APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

No. 21-3858

RICHARD STANTON WHITMAN,

Petitioner-Appellant,

v.

DAVID GRAY, WARDEN,

Respondent-Appellee.

Argued: January 24, 2024

Decided and Filed: June 10, 2024

OPINION

CHAD A. READLER, Circuit Judge.

In state court, Richard Whitman stood trial for the shooting death of David Eadie. The trial court instructed the jury on self-defense but did not provide Whitman's requested instruction on the castle doctrine. A jury convicted Whitman. Finding no relief on direct appeal, Whitman turned to federal habeas proceedings. The federal constitutional issue Whitman asks us to resolve in his favor, however, was not properly preserved in state court and is now barred from further review there. On that basis, Whitman has procedurally defaulted his claim. We thus affirm the district court's judgment in the warden's favor.

I.

One afternoon, David Eadie went to the home of his ex-girlfriend. There, he encountered her brother, Richard Whitman, who was staying at the home. Before long, Eadie and Whitman engaged in a verbal and physical altercation, at which point Whitman separated himself and moved to a bedroom upstairs. When Eadie later approached the bedroom, Whitman fired three shots, killing Eadie.

An Ohio grand jury indicted Whitman for murder and unlawful possession of a firearm. A key dispute at trial was whether Whitman acted in self-defense. In Ohio, self-defense is an affirmative defense to be proven by a preponderance of the evidence. *See* O.R.C. § 2901.05(A) (2018). The trial court instructed the jury on the elements of self-defense. Whitman also requested a so-called castle doctrine instruction. *See State v. Jones*, 195 N.E.3d 561, 567 (Ohio Ct. App. 2022) (explaining that the "castle doctrine" alters the defense of self-defense, identifying circumstances under which a person has no duty to retreat). Had Whitman's request been honored, the jury would have been told that a person who is lawfully in that person's residence has no duty to retreat before using force in self-defense. R.8-1, PageID 227–28; *see* O.R.C. § 2901.09(B) (2018). The trial court denied Whitman's request. Following deliberations, a jury convicted Whitman of one count of murder with a firearm specification and one count of having weapons while under a disability. He was sentenced to a prison term of 21 years to life.

Whitman appealed his conviction to the Ohio Court of Appeals. There, he argued that the trial court erred as a matter of Ohio law by failing to instruct the jury on the castle doctrine. The state confessed error. The appeals court, however, held that any error did not

affect Whitman's substantial rights and thus upheld his conviction. *See State v. Whitman*, 2018-Ohio-2924, 2018 WL 3578464, at *8 (Ohio Ct. App. July 23, 2018) (citing Ohio Crim. R. 52(A)).

Whitman sought leave to appeal to the Ohio Supreme Court. In his memorandum in support of jurisdiction, Whitman argued for the first time that the trial court's error violated his federal due process right to a complete defense. The Ohio Supreme Court denied discretionary review. *State v. Whitman*, 154 Ohio St.3d 1423, 111 N.E.3d 21 (2018) (unpublished table decision).

From there, Whitman turned to federal court, petitioning for a writ of habeas corpus. *See* 28 U.S.C. § 2254. His petition presented ten grounds for relief. Relevant here is Whitman's claim that the state court's denial of the castle doctrine instruction violated his federal due process rights. On that issue, the warden argued that the failure to give Whitman's proposed instruction was merely an error of state law that is not cognizable on federal habeas review. In the alternative, the warden argued that the state court's harmlessness analysis was not unreasonable under the Antiterrorism and Effective Death Penalty Act of 1996 (or AEDPA). *See Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." (citing *Williams v. Taylor*, 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000))).

A magistrate judge recommended denying Whitman's petition, and the district court agreed. With respect to the castle doctrine issue, the district court deemed it "a quintessential state law question," holding that "the

trial court's decision is not a due process violation." The district court, however, issued a certificate of appealability for that claim, resulting in this appeal.

II.

A. At its core, AEDPA reflects a respect for states as separate sovereigns enforcing their criminal law. This understanding is revealed by the deferential standard federal courts employ when reviewing claims adjudicated on the merits by state courts. So too by AEDPA's threshold requirements for granting habeas relief. One familiar requirement is that a state prisoner's "application for a writ of habeas corpus ... shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A). A "properly exhausted" claim, in turn, is one that was "fairly presented to the state courts." *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009) (quotation omitted). To satisfy the presentation requirement, the petitioner must have argued the claim's factual and legal basis at each level of the state court system. *Id.* at 414–15.

