

APPENDIX A

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

May 15, 2024

KELLY L. STEPHENS, Clerk

JOHN C. COLEMAN,)
Petitioner-Appellant,)
v.)
KIM HENDERSON, Warden, Toledo Correctional)
Institution,)
Respondent-Appellee.)

ORDER

Before: MATHIS, Circuit Judge.

John C. Coleman, a pro se state prisoner, appeals the district court's denial of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The district court denied a certificate of appealability ("COA"). Coleman now applies for a COA and moves to proceed in forma pauperis ("IFP"). Coleman also moves for the appointment of counsel, a preliminary injunction, and a restraining order. As discussed below, we deny the application and the motions.

A jury convicted Coleman of two counts of burglary. The trial court sentenced Coleman to an aggregate eight-year prison sentence. The Ohio Court of Appeals affirmed. *State v. Coleman*, No. 29360, 2020 WL 2188847 (Ohio Ct. App. May 6, 2020). The Ohio Supreme Court declined jurisdiction. *State v. Coleman*, 150 N.E.3d 115 (Ohio 2020) (table). Coleman unsuccessfully applied to reopen his direct appeal. Coleman did not appeal that decision to the Ohio Supreme Court. Coleman's petition for post-conviction relief was denied.

Coleman filed an amended § 2254 petition claiming that his right to a speedy trial was violated, insufficient evidence supported his convictions, trial counsel was ineffective, and the prosecution withheld exculpatory and impeachment evidence. A magistrate judge issued a report determining that each claim was procedurally defaulted and recommending that the district court

dismiss the petition. The magistrate judge noted that the state court found that Coleman did not articulate a clear basis for the speedy-trial claim under Ohio Rule of Appellate Procedure 16(A)(7) and failed to show either cause and prejudice to overcome the default or a fundamental miscarriage of justice. The magistrate judge found that Coleman did not raise the remaining claims in state court and could not establish cause and prejudice to overcome the default. Coleman filed objections. The district court overruled Coleman's objections as untimely and dismissed the petition. The district court subsequently denied Coleman's motion for reconsideration, again dismissing the petition because the objections were untimely but also adopting the magistrate judge's report and recommendation on the merits. The district court denied a COA.

Coleman now seeks a COA for the claims raised in his amended petition.

A state prisoner must obtain a COA to appeal from the denial of § 2254 relief, which requires making a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(1)-(2). A substantial showing is made where the applicant demonstrates that “reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted). When a claim has been rejected on the merits, “[t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.* “[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.” *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Where the district court denies a claim on procedural grounds only, “a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484.

The first inquiry is whether Coleman filed timely objections to the magistrate judge’s report and recommendation. If not, he forfeited his right to appellate review. *See Berkshire v. Dahl*, 928 F.3d 520, 530 (6th Cir. 2019) (collecting cases).

On July 14, 2023, the magistrate judge issued his report and recommendation, notifying Coleman that he had 14 days in which to file objections and that failure to do so “may forfeit the right to appeal the District Court’s order.” On August 9, 2023, Coleman filed his objections. The district court determined that Coleman’s objections were untimely, explaining that he did not file them by the deadline of July 31, 2023, and adopted the report and recommendation and dismissed Coleman’s petition. Coleman filed a motion to reconsider, explaining in an unsworn declaration that he submitted his objections to prison officials on July 24, 2023. The district court denied Coleman’s motion to reconsider, rejecting the argument that the certificate of service date of July 24, 2023, under the prison mailbox rule, satisfied the time requirement.

Under the prison mailbox rule, a prisoner’s pleading is “deemed filed on the date that it is turned over to prison officials for transmittal to the court.” *Richard v. Ray*, 290 F.3d 810, 812 (6th Cir. 2002) (per curiam) (citing *Houston v. Lack*, 487 U.S. 266, 270 (1988)). It appears that Coleman filed his objections within the allotted time, having submitted his objections to prison officials as stated in an unsworn declaration that he filed.

With his objections, Coleman sought to establish the requisite cause and prejudice to overcome the magistrate judge’s finding of procedural default. Procedural default occurs when a state prisoner does not satisfy the state procedural requirements when raising a claim or fails to exhaust a claim in state court. *See Coleman v. Thompson*, 501 U.S. 722, 731-32 (1991). A defaulted claim is barred from federal habeas review “unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Id.* at 750.

Coleman states correctly that he exhausted his speedy-trial claim. However, he failed to satisfy Ohio’s procedural requirements. A claim is procedurally defaulted on this basis if the prisoner did not comply with a state procedural rule, the rule was enforced, the rule is an adequate

and independent state ground for denying the review of a federal constitutional claim, and he cannot show cause and prejudice to overcome the default. *Hewitt-El v. Burgess*, 53 F.4th 969, 978 (6th Cir. 2022).

