

APPENDIX A

No. 22-4047

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jul 28, 2023

DEBORAH S. HUNT, Clerk

SHUAIB A. HAJI MOHAMED,

)

Petitioner-Appellant,

)

v.

O R D E R

JAY FORSHEY, Warden,

)

Respondent-Appellee.

)

Before: CLAY, LARSEN, and NALBANDIAN, Circuit Judges.

Shuaib A. Haji Mohamed, an Ohio prisoner proceeding pro se, petitions this court for rehearing of its May 23, 2023, order denying his motions for a certificate of appealability.

On careful consideration, this court concludes that it did not overlook or misapprehend any point of law or fact when it issued its order. *See* Fed. R. App. P. 40(a)(2). The petition for rehearing is therefore **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

APPENDIX B
No. 22-4047

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 23, 2023
DEBORAH S. HUNT, Clerk

SHUAIB A. HAJI MOHAMED,)
Petitioner-Appellant,)
v.)
JAY FORSHEY, Warden,)
Respondent-Appellee.)

O R D E R

Before: NORRIS, Circuit Judge.

Shuaib A. Haji Mohamed, an Ohio prisoner proceeding pro se, appeals a district court judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Mohamed requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). For the reasons discussed below, a certificate of appealability is denied.

A jury found Mohamed guilty of gross sexual imposition (count 1), attempted gross sexual imposition (count 2), two counts of kidnapping with sexual motivation specifications (counts 3 and 5), and attempted rape (count 4). At sentencing, the trial court merged counts one, two, and five, stating that no conviction was entered on those counts, and sentenced Mohamed to serve an aggregate term of 15 years in prison—consecutive sentences of 10 years for kidnapping (count 3) and five years for attempted rape (count 4). Mohamed appealed his convictions and sentences. The Ohio Court of Appeals *sua sponte* remanded for resentencing, finding that count five was still pending because the sentencing transcript showed that after counts one, two, and five were merged, the State elected sentencing on count five but the sentencing entry showed that no conviction was entered on that count.

On remand, the trial court resentenced Mohamed to serve the same aggregate 15-year sentence—consecutive terms of 10 years for kidnapping (count 3) and five years for attempted

rape (count 4) and a concurrent 10-year term for kidnapping (count 5). Mohamed appealed the resentencing, and on Mohamed's motion, the state appellate court consolidated his appeals. After supplemental briefing, the Ohio Court of Appeals affirmed in part, reversed in part, and remanded the case for a new trial "solely on the [Count 5] kidnapping count." *State v. Mohamed*, Nos. 102398, 103602, 2016 WL 1071454, at *6-7 (Ohio Ct. App. Mar. 17, 2016), *rev'd*, 88 N.E.3d 935 (Ohio 2017). It found that trial counsel was ineffective for failing to request a jury instruction pertaining to the release of a kidnapping victim in a "safe place unharmed" and that in the absence of a request from counsel, it was plain error for the trial court to fail to so instruct the jury. *Mohamed*, 2016 WL 1071454, at *6-7. It also found moot Mohamed's claim challenging his consecutive sentences because the sentence imposed for attempted rape was ordered to run consecutively to the Count 5 kidnapping sentence, which it reversed. *Id.* at *9.

The State appealed. It challenged the reversal of Mohamed's kidnapping conviction and remand for a new trial, asserting that the victim was harmed. After the Ohio Supreme Court accepted the appeal, both the State and Mohamed's counsel filed briefs addressing only the "safe place unharmed" instruction issue. The Ohio Supreme Court reversed the appellate court's judgment, reinstated the trial court's judgment, and remanded the case to the appellate court for consideration of Mohamed's consecutive-sentencing claim. *Mohamed*, 88 N.E.3d at 937, 942. It concluded that trial counsel was not ineffective for failing to request a "safe place unharmed" jury instruction but that counsel's failure to do so was strategic, and that it was not plain error for the trial court to fail to provide the jury with such an instruction in the absence of a request from counsel. *Id.* at 937, 941-42. On remand, the Ohio Court of Appeals addressed Mohamed's consecutive-sentencing claim, found no error, and affirmed the trial court's judgment. *State v. Mohamed*, 101 N.E.3d 1041, 1043-44 (Ohio Ct. App. 2017). Mohamed did not file a timely appeal to the Ohio Supreme Court. Instead, on May 9, 2018, Mohamed filed a notice of appeal and a motion for a delayed appeal. The Ohio Supreme Court denied his motion.

In his habeas corpus petition, Mohamed asserted that (1) he was prevented from impeaching the victim with her prior inconsistent statements and the trial court erroneously

permitted the amendment of the indictment to change the location of the offenses, (2) the trial court erroneously denied his motion in limine to exclude other-acts evidence, (3) insufficient evidence was presented to support his convictions, (4) trial counsel was ineffective for failing to properly prepare for trial and to request a “safe place unharmed” jury instruction, and (5) the facts do not support the kidnapping charges. A magistrate judge recommended denying Mohamed’s petition, concluding that all claims were procedurally defaulted except for Mohamed’s ineffective-assistance subclaim concerning the “safe place unharmed” instruction. Over Mohamed’s objections, the district court adopted the magistrate judge’s report and denied a certificate of appealability. Mohamed filed a Federal Rule of Civil Procedure 59(e) motion to alter or amend the district court’s order. The district court ordered Mohamed to show cause why his failure to file a motion for leave to file a delayed cross-appeal to the Ohio Supreme Court would not constitute a procedural default. After consideration of the magistrate judge’s report recommending denial of the Rule 59(e) motion, Mohamed’s objections to that report, and the parties’ responses to the show-cause order, the district court adopted the magistrate judge’s report and denied Mohamed’s Rule 59(e) motion, denied his habeas corpus petition, and denied a certificate of appealability.

A certificate of appealability may be issued only if a petitioner makes “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When a habeas corpus petition is denied on procedural grounds, the petitioner must show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

As noted above, the district court concluded that Mohamed procedurally defaulted all claims but one ineffective-assistance subclaim. Reasonable jurists would not debate that

conclusion. Mohamed presented all of the claims presented in his habeas corpus petition through counsel to the Ohio Court of Appeals, *Mohamed*, 2016 WL 1071454, but he did not present them through new counsel to the Ohio Supreme Court on direct appeal by filing a timely cross-appeal or a timely motion for leave to file a delayed cross-appeal. Instead, only the “safe place unharmed” instruction issue was addressed before the Ohio Supreme Court. *See Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). Although Mohamed filed a pro se notice of appeal and a motion for a delayed appeal to the Ohio Supreme Court, in which he asserted that supreme court counsel should have presented all of his claims on appeal, his motion was denied. “[T]he denial of a motion for a delayed appeal is a procedural ruling, not a ruling on the merits.” *Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir. 2004) (per curiam). Mohamed may not now present these defaulted claims on post-conviction review because they would be barred by Ohio’s res judicata doctrine. *See Hanna v. Ishee*, 694 F.3d 596, 614 (6th Cir. 2012); *see also Cunningham v. Hudson*, 756 F.3d 477, 485 (6th Cir. 2014) (per curiam).

Habeas corpus review of procedurally defaulted claims “is barred unless the prisoner can demonstrate cause for the default and actual prejudice . . . 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). 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).

Mohamed was represented by counsel on appeal to the Ohio Court of Appeals. He was represented by different counsel on appeal to the Ohio Supreme Court. As cause to excuse his procedural default, Mohamed asserted that in April 2016, he filed a timely pro se notice of appeal to the Ohio Supreme Court but the supreme court did not receive it, and that he filed a notice of appeal and a motion for a delayed appeal in May 2018 when he discovered that the court had not received his 2016 notice of appeal. He also suggested that supreme court counsel was ineffective for addressing only the “safe place unharmed” instruction issue and omitting the other issues that had been presented to the state appellate court. But reasonable jurists would not disagree with the

district court's determination that Mohamed failed to establish cause to excuse his default. As discussed by the district court, even assuming that Mohamed filed a timely pro se notice of appeal in the Ohio Supreme Court, it would not have been considered because he was represented by counsel and Ohio law does not guarantee a right to hybrid representation where a criminal defendant proceeds through counsel. *See State v. Tenace*, 849 N.E.2d 1, 4 (Ohio 2006) (per curiam).

Moreover, ineffective assistance of counsel can establish cause to excuse a procedural default only when it occurs in a proceeding where the defendant has a right to counsel. *Wainwright v. Torna*, 455 U.S. 586, 587 (1982) (per curiam); *Gulerterkin v. Tinnelman-Cooper*, 340 F.3d 415, 426 (6th Cir. 2003). Mohamed had no right to counsel in a discretionary appeal to the Ohio Supreme Court. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Nor would reasonable jurists disagree with the district court's rejection of Mohamed's contentions that the Ohio Supreme Court did not impose a procedural bar, that the state supreme court rules do not address cross-appeals, and that his notice of appeal and motion for a delayed appeal automatically "constitute[] a cross-appeal" under Ohio Supreme Court Practice Rule 7.01(A)(2)(b) because they were filed after the State's notice of appeal and the State did not serve him with its notice of appeal. The Ohio Supreme Court's denial of Mohamed's motion for a delayed appeal is a procedural ruling that bars review of all but a portion of his fourth claim on habeas corpus review. *See Bonilla*, 370 F.3d at 497. And as discussed by the district court, the state supreme court rules do address cross-appeals, requiring them to be filed within 45 days after the state appellate court's judgment or 10 days after a notice of appeal is filed. *See Ohio Sup. Ct. Prac. R. 7.01(A)(2)(a); Ohio Sup. Ct. Prac. R. 7.01(A)(2)(b); Ohio Sup. Ct. Prac. R. 7.01(A)(2)(c)*. Mohamed did not show that he filed a timely cross-appeal, and his motion for a delayed appeal could not be considered a cross-appeal because he did not take the proper steps to perfect a timely cross-appeal. Furthermore, even if Mohamed did not receive the State's notice of appeal, he "found out" that the State's appeal had been filed when the Ohio Supreme Court accepted the

appeal on August 31, 2016, yet he took no action to perfect a timely cross-appeal to the Ohio Supreme Court.

In his motion for a certificate of appealability, Mohamed argues that the district court misread Ohio Supreme Court Practice Rule 7.01(A)(4) as permitting motions for leave to file a delayed cross-appeal and by doing so concluded that he procedurally defaulted all but a portion of his fourth claim. He argues that the district court's construction of Rule 7.01(A)(4) "abrogates" Rule 7.01(A)(2)(b) and (c). Mohamed also argues that the district court improperly required him to show when he received notice of the State's appeal so he could file a cross-appeal. He argues that the State did not provide him notice of its appeal and that the record is silent as to that date.

The district court's reading of Rule 7.01(A)(4), which pertains to motions for delayed appeals in criminal cases, does not invalidate Rule 7.01(A)(2), which addresses notices of appeal and cross-appeals. Rather, the two rules may be read together, if necessary, to address the filing of a delayed cross-appeal, as the district court did here. And contrary to Mohamed's contention, the district court did not improperly require him to establish cause. A habeas petitioner carries the burden of demonstrating cause and prejudice to excuse his procedurally defaulted claims. *See Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999).

