CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY SIMMS,	:	
Petitioner,	:	
-vs-	:	
JERRY SPATNY, Warden,	:	
Respondent.	:	_____

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Appendix A: The Magistrate's First Report & Recommendation (R&R), N.D. Ohio, E. Div. Case No. 2:22-CV-00474, (June 20, 2023) (7 pp.).

Appendix B: Magistrate's Second R&R, (07/11/2023) (6 pp.).

Appendix C: Magistrate's Third R&R, (08/1/2023) (9 pp.)

Appendix D: Magistrate's Fourth R&R (09/18/2023) (6 pp.)

Appendix E: Magistrate's Fifth R&R, (05/13/2024) (2 pp.)

Appendix F: Magistrate's Decision & Order Denying Motion for Recusal, 07/09/2024 (8 pp.)

Appendix G: Magistrate's Sixth R&R, (07/22/2024) (8 pp.)

Appendix H: United States District Court, Adopting R&R denying recusal (11/14/2024) (7 pp.)

Appendix I: United States District Court, Dismissal of the underlying Petition for Writ of Habeas Corpus, (11/18/2024) (10 pp.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

TIMOTHY SIMMS,

Petitioner, : Case No. 2:22-cv-474

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Grafton Correctional Institution,

Respondent.

REPORT AND RECOMMENDATION

This habeas corpus case, brought *pro se* by Petitioner Timothy Simms pursuant to 28 U.S.C. § 2254, is before the Court for decision on the merits on the Petition (ECF No. 4), the State Court Record (ECF No. 15), the Respondent's Return of Writ (ECF No. 16), and Petitioner's Reply (ECF No. 17). The case has recently been transferred to the undersigned to help balance the Magistrate Judge workload in the District.

Litigation History

On July 15, 2009, a Franklin County Grand Jury indicted Simms on six counts of rape (Counts 1-6), six counts of sexual battery (Counts 7-12), three counts of gross sexual imposition (Counts 13-15), one count of tampering with evidence (Count 16), and one count of disseminating matter harmful to juveniles (Count 17)(Indictment, State Court Record, ECF No. 15, Ex. 1). After a jury trial, Simms

was found guilty of all the counts of rape, sexual battery, and gross sexual imposition. (Exhibit 4, Verdict Forms). He was sentenced to an aggregate sentence of life without parole.

On direct appeal Simms' conviction was affirmed, but the case was remanded for re-sentencing. *State v. Simms*, 2012-Ohio-2321 (Ohio App. 10th Dist. May 12, 2012). The Ohio Supreme Court declined jurisdiction over a further appeal. *State v. Simms*, 132 Ohio St. 3d 1534 (2012).

On September 23, 2011, while the appeal was still pending, Simms filed a petition for post-conviction relief under Ohio Revised Code § 2953.21. The trial court denied the Petition on November 10, 2011 (Decision and Entry, State Court Record, ECF No. 15, Ex. 18).

After resentencing, Simms appealed to the Tenth District which again remanded for resentencing. No further appeal resulted from this re-sentencing, but Simms filed a motion for new trial on November 20, 2018, the gravamen of which was that the victim recanted her trial testimony. *Id.* at Ex. 27. In a published decision, the Franklin County Common Pleas Court denied the motion. *State v. Simms,* 2020 Ohio Misc. 4826 (Mar. 12, 2020). The Tenth District Court of Appeals affirmed. *State v. T.S.*, 2021-Ohio-2203 (Ohio App. 10th Dist. Jun. 29, 2021), and the exercise of further appellate jurisdiction was declined. 164 Ohio St. 3d 1449 (2021). Sept. 28 2021

Simms filed his Petition for habeas corpus on June 16, 2022, by depositing it in the prison mailing system that date. He pleads the following grounds for relief:

> **Ground One**: Custodial interrogation, Miranda rights violation interrogation was coersive (sic) false confession given.
>
> **Supporting Facts**: Sue Simms my wife was ordered out of the house and told to stay there until the police was done talking to me. The police ordered her out. My brother and sister were detained in the middle of the street off the property. There were police cars at either end of my street, and cars in my driveway blocking my vehicle and my wife's vehicle. Two officers in my house with guns, at the end of the interrogation, one officer said to the other "check and

make sure that she is still in the back yard." My miranda Rights were never read to me.

While interrogating Simms, the officers did ask three times weather [sic] or not Simms had rapped [sic] his daughter. I said no twice. The third time that they asked me. I told them they had to be more specific. The officers got angry and told me that they were not going to tell me what Elizabeth had said, but they did anyway. They used such terminology as, Just tell us the truth and we will know if this is just a misunderstanding or not. Just tell us the truth and we can help you. Just tell us the truth or you can call your daughter a liar. Just tell us the truth and we will go easy on you. This along with my mental state of mind at the time netted a false confession.

During the trial Officer Mcguire was asked about his training as a special victims unit officer. He was asked if he was a false confession expert and he said that he was. He was then asked if he could tell weather [sic] or not my confession was false. He stated at that time he could not tell.

Tim Pearce appeallate [sic] attorney from Franklin County public defenders wrote in a motion for a new trial that he found my interrogation to be custodial and very persuasive.

Ground Two: Ineffective assistance of trial counsel

Supporting Facts: Did not motion to suppress interrogation tape, Did not motion for alibi, did not place the defendant on the witness stand, did not show any evidence during the trial to allow the defendant to testify on his own behalf. Did not put any defense witnesses on the stand, except for the defendants [sic] wife who only testified for about fifteen minutes. She stated her name and relationship to the defendant, were [sic] she was working, her hours, she was then asked how often did we get to see Elizabeth, half way through her statement prosecution objected and defense attorney rested his ca[se.]

Ground Three: Prosecutor misconduct

Supporting Facts: The victim in this case was 10 years old at the time of the trial. Chris brown did take her into his office without an attorney or a guardian with her and instructed her as to what to say during the trial. Sheryl Prichard contacted Shelley John and instructed her to withhold evidence from an investigator. (sic) She also contacted McVay elementary where Elizabeth attended school and instructed them to withhold Elizabeth's attendance, school

> records from an investigator. She did this twice to the school, the second time she said that the school was to ignore the subpoena.
>
> **Ground Four**: Judicial misconduct; prejudice and biases.
>
> **Supporting Facts**: Judge threw a temper tantrum on a public elevator at the start of the trial and also in the middle of the trial. Telling people what he was going to do to me. inoppreate [sic] jury instruction, can't seem to pass sentence as it was written. Chastised the defendants (sic) family not just once but several times, whe[n] the victim chose to recant her story he threatened her with perjury charges for what she said as a ten year old little girl, after prosecutor told her what to say. Tampered with transcripts, Testimony has been altered. Falsifyed [sic] legal documents, Falsely accused the defendants mother and wife of wrong doing, Personal threats were made to the defendant himself.

(Petition, ECF No. 4).

Analysis

Statute of Limitations

In the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"), Congress enacted a one-year statute of limitations for habeas corpus cases. That statute is codified at 28 U.S.C. § 2244(d) and 28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the

> Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

In the Return of Writ, Respondent argues that Petitioner's Grounds One, Two, Three, and any portion of Ground Four relating to events at trial are barred by this statute of limitations (Return, ECF No. 16, PageID 1461). Respondent calculates that the conviction became final on direct review on May 30, 2014, which was the last day on which Simms could have appealed from the second re-sentencing. When he did not appeal by that date, the statute began to run and expired one year later on May 30, 2015. Simms did not file his new trial motion until November 20, 2018, more than three years after the statute had run.

In his Reply, Simms does not respond at all to the statute of limitations defense and it is well taken. Any claims arising out of the trial must be dismissed with prejudice as barred by the statute of limitations. That plainly bars Grounds One, Two, and Three, and those portions of Ground Four which are clearly pleaded as having happened at the time of trial, to wit, (1) the judge's "tantrum" before and during trial; (2) inappropriate jury instructions.

Petitioner provides no time references for the other claims in Ground Four. Challenged by the standard form of habeas petition to state why his Petition is timely, he writes:

> I have filed a number of appeals, a motion for new trial, a recantment [sic] from the witness, Tim Pierce's investigation and waiting time for him to get done with what he had to do and court decisions all took time.

(Petition, ECF No. 4, PageID 36). This also provides no timeline for occurrence of the remaining Ground Four claims.

Federal courts have an obligation to construe *pro se* pleading liberally. *Haines v. Kerner*, 404 U.S. 519 (1972); *Urbina v. Thoms*, 270 F.3d 292, 295 (6th Cir. 2001). The Magistrate Judge will therefore construe Petitioner's remaining Ground Four claims as arising from the new trial proceedings which concluded March 12, 2020. Any judicial misconduct rising to the level of a constitutional violation would have occurred by that date. Therefore, as to the statute of limitations, Simms is entitled to March 12, 2020, as the start date under 28 U.S.C. § 2444(d)(1)(4). Under § 2244(d)(2) the time is tolled until appeals from denial of new trial were concluded. That date is June 8, 2021, when the Supreme Court of Ohio declined to review the new trial decision. The statute would thus have expired June 8, 2022. Because Simms did not file until June 16, 2022, all of his remaining claims in Ground Four are also barred by the statute of limitations.

Conclusion

Based on the foregoing analysis, all claims made in the Petition are barred by the statute of limitations and should be dismissed with prejudice. Because the limitations defense is dispositive of all claims, it is unnecessary to provide analysis of Respondent's other defenses, including particularly procedural default based on *res judicata,* or of the merits of Simms' claims. It is therefore respectfully recommended that the Petition be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner

be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

June 20, 2023.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

TIMOTHY SIMMS,

Petitioner, : Case No. 2:22-cv-474

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Grafton Correctional Institution,

Respondent.

SUPPLEMENTAL REPORT AND RECOMMENDATION

This habeas corpus case, brought *pro se* by Petitioner Timothy Simms pursuant to 28 U.S.C. § 2254, is before the Court on Petitioner's Objections (ECF No. 22) to the Magistrate Judge's Report and Recommendations (the "Report," ECF No. 21) recommending dismissal. District Judge Sargus has recommitted the case for reconsideration in light of the Objections (ECF No. 23).

The Report recommends dismissing the entire Petition as barred by the statute of limitations. For purposes of applying that statute, the Report distinguishes between claims arising from the trial and those arising from new trial proceedings. Specifically, Grounds One, Two, Three, and the claims of judicial misconduct that the judge threw a tantrum at the time of trial and gave erroneous jury instructions were found to have become final on May 30, 2014, the last day on which Simms could have appealed from his second re-sentencing (Report, ECF No. 21, PageID 1508). The Report concluded the statute of limitations on those claims expired one year later on

May 30, 2015. *Id.* Any judicial misconduct which occurred in connection with the new trial proceedings would have happened by the conclusion of those proceedings on March 20, 2020. The appeal from that denial became final June 8, 2021, and the statute therefore ran June 8, 2022, a week before Simms filed his Petition. *Id.*

Respondent pleaded the statute of limitations as a bar in the Return of Writ and Simms made no response in his Traverse. Under those circumstances, the arguments he now makes that the Petition was timely can be treated as waived. The failure to file specific objections is a waiver of right to raise issues on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Alspugh v. Mcconnell,* 643 F.3d 162, 166 (6th Cir. 2011); *Cowherd v. Million,* 380 F.3d 909, 912 (6th Cir. 2004); *Mattox v. City of Forest Park*, 183 F.3d 515, 519 (6th Cir. 1999); *Miller v. Currie,* 50 F.3d 373, 380 (6th Cir. 1995); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). For the sake of completeness, this Supplemental Report will analyze the merits of the Objections.

Simms raises three objections to the Report which will be considered in turn.

First Simms objects the Magistrate Judge miscalculated the date on which the new trial proceeding became final (Objections, ECF No. 22, PageID 1511). The Report concluded that any asserted judicial misconduct occurring during the new trial proceedings would have occurred before March 20, 2020, the date those proceedings concluded in the trial court (Report, ECF No. 21, PageID 1509). The Report noted that Ohio Supreme Court review of those proceedings was declined June 8, 2021, and that the statute would have begun to run that date and expired a year later on June 8, 2022. *Id.* Simms asserts, in contrast, that the new trial direct appeal was not decided until June 28, 2021, and the Ohio Supreme Court did not decline appellate jurisdiction under September 28, 2021 (Objections, ECF No. 22, PageID 1511).

Simms' first objection is well taken. The Report actually found the Common Pleas Court

denied the new trial motion March 12, 2020 (Report, ECF No. 21, PageID 1505, citing *State v. Simms*, 2020 Ohio Misc. 4826 (Franklin Cty. CP, Mar. 12, 2020)). The Court of Appeals affirmed *State v. T.S.*, 2021-Ohio-2203 (Ohio App. 10th Dist. Jun. 29, 2021). Finally, the Supreme Court of Ohio declined appellate review, *State v. T.S.*, 164 Ohio St. 3d 1449 (2021). The Ohio Supreme Court acted September 28, 2021, so the Petition herein, insofar as it raises issues related to the new trial motion, is in fact timely. That portion of the Report recommending dismissal on statute of limitations grounds of constitutional claims relating to the new trial motion is WITHDRAWN. The Magistrate Judge apologizes to the Court and to the Petitioner for his error in this regard.

Simms' second objection is to dismissal of Grounds One, Two, and Three and that portion of Ground Four relating solely to trial matters on a limitations basis (Objections, ECF No. 22, PageID 1512-14). He asserts that the evidence presented in the new trial proceedings constitutes newly discovered evidence of the prior constitutional violations and, in any event, show that he is actually innocent, which would excuse any failure to timely file. *Id.*

Simms does not try to separate the evidence which he says is newly discovered from evidence he clearly had at the time of trial, but such a distinction is necessary to evaluate his claims. His First Ground for Relief is that he was coercively interrogated without compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966), but all that facts on which he relies or could rely for that claim were known to him at the time they happened. His Second Ground for Relief all relies on things which occurred at trial which he knew of at the time. His Third Ground for Relief is for prosecutorial misconduct, but he does not indicate when he learned of any of this conduct. His Fourth Ground for judicial misconduct suffers from the same deficiency: if this evidence is newly discovered, when did he discover it? Extension of the statute of limitations on the basis of newly-discovered evidence depends on when and how the evidence was discovered.

In his Objections, Simms claims for the first time the benefit of the actual innocence exception to the statute of limitations. The controlling precedent on this point is now the Supreme Court's decision in *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

> [A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: "[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U. S., at 329, 115 S. Ct. 851, 130 L. Ed. 2d 808; see *House*, 547 U. S., at 538, 126 S. Ct. 2064, 165 L. Ed. 2d. 1 (emphasizing that the *Schlup* standard is "demanding" and seldom met). And in making an assessment of the kind *Schlup* envisioned, "the timing of the [petition]" is a factor bearing on the "reliability of th[e] evidence" purporting to show actual innocence. *Schlup*, 513 U. S., at 332, 115 S. Ct. 851, 130 L. Ed. 2d. 808.
>
> * * *
>
> [A] federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.

McQuiggin v. Perkins, 569 U.S. 383, 386-87 (2013).

