Five, Kidnapping, as a felony of the 1st degree, and sentencing accordingly, as the verdict form was sufficient only for a felony of the 2nd degree.
2. The trial court erred by not granting Suggs motion for mistrial based on the prosecutor's statement during the closing argument.
3. A. Mr. Suggs was denied his constitutional right to effective assistance of counsel at trial when the trial counsel failed to ask for the jury instruction for lesser included offenses of Kidnapping.
B. Mr. Suggs was denied his constitutional right to effective assistance of counsel at trial when his trial counsel failed to object to the inadequate verdict form.
4. Conviction of Suggs for Kidnapping was against the manifest weight of the evidence, as the jury clearly lost its way in determining that Suggs committed Kidnapping offense.
5. The trial court erred when it improperly impose[sic] maximum and consecutive sentence[sic].

ECF Dkt. #7-1 at 58-76. The State filed a brief in opposition. *Id.* at 84-108. Petitioner filed a reply brief. *Id.* at 113-18. On September 7, 2016, the Ohio Court of Appeals overruled each assignment of error on the merits and affirmed the judgment of the trial court. *Id.* at 119-29.

C. The Supreme Court of Ohio

On January 9, 2017, Petitioner, pro se, executed a notice of appeal in the Ohio Supreme Court, which was filed on January 13, 2017. ECF Dkt. #7-1 at 130-32. He also filed a motion for leave to file a delayed appeal of his direct appeal decision of September 7, 2016 and provided the following reasons for the delay:

1. Appellant Suggs was not aware that a decision had been entered on his direct appeal until he received a letter from his attorney, Wesley A. Johnson, on December 20, 2016.
2. Previously on December 16, 2016, he had received a letter from Kenneth R. Spiert, Asst. State Public Defender which indicated that the time for filing the appeal to the Ohio Supreme court had expired on October 24, 2016 which led Appellant to believe that there was nothing he could do further to appeal to this Court.
3. However, with due diligence, Suggs went to the law library and learned that he could file leave to file a delayed appeal, as he is doing now.

Id. at 133-38.

On March 15, 2017, the Ohio Supreme Court granted Petitioner's motion for delayed appeal and further ordered Petitioner to file a memorandum in support of jurisdiction within 30 days. *Id.* at 150. The State waived a response. *Id.* at 151. On April 20, 2017, the Ohio Supreme Court noted that Petitioner had not yet filed a memorandum in support of jurisdiction that was due on April 14, 2017. ECF Dkt. #7-1 at 152. It, therefore, dismissed the case for failure to prosecute with the requisite diligence. *Id.*

D. Post-Conviction Relief

On November 29, 2017, Petitioner, pro se, executed a petition in the trial court to vacate or set aside judgment of conviction or sentence, which was filed on December 11, 2017. ECF Dkt. #7-1 at 153-57. Petitioner made the following claim:

1. A violation of Amendment IV, V, VI, and XIV

A witness for the state was giving[sic] a lenient[sic] sentence to testify. The prosecution did not tell the court or defense about the "deal." As required by Crim. R. 16(B)(1)(e). Since this happened Crim. R. 33(A)(2) is the remedy. This is a Brady violation, prosecutorial misconduct.

Id. at 154. Petitioner also moved for expert assistance. *Id.* at 161-69. The State moved to dismiss the petition because it was untimely. *Id.* at 170-71. On February 13, 2019, the trial court denied all three of Petitioner's motions as untimely. *State v. Suggs*, Case Nos. CR 2012-03-0638, 2014-03-0883, 2014-07-2219, Doc. 4, available at <https://clerkweb.summitoh.net/PublicSite/Documents/sumzzzi70000071D.pdf>. Regarding Petitioner's motion to vacate or set aside, the trial court stated that even if it considered the merits of the application, Petitioner did not show any constitutional error at trial and the doctrine of res judicata applies to his arguments. *Id.* at 5.

On August 12, 2019, Petitioner filed a motion for delayed appeal in the Ninth District Court of Appeals. *State v. Suggs*, Case Nos. CA 29500, 29501, 29502, Doc. 9, available at <https://clerkweb.summitoh.net/PublicSite/Documents/sumzzr900001319.pdf>. The appellate court dismissed Petitioner's appeals on September 3, 2019. *Id.*, Doc. 2, available at <https://clerkweb.summitoh.net/PublicSite/Documents/sumzzt10000044C.pdf>. The appellate court reasoned that the motions for delayed appeal were inapplicable because App. R. 5(A) does not apply

to post-conviction proceedings and his contention of improper service of the trial court's February 13, 2019 order was without merit because his appeal was nevertheless untimely. *Id.*

On October 9, 2019, Petitioner filed a Notice of Appeal and Memorandum in Support of Jurisdiction to the Ohio Supreme Court regarding the September 3, 2019 ruling. *State v. Suggs*, Case Nos. CA 29500, 29501, 29502, Doc. 1, available at <https://clerkweb.summitoh.net/PublicSite/Documents/sumzzzv200000E4E.pdf> (Notice also available at http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=873581.pdf) (Memorandum available at http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=873582.pdf). Petitioner raised the following propositions of law:

1. The 9th District Court of Appeals erred when it denied Appellant's request of "Postconviction relief pursuant to R.C. 2953.21 to vacate Appellant's convictions on the basis that it is void or voidable under the U.S. Constitution or the Ohio Constitution" when at trial the defence[sic] wasn't notified that a state witness was giving a lenient[sic] sentence to testify against the Appellant.
2. The 9th District Court of Appeals erred when it denied Appellant's "Postconviction relief pursuant to R.C. 2953.21 because App.R5 dose[sic] not apply to postconviction hearings."
3. The 9th District Court of Appeals abused it's[sic] discretion when it denied Appellant's "Postconviction relief" under R.C. 2953.21 on the basis that the time for appeals begins to run only after the clerk of courts notes service of the entry on the service docket.

State v. Suggs, Case No. 2019-1380, (Ohio 2019), available at http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=873582.pdf. On November 26, 2019, the Supreme Court of Ohio declined to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4). *See id.*, available at http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=220728.pdf.

E. Application for Reopening Appeal Pursuant to Ohio App. R. 26(B)

On February 25, 2019, Petitioner filed a Delayed Application for Reopening pursuant to Ohio App. R. 26(B). *State v. Suggs*, Case Nos. CA 27812, 27865, 27866, Doc. 5, available at <https://clerkweb.summitoh.net/PublicSite/Documents/sumzzj300000B58.pdf>. As grounds for reopening the appeal, Petitioner raised the following grounds that prevented him from timely filing:

1. Defendant's appellate attorney did not inform him of his right to file App. R. 26(B) ineffective assistance of appellate counsel. . . .

2. Appellate Counsel was ineffective for not appealing the sufficiency of the Appellant's conviction for Kidnapping. . . .
3. Appellate Counsel was ineffective when he did not appeal the inadequate jury instructions given by Judge Alison McCarty. . . .
4. A manifest miscarriage of justice will occur if denied based on actual & factual innocence claim. Mr. Suggs is "NOT GUILT" of Kidnapping. . . .

Id. The State filed a memorandum in opposition. *Id.*, Doc. 4, available at <https://clerkweb.summitoh.net/PublicSite/Documents/sumzzl20000006E.pdf>. On April 12, 2019, the Ohio Court of Appeals denied Petitioner's application for reopening, concluding that Petitioner did not demonstrate good cause for the delayed application. *Id.*, Doc. 1, available at <https://clerkweb.summitoh.net/PublicSite/Documents/sumzzm100000835.pdf>. The current docket does not indicate any further appeal to the Ohio Supreme Court.

III. FEDERAL HABEAS CORPUS PETITION UNDER 28 U.S.C. § 2254

On March 27, 2018, Petitioner, pro se, executed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, which was filed on April 2, 2018. ECF Dkt. #1. In his instant petition, Petitioner presented the following four grounds for relief and supporting facts:

1. Violations of the IV, V, VI, & XIV Amendments of the United States Constitution

Supporting Facts: During closing argument the prosecutor stated that, "He was enraged. He had a knife. He was going to kill Ms. Bittner." Mr. Suggs was not charged with Murder, or Attempted Murder. Plus all the charges that envolved[sic] the knife Mr. Suggs was found not guilty of. The prosecutor attached a felony to the Kidnapping charge to mislead the jury to find Mr. Suggs guilty. This is prosecutorial misconduct. So in doing this it was impossible for Mr. Suggs to have a fair & impartial jury. Which means no fair trial.

2. Violations of the IV, V, VI, & XIV Amendments of the United States Constitution.

Supporting Facts: Mr. Suggs was denied his right to effective assistance of counsel at trial when the trial counsel failed to ask for the jury instruction for lesser included offenses of Kidnapping. The essential elements for Kidnapping in this case are clearly not met giving[sic] that Mr. Suggs was found not guilty of all the other felonies that were need[sic] to find him guilty of Kidnapping - in this case "Unlawful Restraint," & "Abduction" should have been introduced to the court as lesser included offenses. Insuring[sic] Mr. Suggs a fair trial.

3. Violations of the IV, V, VI, & XIV Amendments of the United States Constitution.

Supporting Facts: Conviction of Suggs for Kidnapping was not sufficient, so the jury clearly lost its way in determining that Suggs committed the Kidnapping offense. This is because the essential elements needed to find one guilty of Kidnapping is not here. The sentence in this case is “void”!!! Because not one of the elements are presented the court should have corrected this imediately[sic] instead Mr. Suggs was sentenced to 11 years. Suggs did not have a fair trial, and it’s clear he did not get Due Process.