"[A]n important 'corollary' to the exhaustion requirement," emanating from court precedent, is the doctrine of procedural default. *Davila v. Davis*, 582 U.S. 521, 527, 137 S.Ct. 2058, 198 L.Ed.2d 603 (2017) (citation omitted). As in the federal system, states may impose procedural rules that limit the availability of state court remedies. *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 92–93, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006) (deadlines for appellate review). If a habeas petitioner fails to comply with such a rule in state court, the claims may be procedurally defaulted. *Id.* We consider a claim procedurally defaulted where (1) there is a state procedural rule that is applicable to the claim, (2) the petitioner failed to comply with the rule, (3) the state

courts routinely enforce the rule, and (4) the rule is an "adequate and independent" state ground foreclosing review of a federal constitutional claim. *Guilmette v. Howes*, 624 F.3d 286, 290 (6th Cir. 2010) (en banc) (quoting *Tolliver v. Sheets*, 594 F.3d 900, 928 n.11 (6th Cir. 2010)). Together, these statutory and common law doctrines, emanating from principles of "federalism and comity," help to "ensure[ ] ... the States' interest in correcting their own mistakes" in the first instance. *Lambrix v. Singletary*, 520 U.S. 518, 523, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (cleaned up).

Whitman procedurally defaulted his federal due process claim. Both parties agree that Whitman never properly argued the merits of his due process claim in state court. Before the Ohio Court of Appeals, Whitman raised the trial court's failure to use his requested castle doctrine instruction when instructing the jury. But he did so on the basis that the jury instructions violated Ohio law, citing state law only. And Ohio law requires that "claims must be raised on direct appeal if possible; otherwise, res judicata bars their litigation in subsequent state proceedings." *Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000); *see also Hand v. Houk*, 871 F.3d 390, 408 (6th Cir. 2017). By failing to make his due process argument before the Ohio Court of Appeals, Whitman is barred from asserting it in future proceedings by res judicata. True, Whitman made a due process argument in his jurisdictional memorandum filed with the Ohio Supreme Court. But that court never considered the issue. Instead, it denied discretionary review, "declin[ing] to accept jurisdiction of the appeal." In the end, no state court adjudicated, or can ever adjudicate, the merits of Whitman's due process claims. *See Brown v. Davenport*, 596 U.S. 118, 142, 142 S.Ct. 1510, 212 L.Ed.2d 463 (2022) (explaining that discretionary denial of leave to

appeal is not an "adjudication" of the underlying claim's "merits" under AEDPA). Accordingly, the first two components of the procedural default standard are satisfied.

The two remaining procedural default elements are likewise satisfied. One, Ohio courts customarily enforce res judicata. *See Gerth v. Warden*, 938 F.3d 821, 830 (6th Cir. 2019). Two, the rule is an adequate and independent state ground to foreclose review. *Id.* All things considered, Whitman procedurally defaulted his due process claim. And he does not argue that he can satisfy the cause and prejudice standard which might otherwise overcome the default. *See Wallace v. United States*, 43 F.4th 595, 602 (6th Cir. 2022).

B. Recognizing his own shortcomings, Whitman responds that the warden likewise stumbled. Before the district court, Whitman notes, the warden never argued that Whitman's due process claim was procedurally defaulted due to his failures in state court. In that respect, the warden forfeited the argument. *See Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1011 (6th Cir. 2022) ("A forfeiture occurs when a party fails to timely assert a claim, even if the party does so unintentionally (say, because the party failed to think of the claim until too late)."). Although the warden now asserts procedural default, counsel conceded at oral argument that the state made "a mistake[ ]" by not raising in district court Whitman's procedural default of the due process claim.

