24-5652

IN THE SUPREME COURT OF THE UNITED STATES

1 First Street, N. E.

Washington, D.C. 20543

Tiffany Smith
Petitioner,

No.: _____

v.

WARDEN, DAYTON
CORRECTIONAL INSTITUTION,
Respondent.

On Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Sixth Circuit – Case No.: 24-3251
Citation: Smith v. Smith,
2024 U.S. App. Lexis 16227

PETITION FOR WRIT OF CERTIORARI

Tiffany Smith **Date:** SEP-18-2024
TIFFANY SMITH, pro se (N-104181)

Dayton Correctional Institution
4104 Germantown Pike
Dayton – Ohio 45417

QUESTIONS PRESENTED

QUESTION 1 – Within the context of **SUFFICIENCY** of Jackson v. Virginia, 443 U.S. 307, at 317 n.10, When the defense of **self-defense** and **provocation** have been put in issue and have been proved by a preponderance of the evidence established by the testimony of the defendant, and when the State failed to controvert the **THEORY OF INNOCENCE**, within the meaning of Engle v. Isaac, 456 U.S. 107 at 122, Martin v. Ohio, 480 U.S. 228 at 234, Holland v. United States, 348 U.S. 121 at 135-139, Musacchio v. United States, 577 U.S. 237 at 248 HN8, AND it follows that the Defendant has met its burden of showing that there is no genuine issue of fact, AND it follows that unless the prosecution offers some concrete evidence from which a reasonable jury could return a verdict in favor of the State, as explained by the Sixth Circuit in Austin v. Bell, 938 F.Supp. 1308 at HN3 at 1314-1315, then WHETHER the Appellate court is precluded from affirming the conviction by merely asserting that the jury might disbelieve the defendant's denial of actual malice, AND then WHETHER it is a due process violation of the **Fourteenth Amendment** to the USC to relieve the State of its own burden of producing in turn evidence that would support a jury verdict, AND WHETHER jury discretion includes the power to return an unreasonable verdict of guilt, within the context of Jackson, 443 at 317 n.10.

QUESTION 2 – When there is uncontradicted evidence of both **self-defense** and **provocation** raised by preponderance of the evidence through the testimony of the defendant, within the meaning of Engle v. Isaac, 456 U.S. 107 at 122, Martin v. Ohio, 480 U.S. 228 at 234, Holland v. United States, 348 U.S. 121 at 135-139, AND when the testimony of the State witnesses is impeached by a video evidence offered by the State, AND when the TRIAL COUNSEL fails to request the jury instruction on manslaughter before the verdict, but at the sentencing hearing the TRIAL COUNSEL makes a MOTION FOR ACQUITTAL on the higher charge based on evidence of provocation, AND when the TRIAL COURT fails to give a jury instruction on manslaughter **sua sponte**, within the meaning of Mathews v. United States, 485 U.S. 58 at 63, THE QUESTION for the Court is WHETHER it is a denial of due process of the **Fourteenth Amendment** to the USC for the TRIAL COURT to deny a **Criminal Rule 29 Motion** made at the sentencing hearing, when both defenses are uncontradicted and supported by the record, AND additionally WHETHER counsel's failure to make a Motion for Acquittal prior to the verdict violates its duty to provide effective assistance as guaranteed by the **Sixth Amendment** to the USC, AND WHETHER it is a denial of due process of the **Fourteenth Amendment** to the USC within the context of 2254(d)(2) for the APPELLATE COURT to invoke "INCONSISTENT THEORIES" to reject the defense of PROVOCATION to reduce murder to manslaughter when the uncontradicted defense is supported by the record?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is in the subject of this petition is as follows:

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TABLE OF AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 2024 U.S. App. Lexis 16227; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[X] reported at 2024 U.S. Dist. Lexis 35212; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[X] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the State Court of Appeals court appears at Appendix D to the petition and is

[X] reported at State v. Smith, 2020-Ohio-4976; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was JUL-02-2024.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment to the USC (Due Process)

Sixth Amendment to the USC (Ineffective Assistance of Counsel)

28 USCS 2254(d)(1)

28 USCS 2254(d)(2)

STATEMENT OF THE CASE

AUG-08-2017 - Defendant was indicted on 2 countes of murder and 2 counts of felonious assault each with a firearm specification (ECF# 10/EX.1). Defendant was found guilty on all counts and specifications (EX.4)

AUG-15-2019 - The trial judge denied a motion to acquit or convict on the lesser offense of voluntary manslaughter and sentenced defendant to an aggregate sentence of 21 years to life (EX. 5, 6)

OCT-21-2020 - Ohio First District Court of Appeals affirmed her conviction and sentence.

DEC-03-2020 - Petitioner filed an Application APP.R.26(B) to reopen her direct appeal raising Ineffective Assistance of Counsel.

MAY-19-2021 - The Ohio Court of Appeals denied her Application to Reopen APP.R.26(B) (EX.23), and because Petitioner did not receive a copy of the decision, she failed to appeal further to the Ohio Supreme Court.

APR-13-2022 - The Petitioner filed her habeas court in the USDC/Ohio/S.D. (ECF#1).

DEC-18-2023 - The USDC issued a substituted Report and Recommendation on remand from the USCA (ECF#30).

FEB-29-2024 - The USDC issued its final decision.

MAR-25-2024 - Petitioner filed a Notice of Appeal to the USCA for the Sixth Circuit (Case No. 24-3251)

JUL-02-2024 - The USCA denied a COA without giving Petitioner a chance to file a brif, as the case manager instructed Petitioner over the phone not to file her brief in support of her Motion for a COA until the Sixth Circuit ruled on her Motion for Pauperis status, which caused her prejudice as the Sixth Circuit denied her COA without reading her legal arguments.

JUL-16-2024 - Petitioner filed a Motion for Rehearing and because she has not received any filing confirmation to this date, Petitioner has reasons to believe that the Sixth Circuit never received her Motion.

REASONS FOR GRANTING THE PETITION

SUFFICIENCY OF THE EVIDENCE ANALYSIS UNDER 2254(d)(1)

SUFFICIENCY OF THE EVIDENCE ANALYSIS UNDER 2254(d)(2)

1. This case must be decided under JACKSON, at [*317 n.10]

The principal question this case presents is whether as to each one the Defendant's explanation of her Theory of Innocence was sufficiently disproved by the State pursuant to its duty to disprove it beyond a reasonable doubt (because the defense negates the element of the offense), in justice to each, a somewhat lengthy discussion of the Theory of Innocence is necessary, and implicates ***HOLLAND at 135-139***, ***ENGLE at 122***, and ***MARTIN at 234***, which the Final Decision by the USDC failed to do [ECF#34/PageID#1920-1929].

Insufficiency under JACKSON-HOLLAND analysis, the prosecution must satisfy the requirement to disprove the specific theory (lead) raised by the Theory of Innocence, especially when the defendant testifies on its own behalf and negates an element of the offense charged. Beyond that, the prosecution is not under the duty to disprove a Theory of Innocence that was not raised by the defense. In other words, the prosecutor is only under the duty to disprove the specific theory (lead) which raises strong reasonable doubt by a preponderance of the evidence, which applies full force when the defendant testifies on its own behalf and negates an element of the offense charged.

➢ CAUTION - APPLES AND ORANGES

JACKSON at 319 **(Validity of the Hypothesis of Innocence, tied to Holland at 138)**

and

JACKSON at 326 **(Meaning of Circumstantial Evidence, tied to Holland at 140)**

(See *United States v. Moya, 721 F.2d 606 (1983CA7) at [*8])*

➢ JACKSON at 326 is not the rule of this case

("Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's [2793] challenge be sustained.**

That theory the Court has rejected in the past. *Holland v. United States, 348 U.S. 121, 140*.")

2. *Jackson v. Virginia, 443 U.S. 307, at 317 n.10*

[CRIMINAL RULE 29]

(Beyond-a-reasonable-doubt Standard)

"***The practice in the federal courts of entertaining properly preserved challenges to evidentiary sufficiency, see Fed. Rule Crim. Proc. 29, serves only to highlight the traditional understanding in our system that the application of the beyond-a-reasonable-doubt standard to the evidence is not irretrievably committed to jury discretion. *** The power of the factfinder to err upon the side of mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty. *** Any such premise [that a jury has power to enter an unreasonable verdict of guilty] is wholly belied by the settled practice of testing evidentiary sufficiency through a motion for judgment of acquittal and a postverdict appeal from the denial of such a motion."

In other words, the jury is not free to believe what was not proved, nor is it free to disbelieve a defense which was uncontroverted.

3. The jury has no power to enter an unreasonable verdict of guilty

This case hinges on whether it was plastic or a glass bottle. Because the State failed to present sufficient conflicting evidence to prove it was NOT a glass bottle, beyond a reasonable doubt, the Opinion by the OCA is contrary to ***JACKSON at 317 n.10***, ***ENGLE at 122***, ***MARTIN at 234***, ***HOLLAND at 135-139***, and an unreasonable conclusion based on the facts on the records.

The record contains no evidence beyond a reasonable doubt that it was not a glass bottle, under 2254(d)(2). Period.

Therefore, through her testimony, Petitioner has sustained her burden to prove by a preponderance of the evidence that she had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape from such a danger was in the use of such force.

Defendant has met her burden under ***HOLLAND at 135-139*** to furnish reasonable leads susceptible of being investigated.

4. ***Martin v. Ohio (1987), 480 U.S. 228 @ [*234]***

[*234] *** When the prosecution has made out a prima facie case and survives a **motion to acquit,** the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. Of course, if such doubt is not raised in the jury's mind and each juror is convinced that the defendant purposely and with prior calculation and design took life, the **killing will still be excused if the elements of the defense are satisfactorily established**. ***

5. **It also follows that it was an Abuse of Discretion to deny her Motion for Acquittal.**

Walker v. Engle, 703 F.2d 959 (1983), held that:

(1) Evidentiary Rulings Abuse of Discretion is a denial of fundamental fairness for habeas corpus relief;

(2) Cumulative Effect of Trial Errors is a Denial of a Fair Trial;

(3) No comity is owed to State procedural bar without a record foundation.