4. Violations of the IV, V, VI, & XIV Amendments of the United States Constitution.

Supporting Facts: The judge could only impose maximum & consecutive sentences if a defendant is found to be a “danger” to the public by how serious the crime is. Looking at the offense committed if the court didn’t corrupt the jury Mr. Suggs will not be guilty of Kidnapping. So the only violence involved is a misdemeanor. In conclusion these drug charges, & misdemeanors should be ran[sic] concurrently. Since the Kidnapping wasn’t corrected by the judge Mr. Suggs could not have received a fair trial.

Id. at 5, 7-8, 10. Regarding Petitioner’s request for relief, he stated the following: “From a conviction or sentence by a person in state prison.” *Id.* at 15.

On May 1, 2018, this case was referred to the undersigned pursuant to Local Rule 72.2. On October 2, 2018, Respondent Warden of the Mansfield Correctional Institution (“Respondent”) filed a Return of Writ, asserting that all four grounds are procedurally defaulted. ECF Dkt. #7. Respondent requested that the Court dismiss Petitioner’s federal habeas corpus petition. *Id.* at 20. Petitioner filed a Traverse on November 12, 2019. ECF Dkt. #16.

IV. APPLICABLE LAW

A. Procedural Barriers to Review

A petitioner must overcome several procedural barriers before a court will review the merits of a petition for a federal writ of habeas corpus. Justice O’Connor noted in *Daniels v. United States*: “Procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim.” 532 U.S. 374, 381 (2001) (citing *United States v. Olano*, 507 U.S. 725, 731 (1993)).

1. Statute of Limitations

The AEDPA statute of limitations period for filing a petition for a writ of federal habeas corpus is one year, and it begins to run on the date judgement became final. 28 U.S.C. § 2244(d)(1). The AEDPA statute of limitations is not at issue in this case.

2. Exhaustion of State Remedies

Subject to the statute of limitations, federal habeas corpus relief is only available to persons that are in custody in violation of the United States Constitution, laws or treaties. 28 U.S.C. § 2254(a); *Engle v. Isaac*, 456 U.S. 107 (1982); *Smith v. Phillips*, 455 U.S. 209, 221 (1983). As a general rule, a state prisoner must exhaust all possible state remedies or have no remaining state remedies before a federal court will review a petition for a writ of habeas corpus. 28 U.S.C. § 2254(b) and (c); *see Baldwin v. Reese*, 541 U.S. 27, 29 (2004); *Wilson v. Mitchell*, 498 F.3d 491, 498 (6th Cir. 2007). Exhaustion is required before a state prisoner may bring a habeas corpus petition under either 28 U.S.C. § 2241 or 28 U.S.C. § 2254. *See Collins v. Million*, 121 Fed.Appx. 628, 630-31 (6th Cir. 2005). The petitioner bears the burden of proving exhaustion. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994). Also, the court of appeals may raise and consider the issue of exhaustion *sua sponte*. *Clinkscale v. Carter*, 375 F.3d 430, 438 (6th Cir. 2004) (citing *Harris v. Rees*, 794 F.2d 1168, 1170 (6th Cir. 1986)). Exhaustion does not require a state court adjudication on the merits of the claim at issue. *Clinkscale*, 375 F.3d at 438 (citing *Smith v. Digmon*, 434 U.S. 332, 333 (1978); *Manning v. Alexander*, 912 F.2d 878, 883 (6th Cir. 1990)).

The exhaustion requirement is satisfied “once the federal claim has been fairly presented to the state courts,” which means “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.” *Smith v. State of Ohio Dep’t of Rehab. & Corr.*, 463 F.3d 426, 430 (6th Cir. 2006) (citing *Lott v. Coyle*, 261 F.3d 594, 608 (6th Cir. 2001)); *see O’Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); *Wilson v. Mitchell*, 498 F.3d 491, 498-99 (6th Cir. 2007); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990); *Franklin v. Rose*, 811 F.2d 322, 325 (6th Cir. 1987). A petitioner will not be allowed to present claims never before presented in the state courts, unless he can show cause to excuse his failure to present the claims in the state courts and actual prejudice to his defense at trial or on appeal, or that he is actually innocent of the crime for which he was convicted. *Coleman v. Thompson*, 501 U.S. 722, 748 (1991) (citing *Engle v. Isaac*, 456 U.S. 107 (1982) and *Murray v. Carrier*, 477 U.S. 478 (1986)).

In addition to full presentation, a claim must also be fairly presented to the state courts as a federal constitutional issue rather than merely as a state law issue. *Franklin v. Rose*, 811 F.2d 322, 325 (6th Cir. 1987); *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984). To exhaust a claim, a petitioner must present it to the state courts under the same theory that it is later presented in federal court. *Wagner v. Smith*, 581 F.3d 410, 417 (6th Cir. 2009); *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000); *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998). For a claim to be “fairly presented,” the petitioner must assert both a factual and legal basis for his claim in state court. *Fulcher v. Motley*, 444 F.3d 791, 798 (6th Cir. 2006). A petitioner “fairly” presents the substance of his federal constitutional claim to the state courts by: (1) relying upon federal cases that use a constitutional analysis; (2) relying upon state cases using a federal constitutional analysis; (3) phrasing his claim in terms of constitutional law or in terms sufficiently particular to allege the denial of a specific constitutional right; or (4) alleging facts that are obviously within the mainstream of constitutional law. *Clinscale v. Carter*, 375 F.3d 430, 437 (6th Cir. 2004) (internal citation omitted); *McMeans*, 228 F.3d at 681 (citing *Franklin*, 811 F.2d at 326). Although general allegations of the denial of rights to a “fair trial” and “due process” do not “fairly present” claims that specific constitutional rights were violated, a petitioner is not required to recite “book and verse on the federal constitution.” *Fulcher v. Motley*, 444 F.3d 791, 798 (6th Cir. 2006) (citing *Newton v. Million*, 349 F.3d 873, 877 (6th Cir. 2003); *McMeans*, 228 F.3d at 681 (citing *Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2d Cir. 1984)).

Originally, the Supreme Court interpreted 28 U.S.C. § 2254 as providing that if a petitioner did not fulfill the total exhaustion requirement, a district court *must* dismiss the habeas petition, even if it contained both unexhausted and exhausted claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 852 (1999) (emphasis added) (citing *Rose v. Lundy*, 455 U.S. 509, 522 (1982)); *cf.* 28 U.S.C. § 2254(b)(2) (stating that “a[n] application for a writ of habeas corpus *may* be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”) (emphasis added). However, the Supreme Court became concerned about petitioners losing their opportunity for federal review when the AEDPA, which was enacted in 1996, included a one-year statute of limitations. *See Rhines v. Weber*, 544 U.S. 269, 274-75 (2005). Citing *Rhines*, the

Sixth Circuit laid out the options that a district court may pursue in dealing with a mixed petition that contains unexhausted claims:

When faced with this predicament in the past, we have vacated the order granting the writ and remanded the case to the district court so that it could do one of four things: (1) dismiss the mixed petition in its entirety, *Rhines*, 544 U.S. at 274, 125 S.Ct. 1528; (2) stay the petition and hold it in abeyance while the petitioner returns to state court to raise his unexhausted claims, *id.* at 275, 125 S.Ct. 1528; (3) permit the petitioner to dismiss the unexhausted claims and proceed with the exhausted claims, *id.* at 278, 125 S.Ct. 1528; or (4) ignore the exhaustion requirement altogether and deny the petition on the merits if none of the petitioner's claims has any merit, 28 U.S.C. § 2254(b)(2).

Harris v. Lafler, 553 F.3d 1028, 1031-32 (6th Cir. 2009) (citing *Rockwell v. Yukins*, 217 F.3d 421, 425 (6th Cir. 2000)).

The AEDPA, as amended, provides that “[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.” 28 U.S.C.A. § 2254(b)(2). Even assuming a state court remedy is available, the District Court may nevertheless consider a petitioner's unexhausted claim if the claim lacks merit and returning to state court “would amount to a mere futility.” *Lott v. Coyle*, 261 F.3d 594, 608 (6th Cir. 2001); *Rhines v. Weber*, 544 U.S. 269, 277 (2005).

3. Procedural Default

The procedural default doctrine serves to bar review of federal claims that a state court has declined to address when a petitioner does not comply with a state procedural requirement. *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). In these cases, “the state judgment rests on independent and adequate state procedural grounds.” *Coleman v. Thompson*, 501 U.S. 722, 730 (1991). For purposes of procedural default, the state ruling with which the federal court is concerned is the “last explained state court judgment.” *Munson v. Kapture*, 384 F.3d 310, 314 (6th Cir. 2004) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991) (emphasis removed)). Absent either cause and prejudice or a finding of actual innocence, a federal court is not required to reach the merits of claims that have been procedurally defaulted in state court by a state prisoner or in federal court by a federal prisoner in a defendant's direct criminal appeal. See *Reed v. Farley*, 512 U.S. 339, 354-55 (1994); *William v. Anderson*, 460 F.3d 789, 805-06 (6th Cir. 2006); *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006); *Harbison v. Bell*, 408 F.3d 823, 830 (6th Cir. 2005).

