No.

In the

Supreme Court of the United States

RANDY A. THOMAS,

Petitioner,

v.

CYNTHIA DAVIS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL APPENDIX

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APPENDIX D — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, FILED DECEMBER 8, 2023

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

CASE NO. 5:20-CV-2628
JUDGE J. PHILIP CALABRESE
MAGISTRATE JUDGE DARRELL A. CLAY

RANDY J. THOMAS,

Petitioner,

vs.

HAROLD MAY, WARDEN,

Respondent.

REPORT AND RECOMMENDATION

On November 23, 2020, Petitioner Randy Thomas, through counsel, filed a petition for a writ of habeas corpus. (ECF #1-1 at PageID 1-50). The District Court has jurisdiction under 28 U.S.C. § 2254(a). On November 24, 2020, pursuant to Local Civil Rule 72.2, this matter was referred to a Magistrate Judge to prepare a Report and Recommendation and was subsequently reassigned to me pursuant to General Order 2021-06. (Non-document entries of Nov. 24, 2020 and May 21, 2021).

Respondent (hereinafter, the State) filed the Return of Writ on February 9, 2021. (ECF #9). On May 23, 2021, Mr. Thomas timely filed his Traverse and a Motion to Supplement the Record. (ECF #12, 13). The State filed the requested supplement on June 15, 2021 (ECF #15, 15-1); I therefore denied Mr. Thomas's motion as moot (ECF #16). On June 20, 2023, Mr. Thomas requested a conference or hearing on his case. (ECF #17). I took notice of his counsel's impending retirement and denied the motion in favor of issuing this Report and Recommendation. (Non-document entry of June 26, 2023).

As discussed below, I recommend the District Court **DISMISS** most of the petition and **DENY** the remainder. I further recommend the District Court **DENY** a Certificate of Appealability for all grounds for relief.

PROCEDURAL HISTORY

Factual Findings of the Court of Appeals

The Ninth District Court of Appeals, Summit County, Ohio, set forth the facts of this case on direct appeal. These findings are presumed correct; Mr. Thomas must rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). The Ninth District determined:

> [¶ 2] On April 13, 2013, Mr. Thomas fatally shot Anthony Smith. The Summit County Grand Jury indicted Mr. Thomas for aggravated murder in violation of R.C. 2903.01(A) with an attendant firearm specification pursuant to

R.C. 2941.145. The case proceeded to a jury trial. After the State rested, Mr. Thomas testified on his own behalf as follows. On the date at issue, Mr. Smith was selling drugs outside of Mr. Thomas' grandmother's house. Mr. Thomas asked Mr. Smith why he could not go further down the street to sell drugs, and Mr. Smith responded by challenging Mr. Thomas to a fistfight. Mr. Thomas accepted, and the men met one street away. Once they arrived, Mr. Thomas swung once at Mr. Smith, but he missed. Mr. Smith pulled out a gun, which Mr. Thomas was able to knock out of Mr. Smith's hand. Mr. Thomas then gained control of the gun, and Mr. Smith began to come toward him. Fearing that Mr. Smith would regain control of the gun, Mr. Thomas shot Mr. Smith. Based upon this scenario, Mr. Thomas claimed that he shot Mr. Smith in self-defense.

* * *

[¶ 36] At trial, the State presented, in part, the testimony of police officers and witnesses to the events prior to and after the shooting. Collectively, these witnesses recalled that, on April 13, 2013, Mr. Smith arrived outside of Mr. Thomas' grandmother's house, where Mr. Thomas was present. Mr. Thomas and Mr. Smith then engaged in a verbal altercation, during which Mr. Smith said that they could "get that work in[,]" which meant that Mr. Smith

> was challenging Mr. Thomas to a fistfight. Mr. Thomas replied that they could go a street over to Eighth Ave. to fight. The two men got into their respective vehicles and drove to a location a short distance away on Eighth Ave. No one witnessed a physical altercation between them on Eighth Ave. However, Phyllis Brown, who lived across the street from where the men met on Eighth Ave., heard three gun shots fired, and looked out her window. Outside she saw Mr. Thomas holding a gun several feet from Mr. Smith, who was sitting on the ground. She also saw Mr. Thomas drive away. After Mr. Thomas left and Mr. Smith unsuccessfully tried to start his car and enter a nearby house, Ms. Brown went outside to assist Mr. Smith, who was bleeding heavily. No gun was located at the scene.

State v. Thomas, No. 27266, 2015 Ohio 2935, 2015 WL 4464893, *1, *7 (Ohio Ct. App. July 22, 2015) ("*Thomas I*").

State Court Conviction

On August 9, 2013, a Summit County Grand Jury indicted Mr. Thomas on one count of aggravated murder in violation of Ohio Rev. Code § 2903.01(A), with a gun specification pursuant to Ohio Rev. Code § 2941.145. (State Court Record, ECF #9-1, PageID 150). He pled not guilty on August 28, 2013. (*Id.* at PageID 926).

On November 5, 2013, Mr. Thomas moved for the appropriation of funds for a defense investigator to support his defense counsel. (*Id.* at PageID 151-54). On November

6, 2013, the trial court granted that motion and authorized defense counsel to retain an investigator in advance of the December 9, 2013 trial date. (*Id.* at PageID 155). After conducting a suppression hearing on December 3, 2013 (and continued to January 3, 2014), the trial court determined that an expert on gangs could testify at trial and denied Mr. Thomas's motion to suppress evidence discovered while executing a search warrant on his brother's vehicle. (*Id.* at PageID 156-83). The trial court also denied Mr. Thomas's motion in limine regarding identification by a purported eyewitness, Phyllis Brown. (*Id.* at PageID 184-86).

A jury trial was held from January 29 through February 3, 2014; on February 4, 2014, the jury returned a verdict of not guilty of aggravated murder, but guilty on the lesser-included offense of murder and included a firearm specification. (ECF #9-1, PageID 203). On February 5, 2014, the trial court sentenced Mr. Thomas to life imprisonment with parole eligibility after 15 years, and to 3 years' incarceration on the firearm specification, to be served consecutively, for a total of 19 years to life. (*Id.* at PageID 204-05).[1]

Direct Appeal

On March 3, 2014, Mr. Thomas appealed his conviction, sentence, and denial of the motions to suppress and in limine. (*Id* at PageID 206). He raised fourteen assignments of error:

1. The additional year was due to a consecutive one-year sentence in another case. (ECF #9-1, PageID 204).

Appendix D

1. The trial court erred in denying a *Batson* challenge when it improperly applied the three step process established by the U.S. Supreme Court.

2. Due Process was violated when the trial judge's bias for the prosecution was demonstrated during the *Batson* challenge.

3. Counsel was constitutionally ineffective under *Strickland* or *Cronic* when it failed in opening statement to assert the affirmative defense upon which it relied, *i.e.*, self-defense.

4. The trial court erred in giving a "duty to retreat" jury instruction in violation of Ohio law and the Sixth, Eighth, and Fourteenth Amendments of the federal Constitution.

5. The "at fault" jury instruction contained in the self-defense jury instructions was unconstitutionally vague.

6. The trial court improperly answered jury question 3 in violation of the Sixth, Eighth, and Fourteenth Amendments of the federal Constitution and equivalent provisions of Ohio law.

7. Ohio unconstitutionally places the burden of proof of self defense on the defendant in

violation of the Second, Fifth, Eighth and Fourteenth Amendments of the federal Constitution and Article I, Sections 1, 4 and 10 of the Ohio Constitution.

8. The appellant was denied his right to be present at all critical stages of his trial when the court answered jury questions in his absence and counsel did not waive his presence in violation of Crim R. 43(A), the Ohio and federal Constitutions.

9. Thomas was denied his right to a public trial under the Sixth and Fourteenth Amendments of the federal Constitution when the court failed to receive and answer the jury questions in open court, with Thomas and his counsel present and on the record.

10. The trial court erred in refusing to instruct the jury on voluntary manslaughter and reckless homicide.

11. The trial court erred in failing to hold hearing or declare mistrial where jurors received outside communication on two occasions in violation of *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954) and *State v. Phillips*, 74 Ohio St.3d 72, 1995- Ohio 171, 656 N.E.2d 643 (1995).

12. Defense counsel was ineffective throughout this case under *Strickland* and the cumulative effect of the ineffectiveness deprived Thomas of his Sixth and Fourteenth Amendments right to counsel even if the errors individually did not do so.

13. The cumulative errors throughout the trial denied the appellant Due Process under the Fourteenth Amendment.

14. The evidence was insufficient to sustain a Murder conviction under the Fourteenth Amendment.

(*Id.* at PageID 213-14) (cleaned up). The State filed a responsive brief. (*Id.* at PageID 243-81). On July 22, 2015, the Ninth District affirmed in all respects, with one judge dissenting. (*Id.* at PageID 282-310; *see also Thomas I*, 2015 Ohio 2935, 2015 WL 4464893, at *15).

On September 8, 2015, Mr. Thomas filed a notice of appeal and Memorandum in Support of Jurisdiction to the Supreme Court of Ohio. (ECF #9-1 at PageID 311-27). On December 30, 2015, the Supreme Court of Ohio declined jurisdiction. (*Id.* at PageID 328).

On March 25, 2016, Mr. Thomas filed a petition for a writ of certiorari to the Supreme Court of the United States, which the Court denied on May 16, 2016. (*Id.* at PageID 329-30).

Petition for Post-Conviction Relief

On November 10, 2014, Mr. Thomas filed a petition for post-conviction relief pursuant to Ohio Rev. Code § 2953.21. (ECF #9-1 at PageID 331-93). He averred as follows:

1. Petitioner's judgment and sentence are void or voidable because he received the ineffective assistance of trial counsel under the Sixth and Fourteenth Amendments of the federal Constitution and Art. I, Section 10 of the Ohio Constitution.

2. Petitioner's judgment and sentence are void or voidable because he received the ineffective assistance of trial counsel when trial counsel failed to properly investigate and present available witnesses/records on petitioner's behalf. Such ineffective assistance of counsel violated the Sixth and Fourteenth Amendments of the federal Constitution and Article I, section 10 of the Ohio Constitution.

3. Petitioner's judgment and sentence are void or voidable because he received the ineffective assistance of trial counsel under the Sixth and Fourteenth Amendments of the federal Constitution and Art. I, Section 10 of the Ohio Constitution when counsel

failed to have Petitioner sign a release (or issue a subpoena) in order to obtain records contained in Ex. 1 (Akron School Records), Ex. 2 (Summit County Juvenile Court records of Dr. Webb) and Ex. 3 (Greenleaf Family Center Records referred to in Ex. 2).