We do not condone the warden's inconsistent approach. That said, in the habeas setting, we are not bound by the state's litigation decisions. *See Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000) ("[W]e are not required to review the merits of defaulted claims simply because the Government has failed to raise the

issue."); *White v. Mitchell*, 431 F.3d 517, 524 (6th Cir. 2005) ("[Courts of appeal] are nonetheless permitted to consider the procedural default issue even when raised for the first time on appeal if [they] so choose."); *see also* Federal Habeas Manual § 9B:92 (West 2023) (compiling cases in which courts of appeal weighed whether to permit the defense of procedural default raised for the first time on appeal). Because federal courts are empowered to raise procedural default sua sponte—in plain English, where no party raises the issue—*see Elzy*, 205 F.3d at 886, it follows they likewise can do so if procedural default was raised on appeal, even if forfeited in the district court, *see Wood v. Milyard*, 566 U.S. 463, 471, 132 S.Ct. 1826, 182 L.Ed.2d 733 (2012) ("[T]he bar to court of appeals' consideration of a forfeited habeas defense is not absolute."); *Sowell v. Bradshaw*, 372 F.3d 821, 830 (6th Cir. 2004) (citing *Elzy*, 205 F.3d at 886).

Numerous considerations justify enforcing Whitman's procedural default. Consider the many institutional interests underlying AEDPA's review framework. *See Wood*, 566 U.S. at 473, 132 S.Ct. 1826; *Day v. McDonough*, 547 U.S. 198, 205–06, 126 S.Ct. 1675, 164 L.Ed.2d 376 (2006). They include "comity," "respectful, harmonious relations between the state and federal judiciaries," "judicial efficiency and conservation of judicial resources," "safeguard[ing] the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh," and "finality to state court judgments within a reasonable time." *Wood*, 566 U.S. at 471–72, 132 S.Ct. 1826 (cleaned up). These interests inspired the concept of procedural default, which is "premised on the idea that state courts should have the first pass at remedying any violation of a state prisoner's federal constitutional rights." *Pollini v. Robey*, 981 F.3d 486, 498 (6th Cir. 2020). State courts

deserve a meaningful opportunity to consider and, if necessary, correct an error in state criminal matters without federal interference. *See Vasquez v. Hillery*, 474 U.S. 254, 257, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986). States likewise enjoy the right to impose rules to ensure that federal claims are timely—and properly—presented in their courts. *See Coleman v. Thompson*, 501 U.S. 722, 740–41, 745, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). It follows that in subsequent habeas proceedings, we "safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Williams*, 529 U.S. at 436, 120 S.Ct. 1479. Yet here, Whitman frustrated these aims by failing to present his due process argument to the Ohio Court of Appeals. He now asks us to assess the due process implications of the state court's jury instruction without the benefit of the state court's analysis of the issue. And he does so at this late stage, when the issue could have been dealt with numerous proceedings ago. In view of the considerable preservation, judicial economy, and comity interests at play, even with the warden's failure to raise Whitman's procedural default of his due process claim, we decline to recognize the claim as cognizable. *Cf. Granberry v. Greer*, 481 U.S. 129, 133, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) (recognizing that the interests of justice govern whether courts can forgive forfeiture of an exhaustion argument). These interests, it bears emphasizing, reach beyond just the state in its role as a litigant. Rather, they extend to the broader interests of the courts and their proper operation. We need not penalize the Ohio state court system solely due to a state lawyer's mistake in federal district court. Equally true, as federal courts, we are reluctant to reach a constitutional question unnecessarily that is otherwise foreclosed by a state procedural bar.

Any other result, it bears noting, would allow Whitman to benefit from his own error. AEDPA requires deference to the state court's application of federal law if "fairminded jurists could disagree on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (cleaned up). At the same time, when a state court has not adjudicated the merits of a claim, AEDPA's deferential standard of review does not apply. *See Hughbanks v. Hudson*, 2 F.4th 527, 535 (6th Cir. 2021) (citing *Williams v. Anderson*, 460 F.3d 789, 796 (6th Cir. 2006)). If we failed to enforce Whitman's procedural default of his due process claim, we would apply de novo review in considering the issue, a seeming windfall to Whitman. After all, the reason we lack a merits opinion to which we normally afford deference is Whitman's failure to ask the court of appeals to address the matter. *See Woodford v. Visciotti*, 537 U.S. 19, 24–25, 27, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (per curiam).