Finally, reasonable jurists would not debate the district court's conclusion that Mohamed did not assert, much less demonstrate, that the failure to consider his procedurally defaulted claims would result in a fundamental miscarriage of justice. *See McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991); *Murray*, 477 U.S. at 496. Because reasonable jurists would not debate the district court's determination that all but a portion of one of Mohamed's claims were inexcusably procedurally defaulted, review of the underlying merits of those claims is unnecessary.

Mohamed has abandoned his remaining claim—the portion of his fourth claim asserting ineffective assistance of trial counsel based on counsel's failure to request a "safe place unharmed" jury instruction—because he does not request a certificate of appealability for it. *See Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam).

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Accordingly, the motions for a certificate of appealability are **DENIED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

FILED

May 23, 2023

DEBORAH S. HUNT, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-4047

SHUAIB A. HAJI MOHAMED,

Petitioner-Appellant,

v.

JAY FORSHEY, Warden,

Respondent-Appellee.

Before: NORRIS, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Shuaib A. Haji Mohamed for a certificate of appealability.

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

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

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

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

Shuaib A. Haji Mohamed,

Case No. 1:19-CV-00709-JGC

Plaintiff

v.

ORDER

Warden Tim Buchanan,

Defendant.

This is a *pro se* state prisoner habeas corpus case under 28 U.S.C. § 2254(d). Following referral to Magistrate Judge Jonathan Greenberg and the filing of his Report & Recommendation, (Doc. 13), the Petitioner filed Objections thereto. (Doc. 16).

In a February 1, 2022 Order based on my *de novo* review of Judge Greenberg's Report & Recommendation, I overruled the Petitioner's Objections and adopted the Report & Recommendation. (Doc. 21).

Petitioner then filed a Motion to Alter/Amend Order on February 18, 2022, asking that I reconsider my decision pursuant to Fed. R. Civ. P. 59(e). Citing *Gibbs v. Huss*, 12 F.3d 544 (6th Cir. 2021), Petitioner noted that if a state procedural ground is not adequate, it does not foreclose habeas review. (Doc. 22, pgID 1387).

Magistrate Judge Greenberg again filed a Report & Recommendation, proposing that I deny Petitioner's Motion to Alter/Amend. (Doc. 27). Petitioner filed Objections to that Report & Recommendation. (Doc. 28).

I issued an opinion on August 1, 2022, explaining that I was inclined to adopt the Report & Recommendation in all respects but that I believed there was a possible additional basis for

denying and dismissing the Petition, namely, that Petitioner committed procedural default when he did not file a timely motion for leave to file a cross-appeal in the Ohio Supreme Court. (Doc. 29, pgID 1420). I ordered the Petitioner to show cause why he did not do so.

On August 12, 2022, the Petitioner filed a Response. (Doc. 30). The Response focused on the State's failure to provide Petitioner with notice of its appeal. (*Id.*, pgID 1424).

Ohio Supreme Court Rule 7.01 addresses the limitations period for filing an appeal or cross-appeal. Section (A)(1)(a)(i) provides: "To perfect a jurisdictional appeal from a court of appeals to the Supreme Court . . . the appellant shall file a notice of appeal in the Supreme Court within forty-five days from the entry of the judgment being appealed." Ohio S. Ct. Prac. R. 7.01.

Regarding cross-appeals, Section (A)(2)(a) states: "If a party timely files a notice of appeal in the Supreme Court, any other party may file a notice of appeal or cross-appeal in the Supreme Court within the time prescribed by division (A)(1) of this rule or ten days after the first notice of appeal was filed, whichever is later."

It was incumbent on Petitioner to seek Ohio Supreme Court review of his assignments of error within forty-five days after judgment or within ten days of the State's notice of appeal.

He did not do so. Instead, he only sought leave to file a delayed appeal on May 9, 2018. (*Id.*).¹

The Petitioner does not indicate when he received a copy of the State's direct appeal, which it had filed on May 2, 2016. (Doc. 5-1, pgID 294). Regardless, it is up to Petitioner to

¹ Petitioner's Response states that he filed his notice of appeal "[o]n or about June 12, 2018." (Doc. 30, pgID 1424). But the Ohio Supreme Court docket shows that he filed his notice of appeal on May 9, 2018. (See Case No. 2018-0651). Even accepting Petitioner's date as accurate, his filing would not comply with the limitations period, as he submitted it almost two years after the State appealed.

show that his effort to file a cross-appeal came within the applicable limitations period. He has not done so. Thus, the default bar precludes consideration of his Petition on its merits.

His Response to the Show Cause Order (Doc. 30) that this is not so makes two unavailing contentions. First, he argues that imposing that bar *vis-a-vis* his untimely effort to secure Supreme Court review would be to invent a new procedural rule. (*Id.*, pgID 1424). I disagree: the applicable Ohio Supreme Court Rule does, in fact, address cross-appeals, providing that Petitioner must have filed one within the original forty-five day limitations period or within ten days of the date on which the State filed its notice of appeal. Ohio S. Ct. Prac. R. 7.01(A)(2)(a).

The Petitioner's failure to show that he sought to file a cross-appeal within such period precludes review of the Petition's merits.

Second, Petitioner points to his May 9, 2018 delayed appeal as "satisfying this Court's concerns." (*Id.*, pgID 1424). It does not because that effort to file a cross-appeal was untimely.

In so concluding, I find that the State's Response to the Show Cause Order (Doc. 32) correctly interprets and asks me to apply, as I do, the Sixth Circuit's decisions in *Maupin v. Smith*, 785 F.2d 135,138 (6th Cir. 1968) and *Bonilla v. Hurley*, 370 F.3d 194 (6th Cir. 2004). Namely, that the Petitioner's completely unexplained failure to file a cross-appeal within the limitations period set forth in Ohio Supreme Court Rule 7.01 constituted a preclusive procedural default.

Conclusion

The Petitioner committed a procedural default when he did not seek leave to file a delayed cross-appeal in a timely fashion. He has shown neither cause for nor prejudice from his default. That default, in turn adds further support to my February 1, 2022 Order rejecting the

Petitioner's Objections to Judge Greenberg's Report & Recommendation that I deny and dismiss the Petitioner's § 2254(d) Petition for habeas corpus relief.

It is, accordingly, hereby

ORDERED THAT:

1. The Order entered Feb. 1, 2022 overruling Petitioner's Objections and adopting the Magistrate Judge's Report & Recommendation (Doc. 21) be, and the same hereby is confirmed;
2. The Petitioner has failed to show cause for his procedural default *vis-a-vis* his filing of a delayed cross-appeal in the Ohio Supreme Court;
3. The Magistrate Judge's Report & Recommendation (Doc. 27) be, and the same hereby is adopted as the order of this court;
4. The Petition for a Writ of Habeas Corpus (Doc. 1) be, and the same hereby is denied and dismissed; and
5. Jurists of reason could not rationally dispute my rationale for this Order or its result.

Accordingly, I decline to grant a Certificate of Appealability.

So ordered.

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

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

SHUAIB A. HAJI MOHAMED,)	CASE NO. 1:19-CV-00709-JGC
)	
Plaintiff,)	
)	JUDGE JAMES G. CARR
vs.)	UNITED STATES DISTRICT JUDGE
)	
WARDEN TIM BUCHANAN,)	MAGISTRATE JUDGE
)	JONATHAN D. GREENBERG
Defendant.)	REPORT & RECOMMENDATION
)	

This matter is before the magistrate judge on referral for a Report and Recommendation on petitioner Shuaib Haji Mohamed's motion to alter or amend the Court's order adopting the undersigned's Report and Recommendation regarding Haji Mohamed's habeas petition (Doc. No. 22). (Doc. No. 23.) For the following reasons, the undersigned recommends that the motion for reconsideration be DENIED.

I. Summary of Facts

In this habeas action, brought pursuant to 28 U.S.C. § 2254, Haji Mohamed challenged his convictions for attempted gross sexual imposition, kidnapping, and attempted rape. On September 1, 2021, the undersigned issued a Report and Recommendation that Haji Mohamed's habeas corpus petition be denied. (Doc. No. 13.) Haji Mohamed filed objections to the Report and Recommendation (Doc. No. 16), Respondent filed a response (Doc. No. 18), and Haji Mohamed filed a reply (Doc. No. 19). Haji Mohamed also filed a motion for default judgment, which the Court overruled as not well taken. (Doc. No. 20; Non-document Order dated January 21, 2022.) On February 1, 2022, the Court overruled Haji Mohamed's objections and adopted the Report and Recommendation. (Doc. No. 21.)

On February 18, 2022, Haji Mohamed filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e). (Doc. No. 22.) On April 6, 2022, Respondent filed an opposition to Haji Mohamed's motion to alter or amend judgment. (Doc. No. 25.) On April 18, 2022, Haji Mohamed filed a reply. (Doc. No. 26.)

II. Analysis

A Rule 59(e) motion is designed only to "correct manifest errors of law or fact or to present newly discovered evidence." *Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997). It is not a vehicle to reargue the case, or present arguments that could have and should have been raised in connection with an earlier motion. *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998). That is, Rule 59(e) is not designed to give an unhappy litigant an opportunity to relitigate matters already decided. *See Dana Corp. v. United States*, 746 F. Supp. 482, 488–89 (N.D. Ohio 1991).

Rule 59(e) motions are "extraordinary and sparingly granted." *Marshall v. Johnson*, No. 3:07-CV-171-H, 2007 WL 1175046, at *2 (W.D. Ky. Apr. 19, 2007)). Accordingly, a Rule 59(e) motion to alter or amend may only be made for one of three reasons: (1) an intervening change in the controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or to prevent manifest injustice. *See Schlaud v. Snyder*, 785 F.3d 1119, 1124 (6th Cir. 2015); *see, e.g., Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005). The proponent of the Rule 59(e) motion bears the burden of proof, and the decision to grant relief under the rule is within the sound discretion of the court. *See Engler*, 146 F.3d at 374 (citing *Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 474 (6th Cir. 1998)).

Haji Mohamed argues there has been "an interim change in decisional law" that entitles him to an altered or amended judgment under 59(e). (Doc. No. 22 at 1.) Haji Mohamed asserts that while the Report and Recommendation was pending, the Sixth Circuit "announced a 'new', alternative standard of

review for determining the adequacy of a state procedural default" which "created an exception to the **Maupin** test, and attacks the procedural ground itself." (*Id.* at 2) (emphasis in original). Haji Mohamed relies on *Gibbs v. Huss*, 12 F.4th 544 (6th Cir. 2021) in support. (*Id.*) Haji Mohamed argues:

What made Petitioner's failure to file a cross-appeal and lack of success on a delayed appeal an exorbitant application of a well-settled state procedural defaults was, [sic] the fact, [sic] that neither the state, in any type of opposition to leave, not [sic] the Ohio Supreme Court, [sic] itself, in entry denying leave, mentioned the failure to cross-appeal as grounds. Since nothing can be presumed from a silent record, **Carnley v. Cochran**, 369 U.S. 506, 516 (1962), the [sic] Magistrate's illustration lacks factual support.