4. Petitioner's judgment and sentence are void or voidable because counsel was ineffective under the federal and State Constitutions and *Strickland* when they failed to properly prepare him for his testimony.

5. Petitioner's judgment and sentence are void or voidable because petitioner was not present for any jury questions posed in his case (see court file and three jury questions/answers) and answers given by the Court; moreover, petitioner's lawyers never discussed the jury questions with him and he did not waive his presence for any jury questions or answers to those questions.

6. Petitioner's judgment and sentence are void or voidable because petitioner has a right to a public trial under the Sixth and Fourteenth Amendments of the federal Constitution. Trial courts are required to consider alternatives to closure even when they are not offered by the parties. Trial courts are

required to take every reasonable measure to accommodate public attendance at trials. If there are threats or safety concerns, then those must be articulated along with findings specific enough so a reviewing court can determine whether the closure order was properly made.

7. Petitioner's judgment and sentence are void or voidable because counsel was ineffective under *Strickland* and ORC 2929.024 in failing to secure the services of a mental health expert to review and explain to the jury the information contained in Ex. 1-3 and Ex. 6 (Social Security Supplemental Income) and its impact on petitioner's state of mind and the subjective elements of self defense under Ohio law.

8. Petitioner's sentence and judgment are void or voidable because of the cumulative effect of the errors in Causes of Action 1-7 and petitioner was thus denied Due Process under the Fourteenth Amendment of the federal Constitution and the effective assistance of counsel under *Strickland*.

(*Id.* at PageID 331-93). The State moved to dismiss and Mr. Thomas opposed. (*Id.* at PageID 394-412). On February 3, 2015, the trial court denied the petition. (*Id.* at PageID 413-18).

On February 26, 2015, Mr. Thomas again appealed to the Ninth District, and filed his brief in support on April 7, 2015. (*Id.* at PageID 419-55). The State responded on May 18, 2015. (*Id.* at PageID 456-88). On August 24, 2016, the Ninth District affirmed in part and reversed in part. (*Id.* at PageID 518-32; *see also State v. Thomas*, No. 27698, 2016 WL 4448966, at *7 (Ohio Ct. App. Aug. 24, 2016) ("*Thomas II*")). Specifically, the Ninth District overruled Assignments of Error Four and Five and overruled Assignment of Error Eight in part on the issue of a discovery hearing on Mr. Thomas's post-conviction relief. (ECF #9-1, PageID 518-23). It found, however, the trial court should have held an evidentiary hearing on Mr. Thomas's ineffective assistance of trial counsel claims, sustained Assignment of Error Eight in part, and remanded for a hearing on this issue. (*Id.* at PageID 524-28). Finally, the Ninth District decided Assignments of Error One, Two, Three, and Six were not yet ripe for review, and it declined to review Assignment of Error Seven. (*Id.* at PageID 528-29).

On October 7, 2016, Mr. Thomas filed a notice of appeal and memorandum in support of jurisdiction with the Supreme Court of Ohio, which declined jurisdiction on April 19, 2017. (*Id.* at PageID 534-35, 566). Mr. Thomas appealed to the Supreme Court of the United States on July 12, 2017, which denied certiorari on October 2, 2017. (*Id.* at PageID 567-68).

Post-conviction Hearing

Following remand from the Ninth District, the trial court held an evidentiary hearing on May 9 and 10, 2018.

(*Id.* at PageID 569-613). Based on the Ninth District's decision, Mr. Thomas's Petition and Supplemental Memorandum, the State's responses, the testimony and evidence presented at the hearing, the transcript of the original trial, and the parties' post-hearing briefs, the trial court denied Mr. Thomas's Petition for Post-Conviction Relief on June 25, 2018. (*Id.* at PageID 614-41).

Mr. Thomas appealed this decision to the Ninth District on July 19, 2018, alleging two assignments of error:

1. Counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution and Art. I Sec. 10 of the Ohio Constitution by failing to investigate and present available evidence of Thomas's state of mind.

2. Counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when they failed to secure services of mental health expert to testify concerning the stipulated exhibits and its impact on Thomas's state of mind and subjective elements of self-defense; Thomas was denied a complete defense as a result under the Sixth and Fourteenth Amendments.

(*Id.* at PageID 642, 673). The State opposed. (*Id.* at PageID 722-92). On October 16, 2019, the Ninth District affirmed, finding Mr. Thomas had not established that but for his trial attorneys' failure to investigate the jury would have accepted his claim of self-defense and found him not guilty of murder. (*Id.* at PageID 793-802; *see also State v. Thomas*, No. 29112, 2019 Ohio 4247, 2019 WL 5212575, at *4 (Ohio Ct. App. Oct. 16, 2019) ("*Thomas III*")).

Mr. Thomas appealed this decision to the Supreme Court of Ohio on December 2, 2019. (*Id.* at PageID 803-19). The State opposed, and the Court declined jurisdiction on February 26, 2020. (*Id.* at PageID 833-43). Mr. Thomas appealed to the Supreme Court of the United States, which denied certiorari on October 5, 2020. (*Id.* at PageID 844-917).

FEDERAL HABEAS CORPUS

On November 23, 2020, Mr. Thomas filed his petition in this matter, asserting the following grounds for relief:

> **Ground One**. The "at fault" jury instruction contained in the self-defense jury instructions was unconstitutionally vague under the federal and Ohio Constitutions and counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution.
>
> **Ground Two**. The trial court improperly answered jury question 3 in violation of the Sixth, Eighth and Fourteenth Amendments of the federal Constitution and equivalent provisions of Ohio law.

Ground Three. Ohio unconstitutionally placed the burden of proof of self defense on the defendant in violation of the Second, Fifth, Eighth and Fourteenth Amendments of the federal Constitution.

Ground Four. Mr. Thomas was denied his right to be present at all critical stages of his trial when the court answered jury questions in his absence and counsel did not waive his presence in violation of the Sixth and Fourteenth Amendments of the federal Constitution.

Ground Five. Thomas was denied his right to a public trial under the Sixth and Fourteenth Amendments of the federal Constitution when the court failed to receive and answer the jury questions in open court, with Thomas and his counsel present and on the record.

Ground Six. The trial court erred in refusing to instruct the jury on Voluntary Manslaughter and Reckless Homicide and violated the Sixth and Fourteenth Amendments of the federal Constitution.

Ground Seven. The trial court erred in failing to hold hearing or declare mistrial where jurors received outside communication in violation of *Remmer v. United States*, 347 U.S. 227, 74 S. Ct.

450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954) and *State v. Phillips*, 74 Ohio St.3d 72, 1995- Ohio 171, 656 N.E.2d 643 (1995).

Ground Eight. Defense counsel was ineffective throughout this case under *Strickland* and the cumulative effect of the ineffectiveness deprived Thomas of his Sixth and Fourteenth Amendment right to counsel even if the errors individually did not do so.

Ground Nine. The cumulative errors violated Due Process under the Fourteenth Amendment of the federal Constitution.

Ground Ten. The evidence is insufficient to sustain a Murder conviction under the Fourteenth Amendment.

Ground Eleven. Counsel was ineffective under *Strickland* or *Cronic* when he failed in opening statement to assert the affirmative defense of self-defense. The Sixth and Fourteenth Amendments were violated.

Ground Twelve. Thomas was denied his right to a public trial under the Sixth and Fourteenth Amendments of the federal Constitution and Art. I, Section 10 of the Ohio Constitution.

Ground Thirteen. Thomas's right to be present at all stages of his trial was violated

> when he did not waive his right to be present for jury questions and answers and his lawyers never discussed the jury questions with him, all in violation of Crim. R. 43(A), the Fifth, Sixth, and Fourteenth Amendments of the federal Constitution.
>
> **Ground Fourteen**. Counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution by failing to investigate and present available evidence of Thomas's state of mind.
>
> **Ground Fifteen**. Counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when they failed to secure services of mental health expert to testify concerning the stipulated exhibits and the impact on Thomas's state of mind and subjective elements of self-defense; Thomas was denied a complete defense as a result under the Sixth and Fourteenth Amendments.

(ECF #1, PageID 24-47) (cleaned up).

STANDARD OF REVIEW

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) governs Mr. Thomas's habeas petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997). AEDPA recognizes that "[s]tate courts are adequate forums for the vindication of federal rights" and therefore acts as a "formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 571 U.S. 12, 19, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013). It "dictates a highly deferential standard for evaluating state-court rulings which demands that state-court decisions be given the benefit of the doubt." *Bell v. Cone*, 543 U.S. 447, 455, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005) (cleaned up). Accordingly, an application for habeas corpus cannot be granted for a person in custody pursuant to a state conviction unless the adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d).

Habeas courts review the last explained state-court judgment on the federal claim at issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 805, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). For purposes of § 2254(d)(1), clearly established federal law "is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003). It includes "the holdings, as opposed to dicta, of [Supreme Court] decisions." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

A state court decision is contrary to Supreme Court precedent if the state court arrives at a conclusion opposite that reached by the Court on a question of law or if the state court decides a case differently than the Court has decided on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405; *White v. Mitchell*, 431 F.3d 517, 523 (6th Cir. 2005), *cert. denied*, 549 U.S. 1047 (2006). The word "contrary" means "diametrically different, opposite in character or nature, or mutually opposed." *Williams*, 529 U.S. at 405. A state court does not act contrary to clearly established law when the precedent of the Supreme Court is ambiguous or nonexistent. *See, e.g., Mitchell v. Esparza*, 540 U.S. 12, 17, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003) (per curiam).

A state court decision involves an unreasonable application of the Court's precedent if the state court identifies the correct governing legal rule from the Court's cases but unreasonably applies it to the facts of the state prisoner's case, or if the state court either unreasonably extends a legal principle from the Court's precedent to a new context where it should not be applied or unreasonably refuses to extend that principle in a new context where it should apply. *Williams*, 529 U.S. at 407. The appropriate measure of whether a state court decision unreasonably applied clearly established federal law is whether that state adjudication was "objectively unreasonable" and not merely erroneous or incorrect. *Id.* at 409-11; *see also Machacek v. Hofbauer*, 213 F.3d 947, 953 (6th Cir. 2000), *cert. denied*, 531 U.S. 1089, 121 S. Ct. 808, 148 L. Ed. 2d 694 (2001). "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 102, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Under § 2254(d)(2), state court factual determinations stand unless they are objectively unreasonable in light of the evidence presented in state court. *Harrington*, 562 U.S. at 100. The Supreme Court has repeatedly emphasized "a state court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion." *Burt*, 571 U.S. at 18.