6. **TIME TO END HIS CHARADE** - The burden of proof to prove absence of provocation or self-defense is no stranger to the Sixth Circuit. The Sixth Circuit refuses to end this charade and recognize a due process principle that the Third Circuit (Gov't of V.I. v. Smith (1991), 949 F.2d 677), and the Second Circuit have recognized a long time ago:

United State v. Alexander (1972), 471 F.2d 923 at 944 (2nd Cir.)
(PROVOCATION)

*[*944]"More important, we cannot ignore that instructions of this form have for years gone uncriticized by scholars, defense lawyers, experienced trial judges, and – we do not hesitate to add – appellate judges with many years on the bench. Therefore, we make our holding on this issue prospective only. *** **when a defense to *** murder – adequate provocation***has been put in issue, the Government must prove its absence beyond a reasonable doubt**."*

7. *Ramos v. Louisiana (2020), 140 S. Ct. 1390 at 1397-1398*

JACKSON at 317 n.10 mandates scrutiny into jury discretion only when it is obvious that the jury verdict is contrary to law [***HOLLAND, MARTIN, ENGLE***] established by the USSC which guarantees the fundamental protection of the due process of law.

8. Shine-Johnson v. Warden, 2021 U.S. Dist. LEXIS 59808 at 69-70 citing MARTIN

[*69-70] *"*** H.B. 228 *** provides that, if, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, *** the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense ***. Ohio Revised Code § 2901.05. In other words, the State only has to prove the absence of self-defense if the evidence raises that issue. Obviously there are many cases of murder where no evidence of self-defense is presented. And the fact that the legislature requires a fact to be proved beyond a reasonable doubt does not make that fact an element of the crime. The General Assembly is [*70] free to require a higher degree of proof of a fact if it sees fit to do so as a matter of public policy."*

Appling these principles, the logical conclusion is that, Petitioner has testified on her own behalf, her testimony was uncontroverted, and it raised reasonable doubt by preponderance of evidence sufficient to entitle her to a judgment of acquittal as a matter of law.

9. THE CASE BELOW IS A DISFIGUREMENT OF DUE PROCESS IN OHIO AND IT MUST BE OVERRULED BY THE SIXTH CIRCUIT

State v. Messenger (2022), 171 Ohio St. 3d 227
(A ruling in Violation of JACKSON and HOLLAND)

Overview: *In a murder case, the Supreme Court of Ohio held that the state's rebuttal of a defendant's claim of self-defense was not subject to review under the sufficiency-of-the-evidence standard; instead, R.C. 2901.05(B)(1) provides that the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense.*

HN13 Burdens of Proof, Prosecution. The sufficiency-of-the-evidence standard of review applies to a defendant's burden of production and a manifest-weight-of-the-evidence standard of review applies to the state's burden of persuasion. A sufficiency challenge disputes whether a party met its burden of production at trial,

and a manifest-weight challenge disputes whether a party carried its burden of persuasion. **[FALSE !!!!]**

The USCA must keep a close watch on Ohio, as it has recently issued an opinion designed to subvert due process as mandated by JACKSON and TIBBS, as it refuses to review and reverse Sufficiency Claims related the defendant's Theory of Innocence.

10. Courts must not disguise insufficiency analysis as weight of the evidence!

Tibbs v. Fla., 457 U.S. 31

*[*45] *** LEdHN[4A] [4A]LEdHN[5A] [5A] Second, our decision in Jackson v. Virginia, 443 U.S. 307 (1979), [****27] places HN14 some* ***restraints on the power of appellate courts to mask reversals based on legally insufficient conflicting evidence as reversals grounded on the weight of the evidence****. We held in Jackson that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt.*

11. Defense of sudden rage fully negates elements of the crime? Yes!!! Then, Petitioner is entitled to habeas corpus review of her Sufficiency Claim based on *JOHNIGAN v. ELO @ [611-612].*

*Johnigan v. Elo, 207 F. Supp. 2d 599 (2002, 6th Cir.), at [*611-612]*

*" [*611] *** An alternative [**31] way to gain habeas review is to show that a defense raised fully "negates an element" of a crime; a state must then disprove that defense as part of its burden of proof. See* ***Engle v. Isaac, 456 U.S. 107, 122****. *** A contention that a state failed to disprove this type of defense raises [*612] a colorable constitutional claim appropriate for habeas review."*

12. The final Opinion is unreasonable under 2254(d)(1): *Jackson v. Virginia @ 317 n.10*

The final Opinion consists of only 293 words, and 19 lines. That is essentially half a page. It contains no findings of facts connected to the moment of the shooting, which was a separate incident from the fight involving the teenager. The ruling is dismissive, conclusory, and fails to engage in a comprehensive analysis of the facts, and ignores the principles of ***ENGLE, MARTIN,*** and ***HOLLAND***.

Besides, ***Nash v. Eberlin, 258 FED. Appx. 761 at n.4*** instructs the courts to construe pro se MWE as Sufficiency Claim; and ***Tibbs v. Florida, 457 U.S. 31 at [*45]*** cautioned courts to be aware of courts employing manifest weight of evidence to "mask" a claim of Sufficiency under JACKSON.

[ECF#34/PageID#1921-Sufficiency of the Evidence] *Petitioner argues in her first objection that the state did not disprove her affirmative defenses — that she acted in self-defense and in defense of her daughter. (Objections, Doc. 33, Pg. ID 1842-45.)* ***When an affirmative defense merely excuses conduct rather than contests the elements of the offense, "the Government has no constitutional duty to overcome the defense beyond a reasonable [*3] doubt."*** ***Smith v. United States, 568 U.S. 106, 110****, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Here, self-defense and defense of another do not contest any elements of Petitioner's convictions. See Ohio Rev. Code § 2903.11(A)(1)-(2) (assault); Ohio Rev. Code § 2903.02 (A), (B) (murder); see also State v. Barnes, 94 Ohio St. 3d 21, 2002- Ohio 68, 759 N.E.2d 1240 (Ohio 2002). Thus, the Government had no constitutional duty to disprove those defenses.* ***Smith, 568 U.S. at 110****.*

In any event, Petitioner's claims are meritless. The state court of appeals noted that a jury could have found that ***Petitioner was at fault because she entered the area with a gun after the situation defused and that Petitioner's daughter was at fault by initiating the physical fight that prompted Petitioner's intervention****. See State v. Smith, 2020 Ohio 4976, 2020 WL 6158467, at *7-.9.* ***Petitioner challenges how the state court of appeals analyzed the facts, but this Court may not "reweigh the evidence . . .*** *or substitute [its] judgment for that of the jury." Smith v. Nagy, 962 F.3d 192, 205 (6th Cir. 2020) (citation omitted). It is not unreasonable to conclude that a rational jury could have convicted Petitioner. Id. Thus, the Court rejects Petitioner's argument as to these claims.*

The Opinion above ignores that in Ohio, self-defense is a statutory defense defining its elements in ORC 2901.05 and the burden shifts to the State if the defendant testifies and establishes the defense by a preponderance of the evidence.

13. The USDC final decision is unreasonable under 2254(d)(2)

The Court failed to distinguish a "fight between the teenagers", and

"the adult KING attacking the teenager T.J., and

then KING repeating her pattern of conduct and attacking Petitioner"

Petitioner's OBJECTIONS [ECF#33] were never taken into consideration or discussed in the Final Decision [ECF#34].

The Final Decision is preposterous as it incorrectly suggests that Petitioner is asking the court to reweigh evidence.

It is even more preposterous that the Final Decision (ECF#34) constitutes of mere half-a-page, which never made any reference to Petitioner's OBJECTIONS (ECF#33).

VOID OR VOIDABLE RULING – The Final Decision does not seem to meet the standard of reporting and analysis followed by all the other federal jurisdictions all over the country and therefore, it warrants close scrutiny by the United States Court of Appeals for the Sixth Circuit.

The daughter may have hit C.M. (the teenager) first, but KING (the adult) initiated he fight with T.J. (the teenager) every single time and provoked and triggered the arrival of SMITH, who intervened only when KING attacked her daughter, the "teenager".

It is important to distinguish between "the fight between the teenagers" and "the fight between KING and the teenager T.J.", which was the sole fact that triggered SMITH to intervene because KING (the adult), was fighting the teenager T.J.

Neither SMITH nor the teenager T.J. ever initiated any physical fight with the adult KING.

SMITH was provoked and triggered by KING (over the phone) to come to the drive-thru scene.

14. **The USDC failed to engage in a thorough discussion of the State's evidence, presented below.**

15. **"Petitioner was at fault because she entered the area with a gun after the situation defused."**

We already know, from the records, the sequence of the events, therefore, the fact that Petitioner entered the situation with a gun did not trigger the fight to escalate.

Petitioner had the right to carry a gun. Petitioner had a similar prior incident with another daughter being burned with acid and becoming disfigured for life (Tr. 708-711). Carrying the gun does not escalate the incident, the same way that police officers carry their guns, for protection.

JACKSON @ 317 n.10 does not condone unreasonable jury verdicts and the courts must recognize and apply that principle where there is a legitimate issue of self-defense, like Petitioner's case. A trial is not a ritual by 12 men. A trial must elicit the truth.

The Court failed to discuss the OBJECTIONS point by point, therefore, the court simply regurgitated the conclusory opinion of the State court, failed to make independent findings of facts to support a rejection of Petitioner's contentions, and therefore perpetuated an unreasonable conclusion of fact and law.

Justice is not supposed to be blind. Justice is supposed to be fair. The District Court cannot refuse to look at the evidence that is on the record, which does not support the conclusion of the State court.

HERE ARE THE FACTS...

16. **The records prove that the victim started the incident by her own words.**

King: "go get your retarded mama"

King: "Little girl, go get your mama ... I'll beat you up"

R&R/ECF#30/Citing/OCA/{¶5} Bryant testified that T.J. called Smith during this argument. According to Bryant, she knew T.J. was on the phone with her mom "[b]ecause she was on the phone saying *** [C.M.'s] mother and aunt are up here [*7] messing with me." Bryant testified that when she heard T.J. on her phone, she yelled at T.J., "**Well, go get your retarded mama**." Bryant acknowledged that she later told police that King was "**[c]ussing [T.J.] out like, 'Little girl, go get your mama** *** And you're not going to kick my car *** **I'll beat you up**.'" After a drive-thru employee intervened, King and Bryant got back into the car, and King talked to another employee about purchasing items.

