No. 23-3643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHYNE V. ANDERSON,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
CHARMAINE BRACY,)
)
Respondent-Appellee.)

Before: LARSEN, Circuit Judge.

Shyne V. Anderson, a pro se Ohio prisoner, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Anderson has filed an application for a certificate of appealability ("COA"), *see* Fed. R. App. P. 22(b)(1), and a motion to proceed in forma pauperis, *see* Fed. R. App. P. 24(a)(5). For the reasons set forth below, the court denies Anderson's COA application and denies his motion for pauper status as moot.

I. Facts & Procedural Background

Between December 2015 and February 2016, an Ohio grand jury indicted Anderson in four separate cases—Case Nos. CR-15-599104-A, 599105-A, 602138-A, and 602139-A. Those cases involved offenses that Anderson committed between July 2014 and December 2015 against two women, S.S. and A.W. Anderson pleaded not guilty in all four cases and waived his right to a jury trial. On the State's motion, and over Anderson's objection, the trial court joined all four cases for trial.

At the ensuing bench trial, the State presented testimony from the two victims and five police officers. Anderson did not call any witnesses. The relevant facts, as summarized by the Ohio Court of Appeals, are as follows: as relates to Case No. CR-15-602138-A, the trial testimony established that Anderson and S.S. went out drinking on the night of July 23, 2014. *State v. Anderson*, 86 N.E.3d 870, 873 (Ohio Ct. App. 2017). Around midnight, S.S. told Anderson that

she wanted to go home. *Id.* Thinking that she was going to see another man, Anderson took S.S.'s keys and drove off in her car. *Id.* When Anderson returned about an hour later, S.S. entered the car, carrying a brick that she had picked up in the street. *Id.* Anderson and S.S. began to argue, and S.S. tossed the brick into Anderson's lap. *Id.* Anderson then threw the brick at S.S.'s face, striking her above her eye and causing a gash. *Id.* S.S. asked Anderson to take her to the hospital, but Anderson refused. *Id.* He instead drove S.S. to her apartment, where they continued to argue. *Id.* On these facts, the trial court convicted Anderson of felonious assault and kidnapping.

With respect to Case No. CR-15-599104-A, the trial testimony established that Anderson and S.S. went out drinking again on January 11, 2015. *Id.* After midnight, Anderson returned S.S. to her apartment. *Id.* Shortly after S.S. entered her second-story unit, she saw Anderson climbing into her apartment through the window. *Id.* S.S. immediately fled the apartment and ran downstairs, but Anderson caught her and started hitting her in the face, injuring her eye, jaw, and forehead. *Id.* at 873-74. The downstairs neighbors heard the commotion and opened their door, and S.S. fell inside their unit. *Id.* at 874. The neighbors eventually pushed Anderson out of the apartment and locked the door. *Id.* While S.S. called the police, the neighbors' apartment windows were shattered. *Id.* The windshield of a vehicle parked in the driveway was also shattered. *Id.* On these facts, the trial court convicted Anderson of aggravated burglary, domestic violence, and two counts of criminal damaging.

As for Case No. 15-CR-599105-A, the trial testimony established that A.W. and Anderson argued on the night of July 18, 2015, after which A.W. went out with a friend. *Id.* When A.W. returned home a few hours later, she found Anderson inside her house. *Id.* He had apparently entered the house through a faulty, unlocked door. *Id.* Anderson immediately began beating A.W. He then ripped off her shorts and digitally penetrated her vagina, accusing her of cheating on him. *Id.* A.W. retreated to the bathroom, but Anderson followed her, tore down the shower curtain, and hit her with the curtain rod. *Id.* He then took A.W.'s cell phone and car keys and drove off in her car. *Id.* After the police arrested Anderson, he frequently called A.W. from jail and asked her not to appear at his court proceedings. *Id.* On these facts, the trial court convicted Anderson of rape, kidnapping, aggravated burglary, grand theft, assault, and intimidation of a crime victim.

Finally, as relates to Case No. 15-CR-602139-A, the trial testimony established that, in December 2015, Anderson and A.W. were driving in A.W.'s rental car. *Id.* at 875. At some point, Anderson asked A.W. if he could borrow the car. When A.W. refused, they fought, and Anderson unsuccessfully tried to drag A.W. out of the car. *Id.* Later, Anderson showed up in A.W.'s driveway and "messed up" the car. *Id.* During a separate incident in December 2015, Anderson arrived at A.W.'s house, acting belligerently. *Id.* Suspecting that another man was in the house, Anderson "bum-rushed" A.W. at the door and pushed her inside the house. *Id.* He then punched A.W. and poured juice and cooking oil over her before driving off in her car without her permission. *Id.* On these facts, the trial court convicted Anderson of burglary, robbery, assault, abduction, and grand theft.

Altogether, the trial court sentenced Anderson to a total term of 22 years' imprisonment.

On direct appeal, Anderson claimed that his convictions were against the manifest weight of the evidence, that the two victims' trial testimony constituted inadmissible "other acts" evidence, and that trial counsel was ineffective for failing to successfully challenge the joinder of his four cases. The Ohio Court of Appeals affirmed, *see id.* at 878, and the Ohio Supreme Court declined review, *State v. Anderson*, 87 N.E.3d 1272 (Ohio 2017).

Thereafter, Anderson filed an application to reopen his direct appeal under Ohio Rule of Appellate Procedure 26(B), claiming that his appellate counsel was ineffective for failing to argue that (1) the prosecutor committed misconduct by not playing the entire recording of his jailhouse phone calls with A.W. at trial, (2) trial counsel rendered ineffective assistance with regard to the recording, by not adequately preparing for trial, and by not arguing self-defense, (3) several of his convictions were against the manifest weight of the evidence or supported by insufficient evidence, and (4) the trial judge improperly considered his athleticism when adjudicating him guilty of aggravated burglary in Case No. CR-15-599104-A. The Ohio Court of Appeals denied Anderson's application. *State v. Anderson*, No. 104460, 2018 WL 386592, at *4 (Ohio Ct. App. Jan. 10), *perm. app. denied*, 96 N.E.3d 302 (Ohio 2018).

Anderson then filed a petition for post-conviction relief, claiming that the prosecutor violated his due process rights under *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing the

recording of his jailhouse phone calls with A.W. prior to trial. The trial court summarily denied the petition, and Anderson did not appeal.

Having no avenues left for challenging his convictions in state court, Anderson filed this § 2254 petition, raising the following claims: (1) the trial judge improperly considered his athleticism when adjudicating him guilty of aggravated burglary in Case No. CR-15-599104-A, (2) the prosecutor committed misconduct by belatedly disclosing the recording of his jailhouse phone calls with A.W. and by not playing that recording in its entirety at trial, (3, 5, & 9) several of his convictions are against the manifest weight of the evidence and supported by insufficient evidence, (4) trial counsel was ineffective, (6) the police conducted an inadequate investigation in Case No. CR-15-599105-A, (7) the victims' trial testimony constituted improper "other acts" evidence, and (8) appellate counsel was ineffective. On a magistrate judge's recommendation, and over Anderson's objections, the district court denied Anderson's habeas petition, concluding that his claims were either meritless or not cognizable, and declined to issue a COA. The district court also denied Anderson's motion to alter or amend the judgment. *See* Fed. R. Civ. P. 59(e).

II. Law & Analysis

Anderson now seeks a COA from this court as to each of his claims, except for Claims 6 and 7 and aspects of Claims 4 and 8. He has forfeited review of those claims by failing to address them in his COA application. *See Elzy v. United States*, 205 F.3d 882, 896 (6th Cir. 2000).

A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To satisfy this standard, the applicant must demonstrate that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude [that] the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court shall not grant a habeas petition with respect to any claim that was adjudicated on the merits in the state courts unless the adjudication resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Where the state courts

adjudicated the petitioner's claims on the merits, the relevant question is whether the district court's application of § 2254(d) to those claims is debatable by jurists of reason. *Miller-El*, 537 U.S. at 336.

In Claims 1, 3, 5, & 9, Anderson challenged the weight and sufficiency of the evidence supporting several of his convictions. With respect to his manifest-weight claims, Anderson argued that beyond the victims' testimony, no credible or corroborating evidence was presented showing that he either assaulted and kidnapped S.S. (Case No. CR-15-602138-A), climbed through a second-story window that was approximately 20 feet off the ground (Case No. CR-15-599104-A), raped A.W. (Case No. 15-CR-599105-A), or forcibly entered A.W.'s house and assaulted her (Case No. 15-CR-602139-A). Reasonable jurists could not debate the district court's conclusion that a manifest-weight claim presents a state-law issue that is not cognizable in federal habeas proceedings. *See State v. Thompkins*, 678 N.E.2d 541, 546 (Ohio 1997) (explaining that, under Ohio law, "[t]he legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different."); *cf. Nash v. Eberlin*, 258 F. App'x 761, 764 n.4 (6th Cir. 2007).

Anderson rehashed the same manifest-weight arguments to claim that his convictions are supported by insufficient evidence. He also seemingly claimed that the trial judge's consideration of facts not in evidence (i.e., his athleticism) proves that his conviction of aggravated burglary in Case No. CR-15-599104-A was based on insufficient evidence. These sufficiency claims do not deserve encouragement to proceed further because they are procedurally defaulted. A procedural default results when a petitioner fails to exhaust a claim by raising it "in state court, and pursu[ing] that claim through the state's 'ordinary appellate review procedures,'" *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)), and, at the time of filing his federal habeas petition, no longer has the ability to raise that claim in state court, *see Pudelski v. Wilson*, 576 F.3d 595, 605 (6th Cir. 2009). Because Anderson could have challenged the sufficiency of the evidence on direct appeal but failed to do so, review of these claims in the Ohio courts is now barred under the doctrine of res judicata. *See State v. Perry*, 226 N.E.2d 104, 108 (Ohio 1967). His sufficiency claims are therefore procedurally defaulted.