Under federal law, "a determination of a factual issue made by a State court shall be presumed to be correct. [Petitioner] shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2554(e)(1). Comity principles also require federal courts to defer to a state's judgment on issues of state substantive and procedural law. *Murray v. Carrie*r, 477 U.S. 478, 491, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *Engle v. Isaac*, 456 U.S. 107, 128-129, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). Federal courts must accept a state court's interpretation of its statutes and rules of practice. *Duffel v. Dutton*, 785 F.2d 131, 133 (6th Cir. 1986).

The standard is intended to be difficult to meet and reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. *Harrington*, 562 U.S. at 102-03; *see also Brown v. Davenport*, 596 U.S. 118, 133, 142 S. Ct. 1510, 212 L. Ed. 2d 463 (2022) (describing habeas as an "extraordinary remedy, reserved for only extreme malfunctions in the state criminal justice system and different in kind from providing relief on direct appeal") (cleaned up). To obtain "habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." *Id.* at 103.

When a properly presented federal constitutional claim was not adjudicated on the merits in the state courts, the reviewing federal court must apply the pre-AEDPA standard, reviewing *de novo* questions of law and mixed questions of law and fact. *Durr v. Mitchell*, 487 F.3d 423, 432 (6th Cir. 2007).

PROCEDURAL BARRIERS TO FEDERAL HABEAS REVIEW

Before a federal court may review a petitioner's habeas claims on the merits, the petitioner must overcome several procedural barriers. These barriers, including exhaustion of state remedies and procedural default, limit a petitioner's access to review on the merits of a constitutional claim. *Daniels v. United States*, 532 U.S. 374, 381, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001). Put simply, federal courts may review federal claims that the state courts have evaluated on the merits. Claims there were not evaluated on the merits, either because they were never presented to the state courts (*i.e.*, they are unexhausted) or because they were not properly presented to the state courts (*i.e.*, they are procedurally defaulted), are generally not cognizable on federal habeas review.

Bonnell v. Mitchell, 301 F. Supp. 2d 698, 722 (N.D. Ohio Feb. 4, 2004).

Exhaustion of Available State Court Remedies. A court may not grant a petition for habeas corpus unless it appears the petitioner has exhausted available state court remedies, state corrective process is unavailable, or circumstances exist rendering such state process ineffective to protect the petitioner's rights. 28 U.S.C. § 2254(b)(1). Typically, the exhaustion requirement is satisfied when the petitioner fairly presents all claims to the highest court in the state in where petitioner was convicted, giving the state a full and fair opportunity to rule on the petitioner's claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). A claim is fairly presented when both the factual and legal basis for the claim has been introduced to the state courts. *Fulcher v. Motley*, 444 F.3d 791, 798 (6th Cir. 2000). A failure to exhaust applies only where state remedies remain "available at the time of the federal petition." *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). In contrast, where state court remedies are no longer available, procedural default (discussed more fully below), rather than exhaustion, applies. *Id.*

Procedural Default. Absent a petitioner demonstrating either cause and prejudice or that failure to review the claim would result in a fundamental miscarriage of justice (discussed below), a federal court will not consider the merits of procedurally defaulted claims. *Lundgren v. Mitchell*, 440 F.3d 754, 763 (6th Cir. 2006) (citing *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)).

There are two avenues by which a petitioner's claim may be procedurally defaulted. *Williams*, 460 F.3d at 806. First, procedural default occurs if a petitioner "fails to comply with state procedural rules in presenting his claim to the appropriate state court." *Id.* To determine whether a petitioner's failure to comply with a state procedural rule bars review of habeas claims, courts in the Sixth Circuit use a four-part analysis: (1) is there a state procedural rule applicable to petitioner's claim and did the petitioner not comply with that rule; (2) did the state court enforce the procedural rule; (3) is the procedural rule an adequate and independent state law ground foreclosing review of the federal constitutional claim; and (4) can the petitioner demonstrate cause for not following the rule and was the petitioner actually prejudiced by the alleged constitutional error. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986).

Second, a claim may be procedurally defaulted when the petitioner fails to raise it in state court and pursue it through the state's "ordinary appellate review procedures." *Williams*, 460 F.3d at 806 (citing *O'Sullivan*, 526 U.S. at 848 (1991)); *see also Baston v. Bagley*, 282 F. Supp. 2d 655, 661 (N.D. Ohio 2003) ("Issues not presented at each and every level [of the state courts] cannot be considered in a federal habeas corpus petition."). As addressed above, "[i]f, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, the claim is procedurally defaulted." *Id.* Although the exhaustion requirement is satisfied because there are no longer state remedies available to the petitioner, *see Coleman v. Thompson*, 501 U.S. 722, 732, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), the petitioner's failure to have the federal claims considered in the state courts constitutes a procedural default of those claims barring federal court review. *Williams*, 460 F.3d at 806; *Shinn v. Ramirez*, 596 U.S. 366, 142 S. Ct. 1718, 212 L. Ed. 2d 713 (2022) ("When [a state prisoner] has failed to [first present that claim to the state court in accordance with state procedures], and the state court would dismiss the claim on that basis, the claim is 'procedurally defaulted.'").

To overcome a procedural bar, a petitioner must show cause for the default and actual prejudice as a result of the alleged violation of federal law or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman*, 501 U.S. at 749. Habeas petitioners cannot rely on conclusory assertions of cause and prejudice to overcome procedural default; they must present affirmative evidence or argument as to the precise cause and prejudice produced. *See Tinsley v. Million*, 399 F.3d 796, 806 (6th Cir. 2005) (citing *Northland Ins. Co. v. Stewart Title Guar. Co.*, 327 F.3d 448, 452 (6th Cir. 2003) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at a developed argumentation, are deemed waived.") (quotation omitted)). A finding of cause and prejudice does not entitle a petitioner to habeas relief; it only allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted. *See Martinez v. Ryan*, 566 U.S. 1, 10, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); *see also Coleman*, 501 U.S. at 750.

A showing of cause for the default requires more than mere proffer of an excuse. Rather, "cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray*, 477 U.S. at 488; *see also Wogenstahl v. Mitchell*, 668 F.3d 307, 321 (6th Cir. 2012). Furthermore, neither a petitioner's pro se status nor his ignorance of the law and procedural filing requirements constitute cause sufficient to overcome procedural default. *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004). Futility cannot constitute cause for the procedural default of a claim for failure to raise a claim on direct review if it means simply that a claim was "unacceptable to that particular court at that particular time." *Engle*, 456 U.S. at 130 n.35.

To demonstrate prejudice sufficient to overcome procedural default, a petitioner must show more than mere errors in the state trial creating a possibility of prejudice; rather, the petitioner must show that the alleged errors worked to the petitioner's actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions. *Murray*, 477 U.S. at 494. There is no prejudice where the petitioner does not show a reasonable probability that the result of the proceeding would have been different. *Ambrose v. Booker*, 801 F.3d 567, 577-78 (6th Cir. 2015). Ineffective assistance of counsel may serve as cause to excuse a procedural default, but the ineffective assistance claim itself must not be procedurally defaulted. *Edwards v. Carpenter*, 529 U.S. 446, 451-52, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Attorney error does not constitute "cause" unless it rises to the level of a constitutional violation of the right to counsel under *Strickland*. *Murray*, 477 U.S. at 488.

Alternatively, a petitioner may overcome procedural default by showing that a fundamental miscarriage of justice will occur if the claims are not considered. *Coleman*, 501 U.S. at 750; *Murray*, 477 U.S. at 495. A fundamental miscarriage of justice occurs in the "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 495-96; *see also Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). Actual innocence means "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). A valid actual innocence claim must be supported by new reliable evidence, such as exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence, that was not presented at trial that is so strong a court cannot have confidence in the outcome of the petitioner's trial. *Schlup*, 513 U.S. at 324. In other words, a "petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327.

State Law Claims Not Cognizable on Federal Habeas Review. The District Court lacks jurisdiction over a petitioner's claims for purposes of habeas corpus review if the claims do not "challenge the legality of his custody" based on a "violation of the Constitution or law or treaties of the United States." 28 U.S.C. § 2254(a). Indeed, "[t]he writ of habeas corpus is not available to remedy errors of only state law." *Smith v. Morgan*, 371 F. App'x 575, 582 (6th Cir. 2010) (citing 28 U.S.C. § 2254(a)); *see also Norris v. Schotten*, 146 F.3d 314, 328 (6th Cir.

1998) ("A claim based solely on an error of state law is not redressable through the federal habeas process."). Moreover, merely asserting that a state law error violates the Federal Constitution does not justify jurisdiction. *See Wilson v. Corcoran*, 562 U.S. 1, 5, 131 S. Ct. 13, 178 L. Ed. 2d 276 (2010); *see also Rivera v. Illinois*, 556 U.S. 148, 158, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) ("The Due Process Clause . . . safeguards not the meticulous observance of state procedural prescriptions, but the fundamental elements of fairness in a criminal trial.") (internal quotation omitted); *see also Engle*, 456 U.S. at 121 n.21 ("We have long recognized that a 'mere error of state law' is not a denial of due process.") (citation omitted).

Nonetheless, habeas relief may be available if an alleged error of state law subjected the petitioner to a "fundamentally unfair" criminal process. *Williams*, 460 F.3d at 816. "[T]he category of infractions that violate fundamental fairness is defined very narrowly," and includes only state rulings that "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Bey v. Bagley*, 500 F.3d 514, 521 (6th Cir. 2007) (cleaned up). "A state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)); *see also Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988) (stating that a federal habeas court does not function as an additional state appellate court reviewing state courts' decisions on state law or procedure). The habeas petitioner bears the burden of showing "the principle of procedure violated by the rule (and allegedly required by due process)" is fundamental. *Bey*, 500 F.3d at 521.

DISCUSSION AND ANALYSIS

Mr. Thomas raises fifteen grounds for review. I conclude that none warrant relief.

I. Procedural Default: Grounds One, Two, Three, Five, Seven, And Twelve

The State argues Mr. Thomas has procedurally defaulted Grounds One, Two, Three, Five, and Twelve. (*See* ECF #9, PageID 87-107). Upon review, I agree. I also note because the Ninth District applied plain-error review to Ground Seven, it is also procedurally defaulted. Therefore, I recommend the District Court **DISMISS** each of these grounds.