17. **KING initiated the aggression to the teenager before Petitioner ever entered the scene.**

PER THE VIDEO EVIDENCE: R&R/ECF#30/Citing/OCA/{¶32} King appeared to kick off a sandal and take off a bracelet. At this point, Bryant got back into the car, and an employee began to move King toward her driver's door. King and T.J. were still speaking to each other as King got into the car.

18. **KING initiated the aggression to the teenager even after Petitioner entered the scene.**

PER THE VIDEO EVIDENCE: R&R/ECF#30/Citing/OCA/{¶37} As Bryant stood near her door, King ran around the back of the car and appeared to strike T.J. ***

19. **Was Petitioner's daughter at fault for initiating the physical fight with another teenager? No!**

The fight with another teenager was not what prompted Petitioner's intervention!

The State could not seriously argue that Petitioner **initiated the physical fight with KING** and it would be impermissible under **JACKSON @317 n.10** for the jury to believe these to be the true facts of the case, being that the records show that Petitioner had already disengaged [ECF#30, at 41, 42], and that **Bryant & King** (the adults) **initiated physical threats, and said, "*... go get your retarded mama ... Little girl, go get your mama ... I'll beat you up...*" :**

> R&R/ECF#30/Citing/OCA/{¶5} **Bryant testified that T.J. called Smith during this argument.** According to Bryant, she [King] knew T.J. was on the phone with her mom "[b]ecause she was on the phone saying *** [C.M.'s] mother and aunt are up here [*7] messing with me." **Bryant testified that when she [King] heard T.J. on her phone, she [King] yelled at T.J., "Well, go get your retarded mama."** Bryant acknowledged that she later told police that **King was "[c]ussing [T.J.] out like, 'Little girl, go get your mama *** And you're not going to kick my car *** I'll beat you up.'"** After a drive-thru employee intervened, King and Bryant got back into the car, and King talked to another employee about purchasing items.
>
> R&R/ECF#30/Citing/OCA/{¶41} **Smith put her gun back in her shirt as Bryant walked toward the car.**

Musacchio v. United States, 577 U.S. 237 (2016)

[*248] " * * * As explained above, HN18 LEdHN[18] [18]a statute-of-limitations [****19] **defense becomes part of a case only if the defendant puts the defense in issue. When a defendant presses a limitations defense, the Government then bears the burden of establishing compliance with the statute of limitations by presenting evidence that the crime was committed within the limitations period or by establishing an exception to the limitations period.** See Cook, supra, at 179, 21 L. Ed. 538. **When a defendant fails to press a limitations defense, the defense does not become part of the case and the Government does not otherwise have the burden of proving that it filed a timely indictment. When a defendant does not press the defense, then, there is no error for an appellate court to correct—and certainly no plain error."**

INCIDENT 1 WAS OVER! NOW, INCIDENT 2 STARTS:

(PER THE VIDEO EVIDENCE)

R&R/ECF#30/Citing/OCA/{¶41} As Bryant opened her car door, she appeared to see C.M. fighting in the rear of the drive-thru.

R&R/ECF#30/Citing/OCA/{¶42} Bryant, Smith, and King all walked toward the rear of the drive-thru toward the **girls' fight**. [Only the girls are fighting now! No adults!]

R&R/ECF#30/Citing/OCA/{¶42} **King [being the aggressor again in the second incident] opened a refrigerator and then approached Smith. As she did, she struck Smith [again, King is the aggressor in a separate incident with different animus] with an object twice.** King then bent forward and stumbled away from Smith toward the car, as Smith stepped backward out of the drive-thru.

We already know, from the records, that the daughter initiate the physical fight with another teenager, not with King. But that situation involving the daughter and King was defused. King started a second incident with the Petitioner, not involving the teenager, therefore, the victim was at fault for attacking Petitioner, after the situation involving the daughter was defused, and after Petitioner had already disengaged and moved to another location.

20. Here is the evidence being overlooked by the USDC [ECF#34]:

The jury was not well oriented by the trial court and was not paying sufficient attention to all the nuances of this case, (a) partially because of the prosecution misrepresenting the evidence, (b) partially because counsel's failure to help the jury to understand the evidence, and (c) partially because of the omission done by the "trial court in directing the jury in matters of fact and giving them great light and assistance, by his weighting the evidence before them, and observing where the question and knot of the issue lies, and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen" (***Capital Traction Co. v. Hof, 174 U.S. 1 at [*14]) (1899).***

21. The Court must pay attention to what was proved and also to what was NOT proved.

Petitioner is not asking the Court to reweigh the evidence because there is no credibility issue left after the State impeached its own witnesses with the videotape, nor there is conflict of evidence left for the jury to resolve related to the State witnesses' testimony in light of the videotape evidence (the better evidence). And most importantly, the videotape matches the testimony of the Petitioner.

Petitioner is not asking the Court to reweigh credibility evidence! Petitioner is instead urging the Court to do a thorough review of the evidence pursuant to ***JACKSON at 317 n.10***, to address the OBJECTIONS raised on the 10 pages (ECF#33/PageID# 1827-1857), and to discuss each OBJECTION in hope that we can come to the same logical conclusion that there is not sufficient evidence to reject Petitioner's legitimate claim of self-defense, or sudden passion by provocation.

Both defenses fit under the circumstances concerning the second incident involving only Smith and King, and not involving the teenager. Obviously, King started the aggression in both situations. Carrying a gun is not sufficient to escalates a situation. Guns are for self-defense, that is a legitimate purpose, and that is why police officers carry guns to situations.

22. ***Capital Traction Co. v. Hof, 174 U.S. 1 at [*13-14]) (1899)***

*"**Trial by jury,**" *** **is not merely a trial by a jury of twelve men** before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution [***878] on their verdict; **but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to [*14] instruct them on the law and to advise them on the facts, [****25] and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.***

*Lord Hale, in his History of the Common Law, c. 12, "touching trial by jury," says: "Another excellency of this trial is this, that **the judge is always present at the time of the evidence given in it. Herein he is able in matters of law, emerging upon the evidence, to direct them; and also, in matters of fact, to give them great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen.***

And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges.**" *** trial by jury, he says: "**It has the advantage of the judge's observation, attention and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury.**" *** **a jury, properly speaking, is an appendage of a court, a tribunal auxiliary to the administration of justice in a court, that a presiding law tribunal [*15] is implied, and that the conjunction of the two is the peculiar and valuable feature of the jury trial**; and, as a necessary inference, that a **mere commission, though composed of twelve [*27] men, can never be properly regarded as a jury. *** the word 'jury,' *** means a tribunal of twelve men, presided over by a court, and hearing the allegations, evidence and arguments of the parties.**" *** **A jury for the trial of a cause was a body of twelve men, *** well qualified and lawful men, disinterested and impartial, sworn to render a true verdict according to the law and the evidence given them; ***"***

23. **Petitioner challenges how the State court of appeals analyzed the facts? Absolutely!**

The final Opinion concludes that the USDC may not "reweigh the evidence . . . or substitute [its] judgment for that of the jury." (citing Smith v. Nagy, 962 F.3d 192, 205 (6th Cir. 2020). But Petitioner is not asking the Court to reweigh the evidence or to substitute its judgment for that of the jury.

Petitioner is not asking the Court to reweigh evidence, not asking to consider credibility of the witnesses, or resolve conflicts in testimony, or evaluate weight of evidence. No!

Petitioner is asking that the Court **review** her Sufficiency Claim under the framework of ***JACKSON @ 317 n.10***.

Again, **JACKSON at [317 n.10], the jury has no power to enter an unreasonable verdict of guilty**.

REWEIGH and REVIEW are two different concepts:

"Even if it is necessary to **review** and consider the evidence, a reversal of a judgment from a jury trial on grounds that the trial court should have granted a **directed verdict** is not a reversal on manifest weight of the evidence". *Eastley v. Volkman, 132 Ohio St. 3d 328*

USCS Fed. R. Civ. Rule 50

Rule 50. Judgment as a Matter of Law in a Jury Trial

De Novo Standard – Concerning the Theory of Innocence raised by the testimony of the Defendant, when evidence points but one way and is susceptible to no reasonable inferences which may support nonmoving party. (See *Chaffin v. Union Pac R.R. Co., 192 Fed. Appx. 739 (2006, 10th Cir.)*.

24. DIRECT VERDICTS – AS A MATTER OF LAW

Eastley v. Volkman, 132 Ohio St. 3d 328 at [P25]**

[P25]** HN13 Judgment as Matter of Law, Directed Verdicts - **Civ.R. 50(A) motions for directed verdict do not present factual issues but instead present questions of law**. The same is true for a **Civ.R. 50(B) JNOV motion**. The test to be applied by a trial court in ruling on a **motion for judgment notwithstanding the verdict** is the same test to be applied on a motion for a directed verdict. Faced with the question of sufficiency through a directed verdict motion, the court must determine whether any evidence exists on every element of each **claim** or **defense** for which the party has the burden to go forward. **Even if it is necessary to review and consider the evidence, a reversal of a judgment from a jury trial on grounds that the trial court should have granted a directed verdict is not a reversal on manifest weight of the evidence**.

25. DISMISSIVE, CONCLUSORY AND SPECULATIVE DECISIONS ARE NULL AND VOID

Courts should not accept as true Opinions that are dismissive, conclusory and speculative in nature [ECF#34], and which failed to make findings of facts and conclusion of law based on the content of the OBJECTIONS [ECF#33] raising legitimate challenges under 2254(d)(1) and 2254(d)(2) to both the OCA's Opinion and to the USDC's Substituted R&R [ECF#30], concerning the **Theory of Innocence** pursuant to **HOLLAND, ENGLE** and **MARTIN**. The USDC [ECF#34] strictly relied on the same dismissive, conclusory and speculative Opinion by the Ohio Court of Appeals. Two wrongs cannot make a right.