In *Souter v. Jones,* 395 F.3d 577 (6th Cir. 2005), the Sixth Circuit held Congress enacted the statute of limitations in 28 U.S.C. § 2244(d)(1) "consistent with the *Schlup* [*v. Delo*] actual innocence exception." The *Souter* court also held:

> [I]f a habeas petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup v. Delo,* 513 U.S. 298, 316 (1995)." Thus, the threshold inquiry is whether "new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317.

> To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327. The Court has noted that "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 140 L. Ed. 2d 828, 118 S. Ct. 1604 (1998). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence -- whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." *Schlup*, 513 U.S. at 324. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321.

Souter v. Jones, 395 F.3d 577, 590 (6th Cir. 2005).

Simms has not previously argued that his new evidence shows he is actually innocent in terms of the *Schlup* gateway. His "Answer to Respondent's Answer" argues he should have been found not guilty by discussing the weight to the evidence and inferences to be drawn from it and not by pointing to anything new (ECF No. 17). In his Motion for Leave to File a Delayed Motion for New Trial, the new evidence on which Simms relies is the purported recantation of her trial testimony by E.J.[1], the victim (State Court Record, ECF No. 15, Ex. 27). The trial judge did not find the recantation credible. *Id.* at Ex. 32. Given the circumstances in which the recantation occurred and the length of time between the purported recantation and its presentation to the courts, this Court is not persuaded the recantation meets the *Schlup* requirements for proving actual innocence.

In sum, the initial Report is withdrawn as to its recommendation for dismissing the claims relating to the motion for new trial. Those claims will be treated in a separate report. Petitioner's objections to dismissal of the trial related claims (Grounds One, Two Three and two sub-claims in Ground Four) should be overruled and those claims dismissed on limitations grounds.

[1] The Magistrate Judge uses initials here although the victim's name is spelled out in the Motion. The purpose is to protect the privacy of victims of sexual abuse.

July 11, 2023.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION AT COLUMBUS

TIMOTHY SIMMS,

Petitioner, : Case No. 2:22-cv-474

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Grafton Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS

This habeas corpus case is before the Court on Petitioner's Objections (ECF No. 25) to the Magistrate Judge's Report and Recommendations (ECF No. 24) recommending dismissal. District Judge Sargus has recommitted the case for reconsideration in light of the Objections (ECF No. 26).

The undersigned had previously recommended dismissing the entire case as barred by the statute of limitations. As to the claims arising from adjudication of Petitioner's new trial motion, that recommendation has been withdrawn (ECF No. 24, PageID 1519). This Report will analyze those claims on the merits.

As to the remaining claims arising at the time of trial, Petitioner has objected to their dismissal on statute of limitations grounds and his objections will be treated here as well.

Claims Arising at Trial

Ground One, Two, Three, and that portion of Ground Four that relates to actions that occurred at trial were found to be barred by the statute of limitations because the Petition was filed more than a year after conclusion of review on direct appeal. Petitioner objected that he had newly-discovered evidence of unconstitutional conduct and he was also exempt from the limitations statute because he was actually innocent. The Supplemental R&R rejected those arguments because Petitioner did not disclose when he had learned of the new evidence and his evidence of actual innocence did not meet the standard of *Schlup v. Delo*, 513 U.S. 298, 319 (1995)(ECF No. 24).

First Objection

Petitioner's first objection is to the Magistrate Judge's conclusion that he waived any objection to Respondent's statute of limitations defense by omitting it from his Reply. The substance of the objection is that the Magistrate Judge cited cases in which litigants were found to have waived objections to a Magistrate Judge's report and recommendation by not objecting. The referenced citations are *Thomas v. Arn*, 474 U.S. 140 (1985); *Alspugh v. Mcconnell,* 643 F.3d 162, 166 (6th Cir. 2011); *Cowherd v. Million,* 380 F.3d 909, 912 (6th Cir. 2004); *Mattox v. City of Forest Park*, 183 F.3d 515, 519 (6th Cir. 1999); *Miller v. Currie,* 50 F.3d 373, 380 (6th Cir. 1995); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981), and they do indeed refer to failure to object to a report and recommendations which is not what happened here. Rather, Respondent pleaded an affirmative defense – expiration of the statute of limitations – in the Return and Petitioner made no response to that defense in his Reply. As Petitioner correctly points out, he was under no duty

to file a reply at all, so his failure to respond to the limitations assertion does not forfeit his right to have that question decided on the merits.

Second Objection

Petitioner's Second Objection is "The Magistrate erred as a matter of law in holding that, because 'the trial judge did not find the recantation credible', it cannot constitute sufficient evidence to support an actual innocence gateway claim." (Objections, ECF No. 25, PageID 1525, citing "R&R 5, PageID 1521").

This objection misstates the holding of the R&R. In discussing Petitioner's actual innocence claim, the Magistrate Judge merely noted as a matter of fact that the trial judge had found the recantation was not credible. That was not a clearly erroneous factual finding: the trial judge did indeed find the recantation not to be credible:

> Here, the Court finds the victim's 2014 deposition in which she purports to recant her trial testimony is not credible and would not materially affect the outcome of the trial. At the time of the deposition, the victim was still a minor and was unrepresented by legal counsel. Additionally, present at the deposition was *Defendant's* mother who at the time was the victim's source of shelter, money, and transportation. Beyond these inherent issues with the deposition, the Court cannot overlook Defendant's own statements to the police as well as the victim's disclosures to CAC and depictions of sex toys at the tender age of nine. All of which point to Defendant's guilt. Accordingly, the Court finds the 2014 deposition of the victim is insufficient to warrant a new trial.

(Decision and Entry, State Court Record, ECF No. 15, Ex. 32, PageID 711-12; emphasis in original).

The Magistrate Judge did not find the trial judge's conclusion on credibility to be

dispositive *per se*, but a factor which this Court could consider in making its own actual innocence finding: "Given the circumstances in which the recantation occurred and the length of time between the purported recantation and its presentation to the courts, this Court is not persuaded the recantation meets the *Schlup* requirements for proving actual innocence." (R&R, ECF No. 24, PageID 1521).

There was no error of law in considering the trial judge's finding of lack of credibility as a factor. Courts considering questions of credibility later in a case's chronology often give weight to prior findings of lack of credibility by fact finders who have actually observed a particular witness and Petitioner cites no authority to the contrary.

Petitioner objects to the bases cited by the Magistrate Judge for rejecting the purported actual innocence showing, to wit, the circumstances in which the recantation occurred and the length of time between recantation and presentation to the courts, by claiming that was all caused by the improper conduct of the prosecutor and the trial judge.

> [T]he record establishes that any delay in attempting to present the recantation to the trial court is wholly attributable to improper conduct on the part of the prosecutor in intentionally interfering with said presentation and to the collusion in such interference by the trial court by issuing threats of prosecution against the recanting witness prior to even hearing the recantation or the circumstances attendant thereto, which collusion and interference are the subject of issues before this Court that the Magistrate seeks to insulate from federal review.

(Objections, ECF No. 25, PageID 1526-27). Petitioner gives no references at all to where the record supposedly establishes this misconduct, despite Judge Silvain's Order that record references must be given with PageID numbers (See ECF No. 9). Petitioner specifies some of the conduct of which he complains in his Reply, but gives no record references there either (See ECF No. 17, PageID 1494-85).

The facts of the purported recantation are recited by the Ohio Tenth District Court of Appeals in its decision affirming the denial of a new trial:

> {¶5} On July 18, 2014, E.J., her mother, and paternal grandmother met with T.S. [Petitioner]'s attorney, Tim Pierce, at his office, where E.J. answered questions under oath. Her answers recanted all of the trial testimony that had incriminated her father. She remembered saying "[s]ome" but "[n]ot all" of the things that she had testified to but denied that her father had ever touched her "in a sexual manner at any time." (July 18, 2014 E.J. Dep. at 10.) She denied that her father had ever touched her, exposed himself to her, forced her to perform oral sex on her [sic], shown her a pornographic movie, ejaculated on her, or shown her or engaged in any act involving an enema or a paddle. Id. at 11-14. E.J. said that she only saw the contents of the black briefcase once, "but all [she] saw was papers." Id. at 13. She had no memory of drawing a picture of the briefcase or its contents at Children's Hospital. *Id.* at 17.
>
> {¶6} E.J. said that the prosecutor had "explained to [her], like, what to say really." *Id.* at 18. She explained that she made the allegations because she "didn't want to go over to [her] dad's anymore" because her mom had been "really sick," she "didn't want to leave her," and "it was really boring over there when he lost his job." *Id.* at 19. She claimed that some of the allegations were based on accusations that a friend had made about her own father and that "the other parts came from" the television shows "Family Guy, and Adult Swim, and American Dad, and Special Victims Unit." *Id.* at 19-20. E.J. stated: "I didn't know he was going to go to jail at all. Like, I had no clue. I just thought I was going to be taken away from him and I was just going to stay with mom." *Id.* at 23. She denied that she was lying in order to get her father out of prison. Id. at 24. E.J. stated multiple times that no one had forced, coerced, or threatened her in order to recant her trial testimony. *Id.* at 7-8, 25, 31.

(Decision, *State v. T.S.*, State Court Record, ECF No. 15, Ex. 37, PageID 819, *et seq.*)

After the trial judge heard of the recantation, he granted Petitioner's motion for leave to file a delayed motion for new trial and appointed an attorney to represent E.J. When the actual delayed motion for new trial came on for hearing, E.J. retracted her recantation and declined to testify on advice of counsel concerning her Fifth Amendment privilege. *Id.* at ¶ 8.

The chronology of events relating to the recantation is important. Simms was indicted July

15, 2009, for sexual misconduct with his daughter, E.J., assertedly occurring between November 2008 and June 2009. Trial occurred in October 2010. The deposition at which E.J. formalized her recantation occurred July 18, 2014, nearly four years later. Petitioner did not move for a new trial until November 20, 2018, more than four years later, during which time Petitioner was imprisoned.

Thus the circumstances of the recantation – in a deposition conducted by her father's lawyer with the Defendant's mother present and later retracted – and the delay in presenting it to the trial court – more than four years – make the recantation less than persuasive to the Magistrate Judge as proof of actual innocence.

In the first place, "Recanting affidavits and witnesses are viewed with extreme suspicion." *United States v. Willis*, 257 F.3d 636, 645 (6th Cir. 2001); *United States v. Chambers*, 944 F.2d 1252, 1264 (6th Cir. 1991); *see also United States v. Lewis*, 338 F.2d 137, 139 (6th Cir. 1964). Even if accepted, recantation of trial testimony is generally not sufficient to grant habeas relief absent constitutional error. *Welsh v. Lafler*, 444 Fed. Appx. 844, 850 (6th Cir. 2011).

Secondly, a recantation is unlike the types of evidence usually presented to show accrual innocence, "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," *Schlup*, 513 U.S. at 324.

Third, the Supreme Court has expressly endorsed considering delay in presenting the new evidence as a factor in determining its reliability:

> [A] federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown.

McQuiggin v. Perkins, 569 U.S. 383, 386-87 (2013).

In sum, Petitioner's new evidence of actual innocence – a retracted recantation of the victim's trial testimony – is insufficient to overcome the bar of the statute of limitations as to

claims raising at trial.

Claims Arising from the New Trial Proceedings

The Magistrate Judge originally recommended that the entire Petition be dismissed as barred by the statute of limitations. However, that recommendation has been withdrawn as to claims in Ground Four arising from the new trial proceedings. Ground Four in its entirety reads:

> **Ground Four:** Judicial misconduct; prejudice and biases.
>
> **Supporting Facts:** Judge threw a temper tantrum on a public elevator at the start of the trial and also in the middle of the trial. Telling people what he was going to do to me. inoppreate [sic] jury instruction, can't seem to pass sentence as it was written. Chastised the defendants (sic) family not just once but several times, whe[n] the victim chose to recant her story he threatened her with perjury charges for what she said as a ten year old little girl, after prosecutor told her what to say. Tampered with transcripts, Testimony has been altered. Falsifyed [sic] legal documents, Falsely accused the defendants mother and wife of wrong doing. Personal threats were made to the defendant himself.

(Petition, ECF No. 4).

Respondent asserts merits review of Ground Four is barred by Petitioner's failure to fairly present these claims of judicial bias and misconduct to the Ohio courts (Return, ECF No. 16, PageID 1488-89).

The procedural default doctrine in habeas corpus is described by the Supreme Court as follows:

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an adequate and independent state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause of the default and actual prejudice as a result of the alleged violation of federal law; or

Conclusion

Based on the foregoing analysis, the Magistrate Judge respectfully recommends the Petition herein be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

August 1, 2023.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal.

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION AT COLUMBUS

TIMOTHY SIMMS,

Petitioner, : Case No. 2:22-cv-474

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Grafton Correctional Institution,

Respondent.

SUPPLEMENTAL REPORT AND RECOMMENDATIONS

This habeas corpus case was brought *pro se* by Petitioner Timothy Simms to obtain relief from his conviction for multiple rapes of his minor daughter. He pleads four Grounds for Relief which relate to error committed in connection with his trial, except that several sub-claims in Ground Four relate to his motion for new trial. The Magistrate Judge has recommended that all claims related to the trial be dismissed as barred by the statute of limitations and that claims arising from the new trial proceedings be dismissed as procedurally defaulted.

Most recently Petitioner has timely objected (ECF No. 36) to the August 1, 2023, Report and Recommendations (ECF No. 27). District Judge Sargus has recommitted the case for reconsideration in light of those Objections (ECF No. 38).

To overcome the statute of limitations defense, Petitioner relies on his claim of actual innocence which in turn relies on the victim's purported recantation of her trial testimony. The Magistrate Judge concluded the recantation, which happened many years after the trial and was

APPENDIX D

not presented to the state court until many years after that, was not the type of evidence of actual innocence called for by *Schlup v. Delo*, 513 U.S. 298, 319 (1995), to wit, "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence -- that was not presented at trial." The Magistrate Judge also relies on the victim's failure to affirm her recantation under oath and subject to cross-examination at the time of the new trial hearing.

Petitioner's First Objection is that the Magistrate Judge did not find the recantation credible (Objections, ECF No. 36, PageID 1562-64).[1]

Franklin County Common Pleas Judge Holbrook tried the case and also heard the evidence on the new trial motion. He found the recantation not credible, writing:

> Here, the Court finds the victim's 2014 deposition in which she purports to recant her trial testimony is not credible and would not materially affect the outcome of the trial. At the time of the deposition, the victim was still a minor and was unrepresented by legal counsel. Additionally, present at the deposition was Defendant's mother who at the time was the victim's source of shelter, money, and transportation. Beyond these inherent issues with the deposition, the Court cannot overlook Defendant's own statements to the police as well as the victim's disclosures to CAC and depictions of sex toys at the tender age of nine. All of which point to Defendant's guilt. Accordingly, the Court finds the 2014 deposition of the victim is insufficient to warrant a new trial.

(Decision and Entry of March 12, 2020, State Court Record, ECF No. 15, Ex. 32, PageID 711-12).