Procedural default limits a federal court's merits review of a constitutional claim where the state court did not first review the merits of that claim. *Daniels*, 532 U.S. at 381; *Bonnell*, 301 F. Supp. 2d 698 at 722. As described above, one cause for procedural default is not complying with state procedural rules when presenting his claim to the appropriate state court. *Williams*, 460 F.3d at 806. To determine if a petitioner's failure to comply with a state procedural rule bars review of his habeas claims, courts in the Sixth Circuit apply the four-pronged *Maupin* analysis. *See* 785 F.2d at 138. Thus, I will apply *Maupin* to each of these claims.

A. Grounds One, Three, And Seven: Enforcement Of The Contemporaneous Objection Rule

In the first ground, Mr. Thomas alleges "[t]he "at fault" jury instruction contained in the self-defense jury instructions was unconstitutionally vague under the federal and Ohio Constitutions and counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution." (ECF #1, PageID 24). He argues "the jury did not understand an essential element of the affirmative defense" and "the judge did not clarify the instructions," resulting in the jury being "unable to understand the jury instruction under self-defense as it applied to whether [Mr.] Thomas was 'at fault.'" (*Id.*) (referencing Jury Question 3 and the dissenting opinion in *Thomas I*). The State counters that Mr. Thomas procedurally defaulted his challenge to the "at fault" jury instruction because he failed to follow Ohio's contemporaneous objection rule. (ECF #9, PageID 87). Mr. Thomas acknowledges his trial counsel failed to object at the time, but argues the error was plain under Ohio Crim. R. 52 and furthermore, trial counsel was ineffective under *Strickland*. (ECF #1, PageID 25).

In Ground Three, Mr. Thomas alleges: "Ohio unconstitutionally placed the burden of proof of self defense on the defendant in violation of the Second, Fifth, Eighth and Fourteenth Amendments of the federal Constitution." (ECF #1, PageID 26). He supports this by maintaining "Ohio was the only state in the union to require a defendant to prove self defense by a preponderance of the evidence" and that although the Supreme Court ruled unfavorably for Mr. Thomas in *Martin v. Ohio*, 480 U.S. 228, 107 S. Ct.

1098, 94 L. Ed. 2d 267 (1987), "[i]t is time for the issue to be reconsidered not only under the Fourteenth Amendment and under the Second, Fifth and Eighth Amendments of the federal Constitution." (*Id.* at PageID 26-27).

The State asserts Ground Three cannot be reviewed on its merits because *Martin* affirmed the constitutionality of placing the burden of self-defense on a defendant and constitutes established Supreme Court precedent binding this Court. (ECF #9, PageID 106). The State also contends Ground Three is procedurally defaulted because Mr. Thomas's attorney did not comply with Ohio's contemporaneous objection rule. (*Id.* at PageID 107, 128-31).

Finally, in Ground Seven, Mr. Thomas asserts: "The trial court erred in failing to hold a hearing or declare mistrial where jurors received outside communication in violation of *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954) and *State v. Phillips*, 74 Ohio St. 72 (1995)." (ECF #1, PageID 32). He asserts the trial court should have held a second hearing with all members of the jury after holding a hearing with one juror who mentioned an acquaintance with a witness, and because there were audible responses from members of the gallery during the trial. (*Id.*). The State responds that the Ninth District reasonably applied *Remmer* to Mr. Thomas's case. (ECF #9, PageID 114-19). I find this ground is procedurally defaulted.

Ohio has a long-standing and consistently enforced rule prohibiting review of a claim where there was no contemporaneous objection at trial. *State v. Murphy*, 91

Ohio St. 3d 516, 2001- Ohio 112, 747 N.E.2d 765, 788 (Ohio 2001) ("The waiver rule requires that a party make a contemporaneous objection to alleged trial error in order to preserve that error for appellate review. The rule is of long standing, and it goes to the heart of an adversary system of justice."). The contemporaneous objection rule relating to jury instructions is contained in Rule 30 of the Ohio Rules of Criminal Procedure, which states "[o]n appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds for objection." Ohio R. Crim. P. 30(A). Rule 30(A) also pertains to objections regarding the constitutionality of a self-defense jury instruction at trial. *See Engle*, 456 U.S. at 124-25 ("None of the respondents challenged the constitutionality of the self-defense instruction at trial. They thus violated Ohio Rule of Criminal Procedure 30, which requires contemporaneous objections to jury instructions.").

Thus, there is a state procedural rule applicable to Grounds One, Three, and Seven and Mr. Thomas failed to comply. This satisfies the first prong of the *Maupin* analysis.

Next, the Ninth District enforced the contemporaneous-objection rule against Mr. Thomas. As to Ground One, in *Thomas I* the Ninth District stated:

> [¶ 17] Mr. Thomas argues that the trial court erred by improperly giving an "at fault" jury instruction that was vague. We disagree.

[¶ 18] Mr. Thomas presented no objection in the trial court to the jury instructions that he challenges in his fourth and fifth assignments of error. Therefore, he has forfeited all arguments pertaining to these instructions except for that of plain error. Pursuant to Crim.R. 52(B), plain error will only be found if it affects a substantial right. "There are three requirements to finding plain error." "First, there must be an error." "Second, the error must be obvious." "Lastly, the error must have affected the outcome of the trial." "The plain error rule should be applied with caution and should be invoked only to avoid a clear miscarriage of justice."

* * *

[¶ 23] With respect to the "at fault" language in the self-defense instruction, the trial court instructed the jury that, in order to prove self-defense, Mr. Thomas was required, in part, to demonstrate that he was "not at fault in creating the situation giving rise to the dispute between [Mr.] Thomas and [Mr.] Smith that began on Seventh Avenue and continued on Eighth Avenue, and/or the shooting that occurred on Eighth Avenue[.]" Mr. Thomas maintains that the "at fault" instruction was vague. However, Mr. Thomas failed to provide, in his merit brief or at oral argument, this Court with an alternative instruction that would have clarified the issue of fault in reference to the defense of self-defense. Accordingly, given the

> limited argument advanced in Mr. Thomas' brief, particularly in the context of a review for plain error, we cannot say that the result would have been different had the trial court given a more precise instruction.
>
> [¶ 24] Therefore, Mr. Thomas' fourth and fifth assignments of error are overruled.

Thomas I, 2015 Ohio 2935, 2015 WL 4464893, at *3, *5 (citations omitted).

As this excerpt notes, Mr. Thomas did not object at trial to the use of the "at fault" jury instructions. *Id.* at *3. The Ninth District determined this failure constituted forfeiture of all arguments pertaining to the jury instructions, meaning that merits review was unavailable to him. *See id.* It reviewed for plain error.[2] *Id.* at *3-5.

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2. As to Grounds One and Two, Mr. Thomas's Traverse asserts: "The Ohio courts did not decide the federal constitutional issued [*sic*] presented on the merits and thus no deference is owed and the court must decide the issue de novo." (ECF #13, PageID 2671) (citing *Johnson v. Williams*, 568 U.S. 289, 133 S. Ct. 1088, 185 L. Ed. 2d 105 (2013); *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Thomas I*, 2015 WL 4464893). But as Mr. Thomas acknowledges elsewhere in his Traverse, "[w]hen the evidence very clearly shows that a federal claim was inadvertently overlooked in state court, § 2254(d) does not apply." (ECF #13, PageID 2668; *see also Johnson*, 568 U.S. at 303 ("When the evidence leads very clearly to the conclusion that a federal claim was inadvertently overlooked in state court, § 2254(d) entitles the prisoner to an unencumbered opportunity to make his case before a federal judge.")).

Here, the Ninth District did not "inadvertently overlook" review of Mr. Thomas's claim. *See Johnson*, 568 U.S. at 303. Rather, it applied

Similarly, the Ninth District determined that Mr. Thomas had not objected to the constitutionality of the self-defense burden of proof issue presented in Ground Three. *See Thomas I*, 2015 Ohio 2935, 2015 WL 4464893, at *3. It stated:

> [¶ 14] In his seventh assignment of error, Mr. Thomas argues that Ohio unconstitutionally places the burden on the defendant to prove self-defense.
>
> [¶ 15] However, Mr. Thomas does not cite to, and this Court has not located, any part of the record wherein he brought this issue to the attention of the trial court. "The failure to raise a constitutional issue at the trial level [forfeits] the right to advance a constitutional argument at the appellate level." "While a defendant who forfeits such an argument still may argue plain error on appeal," this Court generally will not undertake a plain-error analysis if a defendant fails to do so. Mr. Thomas has not argued plain error on appeal, and we decline to create a plain-error argument on his behalf.

Id. (citation omitted).

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a state procedural rule to the claim and conducted plain-error review. As such, AEDPA and its procedural default rules continue to apply, and this Court may not conduct *de novo* review of this claim. *See Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006) ("[A] state court's plain error analysis does not save a petitioner from procedural default. Plain error analysis is more properly viewed as a court's right to overlook procedural defects to prevent manifest injustice, but is not equivalent to a review of the merits.") (citation omitted).

Here, the Ninth District noted Mr. Thomas did not object to the potential constitutional issue presented by the self-defense burden of proof instruction. *Id.* at *3. As a result, the Ninth District determined Mr. Thomas forfeited his constitutional argument, and, as such, merits review was unavailable. *See id.* And because he did not argue plain error, the Ninth District declined to address further the alleged unconstitutionality of the self-defense burden of proof standard the trial court used. Therefore, the second *Maupin* prong is met: the Ninth District enforced the contemporaneous-objection rule against Mr. Thomas with respect to Ground Three.

Finally, the Ninth District found Mr. Thomas failed to object with respect to Ground Seven (therein Assignment of Error Eleven), and applied only a plain-error analysis to his claim:

> [¶ 51] In his eleventh assignment of error, Mr. Thomas argues that the trial court erred when it failed to hold a hearing or declare a mistrial where one juror relayed to the others that she knew one of the witnesses, and where a juror complained of hearing reactions in the gallery to the witnesses' testimony. We disagree.
>
> [¶ 52] "When it is alleged that outside contact with a juror has been made regarding the subject matter of the proceedings, a trial court must conduct 'a hearing with all interested parties permitted to participate' to 'determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial[.]'"

[¶ 53] Here, Mr. Thomas did not object to the trial court's failure to hold *Remmer* hearings. Therefore, he has forfeited all arguments except that of plain error. *See State v. Wooten*, 5th Dist. Stark No.2008 CA 00103, 2009-Ohio-1863, ¶ 38 (applying the plain error doctrine to an argument that the trial court failed to hold *Remmer* hearings when appellant did not challenge such a failure in the trial court).