(*Id.*)

Respondent maintains there has been no change of controlling law. (Doc. No. 25 at 2.) However, even if there were, it would have to be a change in United States Supreme Court precedent, as "a mere change in state law would be noncognizable." (*Id.*)

In his reply, Haji Mohamed asserts, "The controlling law used to be **Maupin**, now it is **Gibbs**. I satisfied **Gibbs**, [sic] and should be allowed to traverse for a supplemental report & recommendation." (Doc. No. 26 at 1) (emphasis in original).

In *Gibbs*, the Sixth Circuit addressed the use of the contemporaneous-objection bar as grounds for procedural default in a case where the petitioner alleged "that he and his attorney were completely ignorant of the trial court's closure" of the courtroom during *voir dire*, and therefore "had no reason to know that they should have objected to a closure." 12 F.4th at 546. The petitioner further alleged he did not learn his family members had been excluded from *voir dire* until after trial. *Id.* at 547. The Sixth Circuit began its analysis in *Gibbs* as follows:

A procedural default is a "critical failure to comply with state procedural law." *Trest v. Cain*, 522 U.S. 87, 89, 118 S.Ct. 478, 139 L.Ed.2d 444 (1997). A default generally bars federal review of the merits of a claim—even a constitutional claim—"that a state court declined to hear because the prisoner failed to abide by a state procedural rule." *Martinez v. Ryan*, 566 U.S. 1, 9, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). A habeas claim is procedurally defaulted if and only if "(1) the petitioner failed to comply with a state rule;

(2) the state enforced the rule against the petitioner; and (3) the rule is an ‘adequate and independent’ state ground foreclosing review of a federal constitutional claim.” *Bickham*, 888 F.3d at 251 (quoting *Willis v. Smith*, 351 F.3d 741, 744 (6th Cir. 2003)).

A common example of a procedural default is a failure to raise a claim in state court in a timely manner. That is what happened in *Bickham*—the defendant failed to object contemporaneously with the closure of the courtroom during voir dire. *Id.* at 251–52. As a result, he forfeited full review of his public-trial claim in the state court. Although the state court applied plain-error review, we still consider such an impediment to merits review to be enforcement of a procedural rule. *Williams v. Burt*, 949 F.3d 966, 973 (6th Cir.), *cert. denied*, — U.S. —, 141 S. Ct. 276, 208 L.Ed.2d 38 (2020).

Federal courts usually decline to meddle with state criminal judgments under these circumstances “[o]ut of respect for finality, comity, and the orderly administration of justice.” *Dretke v. Haley*, 541 U.S. 386, 388, 124 S.Ct. 1847, 158 L.Ed.2d 659 (2004). But there are exceptions, one of which is encapsulated in the third element of our definition of procedural default. If a state procedural ground is not “adequate,” it does not foreclose federal review. *Bickham*, 888 F.3d at 251.

Id. at 550. The Sixth Circuit then went on to identify several instances where a procedural rule may be inadequate: (1) the rule violates the United States Constitution; (2) the rule is novel or inconsistently applied by the state courts; and (3) where in “exceptional cases,” “exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.” *Id.* at 550-51 (citations omitted).

In Gibbs’ case, the “obstruction to showing inadequacy, as the district court pointed out,” was the Sixth Circuit’s prior decision in *Bickham*. *Id.* at 552. After distinguishing Gibbs’ case from *Bickham*, the Sixth Circuit explained:

If it be true that Mr. Gibbs neither was aware nor reasonably should have been aware of the courtroom’s closure during voir dire, then Michigan’s contemporaneous-objection rule would be inadequate to support a default of his public-trial claim in his unique circumstances. This is true for several reasons. First, no perceivable state interest is served by requiring a defendant to object to a constitutional violation he did not know and should not reasonably have known of. Cf. *Osborne*, 495 U.S. at 124, 110 S.Ct. 1691; *Lee*, 534 U.S. at 378, 122 S.Ct. 877. And the federal interest in providing a forum

to vindicate federal rights necessarily outweighs a complete lack of state interest in enforcing a procedural rule. *See Clifton*, 775 F.3d at 764.

Second, requiring a contemporaneous objection to a violation of which a defendant is neither aware nor reasonably should be aware is neither “firmly established” nor “consistently followed” by the Michigan courts. Just as Missouri failed to do in *Lee*, the warden here cites no Michigan case law for the proposition that Michigan requires a contemporaneous objection in the “unique circumstances this case presents,” *Lee*, 534 U.S. at 382, 122 S.Ct. 877, instead resting on the general adequacy of the contemporaneous-objection rule. Indeed, it appears that such an application of the contemporaneous-objection rule would be a novel one, and novelty of a procedural rule is a reason to find it inadequate to foreclose federal review. *Cf. Ford*, 498 U.S. 411, 111 S.Ct. 850.

Third, there is no evidence that the trial court would have allowed his family to spectate during voir dire even had Mr. Gibbs raised a contemporaneous objection to the courtroom *closure*. *See Lee*, 534 U.S. at 387, 122 S.Ct. 877 (“Nor is there any indication that formally perfect compliance with the Rules would have changed the trial court’s decision.”). Indeed, there is affirmative evidence to the contrary. The trial judge herself stated on the record:

I’m telling you, after we start, when the panel is in the room, you’re absolutely right no one would be coming or going. I agree with that. *If that’s a violation, then I violated.*

(emphasis added). The trial court was firm on enforcing its closure rule. The state’s ostensible purpose for its contemporaneous-objection rule—to promote judicial economy by allowing the trial court to rectify errors immediately—would not be advanced by its enforcement here. *See Osborne*, 495 U.S. at 124, 110 S.Ct. 1691 (holding that, “under the circumstances, nothing would be gained” by requiring adherence to a procedural rule for preserving an argument after the trial court “in no uncertain terms” had already rejected the argument once before).

Last, if Mr. Gibbs really did not know and should not reasonably have known that his public-trial right was being violated, then requiring him to object to preserve that right would be an “exorbitant” and “egregious” application of Michigan’s contemporaneous-objection rule. *See Lee*, 534 U.S. at 376, 387, 122 S.Ct. 877 (holding that state procedural rules were inadequate to support a default in a challenge to a violation of a federal right that the state affirmatively caused and that required quick action to correct). Indeed, such a rule would deny due process. *See Gupta*, 699 F.3d at 690 (“[W]e are loath to impute to a defendant—at least in the circumstances here—an obligation to raise a legal objection as to which his own defense counsel is ignorant during the throes of trial.”); *United States v. Tramunti*, 500 F.2d 1334, 1341 n.3 (2d Cir. 1974) (“Defense counsel cannot fairly be penalized for failure to raise at

trial an issue of which he was, without his own fault, ignorant."); *United States v. Douglas*, 155 F.2d 894, 896 (7th Cir. 1946) ("Counsel for the government was the moving factor in the [submission to the jury of hearsay affidavits of which the defendant was not made aware] and must be held responsible for a procedure which ... was unfair, prejudicial and attended with dangerous consequences."); *see also Davis v. Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13, 68 L.Ed. 143 (1923) ("Whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

Thus, under the assumption that Mr. Gibbs neither knew of nor reasonably should have known of the courtroom closure, his failure to contemporaneously object would be an inadequate state procedural ground for a default.

The district court shall determine in the first instance whether Mr. Gibbs was aware of the courtroom closure or whether there were other circumstances that should have reasonably put him on notice of the closure. If he was not—and could not reasonably have been—aware of the closure, then *Bickham* does not control his case. Rather, the contemporaneous-objection rule would not have been an adequate state procedural ground to default Mr. Gibbs's claim, and there would be no procedural default.

Id. at 553-54.

The undersigned disagrees that *Gibbs* changed the law and replaced the *Maupin* test. Rather, in *Gibbs*, the Sixth Circuit explained what constituted an inadequate bar under *Maupin* in a unique set of circumstances in the context of the contemporaneous objection rule. As the Southern District explained: "Judge Boggs did not suggest the Sixth Circuit was adopting a new exception to the adequacy requirement for state procedural rules. Instead, he relied in part on *Osborne v. Ohio*, 495 U.S. 103 (1990), precedent over thirty years old at the time *Gibbs* was decided, upholding Ohio's contemporaneous objection rule." *Brandon v. Buchanan*, Case No. 2:19-cv-2487, 2022 WL 203507, at *2 (S.D. Ohio Jan. 24, 2022). Other courts have continued to apply *Maupin* in the wake of *Gibbs*. *See, e.g., Saxton v. Warden*, Case No. 2:21-cv-4019, 2022 WL 1173891, at *5 (S.D. Ohio Apr. 20, 2022). Haji Mohamed's procedural defaults did not concern application of the contemporaneous objection rule, and therefore the *Gibbs* decision is of no affect on his case. Nor does he assert circumstances that would constitute "exorbitant" and "egregious"

application of the procedural default rules applicable to his case. *Maupin* remains the test for procedural default, and therefore there was no change in the law requiring the Court alter or amend its judgment.

Haji Mohamed argues his failure to file a cross-appeal to the Ohio Supreme Court cannot be held against him as grounds for procedural default as “the state never serviced pleadings upon Petitioner to trigger such a duty.” (Doc. No. 22 at 3.) However, “[m]otions for reconsideration are not substitutes for appeal *nor are they vehicles whereby a party may present arguments inexplicably omitted in prior proceedings.*” *Dantz v. Apple Am. Grp., LLC*, No. 5:04CV0060, 2006 WL 2850459, at *1 (N.D. Ohio Sept. 29, 2006) (quoting *Plaskon Elec. Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 669 (N.D. Ohio 1995)). This argument could have and should have been raised in his objections to the undersigned’s September 1, 2021 Report and Recommendation. Haji Mohamed may not use this motion to alter or amend the judgment to correct his failure to include that argument in his objections.

Haji Mohamed also appears to argue he meets the third reason for granting a motion under 59(e): it is necessary to correct a clear error of law or prevent a manifest injustice. (See Doc. No. 22 at 3-4.) Haji Mohamed asserts:

This Court further erred in placing a “hybrid representation” bar on Petitioner’s pro se attempt to exhaust his federal claims. The Ohio Supreme Court appointed representation **for the state’s appeal**, not discretionary review sought by Petitioner. This Court is allowing the state to “have its cake and eat it too”. If thee [sic] Petitioner wasn’t entitled to counsel on discretionary review, **State v. Buell**, 70 OS3d 1211, 1212, 1994-Ohio-475, and none appeared to protect his interest in claims raised before the appellate court, then the attempt at a delayed appeal could not be concluded as a procedural default but must be considered exhaustion in this unique set of circumstances. Petitioner was under the impression he was waiting for the remand ordered by the appellate court, and nobody informed him, in a timely manner, otherwise. The state cannot benefit on its failure to service, to the prejudice of Petitioner, as such would allow it to prevail on its own wrongdoing by foreclosing meaningful federal review.