Also, when the last explained state court decision rests upon procedural default as an “alternative ground,” a federal district court is not required to reach the merits of a habeas petition. *McBee v. Abramajtys*, 929 F.2d 264, 267 (6th Cir. 1991). On the other hand, the Supreme Court has held that federal courts are not always required to address a procedural default issue before deciding against the petitioner on the merits. *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (“We do not mean to suggest that the procedural-bar issue must invariably be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the [other] question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law.”). The Sixth Circuit has endorsed this view in *Hudson v. Jones* and proceeded to the merits in a habeas corpus proceeding when the question of procedural default presented a complicated question of state law and was unnecessary to the disposition of the case. *Hudson v. Jones*, 351 F.3d 212, 215-16 (6th Cir. 2003); *accord Mahdi v. Bagley*, 522 F.3d 631, 635 (6th Cir. 2008), *as amended* (July 7, 2008).

In determining whether a state court has addressed the merits of a petitioner’s claim, federal courts will apply a presumption that there is no independent and adequate state grounds for a state court decision when the decision “fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion.” *Coleman*, 501 U.S. at 735 (citing *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)); *see also Harris v. Reed*, 489 U.S. 255, 262-63 (1989) (holding that the “plain statement” rule of *Michigan v. Long* applies to federal habeas review).

However, the presumption:

does not apply if the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims.

Coleman, 501 U.S. at 735 n.1; *see Lovins v. Parker*, 712 F.3d 283, 295 (6th Cir. 2013) (citing *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006)) (“[A] claim is procedurally defaulted where the petitioner failed to exhaust state court remedies, and the remedies are no longer available at the time the federal petition is filed because of a state procedural rule.”).

Prior to the Supreme Court's ruling in *Coleman*, the Sixth Circuit Court of Appeals established a four-pronged analysis to determine whether a claim has been procedurally defaulted. *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986). Under the *Maupin* test, a reviewing court must decide:

- (1) whether the petitioner failed to comply with an applicable state procedural rule;
- (2) whether the state courts actually enforced the state procedural sanction;
- (3) whether the state procedural bar is an "adequate and independent" state ground in which the state can foreclose federal review; and
- (4) if the above are met, whether the petitioner has demonstrated "cause" and "prejudice."

Id. at 138.

Under the first prong of *Maupin*, there must be a firmly established state procedural rule applicable to the petitioner's claim and the petitioner must not have complied with the rule. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (state procedural bar that is not "firmly established and regularly followed" cannot serve to bar federal judicial review); *Franklin v. Anderson*, 434 F.3d 412, 418-20 (6th Cir. 2006). The question of whether a state procedural rule was "firmly established and regularly followed" is determined as of the time at which it was to be applied. *Richey v. Mitchell*, 395 F.3d 660, 680 (6th Cir. 2005), vacated on other grounds in *Bradshaw v. Richey*, 546 U.S. 74 (2005), remanded to *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007); *Franklin*, 434 F.3d at 420.

Under the second prong, the last-explained state court to which the petitioner sought review must have invoked the procedural rule as a basis for its decision to reject review of the prisoner's federal claims. See *Coleman v. Thompson*, 501 U.S. 722, 729-30, 735 (1991); *Baze v. Parker*, 371 F.3d 310, 320 (6th Cir. 2004) (if a state court does not expressly rely on a procedural deficiency, then a federal court may conduct habeas review); *Gall v. Parker*, 231 F.3d 265, 310 (6th Cir. 2000) (even if issue is not raised below, where state supreme court clearly addresses the claim, no procedural bar arises) (superseded by statute as stated in *Parker v. Matthews*, 567 U.S. 37 (2012) on different grounds); *Boyle v. Million*, 201 F.3d 711, 716-17 (6th Cir. 2000) (where a state appellate court characterizes its earlier decision as substantive, the earlier decision did not rely on a procedural bar; therefore, the cause and prejudice test does not apply). Although the Sixth Circuit

has required express reliance on a procedural bar in the past, *see Baze*, 371 F.3d at 320, it has also assumed such reliance when the decision “fairly appears to rest on state law.” *Smith v. Warden*, *Toledo Corr. Inst.*, No. 17-3220, 2019 WL 2518311, at *11 (6th Cir. June 18, 2019) (citing *Coleman*, 501 U.S. at 740).

Under the third prong, a state judgment invoking the procedural bar must rest on a state law ground that is both independent of the merits of the federal claim and is an adequate basis for the state court’s decision. *Wilson v. Mitchell*, 498 F.3d 491, 499 (6th Cir. 2007); *Munson v. Kapture*, 384 F.3d 310, 313-14 (6th Cir. 2004); *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

Under the fourth prong, a claim that is procedurally defaulted in state court will not be reviewable in federal habeas corpus, unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or that failure to consider the claim will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 751. “Cause” is a legitimate excuse for the default, and “prejudice” is actual harm resulting from the alleged constitutional violation. *Geneva v. Lazaroff*, 77 Fed.Appx. 845, 850 (6th Cir. 2003); *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986) (Demonstrating “the 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.”). If a petitioner fails to show cause for his procedural default, the reviewing court need not address the issue of prejudice. *Smith v. Murray*, 477 U.S. 527 (1986); *Geneva*, 77 Fed.Appx. at 850. A petitioner can also show that a fundamental miscarriage of justice will occur if the Court does not address his procedurally defaulted ground for relief. *Schlup v. Delo*, 513 U.S. 298, 321 (1995); *Coleman*, 501 U.S. at 750. The Supreme Court described the fundamental miscarriage of justice exception as follows:

To ensure that the fundamental miscarriage of justice exception would remain “rare” and would only be applied in the “extraordinary case,” while at the same time ensuring that the exception would extend relief to those who were truly deserving, the Court explicitly tied the miscarriage of justice exception to the petitioner’s innocence.

Schlup, 513 U.S. at 321. Simply stated, a federal court may review federal claims:

that were evaluated on the merits by a state court. Claims that were not so evaluated, either because they were never presented to the state courts (i.e., exhausted) or because they were not properly presented to the state courts (i.e., were procedurally defaulted), are generally not cognizable on federal habeas review.

Bonnell v. Mitchel, 301 F.Supp.2d 698, 722 (N.D. Ohio 2004). In addition, the Sixth Circuit recognized Ohio's rule that claims must be raised on direct appeal, if possible, or else res judicata bars their litigation in subsequent proceedings. *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 751 (6th Cir. 2013) (citing *State v. Perry*, 226 N.E.2d 104, 108 (1967)). The above standards apply to the Court's review of Petitioner's claims.

B. Standard of Review

If Petitioner's claims overcome the procedural barriers of time limitation, exhaustion and procedural default, the AEDPA governs this Court's review of the instant case for the reasons previously discussed and because Petitioner filed his petition well after the Act's effective date of April 26, 1996. *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998); *see* ECF Dkt. #1-2. As previously stated, under Section 2254, a state prisoner is entitled to relief if he is held in custody in violation of the United States Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(d).

The AEDPA sets forth the standard of review for the merits of a petition for the writ of habeas corpus. The AEDPA provides a deferential standard of review 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.

28 U.S.C. §2254(d) (emphasis added). In *Williams v. Taylor*, the Supreme Court clarified the language of 28 U.S.C. §2254(d) and stated:

Under the “contrary to” clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of

materially indistinguishable facts. Under the “unreasonable application” clause, a federal habeas court may grant the writ if the state court identifies the correct principle to the facts of the prisoner’s case.

529 U.S. 362, 412-13 (2000). Furthermore, the Supreme Court declared that “a federal habeas court making the ‘unreasonable application’ inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable.” *Id.* Elaborating on the term “objectively unreasonable,” the Court stated that “a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.*; see *Bailey v. Mitchell*, 271 F.3d 652, 655-56 (6th Cir. 2001); *Earhart v. Konteh*, 589 F.3d 337, 343 (6th Cir. 2009).

The Sixth Circuit Court of Appeals offers the following guidelines for applying the AEDPA limitations:

- A. Decisions of lower federal courts may not be considered.
- B. Only the holdings of the Supreme Court, rather than its dicta, may be considered.
- C. The state court decision may be overturned only if:
 - 1. It ‘[applies] a rule that contradicts the governing law set forth in [Supreme Court of the United States] cases,’ [the Supreme Court precedent must exist at the time of petitioner’s direct appeal] or;
 - 2. the state-court decision ‘confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent;’ or
 - 3. ‘the state court identifies the correct governing legal rule from [the Supreme] Court’s cases but unreasonably applies it to the facts of the particular state prisoner’s case;’ or
 - 4. the state court ‘either unreasonably extends a legal principle from [a Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.’
- D. Throughout this analysis the federal court may not merely apply its own views of what the law should be. Rather, to be overturned, a state court’s application of Supreme Court of the United States precedent must also be objectively unreasonable. That is to say, that ‘a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established

federal law erroneously or incorrectly.’ ‘An unreasonable application of federal law is different from an incorrect or erroneous application of federal law.’

E. Findings of fact of the state courts are presumed to be correct. ‘The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.’

Bailey v. Mitchell, 271 F.3d 652, 655-56 (6th Cir. 2001) (internal citations omitted); *see Casnave v. Lavigne*, 169 Fed.Appx. 435, 438-39 (6th Cir. 2006).