The entire Opinion [ECF#34] constitutes of 2,000 words, which in essence barely amounts to 4 pages. That is an insult in light of the lengthy OBJECTIONS [ECF#33], comprised of 131 pages.

26. "Case-or-Controversy Clause"

IF THE PROSECUTOR CANNOT DISPROVE THAT THE BOTTLE WAS GLASS, THEN THERE IS NOT CONTROVERSY! THE BOTTLE WAS GLASS.

The R&R [ECF#30] makes unreasonable findings of facts to support a rejection of the bona fide belief that it was a glass bottle.

(1) Uncontroverted Testimony of Petitioner, from the records.

R&R/ECF#30/Citing/OCA/{¶57} Smith argues on appeal that she had reasonable grounds to believe that she was in imminent danger of death "[b]ased on the fact that King would not stop beating [Smith's] daughter even after [King's] shirt and bra were torn off, *** and then went back to the car and cooler to grab an object to strike Ms. Smith and fight her, and did so[.]" However, on cross-examination, Smith admitted that when King approached her, she pulled the gun back out. Although Smith said she did not know she had been struck with a **plastic bottle**, Detective Illing testified that he observed no injuries of any sort on Smith, and Smith admitted that she did not have a scar on her head from being hit with the **bottle**. When shown the video of the incident, Smith admitted that after King dropped the **bottle**, it fell to the ground without breaking, [*24] and that T.J. had grabbed the same **bottle** and thrown it, and that the **bottle** had again struck the ground without breaking. Viewing the evidence in the light most favorable to the prosecution, we find that the jury could reasonably conclude that once Smith was hit with the **plastic bottle**, she knew it was plastic, and she knew that a **plastic bottle** was not capable of inflicting death or great bodily harm, so her belief was not objectively reasonable. Even if Smith's belief that she was in danger of death or great bodily harm was objectively reasonable, the jury could have rejected her testimony and concluded that Smith knew she had been struck with a **plastic bottle**.

Austin v. Bell, 938 F.Supp. 1308 at HN3 (CA6) (*"Clear and convincing standard of evidence was required to determine whether actual malice existed."* And Syllabus: *"State may not defeat a defendant's properly supported motion for summary judgment [within the meaning of* ***ENGLE at 122****, a Theory of Innocence negating the elements of the crime charged] . . . without offering any concrete evidence from which a reasonable jury could return a verdict in his favor and by merely asserting that the jury might disbelieve the defendant's denial of actual malice. The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict."*)

Applying ***AUSTIN***, the same reasoning also supports the conclusion that ***ENGLE at 122*** was violated because the Theory of Innocence and her testimony established clear and convincing evidence that Petitioner had a bona fide belief it was a bottle glass. The State may not defeat a defendant's properly supported motion for summary judgment without any concrete evidence from which a reasonable jury could return a verdict in favor of the State and by merely asserting that the jury might disbelieve the defendant's assertion of bona fide belief. The movant met its burden of showing that there is no genuine issue of fact concerning her Theory of Innocence (***Holland at 135-139***), therefore, the State is not thereby relieved of its own burden of producing in turn evidence that would support a jury verdict.

(1) Speculation is not evidence! From the records, how did Bryant know it was a plastic bottle?

R&R/ECF#30/Citing/OCA/{¶11} Bryant testified that until she saw a surveillance video of the incident, she did not know that as she and King went to break up the fight between C.M. and the other girls, King had grabbed a **plastic bottle** from a refrigerator and had struck Smith with it. Bryant testified, "I didn't even see that, I guess she went to attack [Smith] because she had her gun out."

(2) Speculation is not evidence! From the records, how did Sergeant Lind know it was a plastic bottle?

R&R/ECF#30/Citing/OCA/{¶15} Sergeant Lind testified that the drive-thru surveillance video showed that King grabbed a plastic 12-ounce soft drink bottle from a refrigerator and struck Smith with it and that Smith fired her gun, striking King. **He testified that the police did not recover the bottle because the drive-thru employees had already begun to clean up the scene.**

Holland v. United States, 348 U.S. 121, at [*136][HN7]

"When the government fails to show an **investigation** into the validity of leads furnished by the taxpayer, the trial judge may consider them as true and the government's case insufficient to go to the jury."

27. The ***JACKSON-HOLLAND*** sufficiency framework is that there must exist **conflicting evidence** whether or not it was a glass bottle to disprove that she had an honest belief that it was a glass bottle and she was in imminent or immediate danger of death or great bodily harm for the case to go to the jury. If there isn't, then Petitioner has made a **prima facie** case of SELF-DEFENSE and she is entitled to an acquittal of murder, as a matter of law.

28. **FIRST: IF** the Ohio appellate court fails to make findings of facts of **conflicting evidence** whether or not it was a glass bottle to disprove that she had an honest belief that it was a glass bottle and she was in imminent or immediate danger of death or great bodily harm, or that she started the physical fight, **THEN** Petitioner's conviction cannot stand due to **insufficient evidence to disprove** SELF-DEFENSE, as a matter of law, pursuant to ORC 2901.05 self-defense statute.

29. **THE SECOND CRITERIA IS: IF** the **testimony was contradicted by the State**, **THEN** it doesn't implicate **HOLLAND**, and the **JACKSON** analysis does not require the prosecution to disprove the defendant's defense beyond a reasonable doubt because there is sufficient evidence on the records to raise an **issue of fact** for the case to go to the jury.

30. **THE JURY ONLY DECIDES ISSUES OF FACT, NOT ISSUES OF LAW**. Whether Petitioner's uncontroverted testimony entitles her to an acquittal is a matter of law, not facts. By the way, the testimonies by Bryant R&R/ECF#30/Citing/OCA/{¶11} and Sergeant Lind at R&R/ECF#30/Citing/OCA/{¶15} is not sufficient to controvert her belief that the bottle was glass, because (1) their testimony was clearly based on "guess work", not evidence, (2) it was impeached by the very narration of the facts at {¶11} and {¶15}. Speculation is not evidence.

31. By the way, MANIFEST WEIGHT OF THE EVIDENCE analysis involves resolving conflicts in the evidence. It follows that IF there is not sufficient conflict of evidence concerning the issue of whether it was a glass bottle, THEN it follows that there is no issue for the jury to WEIGH or resolve. Given that there is no evidence beyond a reasonable doubt to establish that the bottle was not glass, or that she didn't act in sudden fit of rage, then it was unreasonable for the jury to enter a verdict of guilt, pursuant to ***JACKSON at 317 n.10***.

32. **It also follows that it was a Due Process Violation to deny her Motion for Acquittal.**

Walker v. Engle, 703 F.2d 959 (1983), held that:

(1) Evidentiary Rulings Abuse of Discretion is a denial of fundamental fairness for habeas corpus relief;
(2) Cumulative Effect of Trial Errors is a Denial of a Fair Trial;
(3) No comity is owed to State procedural bar without a record foundation.

33. **TIME TO END HIS CHARADE** - The burden of proof to prove absence of provocation or self-defense is no stranger to the Sixth Circuit. The Sixth Circuit refuses to end this charade and recognize a due process principle that the Third Circuit (***Gov't of V.I. v. Smith (1991), 949 F.2d 677***), and the Second Circuit have recognized a long time ago:

United States v. Alexander (1972), 471 F.2d 923 at 944 (2nd Cir.)

*[*944] "More important, we cannot ignore that instructions of this form have for years gone uncriticized by scholars, defense lawyers, experienced trial judges, and – we do not hesitate to add – appellate judges with many years on the bench. Therefore, we make our holding on this issue prospective only. *** **when a defense to *** murder – adequate provocation *** has been put in issue, the Government must prove its absence beyond a reasonable doubt**."*

34. United States v. Mitchell, 725 F.2d 832 (1983) (2nd Cir.)

*[*836] Apart from constitutional concerns, several considerations lead us to conclude that HN1 in federal criminal trials **the Government's burden in disproving at least one element of duress should be proof beyond a reasonable doubt. There is a grave possibility of juror confusion if a jury is instructed**, on the one hand, that the prosecution must prove all elements of the crime, including willfulness, beyond a reasonable doubt, and, on the other hand, **that the prosecution need only disprove duress by a preponderance of the evidence.** Such instructions can create an unacceptable risk that the jury will accept a preponderance of the [**10] evidence as sufficient to satisfy the Government's burden of proving willfulness beyond a reasonable doubt. Moreover, a **reasonable doubt standard for duress will lessen the risk that a jury will convict solely because of failure of a defense**, a consideration we have previously stressed in formulating federal rules of practice for jury instructions. See **United States v. Burse, 531 F.2d 1151, 1153 (2d Cir. 1976) (reversible error in federal prosecution to refuse defendant's request for a jury instruction that, even if alibi witnesses are disbelieved, burden of proof remains with the Government)**; see also **United States v. Corrigan, 548 F.2d 879, 881 (10th Cir. 1977)** (self-defense).*

We are not persuaded that juror confusion may be avoided simply by adding an admonition that, regardless of whether the jury disbelieves the duress evidence, the burden remains on the Government to establish every element of the crime beyond a reasonable doubt.