(*Id.*) (emphasis in original).

Respondent did not directly address this argument in his opposition to Haji Mohamed's motion to alter or amend judgment. (See Doc. No. 25.)

Haji Mohamed's arguments fail to establish a clear error of law in the Court's finding of procedural default, in part, based on the bar against hybrid representation. (Doc. No. 21 at 4-5.) Furthermore, even assuming *arguendo* the Court had erred in so finding, Haji Mohamed overlooks a second procedural default in the Ohio Supreme Court's denial of his motion for delayed appeal, which is a procedural ruling. *Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir. 2004) (emphasis added); *accord Baker v. Bradshaw*, 495 F. App'x 560, 565 (6th Cir. 2012) ("The timeliness requirements for an appeal to the Ohio Supreme Court ... constitute adequate and independent state grounds to preclude hearing an untimely claim on the merits."); *Carman v. Ohio*, No. 1:14 CV 2060, 2015 WL 1189084 (N.D. Ohio Mar. 16, 2015); *Crutchfield v. Warden*, No. 1:13-cv-438, 2014 WL 3899287 (S.D. Ohio Aug. 11, 2014) (finding that where the petitioner's motion for delayed appeal before the Ohio Supreme Court was denied, the petitioner must demonstrate cause for his default and actual prejudice to avoid dismissal). While Haji Mohamed's arguments concerning his motion for delayed appeal continue to evolve,¹ the fact remains he fails to show a clear error of law in the Court's decision. "A party seeking reconsideration must show more than disagreement with the Court's decision" *Database Am. v. BellSouth Advertising & Publishing*, 825 F. Supp. 1216, 1219–20 (D.N.J. 1993).

Haji Mohamed has failed to provide any basis for the Court to alter or amend its February 1, 2022 judgment.

¹ In his objection to the undersigned's September 1, 2021 Report and Recommendation, Haji Mohamed claimed for the first time that he had mailed a timely notice of appeal to the Ohio Supreme Court, but the Ohio Supreme Court failed to receive it. (Doc. No. 16.) In the present motion, Haji Mohamed appears to claim that he could not timely appeal to the Ohio Supreme Court because he "was under the impression he was waiting for the remand ordered by the appellate court, and nobody informed him, in a timely manner, otherwise." (Doc. No. 22 at 3.)

III. Conclusion

For all the reasons set forth above, it is recommended that the motion to alter or amend judgment (Doc. No. 22) be DENIED.

Date: May 9, 2022

s/ Jonathan Greenberg

Jonathan D. Greenberg
United States Magistrate Judge

OBJECTIONS

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

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

SHUAIB A. HAJI MOHAMED,) CASE NO. 1:19-CV-00709-JGC
)
 Plaintiff,)
) JUDGE JAMES G. CARR
 vs.) UNITED STATES DISTRICT JUDGE
)
 WARDEN TIM BUCHANAN,) MAGISTRATE JUDGE
) JONATHAN D. GREENBERG
 Defendant.) REPORT & RECOMMENDATION
)

This matter is before the magistrate judge pursuant to Local Rule 72.2. Before the Court is the Petition of Shuaib Haji Mohamed (“Haji Mohamed” or “Petitioner”), for a Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Haji Mohamed is in the custody of the Ohio Department of Rehabilitation and Correction pursuant to journal entry of sentence in the case *State v. Haji Mohamed*, Cuyahoga County Court of Common Pleas Case No. CR-14-585924-A. For the following reasons, the undersigned recommends that the Petition be DENIED.

I. Summary of Facts

In a habeas corpus proceeding instituted by a person in custody pursuant to the judgment of a state court, factual determinations made by state courts are presumed correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Franklin v. Bradshaw*, 695 F.3d 439, 447 (6th Cir. 2012); *Montgomery v. Bobby*, 654 F.3d 668, 701 (6th Cir. 2011). The Ohio Supreme Court summarized the facts underlying Haji Mohamed’s conviction as follows:

{¶ 3} A jury found taxicab driver Shuaib Haji Mohamed guilty of several felonies based upon Mohamed's sexual assault of one of his fares. The victim, J.K., had spent the evening drinking at several establishments in downtown Cleveland with her best friend Stephanie. After the bars closed, the pair were unable to locate their car and ended up hailing Mohamed's cab. J.K. got in the front passenger seat of the minivan taxi and her friend got in the back. In the cab, the women started arguing about the lost car and wound up slapping and hitting each other. During the scuffle, J.K.'s purse was dumped on the floor, and she lost her cell phone. Mohamed eventually stopped the cab near their destination, pulled the girls apart, and the women set off in separate directions.

{¶ 4} At trial, J.K. provided this account of what happened next. As she was walking away, Mohamed caught up with her and told her that the credit card she had used to pay the fare had been declined and that if she did not pay, he was going to call the cops. J.K. promised Mohamed that if he would drive her to her apartment, she had a new debit card that she could activate and use to withdraw cash from a nearby ATM.

{¶ 5} On the way to the apartment, Mohamed remarked that in breaking up the fight, he had noticed that J.K.'s "skin was so soft." Made uncomfortable by the comment, J.K. put on sweatpants and grabbed a large hooded sweatshirt while she was in the apartment retrieving her debit card. After the stop at the apartment, Mohamed drove J.K. to a nearby gas station that had an ATM. She withdrew \$110 in cash and paid for the cab ride. The night, however, was still not over.

{¶ 6} As they were leaving the gas station, J.K. realized that she had locked her keys in her apartment and would not be able to get back inside, so she asked Mohamed to take her to her ex-boyfriend Rodney's house. Soon after they pulled out of the gas station, Mohamed began to touch her thighs. She told him to stop, but he persisted. While on Interstate 71, Mohamed stopped the cab on the side of the road, pulled out his penis, and shoved J.K.'s head down in an apparent attempt to force her to perform oral sex. He also grabbed her breasts. J.K. fought him off, and Mohamed resumed the trip to Rodney's house. At some point during the ride, J.K. borrowed Mohamed's phone and tried to call Rodney. She dialed the number over 50 times, but he did not answer.

{¶ 7} The taxicab eventually made it to its destination. J.K. immediately got out of the cab, went to the house, and began to bang on the windows. Mohamed waited in the cab. When Rodney came to the door, J.K. told him that Mohamed had just tried to rape her. At trial, Rodney described J.K. as "panicky, distraught, [and] scared." He yelled at the cabdriver from the door, but Mohamed sped away.

{¶ 8} According to Mohamed's counsel, J.K.'s story was one big lie. Throughout trial, he sought to undermine her credibility. He asserted that J.K. was highly intoxicated that night and that she and her friend had taken a cab because she was too drunk to remember where she had parked her car. He brought out in cross-examination that Mohamed had allowed J.K. to use his cell phone to call her ex-boyfriend. He argued that J.K. had multiple opportunities to leave the cab during the evening but had not done so. And he pointed out that J.K. had not sought treatment following the incident—behavior that counsel claimed was inconsistent with someone who had been sexually assaulted.

{¶ 9} The jury believed J.K. and found Mohamed guilty of the five felony counts on which he had been charged—one count of gross sexual imposition, one count of attempted gross sexual imposition, two counts of kidnapping, and one count of attempted rape.

State v. Mohamed, 151 Ohio St.3d 320, 2017-Ohio-7468, 88 N.E.3d 935, 937-38 (2017).

II. Procedural History

A. Trial Court Proceedings

On June 20, 2014, the Cuyahoga County Grand Jury indicted Mohamed on one count of Gross Sexual Imposition in violation of Ohio Rev. Code (“O.R.C.”) § 2907.05(A)(1) (Count 1); one count of Attempted Gross Sexual Imposition in violation of O.R.C. § 2923.02/2907.05(A)(1) (Count 2); two counts of Kidnapping in violation of O. R.C. § 2905.01(A)(4), each with a sexual motivation specification (Counts 3 and 5); and one count of Attempted Rape in violation of O.R.C. §2923.02/2907.02(A)(2) (Count 4). (Doc. No. 5-1, Ex. 1.) Haji Mohamed pleaded not guilty. (Doc. No. 5-1, Ex. 2.)

The jury found Haji Mohamed guilty of all charges. (Doc. No. 5-1, Ex. 7.) At sentencing on November 24, 2014, the court stated, “Counts 1, 2 and 5 merge; no conviction entered in Counts 1, 2 and 5.” (Doc. No. 5-1, Ex. 8.) The court then sentenced Haji Mohamed to 10 years in prison for kidnapping (Count 3) and five years in prison for attempted rape (Count 4), to be served consecutively, for an aggregate prison term of 15 years. (*Id.*) The court also found Haji Mohamed to be a Tier III sex offender. (*Id.*)

B. Direct Appeal

On December 23, 2014, Haji Mohamed, through counsel, filed a Notice of Appeal with the Court of Appeals for the Eighth Appellate District ("state appellate court"). (Doc. No. 5-1, Ex. 9.) In his appellate brief filed by new counsel, Haji Mohamed raised the following assignments of error:

- I. Appellant's constitutional rights to due process and a fair trial were violated when his motion to dismiss was denied and he was deprived of the right to impeach J.K. with her prior inconsistent statements.
- II. Appellant's constitutional rights were violated where defense counsel's conduct was deficient and resulted in prejudice to appellant by depriving him of a fair and speedy trial.
- III. The court erred by denying appellant's motion in limine to exclude irrelevant and other acts evidence, by admitting irrelevant and other acts evidence over appellant's objection and by denying his motion for mistrial.
- IV. Appellant's constitutional rights were violated because Det. Cottom improperly bolstered J.K.'s credibility.
- V. Appellant's convictions were not supported by sufficient evidence and the trial court erred by denying his motion for acquittal.
- VI. The convictions were against the manifest weight of the evidence.
- VII. Appellant's federal and state constitutional right to a speedy trial and [sic] due process were violated and his conviction should be vacated and dismissed.
- VIII. Appellant's fifteen year prison sentence is contrary to law.

(Doc. No. 5-1, Ex. 10.) The State filed a brief in response. (Doc. No. 5-1, Exhibit 11.)