A federal court will not review a procedurally defaulted claim unless the petitioner can show either cause for the default and actual prejudice arising therefrom, or that failing to review the defaulted claims would result in a "fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A fundamental miscarriage of justice requires a showing of actual innocence. *See Dretke v. Haley*, 541 U.S. 386, 393 (2004). Broadly construed, Anderson's filing cited appellate counsel's ineffectiveness as cause for his defaults. Although ineffective assistance of appellate counsel may serve as cause to excuse a procedural default, *see Murray v. Carrier*, 477 U.S. 478, 488-89 (1986), Anderson did not show that appellate counsel's decision to omit the sufficiency claims on direct appeal constituted deficient performance or that it prejudiced him. Anderson did not dispute that the State satisfied its burden of production as to every element of the charged offenses; he instead argued that the evidence is insufficient because the victims' testimony was unbelievable and uncorroborated. Appellate counsel raised the same or similar arguments in challenging the manifest weight of the evidence on direct appeal, including that there was no credible evidence that Anderson climbed through S.S.'s window, restrained or assaulted S.S., or digitally penetrated A.W.'s vagina. *See Anderson*, 86 N.E.3d at 876. Anderson thus cannot show that a sufficiency challenge—which, unlike a state-law manifest-weight challenge, does not allow the reviewing court to reweigh the evidence or revaluate the credibility of witnesses—would have been successful. *See Anderson*, 2018 WL 386592, at *4; *see United States v. Martinez*, 430 F.3d 317, 330 (6th Cir. 2005) (noting that, in reviewing a challenge to the sufficiency of the evidence, the reviewing court "may not reweigh the evidence, reevaluate the credibility of witnesses, or substitute [its] judgment for that of the jury"). And a victim's testimony alone, without corroborating witnesses or physical evidence, can be constitutionally sufficient to sustain a conviction. *See Tucker v. Palmer*, 541 F.3d 652, 658-59 (6th Cir. 2008); *O'Hara v. Brigano*, 499 F.3d 492, 500 (6th Cir. 2007). Lastly, Anderson's attacks on the victims' credibility, standing alone, do not satisfy the actual-innocence standard that would permit judicial review of his procedurally defaulted sufficiency claims. *See Schulp v. Delo*, 513 U.S. 298, 324 (1995) (holding that a claim of actual innocence must be supported by new and reliable evidence, such as "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence").

Reasonable jurists would not debate the district court's resolution of Anderson's sufficiency claims.

In Claim 2, Anderson argued that the prosecutor committed misconduct by belatedly disclosing the recording of his jailhouse phone calls with A.W. and by not playing that recording in its entirety at trial. Relatedly, in Claim 4, Anderson faulted his trial counsel for not objecting to the prosecutor's alleged misconduct. But as with his sufficiency claims, these claims are procedurally defaulted. Anderson could have raised them on direct appeal but failed to do so,[1] *see Williams*, 460 F.3d at 806, and res judicata would now bar him from raising them in a state petition for post-conviction relief, *see Perry*, 226 N.E.2d at 108. And to the extent that Anderson's prosecutorial-misconduct claim can be construed as reasserting the *Brady* claim that he raised in his post-conviction petition, it is still procedurally defaulted because Anderson did not exhaust that claim by appealing the trial court's denial of his post-conviction petition, *see Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009), and he is now precluded from doing so, *see Nesser v. Wolfe*, 370 F. App'x 665, 670 (6th Cir. 2010) (citing *State v. Nichols*, 463 N.E.2d 375, 378 (Ohio 1984)); Ohio S. Ct. Prac. R. 7.01(A)(4)(c).

As before, Anderson sought to excuse his procedural defaults by alleging ineffective assistance of appellate counsel. To that end, Anderson argued that, had the prosecutor played the entire recording of his jailhouse phone calls with A.W., it would have exonerated him of the rape charge in Case No. CR-15-599105-A, and thus there was no reasonable justification for appellate counsel to omit this issue on direct appeal. But the trial transcript reflects that the recordings of Anderson's jailhouse phone calls were turned over to the defense prior to trial, thereby undermining any assertion that the prosecutor delayed disclosing that evidence. Furthermore, because Anderson himself could have introduced the allegedly exculpatory information that he accuses the prosecutor of suppressing, he cannot show that he was prejudiced by how the prosecutor presented that evidence to the jury. *See United States v. Corker*, 514 F.3d 562, 568

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[1] This ineffective-assistance-of-trial-counsel claim is apparent from the trial record. Under Ohio law, a criminal defendant's appellate counsel must raise all claims for ineffective assistance of trial counsel that are apparent from the record on direct appeal, at least as long as counsel has no conflict of interest in bringing the claim. *See State v. Lentz*, 639 N.E.2d 784, 786 (Ohio 1994). If, as here, appellate counsel fails to do so, the defendant is barred from raising such claims later. *See Moore v. Mitchell*, 708 F.3d 760, 778 (6th Cir. 2013).

(6th Cir. 2008) (noting that a claim of prosecutorial misconduct requires a showing of prejudice). Accordingly, Anderson failed to make a substantial showing of prosecutorial misconduct. It follows that he cannot establish that he was prejudiced by appellate counsel's failure to raise this prosecutorial-misconduct claim (and corresponding ineffective-assistance claim) on direct appeal. *See Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010). Reasonable jurists would not debate the district court's resolution of Claims 2 and 4.

Lastly, in Claim 8, Anderson argued that appellate counsel was ineffective for failing to raise the foregoing claims on direct appeal. To establish ineffective assistance of counsel, a defendant "must show that his counsel's performance was deficient" and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Shaneberger*, 615 F.3d at 452 ("[I]neffective assistance of appellate counsel claims are governed by the same *Strickland* standard as claims of ineffective assistance of trial counsel.").

Anderson is not entitled to a COA on this claim. Although Anderson faulted appellate counsel for not claiming that his aggravated-burglary and rape convictions in Case Nos. CR-15-599104-A and CR-15-599105-A, respectively, were against the manifest weight of the evidence, counsel did in fact do so. *See Anderson*, 86 N.E.3d at 876. Reasonable jurists therefore could not debate the district court's denial of this claim. Anderson's remaining appellate-counsel claims do not deserve encouragement to proceed further because, as previously discussed, he failed to show that he was prejudiced by appellate counsel's failure to raise those claims on direct appeal. *See Hall v. Vasbinder*, 563 F.3d 222, 239 (6th Cir. 2009) (observing that, when an ineffectiveness claim fails to overcome a procedural default, it necessarily fails as an independent claim under 28 U.S.C. § 2254(d)'s more deferential standard).

III. Conclusion

For these reasons, Anderson's COA application is **DENIED** and his motion for pauper status is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

United States Court of Appeals for the Sixth Circuit

U.S. Mail Notice of Docket Activity

The following transaction was filed on 02/20/2024.

Case Name: Shyne Anderson v. Charmaine Bracy
Case Number: 23-3643

Docket Text:
ORDER filed: Anderson's COA application is DENIED and his motion for pauper status is DENIED as moot. Joan L. Larsen, Circuit Judge.

The following documents(s) are associated with this transaction:
Document Description: Order

Notice will be sent to:

Mr. Shyne V. Anderson
Southern Ohio Correctional Facility
P.O. Box 45699
Lucasville, OH 45699

A copy of this notice will be issued to:

Ms. Maura O'Neill Jaite
Ms. Sandy Opacich

No. 23-3643

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHYNE V. ANDERSON,

Petitioner-Appellant,

v.

CHARMAINE BRACY,

Respondent-Appellee.

ORDER

Before: GIBBONS, GRIFFIN, and DAVIS, Circuit Judges.

Shyne V. Anderson, a pro se Ohio prisoner, petitions for rehearing en banc of this court's order entered on February 20, 2024, denying his application for a certificate of appealability. The petition was initially referred to this panel, on which the original deciding judge does not sit. After review of the petition, this panel issued an order announcing its conclusion that the original application was properly denied. The petition was then circulated to all active members of the court,* none of whom requested a vote on the suggestion for an en banc rehearing. Pursuant to established court procedures, the panel now denies the petition for rehearing en banc.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

*Judge Murphy recused himself from participation in this ruling.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
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Filed: March 28, 2024

Mr. Shyne V. Anderson
Southern Ohio Correctional Facility
P.O. Box 45699
Lucasville, OH 45699

Re: Case No. 23-3643, *Shyne Anderson v. Charmaine Bracy*
Originating Case No.: 1:18-cv-01996

Dear Mr. Anderson,

The Court issued the enclosed Order today in this case.

Sincerely yours,

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

cc: Ms. Maura O'Neill Jaite

Enclosure

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

Shyne V. Anderson,

Petitioner,

v.

Charmaine Bracy,

Respondent.

Case No. 1:18-cv-1996

ORDER

Petitioner Shyne V. Anderson filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, concerning his conviction in the Cuyahoga County, Ohio Court of Common Pleas on charges stemming from four indictments against him. (Doc. No. 1). Magistrate Judge William H. Baughman, Jr., reviewed the petition as well as the related briefing pursuant to Local Rule 72.2(b)(2) and recommended I deny Anderson's petition. (Doc. No. 19). Anderson filed objections to Judge Baughman's Report and Recommendation, (Doc. No. 21), as well as a motion for discovery and an evidentiary hearing. (Doc. No. 23). I denied Anderson's motion for discovery, overruled his objections, adopted Judge Baughman's recommendations, and dismissed Anderson's petition. (Doc. No. 29).

Anderson has filed a motion to alter or amend the judgment against him pursuant to Federal Rule of Civil Procedure 59(e). (Doc. No. 31). Rule 59(e) states that a party must file a motion to alter or amend a judgment within 28 days of the entry of the judgment. Fed. R. Civ. P. 59(e). The party filing a Rule 59(e) motion must demonstrate there was "(1) a clear error of law; (2) newly

discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Henderson v. Walled Lake Consol. Sch.*, 469 F.3d 479, 496 (6th Cir. 2006).

Anderson does not identify which of these four reasons supports his motion. Instead, he appears to argue I reached the wrong decision, stating his motion is intended to allow "this honorable court [to] reconsider a just-issued judgment allowing the District Court to rectify its own mistakes in the period immediately following its decision." (Doc. No. 31 at 2). But Rule 59(e) motions are not a substitute for appeal. *Johnson v. Henderson*, 229 F. Supp. 2d 793, 796 (N.D. Ohio 2002) (citing *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)). And arguments that a district court erred in ruling against a party are best made to an appellate court. Therefore, I deny Anderson's Rule 59(e) motion. (Doc. No. 31).