Ohio courts require that an appellate brief “contain[] the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.” Ohio R. App. P. 16(A)(7). The Ohio Court of Appeals found that Coleman had not done this and denied relief, explaining that it “will not ‘guess at undeveloped claims on appeal’ or construct arguments to support an assignment of error.” *Coleman*, 2020 WL 2188847, at *4 (quoting *McPherson v. Goodyear Tire & Rubber Co.*, No. 21499, 2003 WL 23094976, at *8 (Ohio Ct. App. Dec. 31, 2003)). Ohio Rule of Appellate Procedure 16(A)(7) is an adequate and independent state ground barring habeas review. *See Hubbard v. Haviland*, No. 17-3119, 2017 WL 3613857, at *3 (6th Cir. Aug. 8, 2017). Coleman’s speedy-trial claim is procedurally defaulted. His cause-and-prejudice argument does not address the failure to comply with the state-court rule. Reasonable jurists would not find the district court’s decision debatable or wrong.

Coleman did not exhaust the remaining claims, and he can no longer exhaust them, so they are also procedurally defaulted. *See Coleman*, 722 U.S. at 731-32. Because he does not rely on new evidence, Coleman cannot show actual innocence to overcome the default of his claim that insufficient evidence supported his convictions. *See Schlup v. Delo*, 513 U.S. 298, 316 (1995); *Davis v. Bradshaw*, 900 F.3d 315, 326 (6th Cir. 2018).

Nor can Coleman rely on an ineffective-assistance-of-appellate-counsel claim to overcome the default of his claim of insufficient evidence and trial-counsel ineffectiveness. In his application to reopen his direct appeal, Coleman argued that appellate counsel should have raised these claims on direct appeal. The Ohio Court of Appeals denied the application. Though Coleman states that he filed an untimely appeal, the record does not support that assertion. The claim of appellate-counsel ineffectiveness is itself procedurally defaulted, as “state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of

the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). Significantly, "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted." *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). That is what happened here.

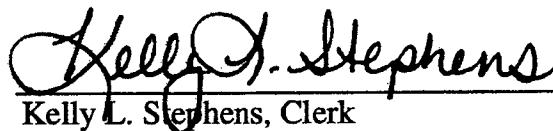
Finally, Coleman has not stated a *Brady* violation, which requires a showing that "the evidence in question be favorable," "the state suppressed the relevant evidence, either purposefully or inadvertently," and "the state's actions resulted in prejudice." *Bell v. Bell*, 512 F.3d 223, 231 (6th Cir. 2008) (en banc) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). Coleman argues that the prosecution withheld an edited portion of a surveillance video. But the prosecution possessed only that edited portion of the video and played it at trial. Similarly, Coleman complains that a witness provided the police with two conflicting statements. Both statements were discussed at trial. To the extent that Coleman raises a *Brady* claim, he has not shown the suppression of evidence and therefore cannot overcome the procedural default. *See Brooks v. Tennessee*, 626 F.3d 878, 890-91 (6th Cir. 2010). Reasonable jurists would not find the district court's decision debatable or wrong.

Motion for preliminary injunction and restraining order

Coleman seeks a preliminary injunction and restraining order against the employees of the Ohio Department of Rehabilitation and Correction, urging this court to enjoin them from interfering with his access to the courts. The district court ordinarily conducts the initial review of this type of motion. *See* Fed. R. App. P. 8(a)(1)(C). However, this motion can first be filed in a court of appeals, but Coleman has not satisfied the conditions for doing so—for example, by having failed to show that moving first in the district court is "impracticable." *See* Fed. R. App. P. 8(a)(2).

For the foregoing reasons, Coleman's COA application, his motion for appointment of counsel, motion for preliminary injunction, and restraining order are **DENIED**. His IFP motion is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT


Kelly L. Stephens
Kelly L. Stephens, Clerk

General Docket
United States Court of Appeals for the Sixth Circuit

Court of Appeals Docket #: 23-3900

Docketed: 11/07/2023

Nature of Suit: 3530 Prisoner: Habeas Corpus

John Coleman v. Kim Henderson

Appeal From: Northern District of Ohio at Akron

Fee Status: pending in 6th Cir

Case Type Information:

- 1) Prisoner
- 2) State
- 3) Habeas Corpus

Originating Court Information:

District: 0647-5 : 5:21-cv-01985

Trial Judge: Charles E. Fleming, U.S. District Judge

Date Filed: 10/20/2021

Date Order/Judgment:

10/25/2023

Date NOA Filed:

10/30/2023

Prior Cases:

None

Current Cases:

	Lead	Member	Start	End
Related	23-3900	<u>23-3938</u>	11/21/2023	11/22/2023

JOHN C. COLEMAN (State Prisoner: #761279)
 Petitioner - Appellant

John C. Coleman
 [NTC Pro Se]
 Toledo Correctional Institution
 P.O. Box 80033
 Toledo, OH 43608

v.