Finally, a reviewing federal court is bound by the presumption of correctness, under which the federal court is obligated to “accept a state court’s interpretation of the state’s statutes and rules of practice.” *Hutchinson v. Marshall*, 744 F.2d 44, 46 (6th Cir. 1984), *cert. denied*, 469 U.S. 1221 (1985); *see Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986). The presumption of correctness is set forth in 28 U.S.C. § 2254(e), which provides:

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e). The presumption of correctness applies to basic, primary, or historical facts, and not to mixed questions of law and fact. *Thompson v. Keohane*, 516 U.S. 99, 107-12 (1995). The presumption also applies to “implicit findings of fact, logically deduced because of the trial court’s ability to adjudge the witnesses’ demeanor and credibility.” *Id.*; *see McMullan v. Booker*, 761 F.3d 662, 671 (6th Cir. 2014) (citing *Thompson*, 516 U.S. at 111). Furthermore, a reviewing federal court is not free to ignore the pronouncement of a state appellate court on matters of law. *See Central States, Southeast & Southwest Areas Pension Fund v. Howell*, 227 F.3d 672, 676, n.4 (6th Cir. 2000). Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

V. ANALYSIS

The undersigned recommends that the Court find that all four grounds raised in Petitioner’s habeas corpus petition are procedurally defaulted and not excused. Notably, in his Traverse,

Petitioner appears to concede his habeas Ground Four, stating: “As far as the judge imposing[sic] consecutive sentences Suggs can see where the judge was within the courts’ rights.” *Id.* at 25.

Petitioner filed a direct appeal with five assignments of error, four of which correspond to Petitioner’s grounds for relief in his instant habeas petition: (A) the habeas Ground One regarding the prosecutor’s statements corresponds to direct appeal Ground Two; (B) the habeas Ground Two regarding ineffective assistance of trial counsel corresponds to direct appeal Ground Three; (C) the habeas Ground Three regarding sufficiency of the Kidnapping conviction corresponds to direct appeal Ground Four; and (D) the habeas Ground Four regarding the sentence corresponds to direct appeal Ground Five. ECF Dkt. #1; #7-1 at 66-73. The Court of Appeals overruled each of Petitioner’s assignments of error on direct appeal on the merits. *See* ECF Dkt. #7-1 at 119-29. Subsequently, after the Ohio Supreme Court granted Petitioner’s motion for delayed appeal, Petitioner did not file a memorandum in support of jurisdiction and thereby did not raise any grounds for appeal to the highest state court. ECF Dkt. #7-1 at 150, 152. The Ohio Supreme Court thereby dismissed Petitioner’s case for procedural reasons, namely for failing to prosecute. *Id.* at 152.

A petitioner commits a procedural default “by failing to raise a claim in state court, and pursue that claim through the state’s ordinary appellate review procedures.” *Carter v. Mitchell*, 693 F.3d 555, 565 (6th Cir. 2012) (quoting *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir.2006) (quoting *O’Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999))) (internal quotation marks omitted). In order to avoid a procedural default of a ground for relief, a federal habeas petitioner “must have exhausted his or her remedies in state court.” *Id.* A federal claim is considered exhausted once it has been “fairly presented” at the first possible opportunity within “one complete round of the State’s established appellate review process.” *Id.* at 564. An unexhausted claim is procedurally defaulted if the petitioner fails to exhaust state court remedies and state law no longer allows the petitioner to raise the claim. *Id.*; *See Pudelski v. Wilson*, 576 F.3d 595, 605 (6th Cir.2009) (When “a petitioner has failed to fairly present federal claims to the state courts, and a state procedural rule now prohibits the state court from considering them, the claims are considered procedurally

defaulted.”). Likewise, the failure to present an issue to the state supreme court on discretionary review constitutes procedural default. *O’Sullivan*, 526 U.S. at 848 (citing *Coleman v. Thompson*, 501 U.S. 722, 731-732 (1991); *Engle v. Isaac*, 456 U.S. 107, 125 n. 28 (1982)).

For procedural default purposes, the “last explained state court judgment” with which the undersigned is concerned is the Supreme Court of Ohio’s April 20, 2017 entry. *Munson v. Kapture*, 384 F.3d 310, 314 (6th Cir. 2004) (citing *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991); ECF Dkt. #7-1 at 152. That court expressly dismissed Petitioner’s direct appeal because Petitioner failed to comply with the Rules of Practice of the Supreme Court of Ohio and failed to prosecute his cause with the requisite diligence. ECF Dkt. #7-1 at 152. Therefore, the court’s opinion “plainly” rested primarily on state law because it did not mention federal law and relied on state rules of procedure. *Coleman v. Thompson*, 501 U.S. 722, 739-40 (1991). Also, by failing to prosecute his case on direct appeal to the Ohio Supreme Court, he did not give the state courts an opportunity to address his claim.

Petitioner contends that his procedural default for not filing his memorandum in support to the Ohio Supreme Court should be excused because he has shown “cause” and “prejudice.” ECF Dkt. #16 at 11, 15. To show “good cause,” Petitioner stated that the prison librarian quit. *Id.* at 11, 15. To show “prejudice,” Petitioner contends that his trial was “infected by constitutional error.” *Id.* at 16. He points to the ineffectiveness of his appellate counsel because (1) he did not timely notify Petitioner of his right to file an App. R. 26(B) application to reopen and (2) he did not argue insufficiency of the evidence for his Kidnapping conviction. *Id.* at 16, 18, 20. Petitioner also reiterated his habeas grounds for relief to show prejudice, including prosecutorial misconduct (Ground One) and ineffective assistance of trial counsel (Ground Two). *Id.* at 21-24. Generally however, a petitioner’s pro se or incarcerated status, his ignorance of the law, unfamiliarity with the English language, or his limited law library access do not establish “cause” to excuse procedural default. *See Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004). Since Petitioner has failed to demonstrate cause for his procedural default, the undersigned need not address the issue of prejudice. *See, e.g., Smith v. Murray*, 477 U.S. 527, 533 (1986); *Geneva v. Lazaroff*, 77 Fed.Appx.

845, 850 (6th Cir. 2003). Therefore, the undersigned recommends that the Court find that Petitioner has not established the requisite “cause” to excuse his procedural default.

The Court can still consider Petitioner’s constitutional arguments if the Court determines that it is “an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent...” *Murray v. Carrier*, 477 U.S. 478, 496 (1986). The Sixth Circuit Court of Appeals explained that the “actual innocence” exception, or the “fundamental 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) (internal citations omitted). The Sixth Circuit held that “[t]o establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.” *Id.* Here, Petitioner has produced no new evidence to carry this burden. In addition, the Court of Appeals on direct review considered each of the assignments of error that Petitioner brings in the instant habeas petition. That court considered the substantive arguments for each of the assignments of error and overruled them. ECF Dkt. #7-1 at 119-29. Accordingly, the undersigned recommends that the Court find that Petitioner has procedurally defaulted all four grounds contained within the instant habeas corpus petition.

VI. CONCLUSION AND RECOMMENDATION

For the above reasons, the undersigned RECOMMENDS that the Court DISMISS Petitioner’s § 2254 federal habeas corpus petition (ECF Dkt. #1) in its entirety WITH PREJUDICE.

DATE: December 27, 2019

/s/ George J. Limbert

GEORGE J. LIMBERT

UNITED STATES MAGISTRATE JUDGE

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days of service of this notice. Fed. R. Civ. P. 72; L.R. 72.3. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge’s recommendation. L.R. 72.3(b).

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

ANTHONY SUGGS,

Case No. 5:18-CV-743

Petitioner,

-vs-

JUDGE PAMELA A. BARKER

EDWARD SHELDON, Warden

Magistrate Judge George J. Limbert

Respondent

**MEMORANDUM OPINION AND
ORDER**

This matter is before the Court upon the Report & Recommendation (“R&R”) of Magistrate Judge George J. Limbert (Doc. No. 17), which recommends that Petitioner Anthony Suggs’s Petition for Writ of Habeas Corpus (Doc. No. 1) be dismissed with prejudice. Petitioner has filed Objections to the R&R. (Doc. No. 20.) For the following reasons, Petitioner’s objections to the R&R are overruled. The R&R is adopted and the Petition is DISMISSED.

I. Background

A. Factual Background

The Court of Appeals for the Ninth District of Ohio (hereinafter “state appellate court”) summarized the facts underlying Suggs’s state court conviction as follows:

{¶2} According to Betty B., on July 24, 201[4]¹, Mr. Suggs, her ex-boyfriend, came to her house looking for her. When she went outside to talk to him, he immediately struck her, causing her to temporarily lose consciousness. When she came to, she was back inside her house, and Mr. Suggs was still attacking her. At some point, Mr. Suggs got a knife from the kitchen and held it to her throat. He then forced her upstairs and into the bathroom. He also allegedly reached into her bra and took money that she was keeping there. By this time, however, police had responded to emergency calls placed by the others in the house. After kicking through the front door

¹ According to the trial transcript filed as part of the Respondent’s State Court Record, Suggs assaulted Betty B. on July 24, 2014, not 2015. (Doc. No. 7-4, PageID# 318.)

of the house, the responding officers came upstairs with their firearms drawn. Upon seeing the officers, Mr. Suggs attempted to crawl out the bathroom window, but they dragged him back inside. After handcuffing Mr. Suggs, they searched him and found cocaine.