Whitman's counterarguments do not convince us otherwise. He first directs us to *Maslonka v. Hoffner*, 900 F.3d 269, 276–77 (6th Cir. 2018), which allowed defaulted habeas claims to move forward due to the state's failure to raise the default. But in *Maslonka*, "the state explicitly and deliberately waived" its procedural default argument in its initial answer. *Id.* at 276 (quoting the state's answer, "in any case, the State is not arguing that any of Maslonka's habeas claims are barred by procedural default"). Not so here, where the warden simply forfeited the opportunity to contest Whitman's procedural default. *See, e.g.*, *Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 677–78 (6th Cir. 2018) (explaining that waiver, unlike forfeiture, typically cannot be forgiven). We have discretion whether to consider a forfeited procedural default

argument. In this instance, the notable interests entwined in AEDPA weigh in favor of doing so.

Nor do we see any disadvantage to Whitman caused by the state's inaction. Whitman had an opportunity to address the default issue. *Arias v. Lafler*, 511 F. App'x 440, 444 (6th Cir. 2013) (citing *Howard v. Bouchard*, 405 F.3d 459, 476 (6th Cir. 2005)). In fact, he highlighted the issue in his opening brief on appeal and raised it again in his reply. As in *Arias*, where the prisoner was able to respond to the state's procedural default argument in his reply, one reason why we reached the procedural default question, *id.*, here too there was no evidence of gamesmanship by the state. And, as already explained, there are good reasons to enforce the doctrine of procedural default in this instance.

* * *

The judgment is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT,
N.D. OHIO

Case No. 5:19-cv-01818

RICHARD STANTON WHITMAN,

Petitioner,

v.

WARDEN DAVID W. GRAY,

Respondent.

Signed 09/08/2021

OPINION & ORDER

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Petitioner Richard Stanton Whitman is presently serving a 21-year to life sentence for murder with a firearm specification and for having a weapon while under a disability.[1]

Under 28 U.S.C. § 2254, Whitman filed a pro se petition for a writ of habeas corpus.[2] Warden Gray filed a return.[3] Petitioner Williams filed a traverse.[4] After

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[1] Doc. 8-1 at 37–48.

[2] Doc. 1.

[3] Doc. 8.

[4] Doc. 25.

an automatic referral,[5] Magistrate Judge Parker filed a Report and Recommendation, recommending that this Court deny Whitman's petition.[6] Petitioner objected to most of the Report and Recommendation.[7] This Court reviews the objected-to portions de novo.[8]

For the following reasons, the Court OVERRULES Petitioner's objections, ADOPTS the reasoning of the Report and Recommendation in part[9] and the conclusions in full, and DENIES Whitman's habeas corpus petition.

I. Background

Petitioner Whitman shot and killed David Eadie. Despite Whitman's claim that he acted in self-defense, an Ohio jury found him guilty of murder with a firearm specification and found him guilty of having a weapon while under a disability.[10]

Previously, Whitman unsuccessfully challenged his conviction in state court through direct and collateral appeal.[11]

Now, Whitman challenges his conviction in federal court under 28 U.S.C. § 2254. In his habeas corpus petition, Whitman raises ten grounds for relief.[12]

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[5] Local Rule. 72.2.

[6] Doc. 41.

[7] Doc. 48.

[8] 28 U.S.C. § 636(b)(1)(C).

[9] In evaluating Petitioner's Ground One claim, this Court applied the "substantial and injurious effect" standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

[10] Doc. 41 at 3.

[11] *Id.* at 3–18.

[12] Doc. 1.

Magistrate Judge Parker addressed each of these grounds in a Report and Recommendation.[13]

Petitioner Whitman objects to Magistrate Judge Parker's Report and Recommendation as to Grounds One, Two, Three, Six, Nine, and Ten.[14] This Court addresses each of Whitman's objected-to grounds in turn.

II. Legal Standard

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[15] governs federal courts' review of a state prisoner's habeas corpus petition. Under AEDPA, federal courts may only consider claims that a petitioner is in custody in violation of the United States' Constitution, laws, or treaties.[16]

Further, AEDPA prohibits federal courts from granting a habeas petition for any claim the state court adjudicated on the merits unless the state court's decision:

> (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 upon an unreasonable determination of facts in light of the evidence presented in the State court proceeding.[17]

Before reviewing a habeas petition claim on the merits, federal courts generally consider whether the claim was procedurally defaulted in the state courts.