KIM HENDERSON, Warden, Toledo Correctional Institution
 Respondent - Appellee

Stephanie Lynn Watson
 [COR LD NTC Retained]
 Office of the Attorney General
 of Ohio
 30 E. Broad Street
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 Columbus, OH 43215

JOHN C. COLEMAN

Petitioner - Appellant

v.

KIM HENDERSON, Warden, Toledo Correctional Institution

Respondent - Appellee

11/07/2023 1 Prisoner Case Docketed with certificate of appealability denied October 25, 2023. Notice filed by Selected Pages: 1 pg, 360.70 KB Selected Size: 0KB C Coleman. Transcript needed: n. (RGF) [Entered: 11/07/2023 02:44 PM]
 Totals reflect accessible documents only and do not include unauthorized restricted documents.

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Document Description	Pages	Size

<input type="checkbox"/>	<input checked="" type="checkbox"/>	Case Opening Letter	3	101.51 KB
	<input type="checkbox"/>	form(s) sent	2	259.28 KB

11/07/2023 2 The case manager for this case is: Mr. Roy G. Ford (513) 564-7016 (RGF) [Entered: 11/07/2023 02:51 PM]

11/07/2023 4 Copy of Notice of appeal sent to the District Court from district court filed. (RGF) [Entered: 3 pg, 464.04 KB 11/07/2023 04:12 PM]

Document	Description	Pages	Size
<input type="checkbox"/>	district court document filed	2	100.93 KB
<input type="checkbox"/>	Appellate letter	1	363.11 KB

11/09/2023 5 APPEARANCE filed for Appellee Kim Henderson by Stephanie L. Watson. Certificate of Service: 11/09/2023. [23-3900] (SLW) [Entered: 11/09/2023 10:56 AM]

11/16/2023 6 Appellant MOTION filed by Mr. John C. Coleman to grant a certificate of appealability, for appointment of counsel. Certificate of service: 11/06/2023. (RGF) [Entered: 11/17/2023 08:22 AM]

32 pg, 5.5 MB

11/16/2023 7 APPELLANT BRIEF filed by Mr. John C. Coleman Certificate of Service: 11/08/2023. Argument Request: PRO SE (RGF) [Entered: 11/17/2023 09:24 AM]

51 pg, 6.6 MB

11/17/2023 8 Appellant MOTION filed by Mr. John C. Coleman to proceed in forma pauperis. Certificate of service: 11/09/2023. (RGF) [Entered: 11/17/2023 04:47 PM]

4 pg, 660.59 KB

11/17/2023 9 Financial Affidavit filed by Party Mr. John C. Coleman Certificate of Service: 11/09/2023. (RGF)

2 pg, 319.02 KB [Entered: 11/17/2023 04:47 PM]

11/30/2023 10 CORRESPONDENCE: Wanting to know the status of his case by Mr. John C. Coleman. (RGF)

3 pg, 376.68 KB [Entered: 11/30/2023 12:05 PM]

11/30/2023 11 Miscellaneous letter sent regarding the status of Mr. Coleman's case. (RGF) [Entered: 11/30/2023 12:06 PM]

4 pg, 464.33 KB

Document	Description	Pages	Size
<input type="checkbox"/>	Letter	1	87.65 KB
<input type="checkbox"/>	miscellaneous letter sent	3	376.68 KB

04/23/2024 12 Appellant MOTION filed by Mr. John C. Coleman for injunction pending appeal. Certificate of service: 04/18/2024. Motion reads Notice of duress/request for restraining order and preliminary injunction with exhibits. (RGF) [Entered: 04/24/2024 11:26 AM]

16 pg, 800.9 KB

05/15/2024 13 ORDER filed - Coleman's COA application, his motion for appointment of counsel, motion for preliminary injunction, and restraining order are DENIED. His IFP motion is DENIED as moot. Andre B. Mathis, Circuit Judge. (RGF) [Entered: 05/15/2024 03:35 PM]

7 pg, 189.98 KB

Document	Description	Pages	Size
<input type="checkbox"/>	U.S. Mail Notice of Docket Activity	1	73.28 KB
<input type="checkbox"/>	judge order filed	6	116.7 KB