Anderson also filed a motion for an order preventing the Ohio Department of Rehabilitation and Correction ("ODRC") from transferring him to another institution until after the completion of his appeals in this case. (Doc. No. 33). Anderson claims that a transfer would deprive him of his legal materials "for weeks" and he would miss court deadlines as a result. (*Id.* at 2). But Anderson fails to show I have the authority to prohibit the ODRC from transferring him due to this hypothetical scenario. Therefore, I deny this motion as well. (Doc. No. 33).

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

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

SHYNE V. ANDERSON, Petitioner, v. WARDEN DAVID MARQUIS, Richland Correctional Institution, Respondent.	)	CASE NO. 1:18 CV 1996 JUDGE JEFFREY J. HELMICK MAGISTRATE JUDGE WILLIAM H. BAUGHMAN, JR. **REPORT & RECOMMENDATION**

Introduction

Before me[1] is the petition of Shyne v. Anderson for a writ of habeas corpus under 28 U.S.C. § 2254.[2] Anderson was convicted in the Cuyahoga County Common Pleas Court in 2016 of kidnapping, aggravated burglary, domestic violence, criminal damaging, rape, grand theft, assault, burglary, robbery, and abduction.[3] He is serving a sentence of 22 years[4] and currently is incarcerated at the Richland Correctional Institution in Mansfield, Ohio.[5]

In his petition, Anderson raises nine grounds for habeas relief.[6] The State has filed a return of the writ, arguing that the petition should be denied as the grounds are either

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[1] This matter was referred to me under Local Rule 72.2 by United States District Judge Jeffrey J. Helmick by non-document order dated September 7, 2018.
[2] ECF No. 1.
[3] *Id.*
[4] *Id.*
[5] http://www.drc.state.oh.us/OffenderSearch
[6] ECF No. 1 at 16-21.

unexhausted, procedurally defaulted, not cognizable, and/or without merit.[7] For the following reasons, I recommend Anderson's petition be dismissed in part and denied in part.

Background

A. Underlying facts, conviction, and sentence.

The facts that follow come from the decision of the appeals court.[8]

Anderson's conviction arises out of an incident involving Shana Saunders, the mother of Anderson's child.[9] Saunders testified that in July of 2014, she and Anderson, after a night of drinking, got into an altercation after Saunders expressed her desire to go home.[10] Thinking she was going to see another man, Anderson chased her around her vehicle, took her key, and drove off in her vehicle.[11] Saunders walked for about an hour until Anderson returned to her.[12] Saunders picked up a brick off the street and got into the car.[13] Anderson and Saunders began to argue, and Saunders threw the brick into Anderson's lap.[14] In response, Anderson picked up the brick and threw it at Saunders, striking her face

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[7] ECF No. 9, at Ex. 19.

[8] Facts found by the state appellate court on its review of the record are presumed correct by the federal habeas court. 28 U.S.C. § 2254(e)(1); *Mason v. Mitchell*, 320 F.3d 604, 614 (6th Cir. 2003) (citing *Sumner v. Mata*, 449 U.S. 539, 546-47 (1981)).

[9] *State v. Anderson*, 8th Dist. Cuyahoga No. 104460, 2017-Ohio-931, 86 N.E.3d 870.

[10] ECF No. 9 at Ex. 34.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

above her eye, causing a gash.[15] Anderson denied Saunders request to seek medical treatment and drove her to her house instead.[16]

Once there, Anderson followed her inside.[17] The two continued to argue, and Saunders picked up a kitchen knife, stabbing it into the wall out of anger.[18] She injured her fingers in the process.[19] Anderson left, taking her vehicle.[20] A friend of Saunders, who was in the home at the time, called the police.[21] The paramedics arrived to take Saunders to the hospital, where she received multiple stiches to her wound above her eye.[22]

For his conduct during the July 2014 incident, Anderson was indicted for four counts of felonious assault, two counts of domestic violence, and kidnapping.[23]

In January of 2015, another altercation occurred.[24] Saunders testified that she and Anderson had been out drinking when she asked him to drop her off at a gas station near her house.[25] As she was walking home from the gas station, Anderson followed her in his

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[15] ECF No. 9 at Ex. 34; *State v. Anderson*, 8th Dist. Cuyahoga No. 104460, 2017-Ohio-931, 86 N.E.3d 870.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*

vehicle.[26] After arriving at home, Saunders began talking to a friend on the phone.[27] Suddenly, Saunders saw Anderson hanging in the window of her apartment.[28] The window was about 20 feet off the ground, with no ladder or rope leading to it.[29] He then lifted the window and climbed in.[30] Saunders fled her apartment and ran downstairs.[31] Anderson chased her and immediately began hitting her in the face.[32] Neighbors, hearing the commotion, opened their door, as Saunders fell inside their apartment and Anderson followed her in.[33] An altercation ensued between Anderson and the residents of the apartment, during which Saunders called the police, and the windows of the apartment were shattered.[34] Saunders sustained injuries to her jaw, forehead, and eye.[35] A police officer arrived to the scene, finding Saunders bleeding and crying, and the neighbors shaken up.[36] The windshield of the vehicle parked in the driveway was also shattered.[37]

For the January 2015 incidents, Anderson was indicted for two counts of aggravated burglary, one count of domestic violence, and two counts of criminal damaging.[38]

Two later incidents occurred between Anderson and A.W., his then-girlfriend.[39] The

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[26] *Id.*
[27] *Id.*
[28] ECF No. 9 at Ex. 34; *State v. Anderson*, 8th Dist. Cuyahoga No. 104460, 2017-Ohio-931, 86 N.E.3d 870.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] ECF No. 9 at Ex. 34.

first, occurring in July of 2015, began with an argument between A.W. and Anderson, according to her testimony.[40] A.W. left the house following the argument, and returning, she found Anderson in her home.[41] After A.W. entered, Anderson grabbed her, punched her, threw her to the ground and kicked her.[42] He ripped off A.W.'s shorts and forced his fingers inside her vagina, accusing her of cheating with someone else.[43] A.W. fought him off, running to the bathroom to hide.[44] Anderson followed her, tearing down the shower curtain and hitting A.W. with the curtain rod.[45] Anderson then took A.W.'s cell phone and car keys and drove off with her car. A.W. called the police.[46] The assault lasted about 20 to 45 minutes, and left A.W. with bruises to her arms and face.[47]

In December of 2015, Anderson and A.W. went drinking in A.W.'s rental car.[48] After asking for Anderson to drop her off at her home, A.W. testifies he refused, and began to argue with her.[49] Anderson tried to drag A.W. out of the vehicle, but she fought him off.[50] Later, Anderson showed up in A.W.'s driveway and damaged her rental car.[51]

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[40] *State v. Anderson*, 8th Dist. Cuyahoga No. 104460, 2017-Ohio-931, 86 N.E.3d 870.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *ECF No. 9 at Ex. 34.*
[50] *Id.*
[51] *Id.*

In another incident in December 2015, Anderson broke into A.W.'s house, thinking there was another man inside.[52] He threw several punches at A.W., sprayed her with a spray bottle, and threw cooking oil and juice on her.[53] He left in her vehicle without her permission. A.W. called the police about the incident.[54]

Both January incidents resulted in indictments for rape, gross sexual imposition, kidnapping, aggravated burglary, grand theft, intimidation of a crime victim, abduction, robbery, and assault.[55]

From December 2015 to February 2016, Anderson faced grand jury indictments in Cuyahoga County, Ohio for the previous charges.[56] Anderson had legal presentation throughout the trial court proceedings.[57] Prior to trial, Anderson filed discovery requests and motions for notice of intent to use Ohio Evid. R. 404(B) evidence of other bad acts, and the State filed discovery responses, bills of particulars, and supplemental discovery responses.[58] The State filed a motion of consolidate all four cases for trial and the trial court granted the motion over Anderson's oral objection.[59] Anderson waived and elected to have his cases tried by the court.[60]

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[52] *State v. Anderson*, 8th Dist. Cuyahoga No. 104460, 2017-Ohio-931, 86 N.E.3d 870.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] ECF No. 9, at Ex. 2.
[57] *Id.* at Ex. 4.
[58] *Id.* at Ex. 9-11.
[59] ECF No. 9 at 6.
[60] *Id.* at Ex. 13.

The consolidated cases proceeded to bench trial.[61] The trial court found Anderson guilty of Rape, Kidnapping, Robbery, Domestic Violence, Felonious Assault, second-degree Burglary Intimidation of a Crime Victim or Witness, and Abduction.[62] The trial court also convicted him of two Aggravated Burglary charges, two Criminal Damaging charges, two Assault charges, and two Grand Theft charges.[63] Anderson was sentenced to 22 aggregate years and classified as a Tier III Sex Offender in a sentencing entry on April 18, 2016.[64]

B. Direct Appeal

1. Ohio Court of Appeals

Anderson filed through counsel a timely[65] notice of appeal[66] with the Ohio Court of Appeals on May 9, 2016. In his brief, Anderson raised three assignments of error:

> 1. The court found, against the manifest weight of the evidence, that the appellant committed the acts alleged in the indictment.
>
> 2. The trial court erred when it admitted other acts testimony in violation of R.C. 2945.59, Evid. R. 404(b) and appellant['s] rights under Article I, Section 10 of the Ohio Constitution and the Fourteenth amendment to the United States Constitution.
>
> 3. Appellant was denied effective assistance of counsel in violation of Amendments VI and XIV, United States Constitution and Article I,

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[61] *State v. Anderson*, 8th Dist. Cuyahoga No. 104460, 2017-Ohio-931, 86 N.E.3d 870.
[62] *Id.*
[63] *Id.*
[64] ECF No. 9 at Ex. 14-17.
[65] Under Ohio App. Rule 4(A), to be timely, a party must file a notice of appeal within 30 days of the judgment being appealed. *See Smith v. Konteh*, No. 3:04CV7456, 2007 WL 171978, at 2 (N.D. Ohio Jan. 18, 2007) (unreported case). Anderson's conviction and sentence were journalized on April 18, 2016 (ECF No. 9 at 10), and the notice of appeal was filed on May 9, 2016. *Id.* at 11.
[66] ECF No. 1 at 2.