Petitioner objects to the Magistrate Judge's reliance on that finding because he claims the whole new trial proceeding was unconstitutional, marked by both judicial and prosecutorial misconduct. But he never assigned either prosecutorial misconduct or judicial bias as error on appeal from denial of the new trial motion, thereby failing to give the Ohio courts an opportunity to consider that claim. From reading the record, the Magistrate Judge finds no prosecutorial or

[1] Petitioner offers no precedent for finding a recantation is the type of evidence of actual innocence that will satisfy *Schlup*.

judicial misconduct which would somehow render the trial judge's credibility finding suspect. Instead Petitioner puts those labels on appropriate behavior of the judge to warn the victim of the possible legal consequences of recanting her prior sworn testimony.

The test for evaluating new evidence of actual innocence is whether that evidence, combined with what the jury heard, makes it "more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup* at 327. The victim had made her recantation at a "deposition" of which the State was not notified, making it uncross-examined hearsay. When given an opportunity to repeat her recantation at the new trial hearing four years later, she declined to take the stand on advice of counsel. While she did not actually take the stand to invoke her Fifth Amendment privilege, her appointed attorney made clear the basis of her refusal.

The Sixth Circuit has held "[r]ecanting affidavits and witnesses are viewed with extreme suspicion." *United States v. Willis*, 257 F.3d 636, 645 (6th Cir. 2001); *United States v. Chambers*, 944 F.2d 1252, 1264 (6th Cir. 1991); *see also United States v. Lewis*, 338 F.2d 137, 139 (6th Cir. 1964). Standing alone, recantation of trial testimony is generally not sufficient to grant habeas relief absent constitutional error. *Welsh v. Lafler*, 444 Fed. Appx. 844, 850 (6th Cir. 2011). As a general matter, reviewing courts are usually deferential to credibility findings of fact finders – judges or juries – who have actually seen the witnesses in person. Simms has given no persuasive reason why this Court should not follow that usual practice, especially when it took four years to obtain the recantation and then another four years to present it to the state courts.

In addition to his unavailing actual innocence claim, Simms asserts that the new evidence presented at the time of the new trial motion supports his claims related to trial. If true, this is

irrelevant. Discovery of new evidence does not reopen the statute of limitations.[2]

The Magistrate Judge also concluded Ground Four as it relates to the new trial proceedings is procedurally defaulted because Ground Four was never fairly presented to the state courts as a federal constitutional claim. Simms claims he did fairly present these claims, quoting his brief on appeal from denial of the new trial:

> In the instant case Simms issued a subpoena for E.J. yet the trial court prevented counsel from calling E.J. to the witness stand. Furthermore, the trial court did not conduct a colloquy, did not inform E.J. of counsel's questions, and did not inquire whether E.J. would assert her Fifth Amendment right as to all questions asked. Moreover because E.J. did not take the witness stand, she did not directly assert her Fifth Amendment right.

(Objections, ECF No. 36, PageID 1568, quoting Appellant's Brief at PageID 746). Simms adds that while the claims may be "inartfully pleaded[3]," they are "sufficiently articulated to put the state court on notice of the constitutional dimension of the issue and to provide an opportunity to correct it. *Id.*

A claim is fairly presented if the petitioner

> (1) relied upon federal cases employing constitutional analysis; (2) relied upon state cases employing federal constitutional analysis; (3) phrased the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleged facts well within the mainstream of constitutional law.

Hand v. Houk, 871 F.3d 390, 418 (6th Cir. 2017). In arguing the assignment of error in question, Simms' counsel says nothing about judicial prejudice as opposed to claiming error in the manner in which the subpoena was quashed. Nothing about the prosecutor is said at all, much less that he

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[2] Even if the statute did not begin to run until Petitioner obtained the deposition in 2014, it would have run a year later. 28 U.S.C. § 2244(d)(2)(D).

[3] Note that for this pleading, Simms cannot claim the *pro se* privilege of liberal construction because he was represented by counsel on this appeal.

engaged in misconduct of a constitutional magnitude.

Instead, counsel argued Simms had been deprived of due process, a fair hearing, and his right to compulsory process (Brief at PageID 722). By themselves the words "due process" and "fair trial" do not fairly present any issue. Merely using talismanic constitutional phrases like "fair trial" or "due process of law" does not constitute raising a federal constitutional issue. *Slaughter v. Parker*, 450 F.3d 224, 236 (6th Cir. 2006); *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987); *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000), *citing Petrucelli v. Coombe*, 735 F.2d 684, 688-89 (2nd Cir. 1984).

The record makes clear Simms was not deprived of his right to compulsory process. The subpoena for E.J. was issued and not quashed prior to the hearing – she was present. The fact that she heeded her counsel's advice and did not take the stand did not deprive Simms of compulsory process. That right does not trump a witness's privilege against self-incrimination under the Fifth Amendment. The trial judge could have forced her to take the stand and invoke the privilege, but to what end? The fact that a trial judge in a very busy jurisdiction – Franklin County – proceeded summarily to recognize the privilege deprived Simms of nothing to which he was constitutionally entitled. And even if it was error, it was not the kind of error that proves judicial prejudice, a claim Simms did not make in the Tenth District Court of Appeals.

Conclusion

Having reconsidered the case in light of the instant Objections, the Magistrate Judge again recommends that it be dismissed with prejudice. Because reasonable jurists would not disagree with this conclusion, it is also recommended that Petitioner be denied a certificate of appealability

and that the Court certify to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

September 18, 2023.

NOTICE REGARDING OBJECTIONS

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within fourteen days after being served with this Report and Recommendations. Because this document is being served by mail, three days are added under Fed.R.Civ.P. 6, but service is complete when the document is mailed, not when it is received. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. A party may respond to another party's objections within fourteen days after being served with a copy thereof. Failure to make objections in accordance with this procedure may forfeit rights on appeal. #

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

TIMOTHY SIMMS,

Petitioner, : Case No. 2:22-cv-474

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Grafton Correctional Institution,

:

Respondent.

DECISION AND ORDER

This habeas corpus case, brought *pro se* by Petitioner Timothy Simms, is before the Court on Petitioner's Motion to Proceed to Hearing and Judgment (ECF No. 45).

The first branch of the Motion asks the Court to convene an evidentiary hearing. However, the Supreme Court has severely limited the authority of District Courts to hold such hearings and has largely confined us to deciding cases entirely from the state court record. *Cullen v. Pinholster,* 563 U.S. 170 (2011). *Pinholster* was cited to Petitioner in the Magistrate Judge's denial of his Motion to Expand the Record (ECF No. 42), but *Pinholster* applies also to motions under Rule 8 of the Rules Governing § 2254 Cases.

The second branch of the Motion seeks expedited consideration of the merits of the case. The undersigned has filed Reports and Recommendations on the merits which are ripe for Judge Sargus's consideration. This case is therefore pending for final decision by Judge Sargus in the ordinary course of the Court's business.

The Motion is denied.

May 13, 2024.

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

TIMOTHY SIMMS,

Petitioner, : Case No. 2:22-cv-474

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Grafton Correctional Institution,

:

Respondent.

DECISION AND ORDER DENYING MOTION FOR RECUSAL

This habeas corpus case, brought *pro se* by Petitioner Timothy Simms, is before the Court on Petitioner's Affidavit of Bias and Motion for Recusal seeking the recusal of Magistrate Judge Michael R. Merz from further involvement in this case (ECF No. 49).

Applicable Legal Standard

Simms purports to bring this Motion under both 28 U.S.C. § 144 and 28 U.S.C. § 455. Two different standards apply to recusal under those two statutes. Under 28 U.S.C. § 144 the party seeking disqualification must make an affidavit of personal bias or prejudice, accompanied by his counsel's certificate that the affidavit is made in good faith. When a party is proceeding *pro se*, no counsel's certificate is required. While the affidavit is directed in the first instance to the judicial officer sought to be disqualified, if it is timely and legally sufficient, recusal is mandatory; the

truth of the facts set forth in the affidavit are not drawn in question, but only their legal sufficiency. 13A C. Wright, A. Miller, and E. Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS 2D, §§ 3541, et seq., particularly § 3550. To be legally sufficient under § 144, assertions in an affidavit must be definite as to time, place, persons, and circumstances. *Berger v. United States*, 255 U.S. 22 (1921). Such detail is necessary to prevent abuse of § 144. *Grimes v. United States*, 396 F.2d 331 (9th Cir. 1968). One distinguished court has held that the appropriate level of detail is the same as required in a bill of particulars. *United States v. Mitchell*, 377 F. Supp. 1312 (D.D.C. 1974)(Sirica, J.), *aff'd. sub. nom. United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976).

Under 28 U.S.C. § 455, different procedure is applicable: no motion or affidavit is required, since the statute places a burden on a judge to disqualify himself or herself *sua sponte.* There is no timeliness requirement. *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980). The Court, moreover, need not accept as true the factual statements in the affidavit if one is filed. *Phillips v. Joint Legislative Committee on Performance and Expenditure Review of Mississippi*, 637 F.2d 1014, 1019, n.6 (5th Cir. 1981).

The standard applied in evaluating recusal motions is an objective one. "[W]hat matters is not the reality of bias or prejudice, but its appearance." *Liteky v. United States,* 510 U.S. 540, 548 (1994). A federal judicial officer must recuse himself or herself where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. This standard is not based 'on the subjective view of a party,'" no matter how strongly that subjective view is held. *United States v. Nelson*, 922 F.2d 311, 319 (6th Cir. 1990), *cert. denied* 499 U.S. 981 (1991); *Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir. 1990); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1251 (6th Cir. 1989); *Browning v. Foltz*, 837 F.2d 276, 279 (6th

Cir. 1988).

A disqualifying prejudice or bias must be personal or extrajudicial. *United States v. Sammons,* 918 F.2d 592, 598 (6th Cir. 1990); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1250 (6th Cir. 1989). That is, it "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *see also Youn v. Track, Inc.,* 324 F.3d 409, 423 (6th Cir. 2003), *citing Grinnell, supra; Bradley v. Milliken,* 620 F.2d 1143, 1157 (6th Cir. 1980), *citing Grinnell, supra*; *Woodruff v. Tomlin,* 593 F.2d 33, 44 (6th Cir. 1979) (citation omitted). The Supreme Court has written:

> The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for 'bias and prejudice' recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for 'bias and prejudice' recusal, since some opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will not suffice. ... [J]udicial rulings alone almost never constitute valid basis for a bias or partiality motion. See *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). ... Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."

Liteky v. United States, 510 U.S. 540, 554-55 (1994); *see also Alley v. Bell*, 307 F.3d 380, 388 (6th Cir. 2002)(quoting the deep-seated favoritism or antagonism standard). Since the decision in *Liteky, supra,* "federal courts have been uniform in holding that § 455(a) cannot be satisfied without proof of extrajudicial bias, except in the most egregious cases." Flamm, Judicial Disqualification 2d § 25.99, *citing In re Antar,* 71 F.3d 97 (3rd Cir. 1995), *overruled on other grounds Smith v. Berg*, 247 F.3d 532, 534 (3rd Cir. 2001).

> Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. This is an objective inquiry. A reasonable observer is unconcerned with trivial risks, which are endemic. If they were enough to require disqualification we would have a system of pre-emptory strikes and judge-shopping, which itself would imperil the perceived ability of the judicial system to decide cases without regard to persons. ... There are not enough political eunuchs on the federal bench to resolve all cases with political implications; anyway it would be weird to assign all political cases to the naifs while concentrating antitrust and securities cases in the hands of political sophisticates. ... Tenure of office, coupled with the resolve that comes naturally to those with independent standing in the community have led a 'political' judiciary in the United States to be more assertive in securing legal rights against the political branches than is the politically neutral, civil service judiciary in continental Europe.

In re Mason, 916 F.2d 384, 385-87 (7th Cir. 1990)(Easterbrook, J.)

Application of the Standard Under 28 U.S.C. § 144

Simms' purported Affidavit of Bias is not an affidavit at all in that it was not sworn to before a notary. Nor is it in the form required for a declaration under penalty of perjury in place of an affidavit as prescribed by 28 U.S.C. § 1746.

Simms' purported Affidavit of Bias is not timely. This case was filed in June 2022. Simms' purported facts are assertedly drawn from the LEXIS database which has apparently been available to Petitioner since before he filed and has not changed since he filed except to the extent it reports additional cases to which I have been assigned since then.

Simms' purported Affidavit is not definite as to time, place, persons or circumstances. He reports only on his interpretation of the results of a LEXIS database search without any discussion of the circumstances of any other case.

With respect to this case, he interprets the instances in which Judge Sargus has recommitted the case after objections by Simms as a "rejection" of the Report. Not so. The uniform practice in this District is that recommittals after objection occur only at the request of the undersigned so that he can address those objections on the merits. Simms claims the undersigned is showing bias in favor of the State of Ohio even now in this case: "Magistrate Merz appears to be effecting a win for the State of Ohio by attrition by refusing to commence review and issuance of a fifth R&R." (Motion, ECF No. 49, PageID 1623). Not so. The case has not been recommitted since the last set of objections, but is pending before Judge Sargus for resolution.

Simms offers no supposed extrajudicial source for my asserted bias and there is none. I have no personal, non-professional relationship now or at any time during my judicial career with any attorney or non-lawyer in the Office of the Attorney General who represents the State in these cases.

I have not attempted to replicate Petitioner's database search because I do not know what search parameters he used. I only very rarely receive unanimous consent from the parties in habeas corpus cases, so the final decisions are made by District Judges upon my reports and recommendations.[1] Simms claims the only habeas case in which I have ever decided in favor of a Petitioner is the *Gillispie* case cited in the footnote. From memory alone I can recall recommendations favorable to petitioners in *Zuern v. Tate*, Case No. 1:92-cv-00771 and *Depew v. Ohio*, 1:94-cv-00459 (both capital cases) and *Hartman v. Ohio Adult Parole Authority,* 3:19-cv-00003.

It is correct that I have recommended dismissal in most of the habeas corpus cases referred

[1] The one habeas decision in favor of a petitioner which Simms acknowledges is *Gillispie v. Timmerman-Cooper*, 835 F. Supp. 2d 482 (S.D. Ohio 2011), in which there was unanimous consent under 28 U.S.C. § 636(c).

to me. This is not because I have any personal bias in favor of the State of Ohio or any of its usual actors in habeas corpus cases. Rather, it is because of the state of habeas corpus law.

Federal habeas corpus only became available to state prisoners after the Civil War; Congress feared retaliation against federal officers carrying out post-Civil War federal legislation. It remained largely confined to jurisdictional issues until *Brown v. Allen*, 344 U.S. 443 (1953), which opened habeas courts to litigation of all constitutional claims even if they had been considered in the state courts. Then during the Chief Judgeship of Earl Warren many of the criminal justice related rights in the Bill of Rights were "incorporated" into the United States Constitution by way of the Due Process Clause of the Fourteenth. With respect to the Sixth Amendment, see, for example, *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) (trial by jury in criminal cases); *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (compulsory process); *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967) (speedy trial); *Pointer v. Texas,* 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965) (right to confront adverse witness); *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (assistance of counsel); *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(ineffective assistance of counsel).

The Supreme Court could not itself review all state cases in which constitutional claims were raised, so in 1963 the Court greatly expanded the habeas corpus power of District Courts. See *Townsend v. Sain*, 372 U.S. 293, 313 (1963)(expanding broadly the categories of cases in which habeas courts could grant an evidentiary hearing) and *Fay* v. *Noia*, 372 U.S. 391 (1963)(federal claims can be barred by procedural default in raising them in state courts only if the State can show they were deliberately bypassed).