*Furthermore, HN2 we see no reason peculiar to the duress defense warranting departure from the general federal practice that once a criminal defendant satisfies an initial burden of producing sufficient evidence to [**11] warrant submission of a substantive defense to the jury,* ***the prosecution must disprove at least an element of that defense beyond a reasonable doubt****. 6Link to the text of the note See* ***United States v. Read, 658 F.2d 1225, 1236 (7th Cir. 1981) (withdrawal)****;* ***United States v. Corrigan, supra, 548 F.2d at 882*** *(self-defense); . . .* ***United States v. Alexander, 152 U.S. App. D.C. 371, 471 F.2d 923, 941-47 (D.C. Cir.) (provocation)*** *. . .*

*[**12] For these reasons we agree with the* ***Eighth*** *and* ***Ninth*** *Circuits that HN3* ***once the defense of duress is sufficiently placed in issue by the defendant,*** ***the prosecution must disprove the defense beyond a reasonable doubt****. United* ***States v. Campbell, 609 F.2d 922, 925 (8th Cir. 1979) . . .***

35. *Wright v. West (1992), 505 U.S. 277 @ [HN8][*297]*

WRIGHT teaches that **only when a reviewing court is faced with facts that support conflicting inferences**, that ***Jackson at 319*** mandates to consider the evidence in the light most favorable to the prosecution, **but only when there is conflicting evidence concerning the Theory of Innocence. By the way, Jackson at 326 is merely about Jury Instructions on Circumstantial Evidence adequacy to prove the prosecutor's Theory of Guilt. Let's not mix apples and orange.**

*[*297] In* ***Jackson @ [*326]*** *we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that "all of the evidence is to be considered in the light most favorable to the prosecution," 443 U.S. at 319 (emphasis in original); that the prosecution need not affirmatively "rule out every hypothesis except that of guilt,"* ***Jackson, at 326****; and that a reviewing court "faced with a record of historical facts* ***that supports conflicting inferences*** *must presume -- even if* ***[*297]*** *[**2493] it does not affirmatively appear in the record -- that the trier of fact resolved any such* ***conflicts*** *in favor of the prosecution, and must defer to that resolution,"*

36. Holloway v. McElroy, 632 F.2d 605 (1980) (Georgia, 5th Cir.), [HN6][HN7][HN13]

*[*621][Paragraph 7] "Maine has chosen to distinguish those who kill in the heat of passion from those who kill [**46] in the absence of this factor.... **By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interests found critical in Winship**." (Mullaney v. Wilbur, 421 U.S. 694 at 698)*

*[625] – Burden – Despite a State's characterization of an issue as being an affirmative defense, the State may not place the burden of persuasion on that issue upon the defendant if the truth of the defense would necessarily **NEGATE** an essential element of the crime charged. [Manslaughter/Provocation]*

37. Holland v. United States (1954), 348 U.S. 121, at [*139]

[*138] *** Nor does this rule shift the **burden of** proof* [to the defendant]. *HN11 The Government must still prove [****31] every **element** of the offense beyond a **reasonable doubt** though not to a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes. Once the Government has established its **[*139]** case, the defendant remains quiet at his peril. Cf. **Yee Hem v. United States, 268 U.S. 178, 185.** The practical disadvantages to [have the] the taxpayer [defendant to testify on his own behalf] are lessened by the pressures on the Government to check and **NEGATE** relevant leads.*

38. Engle v. Isaac (1982), 456 U.S. 107 @ [*122]

*[*122] *** "**This argument states a colorable constitutional claim**. Several courts have applied our Mullaney and Patterson opinions to charge the prosecution with the **constitutional duty of proving absence of self-defense**. *** Most of these decisions adopt respondents' reasoning that due process commands the prosecution **to prove absence of self-defense** if that defense **negates** an element, such as purposeful conduct, of the charged crime."*

39. State v. Blalock, 2022-Ohio-2042

*[*P20] HN10 Murder and voluntary manslaughter are not just inconsistent verdicts; each verdict necessarily precludes the other. See Rhodes, 63 Ohio St.3d at 617, 590 N.E.2d 261; Duncan, 154 Ohio App.3d 254, 2003-Ohio-4695, 796 N.E.2d 1006, at ¶ 24; Amey, 2018-Ohio-4207, 120 N.E.3d 503, at ¶ 12. The trial court's determination that Blalock was guilty of voluntary manslaughter means that the trial court found mitigating circumstances to justify reducing Blalock's conviction from murder to voluntary manslaughter.* ***The trial court cannot find mitigating circumstances yet deprive Blalock of the benefit of mitigation by convicting him of murder, especially when murder carries a greater penalty.***

GROUND 4 - Evidence of Provocation

40. *United States v. Jenkins, 59 M.J. 893*

Inconsistent? Self-defense & Manslaughter? Trial Court invaded the province of the jury to determine guilt when it failed to give manslaughter jury instructions.

41. DUE PROCESS VIOLATION - FAILURE TO GIVE JURY INSTRUCTIONS ON VOLUNTARY MANSLAUGHTER *SUA SPONTE*

Violation of ***Mathews v. United States, 485 U.S. 58 @ 63.***

Trial court abuse of discretion: Refusal to give jury instructions on manslaughter as a lesser included offense to murder.

Pursuant to 28 USCS 2254(d)(1), Petitioner is entitled to habeas review because the CONCLUSION OF LAW by the Ohio Court of Appeals' Opinion at [*79] is contrary to, or an unreasonable application of *Mathews v. United States, 485 U.S. 58 @ 63* ("defendant is entitled to an instruction as to any recognized defense for which there exist evidence sufficient for a reasonable jury to find in his favor...")

Pursuant to 28 USCS 2254(d)(2), the OCA's FINDINGS OF FACTS at [*79] is an unreasonable determination of the facts in light of the evidence of PROVOCATION presented in the State court proceeding. See Petitioner's Direct Appeal Brief for a Summary of the Facts presented to the jury [ECF#33/PageID#1874].

The Conclusion in R&R/ECF#30/Citing/OCA/{*39} that self-defense is inconsistent with PROVOCATION is belied by:

(1) State v. Brown, 2018-Ohio-3068 at 47
(2) State v. Blann, 1984 Ohio App. LEXIS 10027 at [*4]
(3) State v. VanSickle, 1995 Ohio App. LEXIS 3085 at Overview
(4) State v. Berger, 2006-Ohio-6583 at [*8]

42. EXTREME EMOTIONAL STRESS

Appellant was already under extreme emotional stress and in sudden fit of rage, fired a single round in the direction of King. Appellant was **again engaged by King**, believing that she would again be brutally attacked with a glass bottle. It is unquestionable that the actions of Petitioner were **caused by sudden passion or fit of rage, provoked with King intending to cause her substantial bodily harm for the second time that same day**.

GROUND 7

43. An appeal is more than a meaningless "ritual" and an appellate counsel's role is more than a mere "friend of the court"

Evitts v. Lucey, 469 U.S. 387 @ [*394]

(Denial of IAAC – Due Process Violation)

HN6 Right to Counsel, Postconviction

A state that afforded a right of appeal to make that appeal more than a meaningless ***ritual*** *by supplying an indigent appellant in a criminal case with an attorney. This right to counsel is limited to the first appeal as of right, and the attorney need not advance every argument, regardless of merit, urged by the appellant. But the attorney must be available to assist in preparing and submitting a brief to the appellate court and must play the role of an active advocate, rather than* ***a mere friend of the court*** *assisting in a detached evaluation of the appellant's claim.*

GROUND 7

44. Denial of APP.R.26(B) raising IAAC is Violation of Due Process

Investigative work outside the record is necessary to raise a proper Ineffective Assistance of Counsel issue. See *State v. Leyh, 166 Ohio St. 3d 365 (2023)*; *Green v. Stephens, 2017 U.S. Dist. Lexis 71132 at HN 18 and at [*27]*, citing *Trevino v. Thaler, 569 U.S. 413 at 428-429*, quoting *Martinez v. Ryan, 566 U.S. 1 at 11*.

Comprehensive Analysis of OBJECTIONS & R&R & Final Decision

45. GROUND 1 – SUFFICIENCY OF EVIDENCE ANALYSIS – [ECF#33/PageID#1827]

Even if we look at the videotape in the light most favorable to the prosecution, and completely disregard Petitioner's testimony, there is not sufficient evidence to convince the factfinder beyond a reasonable doubt, because there is still sufficient reasonable doubt from the very videotape.

Additionally, the OCA's Opinion at [*27-42] made unreasonable assumptions not supported by the video evidence presented by the prosecution, which, by the way, impeached the credibility of Bryant, the State's star witness, therefore established reasonable doubt based on the State's own videotape evidence.

Jackson v. Virginia, at [*317 n.10], does not permit the jury to reach an unreasonable verdict, which must be reversed by the judge upon a **Motion for Acquittal**, which was done at **Tr.p. 1226**, even if too little too late. (See ***Martin v. Ohio, 480 U.S. 228 at 234***)

Related issues:
- Opinion at 17-26 (Petitioner's testimony)
- Opinion at 27 (videotape evidence)
- Opinion at 51 (self-defense standard)
- Opinion at 55 (facts and conclusion contradicted by Opinion at [*40][*41][*42]

46. **I. Sufficiency of the Evidence [ECF#34/PageID#1921] [293 WORDS]**

*Petitioner argues in her first objection that the state did not disprove her affirmative defenses — that she acted in self-defense and in defense of her daughter. (Objections, Doc. 33, Pg. ID 1842-45.) When an affirmative defense merely excuses conduct rather than contests the elements of the offense, "the Government has no constitutional duty to overcome the defense beyond a reasonable [*3] doubt." Smith v. United States, 568 U.S. 106, 110, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Here, self-defense and defense of another do not contest any elements of Petitioner's convictions. See Ohio Rev. Code § 2903.11(A)(1)-(2) (assault); Ohio Rev. Code § 2903.02 (A), (B) (murder); see also State v. Barnes, 94 Ohio St. 3d 21, 2002- Ohio 68, 759 N.E.2d 1240 (Ohio 2002). Thus, the Government had no constitutional duty to disprove those defenses. Smith, 568 U.S. at 110.*

*In any event, Petitioner's claims are meritless. The state court of appeals noted that a jury could have found that Petitioner was at fault because she entered the area with a gun after the situation defused and that Petitioner's daughter was at fault by initiating the physical fight that prompted Petitioner's intervention. See State v. Smith, 2020 Ohio 4976, 2020 WL 6158467, at *7-.9.*

Petitioner challenges how the state court of appeals analyzed the facts, but this Court may not "reweigh the evidence . . . or substitute [its] judgment for that of the jury." Smith v. Nagy, 962 F.3d 192, 205 (6th Cir. 2020) (citation omitted). It is not unreasonable to conclude that a rational jury could have convicted Petitioner. Id. Thus, the Court rejects Petitioner's argument as to these claims.