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[13] Doc. 41.

[14] Doc. 48.

[15] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[16] 28 U.S.C. § 2254(a).

[17] *See* 28 U.S.C. § 2254(d); *see also Miller v. Francis*, 269 F.3d 609, 614 (6th Cir. 2001).

Procedural default may occur in two ways. First, a claim is procedurally defaulted if the habeas petitioner failed to comply with state procedural rules while presenting his claim to the appropriate state court, and the state court enforced that rule and declined to reach the merits of Petitioner's claims.[18]

Most often, however, procedural default occurs because a petitioner does not raise a claim while in state court proceedings and the state's *res judicata* rules cause the claim's forfeiture.[19] Under Ohio *res judicata* rules, if a petitioner "failed to raise a claim on direct appeal, which could have been raised on direct appeal, the claim is procedurally defaulted."[20]

To overcome procedural default, a petitioner must show: (1) cause for the default and actual prejudice resulting from the alleged federal law violation, or (2) that there will be a fundamental miscarriage of justice if the court does not consider the claim.[21] "Cause" is a legitimate excuse for the default, and "prejudice" is actual harm caused by the alleged constitutional violation.[22] If a petitioner fails to show cause for their procedural default, a court need not consider prejudice.[23] Finally, "a fundamental miscarriage

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[18] *Williams v. Anderson*, 460 F.3d 789, 805–806 (6th Cir. 2006).

[19] *Id.* at 806 (citing *Engle v. Isaac*, 456 U.S. 107, 125 n. 28, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)).

[20] *Id.*

[21] *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006) (citing *Coleman v. Thompson*, 501 U.S. 722, 749–750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

[22] *Castro v. Harris*, No. 1:18-CV-1167, 2018 WL 3829101, at *3 (N.D. Ohio Aug. 13, 2018).

[23] *See Smith v. Murray*, 477 U.S. 527, 532, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986).

of justice" is the conviction of one who is "actually innocent."[24]

III. Discussion

A. Petitioner Whitman's Ground One Is Not Cognizable.

In Ground One, Petitioner Whitman claims that the trial court's refusal to instruct the jury on the Ohio Castle Doctrine violated his federal due process rights.[25] Further, Whitman argues it was a structural, rather than harmless, constitutional error.[26]

In a federal habeas action, errors in state-law jury instructions are generally not reviewable[27] because a federal habeas court does not act as an appeal court for state court decisions on state law questions.[28] Therefore, to the extent that Whitman challenges the Ohio courts' decisions regarding the Ohio Castle Doctrine jury instructions, his claim is not reviewable in a federal habeas action.[29]

A state court ruling on an issue of jury instructions may, however, rise to the level of a due process violation if it, "subverts the presumption of innocence or relieves the state of its burden to prove every

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[24] *Lundgren*, 440 F.3d at 764 (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

[25] Doc. 1 at 5–6; Doc. 48 at 3–37.

[26] *Id.*

[27] *Lampley v. Bunting*, No. 1:13-CV-1102, 2013 WL 5670947, at *11 (N.D. Ohio Oct. 15, 2013) (citing *Wood v. Marshall*, 790 F.2d 548, 551 (6th Cir. 1986)).

[28] *Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

[29] Doc. 25 at 11–12, 49, 58–60.

element of a crime beyond a reasonable doubt."[30] This limited exception does not apply here.

At trial, Ohio and Whitman disagreed whether Whitman created the fight with the victim and whether Whitman reasonably believed that shooting the victim was his only choice to avoid great bodily harm or death.[31] The Ohio trial judge gave Whitman's requested self-defense jury instruction but did not give a Castle Doctrine instruction because Whitman was only temporarily at his sister's residence.[32] Whether Ohio's Castle Doctrine instruction applied is a quintessential state law question and the trial court's decision is not a due process violation.

Any error in not instructing the jury on the Castle Doctrine did not have a substantial and injurious effect or influence in determining the jury's verdict.