The history of habeas corpus since Warren Burger succeeded Earl Warren can best be seen

as a broad and persistent effort by the Supreme Court and eventually Congress to roll back the habeas remedy expanded by the Warren Court. In *Stone v. Powell,* 428 U.S. 465 (1976), the Court made Fourth Amendment claims non-cognizable in habeas if the petitioner had been given a full and fair opportunity to litigate those claims in state court[2]. In *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Court weakened *Fay* and reintroduced procedural default as a bar to habeas claims. Then in 1996 Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No 104-132, 110 Stat. 1214)(the "AEDPA"). This statute reduced the constitutional precedent on which a habeas court could rely to "clearly established" holdings of the Supreme Court. It required deference to state court decisions on the merits unless they were "unreasonable." It adopted for the first time a statute of limitations for habeas cases (one year) and a bar on second or successive habeas petitions unless allowed by the court of appeals on a case-by-case basis. Finally, in *Cullen v. Pinholster,* 563 U.S. 170 (2011), the Supreme Court essentially eliminated evidentiary hearings in habeas by holding that a habeas court must decide factual questions on the basis of the record made in the state courts. That is the legal context in which I have considered habeas corpus cases throughout my federal judicial career (1984-2024).

Federal judges are required by their oath "to administer justice **according to law**." This means for example that a completely meritorious habeas claim filed eleven months after the conviction became final must be dismissed with prejudice as barred by the statute of limitations. That is what the law requires. We are not free to do justice as we see it in a habeas case, but only as the law allows it.

I sincerely believe that I have followed the law faithfully in adjudicating habeas corpus

[2] Since most States follow federal practice in allowing a separate motion to suppress proceeding pre-trial, Fourth Amendment issues have largely disappeared from habeas cases. If they are pleaded, they must be dismissed as barred by *Stone*.

cases, without any bias in favor of the State of Ohio and that any perceived imbalance in outcomes of these cases is required by law. That proposition can be tested by examining how many times District Judges or the Court of Appeals have rejected my analysis in favor of a petitioner, analysis which Simms does not offer.

I decline to recuse myself in this case.

July 19, 2024.

s/ *Michael R. Merz*
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION AT COLUMBUS

TIMOTHY SIMMS,

Petitioner, : Case No. 2:22-cv-474

- vs - District Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN, Grafton Correctional Institution,

:

Respondent.

REPORT AND RECOMMENDATIONS ON MOTION TO RECUSE DISTRICT JUDGE SARGUS

This habeas corpus case, brought *pro se* by Petitioner Timothy Simms, is before the Court on Petitioner's Affidavit of Bias and Motion for Recusal seeking the recusal of District Judge Edmund A. Sargus, Jr., from further involvement in this case (ECF No. 48). While the decision on recusal must be made by Judge Sargus himself, rendering a report and recommendations on the Motion is within the scope of the Magistrate Judge reference in this case.

Applicable Legal Standard

Simms purports to bring this Motion under both 28 U.S.C. § 144 and 28 U.S.C. § 455. Two different standards apply to recusal under those two statutes. Under 28 U.S.C. § 144 the party seeking disqualification must make an affidavit of personal bias or prejudice, accompanied by his counsel's certificate that the affidavit is made in good faith. When a party is proceeding *pro se*, no

counsel's certificate is required. While the affidavit is directed to the judicial officer sought to be disqualified, if it is timely and legally sufficient, recusal is mandatory; the truth of the facts set forth in the affidavit are not drawn in question, but only their legal sufficiency. 13A C. Wright, A. Miller, and E. Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS 2D, §§ 3541, et seq., particularly § 3550.

To be legally sufficient under § 144, assertions in an affidavit must be definite as to time, place, persons, and circumstances. *Berger v. United States*, 255 U.S. 22 (1921). Such detail is necessary to prevent abuse of § 144. *Grimes v. United States*, 396 F.2d 331 (9th Cir. 1968). One distinguished judge has held that the appropriate level of detail is the same as required in a bill of particulars. *United States v. Mitchell*, 377 F. Supp. 1312 (D.D.C. 1974)(Sirica, J.), *aff'd. sub. nom. United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976).

Under 28 U.S.C. § 455, different procedure is applicable: no motion or affidavit is required, since the statute places a burden on a judge to disqualify himself or herself *sua sponte*. There is no timeliness requirement. *Roberts v. Bailar*, 625 F.2d 125, 128 (6th Cir. 1980). The court, moreover, need not accept as true the factual statements in the affidavit if one is filed. *Phillips v. Joint Legislative Committee on Performance and Expenditure Review of Mississippi*, 637 F.2d 1014, 1019, n.6 (5th Cir. 1981).

The standard applied in evaluating recusal motions is an objective one. "[W]hat matters is not the reality of bias or prejudice, but its appearance." *Liteky v. United States,* 510 U.S. 540, 548 (1994). A federal judicial officer must recuse himself or herself where "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. This standard is not based 'on the subjective view of a party,'" no matter how strongly that subjective view is held. *United States v. Nelson*, 922 F.2d 311, 319 (6th Cir. 1990), *cert. denied*

Disqualification 2d § 25.99, *citing In re Antar,* 71 F.3d 97 (3rd Cir. 1995), *overruled on other grounds Smith v. Berg*, 247 F.3d 532, 534 (3rd Cir. 2001).

> Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. This is an objective inquiry. A reasonable observer is unconcerned with trivial risks, which are endemic. If they were enough to require disqualification we would have a system of pre-emptory strikes and judge-shopping, which itself would imperil the perceived ability of the judicial system to decide cases without regard to persons. ... There are not enough political eunuchs on the federal bench to resolve all cases with political implications; anyway it would be weird to assign all political cases to the naifs while concentrating antitrust and securities cases in the hands of political sophisticates. ... Tenure of office, coupled with the resolve that comes naturally to those with independent standing in the community have led a 'political' judiciary in the United States to be more assertive in securing legal rights against the political branches than is the politically neutral, civil service judiciary in continental Europe.

In re Mason, 916 F.2d 384, 385-87 (7th Cir. 1990)(Easterbrook, J.)

Analysis

The first three pages of Simms' Motion for Recusal of Judge Sargus are a verbatim copy of the same text in his Motion to recuse the undersigned. He then devotes only one paragraph to supposedly disqualifying facts about Judge Sargus. That paragraph reads:

> In conducting a cursory review in Federal Court decisions available on LEXIS, Judge Edmund A. Sargus, Jr. has ruled in favor of the State of Ohio by denying Habeas Corpus relief a total of 1,189 times out of 1,193 cases he has handled as a District Court Judge; thereby providing sufficient evidence to establish that a reasonable person would perceive a bias on the part of Judge Sargus in favor of the adverse party to Petitioner in this case, being the State of Ohio.

Application of the Standard Under 28 U.S.C. § 144

Simms' purported Affidavit of Bias is not an affidavit at all in that it was not sworn to before a notary. Nor is it in the form required for a declaration under penalty of perjury in place of an affidavit as prescribed by 28 U.S.C. § 1746.

Simms' purported Affidavit of Bias is not timely. This case was filed in June 2022. Simms' purported facts are assertedly drawn from the LEXIS database which has apparently been available to Petitioner since before he filed and has not changed since he filed except to the extent it reports additional cases to which Judge Sargus has been assigned since then.

Simms' purported Affidavit is not definite as to time, place, persons or circumstances. He reports only on his interpretation of the results of a LEXIS database search without any discussion of the circumstances of any other case.

Simms offers no supposed extrajudicial source for Judge Sargus's asserted bias and there is none so far as the undersigned is aware.

The undersigned has not attempted to replicate Petitioner's database search on LEXIS as to Judge Sargus because I do not know what search parameters he used. Assuming the truth of Simms' reported statistical analysis, it does not support recusal of Judge Sargus. Rather it supports the undersigned's refusal to disqualify himself on the basis of an asserted disproportion of pro-respondent outcomes. For as long as Judge Sargus has been a District Judge resident at the Columbus seat of court, all habeas corpus cases filed in Columbus before February 1, 2022, were automatically referred to one of the Magistrate Judges resident at Columbus: Magistrate Judges Abel, King, Kemp, Deavers, Jolson, and Vascura. Has Petitioner's research revealed any disproportion in the recommendations of those judicial officers? Since February 1, 2022, those

AO 450 (Rev. 11/11) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

Southern District of Ohio

TIMOTHY SIMMS,
Plaintiff
v.
WARDEN,
Defendant

Civil Action No. 2:22-cv-474

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ _____ recover costs from the plaintiff *(name)* _____ _____ .

☒ other: Pursuant to the Opinion and Order filed 11/18/2024 the Magistrate Judge's Reports and Recommendations are ADOPTED AND AFFIRMED. This case is closed.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☐ decided by Judge _____ on a motion for _____

Date: 11/18/2024

CLERK OF COURT

Christen M. Wens
Signature of Clerk or Deputy

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TIMOTHY SIMMS,

Petitioner,

v.

Case No. 2:22-cv-00474
Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN,

Respondent.

OPINION AND ORDER

Petitioner Timothy Simms, who is proceeding *pro se*, filed two Motions for Recusal in his habeas corpus case. The first asks that the undersigned recuse (ECF No. 48), and the second urges the Magistrate Judge assigned to the case to recuse (ECF No. 49). The Magistrate Judge recommended the first Motion be denied in a Report and Recommendation (Recusal Report, ECF No. 51), and denied the second Motion by a Decision and Order (Recusal Decision, ECF No. 50). This matter is before the Court on Mr. Simms's Objections (ECF Nos. 52, 53) to the Recusal Report and Recusal Decision. For the reasons stated below, those Objections are **OVERRULED** and the Recusal Decision and Recusal Report are **ADOPTED AND AFFIRMED.**

I. Background

In his Motions for Recusal, Mr. Simms states that the undersigned "has consistently showed bias toward the State of Ohio" in habeas cases during his career on the bench. (ECF No. 48, PageID 1615.) In support, Mr. Simms points to his LexisNexis research, which shows the undersigned has denied more habeas petitions than he has granted by a wide margin. (*Id.* PageID 1615–17.) Mr. Simms makes similar arguments about the Magistrate Judge, urging that he is also

biased based on analogous reasoning. (*Id.* PageID 1616–17; ECF No. 49.) Mr. Simms cites 28 U.S.C. §§ 144 and 455 in support. (ECF Nos. 48, 49.)

Close in time, the Magistrate Judge issued the Recusal Decision, denying Mr. Simms's Motion for Recusal of the Magistrate Judge, and the Recusal Report, recommending that the Court deny the Motion for Recusal of the undersigned. The Magistrate Judge rejected Mr. Simms's assertions that he and the undersigned should be disqualified from presiding because they favor the State of Ohio in habeas cases. (Recusal Report, Recusal Decision.) He explained the different standards that apply to recusal under 28 U.S.C. §§ 144 and 455. (Recusal Decision, PageID 1627–28; Recusal Report, PageID 1635–36.) He noted that Mr. Simms's Affidavits of Bias ("Affidavits") were not true affidavits because they were not notarized nor in the proper form under 28 U.S.C. § 1746. (Recusal Decision, PageID 1630; Recusal Report, PageID 1639.) The Magistrate Judge found the Affidavits were untimely. (*Id.*) Finally, he concluded that Mr. Simms offered no extrajudicial sources for his or the undersigned's asserted biases, and that there were none. (Recusal Decision, PageID 1631; Recusal Report, PageID 1639.)

Mr. Simms objected to both the Recusal Decision and Recusal Report. (ECF Nos. 52, 53.) The Court analyzes those Objections below, but first summarizes the applicable standards of review.

II. Standards of Review

A. Objections on Non-Dispositive Matters

When a party objects to a magistrate judge's ruling on a non-dispositive motion, the district court must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). Likewise, 28 U.S.C. § 636(b)(1)(A) provides that "[a] judge of the court may reconsider any pretrial matter . . . where it has been shown that the

magistrate judge's order is clearly erroneous or contrary to law." The "clearly erroneous" standard applies to factual findings and the "contrary to law" standard applies to legal conclusions. *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992) (Kinneary, J.) (citations omitted). A factual finding is "clearly erroneous" when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 140 (6th Cir. 1985). A legal conclusion is "contrary to law" when the magistrate judge has "misinterpreted or misapplied applicable law." *Hood v. Midwest Sav. Bank*, No. C2-97-218, 2001 WL 327723, at *2 (S.D. Ohio Mar. 22, 2001) (Holschuh, J.) (citations omitted); *see also Grant v. Ramaswamy*, No. 2:24-CV-281, 2024 WL 1507975, at *1 (S.D. Ohio Apr. 5, 2024) (Watson, J.) (quoting *Hood*).

B. Objections on Dispositive Matters

If a party objects to a report and recommendation within the allotted time, the Court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b). Upon review, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

III. Analysis

Mr. Simms makes these Objections to the Recusal Report and Recusal Decision:

1. The Magistrate Judge "completely lacks jurisdiction" to determine whether Judge Sargus should recuse. (ECF No. 52, PageID 1644.)
2. His Affidavits are proper affidavits. (*Id.*; ECF No. 53, PageID 1652.)
3. His Affidavits were timely. (ECF No. 52, PageID 1647; ECF No. 53, PageID 1654.)

In addition, Mr. Simms reargues the substance his Motions for Recusal in his Objections. (ECF No. 52, PageID 1645–47; ECF No. 53, PageID 1652–53.)

Mr. Simms's contention that the Magistrate Judge has no jurisdiction to determine whether the undersigned should recuse lacks merit. Congress enacted 28 U.S.C. § 636 to relieve the burden on the federal judiciary by permitting the assignment of district-court duties to magistrate judges. *Gomez v. United States*, 490 U.S. 858, 869–70 (1989); *see also Baker v. Peterson*, 67 Fed. App'x 308, 310 (6th Cir. 2003). A district court has the authority to "designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion [with a few exceptions]." 28 U.S.C. § 636(b)(1)(B).

The Magistrate Judge proceeded within the confines of his statutory authority to write a report and recommendation for the undersigned's consideration on the recusal issues raised by Mr. Simms. Mr. Simms cites no authority to support his proposition that a district judge cannot consider on report and recommendation whether he or she should recuse from a matter. The undersigned is the final decision maker on whether he recuses as he determines whether to accept, reject, or modify the Magistrate Judge's recommendations. Mr. Simms first objection is overruled.

Next, Mr. Simms argues that the Magistrate Judge concluded incorrectly that the Affidavits were improper. He points out that they were sworn to under penalty of perjury, signed, and reference 28 U.S.C. § 1746. Mr. Simms urges that the Affidavits were indeed timely, because a due diligence standard applies.