47. **OBJECTIONS [ECF#33] to R&R [ECF#30] which were ignored by the Final Opinion [ECF#34]**

OBJECTIONS under 2254(d)(1): [ECF#33/PageID#1827-1828] (citing: Jackson @ *317 n.10);

OBJECTIONS under 2254(d)(2) [ECF#33/PageID#1829]: (Was the bottle glass or plastic?) (This determination was based on speculation)

THE BOTTLE WAS GLASS OF PLASTIC?

This issue implicates **Ground 1** and **Ground 7 (issue 1 and 6)**

This case hinges on whether the bottle was glass or plastic.

Since the videotape is not definitive evidence whether it was a "plastic" bottle, and because the State brought in the testimony of a police officer to opine that it was a "plastic" bottle, based on the

surveillance videotape, then that demonstrates that it was ineffective assistance of counsel (not trial strategy) not to counter the expert testimony with another expert testimony.

Further, there was failure to comply with Criminal Rule 16(K) – Expert Report, configuring trial-by-ambush. (*State v. Hall, 2019-Ohio-2985*). The trial counsel failure to request continuance prejudiced and deprived defendant of a fair trial, as justice required additional time for defendant to pursue potentially crucial evidence to rebut State's speculative expert testimony, and its "aura" of special reliability (*United States v. Green, 548 F.2d 1261 at [*1268][HN8]*. It is also an unfair disparity. See *Wogenstahl v. Mitchell, 668 F.3d 307* (disparity in the number and quality of witnesses against the defendant was unfair, and that constitutes Ineffective Assistance of Counsel).

48. 2254(d)(2) Determination was based on Speculation, not facts

The OCA's Opinion was an unreasonable determination of the facts:

R&R/ECF#30/Citing/OCA/{¶15} *Sergeant Lind testified that the drive-thru surveillance video showed that King grabbed a plastic 12-ounce soft drink bottle from a refrigerator and struck Smith with it and that Smith fired her gun, striking King. He testified that the police did not recover the bottle because the drive-thru employees had already begun to clean up the scene.*

What? Exactly! That is incredible! That is hard to believe! It is pure speculation to affirm that it was a plastic bottle.

Therefore, the OCA Conclusion of Law at ECF34/{¶57} is an unreasonable determination of the facts:

ECF#34/{¶57} " *** *Viewing the evidence in the light most favorable to the prosecution, we find that the jury could reasonably conclude that once Smith was hit with the plastic bottle, she knew it was plastic, and she knew that a plastic bottle was not capable of inflicting death or great bodily harm, so her belief was not objectively reasonable."*

49. OBJECTIONS UNDER 2254(d)(2) WHICH WERE IGNORED BY THE USDC FINAL DICISION

[ECF#33/PageID#1832-1833] Citing R&R/ECF#30/OCA/{¶17}{¶26} (The Evidence at Trial: Petitioner's Testimony)

[ECF#33/PageID#1834-1835] Citing R&R/ECF#30/OCA/{¶27}-{¶42} (The Evidence at Trial: The Videotape)

[ECF#33/PageID#1836] Citing R&R/ECF#30/OCA/{¶8} to {¶10} (The Evidence at Trial: Bryant's Testimony, which was impeached by the Videotape)

[ECF#33/PageID#1837] Citing R&R/ECF#30/OCA/{¶13}-{¶16} (The Evidence at Trial: Officer Lind's Testimony, which was impeached by the Videotape)

50. [ECF#33/PageID#1839] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶52}-{¶55} under 2254(d)(2):

R&R/ECF#30/Citing/OCA/{¶15} *Sergeant Lind testified that the drive-thru surveillance video showed that King grabbed a plastic 12-ounce soft drink bottle from a refrigerator and struck Smith with it and that Smith fired her gun, striking King.* ***He testified that the police did not recover the bottle because the drive-thru employees had already begun to clean up the scene.***

R&R/ECF#30/Citing/OCA/{¶16} *Hamilton County Sheriff's Detective Kevin Illing testified that when he interviewed Smith, she told him that "**she did not want to be hit with that bottle**."*

51. **[ECF#33/PageID#1842] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶57} under 2254(d)(2):**

That is an unreasonable determination of the facts because the State never proved beyond a reasonable doubt that the bottle was plastic, that is speculation. Petitioner's reaction was a reflex, it was instantaneous, so, it is irrelevant what she learned after the incident. What matters is her belief while she was being hit with the bottle, not after.

52. **[ECF#33/PageID#1843] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶59} under 2254(d)(2):**

This is an unreasonable determination of the facts under 2254(d)(2) because: The R&R/ECF#30/Citing/OCA/{¶59} was belied by the videotape, which impeached Bryant's testimony.

53. **[ECF#33/PageID#1843] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶60} under 2254(d)(2):**

This is an unreasonable determination of the facts under 2254(d)(2) because: the situation had already deescalated and Petitioner had already retreated when the victim decided to seek revenge.

54. **[ECF#33/PageID#1843] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶61} under 2254(d)(2):**

This is an unreasonable determination of the facts under 2254(d)(2) because: this is belied by R&R/ECF#30/Citing/OCA/{¶38}-{¶42}

55. **[ECF#33/PageID#1843] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶62} under 2254(d)(2):**

This is an unreasonable determination of the facts under 2254(d)(2) because: the videotape establishes that this is an unreasonable determination of the facts.

56. **[ECF#33/PageID#1844] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶63}{¶64}{¶65} under 2254(d)(2):**

This is an unreasonable determination of the facts under 2254(d)(2) because: Even though all these facts may disprove defense of another (which Petitioner does not concede), it does not serve to disprove PROVOCATION and MANSLAUGHTER as a matter of law.

*Additionally, T.J. may have initiated the fight with another teenager, but KING certainly started and finished hitting the underage T.J. plenty [OCA *32-39] and then attacked Petitioner after the adults stopped fighting. It seems from the records that ALL the blame points to KING [OCA *40-42].*

57. [ECF#33/PageID#1845] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶67} under 2254(d)(2):

See videotape-evidence at R&R/ECF#30/Citing/OCA/{¶36}{¶37}{¶38}. The best evidence rule points to the videotape, which in many instances impeached Bryant's testimony, including her statement at *R&R/ECF#30/Citing/OCA/{¶66}* [BRYANT] "*** ***we had no intentions of making anything physical, because [T.J.'s] underage and we know we're grown***."

58. [ECF#33/PageID#1846] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶68}{¶69} under 2254(d)(2):

The OCA's failed to take T.J.'s age into consideration. KING had as much duty to retreat and stay in the car.

59. [ECF#33/PageID#1846] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶70} under 2254(d)(2):

*Let's not forget the outrageous **PROVOCATION** by the adult KING while the teenager T.J. was on the phone with her mother.*

*R&R/ECF#30/Citing/OCA/{¶5} Bryant testified that T.J. called Smith during this argument. According to Bryant, she knew T.J. was on the phone with her mom "[b]ecause she was on the phone saying *** [C.M.'s] mother and aunt are up here [*7] messing with me." Bryant testified that when she heard T.J. on her phone, she yelled at T.J., "Well, **go get your retarded mama**." Bryant acknowledged that she later told police that King was "[c]ussing [T.J.] out like, '**Little girl, go get your mama** *** **And you're not going to kick my car *** I'll beat you up**.'" After a drive-thru employee intervened, King and Bryant got back into the car, and King talked to another employee about purchasing items.*

60. II. Weight of the Evidence [ECF#34/PageID#1922] [214 WORDS]

*Petitioner argues in her next objection that her "weight of the evidence" claim is cognizable, pointing to **Tibbs v. Florida, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982)**. (Objections, Doc. 33, Pg. ID 1846.) But, this is not persuasive. The Supreme Court in Tibbs did not recognize a federal "weight of the evidence" claim, [*4] **it only held that a prisoner whose conviction was reversed under a state-law "weight of the evidence" claim could still be retried**. Id. at 47. Furthermore, the Sixth Circuit has recognized that an Ohio prisoner's "weight of the evidence" claim implicates Ohio law—not federal law. See **Nash v. Eberlin, 258 F. App'x 761, 764 n.4 (6th Cir. 2007)**.*

Federal habeas corpus relief is only available to state prisoners who show that they are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). "[I]t is not in the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 68-69, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

Petitioner's claim concerns a violation of state law and is therefore not cognizable in federal habeas proceedings. The Court rejects Petitioner's argument as to Claim Two.

The conclusion above is contrary to law, because clearly *TIBBS* warns courts to not mask *reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence.*

Secondly, the conclusion is contrary to *NASH v. EBERLIN*, because it clearly warns courts to deem a claim of manifest weight of evidence raised by pro se petitioners as sufficiency claim.

Thirdly, Walker v. Engle, 703 F.2d 959 does recognize that JACKSON at 319 also recognizes manifest weight of evidence, and mandates retrial if established by the records.

61. [ECF#33/PageID#1847-1848] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶71} (Ground 2) under 2254(d)(1):

*Citing **Tibbs v. Fla., 457 U.S. 31 at [*45]**, citing **Jackson v. Virginia** ...*

*"[*45] *** Second, our decision in Jackson v. Virginia, 443 U.S. 307 (1979), [****27] places HN14 some **restraints on the power of appellate courts to mask reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence**. We held in Jackson that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt."*

For the reasons stated above, this is an unreasonable determination of the facts.

62. III. Ineffective Assistance of Counsel [ECF#34/PageID#1923] [296 WORDS]

Petitioner next objects to the Magistrate Judge's conclusion that her claims for ineffective assistance of trial counsel were meritless. (See Objections, Doc. 33, Pg. ID 1858, 1865, 1873.)