[¶ 54] Here, after Ms. Brown testified, Juror No. 1 indicated to the trial court that she realized that she was acquainted with Ms. Brown. The trial court then inquired of Juror No. 1 in chambers, where all counsel and Mr. Thomas were present. Juror No. 1 explained that she was familiar with Ms. Brown through one of her friends, but she did not know her very well. Juror No. 1 indicated that she could be fair and impartial. Thereafter, the attorneys inquired of Juror No. 1, and then following exchange took place:

> THE COURT: Have you talked with any other members of the jury about the fact that you have got this indirect acquaintance with her at this point?
>
> JUROR [NO. 1]: Well, when I was back there, I said I may know one of the witnesses, you know, but I didn't say her name, you know.

> THE COURT: Did any of the other jurors respond back to you on that topic?
>
> JUROR [NO. 1]: No. They just listened. They—no, they didn't say anything.

[¶ 55] Mr. Thomas argues that the trial court was required to hold a hearing with respect to the other jurors to determine if what Juror No. 1 had told them would improperly influence them. However, we cannot say that if the trial court had held a hearing with the other jurors that there is a reasonable probability that the error resulted in prejudice.

[¶ 56] The second incident that Mr. Thomas argues required a hearing pertained to the trial court receiving a complaint from a juror that he/she could hear the gallery respond to witness testimony. Outside the presence of the jury, the trial court addressed the gallery as follows:

> I have received a complaint from one of the members of the jury this morning that as the testimony is being given, the jury can hear audible responses from the members of the gallery. "Audible" means that they hear it. So they are hearing people huffing, or disagreeing, or making some sound of agreement.

> I have previously warned the gallery about this. I will not warn the gallery again. If we hear any more sounds or reactions of any kind to the testimony that's being given or to the video that's about to be shown, I will clear the courtroom and there will be no one in the gallery during the rest of the testimony in this case.
>
> I know you all want to be here. So if you want to be here, you have to show that by being completely silent and not moving your heads and not expressing any sound whatsoever to the testimony.
>
> And the deputies are instructed to let me know if anyone—if they can see anyone violating that rule. And if they see it, they will give me a signal, at which point the [c]ourt will order the courtroom cleared.

* * *

[¶ 57] Mr. Thomas argues that the trial court was required to hold a hearing to determine the effect of the gallery's audible reactions during testimony on the jury. "A *Remmer* hearing must be held when the trial court learns of 'private communication, contact, or tampering * * * with a juror during a trial about the matter pending before the jury.'" Here, the gallery's reactions did not constitute private communications with the jury, and we

> are aware of no authority that requires the trial court to conduct a hearing in such a situation. Further, the situation addressed by the trial court here appears similar to that of outbursts by a member of a gallery. The Ohio Supreme Court has held that, in that context, "[w]here the communication is innocuous and initiated by a spectator in the form of an outburst, a hearing is not necessarily required." This is because "[a]n in-court emotional outburst directed at the defendant, not the jury, is a situation quite unlike the private communication with the jury encountered in *Remmer*. The outburst * * * was not a purposeful intrusion into the sanctity of the juror's domain." Accordingly, we are not persuaded by Mr. Thomas' argument that the trial court was required to hold a *Remmer* hearing to determine the effect on the jury of the gallery's audible reactions to testimony. Further, even if the trial court had held such a hearing, Mr. Thomas has not established a reasonable probability that the outcome of the case would have been different.
>
> [¶ 58] Accordingly, the trial court's failure to hold *Remmer* hearings in these instances did not amount to plain error. Therefore, Mr. Thomas' eleventh assignment of error is overruled.

Thomas I, 2015 Ohio 2935, 2015 WL 4464893, at *10-12 (citations omitted). Thus, by applying only plain-error review to his *Remmer* claim, the Ninth District enforced the contemporaneous objection rule against Mr. Thomas. Thus, as to Ground Seven, the second *Maupin* prong is satisfied.

The third prong of the *Maupin* analysis is satisfied because the contemporaneous objection rule has long been established as an adequate and independent state ground to bar federal habeas review. *See Hinkle v. Randle*, 271 F.3d 239, 244 (6th Cir. 2001) ("Ohio's contemporaneous objection rule constitutes an adequate and independent state law ground that bars federal habeas review absent a showing of cause and prejudice."); *see also Engle*, 456 U.S. at 124-25 ("Failure to comply with Rule 30 is adequate, under Ohio law, to bar appellate consideration of an objection....The Ohio Supreme Court has enforced this bar against the very due process argument [regarding burden of proof in self-defense] raised here.")

Finally, the fourth *Maupin* prong considers whether the petitioner can demonstrate cause for his failure to follow the state procedural rule and that he was actually prejudiced by the alleged constitutional error. *Maupin*, 785 F.2d at 138. Therefore, these grounds are procedurally defaulted unless Mr. Thomas "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. A petitioner must show that "some objective factor external to the defense" caused his failure to comply with the state's procedural rule, *Murray*, 477 U.S. at 488; if the petitioner cannot make this showing, a reviewing court need not consider the prejudice prong. *Smith v. Murray*, 477 U.S. 527, 533-34, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986).

Mr. Thomas makes no substantial argument as to his lack of contemporaneous objection. (*See* ECF #13, PageID 2671-74). Instead, he erroneously asserts in his Traverse that "all issues are properly preserved for this Court's review." (*Id.* at PageID 2670) (citing cases). Thus, he has not demonstrated cause for not following the contemporaneous objection rule with respect to any of these three grounds.

Despite this, Mr. Thomas obliquely references potential prejudice resulting from the trial court's response to the jury's question. Although not couched in terms of cause and prejudice, Mr. Thomas asserts that his counsel

> should have objected to the judge's failure to clarify or answer the question posed by the jury. If he had done so, then there is a reasonable probability that the outcome would have been different ....If counsel had argued to the judge that if Thomas was only 10% at fault, then he had met his burden under the preponderance of the evidence standard. There is a reasonable probability that the judge would have agreed and so instructed the jury. Moreover, the jury would have returned a verdict of not guilty once properly instructed.

(ECF #13, PageID 2673). These are conclusory allegations premised on hypotheticals, and thus are insufficient to demonstrate cause and prejudice. I therefore find Mr. Thomas has not met his burden to demonstrate actual prejudice. To overcome procedural default, habeas petitioners must present affirmative evidence or argument as to the precise cause and prejudice produced. *See Tinsley*, 399 F.3d at 806. Mr. Thomas has not done so.

For these reasons, I conclude Grounds One, Three, and Seven are procedurally defaulted.

B. Grounds Two, Five, and Twelve: Jury Question and Presence under Ohio Appellate Rule 16 (A)(7)

In Ground Two, Mr. Thomas argues that "[t]he trial court improperly answered jury question 3 in violation of the Sixth, Eighth and Fourteenth Amendments of the federal Constitution and equivalent provisions of Ohio law." (ECF #1, PageID 25). In support, he claims "the Ohio Jury Instructions do not define 'at fault' (see paragraph 78 of Dissenting opinion) and the jury needed guidance which the trial court failed to give even though case law from another district provided guidance." (*Id.* at PageID 26) (citing *State v. Hendrickson*, No. 08CA12, 2009 Ohio 4416, 2009 WL 2682158 (Ohio Ct. App. Aug. 25, 2009). He further argues the trial court must provide the jury with clear instructions, the jury was clearly confused by the jury instructions, and thus he was denied his constitutional right to a complete defense under the Sixth and Fourteenth Amendments. (ECF #13 at PageID 2672). He asserts the trial court should have addressed the jury's confusion over a matter of law, and "the judge's refusal to answer the jury's question left in place an unconstitutionally vague instruction and denied [him] a fair trial and Due process under the Sixth and Fourteenth Amendments." (*Id.* at PageID 2673). The State counters that Mr. Thomas has procedurally defaulted this ground by not following Ohio Appellate Rule 16(A)(7). (ECF #9, PageID 94-99).

In Ground Five,[3] Mr. Thomas argues he "was denied his right to a public trial under the Sixth and Fourteenth Amendments of the federal Constitution when the court failed to receive and answer the jury questions in open court, with Thomas and his counsel present and on the record." (ECF #1, PageID 29). In Ground Twelve, Mr. Thomas argues he "was denied his right to a public trial under the Sixth and Fourteenth Amendments of the federal Constitution and Art. I, Section 10 of the Ohio Constitution." (*Id.* at PageID 35).

As to both, Mr. Thomas posits he has a right to a public trial under the Sixth and Fourteenth Amendments to the Constitution, and that, pursuant to *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010), trial courts must consider alternatives to closure even when

3. Mr. Thomas presents Grounds Five and Twelve as separate bases for relief but his briefing does little to distinguish them. (*See* ECF #1, PageID 29, 35-36; *see also* ECF #13, PageID 2677-78, 2685-86). In his direct appeal, Mr. Thomas raised only one assignment of error relating to his right to a public trial under the Sixth and Fourteenth Amendments to the Constitution. *Thomas I*, 2015 Ohio 2935, 2015 WL 4464893, at *9-10. I thus respond to these grounds as a single claim.

not offered by the parties. (ECF #1, PageID 29, 35; ECF #13, PageID 2677). He argues his right to a public trial was violated when the trial court answered the jury's questions regarding the jury instructions in a non-public proceeding where neither he nor his counsel was present or waived their presence. (ECF #13, PageID 2677, 2685-86). The State counters that, like Ground Two, Grounds Five and Twelve are procedurally defaulted pursuant to Ohio Appellate Rule 16(A)(7). (ECF #9, PageID 103).

Ohio Appellate Rule 16 establishes the requirements for a party's brief to the court. In pertinent part, the rule requires an appellant's brief include "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." Ohio R. App. P. 16(A)(7). Furthermore, Ohio Appellate Rule 12 empowers appellate courts to "disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App.R. 16(A)." Ohio App. R. 12(A)(2); *see also Campbell v. Bunting*, No. 1:14CV1187, 2015 U.S. Dist. LEXIS 109496, 2015 WL 4984871, at *1 (N.D. Ohio Aug. 19, 2015) ("Ohio App. R. 12(A)(2) . . . empowers the court to disregard any assignment of error the appellant fails to brief in conformity with Rule 16(A).") In combination, therefore, enforcement of these state appellate procedural rules may serve to bar merits review of an appellant's claim, and later, serve as a procedural bar in a habeas petition if they are not met. Thus, the first *Maupin* prong is satisfied.