Even if the Court assumes Mr. Simms's Affidavits comply with the necessary requirements—and the Magistrate Judge points out reasons they may not (*see, e.g.*, PageID 51, PageID 1639)—his Affidavits are insufficient for other reasons. Under 28 U.S.C. § 144, a party may seek a judge's recusal based on personal bias or prejudice by filing an affidavit:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term [session] at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144; *See Massey v. Specialized Loan Servicing, LLC,* 2024 U.S. App. LEXIS 22977, *12 (6th Cir. Sept. 9, 2024). "The requirements of § 144 are strictly construed to prevent abuse because the statute is heavily weighted in favor of recusal." *Scott v. Metro. Health Corp.*, 234 F. App'x 341, 353 (6th Cir. 2007). "The § 144 affidavit must state factual averments with particularity as to time, person, place, and circumstances." *Id.*

Absent from Mr. Simms's Affidavits are any of these particularities. There is no information about the Judges' personal biases or prejudices, must less the times, places, or circumstances in which the Judges made such biases or prejudices known. Rather, Mr. Simms restates the results of his LexisNexis research (discussed in his Motions and more *infra*) and states the numbers amount to bias that rises to the level of requiring automatic recusal. Such averments are not enough to satisfy § 144; the Affidavits are insufficient.

As to Mr. Simms's re-argument of his Motions in his Objections, the Court finds no error in the Magistrate Judge's findings and reasoning, nor in the Magistrate Judge's conclusion that Mr. Simms offers no extrajudicial source for either Judge's asserted bias. The Supreme Court has explained:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. *See United States v. Grinnell Corp.*, 384 U.S. [563, 583 (1966)]. In and of themselves (*i.e.*, apart from surrounding comments or accompanying

> opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required [ ] when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.

Liteky v. United States, 510 U.S. 540, 555 (1994). "[S]peculative and unfounded allegations are insufficient to demonstrate bias or prejudice . . . and do not establish a basis for recusal." *Smith v. Yost*, No. 1:23-CV-749, 2024 WL 4343035, at *5 (S.D. Ohio Sept. 30, 2024).

All that Mr. Simms has to support his Motions are unsupported statistics based on judicial recommendations and rulings on habeas petitions. Mr. Simms assumes the volume of denials in comparison to grants makes judicial bias self-evident. Yet as the Magistrate Judge stresses, Mr. Simms provides no search methodology or context surrounding the numbers (e.g. data from other judges, reversal rates) that might support or undercut Mr. Simms's conclusion. (ECF No. 51, PageID 1639.) And importantly, Mr. Simms references no out-of-court statements and acts indicating biases or prejudices that the Judges took outside of their judicial capacities.

The moving party bears the burden of justifying disqualification. *Consol. Rail Corp. v. Yashinsky*, 170 F.3d 591, 597 (6th Cir. 1999). When recusal is appropriate "is not based on the subjective view of a party," but recusal "imposes an objective standard: a judge must disqualify himself where a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Burley v. Gagacki*, 834 F.3d 606, 615–16 (6th Cir. 2016) (internal citations and quotations omitted); *see also United States v. Nelson*, 922 F.2d 311, 319 (6th Cir. 1990), *cert. denied*, 499 U.S. 981 (1991) (explaining the recusal standard is objective and not based on the subjective view of a party); *Hughes v. United States*, 899 F.2d

1495, 1501 (6th Cir. 1990) (same). Mr. Simms's subjective views are not enough, and he has not met his burden.

IV. Conclusion

The Magistrate Judge's Recusal Decision was neither clearly erroneous nor contrary to law. The Magistrate Judge's findings and recommendations in his Recusal Report are sound. Mr. Simms's Objections (ECF Nos. 52, 53) are **OVERRULED** and the Decision and Order (ECF No. 50) and Report and Recommendation (ECF No. 51) are **ADOPTED AND AFFIRMED.** The Motions for Recusal are **DENIED.** (ECF Nos. 48, 49.) This case remains open.

IT IS SO ORDERED.

11/14/2024
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TIMOTHY SIMMS,

Petitioner,

v.

Case No. 2:22-cv-00474
Judge Edmund A. Sargus, Jr.
Magistrate Judge Michael R. Merz

WARDEN,

Respondent.

OPINION AND ORDER

This is a habeas corpus case pursuant to 28 U.S.C. § 2254 brought by *pro se* Petitioner Timothy Simms. Before the Court are Reports and Recommendations issued by the Magistrate Judge and objections to those Reports and Recommendations filed by Mr. Simms. For the reasons below, the Court **ADOPTS** and **AFFIRMS** the Reports and Recommendations, except the portions withdrawn by the Magistrate Judge, and **OVERRULES** Mr. Simms's objections, except where the objections were well taken. The Court also examines an objection by Mr. Simms to a Decision and Order from the Magistrate Judge, and **OVERRULES** that objection.

I. THE REPORTS AND RECOMMENDATIONS

A. Background

Mr. Simms was convicted of raping his minor daughter. His habeas corpus Petition pleads four grounds for relief: confession taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966) (ground one), ineffective assistance of trial counsel (ground two), prosecutorial misconduct (ground three), and judicial misconduct (ground four). (Petition, ECF No. 4.) The Magistrate Judge issued four Reports and Recommendations on the Petition, three after Recommital Orders.

First R&R. The Magistrate Judge's first Report and Recommendation (First R&R, ECF No. 21) recommended that all four grounds for relief be dismissed as barred by the statute of limitations. In his objections to that Report, Mr. Simms asserted that the Magistrate Judge had miscalculated the date of finality of the new trial motion. (ECF No. 22.) In addition, Mr. Simms argued that evidence presented in his new trial motion constituted newly discovered evidence of prior constitutional violations and showed that he was actually innocent, which excused his failure to timely file. (*Id.*)

Second R&R. On recommittal, the Magistrate Judge admitted his mistake in time calculation as to the finality of the new trial motion,[1] apologized to Mr. Simms, and withdrew that portion of the First Report. (Second R&R, ECF No. 24, PageID 1519.)

The Second Report and Recommendation went on to explained that, although Mr. Simms was claiming the benefit of newly discovered evidence to avoid the statute of limitations defense, he provided no timeline about the discovery of the new evidence, which was necessary information. (*Id.*) The Magistrate Judge rejected Mr. Simms's argument that such evidence showed actual innocence and served as a *Schlup* gateway. (*Id.* PageID 1520–21); *see Schlup v. Delo*, 513 U.S. 298, 319 (1995). "[A]ctual innocence, if proved, serves as a gateway through

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[1] The Magistrate Judge explained:

> The Report actually found the Common Pleas Court denied the new trial motion March 12, 2020 (Report, ECF No. 21, PageID 1505, citing *State v. Simms*, 2020 Ohio Misc. 4826 (Franklin Cty. CP, Mar. 12, 2020)). The Court of Appeals affirmed *State v. T.S.*, 2021-Ohio-2203 (Ohio App. 10th Dist. Jun. 29, 2021). Finally, the Supreme Court of Ohio declined appellate review, *State v. T.S.*, 164 Ohio St. 3d 1449 (2021). The Ohio Supreme Court acted September 28, 2021, so the Petition herein, insofar as it raises issues related to the new trial motion, is in fact timely.

(Second R&R, ECF No. 24, PageID 1518–19.) The Antiterrorism and Effective Death penalty Act of 1996 has a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). Mr. Simms filed this case in February 2022 and his Petition in June 2022. (ECF Nos. 1, 4.)

which a petitioner may pass whether the impediment is a procedural bar, as it was in *Schlup* and *House*, or, . . . expiration of the statute of limitations." *McQuiggin v. Perkins*, 569 U.S. 383, 384 (2013) (citing *Schlup*, 513 U.S. at 319; *House v. Bell*, 547 U.S. 518, 537 (2006)). Mr. Simms's new evidence was his rape victim's recantation of her trial testimony that happened about four years after the trial (July 2014) and was presented to the courts around four years after that (November 2018). (Second R&R, ECF No. 24, PageID 1521; *see* ECF No. 16, PageID 1454.) The Magistrate Judge observed that the trial judge did not find the recantation credible and found that: "Given the circumstances in which the recantation occurred and the length of time between the purported recantation and its presentation to the courts, this Court is not persuaded the recantation meets the *Schlup* requirements for proving actual innocence." (*Id.*; *see Schlup*, 513 U.S. at 319–23.)

The Magistrate Judge concluded that the claims relating to the motion for new trial and the parts of the withdrawn recommendation regarding ground four (judicial misconduct) would be treated in a separate, forthcoming report. (*Id.*) He reiterated his recommendation to dismiss the other claims relating to the trial—grounds one (*Miranda* violations), two (ineffective assistance of counsel), and three (prosecutorial misconduct) and two parts of ground four (judicial misconduct) on statute of limitations grounds. (*Id.* PageID 1521.)

Mr. Simms objected (ECF No. 25) to the Second Report, and this Court issued a Recommittal Order (ECF No. 26). The Magistrate Judge filed another Report and Recommendation (Third R&R, ECF No. 27), analyzing the claims arising from adjudication of Mr. Simms's new trial motion and the new objections.

Third R&R. Mr. Simms again argued his actual innocence claim provided a gateway past the statute of limitations bar. (ECF No. 25, PageID 1525.) The Magistrate Judge elaborated on

the reasoning in his Second Report where he found that the victim's recantation of her trial testimony was not credible. (Third R&R, ECF No. 27, PageID 1532–36.) He provided details about how the recantation was made with the victim's mother, paternal grandmother (Mr. Simms's mother), and Mr. Simms's attorney present, at Mr. Simms's attorney's office. (*Id.* PageID 1534.) When the victim had a chance to repeat her recantation at the new trial hearing four years later, she declined to take the stand on advice of counsel. (*Id.*) The Magistrate Judge again concluded that a retracted recantation was not the sort of evidence that satisfies the actual innocence exception recognized in *Schlup*. (*Id.* PageID 1535; *see* 513 U.S. at 324.)

Also in the Third R&R, the Magistrate Judge found that Mr. Simms's claims of judicial misconduct at the new trial proceedings were procedurally defaulted because they had not been fairly presented to the Ohio courts.[2] (*Id.* PageID 1536–37.).

Fourth R&R. After objections (ECF No. 36) and another recommittal (ECF No. 38),[3] the Magistrate Judge again elaborated on his findings on the recantation. (Fourth R&R, ECF No. 39.) He detailed why Mr. Simms's judicial prejudice claim had not been fairly presented. (*Id.* PageID 1578.) Mr. Simms objected to the Fourth R&R, and those objections are before the Court.

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[2] The Magistrate Judge sustained an objection to his conclusion in the Second R&R that Mr. Simms had waived any objection to Warden's statute of limitations defense by omitting it from his Reply. (Third R&R, ECF No. 27, PageID 1531–32.) Mr. Simms correctly pointed out that he was under no duty to file a reply at all, so his failure to respond to the limitations assertion was not a forfeiture of his right to have that question decided on the merits. (*Id.*)

[3] Mr. Simms received an extension of time to file such objections from the Magistrate Judge until September 15, 2023. (ECF No. 31.) The undersigned mistakenly entered an order adopting the Third R&R and a judgment on September 13, 2023 (ECF Nos. 34, 35), but entered an order vacating that judgment on September 14, 2023 (ECF No. 37). Mr. Simms filed his objections on September 13, 2024. (ECF No. 36.) This Court recommitted the matter to the Magistrate Judge on September 14, 2024. (ECF No. 38.)

B. Standard of Review

If a party objects to a report and recommendation within the allotted time, the Court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b). Upon review, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1).

C. Analysis

In sum, the Magistrate Judge's recommendation is that all of Mr. Simms's claims related to the trial (grounds one, two, three, and portions of ground four) be dismissed as barred by the statute of limitations and that claims arising from the new trial proceedings (remaining portions of ground four) be dismissed as procedurally defaulted.

After analyzing Mr. Simms's objections to the First, Second, and Third R&Rs de novo, the Court accepts the findings and recommendations, including the Magistrate Judge's conclusion to withdraw some recommendations, and **OVERRULES** Mr. Simms's objections, except those sustained that caused the Magistrate Judge to withdraw recommendations.

As explained above to try to overcome the statute of limitations bar, Mr. Simms has argued a claim of actual innocence, which relies on the victim's purported recantation of her trial testimony. (*See* Fourth R&R, ECF No. 39, PageID 1574.) In his first objection to the Fourth R&R, he reiterates his previous positions, positing that the Magistrate Judge "erroneously misstates the facts surrounding the recantation by the complaining witness." (ECF No. 40, PageID 1581.) He takes issues with the Magistrate Judge's characterization of the recantation as occurring "many years after the trial" (*id.* PageID 1581–82) and urges that the trial judge's finding that the recantation was not credible is "highly irrelevant" (*id.* PageID 1583).

Mr. Simms's contentions are unpersuasive; the Magistrate Judge's reasoning in previous Reports and Recommendations was sound and thorough. As the Magistrate Judge explained (and the state trial court judge found) the recantation was taken when the minor victim was unrepresented and in the presence of Mr. Simms's mother, who was the victim's source of shelter, money, and transportation at the time. (Fourth R&R, ECF No. 39, PageID 1575.) When the victim had a chance to repeat her recantation at the new trial hearing four years later, she declined to take the stand on advice of counsel. (*Id.* PageID 1576.)

While a credible claim of actual innocence requires "new reliable evidence," federal courts must not limit their analysis to that evidence. *Hubbard v. Rewerts*, 98 F.4th 736, 743 (6th Cir. 2024) (citing *House*, 547 U.S. at 537). "The court must instead look at the entire record, 'old and new' evidence, without regard to its admissibility, before determining whether a petitioner has credibly shown actual innocence sufficient to overcome a habeas procedural barrier." *Id.* (citing *House*, 547 U.S. at 538). The old evidence includes—as the Magistrate Judge highlights in his Fourth R&R—Mr. Simms's own statements to the police that he had engaged in sex acts with his daughter, and the minor victim's disclosures to a forensic interviewer at the child advocacy center regarding sexual acts and depictions of sex toys. (Fourth R&R, ECF No. 39, PageID 1575; ECF No. 16, PageID 1443–46.)

Given the circumstances in which the victim's recanting statement were obtained and presented, as well as the old evidence (summarized only briefly here) Mr. Simms has not "persuade[d] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *See Schlup,* 513 U.S. at 329. Mr. Simms's argument about the Magistrate Judge's use of "many years" to describe the four years that happened between the end of the trial and when the recantation occurred is semantic;

the Magistrate Judge laid out the relevant timeline. (*See* Fourth R&R, ECF No. 39, PageID 1575–76.)

The actual innocence exception is "rare" and only applies in "extraordinary case[s]." *Souter v. Jones,* 395 F.3d 577, 590 (6th Cir. 2005); *Hubbard,* 98 F.4th at 747 ("the actual-innocence remedy is reserved for only the most extraordinary case") (collecting cases). This is not that exceptional case.

As for Mr. Simms's second objection to the Fourth R&R (ECF No. 40, PageID 1584), the Court agrees with the Magistrate Judge that those portions of ground four protesting of judicial misconduct at the new trial proceedings were not fairly presented to the Ohio courts.

Mr. Simms's third objection to the Fourth R&R is that the Magistrate Judge is systematically biased against habeas corpus petitioners. (*Id.* PageID 1585–86.) Mr. Simms made this same objection in his Motion to Recuse the Magistrate Judge. (ECF No. 49.) The Magistrate Judge denied that Motion (ECF No. 50), and the undersigned adopted and affirmed that Decision and Order over Mr. Simms's objection (ECF Nos. 53, 56). The Court overrules Mr. Simms's third objection for the same reasons.