Section 10 of the Ohio Constitution.[67]

The state filed a brief in response.[68] Anderson subsequently filed a *pro se* motions to withdrawal counsel and appoint new counsel, to which his counsel responded.[69] The state appellate court denied Anderson's *pro se* motions.[70] Next, Anderson filed a *pro se* motion for discovery, and the State filed an oppositional response.[71] The state appellate court denied Anderson's motion as moot.[72] Anderson then filed a pro se motion to pull call record", which the state appellate court denied.[73] Anderson then filed a *pro se* pleading captioned Newly discovered evidence."[74]

On March 16, 2017, the state appellate court overruled Anderson's error assignments and affirmed Anderson's convictions and sentences.[75]

2. Appeal to the Supreme Court of Ohio

On June 2, 2017, Anderson filed an untimely[76] *pro se* appeal notice and a motion

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[67] ECF No. 9 at Ex. 19.
[68] *Id.*, at Ex. 20.
[69] *Id.*, at Ex. 21-25.
[70] *Id.*, at Ex. 23.
[71] *Id.*, at Ex. 28-29.
[72] *Id.*, at Ex. 30.
[73] *Id.*, at Ex. 31-32.
[74] *Id.*, at Ex. 33.
[75] *State v. Anderson*, 2017-Ohio-931, 86 N.E. 3d 870.
[76] *See* Ohio S. Ct. Prac. R. 7.01(A)(5)(b) (to be timely, a notice of appeal must be filed within 45 days of entry of the appellate judgment for which review is sought); *Applegarth v. Warden*, 377 F. App'x 448, 450 (6th Cir. 2010) (discussing forty-five day limit) (unreported case). The Ohio court of appeals decision was filed on March 16, 2017, (*id.* at 133),

for delayed appeal in the Ohio Supreme Court.[77] The court granted Anderson leave to file a delayed appeal and Anderson raised the following four propositions of law in his jurisdictional memorandum:

1. The court found, against the manifest weight of the evidence, that the appellant committed the acts alleged in the indictment.

2. The trial court erred when is admitted other acts in violation of R.C. 2945.59, Evid. R. 404(B) and appellant rights under Article I, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the Untied States Constitution.

3. Appellant was denied effective assistance of counsel in violation of amendments VI and XIV, Untied State Constitution and Article I, Section 10 of the Ohio Constitution.

4. Appellant was denied and/or equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution when the Eight District Court of Appeals denied him motion to withdraw appellant counsel.[78]

The state did not respond to the memorandum.[79] On December 20, 2017, the Ohio Supreme Court declined to accept jurisdiction of Anderson's appeal.[80] Anderson did not timely file a petition for certiorari in the United States Supreme Court and his filing deadline expired on March 20, 2018.[81]

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and Anderson's notice of appeal to the Supreme Court of Ohio was filed on June 2, 2017; thus, it is untimely. (ECF No. 9)

[77] ECF No. 9 at Ex. 35.

[78] ECF No. 9 at Ex. 38.

[79] ECF No. 9 at Ex. 39.

[80] *State v. Anderson*, 151 Ohio St. 3d 1474, 2017-Ohio-0111; 87 N.E.3d 1272.

[81] Sup. Ct. R. 13.

3. App. R. 26(b) Application to Reopen Appeal

On May 26, 2017, Anderson timely[82] filed a pro se application to reopen his direct appeal due to ineffective assistance of appellate counsel under Ohio App. 26(B).[83] Anderson argued his appellate counsel was unconstitutionally ineffective for not raising these claims on direct appeal:

1. Prosecutorial Misconduct.
2. Ineffective Assesstants of Trial Counsels'. [*sic.*]
3. Relevance (as defined by Federal Rule of Evidence 402).
4. Judicial Findings contrary to the evidence.
5. Faulty police methods.
6. Insufficient Evidence.[84]

Following the State's memorandum in oppositions, and Anderson's response, the state appellate court denied Anderson's application to reopen his direct appeal.[85]

On February 14, 2018, Anderson filed a timely[86] pro se appeal notice in the Ohio

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[82] Under Ohio R. App. P. 26(B), an application for reopening must be filed in the court of appeals within ninety days from journalization of the appellate judgement. Anderson's appeal is considered timely because the appellate judgement was journalized on March 16, 2017 and his application to reopen the direct appeal was filed on May 26, 2017. *Flynn v. GMC*, Ohio App. 3d, 2004 Ohio 392, N.E. 2d, 2004 Ohio App. LEXIS 343 (2004).
[83] ECF No. 9 at Ex. 40.
[84] ECF No. 9.
[85] *Id.*
[86] Under Ohio App. Rule 4(A), to be timely, a party must file a notice of appeal within 30 days of the judgment being appealed. *See, Smith v. Konteh*, No. 3:04CV7456, 2007 WL

Supreme Court, in which he raised the following propositions of law:

1. Prosecutor Misconduct.
2. Ineffective Assistance of Trial Counsel.
3. Relevance as defined by Federal Rule of Evidence 402.
4. Judicial Finding contrary to the evidence.
5. Faulty police methods.
6. Insufficient evidence.
7. Insufficient Assistance of Appellant counsel.[87]

Anderson also filed a motion for discovery and a motion for transcripts. The Ohio Supreme Court declined to accept jurisdiction of Anderson's appeal and denied Anderson's motions on April 25, 2018.[88] Anderson did not file a petition for certiorari in the United States Supreme Court and his filing deadline expired on July 24, 2018.[89]

D. Post-Conviction Relief

On October 5, 2016, Anderson filed a timely[90] *pro se* motion for transcripts and a *pro se* motion of discovery in the trial court, to which the State replied in opposition.[91]

171978, at *2 (N.D. Ohio Jan. 18, 2007) (unreported case). Anderson placed his notice of appeal and supporting brief in the prison mail system on May 26, 2017, and the notice itself was filed on February 14, 2018. ECF No. 9.

[87] ECF No. 9 at Ex. 44.

[88] *State v. Anderson*, 152 Ohio St.3d 1449, 2018-Ohio-1600, 96 N.E.3d 302.

[89] ECF No. 9 at Ex. 40.

[90] Under Ohio App. Rule 4(A), to be timely, a party must file a notice of appeal within 30 days of the judgment being appealed. See, *Smith v. Konteh*, No. 3:04CV7456, 2007 WL 171978, at *2 (N.D. Ohio Jan. 18, 2007) (unreported case). Anderson's denial was journalized on April 25, 2018 (ECF No. 9 at Ex. 49) and the notice of appeal was filed on June 8, 2018, rendering it untimely. ECF No. 9 at Ex. 61.

[91] ECF No. 9 at Ex. 50-51.

Anderson also filed *pro se* motions for a time extension to file a post-conviction relief petition, for copies of documents, for subpoena in one of the consolidated cases.[92] The State opposed Anderson's motions and the trial court denied Anderson's motions on August 15, 2018.[93]

Anderson filed yet another *pro se* motion, on June 8, 2018, for delayed post-conviction and an untimely *pro se* petition[94] to vacate or set aside judgement of conviction or sentence. Anderson raised the following claim in his petition:

1. When the State withholds from a criminal defendant evidence that is material to his guilt or punishment it violates his right to due process of law in violation of the Fourteenth Amendment. By petition being denied his discovery and transcripts which he needs to prove his innocence the State is depriven [sic.] him of life without due process and equal protection of the laws in violation of Amendment VIV and Amendment V. Not only do this violates his Amendments it violates his right as a human [sic.]. Universal of Human Rights Article 11 State a person should have all guarantees necessary for his defense.[95]

Anderson then filed a motion for appointment of counsel and a motion for expert assistance.[96] The trial court denied these motions and Anderson's motion to set aside judgement on June 20, 2018.[97] Anderson filed a post-judgement reply to the State's response in

[92] *Id.*, at Ex. 56.
[93] *Id.*, at Ex. 59.
[94] *Id.*, at Ex. 60.
[95] ECF No. 9 at Ex.
[96] *Id.*, at Ex. 65-66.
[97] *Id.*, at Ex. 66.

opposition.[98]

Anderson did not file a timely appeal in the state appellate court and his filing deadline expired on July 20, 2018.[99]

Petition for Writ of Habeas Corpus

Anderson claims his placed his *pro se* habeas petition in the prison mail system on August 18, 2018.[100] He raises nine grounds for relief:

GROUND ONE: Judicial finding contrary to the evidence.

GROUND TWO: Prosecution Misconduct.

GROUND THREE: Manifest Weight.

GROUND FOUR: Ineffective assistance of trial counsel.

GROUND FIVE: Relevance as defined by Federal Rule of Evidence 402.

GROUND SIX: Faulty Police Methods.

GROUND SEVEN: Other acts testimony.

GROUND EIGHT: Ineffective assistance of appellant [sic.] counsel.

GROUND NINE: Insufficient evidence.[101]

Analysis

A. Preliminary observations

Before proceeding further, I make the following preliminary observations:

1. There is no dispute that Anderson is currently in state custody as the

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[98] *Id.*, at Ex. 67.
[99] Ohio App.R. 4(A)(1); Ohio App.R. 14(A); ECF No 9.
[100] ECF No. 1.
[101] ECF No. 1. at 16-21.

result of his conviction and sentence by an Ohio court, and that he was so incarcerated at the time he filed this petition. Thus, he meets the in custody" requirement of the federal habeas statute vesting this Court with jurisdiction over the petition.[102]

2. There is also no dispute, as detailed above, that this petition was timely filed under the applicable statute.[103]

3. In addition, my review of the docket of this Court confirms, that this is not a second or successive petition for federal habeas relief as to this conviction and sentence.[104]

4. Finally, Anderson has not requested the appointment of counsel,[105] nor has he requested an evidentiary hearing to develop the factual bases of his claims.[106]

B. Standards of review

1. AEDPA

AEDPA[107], codified at 28 U.S.C. § 2254, strictly circumscribes a federal court's ability to grant a writ of habeas corpus.[108] Under AEDPA, a federal court shall not grant a habeas petition with respect to any claim adjudicated on the merits in state court unless the state adjudication:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [f]ederal law, as determined by the Supreme Court of the United States; or

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[102] 28 U.S.C. § 2254(a); *Ward v. Knoblock*, 738 F.2d 134, 138 (6th Cir. 1984).
[103] 28 U.S.C. § 2254(d)(1); *Bronaugh v. Ohio*, 235 F.3d 280, 283-84 (6th Cir. 2000).
[104] 28 U.S.C. § 2254(b); *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006).
[105] 28 U.S.C. § 2254(h); Rule 8(c), Rules Governing 2254 Cases.
[106] 28 U.S.C. § 2254(e)(2).
[107] Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[108] See 28 U.S.C. § 2254 (2012).