B. Petitioner Whitman's Ground Two Is Procedurally Defaulted.

In Ground Two, Petitioner Whitman claims that the trial court erred when it admitted certain prior bad act evidence in violation of the Ohio and Federal Rules of Evidence.[33]

While Whitman raised this evidentiary issue in his direct appeal to the Ohio Court of Appeals,[34] he

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[30] *Brown v. Jess*, No. 19-CV-1010-BBC, 2021 WL 681097, at *4 (W.D. Wis. Feb. 22, 2021) (citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)). *See Wood*, 790 F.2d at 551 ("The petitioner must show more than that the instructions are undesirable, erroneous, or universally condemned.").

[31] Doc. 8-1 at 158.

[32] *Id.* at 155–157.

[33] Doc. 1 at 7.

[34] Doc. 8-1 at 161–163.

omitted it from his memorandum in support of jurisdiction to the Ohio Supreme Court.[35] Therefore, Whitman's claim is procedurally defaulted.[36] Moreover, Whitman cannot establish cause to overcome the default. It is insufficient that Whitman was acting pro se and may have received incorrect legal advice from another inmate.[37]

C. Petitioner Whitman's Ground Three Is Procedurally Defaulted.

In Ground Three, Petitioner Whitman claims that his trial counsel was ineffective for failing to investigate evidence that police altered the crime scene by moving the victim.[38]

Though Whitman could have raised this ineffective-assistance-of-trial-counsel claim on direct appeal, he failed to do so.[39] Therefore, Whitman procedurally defaulted the claim.

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[35] *Id.* at 174–187.

[36] *Williams*, 460 F.3d at 806 ((holding a claim procedurally defaulted where the petitioner raised it before the Ohio Court of Appeals but not the Ohio Supreme Court while pursuing direct review) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999))).

[37] Doc. 1 at 7–8; *See Hannah v. Conley*, 49 F.3d 1193, 1197 (6th Cir. 1995) (holding a petitioner's *pro se* status and ignorance of their rights do not constitute cause excusing procedural default).

[38] Doc. 1 at 8–9.

[39] On collateral appeal, the Ohio Court of Appeals applied *res judicata* as an alternative ground for denying relief. Doc. 8-1 at 354.

To establish cause to overcome his procedural default, Whitman points to the *Martinez / Trevino* framework.[40] In *Trevino*,[41] the Supreme Court held that:

> [W]here ... [a] state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, our holding in Martinez applies[.][42]

In *Martinez*,[43] the Court held that:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

But "Martinez does not apply [to Ohio habeas petitioners] because Ohio permits ineffective-assistance-of-trial-counsel claims on direct appeal" making the exception inapplicable.[44] In Ohio, defendants receive access to court-appointed or privately retained counsel for the direct appeal from their conviction. *Martinez* does not apply to Ohio's scheme.

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[40] Doc. 48 at 50.

[41] *Trevino v. Thaler*, 569 U.S. 413, 429, 133 S.Ct. 1911, 185 L.Ed.2d 1044 (2013).

[42] *Id.* (citing *Martinez v. Ryan*, 566 U.S. 1, 17, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012)).

[43] *Martinez v. Ryan*, 566 U.S. 1, 17, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).

[44] *Williams v. Mitchell*, 729 F.3d 606, 615 (6th Cir. 2015).

Further, *Trevino* does not apply in this case. Whitman argues that he could not have raised this ineffective-assistance-of-trial-counsel claim on direct appeal because it would require evidence outside the trial record.[45] It is true that where there is insufficient evidence for a direct appeal court to determine whether trial counsel's assistance was ineffective, the claim is not procedurally defaulted.[46]

In his traverse, however, Whitman admits that the state played a trial bodycam video showing police moving the victim's body.[47] Further, photographs of the body at the scene were introduced at trial.[48] Relying on the video and photographs in the trial record, Whitman could have argued on direct appeal that his trial counsel was ineffective for failing to investigate police crime scene tampering.

Accordingly, the *Martinez*/*Trevino* framework is inapplicable and does not excuse Whitman's procedural default.

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[45] Doc. 48 at 50.

[46] *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 274–277 (6th Cir. 2019) (Ohio Court of Appeals deemed direct appeal an inappropriate forum for an ineffective-assistance claim based on trial counsel's pending criminal indictment because the record lacked sufficient evidence); *State v. Cooperrider*, 4 Ohio St.3d 226, 448 N.E.2d 452, 454 (Ohio 1983) (holding direct appeal was an inappropriate forum for an ineffective-assistance claim where the allegations of ineffectiveness are based on facts not appearing in the record).