On July 7, 2015, the state appellate court *sua sponte* remanded the case because the sentencing transcript indicated that Counts 1, 2, and 5 would be merged, with the State electing sentencing on Count 5, but the sentencing entry stated that no conviction was entered on these counts. (Doc. No. 5-1, Ex. 12.) Therefore, no sentence was imposed for Count 5, and so Count 5 remained pending. (*Id.*)

On September 8, 2015, the trial court re-sentenced Haji Mohamed pursuant to the state appellate court's remand order. (Doc. No. 5-1, Ex. 13.) The trial court noted "Counts 1, 2 and 5 merge. State elects

Count 5. No conviction on Counts 1 and 2.” (*Id.*) The trial court sentenced Haji Mohamed to 10 years on Count 3 and five years on Count 4, to be served consecutively, as well as 10 years in prison on Count 5, to be served concurrently with the other sentences, for the same aggregate sentence of 15 years in prison. (*Id.*)

On October 7, 2015, Haji Mohamed, through counsel, filed a Notice of Appeal of the re-sentencing (Doc. No. 5-1, Ex. 14), and moved to consolidate it with the existing appeal. (Doc. No. 5-1, Ex. 15.) The appellate court granted the motion and consolidated the appeals. (Doc. No. 5-1, Ex. 16.) Haji Mohamed filed a supplemental brief (Doc. No. 5-1, Ex. 17), as did the State. (Doc. No. 5-1, Ex. 18.) On March 17, 2016, the state appellate court affirmed in part, reversed in part, and remanded. (Doc. No. 5-1, Ex. 19.) The appellate court sustained part of the second assignment of error (ineffective assistance of counsel). *State v. Mohamed*, 2016-Ohio-1116, 2016 WL 1071454, at **6-7 (Ohio Ct. App. Mar. 17, 2016). The state appellate court agreed defense counsel had an obligation to ask the court to give an instruction on the kidnapping charge regarding the “safe place unharmed” provision of O.R.C. § 2905.01(C). *Id.* at *7. Further, the state appellate court found:

And apart from defense counsel’s failure to seek the instruction, this court has on several occasions said that it is plain error for the court to fail to give the instruction even if no instruction is requested if the evidence shows that the victim had been released in a safe place unharmed. *See State v. Fisher*, 8th Dist. Cuyahoga No. 101365, 2015-Ohio-597, ¶ 37; *State v. Carroll*, 8th Dist. Cuyahoga No. 93938, 2010-Ohio-6013, ¶ 14. The existence of plain error satisfies the prejudice prong of the test for ineffective assistance of counsel. We sustain this part of the second assignment of error and order a new trial solely on the kidnapping count.

Id.

The court also determined that, since the attempted rape charge was to be served consecutively to the now-reversed kidnapping charge, the eighth assignment of error (which argued that the 15-year sentence was contrary to law) had become moot. *Id.* at 9.

On May 2, 2016, the State filed a Notice of Appeal with the Ohio Supreme Court. (Doc. No. 5-1, Ex. 20.) In its memorandum in support of jurisdiction, the State presented the following proposition of law:

- I. A victim is not "unharmed" under R.C. 2905.01(C)(1), requiring a reduction of the kidnapper's sentence, where the victim is sexually assaulted while kidnapped.

(Doc. No. 5-1, Ex. 21.) On August 31, 2016, the Supreme Court of Ohio accepted the appeal. (Doc. No. 5-1, Ex. 22.) On November 17, 2016, the State filed its merit brief in support of jurisdiction, raising the same proposition of law as it did in its memorandum in support of jurisdiction. (Doc. No. 5-1, Ex. 23.) On January 9, 2017, Haji Mohamed, through new counsel, filed a merit brief in response. (Doc. No. 5-1, Ex. 24.) On January 30, 2017, the State filed its reply. (Doc. No. 5-1, Ex. 25.)

On September 7, 2017, the Ohio Supreme Court reversed the judgment of the court of appeals, reinstated the judgment of the trial court, and remanded to the appellate court to consider the assignment of error regarding consecutive sentences that had been deemed moot. *State v. Mohamed*, 151 Ohio St. 3d 320, 2017-Ohio-7468, 88 N.E.3d 935, 942 (Ohio Sept. 7, 2017).

On December 14, 2017, the state appellate court, on remand, affirmed the judgment of the trial court. *State v. Mohamed*, 2017-Ohio-9012, 101 N.E.3d 1041 (Ohio Ct. App. Dec. 14, 2017). Haji Mohamed did not timely appeal. (Doc. No. 5-1.)

C. Post-Conviction Motions/Collateral Review

On May 9, 2018, Haji Mohamed, *pro se*, filed a Notice of Appeal and a Motion for Delayed Appeal in the Ohio Supreme Court. (Doc. No. 5-1, Ex. 28.) In his motion, Haji Mohamed stated:

On March 17, 2016, the Court of appeals [sic] at Nos. 102398 and 103602 filed its Journal Entry and Opinion. Judgment affirmed in part, reversed in part, and remanded. (Append 1) On May 3, 2017, the Supreme Court of Ohio accepts the Appeal from the state of ohio [sic] at No. 2016-0672, as a result of the reversal in part by the Court of Appeals at Nos. 102398 and 103602. (Append 2) The Supreme Court decided the Appeal on September 7, 2017.

However, the issues raised by Direct Appeal counsel, with the one exception, never actually reached the Court, although the six assignment of errors were fully addressed in the Court of Appeals opinion. Assistant Public Defendant Erika Cunliffe was subsequently assigned and contributed a Merit Brief of Appellant to the Court as a result of the *kidnapping* issue, however, counsel never filed Notice of Appeal for the remaining assignment of errors raised by Direct Appeal counsel.

It is unreasonable that the Appellant should be denied a hearing before the Supreme Court, or in the least be given the opportunity for meritorious issues to be heard instead of simply set aside, considering this is Appellant's only opportunity to demonstrate his denial of a fair trial. The Appellant request [sic] that his Notice of Appeal/Delayed Appeal be granted.

(*Id.*) (emphasis in original).

On June 27, 2018, the Supreme Court of Ohio declined to accept jurisdiction of the appeal. (Doc. No. 5-1, Ex. 29.)

D. Federal Habeas Petition

On March 20, 2019,¹ Haji Mohamed, *pro se*, filed a Petition for Writ of Habeas Corpus and asserted the following grounds for relief:

Ground One: Petitioner's constitutional right to due process and a fair trial were violated when his motion to dismiss was denied and he was deprived of the right to impeach JK with her prior inconsistent statement[;] the trial court erred when improperly allowing the state to amend the indictment of the grand jury, changing the location of the alleged offense.

Ground Two: The court erred by denying petitioner's motion in limine to exclude irrelevant and other acts evidence over petitioner's objection, thus, denying the motion for mistrial.

Ground Three: Petitioner's convictions were not supported by sufficient evidence and the trial court erred by denying his motion for acquittal.

¹ Under the mailbox rule, the filing date for a *pro se* petition is the date that a petitioner delivers it to prison authorities. *See Houston v. Lack*, 487 U.S. 266 (1988). While the Petition did not arrive at the Court for filing until April 1, 2019, Haji Mohamed states he placed it in the prison mailing system on March 20, 2019. (Doc. No. 1 at 16.) Thus, the Court will consider the Petition as filed on March 20, 2019.

Ground Four: Petitioner's constitutional rights were violated where defense counsel's conduct was deficient and resulted in prejudice to petitioner by depriving him of a fair and speedy trial.

Ground Five: The petitioner was denied due process when charged with kidnapping JK pursuant to the facts of the case.

(Doc. No. 1.)

Respondent filed a Motion to Dismiss the Petition on May 30, 2019. (Doc. No. 5.) Haji Mohamed filed a Response on July 26, 2019 (Doc. No. 7), after receiving a 30-day extension of time to respond. (Non-document Order dated June 12, 2019). The Respondent did not file a Reply in support of his Motion to Dismiss.

On December 2, 2019, the undersigned issued a Report and Recommendation that Respondent's Motion to Dismiss be denied. (Doc. No. 8.) On February 3, 2020, the Court adopted the Report and Recommendation and denied Respondent's Motion to Dismiss. (Doc. No. 9.)

On March 27, 2020, Respondent filed his Return of the Writ. (Doc. No. 12.) Haji Mohamed did not file a Traverse.

III. Exhaustion and Procedural Default

A. Legal Standard

Petitioners must exhaust their state remedies prior to raising claims in federal habeas corpus proceedings. *See 28 U.S.C. § 2254(b),(c).* This requirement is satisfied "when the highest court in the state in which the petitioner was convicted has been given a full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir.1990).

Federal courts will not consider the merits of procedurally defaulted claims, unless the petitioner demonstrates cause for the default and prejudice resulting therefrom; or where failure to review the claim would result in a fundamental miscarriage of justice. *See Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87, 97S.Ct. 2497, 53 L.Ed.2d 594 (1977)). A claim

may become procedurally defaulted in two ways. *Id.* First, a petitioner may procedurally default a claim by failing to comply with state procedural rules in presenting his claim to the appropriate state court. *Id.*; see also *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). If, due to petitioner's failure to comply with the procedural rule, the state court declines to reach the merits of the issue, and the state procedural rule is an independent and adequate grounds for precluding relief, the claim is procedurally defaulted.² *Id.*

Second, a petitioner may also procedurally default a claim by failing to raise and pursue that claim through the state's "ordinary appellate review procedures." *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, it is procedurally defaulted. *Engle v. Isaac*, 456 U.S. 107, 125 n. 28, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); see also *Coleman v. Thompson*, 501 U.S. 722, 731–32, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Lovins*, 712 F.3d 283, 295 (6th Cir. 2013) ("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.") This second type of procedural default is often confused with exhaustion. Exhaustion and procedural default, however, are distinct concepts. AEDPA's exhaustion requirement only "refers to remedies still available at the time of the federal petition." *Engle*, 456 U.S. at 125 n. 28. Where state court remedies are no longer available to a petitioner because he failed to use them within the required time period, procedural default and not exhaustion bars federal court review. *Id.* In Ohio, a petitioner is not entitled to raise claims in post-

² In *Maupin*, the Sixth Circuit established a four-step analysis to determine whether a claim is procedurally defaulted. 785 F.2d at 135. Under this test, the Court decides (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 "independent and adequate" state ground on which the state can foreclose federal review, and (4) whether the petitioner has demonstrated "cause" and "prejudice." *Id.* at 138–39; *Barkley v. Konteh*, 240 F. Supp.2d 708 (N.D. Ohio 2002). "In determining whether a state court actually enforced a procedural rule, we apply the 'plain statement' rule of *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)." *Lovins v. Parker*, 712 F.3d 283, 296 (6th Cir. 2013) ("a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on the procedural bar.") (citations omitted).

conviction proceedings where those claims could have been raised on direct appeal. *Id.* Thus, if an Ohio petitioner failed to raise a claim on direct appeal, which could have been raised, the claim is procedurally defaulted. *Id.*

A claim is adequately raised on direct appeal if it was "fairly presented" to the state court. To fairly present a claim to a state court a petitioner must assert both the legal and factual basis for his claim. *See McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000). Accordingly, a "petitioner must present his claim to the state courts as a federal constitutional issue—not merely as an issue arising under state law." *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984). A petitioner can take four actions in his brief which are significant to the determination as to whether a claim has been fairly presented as a federal constitutional claim: (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006).