Next, I look to whether the state court enforced this rule against Mr. Thomas. I conclude it did. The Ninth District considered Mr. Thomas's second, fifth, and twelfth grounds for relief (numbered six and nine in his state direct appeal) as follows:

> [¶ 44] In his sixth, eighth, and ninth assignments of error, Mr. Thomas argues that the trial court erred in answering a jury question and that the court improperly answered the question without his or his counsel's presence in open court. We disagree.
>
> [¶ 45] Included with the exhibits in this case is what appears to be a list of questions from the jury, which presumably was presented to the trial court. The third of these questions reads:
>
>> Under Self Defense, Part(A) states, "he was not at fault in creating the situation that gave rise to the dispute [...]"/We are having trouble analyzing the issue of "fault." If he/were say "10%" at fault for having agreed to fist fight, is he considered at fault as it pertains to the wording in this section?
>
> [¶ 46] Also included in the exhibits is what appears to be the trial court's response to the jury's questions. Therein, the court stated:

> You must re-review and apply your collective understanding of the meaning of the terms used in the jury instructions. The court cannot further define the meaning of those terms.

[¶ 47] Although Mr. Thomas argues, as part of his sixth assignment of error, that "[i]t appears from the transcript[ ]that the court did not consult the defense concerning this question[,]" and, as part of his eighth and ninth assignments of error, that neither defense counsel nor Mr. Thomas were present when the trial court answered the question, the transcript is silent on whether the trial court consulted with the parties regarding the question and on whether the parties were present when the court answered the question. Mr. Thomas' sixth, eighth, and ninth assignments of error depend, in whole or in part, upon the premises that Mr. Thomas and his counsel were not consulted prior to the court answering the jury question, and that they were not present when the court proceeded to answer the question. However, on direct appeal, our review is limited to the record, and from this record, we cannot determine the accuracy of these premises. *See State v. Charlton*, 9th Dist. Lorain No. 12CA010206, 2014-Ohio-1330, ¶ 49, (where proof outside of the record is required to support an assignment of error, the argument raised in the assignment of [*sic*] is not appropriate for consideration on direct appeal), and *State* *v. Batton*, 9th Dist. Lorain No. 96CA006505, 1997 Ohio App. LEXIS 4259, 1997 WL 600661, *5 (Sept. 17, 1997) ("we cannot presume error from a silent record").

[¶ 48] Moreover, in his sixth assignment of error, Mr. Thomas argues that the trial court improperly answered the jury question in violation of the Sixth, Eighth, and Fourteenth Amendments of the federal constitution and equivalent provisions of Ohio law. However, his argument in support of this assignment of error fails to discuss or in any way analyze the federal constitutional amendments and state law cited in his assignment of error. *See* App.R. 16(A)(7).

[¶ 49] Further, we note that in Mr. Thomas' ninth assignment of error, he maintains in part that the court erred by not answering the jury question on the record. We would agree that the best practice is for the trial court to answer jury questions on the record. However, Mr. Thomas has pointed this Court to no authority in support of his argument that the trial court commits reversible error in failing to do so, and we decline to construct an argument on his behalf. *See* App.R. 16(A)(7).

[¶ 50] Accordingly, Mr. Thomas' sixth, eighth, and ninth assignments of error are overruled.

Thomas I, 2015 Ohio 2935, 2015 WL 4464893, at *9-10.

Plainly, the Ninth District enforced Ohio Appellate Rule 16(A)(7) against Mr. Thomas. *Id.* It found this rule applicable because he failed to discuss the appropriate amendments to the Constitution and failed to cite authorities in his brief on which the court could rely. *Id.* Thus, the Ninth District concluded Mr. Thomas had not complied with Rule 16(A)(7); as a result, it overruled the assignments of error that are the bases for Grounds Two, Five, and Twelve. *Id.* Therefore, the second *Maupin* prong is met.

I next determine whether Ohio Appellate Rule 16 (A)(7) is an adequate and independent state ground. The Sixth Circuit and district courts within this circuit have determined that Ohio Appellate Rule 16(A)(7) is an adequate and independent state ground on which the state court could rely to foreclose consideration of a petitioner's claim. *Haywood v. Harris*, No. 21-3170, 2021 U.S. App. LEXIS 30253, 2021 WL 7162137, at *4 (6th Cir. Oct. 7, 2021) (collecting cases); *see also Johnson v. Bradshaw*, No. 1:03 CV 2509, 2006 U.S. Dist. LEXIS 74548, 2006 WL 2945915, at *9-10 (N.D. Ohio Oct. 13, 2006). Therefore, *Maupin*'s third prong is met.

To overcome the fourth *Maupin* prong, Mr. Thomas must demonstrate cause for not following the state procedural rule and that he was actually prejudiced by the alleged constitutional error. *Maupin*, 785 F.2d at 138. Mr. Thomas makes no such argument as to Grounds Two, Five, and Twelve. (*See* ECF #13, PageID 2670) ("all issues are properly preserved for this Court's review."). I thus find he has not demonstrated cause and prejudice to excuse his failure to follow Ohio Appellate Rule 16(A)(7). The final *Maupin* prong cuts against Mr. Thomas.

For these reasons, I conclude Grounds Two, Five, and Twelve are procedurally defaulted.

C. Fundamental Miscarriage of Justice

Finally, a petitioner may overcome procedural default by showing a fundamental miscarriage of justice will occur if the federal habeas court does not consider the petitioner's claims. *Coleman*, 501 U.S. at 750; *Murray*, 477 U.S. at 495. This question turns on whether the alleged constitutional violation resulted in the conviction of one who is "actually innocent." *Murray*, 477 U.S. at 495-96; *see also Schlup*, 513 U.S. at 327. A valid actual innocence claim must be supported by new reliable exculpatory evidence not presented at trial. *Schlup*, 513 U.S. at 324. In other words, a "petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id.* at 327.

Mr. Thomas has not presented the type of new and reliable evidence that would satisfy the *Schlup* standard. In fact, Mr. Thomas has not argued that he is actually innocent. (ECF #13, PageID 2682) ("Mr. Thomas does not dispute he caused the death of the victim ...."). Rather, much of his petition argues the evidence was insufficient to convict him of murder, and that he should have been convicted of a lesser charge of involuntary manslaughter or reckless homicide, or that he should have won on the affirmative defense of self-defense. (*See generally* ECF #1, 13).

Mere legal insufficiency does not demonstrate a petitioner's actual innocence. *Bousley*, 523 U.S. at 623. Mr. Thomas has not overcome procedural default of Grounds One, Two, Three, Five, Seven, and Twelve. Accordingly, I recommend the District Court **DISMISS** Grounds One, Two, Three, Five, Seven, and Twelve as procedurally defaulted.

II. Available for Review Under AEDPA: Grounds Four, Ten, Eleven, Thirteen, Fourteen, and Fifteen

Six of the remaining grounds for relief are available for merits review under AEDPA. Because "[s]tate courts are adequate forums for the vindication of federal rights," *Burt*, 571 U.S. at 19, AEDPA "dictates a highly deferential standard for evaluating state-court rulings which demands that state-court decisions be given the benefit of the doubt." *Bell*, 543 U.S. at 455 (cleaned up). Therefore, the writ may not be granted unless the state court's adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d).

A. Grounds Four and Thirteen: Right to Presence

In Ground Four, Mr. Thomas asserts he "was denied his right to be present at all critical stages of his trial when the court answered jury questions in his absence and counsel did not waive his presence in violation of the Sixth and Fourteenth Amendments of the federal Constitution." (ECF #1, PageID 28). He claims "the jury questions were not asked or answered in open court with counsel present [or] with [Mr.] Thomas present." (*Id.* at PageID 29). He asserts the trial court provided written answers to the jury's questions without notifying either party. (*Id.*; ECF #13, PageID 2676; *see also* ECF #9-1, PageID 241-42). Mr. Thomas also asserts: "The right to be present at trial was violated and the Ohio courts clearly violated well established U.S. Supreme Court law." (ECF #13, PageID 2677; *see also Lewis v. United States*, 146 U.S. 370, 372, 13 S. Ct. 136, 36 L. Ed. 1011 (1892) ("A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.")).

In Ground Thirteen, Mr. Thomas states his

> right to be present at all stages of his trial was violated when he did not waive his right to be present for jury questions and answers and his lawyers never discussed the jury questions with him all in violation of Crim. R. 43(A), the Fifth, Sixth, and Fourteenth Amendment[s] of the federal Constitution.

(ECF #1, PageID 37). For this ground, he provides similar support as he did for Ground Four: "In this case the jury questions were not asked or answered in open court with counsel present and with [Mr.] Thomas present." (*Id.*) He states the trial court provided written answers to the jury's questions without notifying either party. (*Id.*; ECF #13, PageID 2687 (citing Trial Court File Ex. 4 Thomas' affidavit of 9-11-14)).

For both grounds, Mr. Thomas argues that by not answering the jury's questions in open court, the trial court violated his Fifth, Sixth, and Fourteenth Amendment rights, as provided in *Snyder v. Massachusetts*, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 674 (1934), and *United States v. Gagnon*, 470 U.S. 522, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985). (ECF #1, PageID 28, 37; ECF #13, PageID 2676, 2687). The State responds that the trial court's actions did not violate clearly established United States Supreme Court precedent. (ECF #9, PageID 99-103). The State maintains *Snyder* does not support Mr. Thomas's claims in federal habeas review because it "holds that a defendant has a right to be present at a critical stage of the criminal proceedings but fails to identify the jury question and answer conference as such a critical stage." (*Id.* at PageID 101).

A defendant's right to be present at all critical stages of trial is rooted in the Sixth Amendment's Confrontation Clause. *Gagnon*, 470 U.S. at 526 (citing *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970)). It is also protected by the Due Process Clause in situations where, like here, the defendant is not actually confronting witnesses or the evidence against him. *Id.* (citing *Snyder*, 291 U.S. at 105-06).

The Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v. Cronic*, 466 U.S. 648, 659 n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (collecting cases). In certain egregious circumstances, courts may presume a denial of Sixth Amendment rights without a showing of prejudice. *Id.* at 659 (citing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)). Such egregious cases arise when a petitioner's counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* A "presumptively unreliable" adversary process can include where a petitioner is denied the right of effective cross-examination, *Davis*, 415 U.S. at 318, or where defense counsel is appointed on the same day as trial and not afforded the opportunity to prepare a defense, *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Cronic*, 466 U.S. at 659 n.26 (citing *Strickland*, 466 U.S. at 693-96).