05/15/2024 14 ENTRY OF JUDGMENT. (RGF) [Entered: 05/15/2024 03:38 PM]

1 pg, 46.35 KB

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APPENDIX B

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN C. COLEMAN,)	CASE NO. 1:21-CV-01985
)	
Petitioner,)	JUDGE CHARLES ESQUE FLEMING
)	
vs.)	MAGISTRATE JUDGE
)	JAMES E. GRIMES JR.
WARDEN TIM MCCONAHEY,)	
)	OPINION AND ORDER
Respondent.)	
)	

I. Background

On October 20, 2021, Petitioner John C. Coleman (“Petitioner”) filed a Petition for Writ of Habeas Corpus (“Petition”), pursuant to 28 U.S.C. § 2254. (ECF No. 1). On July 14, 2023, Magistrate Judge James E. Grimes Jr. filed a Report and Recommendation (R&R) recommending that the Court deny and dismiss the Petition. (ECF No. 164). Fed. R. Civ. P. 72(b)(2) provides that the parties may object to a Magistrate Judge’s R&R within 14 days after service. The R&R also gave the parties notice of the 14-day time limit for filing objections. (ECF No. 164, PageID #2046). Under Fed. R. Civ. P. 5(b)(2)(C), service is complete upon mailing. Fed. R. Civ. P. 6(d) provides an additional three days to the time limit for objecting when service is made by mail. On July 14, 2023, a copy of the R&R was mailed to Petitioner at the Toledo Correctional Institution. As a result, any objections by the parties were due on July 31, 2023.

Petitioner’s Objection to the R&R (“Objection”) was filed on the docket on August 9, 2023. (ECF No. 171). On August 22, 2023, the Court dismissed the Petition because Petitioner failed to timely file his Objection. (ECF Nos. 174 and 175). On September 5, 2023, Petitioner filed a

motion for the Court to apply the mailbox rule to his Objection (ECF No. 177) and a motion for reconsideration (ECF No. 176). The Respondent filed his opposition to the motions (ECF No. 180) on September 12, 2023. Petitioner filed his reply in support of the motions (ECF No. 181) on October 10, 2023.

II. Legal Standard

Under the Federal Magistrates Act, a district court must conduct a *de novo* review of those portions of the report and recommendation to which the parties have objected. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3). Absent objection, a district court may adopt a report and recommendation without further review. *See Peretz v. United States*, 501 U.S. 923, 939 (1991); *Thomas v. Arn*, 474 U.S. 140, 141-42 (1985).

III. Analysis

A. Mailbox Rule

The “prisoner mailroom or mailbox filing rule” provides “a document filed by a pro se prisoner is deemed ‘filed’ with a court on the date the prisoner delivers the document to prison officials for forwarding to the court.” *In re Looper*, 334 B.R. 596, 599 (2005) (citing *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 2382, 101 L.Ed.2d 245 (1988)). Petitioner is a pro se prisoner, thus the mailbox rule applies to his filings. However, Petitioner has failed to establish that he delivered his Objection for mailing by July 31, 2023. Petitioner asserts that he gave his Objection to prison authorities for mailing on July 24, 2023. (ECF No. 177, PageID #2183). His only evidence that he placed his Objection in the mail on that date is the self-serving certificate of service attached to the Objection. (ECF No. 176, PageID #2180).

In *Houston*, the Supreme Court found “[b]ecause reference to prison mail logs will generally be a straightforward inquiry, making filing turn on the date the pro se prisoner delivers

the notice to prison authorities for mailing is a bright-line rule, not an uncertain one.” *Houston*, 487 U.S at 285. The Court agrees with Respondent’s assertion that, in so doing, the Supreme Court did not adopt a rule that a prisoner’s unsupported declaration of the mailing date is dispositive. (ECF No. 180, PageID #2195). Petitioner has not put forth any evidence, such as an affidavit from a prison mailing official or a prison mail log, showing the date he placed his Objection in the mail. Petitioner’s unsupported and self-serving assertion in the certificate of service that he mailed his Objection on July 24, 2023 is insufficient evidence that his Objection was timely.

B. Objections

The Court finds that Petitioner failed to establish that he timely filed his Objection. In an abundance of caution, though, the Court has reviewed the Magistrate Judge’s R&R *de novo*. The Magistrate Judge found that Petitioner procedurally defaulted all of his grounds for relief, and recommended that the petition be dismissed. (ECF No. 164, PageID #2023, 2045-2046). The Court agrees with the Magistrate Judge’s findings and, after *de novo* review, adopts the R&R.