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.[109]

The Supreme Court teaches that this standard for review is indeed both highly deferential" to state court determinations[110] and difficult to meet,"[111] thus preventing petitioner and federal court alike from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts."[112]

a. Contrary to" or unreasonable application of" clearly established federal law

Under § 2254(d)(1), clearly established Federal law" includes only Supreme Court holdings and does not include dicta.[113] In this context, there are two ways that a state court decision can be contrary to" clearly established federal law:[114] (1) in circumstances where the state court applies a rule that contradicts the governing law set forth in a Supreme Court case[115] or (2) where the state court confronts a set of facts that are materially indistinguishable from a Supreme Court decision, but nonetheless arrives at a different result.[116] A state

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[109] See 28 U.S.C. § 2254 (2012).
[110] *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (citation omitted).
[111] *Id.* (citation omitted).
[112] *Rencio v. Lett*, 559 U.S. 766, 779 (2010).
[113] *Howes v. Fields*, 132 S. Ct. 1181, 1187 (2012) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)).
[114] *Brumfield v. Cain*, 135 S. Ct. 2269, 2293 (2015).
[115] *Id.*
[116] *Id.*

court's decision does not rise to the level of being contrary to" clearly established federal law simply because that court did not cite the Supreme Court.[117] The state court need not even be aware of the relevant Supreme Court precedent, so long as neither its reasoning nor its result contradicts it.[118] Under the contrary to" clause, if materially indistinguishable facts confront the state court, and it nevertheless decides the case differently than the Supreme Court has previously, a writ will issue.[119] When no such Supreme Court holding exists, the federal habeas court must deny the petition.[120]

A state court decision constitutes an unreasonable application" of clearly established federal law when it correctly identifies the governing legal rule but applies it unreasonably to the facts of the petitioner's case.[121] Whether the state court unreasonably applied the governing legal principle from a Supreme Court decision turns on whether the state court's application was objectively unreasonable.[122] A state court's application that is merely wrong," even in the case of clear error, is insufficient.[123] To show that a state court decision is an unreasonable application, a petitioner must show that the state court ruling

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[117] *Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (per curiam).
[118] *Id.*
[119] *See id.*
[120] *White v. Woodall*, 134 S. Ct. 1697, 1699 (2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000)).
[121] *Id.* (quoting *Lockyear v. Andrade*, 538 U.S. 63, 75-76. (2003)).
[122] *White v. Woodall*, 134 S. Ct. 1697, 1699 (2014) (quoting *Lockyear v. Andrade*, 538 U.S. 63, 75-76. (2003)).
[123] *Id.*

on the claim being presented to the federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement."[124] Under the unreasonable application" clause, the federal habeas court must grant the writ if the State court adopted the correct governing legal principle from a Supreme Court decision, but unreasonably applied that principle to the facts of the petitioner's case.

b. Unreasonable determination" of the facts

The Supreme Court has recognized that § 2254(d)(2) demands that a federal habeas court accord the state trial courts substantial deference: Under § 2254(e)(1), a determination of a factual issue made by a [s]tate court shall be presumed to be correct."[125] A federal court may not characterize a state court factual determination as unreasonable merely because [it] would have reached a different conclusion in the first instance."[126] While such deference to state court determinations does not amount to an abandonment or abdication of judicial review" or by definition preclude relief," it is indeed a difficult

[124] *Id.* (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).
[125] *Brumfield*, 135 S. Ct. at 2277.
[126] 28 U.S.C. § 2254(e)(1) (2012).

standard to meet.[127] The role of a federal habeas court is to guard against extreme malfunctions in the state criminal justice systems, not to apply de novo review of factual findings and to substitute its own opinions for the determination made on the scene by the trial judges."[128]

2. Procedural default

Under the doctrine of procedural default, the federal habeas court may not review a claim for relief if the petitioner failed to obtain consideration of that claim on its merits in state court, either because the petitioner failed to raise it when state remedies were still available or because of some other violation of a state procedural rule.[129]

When the State asserts a violation of a state procedural rule as the basis for the default, the Sixth Circuit has long-employed a four-part test to determine if the claim is procedurally defaulted in a federal habeas proceeding:

(1) Does a state procedural rule exist that applies to the petitioner's claim?

(2) Did the petitioner fail to comply with that rule?

(3) Did the state court rely on that failure as the basis for its refusal to address the merits of the petitioner's claim?

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[127] *Id.* (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("If reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination.") (internal quotation marks omitted)).

[128] *Davis v. Ayala*, 135 S. Ct. 2187, 2202 (2015) (citation omitted).

[129] *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006).

(4) Is the state rule violated by the petitioner an adequate and independent state law basis for barring the federal court from considering the claim?[130]

In addition to establishing these elements, the state procedural rule must be (a) firmly established and (b) regularly followed before the federal habeas court will decline review of an allegedly procedurally defaulted claim.[131]

If the State establishes a procedural default, the petitioner may overcome the default if he can show (1) cause for the default and actual prejudice from the court's failure to address the alleged constitutional violation, or (2) that a lack of review of the claims merits will result in a fundamental miscarriage of justice.[132] In addition, a showing of actual innocence may also excuse a procedural default.[133]

To establish cause" for the default, a petitioner must generally show that some objective factor, something external to himself, prevented him from complying with the state procedural rule.[134] Demonstrating prejudice" requires the petitioner to show that the alleged constitutional error worked to his actual and substantial disadvantage, infecting the entire proceeding with error of a constitutional dimension.[135] If the petitioner cannot show a reasonable probability of a different outcome at trial, prejudice does not exist.[136]

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[130] *Morales v. Mitchell*, 507 F.3d 916, 937 (6th Cir. 2007) (citation omitted).
[131] *Smith v. Ohio Dep't of Rehab. & Corrs.*, 463 F.3d 426, 431 (6th Cir. 2006) (citations omitted).
[132] *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).
[133] *Id.*
[134] *Id.* at 753.
[135] *United States v. Frady*, 456 U.S. 152, 170 (1982).
[136] *Mason v. Mitchell*, 320 F.3d 604, 629 (6th Cir. 2003).

Notwithstanding these elements, the Supreme Court has held that federal habeas courts need not consider an assertion of procedural default before deciding a claim against the petitioner on the merits.[137] In that regard, the Sixth Circuit has stated that a federal habeas court may bypass an issue of procedural default when that issue presents complicated questions of state law and addressing it is unnecessary to resolving the claim against the petitioner on the merits.[138]

3. Non-cognizable claims

The federal habeas statute, by its own terms, restricts the writ to state prisoners in custody in violation of federal law.[139] Accordingly, to the extent a petitioner claims that his custody is a violation of state law, the petitioner has failed to state a claim upon which federal habeas relief may be granted.[140] In such circumstances, a claim for federal habeas relief based solely on the ground of purported violation of state law is properly dismissed by the federal habeas court as non-cognizable.[141]

But a claimed error of state law may nevertheless serve as the basis for federal habeas relief if such error resulted in the denial of fundamental fairness" at trial.[142] The Supreme Court has made clear that it defines very narrowly" the category of infractions

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[137] *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997).
[138] *Hudson v. Jones*, 351 F.3d 212, 215-16 (6th Cir. 2003).
[139] 28 U.S.C. 2254(a).
[140] *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).
[141] *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).
[142] *Id.*

that violate the fundamental fairness" of a trial.[143] Specifically, such violations are restricted to offenses against "'some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[144]

The petitioner bears the burden of showing a violation of a principle of fundamental fairness.[145] In so doing, the federal habeas court must follow the rulings of the state's highest court with respect to state law and may not second-guess a state court's interpretation of its own procedural rules.[146] Further, while in general distinct constitutional claims of trial error may not be cumulated to grant habeas relief,[147] the Sixth Circuit has recognized that "'[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'"[148]

C. Application of standards

1. Ground One should be dismissed as procedurally defaulted and noncognizable.

Ground One must be dismissed as procedurally defaulted and noncognizable for several reasons. First, 28 U.S.C. § 2254 does not establish that federal habeas corpus relief

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[143] *Bey*, 500 F.3d at 522 quoting *Dowling v. United States*, 493 U.S. 342, 352 (1996).
[144] *Id.* at 521, quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996).
[145] *Bey*, 500 F.3d at 522 quoting *Dowling v. United States*, 493 U.S. 342, 352 (1996).
[146] *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988).
[147] *Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006).
[148] *Gilliard v. Mitchell*, 445 F.3d 883, 898 (6th Cir. 2006).

may be granted for judicial findings contrary to the evidence,"[149] as Anderson argues here. Considering Anderson's claim in the best light possible, his claim can be understood as a manifest weight of the evidence claim. While Anderson did bring forth a claim of the manifest weight of the evidence at the state appellate level and to the Ohio Supreme Court, he did so without relying on federal law of any kind.[150] Therefore, Anderson's claim of a due process violation has not been fairly presented at the state level, and as such, is procedurally defaulted.

Further, it is well established that the Due Process Clause does not provide relief for defendants whose conviction are against the manifest weight of the evidence and that manifest weight of the evidence claims are noncognizable for federal habeas corpus review.[151] In Ohio, a claim that a verdict was against the manifest weight of the evidence requires the appellate court to act as a thirteenth juror and to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, 'The jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.[152] Such a claim only raises a state law issue, and a federal habeas court is not

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[149] 28 U.S.C. 2254.
[150] ECF No. 9 at Ex. 34.
[151] *Walker v. Engle*, 730 F.2d 959, 969 (6th Cir. 1983), *State v. Thompkins*, 78 Ohio St.3d. 380 (1997).
[152] *State v. Martin*, 20 Ohio App.3d 172, 175 (1983); *Tibbs v. Florida*, 457 U.S. 31, 421-47 (1982).

vested with the authority to conduct such an exhaustive review.[153] To provide habeas corpus relief for Anderson's manifest weight of the evidence claim would be to erroneously render this court an additional state appellate court. Consequently, I recommend Ground One be dismissed as procedurally defaulted and noncognizable.