Mr. Simms's fourth objection to the Fourth R&R is that Magistrate Judge Merz has recommended denial of a certificate of appealability without waiting for an application from Mr. Simms first. (ECF No. 40, PageID 1586.) Because the Magistrate made an error in his analysis—e.g., the miscalculation of the date of finality of the new trial proceeding—he is entitled to a certificate of appealability, Mr. Simms says.

Mr. Simms's argument that the Magistrate Judge made a recommendation on a certificate of appealability before Mr. Simms moved for one disregards Rule 11 of the Rules Governing § 2254 Proceedings, effective December 1, 2009. That Rule requires that district courts include

in any final judgment against a habeas petitioner a ruling on whether the petitioner is to receive a certificate of appealability. The case authority Mr. Simms relies on all pre-dates the 2009 Rule amendment which requires the Court to make this decision without any motion by the petitioner.

As for Mr. Simms's argument that he is entitled to a certificate of appealability because of an error in analysis, when a judicial officer recognizes and corrects an error before judgment, the fact that the error was made sometime in the proceedings does not entitle a petitioner to appeal. *See Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991) (citing *Marconi Wireless Tel. Co. v. United States,* 320 U.S. 1, 47–48, (1943)) ("District courts have inherent power to reconsider interlocutory orders and reopen any part of a case before entry of a final judgment."). Even more, the undersigned had not yet reviewed the First R&R and determined whether he would accept, reject, or modify the findings and recommendation from the Magistrate Judge. *See* 28 U.S.C. § 636(b)(1).

Mr. Simms's objections to the Fourth R&R are **OVERRULED.**

II. DECISION AND ORDER ON EVIDENTIARY HEARING

A. Background

While the Reports and Recommendations were pending, the Magistrate Judge issued a Decision and Order on a "Motion to Proceed to Hearing and Judgment" (ECF No. 45) filed by Mr. Simms. (Decision and Order, ECF No. 46.) Mr. Simms asked for an evidentiary hearing and for expedited consideration of the merits. (ECF No. 45.)

In rejecting Mr. Simms's request for an evidentiary hearing the Magistrate Judge explained that the Supreme Court has limited the authority of district courts to hold evidentiary hearings; rather, district courts are confined to deciding cases from state court records. (Decision and Order (citing *Cullen v. Pinholster*, 563 U.S. 170, 183 (2011).) The Magistrate Judge

explained that the pending Reports and Recommendations were ripe for the undersigned's consideration, and a final decision would be issued "in the ordinary course of the Court's business." (*Id.*)

B. Standard of Review

When a party objects to a non-dispositive motion, the district court must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). Likewise, 28 U.S.C. § 636(b)(1)(A) provides that "[a] judge of the court may reconsider any pretrial matter . . . where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." The "clearly erroneous" standard applies to factual findings and the "contrary to law" standard applies to legal conclusions. *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992) (Kinneary, J.) (citations omitted). A factual finding is "clearly erroneous" when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Heights Cmty. Cong. v. Hilltop Realty, Inc.*, 774 F.2d 135, 140 (6th Cir. 1985). A legal conclusion is "contrary to law" when the magistrate judge has "misinterpreted or misapplied applicable law." *Hood v. Midwest Sav. Bank*, No. C2-97-218, 2001 WL 327723, at *2 (S.D. Ohio Mar. 22, 2001) (Holschuh, J.) (citations omitted).

C. Analysis

Mr. Simms has not shown that the Magistrate Judge's Decision and Order is contrary to law, and so his objections are **OVERRULED**.

III. CONCLUSION

The Reports and Recommendations at ECF Nos. 21, 24, 27, and 39 are **ADOPTED AND AFFIRMED,** except the portion that the Magistrate Judge withdrew (*see* ECF No. 24, PageID 1518–19; ECF No. 27, PageID 1531–32). The objections to those Reports and Recommendations

are **OVERRULED** unless the objections were sustained. (ECF Nos. 22, 25, 36, 40; *see* ECF No. 24, PageID 1518–19; ECF No. 27, PageID 1531–32.) Mr. Simms's objection (ECF No. 47) to the Magistrate Judge's Decision and Order (ECF No. 46) is **OVERRULED**.

Finally, as reasonable jurists would not disagree with the conclusions above, no certificate of appealability will issue. *See Porterfield v. Bell*, 258 F.3d 484 (6th Cir. 2001) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). The Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and should not be permitted to proceed *in forma pauperis*.

The Clerk is **DIRECTED** to enter judgment and close this case.

IT IS SO ORDERED.

11/18/2024
DATE

s/Edmund A. Sargus, Jr.
EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

No. 24-4063

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TIMOTHY SIMMS,

Petitioner-Appellant,

v.

JERRY SPATNY, Warden,

Respondent-Appellee.

ORDER

Before: STRANCH, Circuit Judge.

Timothy Simms, an Ohio prisoner proceeding pro se, appeals the district court's judgment dismissing his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. Simms has filed an application for a certificate of appealability (COA) and a motion for leave to proceed in forma pauperis (IFP). For the following reasons, we deny the application for a COA and deny as moot the motion for leave to proceed IFP.

In 2010, a jury convicted Simms of six counts of raping a minor under the age of 10, six counts of sexually battering a victim under the age of 13, three counts of gross sexual imposition of a victim under the age of 13, and one count of tampering with evidence. The trial court sentenced him to four consecutive terms of life in prison. The Ohio Court of Appeals affirmed Simms's convictions but remanded for resentencing, *State v. Simms*, No. 10AP-1063, 2012 WL 1894276, at *14-15 (Ohio Ct. App. May 24, 2012), and the Ohio Supreme Court denied leave to appeal, *State v. Simms*, 974 N.E.2d 1210 (table) (Ohio 2012). The trial court again sentenced Simms to four consecutive terms of life in prison,[1] and the Ohio Court of Appeals again reversed

[1] The trial court's journal entry states that it "imposed five consecutive life without parole sentences," but the judge announced at the sentencing hearing that it was imposing four consecutive life sentences. *See Simms*, 2013 WL 6157261, at *1.

the judgment, in part, and remanded for resentencing. *State v. Simms*, No. 13AP-299, 2013 WL 6157261, at *4 (Ohio Ct. App. Nov. 21, 2013). The trial court then sentenced Simms to five consecutive terms of life in prison. Simms moved for a new trial. The trial court held a hearing but denied the motion, and the Ohio Court of Appeals affirmed. The Ohio Supreme Court denied leave to appeal.

In 2022, Simms petitioned for a writ of habeas corpus, raising four grounds for relief: (1) his confession was not knowing, free, and voluntary; (2) trial counsel performed ineffectively; (3) the prosecutor engaged in misconduct; and (4) the trial judge and the judge who ruled on his motion for a new trial were prejudiced and biased against him. A magistrate judge recommended dismissing the petition, finding that Simms's claims were barred by the one-year statute of limitations. Simms objected, and the district court recommitted the case to the magistrate judge. The magistrate judge then issued a supplemental report and recommendation, finding that claims one, two, three, and certain sub-parts of claim four were time-barred, but any portion of claim four that alleged judicial misconduct relating to proceedings on the new trial motion were timely. He further found that Simms failed to make a sufficient showing of actual innocence to overcome the time-bar. The magistrate judge stated that he would issue a separate report discussing the portions of claim four that related to the new trial motion.

Simms objected, and the district court again recommitted the case to the magistrate judge. The magistrate judge concluded that the timely portions of claim four were procedurally defaulted, and he reaffirmed his finding that Simms failed to make a credible showing of actual innocence. Simms objected. The district court overruled the objections, adopted the magistrate judge's report and recommendation, and dismissed the case. Simms filed delayed objections, however, and the district court vacated its judgment and recommitted the case to the magistrate judge.

In a final supplemental report and recommendation, the magistrate judge reiterated that most of Simms's claims were time-barred, the portions of claim four relating to the new trial motion were procedurally defaulted, and Simms did not make a sufficient showing of actual innocence to overcome either the time-bar or the procedural default. Simms objected, and the

district court overruled the objections and adopted the magistrate judge's reports and recommendations to the extent that they concluded that Simms's claims were either time-barred or procedurally defaulted and that Simms did not make a sufficient showing of actual innocence to excuse the procedural default. The district court declined to issue a COA.

In his COA application, Simms argues that the district court erred in finding that he failed to make a sufficient showing of actual innocence to overcome the untimeliness and procedural default of his claims. He also contends that the district court erred in finding that he procedurally defaulted his claims of judicial misconduct during the state-court proceedings. Finally, Simms argues that the district court should have granted his motions for recusal of both the magistrate judge and the district court judge due to bias and prejudice.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A petitioner may meet this standard by showing that reasonable jurists could debate whether the petition should have been determined in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). If the district court denies relief on a procedural ground, the petitioner must show, "at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

I. *Actual Innocence*

Simms's COA application does not challenge the district court's finding that claims one, two, three, and portions of claim four are untimely. However, he does argue that he made a sufficient showing of actual innocence to overcome the time-bar. A prisoner may overcome a time-bar by making a credible showing of actual innocence, but that requires a showing "that it is more likely than not that no reasonable juror would have convicted him in the light of . . . new evidence." *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). To determine whether this standard is satisfied, a habeas court "must . . . look

at the entire record, 'old and new' evidence, without regard to its admissibility, before determining whether a petitioner has credibly shown actual innocence." *Hubbard v. Rewerts*, 98 F.4th 736, 743 (6th Cir. 2024) (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). "Based on the entire record, the court must then determine whether 'no reasonable juror would find [the petitioner] guilty.'" *Id.* (quoting *House*, 547 U.S. at 538).

Reasonable jurists could not debate the district court's conclusion that Simms did not make a credible showing of actual innocence. The victim, Simms's daughter, did recant her testimony during a 2014 deposition: she denied all aspects of her trial testimony and declared that Simms never touched her in a sexual manner. She stated that she testified falsely because she did not want to spend time at Simms's house and she "was just a stupid, little nine-year-old girl that just wanted to stay with [her] mom." Although she admitted during trial that she had drawn pictures of items that Simms kept in a black suitcase, she stated during her 2014 deposition that she did not recall drawing those pictures, she stated that her sexual knowledge was derived from television shows that she had watched, and she explained that the prosecutor had "explained to [her] . . . what to say." Simms's mother accompanied the victim when she provided her 2014 recantation.

Setting aside the specific facts undermining the reliability of the recantation, reasonable jurists would agree that the recantation, when viewed in conjunction with the evidence presented at trial, is not sufficient to show that Simms is actually innocent. The victim's allegations against Simms came to light only after the victim was overheard discussing the abuse with a friend. And the allegations were specific and included details about items that Simms kept inside a locked, black suitcase—items about which most nine-year-olds would not have knowledge. The victim also repeated her detailed allegations to a forensic interviewer. Most critically, the jury heard an audio recording of Simms's admission to authorities that he had engaged in oral sex with the victim multiple times, that he used to have a locked briefcase that contained specific items mentioned by the victim, and that he wanted to get help instead of going to prison. In light of this evidence, Simms's claim that the time-bar should be excused due to his actual innocence does not deserve encouragement to proceed further.

II. *Procedural Default of Judicial Misconduct Claim*

In appealing the trial court's denial of his motion for a new trial, Simms argued that, at a hearing in 2019, the trial court erred by failing to ensure that the victim had proper grounds for invoking her Fifth Amendment right against self-incrimination when her attorney indicated that she did not wish to testify. He argued that this violated his right to due process and his right to confront adverse witnesses. Simms presented this same argument to the Ohio Supreme Court. The district court found that these arguments did not properly preserve Simms's habeas claim that the trial court was biased and prejudiced against him. Reasonable jurists could not debate that conclusion. To properly exhaust a habeas claim, a state prisoner must present his claim "to the state courts under the same theory in which it is later presented in federal court." *Bumpas v. Tennessee*, No. 24-5888, 2025 WL 947268, at *2 (6th Cir. Mar. 19, 2025) (quoting *Wong v. Money*, 142 F.3d 313, 322 (6th Cir. 1998)). Reasonable jurists could not debate the district court's conclusion that Simms's due process and confrontation claims raised in state court were based on a different legal theory and, therefore, did not exhaust, his judicial-misconduct claim.

III. *Judicial Bias*

Simms moved the magistrate judge and the district court judge to recuse themselves. He argued that the magistrate judge was biased against habeas petitioners because he overwhelmingly ruled in favor of the State of Ohio in habeas cases. He also argued that the magistrate judge had issued four separate reports and recommendations in his case alone and admitted a legal error in one of those reports. As to the district court judge, Simms argued that the judge's rulings in favor of the State of Ohio in almost every habeas case assigned to him and his refusal to reassign Simms's case to a different magistrate judge showed that he was prejudiced against habeas petitioners. Reasonable jurists would agree that these arguments do not deserve encouragement to proceed further. "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). And, for reasons just discussed, Simms has not shown that any of the district court's adverse rulings themselves warrant a COA.

For the foregoing reasons, this court **DENIES** Simms's application for a COA and **DENIES** as moot his motion for leave to proceed IFP.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-4063

TIMOTHY SIMMS,

Petitioner-Appellant,

v.

JERRY SPATNY, Warden,

Respondent-Appellee.

Before: STRANCH, Circuit Judge.

JUDGMENT

THIS MATTER came before the court upon the application by Timothy Simms for a certificate of appealability.

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

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

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

Elizabeth's Recantment. The Victim Alleged

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

- - -

State of Ohio, :
:
Plaintiff, :
:
vs. : Case No. 09CR-07-4205
:
Timothy Simms, :
:
Defendant. :

- - -

DEPOSITION

of Elizabeth Jenn, taken before me, Marissa LaRue, a Notary Public in and for the State of Ohio, at the Franklin County Public Defender's Office, 373 South High Street, Columbus, Ohio, on Friday, July 18, 2014, at 9:00 a.m.

- - -

ARMSTRONG & OKEY, INC.
222 East Town Street, 2nd Floor
Columbus, Ohio 43215-5201
(614) 224-9481 - (800) 223-9481
FAX - (614) 224-5724

- - -

APPEARANCES:

Franklin County Public Defender's Office
By Mr. Tim Pierce
373 South High Street, 12th Floor
Columbus, Ohio 43215

On behalf of the Defendant.

ALSO PRESENT:

Alicia Lash

Nancy Kirkwood

Shelley Jehn

- - -

APPENDIX K

Friday Morning Session,
July 18, 2014.
9:05 a.m.

- - -

MR. PIERCE: Good morning. My name is Tim Pierce. I am the lawyer appointed to represent Mr. Timothy Simms. This is in Case No. 09CR-07-4205. It is captioned State of Ohio versus Timothy Simms. Today is Friday the 18th of July 2014. It's approximately nine o'clock in the morning, maybe a few minutes after that. We are located for this deposition on the 11th Floor of 373 South High Street, Columbus, Ohio 43215. This is part of the offices of the Franklin County Public Defender Office. I'm accompanied this morning by Elizabeth Jehn.

Do you go by Jehn or do you go by Simms?

MISS JEHN: It don't matter.

MR. PIERCE: And, Elizabeth, how do you spell your last name?

MISS JEHN: Jehn, it's J-E-H-N.

MR. PIERCE: Okay. Very good. That's fine. And I'm also accompanied here with Elizabeth's mother, Shelley Jehn and same -- is it Shelly, S-H --

how do you spell your name?