{¶ 3} The Grand Jury indicted Mr. Suggs for aggravated robbery, aggravated burglary, kidnapping, felonious assault, possession of cocaine, obstructing official business, and resisting arrest. At trial, the jury found him guilty of kidnapping, the lesser-included offense of assault, possession of cocaine, obstructing official business, and resisting arrest. The trial court sentenced him to a total of 12 years for those offenses. That same day, it also sentenced him in two other cases. Finding that he had violated the community control he was under for a previous offense, the court sentenced him to two years imprisonment. It also sentenced him to three years imprisonment for trafficking in cocaine and heroin offenses that arose out of a separate incident. The court ordered Mr. Suggs to serve his prison terms in each of the three cases consecutively for a total of 17 years.

State v. Suggs, Nos. 27812, 27865, 27866, 2016 WL 4649486, at *1 (Ohio App. 9th Dist. Sept. 7, 2016).

B. Procedural History

1. Relevant Prior State Trial Court Proceedings

Prior to Suggs's July 2014 assault of Betty B., Suggs pleaded guilty to various offenses in two separate state court proceedings.

a) Case Number CR-2012-03-0638

On March 13, 2012, the Summit County Grand Jury indicted Suggs on four counts: robbery, felonious assault, domestic violence, and unlawful restraint. (Doc. No. 17 at PageID# 736.) On March 14, 2013, Suggs retracted his not guilty plea and pleaded guilty to felonious assault and domestic violence. (*Id.*) The trial court dismissed the remaining charges on the recommendation of the State. (*Id.*) The trial court sentenced Suggs to two years in prison and a mandatory period of three years of post-release control. (*Id.*) Suggs would be permitted to file a motion for judicial release after serving six months' imprisonment. (*Id.*) On December 6, 2013, the trial court granted Suggs's

request for judicial release. (*Id.*) The trial court suspended the balance of his prison sentence and placed him on community control for a two-year period. (*Id.*)

b) Case Number CR-2014-03-0883

On April 4, 2014, the Summit County Grand Jury indicted Suggs on five drug-related counts: trafficking heroin, trafficking cocaine, possession of heroin, possession of cocaine, and possession of drug paraphernalia. (*Id.*) The State also charged Suggs with violating his community control terms and conditions due to these new charges. (*Id.*) On July 15, 2014, Suggs waived a community control violation hearing and admitted the violation. (*Id.* at PageID# 737.) Suggs subsequently pleaded guilty to the trafficking counts, which were amended to lesser felonies. (*Id.*) The trial court accepted Suggs's plea and dismissed the remaining charges and remaining criminal forfeiture specifications upon the State's recommendation. (*Id.*)

2. State Trial Court Proceedings

Following his assault of Betty B., the Summit County Grand Jury indicted Suggs on ten counts on August 4, 2014: aggravated robbery (Count One), aggravated robbery (Count Two), aggravated burglary (Count Three), aggravated burglary (Count Four), kidnapping (Count Five), felonious assault (Count Six), felonious assault (Count Seven), possession of cocaine (Count Eight), obstructing official business (Count Nine), and resisting arrest (Count Ten). (*Id.*) Suggs pleaded not guilty. (*Id.*) This case was numbered as CR-2014-07-2219. (*Id.*)

On April 13, 2015, the jury found Suggs guilty of kidnapping (Count Five), a lesser included offense of assault (Count Six), possession of cocaine (Count Eight), obstructing official business (Count Nine), and resisting arrest (Count Ten). (*Id.* at PageID# 738.) The trial court sentenced Suggs to eleven years for Count Five, 180 days for Count Six, one year for Count Eight, 90 days for Count

Nine, and 90 days for Count Ten. The trial court ordered the sentences imposed on Count Five and Eight to be served consecutively to each other, and ordered the sentences imposed in Counts Six, Nine, and Ten to be served concurrently with each other and concurrently with Counts Five and Nine.² (*Id.*)

That same day, the trial court in CR-2012-03-0638 revoked Suggs's community control and imposed a two-year prison term for Count Two (felonious assault). (*Id.*; *see also* Doc. No. 7-1, Ex. 15, PageID# 107.) The trial court in CR-2014-03-0883 sentenced Suggs to eighteen months in prison for amended Count One (trafficking heroin) and eighteen months in prison for amended Count Two (trafficking cocaine), to be served consecutively to each other. (Doc. No. 17, PageID# 738; *see also* Doc. No. 7-1, Ex. 16, PageID# 109.) The trial court ordered that the twelve-year sentence imposed in CR-2014-07-2291 be served consecutively to the five total years imposed in CR-2012-03-0638 and CR-2014-03-0883. (Doc. No. 17, PageID# 738.)

3. Direct Appeal

Suggs, through appellate counsel, filed notices of appeals in each of his three criminal cases, as well as notices of delayed appeal in CR-2012-03-0638 and CR-2014-03-0883. (*Id.*) The state appellate court granted the delayed filings and consolidated the three appeals. (*Id.*)

Suggs, through counsel, filed an appellate brief on March 9, 2016. In his brief, Suggs raised the following assignments of error:

- I. The trial court erred by entering a judgment of conviction as to Count Five, Kidnapping as a felony of the 1st degree, and sentencing accordingly, as the verdict form was sufficient only for a felony of the 2nd degree.
- II. The trial court erred by not granting Suggs [sic] motion for mistrial based on the prosecutor's statement during the closing argument.

² The Court notes, as did the Magistrate Judge, that the trial court may have meant concurrently with Counts Five and Eight, not Nine. (Doc. No. 17, PageID# 738; *see also* Doc. No. 7-1, PageID# 105.)

- III. A. Mr. Suggs was denied his constitutional right to effective assistance of counsel at trial when the trial counsel failed to ask for the jury instruction for lesser included offenses of Kidnapping.
B. Mr. Suggs was denied his constitutional right to effective assistance of counsel at trial when his trial counsel failed to object to the inadequate verdict form.
- IV. Conviction of Suggs for Kidnapping was against the manifest weight of the evidence, as the jury clearly lost its way in determining that Suggs committed Kidnapping offense.
- V. The trial court erred when it improperly impose [sic] maximum and consecutive sentence [sic].

(Doc. No. 7-1, Ex. 26, PageID# 126, 137.) On September 7, 2016, the state appellate court overruled Suggs's assignments of error on the merits and affirmed the judgment of the trial court. (Doc. No. 7-1, Ex. 29.)

4. Appeal to Ohio Supreme Court

On January 13, 2017, Suggs, proceeding *pro se*, filed a delayed notice of appeal of the state appellate court's September 7, 2016 ruling with the Ohio Supreme Court. (Doc. No. 17, PageID# 739; Doc. No. 7-1, Ex. 31.) On March 15, 2017, the Ohio Supreme Court granted Suggs's motion for delayed appeal and ordered Suggs to file a memorandum in support of jurisdiction within thirty days. (*Id.*) On April 20, 2017, the Ohio Supreme Court noted that “[t]he records of this court indicate that appellant has not filed a memorandum in support of jurisdiction, due April 14, 2017, in compliance with the Rules of Practice of the Supreme Court of Ohio and therefore has failed to prosecute this cause with the requisite diligence.” (Doc. No. 7-1, Ex. 34.) The Ohio Supreme Court thus dismissed Suggs's case. (*Id.*)

5. Post-Conviction Relief Proceedings

On November 29, 2017, Suggs executed a petition in the trial court to vacate or set aside judgment of conviction or sentence, which was filed on December 11, 2017. (Doc. No. 17, PageID# 740.) Suggs set forth a single claim:

I. A violation of Amendment IV, V, VI, and XIV

A witness for the state was giving [sic] a lenient [sic] sentence to testify. The prosecution did not tell the court or defense about the “deal.” As required by Crim. R. 16(B)(1)(e). Since this happened Crim. R. 33(A)(2) is the remedy. This is a Brady violation, prosecutorial misconduct.

(Doc. No. 7-1, Ex. 35, PageID# 218.) Suggs also filed motions for appointment of counsel and for expert assistance. (Doc. No. 7-1, Exs. 36, 37.) The trial court denied Suggs’s motion as untimely.

See State v. Suggs, Case Nos. CR 2012-03-0638, CR 2014-03-0883, CR 2014-07-2219, Doc. No. 4 (Summit Cty. Ct. Common Pleas Feb. 13, 2019)

<https://clerkweb.summitoh.net/PublicSite/Documents/sumzzi70000071B.pdf>. The trial court also concluded that, even if it considered the merits of Suggs’s motion, Suggs failed to show a constitutional error occurred at trial, and also that the doctrine of *res judicata* barred Suggs from raising this claim now, when he failed to raise it on direct appeal. *Id.* Because Suggs’s motion for post-conviction relief was time-barred, the court ruled that Suggs’s other motions were moot and even if they were considered on their merits, Suggs was not entitled to either appointment of counsel or an expert on a petition for post-conviction relief. *Id.*

Suggs filed a motion for delayed appeal in the state appellate court on August 12, 2019. (Doc. No. 17, PageID# 740.) The state appellate court dismissed Suggs’s appeal on September 3, 2019. (*Id.*) The state appellate court reasoned that Ohio App. R. 5(a) did not apply to post-conviction

proceedings and also that Suggs's contention of improper service of the trial court's February 13, 2019 order was meritless because his appeal was nevertheless untimely. (*Id.*)

On October 9, 2019, Suggs filed a notice of appeal and accompanying memorandum in support of jurisdiction with the Ohio Supreme Court. (*Id.*) Suggs raised the following propositions of law:

- I. The 9th District Court of Appeals erred when it denied Appellant's request of "Postconviction Relief Pursuant to R.C. 2953.21 to Vacate Appellant's Conviction on the Basis That It Is Void or Voidable Under the U.S. Constitution or the Ohio Constitution" when at trial the defence [sic] wasn't notified that a state witness was giving [sic] a lenient [sic] sentence to testify against the Appellant."
- II. The 9th District Court of Appeals erred when it denied Appellant's "Postconviction Relief Pursuant to R.C. 2953.21["] because App. R. 5 dose [sic] not apply to postconviction hearings.
- III. The 9th District Court of Appeals abused it's [sic] discretion when it denied Appellant's "Postconviction Relief" under R.C. 2953.21 on the basis that the time for appeals begins to run only after the clerk of courts notes service of the entry on the service docket.