2. *Ground Two should be dismissed as procedurally defaulted and denied as meritless.*

Ground Two must be dismissed as procedurally defaulted and denied as meritless for several reasons. Anderson's claim of prosecutorial misconduct does not render him eligible for habeas relief because it is procedurally defaulted for failure to fairly present a federal constitutional due process claim of prosecutorial misconduct in his appeal to the state.[154] The State correctly notes in its return of the writ that Anderson did not raise a federal constitutional prosecutorial misconduct claim in his direct appeals to the state appellate court and Ohio Supreme Court. [155]

Second, Anderson's claim is meritless. On this matter, the State correctly notes this

[153] 28 U.S.C. § 2254(a).
[154] ECF No. 9 at Ex. 19-20.
[155] ECF No. 9 at 34.

court may deny relief on the merits, notwithstanding a failure to exhaust where appropriate."[156] Further, that appellate court found that Anderson's argument for prosecutorial conduct was unfounded because the evidence the prosecution allegedly mishandled contained nothing exonerating to Anderson upon review.[157] Anderson has not rebutted these findings by clear and convincing evidence, nor has he established that the state appellate court's decision is contrary to any clearly established federal law pertaining to prosecutorial misconduct.[158] As the State notes, under U.S.C. 28 § 2254 this court must presume the appellate court's findings are correct.[159] Subsequently, I recommend this court defer to the appellate court's decision to dismiss and deny Anderson's claim of prosecutorial misconduct.

3. Ground Three should be dismissed as procedurally defaulted and noncognizable.

Ground Three must be dismissed as procedurally defaulted and noncognizable for several reasons. As noted by the State, Anderson failed to present these claims in a timely manner to the Supreme Court of Ohio on direct appeal.[160] Anderson filed a pro se appeal notice along with a motion for discovery and a motion for transcripts, yet the Ohio Supreme

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[156] 28 U.S.C. § 2254(b)(2); Hanna v. Ishee, 694 F.3d 596, 610 (6th Cir. 2012).
[157] ECF No. 9 at Ex. 43.
[158] *Id.*
[159] *Id.* at 35.
[160] *Id.* at Ex. 19.

denied the motions and dismissed the case, declining to accept jurisdiction.[161] This dismissal by the Ohio Supreme Court constitutes an adequate and independent state law ground on which the state may now foreclose review by the federal habeas court.[162]

Alternatively, Ground Three is also non-cognizable. While Anderson did bring forth a claim of the manifest weight of the evidence at the state appellate level and to the Ohio Supreme Court, he did so without relying on federal law of any kind.[163] Therefore, Anderson's claim of a due process violation should be here dismissed as procedurally defaulted because Anderson failed to fairly present the claim to the state's highest court through the state's ordinary appellate review procedure.[164]

Further, it is well established that the Due Process Clause does not provide relief for defendants whose conviction are against the manifest weight of the evidence and that manifest weight of the evidence claims are noncognizable for federal habeas corpus review.[165] As established above in response to Anderson's first manifest weight claim, to provide habeas corpus relief for Anderson's manifest weight of the evidence claim would be to utilize this court as an additional state appellate court without the proper authority to do so. Consequently, I must recommend that Ground Three is dismissed as procedurally defaulted

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[161] *Id.* at Ex. 47-48.
[162] *Bonilla v. Hurley,* 370 F.3d 494 (6th Cir. 2004).
[163] ECF No. 9 at Ex. 43.
[164] *O'Sullivan v. Boerckel*, 326 U.S. 838, 847 (1999).
[165] *Walker v. Engle*, 730 F.2d 959, 969 (6th Cir. 1983), *State v. Thompkins*, 78 Ohio St.3d. 380 (1997).

and noncognizable.

4. *Ground Four should be dismissed as procedurally defaulted in part and denied as meritless in part.*

Ground Four must be dismissed as procedurally defaulted and denied as meritless for several reasons. First, Anderson did not properly present his Sixth Amendment claims before the state court, and therefore the claims are precluded from review.[166] While Anderson did raise a Sixth Amendment right to trial counsel claim in his direct appeal to the state appellate court and the Ohio Supreme court,[167] the State correctly notes that Anderson's claims were based solely on allegations that his trial counsel was unconstitutionally ineffective for failing to successfully object to the trial court's joinder of his criminal cases.[168] Beyond the ineffective assistance of counsel claim based on an insufficient objection to joinder, the remaining Sixth Amendment right to trial counsel claims in Anderson's petition are procedurally defaulted.

Regarding the exhausted claim of ineffective assistance of counsel claim based on an insufficient objection to the joinder of Anderson's four criminal cases, the appellate court found that Anderson's claim was meritless: The trial court was within its discretion

[166] ECF No. at Ex. 19-20.
[167] ECF No. 9 at Ex. 19 and 38.
[168] ECF No. 1 at 18-19.

to grant the state's request for joinder and deny the defense counsel's motion for severance."[169] Anderson has not rebutted this finding by clear and convincing evidence and in his federal habeas action,[170] this Court must presume the state appellate court's factual findings are correct.[171] Further, because Anderson has produced no evidence that the state appellate court's rejection of the Sixth Amendment ineffective assistance of trial counsel claim was contrary to or an unreasonable application of federal law,[172] I recommend this court deny and dismiss Anderson's claim as procedurally defaulted and without merit.

5. Ground Five should be dismissed as procedurally defaulted and noncognizable.

Ground Five must be dismissed as noncognizable because Anderson does not raise a federal claim under which habeas relief can be granted. First, 28 U.S.C. § 2254 does not establish that federal habeas corpus relief may be granted for judicial findings Relevance as Defined by Federal Rule of Evidence 404,"[173] as Anderson argues here. Considering Anderson's claim in the best light possible, his claim can be understood as a manifest weight of the evidence claim. While Anderson did bring forth a claim of the manifest weight of the evidence at the state appellate level and to the Ohio Supreme Court, he did

[169] ECF No. 9 at Ex. 43.
[170] ECF No. 9 at Ex. 34.
[171] 28 U.S.C. § 2254 (e)(1).
[172] ECF No. 1 at 18-19.
[173] 28 U.S.C. § 2254(a).

so without relying on federal law of any kind.[174] Therefore, Anderson's claim of a due process violation has not been fairly presented at the state level, and as such, is procedurally defaulted.

Finally, I have already established that the Due Process Clause does not provide relief for defendants whose conviction are against the manifest weight of the evidence and that manifest weight of the evidence claims are noncognizable for federal habeas corpus review.[175] Consequently, I recommend Ground Five be dismissed as procedurally defaulted and noncognizable.

6. Ground Six should be dismissed as procedurally defaulted and noncognizable.

Ground Six must be dismissed as noncognizable because Anderson does not raise a federal claim under which habeas relief can be granted. First, 28 U.S.C. § 2254 does not establish that federal habeas corpus relief may be granted for judicial findings Faulty Police Methods," as Anderson argues here.[176] Considering Anderson's claim in the best light possible, his claim can be understood as a manifest weight of the evidence claim. While Anderson did bring forth a claim of the manifest weight of the evidence at the state appellate level and to the Ohio Supreme Court, he did so without relying on federal law of any

[174] ECF No. 1 at 19.
[175] *Walker v. Engle*, 730 F.2d 959, 969 (6th Cir. 1983), *State v. Thompkins*, 78 Ohio St.3d. 380 (1997).
[176] 28 U.S.C. § 2254(a).

kind.[177] Therefore, Anderson's claim of a due process violation has not been fairly presented at the state level, and as such, is procedurally defaulted.

Further, I have established here that the Due Process Clause does not provide relief for defendants whose conviction are against the manifest weight of the evidence and that manifest weight of the evidence claims are noncognizable for federal habeas corpus review.[178] Consequently, I recommend Ground Six be dismissed as procedurally defaulted and noncognizable.

7. Ground Seven should be dismissed as procedurally defaulted and denied as meritless.

Ground Seven must be dismissed as procedurally defaulted and denied as meritless for several reasons. Anderson's other acts evidentiary ruling claim does not render him eligible for habeas relief because it is procedurally defaulted for failure to fairly present a federal constitutional due process claim of other acts" in his appeal to the state.[179] The State correctly notes in its return of the writ that Anderson did not fairly present a federal constitutional due process claim related to his seventh relief ground to the state appellate court and Ohio Supreme court."[180] Anderson raised his other acts claim strictly as a state

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[177] ECF No. 9 at Ex. 19, 34.
[178] *Walker v. Engle*, 730 F.2d 959, 969 (6th Cir. 1983), *State v. Thompkins*, 78 Ohio St.3d. 380 (1997).
[179] ECF No. 9.
[180] *Id.*

law claim in state court.[181] Subsequently, Anderson's inexcusable state court procedural defaults precludes federal habeas review on the matter.

Second, Anderson's claim is meritless. On this matter, the State correctly notes this court may deny relief on the merits, notwithstanding a failure to exhaust where appropriate."[182] Further, that appellate court found that Anderson's other acts claim was unfounded because the state met the necessary joinder test," needed to prove the court has properly joined the four criminal cases against Anderson.[183] Therefore, the other acts" which Anderson argues was improperly used as evidence were necessarily included at trial as a result of the proper joinder.[184] Anderson has not rebutted these findings by clear and convincing evidence, nor has he established that the state appellate court's decision is contrary to any clearly established federal law pertaining to prosecutorial misconduct.[185] As the State notes, under U.S.C. 28 § 2254 this court must presume the appellate court's findings are correct.[186] Subsequently, I recommend this court defer to the appellate court's decision to dismiss and deny Ground Seven.

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[181] ECF No. 9 at Ex. 19.
[182] 28 U.S.C. § 2254(b)(2); *Hanna v. Ishee*, 694 F.3d 596, 610 (6th Cir. 2012).
[183] ECF No. 9 at Ex. 43.
[184] ECF No. 1 at 20.
[185] ECF No. 9 at 60.
[186] 28 U.S.C. § 2254(e)(1).

8. Ground Eight should be denied as meritless.

Anderson is not entitled to habeas relief under the claim of ineffective assistance of appellate counsel because the claim is without merit. While Anderson properly exhausted Ground Eight at the state appellate level and in the Ohio Supreme Court, the state appellate court reasonably denied Anderson's claim in accord with the correct clearly established Supreme Court precedent.[187] On review, the state appellate court determined Anderson's claim that his appellate counsel was ineffective for not raising the issue was not well founded.[188] Anderson has not rebutted the state appellate court's findings by clear and convincing evidence[189] and in this federal habeas action, therefore, I must presume the state appellate court's factual findings are correct.[190] Further, because Anderson has produced no evidence that the state appellate court's rejection of the Sixth Amendment ineffective assistance of appellate counsel claim was contrary to or an unreasonable application of federal law,[191] I recommend this claim be denied as lacking merit.