A petitioner's procedural default, however, may be excused upon a showing of "cause" for the procedural default and "actual prejudice" from the alleged error. *See Maupin*, 785 F.2d at 138–39. "Demonstrating cause requires showing that an 'objective factor external to the defense impeded counsel's efforts to comply' with the state procedural rule." *Franklin v. Anderson*, 434 F.3d 412, 417 (6th Cir. 2006) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Meanwhile, "[d]emonstrating prejudice requires showing that the trial was infected with constitutional error." *Id.* Where there is strong evidence of a petitioner's guilt and the evidence supporting petitioner's claim is weak, the actual prejudice requirement is not satisfied. *See United States v. Frady*, 456 U.S. 152, 172, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); *Perkins v. LeCureux*, 58 F.3d 214, 219–20 (6th Cir. 1995); *Rust v. Zent*, 17 F.3d 155, 161–62 (6th Cir. 1994). Prejudice does not occur unless petitioner demonstrates "a reasonable probability" that

the outcome of the trial would have been different. *See Mason v. Mitchell*, 320 F.3d 604, 629 (6th Cir. 2003) (citing *Strickler v. Greene*, 527 U.S. 263, 289, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)).

Finally, a petitioner's procedural default may also be excused where a petitioner is actually innocent in order to prevent a "manifest injustice." *See Coleman v. Thompson*, 501 U.S. 722, 749–50, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Conclusory statements are not enough—a petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). *See also Jones v. Bradshaw*, 489 F. Supp. 2d 786, 807 (N.D. Ohio 2007); *Allen v. Harry*, 497 F. App'x 473, 480 (6th Cir. 2012).

B. Application to Petitioner

Respondent argues all grounds but the part of Ground Four concerning the claim that counsel failed to ask for a "safe place unharmed" instruction are procedurally defaulted. (Doc. No. 12 at 12-42.) Respondent asserts Haji Mohamed fails to show cause and prejudice or actual innocence to excuse the default. (*Id.*) As Haji Mohamed failed to file a Traverse, Respondent's arguments are uncontested.

A careful review of the record reveals that while Haji Mohamed raised these claims to the state appellate court, he failed to present these claims to the Supreme Court of Ohio on cross-appeal after the State appealed the granting of one of Haji Mohamed's ineffective assistance of counsel claims regarding the failure to ask for a "safe place unharmed" instruction. (Doc. No. 5-1, Ex. 10, 17, 24.)

Nor did Haji Mohamed timely appeal the state appellate court's decision on his eighth assignment error regarding consecutive sentences after remand by the Supreme Court of Ohio. Haji Mohamed instead filed a motion for leave to file a delayed appeal on May 9, 2018. (Doc. No. 5-1, Ex. 28.) Haji Mohamed argues his delayed appeal "had nothing what-so-ever to do with the 8th district's order of December 14, 2017, concerning the remand order of the state supreme court"; "[r]ather, the Petitioner was attempting to

complete his first appeal as of right.” (Doc. No. 7 at 2.)³ On June 27, 2018, the Supreme Court of Ohio denied Haji Mohamed’s motion for leave to file a delayed appeal and dismissed the case. (Doc. No. 5-1, Ex. 29.)

Under its procedural rules, the Ohio Supreme Court has jurisdiction over timely appeals which are made within 45 days of the state appellate court’s decision. *See* Ohio S.Ct.Prac.R. 6.01(A)(1) & 7.01(A)(1). The Ohio Supreme Court may, in its discretion, take jurisdiction over untimely felony appeals upon motion for leave to file a delayed appeal pursuant to Ohio S.Ct.Prac.R. 7.01(A)(4). However, where (as here) the delayed appeal is not allowed, the Sixth Circuit Court of Appeals has held that even an unexplained decision denying leave to file an untimely appeal is presumed to enforce any applicable procedural bar:

This case turns upon whether the Ohio Supreme Court entry denying Bonilla’s motion for leave to file a delayed appeal constitutes a procedural ruling sufficient to bar federal court review of Bonilla’s habeas corpus petition. Upon examination of the Ohio Supreme Court Rules, we conclude that it does. The Ohio Supreme Court Rules require a motion for a delayed appeal to state “the date of entry of the judgment being appealed and adequate reasons for the delay.” Ohio Sup.Ct. R. II, Section 2(A)(4)(a). In addition, the motion must be accompanied by a supporting affidavit and a “copy of the decision being appealed.” *Id.* A motion for a delayed appeal is not required to contain the actual claims and supporting arguments sought to be presented on appeal. *Id.* Instead, only when “the Supreme Court grants a motion for delayed appeal,” is the appellant required to “file a memorandum in support of jurisdiction.” Ohio Sup.Ct. R. II, Section 2(A)(4) (c). Thus, the applicable Ohio court rules indicate that the denial of a motion for a delayed appeal is a procedural ruling, not a ruling on the merits.

Bonilla v. Hurley, 370 F.3d 494, 497 (6th Cir. 2004) (emphasis added); *accord Baker v. Bradshaw*, 495 F. App’x 560, 565 (6th Cir. 2012) (“The timeliness requirements for an appeal to the Ohio Supreme Court ... constitute adequate and independent state grounds to preclude hearing an untimely claim on the merits.”); *Carman v. Ohio*, No. 1:14 CV 2060, 2015 WL 1189084 (N.D. Ohio Mar. 16, 2015); *Crutchfield v.*

³ The Court notes that while Haji Mohamed references Rule 26(B), he did not file a Rule 26(B) application to reopen his direct appeal. (Doc. No. 5-1.)

Warden, No. 1:13-cv-438, 2014 WL 3899287 (S.D. Ohio Aug. 11, 2014) (finding that where the petitioner's motion for delayed appeal before the Ohio Supreme Court was denied, the petitioner must demonstrate cause for his default and actual prejudice to avoid dismissal).

The Court finds Haji Mohamed's failure to cross-appeal the state appellate court's denial of his other assignments of error, coupled with the Supreme Court of Ohio's denial of a motion for delayed appeal, resulted in a procedural default. Therefore, all grounds except for the portion of Ground Four concerning counsel's failure to request a "safe place unharmed" instruction are procedurally barred unless Haji Mohamed "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*, 501 U.S. at 750. A habeas petitioner must "show that some objective factor external to the defense" caused his failure to comply with the state's procedural rule, *Murray*, 477 U.S. at 488, and if the petitioner fails to do so, the Court need not consider the prejudice prong. *Smith v. Murray*, 477 U.S. 527, 533-34 (1986).

a. Cause and Prejudice

As Haji Mohamed failed to file a Traverse, he did not raise any arguments regarding cause and prejudice to excuse the procedural default. However, the Court addresses any arguments Haji Mohamed may have raised with respect to ineffective assistance of counsel.

While the ineffective assistance of counsel can normally provide cause to excuse procedural default, "attorney error cannot constitute cause where the error caused a petitioner to default in a proceeding in which the petitioner was not constitutionally entitled to counsel, including a discretionary appeal." *Barkley v. Konteh*, 240 F. Supp. 2d 708, 714 (N.D. Ohio Dec. 13, 2002) (citing *Coleman v. Thompson*, 501 U.S. 722, 751-53 (1991)). Here, Haji Mohamed had no constitutional right to counsel on a discretionary appeal to the Supreme Court of Ohio. *Tanner v. Jeffreys*, 516 F. Supp. 2d 909, 916 (N.D.

Ohio Oct. 19, 2007) (citing *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). Thus, any purported failure of his attorney in failing to raise certain issues on appeal to the Supreme Court of Ohio cannot serve as cause to excuse the procedural default. As Haji Mohamed fails to show cause, the Court need not consider the prejudice prong. *Smith v. Murray*, 477 U.S. at 533–34.

a. Actual Innocence

As noted above, a petitioner’s procedural default may be excused where a petitioner is actually innocent in order to prevent a “manifest injustice.” *See Coleman*, 501 U.S. at 749–50. In order to establish actual innocence, a habeas petitioner must show “factual innocence, not mere legal insufficiency.” *Bousley*, 523 U.S. at 623. Conclusory statements are not enough—a petitioner must “support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup*, 513 U.S. at 324. *See also Jones*, 489 F. Supp. 2d at 807; *Allen*, 2012 WL 3711552, at *7. A petitioner must show that, in light of new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 327. “Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim.” *Id.* at 316.

Here, Haji Mohamed does not assert he is actually innocent. (Doc. No. 1; Doc. No. 15.) Nor does he present any new, reliable evidence of his innocence. Therefore, the Court finds Haji Mohamed has failed to demonstrate the procedural default of Grounds One, Two, Three, Four (except for counsel’s failure to request a “safe place unharmed” instruction), and Five should be excused on the basis of actual innocence.

IV. Review on the Merits

A. Legal Standard

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), 28 U.S.C. § 2254. *See Lindh v. Murphy*, 521 U.S. 320, 326-27, 337 (1997). The relevant provisions of AEDPA state:

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) (1996).

Clearly established federal law is to be determined by the holdings (as opposed to the dicta) of the United States Supreme Court. *See Parker v. Matthews*, 567 U.S. 37, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012); *Renico v Lett*, 559 U.S. 766, 130 S.Ct. 1855, 1865-1866 (2010); *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Shimel v. Warren*, 838 F.3d 685, 695 (6th Cir. 2016); *Ruimveld v. Birkett*, 404 F.3d 1006, 1010 (6th Cir.2005). Indeed, the Supreme Court has indicated that circuit precedent does not constitute “clearly established Federal law, as determined by the Supreme Court.” *Parker*, 567 U.S. at 48-49; *Howes v. Walker*, 567 U.S. 901, 132 S.Ct. 2741, 183 L.Ed.2d 612 (2012). *See also Lopez v. Smith*, — U.S. —, 135 S.Ct. 1, 4, 190 L.Ed.2d 1 (2014) (per curiam) (“Circuit precedent cannot ‘refine or sharpen a general principle of Supreme Court jurisprudence into a

specific legal rule that this Court has not announced.’ ” (quoting *Marshall v. Rodgers*, 569 U.S. 58, 133 S.Ct. 1446, 1450, 185 L.Ed.2d 540 (2013)).

A state court’s decision is contrary to clearly established federal law “if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*, 529 U.S. at 413. By contrast, a state court’s decision involves an unreasonable application of clearly established federal law “if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” *Id.* See also *Shimel*, 838 F.3d at 695. However, a federal district court may not find a state court’s decision unreasonable “simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly.” *Williams v. Taylor*, 529 U.S. at 411. Rather, a federal district court must determine whether the state court’s decision constituted an objectively unreasonable application of federal law. *Id.* at 410-12. “This standard generally requires that federal courts defer to state-court decisions.” *Strickland v. Pitcher*, 162 Fed. Appx. 511, 516 (6th Cir. 2006) (citing *Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998)).

In *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011), the Supreme Court held that as long as “fairminded jurists could disagree on the correctness of the state court’s decision,” relief is precluded under the AEDPA. *Id.* at 786 (internal quotation marks omitted). The Court admonished that a reviewing court may not “treat[] the reasonableness question as a test of its confidence in the result it would reach under *de novo* review,” and that “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Id.* at 785. The Court noted that Section 2254(d) “reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems” and does not function as a “substitute for ordinary error correction through appeal.” *Id.* (internal

quotation marks omitted). Therefore, a petitioner “must show that the state court’s ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at 786–87. This is a very high standard, which the Supreme Court readily acknowledged. *See id.* at 786 (“If this standard is difficult to meet, that is because it is meant to be.”)