[47] Doc. 25 at 76 ("When Whitman saw the video being played at trial showing the police moving Eadie after declaring him D.O.A. and how much the states theory had been based on Eadies [sic] location and position after he had been moved Whitman tried to get his trial counsel to address that issue, trial counsel ignored Whitman's pleas.").

[48] Doc. 8-2 at 244–245.

Likewise, an ineffective-assistance-of-appellate counsel claim cannot constitute cause to excuse his procedural default as that claim would also be procedurally defaulted.[49]

D. Petitioner Whitman's Ground Six Is Procedurally Defaulted.

In Ground Six, Whitman claims that his appellate counsel was ineffective for failing to communicate with Whitman and raise certain claims.[50]

This claim is procedurally defaulted because Whitman failed to fairly present it at each stage of Ohio's review process.[51] While Whitman moved to replace appellate counsel and "restrict" counsel,[52] Whitman did not raise these arguments in his memorandum to the Ohio Supreme Court when asking it to accept jurisdiction.[53] Nor did Whitman raise these arguments in his subsequent post-conviction proceedings.[54]

Whitman has not established cause to excuse this procedural default.[55]

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[49] Doc. 1; Doc 25.

[50] Doc. 1 at 13–14.

[51] *Wagner v. Smith*, 581 F.3d 410, 418 (6th Cir. 2009).

[52] Doc. 41 at 61.

[53] Doc. 8-1 at 174–187.

[54] *Id.* at 235–246, 285–296, 341–345, 359–367.

[55] Doc. 1 at 13–15; Doc. 48 at 51–52. *See Davila v. Davis*, —— U.S. ——, 137 S. Ct. 2058, 2065, 198 L.Ed.2d 603 (2017) (declining to extend the *Martinez/Trevino* exception regarding procedural default to claims of ineffective assistance of appellate counsel).

E. Petitioner Whitman's Ground Nine Is Not Cognizable.

In Ground Nine, Petitioner Whitman claims that Ohio Revised Code § 2901.05 should apply retroactively to him.[56]

The retroactivity of a state statute is a matter of state law and is not reviewable on federal habeas review.[57] The Ohio Court of Appeals' ruling that the changes in Ohio Revised Code § 2901.05 are not retroactive, thus, does not raise a cognizable claim.[58]

Whitman responds that his conviction had not yet become final at the time Ohio Revised Code § 2901.05 was revised. But the revised statute went into effect on March 28, 2019 and Whitman's conviction became final on November 7, 2018, when the Ohio Supreme Court declined to accept jurisdiction over his appeal.[59]

F. Petitioner Whitman's Ground Ten Is Not Cognizable.

In Ground Ten, Petitioner Whitman claims that the cumulative errors in the trial jury instructions denied him a fair trial and violated his due process rights.[60]

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[56] Doc. 1 at 18.

[57] *Chapman v. Tim LeMaster*, 302 F.3d 1189, 1198 (10th Cir. 2002); *Messenger v. McQuiggin*, No. 2:09-cv-13860, 2010 U.S. Dist. LEXIS 69871 at *21, 2010 WL 2772312 (E.D. Mich. June 15, 2010).

[58] Doc. 8-1 at 587–588.

[59] *Id.* at 234.

[60] Doc. 1 at 20.

In the Sixth Circuit, cumulative error claims are not cognizable on federal habeas review.[61] In his objection, Whitman does not, and cannot, establish otherwise.

IV. Conclusion

For the foregoing reasons, the Court OVERRULES Petitioner's objections, ADOPTS the reasoning of the Report and Recommendation in part and the conclusions in full, and DENIES Whitman's habeas corpus petition.

Moreover, the Court ISSUES a certificate of appealability for Grounds One and Three.[62] The Court DECLINES to issue a certificate of appealability for all other grounds.[63]

IT IS SO ORDERED.

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[61] *Williams*, 460 F.3d at 816 ("[T]he law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue.").

[62] 28 U.S.C. § 2253(c)(2); 28 U.S.C. § 2254(c)(3).

[63] 28 U.S.C. § 2253(c)(1)(A).