MS. SHELLEY JEHN: S-H-E-L-L-E-Y.

MR. PIERCE: And then the last name?

MS. SHELLEY JEHN: Jehn, J-E-H-N.

MR. PIERCE: J-E-H-N, and then we're also accompanied by Nancy Kirkwood, Elizabeth's grandmother.

And could you spell your first name and last name?

MS. KIRKWOOD: N-A-N-C-Y, K-I-R-K-W-O-O-D.

MR. PIERCE: Okay. And lastly, we're also accompanied by my paralegal, Alicia Lash, and why don't you spell your first and last name?

MS. LASH: A-L-I-C-I-A. Last name is L-A-S-H.

MR. PIERCE: We are here this morning to talk to Elizabeth about these allegations that you made against your father many years ago. I want to say, I do have a copy of the indictment in front of me. These allegations arose supposedly back in November of 2008 and lasted until June of 2009.

If I could just have a moment, I believe all of these allegations -- and, again, let the

record reflect that I'm reviewing the indictment as I'm determining the time frames here. Yeah. That -- so, yeah. These appear to be one count, which I think was the tampering, which was not guilty. Other than the tampering count in the indictment, all of these allegations arose between, I believe, the 5th of November 2008 and lasted to June 28th of 2009.

Are you familiar with those allegations that I'm talking about?

MISS JEHN: I have no what allegation means.

MR. PIERCE: Okay. Basically, by allegation, what I mean is, is that these are things that you said that your dad did to you.

MISS JEHN: Okay.

MR. PIERCE: And so, anyway -- well, I think before we go further here, I'd like you to be placed under oath. This young lady is going to place you under oath and I'll have a few other things to explain to you and then we'll get into it.

(Witness sworn.)

MR. PIERCE: Very good. Thank you. Back on the record here.

What I'm -- what, I guess, I'd like the

record to reflect is your reason for being here this morning, and that is we're going to talk about these things that you had said that your dad did to you back between November of 2008 to June of 2009, and whether or not those were true; okay? So, that's -- do you understand that?

MISS JEHN: Yes.

MR. PIERCE: Very good. And before we go further, I'd also like the record to reflect that is it correct that I have discussed with -- now, not only with you, but also your mother, who's accompanying you today, about the possibility that if you were to now say that the things that you said earlier in trial are not true, that could subject you, that could cause you to be charged with maybe certain criminal offenses, such as perjury, which means lying under oath, or falsification, which is, you know, knowingly making a false statement, that could result, you know, in a number of penalties to you, including the possibility of being sent to a juvenile correctional facility, which is kind of like juvenile prison?

MISS JEHN: Yeah.

MR. PIERCE: And you understand that

there's a possibility that you could be charged? You need to answer "yes" or "no."

MISS JEHN: Oh, yes.

MR. PIERCE: That's okay. I'm sorry.

And Ms. Jehn, is it true that I've also discussed this with you?

MS. SHELLEY JEHN: Yes.

MR. PIERCE: Very good. And in addition to that, I have also explained to both you and you, meaning Elizabeth, and Ms. Jehn, I've also explained that if Elizabeth wanted to have legal counsel here, she could, but you all are comfortable proceeding without legal -- her being accompanied by legal counsel?

MS. SHELLEY JEHN: Yes. That's fine.

MR. PIERCE: Okay. That's fine?

MS. SHELLEY JEHN: That's fine.

MR. PIERCE: And you're good with that as well?

MISS JEHN: Yes.

MR. PIERCE: First of all, there are a number of people in this room here. Has anybody forced you to be here today, coerced you or threaten you in any way to come in here to talk to me this

morning?

MISS JEHN: No.

MR. PIERCE: Are you here on your own free will?

MISS JEHN: Yes.

MR. PIERCE: I'm going to go ahead and, kind of, jump into this.

I'm sorry. One other preliminary item: You also -- well, a couple preliminary items: You also understand that if at any time you want to get up and leave or you're uncomfortable being here, or you're uncomfortable with certain people being here, you understand all you have to do is say something and we can terminate this interview?

MISS JEHN: Yes.

MR. PIERCE: Okay. You did have a chance, I believe, about 15 minutes ago to review an affidavit that, as I understand it, you signed this affidavit. This is an unsigned copy.

MISS JEHN: Yeah.

MR. PIERCE: But you actually signed and notarized this affidavit; is that right?

MISS JEHN: Yeah.

MR. PIERCE: And you had a chance to

review this?

MISS JEHN: Yeah.

MR. PIERCE: The reason I'm doing that is because there may be instances where I will be referring to this.

MISS JEHN: Okay.

MR. PIERCE: Okay? And -- okay. Do you have any questions before we begin?

MISS JEHN: No.

MR. PIERCE: Mom, do you have any questions before we begin?

MS. SHELLEY JEHN: No.

MR. PIERCE: And, Grandma, do you have any?

MS. KIRKWOOD: No.

MR. PIERCE: Well, I guess I'll ask you. I don't want to leave you out. Do you have any questions?

MS. LASH: No.

- - -

ELIZABETH JEHN

being by me first duly sworn, as hereinafter certified, deposes and says as follows:

- - -

EXAMINATION

BY MR. PIERCE:

Q. Elizabeth, in reviewing the testimony that you gave during the trial -- the testimony is the things you said --

A. Yeah.

Q. -- things you said, okay, during the trial -- there were a number of things that you told the jury that your father had done to you?

A. Yeah.

Q. Do you remember saying those things during the trial?

A. Some of them. Not all of them.

Q. Okay. Well, we'll -- at any point, if there's something where your memory needs to be refreshed or something, let me know. Okay.

Well, I guess first of all, I'm going to ask you, did your father touch in you in a sexual manner at any time?

A. No.

Q. And let me -- I got a question about a black suitcase. Do you remember talking some about the black suitcase?

A. A little bit.

Q. What can you tell me about that black suitcase?

A. It was by the bed, but there -- I didn't know what was in it. There was like some kind of paperwork or something like that.

Q. So, are you telling me you never saw what was in that suitcase?

A. Yeah.

Q. And -- all right. I'm going to probably come back to that in a little bit.

A. Okay.

Q. You said, during the jury trial a number of years ago, that your father had touched you in your private parts underneath your clothing. Is that true?

A. No.

Q. Do you -- did he, at any point, ever touch your vagina, inside or out?

A. No.

Q. Did he ever touch your buttocks or your butt, inside or out?

A. No.

Q. All right. And because of your answers then, it would not be true that he touched you more

than two times?

A. No.

Q. In other words, that's not a true statement?

A. Oh, no.

Q. Did your father, at any point, touch you sexually with his hands or his fingers?

A. No.

Q. Did he ever show you his penis?

A. No.

Q. Did he ever force you to lick his penis?

A. No.

Q. Did he ever put his mouth on the inside of your vagina?

A. No.

Q. Did you ever see your father ejaculate?

A. What's that? Like naked?

Q. Well, let me explain. Did you ever see him, say, have semen that came out of his penis?

A. No.

Q. You never saw that, okay. Okay.

Referring you back to the black case, okay, and, again, I don't want to put words in your mouth, you said that you saw the black case, and,

what, you thought there were papers in it or something?

A. Well, I mean, I saw it opened up once, but all I saw was papers.

Q. Papers?

A. Yeah.

Q. Okay. I'm going to ask you about that here in just a minute.

Where there any -- was there ever a ping-pong paddle that you saw in that briefcase?

A. No.

Q. So, did he ever smack you with a ping-pong paddle?

A. No.

Q. Did you ever smack him with one?

A. No.

Q. Did he keep magazines of naked women in the -- naked ladies in that briefcase?

A. No.

Q. Okay. Let me see here. Did you ever watch a movie, like a pornographic movie, with your dad, you know, showing naked woman, that kind of thing.

A. No.

Q. Nothing like that, okay.

Now, let me ask you this question: If you remember, did you ever see -- and there's a list of things I'm going to go through --

A. Okay.

Q. -- and if you need me to explain what these are, I'll do my best. Did you ever see an enema in that briefcase?

A. No.

Q. Do you know what an enema is?

A. Yes.

Q. Did you ever see, you know, pornographic magazines?

A. No.

Q. And I think you said you didn't see a ping-pong paddle?

A. No.

Q. There was nothing like that, okay.

Did you ever see an item, it's like a sex toy called a dildo? Did you ever see that in the briefcase?

A. No.

Q. Was there a red cord that you saw in the briefcase?

A. No.

Q. Okay. Did you see a fly swatter in this briefcase?

A. No.

Q. Did you ever see a tube of K-Y Jelly in the briefcase?

A. No.

Q. Okay. Let me ask you this question: Was there ever an instance where you and your father would play a card game where when somebody got a certain score with the cards, they'd have to start taking their clothes off?

A. No.

Q. You never did that?

A. No.

Q. Never did that with him, okay.

Were you ever in a position where these things happened and your father said don't tell anybody?

A. No.

Q. Did you ever see your dad, your father, with an enema?

A. No.

Q. You never saw that?

A. No.

Q. Okay. So, you never -- or he never asked you to help him put an enema in -- in --

A. No.

Q. Okay. Let me be more specific. He never asked you to help him put an enema inside his butt?

A. No.

Q. Now, did he ever give you an enema?

A. No.

Q. Never did that, okay.

So, where you may have -- where you indicated that he put an enema in you and it hurt you, that's not true?

A. No.

Q. Okay. And you're saying he never licked your vagina?

A. No.

Q. Did that -- and I'm sorry. I'm reading here, so I --

A. Okay.

Q. So, there were no events, no instances where your dad engaged in any kind sexual activity with you in -- anywhere in the house?

A. No.

Q. Let me -- okay. Do you recall drawing a picture of that black suitcase at Children's Hospital?

A. No.

Q. You don't remember doing that?

A. Uh-uh.

Q. You don't remember drawing it in -- showing -- drawing the things that were contained in the black suitcase?

A. No.

Q. You don't remember, okay.

Would your father ever show you pictures of nude people on a computer?

A. No.

Q. I'm sorry I keep talking about that black suitcase. So, there was never an instance, never a time when your dad put that black suitcase on the bed and you would look in it?

A. No.

Q. And your testimony is your father never touched you sexually with his hands or anything else for that matter?

A. No.

Q. You know what I mean when I say

"sexually"?

A. Yeah.

Q. Okay. Okay. Elizabeth, I'm going to ask you now a number of questions, and I'd like you to explain, if you can, then how these things -- you know, how it came to be that your father got charged with these things; okay?

A. Okay.

Q. And I'll get to that in a minute, but, I guess, first of all, let me ask you this question: Before the trial, and, again, we're talking many years ago, but I'm curious, was there anybody that forced you, that you thought, to have you say those things or -- or not? And if they didn't, they didn't. But was there anybody that you -- the prosecutor or maybe somebody else that maybe, kind of, forced you to say these things?

A. It was the guy that -- I think it was the prosecutor. I don't know if that's what he's called.

Q. What -- okay. Well, are you saying that -- that he kind of forced you or -- to --

A. No. He just kind of, like, explained to me, like, what to say really.

Q. Okay. Okay. All right. Well, I guess

what I'd like you to do is, could you explain how it is that these things -- how it became that your -- that you accused your father of these things? And I think, you know, for example, you've got -- I think that, you know -- I think you mentioned, I think, Christina, I think, is the name of somebody. And so anyway, so walk me through that. How is it that these came -- these allegations got made?

A. Okay. So, Christy, which is actually Christina, but I call her Christy, she kind of, like, told me a story about her dad and stuff like that. And then -- well, I got some of that off of there.

But the reason why I didn't want to go over to my dad's anymore was because, one thing, my mom was really sick and I didn't want to leave her. And, I mean, it was really boring over there when he lost his job.

Q. Okay.

A. There was not anyone to play with.

Q. Yeah. Right.

A. So, after she started telling me stories about her dad, that's where some of it came from. But the other parts came from off Family Guy, and Adult Swim, and American Dad, and Special Victims

Unit.

Q. These are TV shows you're talking about?

A. Yeah.

Q. And, so what -- without -- you know, so you don't have to go into a lot of detail, but, I mean, what were the kinds of things that you were hearing or seeing on these shows?

A. I mean, Special Victims Unit is all about rape and sexual things.

Q. Yeah. Okay.

A. So, that's where a lot of it came from.

Q. Adult Swim, I don't have cable, so I don't know what that is. So, what kind of shows are on that? I mean --

A. Well, I mean, there's Family Guy and American Dad. They're made by the same company kind of thing.

Q. Yeah.

A. And, well, I mean, all they do is just, like, talk dirty and things like that, and they show things on there.

Q. Okay. So, if I'm understanding you, so you got -- there was the show -- these shows, there was Christina talking about her -- I'm sorry. You

said -- I'm sorry. Are you talking about her dad?

A. Yeah. I mean, she said that this stuff happened with her dad. I don't know if it was true, but.

Q. Okay. Okay. Things that maybe her dad had done?

A. Yeah.

Q. Okay. I'm just - okay. And how is it that, if you know -- somehow this -- these things that you were saying got communicated to your mom. Do you know how that happened?

A. Well, I mean, we were talking about it in the bathroom, and then my sister overheard.

Q. And I'm sorry. Who is your sister? What's her name?

A. Erica Jehn.

Q. Erica, okay.

A. And she went over and told my mom. And then Christy went home and told her mom. So, her mom called my mom, and then my mom got, like, nervous and called the police.

Q. And when you say the friend you were talking to in the bathroom, are you referring to Christy?

A. Yeah.

Q. So, as best I can tell, it's like Chrisky tells her mom, Erica tells --

A. Yeah.

Q. -- your mom, and then phone calls are made, and this is how --

A. Yeah.

Q. Okay. Okay. Well, here's a question: Why didn't you say at -- you know, when the police were getting involved and Children's Hospital was getting involved, how come you didn't say, hey, this wasn't true, none of this happened? Tell me what was going through your mind?

A. Mostly the police really scared me then. I mean, I was terrified of the police. And -- let me think. I'm sorry.

Q. No. You're doing fine actually. You're doing real good.

A. After the police came, my daddy always taught me not to lie, but, I mean, the -- Christina, the same thing happened with her dad. He went to -- like, she wasn't able to go see him anymore. So, I thought the same thing was going to happen with my dad, I just wasn't going to be able to see him

anymore, and I was just going to spend -- stay with my mom.

Q. I'm sorry. I'm trying to -- and how did that -- okay. I understand you were afraid, but -- you know, of the police, and then you -- okay. Your fear -- well, you were afraid your dad may go to prison, and, of course, that's what's happened?

A. Yeah.

Q. So, I guess I'm trying to understand how that worked into you making this story up against him though, I mean, especially seeing Christy -- what happened to Christy's dad.

A. Well, I didn't know he was going to go to jail at all. Like, I had no clue. I just thought I was going to be taken away from him and I was just going to stay with my mom.

Q. Oh, I see. Okay. I'm sorry. I misunderstood. No. No. No. Good. Thank you for clarifying that.

Let me ask you a question because I'll get right to this: So, you know that what you're telling me is a lot different than what you testified to during the trial.

A Yeah.