9. Ground Nine should be dismissed as procedurally defaulted and noncognizable.

Finally, Ground nine should be dismissed for several reasons. First, Anderson is not entitled to habeas relief on his evidence sufficiency claim because it has not been exhausted

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[187] ECF No. 9 at Ex. 43.
[188] *Id.*
[189] ECF No. 9 at 60.
[190] 28 U.S.C. § 2254(e)(1).
[191] ECF No. 1 at 20.

in the state appellate court or Ohio Supreme Court. While Anderson presents his claim as an evidence sufficiency question, the State contends his claims is a *de facto* manifest weight of the evidence claim and is therefore noncognizable.[192]

Where there is a claim of insufficient evidence, the test is whether after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.[193] Whereas, a manifest weight claim carries a much broader analysis.[194] The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.[195]

In deciding which of these claims has arisen, this court must consider if the defendant seeks to have this court reweigh evidence and make credibility determination.[196] In his petition, Anderson argues this court ought to reweigh the evidence regarding his ability to enter the victim's residence, the credibility of the victim's testimony, and reconsider the weight of the existing evidence against him.[197] Anderson seeks to ignore the majority of the evidence against him which was sufficient at the trial and appellate level.[198] In doing

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[192] ECF No. 9 at 62.
[193] *State v. Martin*, 20 Ohio App. 3d 172, 175 (1983).
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] ECF No. 1 at 21.
[198] *Id.*

so, Anderson raises issues characteristic of a determination of manifest weight, rather than that of the sufficiency of the evidence.

As such, it is well settled that the Due Process Clause does not provide relief for defendants whose conviction are against the manifest weight of the evidence and that manifest weight of the evidence claims are noncognizable for federal habeas corpus review.[199] As established above in response to Anderson's first manifest weight claim, to provide habeas corpus relief for Anderson's manifest weight of the evidence claim would be to utilize this court as an additional state appellate court without the proper authority to do so. In addition, and as mentioned above, Anderson's manifest weight claim is procedurally defaulted for failure to fairly present a federal constitutional argument before the state appellate court and the Supreme Court of Ohio. Consequently, I must recommend that Anderson's ninth ground for habeas relief be dismissed as noncognizable and procedurally defaulted.

10. None of the procedural defaults have been cured by a showing of cause and prejudice or by a showing of actual innocence.

Anderson has not filed a traverse and has not attempted any showing of cause and prejudice such as would cure the procedural defaults detailed above.[200] The petition is

[199] *Walker v. Engle*, 730 F.2d 959, 969 (6th Cir. 1983), *State v. Thompkins*, 78 Ohio St.3d. 380 (1997).
[200] ECF No. 1.

silent as to any new or reliable evidence showing of actual innocence or excuse for procedural defaults.[201] Finally, for each of the procedural defaults, Anderson cannot rely on ineffective assistance of appellate counsel for excuse because the state appellate court reasonably rejected Anderson's ineffective assistance of counsel claim[202] and this court must defer to the to that decision.[203]

Conclusion

For the reasons stated above, I recommend that the *pro se* petition of Shyne Anderson for a writ of habeas corpus be dismissed in its entirety with prejudice.

IT IS SO RECOMMENDED.

Dated: July 26, 2020

s/ William H. Baughman, Jr.
United States Magistrate Judge

[201] *Id.*
[202] *State v. Anderson*, 8th Dist. Cuyahoga No. 104460, 2018-Ohio-82.
[203] *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Objections

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the District Court's order.[204]

[204] *See United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*, 474 U.S. 1111 (1986).

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

Shyne V. Anderson,

Petitioner,

v.

Charmaine Bracy,

Respondent.

Case No. 1:18-cv-1996

MEMORANDUM OPINION
AND ORDER

I. INTRODUCTION

Petitioner Shyne V. Anderson has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, concerning his conviction in the Cuyahoga County, Ohio Court of Common Pleas on charges stemming from four indictments against him. (Doc. No. 1). Magistrate Judge William H. Baughman, Jr., reviewed the petition as well as the related briefing pursuant to Local Rule 72.2(b)(2) and recommends I deny Anderson's petition. (Doc. No. 19). Anderson filed objections to Judge Baughman's Report and Recommendation. (Doc. No. 21). Respondent Charmaine Bracy,[1] filed a response to Anderson's objections. (Doc. No. 22). Anderson replied to Respondent's response. (Doc. No. 25).

Anderson also filed a motion for discovery and a request for an evidentiary hearing. (Doc. No. 23). Respondent opposed this motion, (Doc. No. 24), and Anderson replied. (Doc. No. 26).

[1] Anderson currently is incarcerated at the Ohio State Penitentiary in Youngstown, Ohio, where Bowen is the warden. The Clerk of Court is ordered to substitute Bracy as the Respondent in this case. Fed. R. Civ. P. 25(d).

For the reasons stated below, I deny Anderson's motion for discovery and an evidentiary hearing, overrule his objections, adopt Judge Baughman's recommendations, and dismiss Anderson's petition.

II. BACKGROUND

Between December 2015 and February 2016, Anderson was indicted by Cuyahoga County grand juries in four separate cases on charges arising from incidents involving acts of violence against two women. *State v. Anderson*, 86 N.E.3d 870 (Ohio Ct. App. 2017). The trial court joined all four cases for trial and Anderson waived his right to a jury trial. Anderson ultimately was convicted of one count of felonious assault, two counts of kidnapping, two counts of aggravated burglary, one count of domestic violence, two counts of criminal damaging, one count of rape, two counts of grand theft, one count of intimidation of a crime victim, one count of assault, one count of burglary, one count of robbery, and one count of abduction. *Id.* at 873-75. He was sentenced to a total of 22 years in prison. *Id.* at 875.

While Anderson claims I am "obliged to make a de novo assessment . . . of whether [the] factual findings were fairly supported by the record," (Doc. No. 21 at 23), that is not the law. Instead, it is Anderson's burden to demonstrate, by clear and convincing evidence, that the state court's factual findings were incorrect. 28 U.S.C. § 2254(e)(1). *See also Burt v. Titlow*, 571 U.S. 12, 18 (2013) ("The prisoner bears the burden of rebutting the state court's factual findings 'by clear and convincing evidence.'") (quoting 28 U.S.C. § 2254(e)(1)). He has not done so. Therefore, I overrule his objection to the factual and legal background sections of the Report and Recommendation.

III. STANDARD

Once a magistrate judge has filed a report and recommendation, a party to the litigation may "serve and file written objections" to the magistrate judge's proposed findings and recommendations, within 14 days of being served with a copy. 28 U.S.C. § 636(b)(1)(C); Fed. R.

Civ. P. 72(b)(2). Written objections "provide the district court 'with the opportunity to consider the specific contentions of the parties and to correct any errors immediately' . . . [and] 'to focus attention on those issues – factual and legal – that are at the heart of the parties' dispute.'" *Kelly v. Withrow*, 25 F.3d 363, 365 (6th Cir. 1994) (quoting *United States v. Walters*, 638 F.2d 947, 950 (6th Cir. 1981) and *Thomas v. Arn*, 474 U.S. 140, 147 (1985)). A district court must conduct a *de novo* review only of the portions of the magistrate judge's findings and recommendations to which a party has made a specific objection. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(3).

IV. DISCUSSION

A. DISCOVERY

If the petitioner requests an evidentiary hearing, "the judge must review the answer, any transcripts and records of state-court proceedings, and any materials submitted under Rule 7 to determine whether an evidentiary hearing is warranted." Rule 8(a) of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. § 2254.

"Generally, a habeas petitioner is entitled to an evidentiary hearing in federal court if the petition alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." *Stanford v. Parker*, 266 F.3d 442, 459 (6th Cir. 2001) (citation and internal quotation marks omitted). "'[B]ald assertions and conclusory allegations do not provide sufficient ground to warrant requiring the state to respond to discovery or to require an evidentiary hearing.'" *Id.* at 460 (quoting *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 301 (3d Cir. 1991)).

Anderson contends he is entitled to an evidentiary hearing because the common pleas court judge who presided over his trial "relied on personal opinion [rather] than the record." (Doc. No. 21 at 22). He also claims he "feel[s] it['s a high probability there is favorable evidence" that allegedly was not disclosed before his trial that would prove his innocence. (Doc. No. 23 at 3). But the record shows Anderson's attorney requested, and the State of Ohio produced, discovery during

the trial proceedings. (Doc. No. 9-1 at 39). Anderson provides no basis for his conclusory allegation that there is other discoverable evidence which was not disclosed prior to trial and, therefore, he fails to show an evidentiary hearing is warranted. I deny his motion. (Doc. No. 23).

B. HABEAS PETITION

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") prohibits the issuance of a writ of habeas corpus "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).

Anderson presents the following grounds for relief:

Ground One: Judicial finding contrary to the evidence

Ground Two: Prosecution misconduct

Ground Three: Manifest Weight [of the evidence]

Ground Four: Ineffective assistance of trial counsel

Ground Five: Relevance as defined by Federal Rule of Evidence 404

Ground Six: Faulty police methods

Ground Seven: Other acts testimony

Ground Eight: Ineffective assistance of appell[ate] counsel

Ground Nine: Insufficient evidence

(Doc. No. 1 at 16-21).

Judge Baughman recommends I dismiss Grounds One, Three, Five, Six, and Nine as procedurally defaulted and not cognizable in habeas proceedings, dismiss Grounds Two, Four, and Seven as procedurally defaulted and meritless, and deny Ground Eight as meritless. (Doc. No. 19).

A. MANIFEST WEIGHT OF THE EVIDENCE

"A manifest-weight-of-the-evidence claim in Ohio is a state law claim that is similar to but ultimately different from a federal constitutional claim that the evidence was insufficient to support a conviction." *Schwarzman v. Gray*, No. 17-3859, 2018 WL 994352, at *3 (6th Cir. Jan. 30, 2018) (citing *State v. Thompkins*, 678 N.E.2d 541, 546 (Ohio 1997)). Federal habeas relief is not available for state law errors. *See, e.g., Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). An appellate court, in considering a manifest-weight claim, reviews:

> the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses[,] and determines whether[,] in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

State v. Martin, 485 N.E.2d 717, 720-21 (Ohio Ct. App. 1983) (citing *Tibbs v. Florida*, 457 U.S. 31, 38, 42 (1982) (further citation omitted).