Petition to Vacate or Set Aside Judgment of Conviction or Sentence, *State v. Suggs*, No. 2019-1380 (Ohio Oct. 2, 2019). On November 26, 2019, the Ohio Supreme Court declined to accept jurisdiction of Suggs's appeal. (Doc. No. 17, PageID# 741.)

6. Application to Reopen Appeal Pursuant to Ohio App. R. 26(B)

Suggs filed a delayed application to reopen his appeal, pursuant to Ohio App. R. 26(B), in the state appellate court on February 25, 2019. (*Id.*) Suggs argued that he was prevented from timely filing to reopen his appeal because his appellate attorney failed to inform him of his right to file to reopen his appeal under Ohio App. R. 26(B). (*Id.*) He also argued that his appellate attorney was ineffective for "not appealing the sufficiency" of Suggs's conviction for kidnapping and for failing to appeal the inadequate jury instructions given at trial. (*Id.* at PageID# 742.) Finally, Suggs argued that a manifest miscarriage of justice would occur if his application was not granted, "based on actual

and factual innocence claim [sic].” (*Id.*) The state appellate court denied Suggs’s application for reopening, concluding that Suggs did not demonstrate good cause for his delayed application. (*Id.*) According to the docket, Suggs never appealed the state appellate court’s denial to the Ohio Supreme Court. *See State v. Suggs*, No. CA-27812 Docket (last accessed Nov. 11, 2020), <https://clerkweb.summitoh.net/RecordsSearch/Dockets.asp?CaseID=727181&CT=&Suffix=.>

7. Federal Habeas Corpus Petition

On March 27, 2018, Suggs, proceeding *pro se*, filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 1.) Suggs presented the following four grounds for relief:

GROUND ONE: Violations of the IV, V, VI, and XIV Amendments of the United States Constitution

Supporting Facts: During closing argument the prosecutor stated that, “He was enraged. He had a knife. He was going to kill Ms. Bittner.” Mr. Suggs was not charged with Murder, or Attempted Murder. Plus all the charges that envolved[sic] the knife Mr. Suggs was found not guilty of. The prosecutor attached a felony to the Kidnapping charge to mislead the jury to find Mr. Suggs guilty. This is prosecutorial misconduct. So in doing this it was impossible for Mr. Suggs to have a fair & impartial jury. Which means no fair trial.

GROUND TWO: Violations of the IV, V, VI, & XIV Amendments of the United States Constitution.

Supporting Facts: Mr. Suggs was denied his right to effective assistance of counsel at trial when the trial counsel failed to ask for the jury instruction for lesser included offenses of Kidnapping. The essential elements for Kidnapping in this case are clearly not met giving[sic] that Mr. Suggs was found not guilty of all the other felonies that were need[sic] to find him guilty of Kidnapping—in this case “Unlawful Restraint,” & “Abduction” should have been introduced to the court as lesser included offenses. Insuring [sic] Mr. Suggs a fair trial.

GROUND THREE: Violations of the IV, V, VI, & XIV Amendments of the United States Constitution.

Supporting Facts: Conviction of Suggs for Kidnapping was not sufficient, so the jury clearly lost its way in determining that Suggs committed the Kidnapping offense. This is because the essential elements needed to find one guilty of Kidnapping is not here. The sentence in this case is “void”!!! Because not one of the elements are presented the court should have corrected this imediately[sic] instead Mr. Suggs was sentenced to 11 years. Suggs did not have a fair trial, and it’s clear he did not get Due Process.

GROUND FOUR: Violations of the IV, V, VI, & XIV Amendments of the United States Constitution.

Supporting Facts: The judge could only impose maximum & consecutive sentences if a defendant is found to be a “danger” to the public by how serious the crime is. Looking at the offense committed if the court didn’t corrupt the jury Mr. Suggs will not be guilty of Kidnapping. So the only violence involved is a misdemeanor. In conclusion these drug charges, & misdemeanors should be ran[sic] concurrently. Since the Kidnapping wasn’t corrected by the judge Mr. Suggs could not have received a fair trial.

(Doc. No. 1, PageID# 5-10.) Warden Edward Sheldon (“Respondent”) filed a Return of Writ on October 2, 2018. (Doc. No. 7.) Suggs filed a Traverse on November 12, 2019. (Doc. No. 16.)

On December 27, 2019, Magistrate Judge George J. Limbert issued an R&R recommending that Suggs’s Petition be dismissed with prejudice. (Doc. No. 17.) Magistrate Judge Limbert concluded that all four grounds raised in Suggs’s petition are procedurally defaulted and not excused. (*Id.* at PageID# 752.) Further, the Magistrate Judge concluded that Suggs did not produce any new evidence to carry the heavy burden of actual innocence. (*Id.* at PageID# 755.)

After requesting an extension of time, Suggs timely filed Objections to the R&R on March 9, 2020. (Docs. No. 19, 20.)

II. Standard of Review

Parties must file any objections to a Report and Recommendation within fourteen days of service. Fed. R. Civ. P. 72(b)(2). Failure to object within this time waives a party’s right to appeal

the district court's judgment. *See Thomas v. Arn*, 474 U.S. 140, 145 (1985); *United States v. Walters*, 638 F.2d 947, 949-950 (6th Cir. 1981).

When a petitioner objects to the magistrate judge's Report and Recommendation, the district court reviews those objections *de novo*. Fed. R. Civ. P. 72(b)(3). A district judge:

must determine *de novo* any part of the magistrate judge's disposition that has been properly objected 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.

Id. "A party who files objections to a magistrate [judge]'s report in order to preserve the right to appeal must be mindful of the purpose of such objections: to provide the district court 'with the opportunity to consider the specific contentions of the parties and to correct any errors immediately.'"

Jones v. Moore, No. 3:04-cv-7584, 2006 WL 903199, at * 7 (N.D. Ohio April 7, 2006) (citing *Walters*, 638 F.2d at 949-50).

The Court conducts a *de novo* review of the portions of the Magistrate Judge's Report to which Petitioner has properly objected.

III. Analysis

A. Procedural Default

The Magistrate Judge concluded that Suggs procedurally defaulted all four of his grounds for relief because he raised each of the grounds for relief in his direct appeal but failed to raise any grounds for relief in his subsequent appeal to the Ohio Supreme Court. (Doc. No. 17, PageID# 752-53.) Suggs did not object to the Magistrate Judge's conclusion that Suggs's claims are procedurally defaulted. Indeed, Suggs argued that he can overcome the procedural bar by demonstrating cause and prejudice: "However, Suggs provided in his Traverse adequate grounds to overcome the

procedural bar.” (Doc. No. 20, PageID# 763.) Therefore, finding no clear error, the Court adopts the Magistrate Judge’s finding that all four of Suggs’s grounds for relief are procedurally defaulted.

B. Cause and Prejudice for Suggs’s Procedural Default

The Magistrate Judge concluded that Suggs cannot show cause to overcome the procedural default of Grounds One through Four. (Doc. No. 17, PageID# 754-55.) Suggs objected.

In his Objections, Suggs argued that he established cause for his procedural default because he was prevented from accessing the prison library to conduct legal research for his memorandum in support of jurisdiction in the Ohio Supreme Court. (Doc. No. 20, PageID# 764.) Suggs argued that this inability to access the prison library amounted to ““an objective factor external to the defense [that] impeded his efforts to comply with [the] state procedural rule.”” (*Id.*, quoting *Franklin v. Anderson*, 434 F.3d 412, 417 (6th Cir. 2006).) He argued that the Magistrate Judge incorrectly stated that Suggs had “limited access” to the law library. (*Id.*) Suggs argued that his case is different from the well-established line of Sixth Circuit caselaw that established that limited access to the prison law library does not constitute cause for default. *See, e.g., Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004). Instead, Suggs argued that, because the law librarian quit the Mansfield Correctional Institution on April 1, 2017, Suggs had no access to the law library and was therefore denied access to the courts under *Bounds v. Smith*. (Doc. No. 20, PageID# 764.) Suggs stated that he did everything in his power to access the law library and referred the Court back to his Traverse exhibits 1-3. (*Id.*)

Where a petitioner has procedurally defaulted claims, “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.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

Demonstrating cause requires showing that an “objective factor external to the defense impeded counsel’s efforts to comply” with the state procedural rule. *Murray v. Carrier*, 477 U.S. 478, 488 (1986). *See also Gerth v. Warden, Allen Oakwood Corr. Inst.*, 938 F.3d 821, 830 (6th Cir. 2019). “Prejudice, for purposes of procedural default analysis, requires a showing that the default of the claim not merely created a possibility of prejudice to the defendant, but that it worked to his actual and substantial disadvantage, infecting his entire trial with errors of constitutional dimensions.” *Jamison v. Collins*, 291 F.3d 380, 388 (6th Cir. 2002) (citing *United States v. Frady*, 456 U.S. 152, 170-71 (1982)). *See also Beuke v. Houk*, 537 F.3d 618, 634 (6th Cir. 2008).