Q. I think you'll agree with that?

A. Yeah.

Q. Now, are you -- is this a situation where you're changing your story because, gee, you're really sad and upset that your dad is now in prison for the -- you know, prison for a long, long time --

A. Yeah.

Q. -- the rest of his life actually, and now you're, like, oh, gee, I made a -- boy, I didn't want that to happen, so now I'm going to change my story? Is that's what going on here?

A. Well, I mean, kind of. I mean, I do -- like, all this was just made up. Like, none of it's true at all. I was just a stupid, little nine-year-old girl wanting to stay with my mom.

Q. Okay. Got you. Got you. I guess what I'm trying to do is this, so let me clarify. Are you now saying, hey, none of this happened because -- well, let me -- let me -- yeah. And I understand there's a little bit of a disconnect here. Are you lying now --

A. Oh, no.

Q. -- to get your dad out of prison?

A. No. I'm confused.

Q. Well -- and I didn't do a really good job asking, so I apologize. Okay.

And, again, have -- has anybody forced you, or threatened you, or coerced you to say these things that you shared with me today?

A. No.

Q. And what you're telling me is true and -- what you're now telling me is true and accurate?

A. Yes.

MR. PIERCE: If I could just go off the record and -- just a moment.

(Discussion off the record.)

MR. PIERCE: We're back on the record.

Q. I'd like the record to reflect that I consulted with my paralegal who is working with me on this motion for post-conviction relief. She's had an opportunity to review the transcripts herself, and she has reminded me of something that I should have asked you about. And that is this: Do you recall drawing pictures of what was contained in this black suitcase?

A. No.

Q. So, you don't remember anything about that?

A. No.

Q. So -- and I'm not ignoring what you just said, but let me -- let me -- so, this is not a situation where you went to Children's Hospital and drew pictures of what was contained in the black suitcase, is it?

A. No.

Q. Nor is it a situation where you drew some pictures and Erica showed your mom these pictures of what was contained in the black suitcase?

A. No.

MR. PIERCE: Okay. Is that -- okay. If I can just have a moment, I think we're --

THE WITNESS: Okay.

MR. PIERCE: -- close to wrapping this up actually.

(Off the record.)

MR. PIERCE: Yeah, I do. I do have a few more questions.

Q. So, if you remember, what were the -- what was a typical week -- what would a typical week look like with, like, you going to your dad's house and when you'd be, like -- you know, when you'd be at your mom's? I mean, how would that work? Like, when

typically would you go to your dad's and -- yeah.

A. Okay. I don't really remember when I would go to my dad's, but I was with my mom a lot. I mean, at my mom's house, we used to just play with friends and stuff like that. But when my dad came to pick me up, we would -- well, first, he had to take a shower because he worked at Rumpke and he stank.

Q. Yes.

A. I mean, stunk.

Q. Well, yeah. Sure. Absolutely. Yeah. Right.

A. And when he was doing that, I would just be in the living room, watching TV. And then when he's done, we would go over to my grandma's house, and we would have dinner. And then we'd just hang out with her for a little bit, and then he would take me home.

Q. Okay. And I'm going to ask you, he wouldn't ask you to join him in these showers, would he?

A. No.

Q. And would he typically -- you know, when you would return home, would he be like -- after like visiting with your grandma, would he be, like, really

tired?

A. Yeah.

Q. And like fall asleep and stuff?

A. Well, I mean, before we go to my grandma's, he normally took, like, a 30-minute nap, and then we would go to her, and then he'd take me home after.

Q. Let me ask you about the sleeping arrangements there at the house at the time. Would he sleep in, like, a -- in a bed upstairs with, like, the four dogs?

A. Yeah.

Q. Yeah. I can't imagine him doing that. But you would sleep down in the basement with your step-mom --

A. Yeah.

Q. -- Sue; right? Is that -- okay.

And she had her own -- a bed, and then you had your bed; right?

A. Yes.

Q. Let me ask you this question because I came across another transcript: Did you ever play this game, the naughty game, with Dylan? Did you ever play --

A. No.

Q. Okay. Do you know what the naughty game is?

A. No.

MR. PIERCE: Okay. Something that came up. All right. I don't really have anything else to say, but I'm going -- okay. You do.

(Discussion off the record.)

MR. PIERCE: Yeah. I'd like the record to reflect that, again, after consulting with Alicia Lash, my court reporter -- or I'm sorry -- my paralegal -- you're the court reporter -- that I do have a couple additional questions.

Q. Would your father always pick you up at your mom's house or would he sometimes pick you up at school?

A. I'm mostly remember my mom's house.

Q. Could there have been occasions he picked you up from school?

A. Sometimes, like, maybe if I was sick or something.

Q. Did you ever leave school early to go to your dad's house or to skip school?

A. No. It was only, like, second grade,

maybe third.

Q. So, you didn't do any school -- did you ever play hooky when you were in school?

A. Yes.

Q. Yeah. We talked about that.

MR. PIERCE: Okay. Yeah. I'm, like, running out here.

Do you guys have any questions, I mean, for me to ask?

MS. KIRKWOOD: For you to ask?

MR. PIERCE: Well, here. Let me --

(Discussion off the record.)

MR. PIERCE: Okay. Again, let the record reflect that I consulted with Elizabeth's mother, Shelley Jehn, and based on that consultation, I do have a question.

Q. Do you remember showing your mom, with Erica, any pictures of this black suitcase?

A. No.

Q. You don't have any memory of that?

A. No.

Q. All right. I can't think of anything else. I think we've covered -- is there anything else that you're, like, dying to tell me or you think

that, you know, I should know or anything like that, you know, that's important to this case?

A. Well, I mean, I'd just kind of like to piece together this: I was just a stupid, little nine-year-old girl that just wanted to stay with my mom, and I didn't want to go with my dad because he was boring and broke. And it is all my fault that he is in jail, and I should be put in there instead of him.

Q. Well, okay. All right. Well, I appreciate you saying that, but okay Is there anything else, or --

A. (The witness shakes her head.)

Q. I don't think I have anything else to say. And, again -- and I've said this now a bunch of times, you know, are all these statements that you're making, are they true?

A. Yes.

Q. And no one has forced you, coerced you, threatened you in order to make these statements?

A. No.

MR. PIERCE: Okay. I don't believe I have any other questions. I appreciate you coming down, and Shelley and Nancy, and I appreciate it.

So, this concludes this deposition. Thank you.

(The deposition concluded at 9:42 a.m.)

- - -

State of Ohio :
: SS.
County of Franklin :

I, Elizabeth Jehn, do hereby certify that I have read the foregoing transcript of my deposition given on Friday, July 18, 2014; that together with the correction page attached hereto noting changes in form or substance, if any, it is true and correct.

Elizabeth Jehn

I do hereby certify that the foregoing transcript of the deposition of Elizabeth Jehn was submitted to the witness for reading and signing; that after she had stated to the undersigned Notary Public that she had read and examined her deposition, she signed the same in my presence on the 15th day of August, 2014.

Notary Public

My commission expires July 24, 2018.

CERTIFICATE

State of Ohio :
: SS:
County of Franklin :

I, Marissa LaRue, Notary Public in and for the State of Ohio, duly commissioned and qualified, certify that the within named Elizabeth Jehn was by me duly sworn to testify to the whole truth in the cause aforesaid; that the testimony was taken down by me in stenotypy in the presence of said witness, afterwards transcribed upon a computer; that the foregoing is a true and correct transcript of the testimony given by said witness taken at the time and place in the foregoing caption specified and completed without adjournment.

I certify that I am not a relative, employee, or attorney of any of the parties hereto, or of any attorney or counsel employed by the parties, or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this 31st day of July, 2014.

Marissa LaRue, Notary Public
in and for the State of Ohio.

My commission expires April 10, 2017.

- - -

Evedence

Copy

first year or so at all. I mean, other than child support that we paid.

Q. Okay.

A. Okay. And when Elizabeth lived there she was going to school and -- it was in the summer that she came to stay with us, so there wasn't any school going on. And I said, you need to get a part-time job and you need to finish school.

Because she was already 17 and her -- she had like 12 credits to get yet, and she promised to do that.

Q. And was there talk with your son at any point to the effect that the judge was coercing her to change her story?

Do you remember some jail conversations -- jail calls to that effect?

A. I don't think he ever said he was coercing her to change her conversations.

Q. No talk about being pressured by the judge?

A. I don't remember that. I remember telling him on the phone that she had changed her statements, and he was very upset. You know, he goes, why would she do that?

And I repeated what she said to me, that Judge Holbrook told her that if she did change her statements,

that she would not be in any danger of being prosecuted, and that scared her and --

THE COURT: The young child told you that?

THE WITNESS: Not a young child. When she was 18.

THE COURT: Okay. That's young for me.

THE WITNESS: Okay. Well, me too.

THE COURT: Okay. So this 18 year old told you that I said something to her?

THE WITNESS: She said that you told her she could be prosecuted for filing a complaint and then changing her mind. That is what she said to me.

THE COURT: Just so the record knows, I've never had a direct conversation. I put a lawyer on her right away for that very reason.

THE WITNESS: Okay. Well, I wasn't in here so I don't know. I'm just telling you what she said to me.

THE COURT: Well, I did appoint counsel for her. I appointed Mr. Hunt.

THE WITNESS: Right, right.

THE COURT: And I paid for it. That's about the extent.

THE WITNESS: Well, see, that's not what she said to me.

THE COURT: Okay.

Hearing for New trial (Nancy Kirkwood) Judge Holbrook

APPENDIX L

Please Cont'd

THE WITNESS: I mean, I knew about Mr. Hunt and I knew you were giving her that attorney but --

THE COURT: Okay.

BY MS. PRICHARD:

Q. Well, for the sake of consistency, I think you said that she said that the judge -- she wouldn't be in any trouble, the judge told her.

A. Right.

Q. Okay. Very good.

A. Did I get it backwards?

Q. And was there -- yes.

A. I'm sorry.

Q. When you talked to the judge you had it backwards, that he told her she would be in trouble. He told her she's not in any kind of trouble.

A. He told her she would not be in trouble if she changed her recantment, that's what she said to me.

Q. And shortly -- within a short period of time after that she ended up moving out, asking you should she move out?

A. And I said no.

Q. Right. Okay.

A. And do you want me to tell you the reasons for that?

Q. You've already said you didn't want her out. It

was her choice, you're saying. Right?

A. Yeah.

Q. Okay. Do you think she felt some sort of pressure and tension?

A. No, I don't.

Q. You have consistently visited your son in prison, obviously called, Jpay, email, things of that nature?

A. Just call.

Q. Just calls?

A. Uh-huh.

Q. And visits?

A. And visits.

Q. Okay. Are you aware of his audiotaped confession from --

A. Uh-huh.

Q. -- way back when?

Have you heard that?

A. No.

Q. Are you aware of Elizabeth's recorded statement at age 9 right after this happened?

A. Huh-uh.

Q. So you are unaware of allegations and the details that are on video in that respect?

A. Uh-huh.

APPENDIX M: TABLE OF EXONEREES WITH AEDPA-DISMISSED HABEAS CORPUS PETITIONS (33/167= 24%)

Ohio Innocence Project (12/44 listed):

1. Jones, Dewey - 1999 U.S. Dist. LEXIS 3084 (served 20 years) (COA Denied)
2. Wheatt, Derrick - 2013 U.S. Dist. LEXIS 389953 (served 18 years) (COA Denied)
3. Glover, Laurese - 2013 U.S. Dist. LEXIS 38947 (served 18 years) (COA Denied)
4. Johnson, Eugene - 2009 U.S. Dist. LEXIS 87690 (served 18 years) (COA Denied)
5. McMeans, Jerry - (6th Cir., 2000) 228 F3d 3674 (served 30 years)
6. Sutton, Michael - 2015 U.S. Dist. LEXIS 118437 (served 14 years) (COA Denied)
7. Cleveland, Jr., Alfred - 760 F. Supp. 2d 751 (served 25 years) (COA Denied, no Actual Innocence gateway permitted)
8. Butts, Alan – 2006 U.S. Dist. LEXIS 64395 (served 20 years) (Cert den. 555 U.S. 1037)
9. Willis, Karl – 2009 U.S. Dist. LEXIS 56848 (Served 23 years) (time bar, COA Denied)
10. Horton, Richard – 2014 U.S. Dist. LEXIS 18134 (Served 16 years)
11. Sapp, Marcus 2014 U.S. Dist. LEXIS 155827 (served 13 years) (COA Denied)
12. Levingston, Marty – 2017 U.S. Dist. LEXIS 16367 (served 15 years) Proc. Default, no Actual Innocence gateway permitted, Affirmed 891 F3d 251)

National Registry of Exonerations (21/123):

1. Adams, Don Ray – 2003 U.S. Dist. LEXIS 13910 (untimely, no Actual Innocence gateway permitted)
2. Addison-El, Ronald – 57 Fed App'x. 185 (COA Denied)
3. Ahmed, Mubarez – 2008 U.S. Dist. LEXIS 107272 (Presumption of Correctness)
4. Aldrich, Robert Jr. – 2018 U.S. Dist. LEXIS 10188 (Proc. Default, no Actual Innocence gateway permitted, COA denied)
5. Alexander, Malcolm – 2015 U.S. Dist. LEXIS 77962 (third federal habeas, finally granted)
6. Allen, Dennis (2018 U.S. Dist. LEXIS 121430) (Presumption of Correctness, COA Denied)

7. Alonzo, Quintin Lee – 2011 U.S. Dist. LEXIS 89895 (Procedural Default, no Actual Innocence Gateway permitted on Brady claims, hearing denied)

8. Alvarez, Roy – 2011 U.S. Dist. LEXIS 80116 (presumption of Correctness)

9. Amon-Ra, Nubian – 12016 U.S. Dist. LEXIS 167487 (procedural default)

10. Amrine, Joseph – 238 F3d 1023, procedural default, no actual innocence gateway permitted)

11. Anderson, Eric – 2013 U.S. Dist. LEXIS 83848 (presumption of correctness, COA denied)

12. Miller, Naeem – 2014 U.S. Dist. LEXIS 33005 (procedural default, COA denied)

13. Warthen, Warando – 156 Fed App'x. 586 (COA denied)

14. Collins, Charles – 2006 U.S. Dist. LEXIS 7828 (untimely)

15. Abramowski, Jeffrey – 2015 U.S. Dist. LEXIS 99368 (untimely, equitable tolling denied, actual innocence gateway not allowed, COA denied, new evidence denied) (Exonerated ten years later)

16. Torres-Rivera, Jose A. – 2014 U.S. Dist. LEXIS 159669 (procedural default, actual innocence gateway denied, COA denied)

17. Rodriguez, Alexis – 2022 U.S. Dist. LEXIS 216960 (presumption of correctness, COA denied)

18. Gomez, Fernando – 2013 U.S. Dist. LEXIS 155462 (presumption of correctness, COA denied)

19. Jackson, Kevin – 2011 U.S. Dist. LEXIS 38848 (presumption of correctness, actual innocence gateway denied despite recantation, COA denied)

20. McDowell, Antonio – 2012 U.S. Dist. LEXIS 98860 (procedural default, aff'd. 2013 U.S. App. LEXIS 24735

21. Bullock, Kenneth – 2016 U.S. Dist. LEXIS 83390 (presumption of correctness, COA denied)