In Ground Three, Anderson asserts his convictions on at least some of the charges asserted in each of the four of the indictments against him were against the manifest weight of the evidence. (Doc. No. 1 at 17-18). He asserted this claim during his direct appeal. The Court of Appeals of Ohio, Eighth District, after considering the parties' briefing on appeal and the trial court record, stated:

> Anderson essentially asks this court to re-evaluate the credibility of the witnesses and re-weigh the inferences from their testimony. Our authority to weigh the evidence and reasonable inferences is greatly restrained by case law authority holding that the credibility of witnesses' testimony is primarily a matter to be determined by the factfinder. . . . We afford the trier of fact great deference because it is in the best position to observe the witnesses' demeanor and assess their credibility. As such, our power to reverse a judgment as against the manifest weight of the evidence is to

> be exercised with extreme caution. After reviewing the record, we cannot say the trial court lost its way in convicting the defendant of multiple offenses he was charged with. We decline to exercise our discretionary power to grant a new trial.

Anderson, 86 N.E.3d at 876.

Judge Baughman recommended, in part, that I dismiss Ground Three because it is not cognizable in habeas proceedings. Anderson did not object to this recommendation. (*See* Doc. No. 21). Therefore, he has waived *de novo* review of Judge Baughman's recommendation on Ground Three. *See* 28 U.S.C. § 636(b)(1)(C). I adopt Judge Baughman's recommendation and dismiss Ground Three as noncognizable.

After reviewing Anderson's arguments in support of Grounds One, Five, Six, and Nine, Judge Baughman recommends I conclude those claims are best understood as claims challenging the manifest weight of the evidence as well. (Doc. No. 19 at 21-22, 27-29, and 31-33). Anderson did not object to these recommendations, arguing instead that any procedural default of these claims should be excused. (Doc. No. 21 at 3-7, 15-18, and 19-21). I agree these grounds for relief – which challenge the trial court's determinations regarding witness credibility and allege the prosecution presented perjured testimony, (*see, e.g., id.* at 15-16, 19) – are best understood as challenging the manifest weight of the evidence presented at trial. Because such claims are not cognizable in federal habeas proceedings, I adopt Judge Baughman's recommendations and dismiss Grounds One, Five, Six, and Nine.

B. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In Ground Eight, Anderson alleges he received ineffective assistance from the attorney appointed to represent him in his direct appeal, because that attorney allegedly failed to raise all of the assignments of error Anderson believes should have been raised. (Doc. No. 1 at 20). While his direct appeal was pending, Anderson filed a disciplinary complaint against his appellate attorney with the Disciplinary Counsel of the Supreme Court of Ohio, as well as a motion to remove his attorney.

(*See* Doc. No. 9-1 at 144-45, 148-49). The Eighth District Court of Appeals denied Anderson's motion. (*Id.* at 151).

A habeas petitioner must show "his counsel's performance was deficient and that it prejudiced him" in order to prevail on an ineffective assistance of counsel claim. *Nichols v. Heidle*, 725 F.3d 516, 539 (6th Cir. 2013) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "Deficient performance means that 'counsel's representation fell below an objective standard of reasonableness,'" while prejudice "means 'there is a reasonable probability that, but for counsel's unprofessional errors [i.e., deficient performance], the result of the proceeding would have been different.'" *Nichols*, 725 F.3d at 539 (quoting *Strickland*, 466 U.S. at 688, 694) (alteration added by *Nichols*).

Appellate counsel "has no obligation to raise every possible claim" on appeal, and "the decision of which among the possible claims to pursue is ordinarily entrusted to counsel's professional judgment." *McFarland v. Yukins*, 356 F.3d 688, 710 (6th Cir. 2004) (citing *Jones v. Barnes,* 463 U.S. 745, 751-54 (1983) and *Smith v. Murray,* 477 U.S. 527, 536 (1986)). "Counsel's performance is strongly presumed to be effective." *Scott v. Mitchell*, 209 F.3d 854, 880 (6th Cir. 2000) (citing *Strickland*, 466 U.S. at 690 and *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986)).

When asserting an ineffective assistance claim in a habeas petition, the petitioner must show "the state court's rejection of that claim was 'contrary to, or involved an unreasonable application of' *Strickland*, or rested 'on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Nichols*, 725 F.3d at 540 (quoting 28 U.S.C. § 2254(d)). Thus, the AEDPA mandates that a habeas court's review of the state court's ineffective-assistance analysis is "doubly deferential." *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (citations omitted).

In his application to reopen his appeal, Anderson argued "his appellate counsel should have argued prosecutorial misconduct, ineffective assistance of trial counsel, improper evidence, [and]

insufficient evidence." *State v. Anderson*, 2018-Ohio-82, 2018 WL 386592, at *1 (Ohio Ct. App. Jan. 10, 2018). The Eighth District Court of Appeals considered and rejected each of these arguments. *Id.*, at *3-4. That court ruled: (a) Anderson's allegations of prosecutorial misconduct were not supported by the trial court record and, therefore, appellate counsel was not ineffective in failing to raise that claim; (b) appellate counsel's choice to pursue some arguments in support of an ineffective-assistance-of-trial-counsel claim, but not others, was a reasonable strategic choice; (c) appellate counsel's decision to pursue some, but not all, of Anderson's evidentiary arguments in the manifest weight argument was a reasonable strategic choice. *Id.*

Anderson effectively reiterates his earlier arguments here, claiming his appellate attorney "fil[ed] the weakest grounds possible and [ignored] every strong ground Petitioner asked her to file . . ." (Doc. No. 21 at 18). I find those arguments no more persuasive than did the Eighth District Court of Appeals. Alexander fails to show the state court's rejection of his ineffective assistance of appellate counsel claim was "'contrary to, or involved an unreasonable application of' *Strickland*, or rested 'on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Nichols*, 725 F.3d at 540 (quoting 28 U.S.C. § 2254(d)). Therefore, I overrule his objection and dismiss Ground Eight because it is without merit.

C. GROUNDS TWO, FOUR, AND SEVEN

Judge Baughman recommends I conclude Grounds Two, Four, and Seven should be dismissed as procedurally defaulted or, in the alternative, denied as meritless. In Ground Two, Anderson claims the prosecution engaged in misconduct by withholding favorable evidence, while in Ground Four, he alleges his trial attorney was constitutionally ineffective. (Doc. No. 1 at 17, 19). In Ground Seven, Anderson asserts he was prejudiced through the admission of certain other acts evidence. (*Id.* at 20).

Ordinarily, "a habeas petitioner must give the state courts the first opportunity to consider and rule upon the federal claims the prisoner wishes to use to attack his state court conviction." *Pudelski v. Wilson*, 576 F.3d 595, 605 (6th Cir. 2009) (citing *Picard v. Connor*, 404 U.S. 270, 275 (1971)). If a petitioner did not do so, and a state procedural rule now prevents him from raising the claims in state court, those claims are barred by the procedural default rule. *Pudelski*, 576 F.3d at 605 (citing *Martin v. Mitchell*, 280 F.3d 594, 603 (6th Cir. 2002)). Section 2254(b)(2) also permits a court to deny a petitioner's claims on the merits, notwithstanding the petitioner's failure to comply with the state procedural rules. *See Hanna v. Ishee*, 694 F.3d 596, 610 (6th Cir. 2012); *Pudelski*, 576 F.3d at 606-07.

Anderson did not object to Judge Baughman's recommendation as to Ground Seven. (*See* Doc. No. 21 at 17-18). Therefore, he has waived *de novo* review of Judge Baughman's recommendation on Ground Seven. *See* 28 U.S.C. § 636(b)(1)(C). I deny Ground Seven as meritless.

Anderson objects to Judge Baughman's recommendation regarding Ground Two, again claiming the prosecution failed to disclose favorable evidence which he claims would have led to a not guilty verdict on the charge of rape. (Doc. No. 21 at 8-9). He also objects to the recommendation regarding Ground Four, asserting his trial attorney was ineffective in failing to discover this allegedly favorable evidence. (*Id.* at 14-15).

Anderson's objections are not persuasive. As I noted above, the Eighth District Court of Appeals already rejected these arguments in concluding Anderson's appellate attorney was not ineffective, because the allegedly favorable evidence Anderson discusses does not in fact exist and his trial attorney therefore was not ineffective in failing to present it. *See Anderson*, 2018 WL 386592, at *3. Neither of these claims have merit and, therefore, they do not create a basis for habeas relief. *See, e.g., Hanna*, 694 F.3d at 607-18.

D. CERTIFICATE OF APPEALABILITY

A habeas corpus petitioner is not entitled to a certificate of appealability as a matter of right but must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The petitioner need not demonstrate he should prevail on the merits. Rather, a petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Anderson's petition has not met this standard.

For the reasons set forth in this decision, I certify there is no basis on which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed. R. App. P. 22(b).

V. CONCLUSION

For the reasons stated above, I overrule Anderson's objections, (Doc. No. 21), to Judge Baughman's Report and Recommendation. (Doc. No. 19). I conclude Grounds One, Three, Five, Six, and Nine of Anderson's petition are not cognizable in habeas proceedings and dismiss his petition as to those claims. I also conclude Grounds Two, Four, Seven, and Eight lack merit and deny his petition as to those claims. Further, I deny Anderson's motion for discovery and an evidentiary hearing. (Doc. No. 23).

Finally, I conclude Andersons fails to make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(b)(2), and decline to issue a certificate of appealability.

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

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

Shyne V. Anderson,

Case No. 1:18-cv-1996

Petitioner,

v.

JUDGMENT ENTRY

Charmaine Bracy,

Respondent.

For the reasons stated in the Memorandum Opinion and Order filed contemporaneously, I overrule the objections filed by Petitioner Shyne V. Anderson, (Doc. No.21), to the Report and Recommendation of Magistrate Judge William H. Baughman, Jr., (Doc. No. 19), and dismiss the petition. (Doc. No. 1). I also deny Anderson's motion for discovery and for an evidentiary hearing. (Doc. No. 23).

Further, for the reasons set forth in that opinion, I conclude Anderson has not made a substantial showing of the denial of a constitutional right and I certify there is no basis on which to issue a certificate of appealability. 28 U.S.C. § 2253; Fed. R. App. P. 22(b).

So Ordered.

s/ Jeffrey J. Helmick
United States District Judge

Additional material from this filing is available in the Clerk's Office.