In the portion of Ground Four that is not procedurally defaulted, Haji Mohamed argues that trial counsel provided ineffective assistance of counsel by failing to request a jury instruction pursuant to O.R.C. § 2905.01(C)(1). (Doc. No. 1 at 11.) Respondent asserts this claim is without merit. (Doc. No. 12 at 42.)

In order to establish ineffective assistance of counsel, a petitioner must demonstrate that his counsel’s conduct was so below acceptable standards of representation that counsel was not functioning as “counsel” guaranteed by the Sixth Amendment to the United States Constitution. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner also must demonstrate that a trial counsel’s performance prejudiced the petitioner’s defense to such an extent that it rendered the proceeding unfair. *Id.* To establish prejudice, the “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. In other words, a counsel’s deficient performance must have “caused the defendant to lose what he otherwise would probably have won” and it must have been “so manifestly ineffective that defeat was snatched from the hands of probable victory.” *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992).

“[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Strickland*, 466 U.S. at 690. Mere disagreements by a defendant with tactics or strategies employed by counsel are not enough to support a

claim of ineffective assistance of counsel and there is a presumption that the challenged conduct of a petitioner's counsel was a matter of strategy. *Id.* at 689. See also *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990).

As explained by the United States Supreme Court:

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.* at 689, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so; *Knowles*, 556 U.S., at ___, 129 S.Ct. 1411, 173 L.Ed.2d 251. The *Strickland* standard is a general one, so the range of reasonable applications is substantial: 556 U.S., at ___, 129 S.Ct. 1411, 173 L.Ed.2d 251. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington, 562 U.S. at 105. See also *Kennedy v. Warren*, 428 F. App'x 517, 520 (6th Cir. May 3, 2011); *Phillips v. Sheldon*, 2014 WL 185777 at * 14-15 (N.D. Ohio Jan. 16, 2014).

Haji Mohamed raised this claim on direct appeal to the state appellate court and the State raised this issue on appeal to the Supreme Court of Ohio. (Doc. No. 5-1, Ex. 10, 17, 21.) The Supreme Court of Ohio considered this claim on the merits and rejected it as follows:

II: Psychological Harm Is Harm

{¶ 13} Because the court of appeals based its ineffective-assistance-of-counsel and plain-error holdings on its finding that Mohamed had released J.K. in a safe place physically unharmed, we first must decide whether the definition of "harm" in the kidnapping statute also contemplates psychological harm. We start, as we always do in cases of statutory interpretation, with the plain and ordinary meaning of the statutory language.

{¶ 14} "Unharmed" means "not harmed." *Webster's Third New International Dictionary* 2497 (2002). "Harm" is defined in the dictionary as "physical or mental damage." *Id.* at 1034. This is consistent with how we use the word in ordinary conversation. We use the term "harm" to describe both physical injuries and emotional or psychological injuries. We might say that someone was "mentally harmed" or that they were "physically harmed," but in both

cases, we say that they were "harmed." Under its plain meaning, the statute includes both physical and psychological harm.

{¶ 15} This plain-meaning approach is consistent with the way the General Assembly has used the term in statutes. When the legislature wants to limit harm to physical harm, it has done so explicitly. The assault statute, for example, prohibits anyone from knowingly causing "physical harm to another." R.C. 2903.13(A). Indeed, in over 150 different sections of the Revised Code (including 89 sections of the criminal code, R.C. Title 29), the General Assembly specifies "physical harm." It did not do so in R.C. 2905.01(C)(1). We cannot create a limitation of harm to "physical" harm that is not found in the statutory language. The lower court erred in holding otherwise.

III. Ineffective Assistance of Counsel and Plain Error

{¶ 16} Ultimately, the trier of fact decides whether a victim has been released in a safe place unharmed, and we hold in this case that triers of fact may consider the psychological harm to the victim in making that determination. However, our holding that the court of appeals erred in writing a psychological-harm exclusion into the statute does not resolve the matter. Here, arguably at least, a jury might have found based upon the evidence presented at trial that J.K. was released unharmed both physically and psychologically. The questions are then, with a proper definition of the term "unharmed" guiding our analysis, was counsel ineffective for failing to ask for the safe-place-unharmed jury instruction and did the trial court commit plain error in failing to provide such an instruction? In our view, the answer to both questions is no.

A. Ineffective Assistance of Counsel

{¶ 17} Considering the record as a whole, we determine that Mohamed has failed to overcome the presumption that counsel's failure to request the safe-place-unharmed instruction was the result not of ineffectiveness but of trial strategy. To show that his trial counsel was ineffective, Mohamed was required to prove that his counsel's performance fell below an objective standard of reasonable representation and that the deficiency prejudiced him. *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus, citing *Strickland v. Washington*, 466 U.S. 668, 687–688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 18} Questionable trial strategies and tactics, however, do not rise to the level of ineffective assistance of counsel. *State v. Clayton*, 62 Ohio St.2d 45, 49, 402 N.E.2d 1189 (1980). "To justify a finding of ineffective assistance of counsel, the appellant must overcome a strong presumption that, under the circumstances, the challenged action might be considered sound trial

strategy.” *State v. Carter*, 72 Ohio St.3d 545, 558, 651 N.E.2d 965 (1995), citing *Strickland* at 689, 104 S.Ct.2052.

{¶ 19} In *Clayton*, the defendant was charged with and convicted of two counts of attempted murder. *Clayton* at 45, 402 N.E.2d 1189. On appeal, the defendant challenged his counsel’s decision not to request jury instructions on lesser included offenses. *Id.* at 46, 48–49, 402 N.E.2d 1189. We concluded that the decision not to request the mitigating instruction, despite being a “tactical error” and a “questionable” strategy, did not rise to the level of ineffective assistance of counsel. *Id.* at 48–49, 402 N.E.2d 1189. Simply because there was “another and better strategy available” did not mean that counsel provided ineffective assistance. *Id.* at 49, 402 N.E.2d 1189.

{¶ 20} In this case, Mohamed’s counsel’s trial strategy was simple: completely deny that any kidnapping or sexual assault occurred and attack the credibility of J.K. Throughout trial, counsel maintained that J.K.’s story just didn’t add up: if what she said about Mohamed’s conduct were really true, she would have taken advantage of the multiple opportunities she had to flee. She could have stayed in her apartment when she went back to get her debit card, taken off when he took her to the ATM; or jumped out of the cab at a stop sign on the way to her ex-boyfriend’s home. In addition, he pointed out that at no point did Mohamed brandish a weapon and that, even under her account, J.K. had been able to physically fight off Mohamed. Nor did J.K. seek medical attention after the alleged assault.

{¶ 21} Counsel closed with an attack on J.K.’s veracity. He charged that she was “evasive on the stand,” had “impeach[ed] herself,” and had gotten “caught up in her own lies.” He finished with this summation: “What I’m saying to you is that the story is preposterous. It’s preposterous. It is offensive, it is deceitful and misleading. If you can go back and convict him on that, God bless, God bless, I’m done.”

{¶ 22} Understood in this context, defense counsel’s decision not to request a jury instruction concerning the safe-place-unharmed defense would seem to be part of a reasonable trial strategy. The theory that defense counsel presented to the jury was that the victim was telling one big whopping lie. Counsel could not at the same time have credibly argued to the jury that even if Mohamed did kidnap her, he released her in a safe place unharmed. And counsel could have reasonably concluded that requesting such a jury instruction would have undercut his “she’s a liar” defense. See, e.g., *State v. Keith*, 79 Ohio St.3d 514, 536, 684 N.E.2d 47 (1997) (failure to present mitigating evidence not “demonstrably deficient trial strategy” when it was at least arguably consistent with defendant’s claim of complete innocence).

{¶ 23} Furthermore, a safe-place-unharmed instruction would have opened the door for the prosecution to argue that Mohamed had caused profound psychological damage to J.K.—a point that J.K. emphasized after trial in her

victim's letter, which the judge mentioned at the sentencing hearing. Defense counsel may well—and quite reasonably—have thought it better to avoid discussion of lasting emotional injury done to J.K. This is a factor that the appellate court does not consider, because under its reasoning, the state could not have presented to the jury any evidence regarding the psychological harm J.K. suffered.

{¶ 24} Our determination that counsel was not ineffective is premised on the appropriate definition of "unharmed" in R.C. 2905.01. The concurring opinion suggests that under any definition of "unharmed" (even the erroneous definition adopted by the court of appeals), trial counsel provided effective assistance, and therefore, we should avoid addressing the proposition of law on which this case was accepted. But we must identify what the law is before we can determine whether counsel's strategy in not requesting an instruction on it was reasonable. The analysis about what is reasonable trial strategy would be different in a hypothetical case—under a hypothetical statute—where only physical harm could be considered. Our job is to decide the case before us, not hypotheticals. Under the proper definition of "unharmed" in R.C. 2905.01, it was not ineffective assistance for counsel to not ask for the instruction. Doing so would have undermined counsel's trial strategy and opened the door for testimony about the psychological harm suffered by the victim.

{¶ 25} Mohamed has not overcome the presumption that his counsel's failure to request the safe-place-unharmed instruction was a matter of trial strategy. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. Accordingly, the court of appeals erred in finding that his counsel was ineffective.

B. Plain Error

{¶ 26} We reach a similar conclusion on the Eighth District's determination that the failure to provide the instruction amounted to "plain error." To establish plain error, a defendant must show that (1) there was an error or deviation from a legal rule, (2) the error was plain and obvious, and (3) the error affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). We find plain error only "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Clayton*, 62 Ohio St.2d at 47, 402 N.E.2d 1189, quoting *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶ 27} When the decision not to request a particular jury instruction may be deemed to be part of a reasonable trial strategy, we will not find plain error. *Clayton* at 47–48, 402 N.E.2d 1189; *State v. Claytor*, 61 Ohio St.3d 234, 240, 574 N.E.2d 472 (1991). Thus, in *Clayton* we found no plain error when counsel had failed to request an instruction on a lesser included offense

and instead sought a total acquittal for his client. Similarly, in *Claytor*—a death-penalty case in which the defendant was convicted of aggravated murder—we found no plain error in the trial court’s failure to provide an instruction on the lesser included offense of murder when counsel’s “tactical decision” was to argue that his client was not guilty by reason of insanity. *Claytor* at 240, 574 N.E.2d 472.

{¶ 28} The same goes here. Having determined that counsel’s decision not to request an instruction on the safe-place-unharmed defense falls within a reasonable trial strategy, we will not find that the trial judge committed plain error in failing to provide the unrequested instruction. Mohamed has failed to show that the trial judge’s decision not to give the jury the instruction was obvious error, that it deviated from clear legal rules, or that it affected the outcome of the trial.

State v. Mohamed, 2017-Ohio-7468, 88 N.E.3d at 939-42.