A "defendant has a due process right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge ....The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *United States v. Gagnon*, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 L. Ed. 2d 486 (1985) (cleaned up). Similarly, a court "presum[es] that counsel's assistance is essential" and "a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Cronic*, 466 U.S. at 659. The Supreme Court further clarified in *Bell v. Cone* that a "critical stage" is one that holds "significant consequences for the accused." 535 U.S. 685, 696, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002).

When determining what constitutes a "critical stage" requiring the presence of the defendant or defense counsel, courts assess the likelihood of significant consequences resulting from their absence at that stage. *Van v. Jones*, 475 F.3d 292, 313 (6th Cir. 2007). But the Supreme Court has cautioned that courts should consider the exclusion of a defendant from a trial proceeding in light of the whole record. *Gagnon*, 470 U.S. at 526-27 (citing *Snyder*, 29 U.S. at 115).

Here, Mr. Thomas asserts his right to be present was violated when the judge answered Question Three of the jury without Mr. Thomas's or his counsel's presence. (ECF #13, PageID 2687). He argues this was an "especially important question" going to an element of the case in which he had the burden of proof, thus requiring that he or his counsel be present. (*Id.*) He concludes that "[s]uch error is structural and no prejudice need be shown." (*Id.*)

Question Three asked: "Under Self Defense, Part (A) states 'he was not at fault in creating the situation that gave rise to the dispute [. . .]' We are having trouble analyzing the issue of 'fault.' If he were say '10%' at fault for having agreed to a fist fight is he considered at fault as it pertains to the wording in this section?" (ECF

#9-1, PageID 241). The trial court's written response states: "You must re-review and apply your collective understanding of the meaning of the terms used in the jury instructions. The court cannot further define the meaning of those terms." (*Id.* at PageID 242).

On direct appeal, the Ninth District responded to federal habeas Ground Four (therein Assignment of Error Eight) as follows:

> [¶ 47] Although Mr. Thomas argues . . . as part of his eighth and ninth assignments of error, that neither defense counsel nor Mr. Thomas were present when the trial court answered the question, the transcript is silent on whether the trial court consulted with the parties regarding the question and on whether the parties were present when the court answered the question. Mr. Thomas' . . . eighth, and ninth assignments of error depend, in whole or in part, upon the premises that Mr. Thomas and his counsel were not consulted prior to the court answering the jury question, and that they were not present when the court proceeded to answer the question. However, on direct appeal, our review is limited to the record, and from this record, we cannot determine the accuracy of these premises.

Thomas I, 2015 Ohio 2935, 2015 WL 4464893, at *9 (citation omitted).

In its review on postconviction relief, the Ninth District analyzed habeas Ground Thirteen (therein Assignment of Error Four) as follows:

> [¶ 9] In his fourth assignment of error, Thomas argues that he was entitled to post-conviction relief because he was denied his constitutional right to be present at all stages of his trial. Specifically, he argues that he had a right to be present when the trial judge received and answered a question from the jury during deliberations. Because Thomas cannot demonstrate prejudice as a result of his absence, we reject his assignment of error.
>
> [¶ 10] Initially, we note that Thomas raised this same argument on direct appeal, but this Court was unable to address its merits. We found that the record was silent as to whether "the trial court consulted with the parties regarding the [jury] question and on whether the parties were present when the court answered the question." Because we determined that Thomas' argument required proof outside the record, we did not address its merits. As such, his fourth assignment of error is not barred by res judicata.
>
> [¶ 11] "A criminal defendant has a fundamental right to be present at all critical stages of his trial." Even so, "[a] criminal defendant's absence * * * 'does not necessarily result in prejudicial or constitutional error.'"

> Before a defendant may prevail upon the argument that he was denied due process as a result of his absence, * * * (1) " '[t]he record must affirmatively indicate the absence of [the] defendant or his counsel during a particular stage of the trial,' " * * * and (2) the defendant must show that the absence prejudiced his defense.

In the absence of a showing of prejudice, any error in not securing the defendant's presence is harmless.

[¶ 12] Because the trial court did not permit discovery or hold a hearing on Thomas' petition, the record contains limited evidence regarding the jury question that the trial court is said to have received and answered. It does contain, however, a sheet of paper with what appears to be a list of questions from the jury and another sheet of paper with what appears to be the court's responses. The third question on the list that appears to be from the jury reads as follows:

> Under Self Defense, Part (A) stated "he was not at fault in creating the situation that gave rise to the dispute [...]"/We are having trouble analyzing the issue of "fault." If he were say "10" at fault for having agreed to fist fight, is he considered at fault as it pertains to the wording in this section?

(Alteration sic.) The response to the question reads as follows:

> You must re-review and apply your collective understanding of the meaning of the terms used in the jury instructions. The court cannot further define the meaning of those terms.

Thomas presented an affidavit in support of his post-conviction relief petition and averred that he was not present for any jury questions, he did not waive his presence, and his attorneys never discussed any jury questions with him. He argues that he was prejudiced when the court received and answered the above-quoted jury question outside of his presence because the court's answer was vague and his absence deprived him of the ability to object to it.

[¶ 13] Even assuming that the trial court did, in fact, receive and answer the jury's question without Thomas or his counsel being present, Thomas cannot demonstrate prejudice as a result of his absence. His claim of prejudice stems strictly from his inability to challenge the court's allegedly vague answer through an objection. The propriety of the court's answer, however, was a matter that Thomas could have raised on direct appeal. In fact, Thomas specifically argued on appeal that the trial court improperly answered the jury's question

> about fault. Over a dissent, a majority of this Court rejected his argument. Thomas' absence, therefore, did not deprive him of the ability to challenge the trial court's answer. He had the opportunity to litigate that issue on appeal, and his appeal resulted in this Court rejecting his assertion that the trial court's answer was improper. Thomas has not shown that, had he been present when the court received and answered the jury's question, the result in this matter would have been any different. Accordingly, even assuming that the court erred by receiving and answering a question from the jury outside of Thomas' presence, that error was harmless. Thomas' fourth assignment of error is overruled.

Thomas II, 2016 WL 444896, at *2-3 (citations omitted).

On direct appeal, the Ninth District limited its review to the record evidence and determined it could not rule where the record was silent on the matter of Mr. Thomas's or his counsel's presence. On postconviction appeal, the Ninth District accepted Mr. Thomas's affidavit that he and his counsel were not present and that he had not waived his presence. Although the record must affirmatively show the defendant's absence, the court assumed this was true based on the affidavit. Nevertheless, it found Mr. Thomas had not demonstrated he was prejudiced by the trial court's answer and could not show that the result in this matter would have been different. Thus, it found any error was harmless.

Federal habeas review focuses on whether a state court's decision runs contrary to established Supreme Court precedent based on a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405; *Mitchell*, 431 F.3d at 523. But a state court's decision is not contrary to clearly established law where the U.S. Supreme Court's precedent is ambiguous or does not exist. *See, e.g., Mitchell*, 540 U.S. at 17. This Court further reviews to determine if a state court decision unreasonably applied clearly established federal law—in other words, whether the state's adjudication was "objectively unreasonable," not merely erroneous or incorrect. *Williams*, 529 U.S. at 409-11; *see also Machacek*, 213 F.3d at 95. Yet, "[i]t bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, 562 U.S. at 102.

Here, the Ninth District's decision is not contrary to established precedent, nor was its adjudication objectively unreasonable. Mr. Thomas is correct that "the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983). Thus, defense counsel's absence at a critical stage of trial is per se reversible error. *French v. Jones*, 332 F.3d 430, 438 (6th Cir. 2003) (citing *Cronic*, 466 U.S. at 666-67); *see also Holloway v. Arkansas*, 435 U.S. 475, 489, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978) ("when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.")

(collecting cases). The Supreme Court has also counseled that when an *ex parte* communication between the trial judge and the jury "relates to some aspect of the trial," the judge "generally should disclose the communication to counsel for all parties." *Rushen*, 464 U.S. at 119.

Without detracting from the fundamental nature of the defendant's right to personal presence, the Supreme Court has also recognized "the necessity for preserving society's interest in the administration of criminal justice." *Id.* at 117. Thus, cases involving constitutional deprivations such as these—including those involving a judge's *ex parte* communications with jurors—are subject to the general rule that remedies should be tailored to the injury suffered and should not unnecessarily infringe on competing interests. *Id.* at 117-18 (citing *United States v. Morrison*, 449 U.S. 361. 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981); *Rogers v. United States*, 422 U.S. 35, 38-40, 95 S. Ct. 2091, 45 L. Ed. 2d 1 (1975)). Thus, the court looks to any prejudicial effect from the trial judge's failure to disclose the *ex parte* communications with jurors to determine whether the alleged constitutional is harmless. *Rushen*, 464 U.S. at 117-20. As noted earlier, the state court's factual findings on this issue are presumed correct. Accordingly, "[t]he substance of the *ex parte* communications and their effect on juror impartiality . . . must be determined, in the first instance, by state courts and deferred to, in the absence of convincing evidence to the contrary, by the federal courts." *Id.* (internal quotations omitted).

The Ninth District found that, although Mr. Thomas and his counsel were not present, he suffered no prejudice from the trial court's written response to Question Three. At the postconviction stage, Mr. Thomas merely argued for an opportunity to object to the judge's allegedly vague instruction and did not show that the outcome of the trial would have been different. Thus, the Ninth District found no prejudice and no reversible error. As the federal court sitting in habeas review, I must defer to the Ninth District's determination absent convincing evidence to the contrary, none of which has been presented.

Mr. Thomas has not shown that the Ninth District's adjudication resulted in a decision contrary to, or involving an unreasonable application of, clearly established Supreme Court precedent. Mr. Thomas has also not shown the Ninth District's decision relied on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *See* 28 U.S.C. § 2254(d). Accordingly, I recommend the District Court **DENY** Grounds Four and Thirteen as without merit.

B. Ground Ten: Sufficiency of The Evidence

In his Tenth Ground for relief, Mr. Thomas argues: "The evidence is insufficient to sustain a Murder conviction under the Fourteenth Amendment." (ECF #1, PageID 34). He maintains that in light of the evidence, self-defense, voluntary manslaughter, or reckless homicide were more appropriate outcomes. (ECF #13, PageID 2682). With little clarification, he asserts "[g]iven the peculiar facts of this case, the murder conviction violates the Fourteenth Amendment" and is "'so inadequately supported by the record . . . as to be unreasonable.'" (*Id.* at PageID 2683) (quoting *Maynard v. Boone*, 468 F.3d 665, 671 (10th Cir. 2006)). The State counters that, under *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), this Court must defer to state court determinations, and, in the sufficiency of the evidence context, must apply double deference. (ECF #9, PageID 120-27).