*Petitioner contends that a **crime scene expert** would have helped the jury understand the sequence of events captured on the videotape played at trial. (Objections, Doc. 33, Pg. ID 1861.) The state court of appeals concluded that [*5] this argument was speculative. See Smith, 2020 WL 6158467, at *10. The jury already watched the tape, and Petitioner testified in depth about the incident. See id. at *1-5. Petitioner does not explain how a **crime scene expert** would have affected this evidence or the trial outcome, so her claim is speculative and insufficient to secure relief. See Cunningham v. Shoop, 23 F.4th 636, 673 (6th Cir. 2022).*

*Petitioner also claims that her trial counsel should have argued for a **voluntary manslaughter** conviction as an alternative to her self-defense theory. (See Objections, Doc. 33, Pg. ID 1865.) The state court concluded that self-defense and **voluntary manslaughter** were mutually exclusive theories due to their contrasting state-of-mind requirements, so counsel acted reasonably by not advocating the alternative theory to the jury. See Smith, 2020 WL 6158467, at *11. Courts in Ohio have repeatedly recognized that "arguments based on self-defense are inconsistent with arguments based upon **voluntary manslaughter**." State v. Grant, 2023-Ohio-2720. There is a strong presumption that trial counsel acts*

reasonably, see Haight v. Jordan, 59 F.4th 817, 831-32 (6th Cir. 2023), and the failure to advocate conflicting theories "might be considered sound trial strategy," Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Thus, the Court rejects Petitioner's argument as to claim Four.

The Opinion mingles and buries in its opinion the Voluntary Manslaughter grounds, which is a sound ground for appeal.

63. **[ECF#33/PageID#1859] OBJECTIONS to ECF#30 (Ground 4A) under 2254(d)(1):**

Citing: Dugas v. Coplan 428 F.3d 317, citing Strickland v. Washington, 466 U.S. 669.

Petitioner submitted at ECF#17/PageID#1664-1665 that failure to engage a Crime Scene Reconstruction Expert is a violation of Due Process and Ineffective Assistance of Counsel.

64. **[ECF#33/PageID#1860] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶72}{¶73}{¶74}{¶75} (Ground 4A) under 2254(d)(2):**

An expert would have helped jury to understand the fast videotape without audio. This was prejudicial.

65. **[ECF#33/PageID#1861-1864] OBJECTIONS to ECF#30 (Ground 4A) under 2254(d)(2):**

Additional relevant facts from Direct Appeal Brief.

66. **[ECF#33/PageID#1866] OBJECTIONS to ECF#30 (Ground 4B) under 2254(d)(1):**

Citing: Dugas v. Coplan 428 F.3d 317, citing Strickland v. Washington, 466 U.S. 669.

Petitioner submitted at ECF#17/PageID#1664-1665 that failure to engage a Crime Scene Reconstruction Expert is a violation of Due Process and Ineffective Assistance of Counsel.

67. **[ECF#33/PageID#1868] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶76} to {¶79} (Ground 4B) under 2254(d)(2):**

THE USDC CONCLUSION ON THE SECOND SUB-CLAIM ABOUT A POSSIBLE ARGUMENT FOR VOLUNTARY MANSLAUGHTER IS CONTRARY TO FACTS OF THE CASE UNDER 2254(d)(2):

EVIDENCE ON THE RECORD THAT ESTABLISHES RAGE BY PROVOCATION

R&R/ECF#30/Citing/OCA/{¶13} *Lockland Police Sergeant Christopher Lind testified that he received a frantic call from Joe's Drive-Thru in Lockland about someone having a gun. As he and two other officers walked out of their station to respond to the drive-thru, they encountered [*10] a hysterical T.J. at their door, who told them, "My mom just shot somebody."*

R&R/ECF#30/Citing/OCA/{¶14} *As Smith got out of her car and walked toward the officers, she appeared to be* ***irate*** *[rage]. When the officers asked her if she shot somebody, Smith yelled, "Yeah, I did it, I shot someone." After Smith was taken into custody, police recovered her gun from her car and Smith handed them her gun holster, which had been under her shirt.*

R&R/ECF#30/Citing/OCA/{¶5} *Bryant testified that T.J. called Smith during this argument. According to Bryant, she knew T.J. was on the phone with her mom "[b]ecause she was on the phone saying *** [C.M.'s] mother and aunt are up here [*7] messing with me." Bryant testified that when she heard T.J. on her phone, she yelled at T.J., "**Well, go get your retarded mama**." Bryant acknowledged that she later told police that King was "[c]ussing [T.J.] out like, '**Little girl, go get your mama** *** And you're not going to kick my car *** **I'll beat you up**.'" After a drive-thru employee intervened, King and Bryant got back into the car, and King talked to another employee about purchasing items.*

R&R/ECF#30/Citing/OCA/{¶9} *Bryant said that Smith pointed the gun at her again as King walked back to the car to clean blood off of herself and to fix herself up. According to Bryant, when Tamiko let go of her, Smith was still pointing the gun at her: "[Smith] didn't say absolutely nothing. She just looked at me crazy and pointed the gun at me." Bryant said that as she and King were about to get back in the car to leave,* ***Smith put the gun into her bra***.

ECF#30 R&R/ECF#30/Citing/OCA/{¶11} *Bryant testified that until she saw a surveillance video of the incident, she did not know that as she and King went to break up the fight between C.M. and the other girls, King had grabbed a plastic bottle from a refrigerator and had struck Smith with it. Bryant testified, "I didn't even see that, I* ***guess*** *she went to attack [Smith] because she had her gun out."*

68. **[ECF#33/PageID#1869-1870] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶79} (Ground 4B) under 2254(d)(2):**

The Conclusion that self-defense is inconsistent with PROVOCATION is at odds with Ohio caselaw:

(1) State v. Brown, 2018-Ohio-3068 at 47
*(2) State v. Blann, 1984 Ohio App. LEXIS 10027 at [*4]*
(3) State v. VanSickle, 1995 Ohio App. LEXIS 3085 at Overview
*(4) State v. Berger, 2006-Ohio-6583 at [*8]*

Therefore the USDC'S R&R is an unreasonable determination of the facts.

69. **[ECF#33/PageID#1871-1874] OBJECTIONS to R&R/ECF#30/Citing/OCA/{¶79} (Ground 4B) under 2254(d)(2):**

NOTE: Due to the page limitation, Petitioner would direct the court to ECF#33/PageID#1871-1874 for additional objections on the records.

70. **IV. Police Officer's Expert Testimony [ECF#34/PageID#1924] [470 WORDS]**

*Petitioner contends in her next objection [*6] that the trial court violated her due process rights by allowing a police officer to improperly testify as an expert witness. (Objections, Doc. 33, Pg. ID 1876, 1881.)*

*The state court of appeals construed Petitioner's claim as two subclaims challenging the officer's testimony that (1) he would not draw his firearm in the middle of a fight if no one else had a weapon and (2) a firearm only escalates a situation. See Smith, 2020 WL 6158467, at *11. It reviewed the first issue for plain error because Petitioner failed to object to the testimony at trial. It noted that Petitioner objected to the second issue but concluded that allowing the testimony was harmless error. Id.*

*Petitioner procedurally defaulted her first subclaim. Federal habeas review is barred where the state court does not address the federal claim and instead enforces a procedural requirement independent of the federal question. Coleman v. Thompson, 501 U.S. 722, 729-730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). Petitioner did not object to the officer's testimony about not drawing his firearm, so the state court of appeals reviewed this argument for plain error instead of on the merits. Smith, 2020 WL 6158467, at *11. Accordingly, the state court enforced an independent and adequate state ground that now bars federal review of this claim. Awkal v. Mitchell, 613 F.3d 629, 648-49 (6th Cir. 2010).*

*The state court of appeals [*7] determined that Petitioner's second subclaim was meritless, concluding that the admission of the officer's testimony was harmless error. Smith, 2020 WL 6158467, at *11-12. Magistrate Judge Merz concluded that this claim did not state a constitutional violation.*

*Petitioner relies on **Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)** to argue that federal courts can review state-court **evidentiary rulings** in habeas proceedings. (See Objections, Doc. 33, Pg. ID Pg. ID 1876.) Petitioner's argument is not persuasive. Federal courts will not usually review a state-court evidentiary ruling in a habeas proceeding unless the ruling is "especially egregious" and results in the **denial of fundamental fairness**. Wilson v. Sheldon, 874 F.3d 470, 475-76 (6th Cir. 2017). This is evident even in Chambers, where the Supreme Court only recognized that "[m]ultiple erroneous evidentiary rulings excluding reliable, direct evidence of actual innocence in a criminal case can, in combination, violate due process." Rogers v. Mays, 69 F.4th 381, 394 (6th Cir. 2023) (en banc) (citing Montana v. Egelhoff, 518 U.S. 37, 53, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) (plurality opinion)). This evidentiary ruling was more limited and did not exclude exculpatory evidence. Federal courts do not second-guess these state-court harmless error determinations in habeas proceedings. Wilson, 874 F.3d at 477. Thus, the Court rejects Petitioner's argument as to claim Five.*

71. **[ECF#33/PageID#1875-1881] OBJECTIONS to ECF#30 (Ground 5) under 2254(d)(2) & 2254(d)(1):**

Due to page limitation, see ECF#33/PageID#1875-1881.

72. **V. Improper Sentence Enhancements [ECF#34/PageID#1925] [140 WORDS]**

*Petitioner next [*8] objects to the conclusion that her improper sentencing claim is not cognizable. (See Objections, Doc. 33, Pg. ID 1883-86.) That said, she does not specifically object to the cognizability conclusion and instead repeats her arguments on the merits. "The failure to file specific objections to a*

*magistrate's report constitutes a waiver of those objections." Carter v. Mitchell, 829 F.3d 455, 472 (6th Cir. 2016) ***.*

*In any event, the claim is not cognizable. Petitioner argued that two provisions of Ohio's sentencing scheme conflicted. See Smith, 2020 WL 6158467, at *12. This is an issue of state law and is outside of this Court's purview. See Estelle, 502 U.S. at 68-69. Thus, the Court rejects Petitioner's argument as to Claim Six.*

73. See [ECF#33/PageID#1882-1886] for OBJECTIONS to ECF#30 (Ground 6) under 2254(d)(2) & 2254(d)(1).

74. VI. Ineffective Assistance of Appellate Counsel [ECF#34/PageID#1926] [423 WORDS]

Petitioner next objects to the Magistrate Judge's findings about her claims for ineffective assistance of trial and appellate counsel. (See Objections, Doc. 33, Pg. ID 1897, 1901-03, 1910-11.)