First, to the extent the portion of Ground Four regarding counsel’s failure to request a “safe place unharmed” instruction asserts a violation of Ohio law, such a claim is not cognizable on federal habeas review. It is well-established that, in conducting habeas review, “a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). As such, the Supreme Court has explained “it is not the province of a federal habeas court to reexamine state-court decisions on state-law questions.” *Id.* at 67-68. *See also Bey v. Bagley*, 500 F.3d 514, 519 (6th Cir. 2007); *Coleman v. Mitchell*, 244 F.3d 533, 542 (6th Cir. 2001). Because habeas review is limited to claims implicating federal concerns, this Court lacks jurisdiction to consider a claim the Supreme Court of Ohio violated Ohio law in determining the word “harm” in O.R.C. § 2905.01 includes psychological harm.

Second, the Court finds the Supreme Court of Ohio reasonably determined trial counsel was not ineffective for failing to request a “safe place unharmed” jury instruction. As noted in the Supreme Court of Ohio’s opinion, a review of the trial transcript shows trial counsel’s strategy was to deny the kidnapping and sexual assault and attack the victim’s credibility. On cross-examination, trial counsel elicited admissions that J.K. left the car several times and upon returning got back into the front seat of the

cab, that Haji Mohamed took her wherever she wanted to go, Haji Mohamed never threatened her with a weapon, J.K. had been able to fight Haji Mohamed off, and she did not seek medical attention afterward. (Doc. No. 11-4, PageID #827-29, 834-36, 842-43, 850-53, 861-62, 892-93.) Counsel's closing argument highlighted the many inconsistencies in J.K.'s account of that evening and consistently commented upon the lack of J.K.'s credibility. (Doc. No. 11-6, PageID # 1148-64) (e.g., "significant, material differences in every version"; "[i]t flies in the face of reason and common sense"; "Would you want to come to court to the criminal justice system and be lied to?"; "Tell the truth. Why lie? Why exaggerate?"). Counsel argued, "What I'm saying to you is that the story is preposterous. It's preposterous. It is offensive, it is deceitful and misleading. If you can go back and convict him on that, God bless, God bless. I'm done." (*Id.* at PageID #1163.) As the Supreme Court of Ohio recognized, given that strategy, trial counsel could not then have argued credibly that even if a kidnapping occurred, J.K. had been released in a safe place unharmed. In addition, requesting a "safe place unharmed" instruction would have opened the door to argument by the prosecution regarding J.K.'s mental state, which the trial court relied on in part as a factor in sentencing. (*Id.* at PageID #1204-05.) Therefore, it appears trial counsel did not request a "safe place unharmed" instruction as part of a reasonable trial strategy.

Under these circumstances, the Court finds the Supreme Court of Ohio reasonably determined trial counsel was not ineffective for failing to request such an instruction. It is therefore recommended this portion of Haji Mohamed's fourth ground for relief be denied.

V. Conclusion

For all the reasons set forth above, it is recommended that the Petition be DENIED.

Date: September 1, 2021

s/ Jonathan Greenberg
Jonathan D. Greenberg
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Court within fourteen (14) days after the party objecting has been served with a copy of this Report and Recommendation. 28 U.S.C. § 636(b)(1). Failure to file objections within the specified time may waive the right to appeal the District Court's order. *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

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

Shuaib A. Haji Mohamed,

Case No.: 1:19-cv-00709-JGC

Petitioner,

v.

ORDER

Warden Tim Buchanan,

Respondent.

This is a pro se petition filed under 28 U.S.C. § 2254. I referred the petition to Magistrate Judge Jonathan D. Greenberg for a Report & Recommendation. Magistrate Judge Greenberg has filed a Report & Recommendation, recommending that I deny the petition. (Doc. 13). Petitioner Shuaib A. Haji Mohamed has filed an objection. (Doc. 16). For the reasons discussed below, I overrule petitioner's objection and I approve and adopt the Report and Recommendation.

Background

On October 8, 2014, a jury in the Court of Common Pleas of Cuyahoga County, Ohio found petitioner guilty of: 1) attempted gross sexual imposition, 2) two counts of kidnapping, and 3) attempted rape. (Doc. 5-1, pgID 146). The charges arose from an incident in which petitioner, a taxi driver, attacked a female passenger. (Doc. 13, pgID 1288-90). The trial court imposed an aggregate fifteen-year sentence. (*Id.*, pgID 1291-92).

On direct appeal, petitioner raised eight claims. In a March 17, 2016 opinion, the Eighth Appellate District rejected seven of those arguments. *State v. Mohamed*, 10th Dist. Cuyahoga Nos. 02398, 103602, 2016-Ohio-1116, 2016 WL 1071454, *rev'd*, 151 Ohio St.3d 620, 2017-Ohio-7468, 35, 88 N.E.3d 935. It found merit, however, in petitioner's argument that his trial

reversing the kidnapping convictions. *Id.* ¶ 30. On remand, on December 14, 2017, the Eighth District affirmed Mohamed's conviction and sentence. (Doc. 13, pgID 1293).

On May 9, 2018, Mohamed filed a pro se Notice of Appeal and Motion for Delayed Appeal in the supreme court. (Doc. 13, pgID 1293-1294. He sought a delayed appeal to raise the other issues that he had raised in his direct appeal to the Eighth District but that appointed counsel had not raised in his supreme court briefing. (*Id.*).

Mohamed's argument in that pleading rested solely on the ground that his Supreme Court counsel had failed to raise the various other issues that his prior appellate counsel had raised before the Eighth District. (*Id.*). His sole argument was that it would be "unreasonable" to allow that failure to deny him the opportunity to raise those "meritorious issues." (*Id.*, pgID 1294). The supreme court declined to accept jurisdiction. (*Id.*).

Mohamed filed his habeas corpus petition on March 20, 2019. *See (id.*, pgID 1294 n.1). In his petition, Mohamed seeks again to raise the issues that his intermediate appellate counsel had raised but that his supreme court counsel had not. (Doc. 1). The State responded by arguing that Mohamed had procedurally defaulted those issues. (Doc. 12, pgID 1249-51). Mohamed failed to file a traverse. (Doc. 13, pgID 1300).

In his Report and Recommendation, Magistrate Judge Greenberg found that Mohamed had defaulted the claims not raised in his brief to the Ohio Supreme Court. He concluded that Mohamed's failure to raise his claims other than the issue whether he released the victim unharmed in a cross-appeal to the Ohio Supreme Court and that court's denial of his motion for a delayed appeal constituted a procedural default barring habeas review. (*Id.*, pgID 1298-1301).

As Magistrate Judge Greenberg noted, (*Id.*, pgID 1299), under Ohio law, the denial of a motion for delayed appeal is a procedural ruling. *Bonilla v. Hurley*, 370 F.3d 494, 497 (6th Cir.

asking the court to permit a delayed appeal, he would not have raised the claim that he had, in fact, filed a timely notice of appeal.

Nevertheless, even assuming *arguendo* that Mohamed filed a timely notice of appeal to the Ohio Supreme Court, that would not provide any basis for relief. The court appointed counsel for Mohamed's appeal. Ohio law prohibits a party represented by counsel from filing pro se pleadings – a practice referred to as “hybrid representation.” As the Ohio Supreme Court has held, “in Ohio, a criminal defendant has the right to representation by counsel or to proceed pro se with the assistance of standby counsel. However, these two rights are independent of each other and may not be asserted simultaneously.” *State v. Martin*, 103 Ohio St.3d 385, 391, 2004-Ohio-5471, 816 N.E.2d 227 ¶ 32.

[“T]he rule against hybrid representation is firmly established and regularly followed in the Ohio courts.” *Ahmed v. Houk*, No. 2:07-CV-658, 2020 WL 5629622, at *7 (S.D. Ohio), (collecting cases), *appeal dismissed sub nom. Ahmed v. Shoop*, No. 20-4187, 2021 WL 1884833 (6th Cir.), and *appeal dismissed sub nom. Ahmed v. Shoop*, No. 20-4302, 2021 WL 6197332 (6th Cir.). Moreover, federal courts apply the same rule. *See, e.g., Wilson v. Hurt*, 29 F. App’x 324, 327 (6th Cir. 2002); *Ahmed, supra*, 2020 WL 5629622, at *8 (collecting cases).

Thus, even if the court received Mohamed's alleged pro se notice of appeal, the court would not have considered it. That filing would not have prevented Mohamed's procedural default.

Moreover, because Mohamed had no constitutional right to counsel in a discretionary appeal to the Ohio Supreme Court, any attorney error by appointed counsel cannot constitute cause to overcome a procedural default. *Tanner v. Jeffreys*, 516 F. Supp. 2d 909, 916-17 (N.D. Ohio 2007) (Katz, J.) (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)); *Barkley v. Konteh*,

kidnap or sexually assault the victim was a reasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). Asking the court to instruct the jury to determine pursuant to the kidnapping statute whether after he kidnapped the victim, he released her safely certainly would have undermined that defense.

It is therefore

ORDERED THAT:

1. Petitioner's Objection to the Report and Recommendation, (Doc. 16), shall be, and the same hereby is, OVERRULED;
2. The Report and Recommendation, (Doc. 13), shall be, and the same hereby is, APPROVED and ADOPTED;
3. Jurists of reason could not rationally disagree with this decision or its rationale; therefore, I decline to issue a Certificate of Appealability.
4. The Clerk of Court shall mark this matter closed.

So ordered.

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

APPENDIX C

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

Shuaib A. Haji Mohamed,

Case No. 1:19-CV-00709

Petitioner

v.

ORDER

Warden Tim Buchanan,

Respondent.

Pending before me, following referral to the Hon. Johnathan D. Greenberg, United States Magistrate Judge, is his Report & Recommendation (Doc. 27), to which the petitioner has filed objections. (Doc. 28)

I conclude, based on my *de novo* review, that the Report & Recommendation is well-taken in all respects, and that I should adopt it.

But I also believe that there may be an alternative basis for rejecting the petitioner's petition: namely, that he committed procedural default when he failed to file a timely motion for leave to file a delayed cross-appeal in the Ohio Supreme Court after learning that the State had filed its own appeal.

Petitioner contends, and I accept *arguendo*, that the State did not, as it should have, serve him with a copy of its appeal – or, at least, he never received the copy the State presumably sent to him. Thus, he first became aware of the State's appeal when he received notice from the Supreme Court that it had accepted the State's appeal.

delayed appeal in the Ohio Supreme Court as a further preclusive procedural default that precludes merits review of the claim he here asserts. (Namely: that the State's failure to give him notice of its appeal deprived him of his right to obtain Ohio Supreme Court review of the underlying substantive claim in this petition).

Accordingly, it is hereby ORDERED THAT:

1. Petitioner shall, within six weeks of this Order, show cause why his failure to seek leave to file a motion for leave to file a delayed appeal in the Ohio Supreme Court should not be deemed a preclusive procedural default as to the claim he asserts he would have raised, but for the State's failure to have given him notice of its appeal; and

2. Respondent shall, within three weeks thereafter respond to petitioner's response to this show cause order.

So ordered.

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