Suggs argues that he was denied access to the prison library such that he was denied access to the courts. (See Doc. No. 20, PageID# 764.) A prisoner’s constitutional right of access to the courts “requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.” *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (abrogated on other grounds by *Lewis v. Casey*, 518 U.S. 343, 354 (1996)). However,

Bounds did not create an abstract, freestanding right to a law library or legal assistance, [and] an inmate cannot establish relevant actual injury simply by establishing that his prison’s law library or legal assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned, “meaningful access to the courts is the touchstone,” *id.*, at 823, 97 S.Ct., at 1495 (internal quotation marks omitted), and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison’s legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Lewis, 518 U.S. at 351. To establish cause, the petitioner must demonstrate that a prison's resources were so inadequate that it was impossible for him to access the courts and raise his claims. *Doliboa v. Warden U.S. Penitentiary Terre Haute*, 503 Fed. App'x. 358, 360 (6th Cir. Oct. 29, 2012) (citing *Jones v. Armstrong*, 367 Fed. App'x. 256, 258 (2d Cir. 2010)).

The Court finds that Suggs failed to establish cause for his procedural default. Suggs did not establish that he was denied access to the prison library and, thus, lacked "meaningful access to the courts." See *Lewis*, 518 U.S. at 351. To the contrary, Suggs's exhibits to his Traverse—to which he repeatedly directs the Court's attention—clearly establish that Suggs had access to the library at the time that he received the order from the Ohio Supreme Court. Suggs attached an "Informal Complaint Resolution" that Suggs sent to prison personnel in May 2017 as an exhibit to his Traverse. (Doc. No. 16-6, PageID# 729.) Suggs stated the following:

On 3-20-17 (a Monday) ireceived[sic] a pass for legal mail it was a response from the Ohio Supreme Court granting my delayed appeal, deadline was 4-14-17. **At the time I was going to the law library twice a week.** (Sat. & Sun.) Sat., 4-25-17³ I asked the legal aid for help getting more days to research. The maximum days a week is 4. I sent a kite requesting Wed., Thur., Fri., & Sat. I never received my kite back. On 4-1-17 the librarian stopped working here. After talking with several inmates who experienced the kites not being returned I assumed it was because the librarian was leaving. Yet I sent another kite to the same results. I talked to my case manager Mrs. Thorne Who told me to kite Ms. McMillan on 4-3-17 I sent a kite requesting some proof to send to the Ohio Supreme Court that I didn't have the appropriate time to research how to file the paperwork. I also asked Mr. Melton for the proof, he E-mailed the vice principal at the school because they were in charge of the library until a new librarian worked. Mr. Bacon never responded. On 4-6-17(a Thur.) I kited requesting Sat., Sun., Mon., & Tues. Tues. 4-11-17 [] I mailed a request for an extention[sic] of time to file my Memorandum in Support of Jurisdiction that was due that Fri. I also got the kite back granting me the days I asked for in the library. Since I didn't have enough time to research how to file "The Paper Work" I didn't add a "Certificate of Service) which gose[sic] on all motions. Due[sic] to this the Ohio Supreme Court are tring[sic] to dismiss my appeal. . . .

³ The Court assumes that "4-25-17" should read "3-25-17," as April 25, 2017 would have been past the deadline for Suggs to file his memorandum in support.

(Doc. No. 16-6, PageID# 729 (emphasis added).)

In another exhibit attached to his Traverse, Suggs filed a similar grievance with prison personnel. (Doc. No. 16-8, PageID# 731.) In this grievance, Suggs wrote that on Monday, March 20, 2017, he received the order from the Ohio Supreme Court and, “[a]t the time I was going to the law library twice a week . . .” (Doc. No. 16-8, PageID# 731 (emphasis added).) Suggs also wrote that he “kited asking for Wed., Thur., Fri., and Sat.,” to access the library, but he “never received a response.” (*Id.*)

In another exhibit, Suggs attached an undated, handwritten note in which he stated that “since there is no librarian[,] I can’t get enough time in the law library” to finish his memorandum to the Ohio Supreme Court. (Doc. No. 16-9, PageID# 732 (emphasis added). At the bottom of Suggs’s note is an undated, unsigned handwritten note in response that reads “[t]he librarian asst. and teacher staff are addressing kites for library visits to the Law Library. Passes are being issued.” (*Id.*)

According to his own exhibits, Suggs already had access to the prison library at the time he received the Ohio Supreme Court’s March 20, 2017 order. Suggs felt simply that he did not have “enough” time in the library to complete his memorandum. (*See id.*) Suggs’s assertion in his Objections that he “had ‘no access’ to the library as evidenced in Exhibits A through J” because the librarian quit is disingenuous. (Doc. No. 20, PageID# 764.) Suggs’s exhibits clearly demonstrate that he already had access to the library two days a week. Courts have repeatedly held that limited access to the prison law library does not constitute cause sufficient to excuse procedural default. *See, e.g., Bonilla*, 370 F.3d at 498 (citing *Hannah v. Conley*, 49 F.3d 1193, 1197 (6th Cir. 1995)); *Crosby v. Warden, London Correctional Facility*, No. 1:12-cv-523, 2013 WL 5963136, at *5 n. 2 (S.D. Ohio Nov. 7, 2013). Although Suggs may not have had as much access to the law library as he wished,

the Court nevertheless concludes that this limited access fails to constitute sufficient cause for Suggs's procedural default.⁴ Accordingly, Suggs's Objections with respect to cause are overruled. The Court adopts the Magistrate Judge's conclusion that Suggs cannot excuse his procedural default.

C. Actual Innocence

Suggs does not specifically object to the Magistrate Judge's conclusion that Suggs did not produce any new evidence to carry the "actual innocence" burden. Accordingly, the Court adopts the Magistrate Judge's conclusion.

IV. Conclusion

For the foregoing reasons, the Court finds Suggs's Objections (Doc. No. 20) are overruled, the Report & Recommendation (Doc. No. 17) is adopted in its entirety, and the Petition (Doc. No. 1) is dismissed. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Date: November 17, 2020

s/Pamela A. Barker
PAMELA A. BARKER
U. S. DISTRICT JUDGE

⁴ In the absence of cause, the Court need not reach the issue of prejudice. *See Simpson v. Jones*, 238 F.3d 399, 409 (6th Cir. 2000). *See also Sandridge v. Buchanan*, No. 1:16-CV-2299, 2017 WL 2255378, at *11 (N.D. Ohio Apr. 27, 2017).

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO**

ANTHONY SUGGS,

Case No. 5:18-CV-743

Petitioner,

-vs-

JUDGE PAMELA A. BARKER

EDWARD SHELDON, Warden

Magistrate Judge George J. Limbert

Respondent

**MEMORANDUM OPINION AND
ORDER**

Currently pending are two identical Motions to Alter or Amend Judgment under Fed. R. Civ. P. 59(e), as well as a Motion to Supplement, filed by Petitioner Anthony Suggs (“Suggs”). (Doc. Nos. 23, 24, 25.) The Court DENIES the Motions to Alter or Amend and DENIES the Motion to Supplement as moot.

I. Background

The Court detailed the facts and procedural history of this case in its prior Memorandum Opinion and Order. (Doc. No. 21, PageID# 786-94.) Relevant to the instant Motions, on April 13, 2015, Suggs was sentenced to a total of 17 years in prison, stemming from convictions in three separate criminal cases. (*Id.* at PageID# 789.) On September 7, 2016, the Ohio Court of Appeals affirmed Suggs’s convictions. (*Id.* at PageID# 790.) On January 13, 2017, Suggs, proceeding *pro se*, filed a delayed notice of appeal of the state appellate court’s ruling with the Ohio Supreme Court:

On March 15, 2017, the Ohio Supreme Court granted Suggs’s motion for delayed appeal and ordered Suggs to file a memorandum in support of jurisdiction within thirty days. (*Id.*) On April 20, 2017, the Ohio Supreme Court noted that “[t]he records of this court indicate that appellant has not filed a memorandum in support of jurisdiction, due April 14, 2017, in compliance with the Rules of Practice of the Supreme Court of Ohio and therefore has failed to prosecute this cause with

the requisite diligence.” (Doc. No. 7-1, Ex. 34.) The Ohio Supreme Court thus dismissed Suggs’s case. (*Id.*)

(*Id.* at PageID# 790.) Suggs filed a post-conviction petition with the trial court, which was denied. (*Id.* at PageID# 791.) Suggs also filed an application to reopen his direct appeal pursuant to Ohio App. R. 26(b), which was also denied. (*Id.* at PageID# 792.) Suggs then filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. (Doc. No. 1.) On November 17, 2020, the Court denied Suggs’s Petition. (Doc. No. 21.)