*Petitioner raised several subclaims of ineffective assistance of trial counsel in her Rule 26(B) proceedings, on which she based her claims of ineffective assistance of appellate counsel. Magistrate Judge Merz determined that Petitioner's Rule 26(B) Motion preserved only her claims for ineffective [*9] assistance of appellate counsel for habeas review, not her underlying claims about trial counsel. (Report, Doc. 30, Pg. ID 1803.) Petitioner does not object to this conclusion, so it is waived. Carter, 829 F.3d at 472. In any event, that determination was correct, see Wogenstahl v. Mitchell, 668 F.3d 307, 338 (6th Cir. 2012), and Petitioner's ineffective assistance of trial counsel subclaims are not properly before this Court.*

The state court of appeals rejected one of Petitioner's ineffective assistance of appellate counsel claims because the underlying ineffective assistance of trial counsel claims required evidence outside the record and were thus outside the scope of review, so appellate counsel was not ineffective for not raising them on appeal. (See State Court Records, Doc. 10, Pg. ID 465.) Petitioner objects to this conclusion. (See Objections, Doc. 33, Pg. ID 1897.) But, Rule 26(B) motions are collateral proceedings, Lopez v. Wilson, 426 F.3d 339, 351 (6th Cir. 2005) (en banc), and this Court may not reevaluate the state court's analysis of its collateral proceeding procedures, Cress v. Palmer, 484 F.3d 844, 853 (6th Cir. 2007). Nor has Petitioner shown that these issues were clearly stronger than what appellate counsel raised. See Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).

*Petitioner also argues that her ineffective assistance of appellate counsel claim for failure to appeal trial counsel's decision [*10] to not pursue a **plea agreement** had merit. (See Objections, Doc. 33, Pg. ID 1910.) The state court determined that trial counsel had not acted deficiently by proceeding to trial rather than seeking a plea deal. (See State Court Records, Doc. 10, Pg. ID 465-66.) Trial counsel's strategy to pursue a self-defense theory was reasonable, see Hobbs v. Hooks, 742 F. App'x 105, 110 (6th Cir. 2018), and appellate counsel cannot be faulted for failing to raise an issue that lacks merit, Shaneberger v. Jones, 615 F.3d 448, 452 (6th Cir. 2010). Nor does Petitioner show how this claim was clearly stronger than the ones presented on direct appeal. Thus, the Court rejects Petitioner's Objections on Claim Seven.*

75. **See [ECF#33/PageID#1887-1896] for OBJECTIONS to ECF#30 (Ground 7 & 8) under 2254(d)(2) & 2254(d)(1).**

76. **See [ECF#33/PageID#1897-1899] for OBJECTIONS to ECF#30 (Ground 7) under 2254(d)(2).**

77. **See [ECF#33/PageID#1900-1901] for OBJECTIONS to ECF#30 (Ground 7 – Issue 4: CCW Instructor Testimony) under 2254(d)(1).**

78. **See [ECF#33/PageID#1902-1907] for OBJECTIONS to ECF#30 (Ground 7 – Issue 5: PTSD Issue) under 2254(d)(2).**

79. **See [ECF#33/PageID#1908-1911] for OBJECTIONS to ECF#30 (Ground 7 – Issue 7: Plea Deal) under 2254(d)(2).**

80. **VII. Judicial Misconduct [ECF#34/PageID#1927] [93 WORDS]**

Petitioner lastly objects to the Magistrate Judge's findings on her claim for judicial misconduct, arguing that the trial court should have permitted her to seek a lesser-included manslaughter conviction. (See Objections, Doc. 33, Pg. ID 1912-13.) Petitioner waived this claim because she raised it for the first time in her objections. See Morgan v. Trierweiler, 67 F.4th 362, 367 (6th Cir. 2023). In any event, this is a matter of state law outside of this Court's purview. See Estelle, 502 U.S. at 68-69. Thus, the Court rejects Petitioner's argument as to Claim Eight.

81. **See [ECF#33/PageID#1912-1916] for OBJECTIONS to ECF#30 (Ground 8 – Issue 3: Overruling Motion for Manslaughter) under 2254(d)(2).**

See also ECF#10/ID#467-470, ECF#17/ID#1677-1978, ECF#20/ID#1703-1704 (Tr. 1226-1227)

82. **VIII. General Objections [ECF#38/PageID#1926] [48 WORDS]**

*Petitioner objects to several other aspects of the Report and Recommendation, [*11] but she does not provide any specificity or supporting arguments. (See, e.g., Objections, Doc. 33, Pg. ID 1898-99.) Thus, Petitioner waived any remaining objections to the recommended disposition of her claims. Carter, 829 F.3d at 472.*

83. **See [ECF#33/PageID#1887-1911] for OBJECTIONS**

84. **CONCLUSION [ECF#34/PageID#1928] [79 WORDS]**

As required by 28 U.S.C. § 636(b) and Federal Rule of Civil Procedure 72(b), the Court has made a de novo review of this record. Accordingly, the Court OVERRULES Petitioner's Objections (Doc. 33) and

ADOPTS the Substituted Report and Recommendation (Doc. 30) in its entirety. The Court ORDERS the following:

(1) Petitioner's Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254 (Doc. 1) is DISMISSED WITH PREJUDICE;
(4) This case is TERMINATED from the Court's docket.

85. **[ECF#33/PageID#1917-1918] CONCLUSION TO OBJECTIONS to ECF#30 under 2254(d)(2) & 2254(d)(1):**

Petitioner kindly requests that the Federal Courts correct this manifest miscarriage of justice that has been wrongfully convicting so many defendants in the State of Ohio because of the courts' refusal to follow the law.

I pray and hope that Petitioner will be the first common citizen to be acquitted on self-defense of Ohio.

*The laws of self-defense in Ohio seem to work only for police officers (see **State v. Brelo, 2015 Ohio Misc. LEXIS 54**), military persons (see **State v. Michael A. Clark, 2022-Ohio-46**, the accomplice of **State v. Angelina Hamrick, 2023-Ohio-117**, a Russian woman, got 33 years to life, and her military accomplice, Michael Clark, got community service!), and the prominent members of society.* State v. Peterson 2006 - Ohio - 6525

It is time that justice is for all in Ohio, not only a mirage for the common citizens.

*It is time that the federal due process standard in **WINSHIP** and **JACKSON v. VIRGINIA** be also applied in Ohio and that the State's burden of proof beyond a reasonable doubt be correctly applied to disprove an affirmative defense, as self-defense and sudden passion provoked by the victim.*

For the reasons above states, Petitioner requests this Court to fully review Petitioner's GROUND 1 through 8 and grant her habeas relief as this is a case of wrongful conviction as the records contain clear and convincing evidence that Petitioner acted in self-defense, defense of another, and sudden passion.

86. CONCLUSION

THEORY OF INNOCENCE: SELF-DEFENSE UNDER HOLLAND at 135-139

When the defendant testifies on its own behalf and asserts that she had a bona fine belief that she was in imminent danger of death, she is no longer relying on the presumption of innocence created by the law, because she has established a strong defense by preponderance of the evidence by putting her credibility on the line and which requires the State to counter that with conflicting evidence about the

bottle not being a glass bottle. And for the jury to convict pursuant to JACKSON at 317 n.10, the evidence must be stronger than Defendant's to overcome the reasonable doubt raised by the Defendant's Theory of Innocence, within the meaning of **HOLLAND at 135-139. In other words, the State must disprove the reasonable leads furnished by the defendant.** (See MARTIN at 234).

THEORY OF INNOCENCE: SUDDEN RAGE BY PROVOCATION under HOLLAND at 135-139 & MARTIN at 234

Defendant's evidence also supports a defense of sudden rage, despite not being given a jury instruction sua sponte, which negates the element of INTENT, which is an abuse of discretion pursuant to *United States v. Askew, 2024 U.S. App. Lexis 8623 (4th Cir.)*. Such an instruction is necessary to reduce any perceived endorsement or criticism of one side or the other.

Additionally, *Mathews v. United States, 485 U.S. 58 at 63* held that refusal to give jury instructions is an abuse of discretion: "**defendant is entitled to an instruction as to any recognized defense for which there exist evidence sufficient for a reasonable jury to find in his favor...**"

Pursuant to 28 USCS 2254(d)(2), the OCA's findings of facts at [*79], and the R&R ECF#30 at [*39] is an unreasonable determination of the facts in light of the evidence of PROVOCATION presented in the State court proceeding. See Petitioner's Direct Appeal (ECF#33/PageID#1874).

What parent in her circumstances would not have come to her rescue?

The jury has to be able to put itself in the defendant's shoes to judge her actions.

But when the prosecutor injects emotionality in the juror's mind, they cannot think logically because they were inflamed.

Petitioner is not guilty of murder. Either she is innocent, or is guilty of manslaughter at best.

Second, KING was a devil. She provoked everyone to start a physical fight, first with the teenager, and then with her mother. She was unstoppable.

Put yourselves in Petitioner's shoes and focus on KING's actions. She was the initial physical aggressor, both towards the teenager and towards Petitioner every single time.

Given Petitioner's prior history with another daughter, she had every right to bring her gun with herself for protection. That is not illegal. That cannot be held against Petitioner. She had the right to defend herself and her daughter, and even before she arrived at the scene, she heard KING's threats and provocation over the phone, calling her "**retarded mama**".

R&R/ECF#30/Citing/OCA/{¶5} Bryant testified that T.J. called Smith during this argument. According to Bryant, she knew T.J. was on the phone with her mom "[b]ecause she was on the phone saying *** [C.M.'s] mother and aunt are up here [*7] messing with me." Bryant testified that when she heard T.J. on her phone, she yelled at T.J., "***Well, go get your retarded mama***." Bryant acknowledged that she later told police that King was "[c]ussing [T.J.] out like, '***Little girl, go get your mama *** And you're not going to kick my car *** I'll beat you up***.'" After a drive-thru employee intervened, King and Bryant got back into the car, and King talked to another employee about purchasing items.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

x Tiffany Smith Date: SEP-18-2024

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