1. Speedy Trial Claim

The Magistrate Judge found that Petitioner failed to show that “the Ohio court of appeals’ finding that his rights were not violated is contrary to, or represents an unreasonable application of, clearly established Supreme Court precedent or that it was based on an unreasonable determination of the facts in light of the evidence presented.” (*Id.* at PageID #2027); *See* 28 U.S.C. § 2254(d)(1), (2); *Brown v. Bobby*, 656 F.3d 325, 329 (6th Cir. 2011). Upon review of the record, the Court agrees with the Magistrate Judge that Petitioner failed to address the Ohio court of appeals’ decision. The Court also agrees that based on the undisputed facts as determined by the court of appeals, if Petitioner did file a speedy trial motion, he filed it in a different case, seven

months after his arrest, and was responsible for the delay in this case. (ECF No. 164, PageID #2032). Further, while Coleman raised the speedy trial claim in his petition to reopen his state appeal, he failed to appeal the denial of the petition to the Ohio Supreme Court. (*Id.* at PageID #2026). As a result, “Coleman has procedurally defaulted his speedy trial claim and has not shown cause and prejudice sufficient to excuse his default.” (*Id.* at PageID #2032).

2. Sufficiency Challenge

The Magistrate Judge found that Petitioner never presented his claim that the state presented insufficient evidence to prove his guilt to any Ohio court. (*Id.* at PageID #2034). Upon review of the record, the Court agrees. “In Ohio, a petitioner is not entitled to raise claims in post-conviction proceedings where those claims could have been raised on direct appeal.” *Williams*, 460 F.3d at 806; *see Gerth v. Warden, Allen Oakwood Corr. Inst.*, 938 F.3d 821, 830 (6th Cir. 2019) (explaining that Ohio courts enforce res judicata). As a result, “if an Ohio petitioner failed to raise a claim on direct appeal, which could have been raised on direct appeal, the claim is procedurally defaulted.” *Williams*, 460 F.3d at 806; *see Hicks v. Collins*, 384 F.3d 204, 211 (6th Cir. 2004). To the extent that Coleman may assert that this issue was raised in his petition to reopen his appeal, he failed to appeal the denial of the petition to the Ohio Supreme Court. (ECF No. 164, PageID #2034). As a result, this claim has been procedurally defaulted and Coleman has not shown cause and prejudice to excuse the default.

3. Ineffective Assistance of Counsel

The Magistrate Judge found that Petitioner did not raise his ineffective assistance of trial counsel claim before any Ohio court. . (ECF No. 164, PageID #2036). He also determined that Petitioner has only raised a claim that his appellate counsel was ineffective when he petitioned to reopen his appeal. (*Id.*). Even if he arguably raised the issues of ineffectiveness of trial and

appellate counsel when he petitioned to reopen his state appeal, he failed to appeal the denial of the petition to the Ohio Supreme Court. (ECF No. 164, PageID #2036-2037). As a result, the Magistrate Judge found that these claims have been procedurally defaulted, and Coleman has made no showing of cause and prejudice to excuse the default. (*Id.*). Upon review of the record, the Court agrees.

4. *Brady* Claim

Coleman alleges, and has sought to bolster through a number of filings, that the state court violated his rights under *Brady v. Maryland*, 373 U.S. 83 (1963) by suppressing evidence. The Magistrate Judge found that Petitioner failed to assert any *Brady* claim because “he hasn’t shown that the State suppressed anything.” (ECF No. 164, PageID #2044). Furthermore, this claim was not raised in any Ohio court; as a result, it has been procedurally defaulted. (*Id.*). Upon review of the record before the Court, the Magistrate Judge properly found that Coleman has shown neither cause nor prejudice to excuse this default.

IV. Conclusion

Accordingly, the Court **ADOPTS** Magistrate Judge Grimes’ R&R, incorporates it fully herein by reference, and **DISMISSES** the Petition. Coleman’s motions for reconsideration (ECF No. 176) and to proceed to judgment (ECF No. 178) are **DENIED**. His motion for the Court to apply the “mailbox rule” is **DENIED AS MOOT**; while the Court has applied this rule, the Court has found that Coleman has failed to establish the timely filing of his Objection. Notwithstanding the rule, the Court has found, after *de novo* review, that even if the Petition was timely filed, all of Coleman’s claims are meritless for the reasons stated. The Court **CERTIFIES**, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision cannot be taken in good faith, and that there

is no basis upon which to issue a certificate of appealability. Fed. R. App. P. 22(b); 28 U.S.C. § 2253(c).

IT IS SO ORDERED.

Date: October 25, 2023



CHARLES ESQUE FLEMING
UNITED STATES DISTRICT JUDGE

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available in the
Clerk's Office.**