Suggs filed the two pending Motions to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) on December 14, 2020 and December 23, 2020 (“Motions to Alter or Amend”). (Doc. Nos. 23, 24.) Suggs’s Motions to Alter or Amend are substantively identical. (*Id.*) On December 31, 2020, Suggs filed a Motion to Supplement Document #23. (Doc. No. 25.) The Warden did not oppose any of Suggs’s Motions. Suggs’s Motions are ripe and ready for review.

II. Standard of Review

A court may grant a motion to amend or alter judgment under Rule 59(e) if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *See Brumley v. United Parcel Service, Inc.*, 909 F.3d 834, 841 (6th Cir. 2018); *Gencorp, Inc. v. Am. Int’l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999). “It is not the function of a motion to reconsider either to renew arguments already considered and rejected by a court or ‘to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue.’” *McConocha v. Blue Cross & Blue Shield Mut. of Ohio*, 930 F.Supp. 1182, 1184 (N.D.

Ohio 1996).¹ *See also Brumley*, 909 F.3d at 841. Motions to alter or amend under this Rule are extraordinary and should be sparingly granted. *See Cequent Trailer Products, Inc. v. Intradin (Shanghai) Machinery Co., Ltd.*, 2007 WL 1362457 at * 2 (N.D. Ohio May 7, 2007); *Plaskon Elec. Materials, Inc. v. Allied-Signal, Inc.*, 904 F.Supp. 644, 669 (N.D. Ohio 1995).

III. Analysis

A. Motion to Alter or Amend under Fed. R. Civ. P. 59(e)

Suggs argues that the Court should alter or amend its judgment because the Court's conclusion that Suggs procedurally defaulted his claims "was clearly an error of law" and a "misapplication [of] Mr. Suggs['s] fact exhibits," which Suggs believes prove that he was prevented from accessing the prison law library and therefore establish cause and prejudice to excuse his procedural default. (Doc. No. 23, PageID# 803; Doc. No. 24, PageID# 815.) Suggs contends that the Court mistakenly ignored his April 10, 2017 Request for Extension of Time and his May 9, 2017 Motion for Reconsideration to the Ohio Supreme Court. (*Id.*) According to Suggs, if the Court had considered these two exhibits when evaluating Suggs's Objections, the Court would have been compelled to conclude that Suggs was prevented from accessing the courts because the prison law library was closed. (*Id.* at PageID# 804-05; *Id.* at PageID# 816-17.) Therefore, Suggs argues, the Court must alter or amend its judgment because Suggs's inability to access the law library excuses his procedural default. (*Id.*)

The Court finds that Suggs's arguments do not justify altering or amending the Court's opinion. Suggs contends that the Court's conclusion that Suggs could not show cause and prejudice

¹ *See also Gascho v. Global Fitness Holdings, LLC*, 918 F.Supp.2d 708, 715 (S.D. Ohio Jan. 16, 2013) ("A motion for reconsideration or to alter or amend is not a vehicle to reargue the case or to present evidence which should have been raised in connection with an earlier motion."); 11 Charles Alan Wright, Arthur Miller and Mary Kay Kane, *Federal Practice and Procedure*, § 2810.1 (2d ed. 1995) (motions to alter or amend judgment cannot be used to "relitigate old matters, or to raise arguments or present evidence that could have been raised prior to entry of judgment.").

to overcome his procedural default “was clearly an error of law.” (Doc. No. 23, PageID# 803; Doc. No. 24, PageID# 815.) However, Suggs offers no legal analysis of any kind to suggest that the Court incorrectly applied the law in denying his Petition. Rather, Suggs disagrees with the Court’s factual analysis of the record. This argument gives no basis for altering or amending the Court’s judgment, as Suggs fails to identify a clear error in the Court’s legal analysis.

Suggs’s disagreements with the Court’s factual analysis also offer no basis for altering or amending the Court’s judgment, as he rehashes the same factual claims and arguments he made in his Traverse and Objections. A motion to alter or amend “is designed only to ‘correct manifest errors of law or fact or to present newly discovered evidence.’” *Gascho*, 918 F.Supp.2d at 714. None of Suggs’s exhibits can be characterized as “newly discovered evidence.” Suggs appended three exhibits to his Motions: a notarized affidavit² in which Suggs avers that he had no time in the law library from March 25, 2017 through April 13, 2017; his April 10, 2017 Request for Extension of Time, in which he sought additional time to file his Memorandum in Support of Jurisdiction to the Ohio Supreme Court; and his May 9, 2017 Motion for Reconsideration, in which he asked the Ohio Supreme Court to reconsider its dismissal of his appeal due to his failure to timely file his memorandum. (Doc. Nos. 23-1, 23-2, 23-3, 24-2.) None of this is newly discovered evidence. Suggs’s affidavit contains the same arguments and assertions that he made in his Traverse and Objections. (See, e.g., Doc. No. 20, PageID# 764, “The Magistrate Judge wants the Court to believe that Suggs had ‘limited access’ to the law library at the Mans. C.I., but Suggs had ‘no access’ to the law library.”) Moreover, the Court already considered Suggs’s April 10, 2017 Request for Extension of Time and his May 9, 2017 Motion for Reconsideration during its evaluation of Suggs’s Objections

² The Court notes that Suggs appended an affidavit only to the Motion filed on December 14, 2020, not to the Motion filed on December 23, 2020. (See Doc. No. 23-1.)

to the Magistrate Judge's Report & Recommendation. Suggs appended both documents as exhibits to his Traverse and to his Objections. (See Doc. Nos. 16-3, 16-4, 20-3.) These exhibits were already part of the record and the Court considered them alongside the rest of the exhibits in the record while evaluating whether Suggs had some or no access to the law library.

In the Court's November 17, 2020 decision, the Court explained that it agreed with the Magistrate Judge's evaluation that the record evidence demonstrated that Suggs had *some* access to the law library and could not demonstrate cause for his procedural default. (See Doc. No. 21, PageID# 798-99.) Suggs makes clear in his instant Motions that he disagrees with the Court's analysis of the facts surrounding his access to the law library. However, a motion to alter or amend judgment "is not a vehicle to reargue the case," as Suggs does here. *Gascho*, 918 F.Supp.2d at 714. Suggs does not assert any clear error of law in the Court's determination that Suggs cannot establish cause and prejudice to excuse his procedural default, nor does he provide the Court with any newly discovered evidence. Thus, the Court concludes that there is no basis for altering or amending its judgment denying Suggs's Petition.

B. Motion to Supplement

The Court denies Suggs's Motion to Supplement Document 23 as moot. (Doc. No. 25.) According to Suggs, when he received a time-stamped copy of Document 23 in the mail, "his exhibits were not attached to his Motion to Alter or Amend Judgment citing all PageID numbers." (*Id.* at PageID# 825.) Out of an abundance of caution, Suggs filed the instant Motion to Supplement Document 23 with copies of his April 10, 2017 Request for an Extension of Time and the May 15, 2017 Motion for Reconsideration to ensure that the Court reviewed these documents in conjunction with his Motion to Alter or Amend Judgment. (Doc. No. 25-1.) The Court denies the Motion to

Supplement as moot because these documents are already attached as exhibits to the Motion to Alter or Amend Judgment.³

IV. Conclusion

For the above reasons, Suggs's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) (Doc. No. 23) is DENIED. Suggs's Motion to Supplement Document #23 (Doc. No. 25) is DENIED as moot.

IT IS SO ORDERED.

Date: February 24, 2021

s/Pamela A. Barker

PAMELA A. BARKER
U. S. DISTRICT JUDGE

³ Moreover, as discussed above, these documents are already part of the record because Suggs attached both to his Traverse and his Objections. (See Doc. Nos. 16-3, 16-4, 20-3.) The Court already reviewed these documents while evaluating Suggs's Objections to the Magistrate Judge's Report and Recommendation.

Case No. 21-3281

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ORDER

ANTHONY SUGGS

Petitioner - Appellant

v.

TIM MCCONAHEY, Warden

Respondent - Appellee

BEFORE: MCKEAGUE, Circuit Judge;

Upon consideration of the petition for rehearing filed by the Appellant,

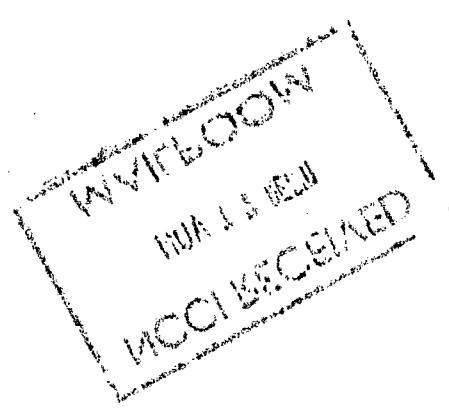
It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk



Issued: November 09, 2022



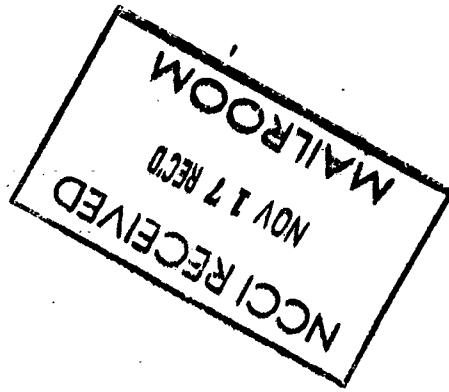
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