First, this Court must defer to the jury's determinations when resolving conflicts in testimony, weighing the evidence, and drawing reasonable inferences from that evidence; a reviewing court is not permitted to substitute its own opinion for that of the jury. (ECF #9, PageID 121). Second, as a federal court sitting in habeas review, this Court must also defer to the state appellate court's consideration of the trier-of-fact's verdict, as required by AEDPA. (*Id.* at PageID 122) (citing *Davis v. Lafler*, 658 F.3d 525, 531 (6th Cir. 2011)). Given these limiting principles, I conclude Mr. Thomas has not shown the Ninth District unreasonably applied *Jackson* or unreasonably determined the facts. (ECF #9, PageID 122-27).

The Fourteenth Amendment's Due Process Clause requires a state to prove every element of a crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 315-16. On habeas review, a federal district court must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. The Supreme Court further teaches that "the *Jackson* inquiry does not focus on whether the trier of fact made a correct guilt or innocence determination, but rather whether it made a rational decision to convict or acquit." *Herrera v. Collins*, 506 U.S. 390, 402, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

Claims controlled by *Jackson* face the high burden of two layers of judicial deference. *Coleman v. Johnson*, 566 U.S. 650, 651, 132 S. Ct. 2060, 182 L. Ed. 2d 978 (2012). First, the state court on direct appeal may set aside the jury's verdict on insufficient evidence only if no trier of fact could have agreed with the jury. *Id.* Second, the habeas court may only overturn if the state court decision was "objectively unreasonable"; simply disagreeing with the state court's result is insufficient. *Id.* Thus, when analyzing sufficiency-of-the-evidence claims, the reviewing district court defers to both the trier-of-fact's verdict and the state court's consideration of that verdict. *Davis*, 658 F.3d at 531.

Claims based on the sufficiency of the evidence are assessed with "explicit reference to the substantive elements of the criminal offense as defined by state law." *Jackson*, 443 U.S. at 324 n.16. And the state appellate court's interpretation of state law is binding on a federal court sitting in habeas review. *See Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). As such, it is the task of a habeas court "not to upset state court judgments by substituting our judgements or opinions." *Neace v. Edwards*, 129 F. App'x 985, 991 (6th Cir. 2005) (citing *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) (explaining that the role of federal habeas court is important to assure observation of constitutional rights, but it is secondary and limited, and federal courts are not forums in which to relitigate state trials)).

Here, the Ninth District analyzed Mr. Thomas's sufficiency-of-the-evidence claim as follows:

> [¶ 34] The issue of whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production. "The relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt."
>
> [¶ 35] Mr. Thomas was convicted of the lesser offense of murder, in violation of R.C. 2903.02(A), which provides, in relevant part, that "[n]o person shall purposely cause the death of another * * *." Former R.C. 2901.22(A) provides that "[a] person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."
>
> [¶ 36] At trial, the State presented, in part, the testimony of police officers and witnesses to the events prior to and after the shooting. Collectively, these witnesses recalled that, on April 13, 2013, Mr. Smith arrived outside

of Mr. Thomas' grandmother's house, where Mr. Thomas was present. Mr. Thomas and Mr. Smith then engaged in a verbal altercation, during which Mr. Smith said that they could "get that work in[,]" which meant that Mr. Smith was challenging Mr. Thomas to a fistfight. Mr. Thomas replied that they could go a street over to Eighth Ave. to fight. The two men got into their respective vehicles and drove to a location a short distance away on Eighth Ave. No one witnessed a physical altercation between them on Eighth Ave. However, Phyllis Brown, who lived across the street from where the men met on Eighth Ave., heard three gun shots fired, and looked out her window. Outside she saw Mr. Thomas holding a gun several feet from Mr. Smith, who was sitting on the ground. She also saw Mr. Thomas drive away. After Mr. Thomas left and Mr. Smith unsuccessfully tried to start his car and enter a nearby house, Ms. Brown went outside to assist Mr. Smith, who was bleeding heavily. No gun was located at the scene.

[¶ 37] It is undisputed that Mr. Thomas fatally shot Mr. Smith. However, Mr. Thomas maintains that the evidence was sufficient only to show that he acted in self-defense, or that he was guilty of voluntary manslaughter or reckless homicide.

[¶ 38] First, we note, as the State has pointed out, Mr. Thomas fails to cite portions in the record in support of his argument in violation of App.R. 16(A)(7).

[¶ 39] Further, a sufficiency of the evidence challenge is not a proper vehicle to review self-defense, which is an affirmative defense This is because "a defendant may be convicted of a crime in accordance with due process strictures upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Thus, the due process sufficient evidence guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime."

[¶ 40] Moreover, Mr. Thomas does not appear to develop an argument that his conviction was not supported by sufficient evidence, and, instead seems to argue that the evidence supported a determination that he was in a sudden fit of rage or passion when he shot Mr. Smith. As set forth in our discussion of Mr. Thomas' tenth assignment of error, the trial court did not instruct the jury on voluntary manslaughter because there was insufficient evidence to support such an instruction. Further, such an argument would be more appropriate in a challenge to the weight, not the sufficiency, of the evidence. An appellant's "assignment of error provides a roadmap for our review and, as such, directs our analysis of the trial court's

> judgment." Accordingly, we confine our review to the sufficiency of the evidence.
>
> [¶ 41] Further, although Mr. Thomas generally asserts in his argument in support of his fourteenth assignment of error that he should have been convicted only of reckless homicide, no instruction was sought or given to the jury on reckless homicide, and he develops no further argument as to how the evidence demonstrated only recklessness.
>
> [¶ 42] Although Mr. Thomas does not develop a proper sufficiency argument, we have reviewed the record, and the evidence, when viewed in a light most favorable to the State, supports his conviction for murder. The State provided evidence that Mr. Thomas and Mr. Smith engaged in an argument outside of Mr. Thomas' grandparents' home, and they agreed to meet a short distance away to engage in a fistfight. After they arrived at their agreed upon location to engage in the fight, Mr. Thomas shot Mr. Smith multiple times, firing a fatal shot to Mr. Smith's chest. Mr. Thomas conceded in his testimony that he shot Mr. Smith. Mr. Thomas then fled the scene with the gun and was later apprehended in another state. Construing this evidence in a light most favorable to the State, we conclude there was sufficient evidence to establish that Mr. Thomas purposely caused the death of Mr. Smith.

Thomas I, 2015 WL 4464893 at *7-9 (citations omitted).

The Ninth District's analysis notes several issues that are also present in Mr. Thomas's briefing to this Court. First, Mr. Thomas does not cite to the record in support of his sufficiency of the evidence claim. (*See* ECF #13, PageID 2682-84). Next, he argues the evidence supports a conviction under self-defense, which is an affirmative defense and therefore not appropriate for a sufficiency-of-the-evidence claim. (*See id.* at PageID 2682-83). Furthermore, with respect to voluntary manslaughter and reckless homicide, the trial court determined, and the Ninth District agreed, the evidence was insufficient to warrant a voluntary manslaughter jury instruction and Mr. Thomas did not seek a reckless homicide instruction during trial. *Thomas I*, 2015 WL 4464893 at *8. Once again, Mr. Thomas's briefing to this Court is similarly underdeveloped. Without more, he has not reached his first hurdle of overcoming AEDPA deference to the Ninth District's determination.

I therefore recommend the District Court **DENY** Ground Ten as meritless.

C. Grounds Eleven, Fourteen, And Fifteen: Ineffective Assistance of Counsel

Mr. Thomas's eleventh, fourteenth, and fifteenth grounds for relief all allege ineffective assistance of counsel.

1. Ground Eleven

In Ground Eleven, Mr. Thomas states: "Counsel was ineffective under *Strickland* or *Cronic* when he failed in opening statement to assert the affirmative defense of self-defense. The Sixth and Fourteenth Amendments were violated." (ECF #1, PageID 34). In support, he makes a passing argument that his counsel's conduct fell below an objective standard of reasonableness and he was prejudiced by counsel's omission of the affirmative defense of self-defense during the opening statement. (ECF #13, PageID 2684-85). In response, the State argues that Mr. Thomas's trial counsel focused on other aspects of the State's case relating to the element of prior calculation and design, and, as such this may be considered sound trial strategy; thus, the state court's determination of the issue is not an unreasonable application of *Strickland*. (ECF # 9, PageID 62-63).

Strickland establishes a two-part test to determine whether a defendant was denied effective assistance of counsel:

> First, defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. To satisfy the deficiency prong, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 668. Because "[i]t is all too tempting for a defendant to second-guess

counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. In other words, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (cleaned up).

This is an extremely deferential standard, because "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. In particular, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690-91. Moreover, this inquiry requires eliminating "the distorting effects of hindsight . . . [in order] to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The goal is not to ensure that a criminal defendant be afforded perfect counsel, but rather "to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Id.* at 687.

The Ninth District considered this issue as follows:

> [¶ 9] In his third assignment of error, Mr. Thomas argues that his trial counsel was ineffective by failing to inform the jury of his argument of self-defense during opening statements. We disagree.

[¶ 10] This Court must analyze claims of ineffective assistance of counsel under a standard of objective reasonableness. Under this standard, a defendant must show (1) deficiency in the performance of counsel "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that the errors made by counsel were "so serious as to deprive the defendant of a fair trial[.]" A defendant must demonstrate prejudice by showing that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. In applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" "There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." "Most obvious, of course, is the complete denial of counsel."

[¶ 11] Here, in his opening statement, Mr. Thomas' trial counsel focused on the element of intent as contained in the aggravated murder statute, urging the jury to consider whether the State could prove that Mr. Thomas killed Mr. Smith with "prior calculation and design[.]"Counsel also asked the jury to focus on the absence of witnesses to the shooting, and the fact that the jury would hear that what occurred during the incident happened "quickly and instinctively[,]" and there was "little time for thought, reflection, [and] planning."

[¶ 12] It appears that defense counsel focused his opening statement upon the element of intent. If he were successful in his effort, the jury could either acquit on the aggravated murder count, or convict on the lesser included offense of murder. In fact, counsel's efforts in focusing the jury's attention on the element of intent resulted in the conviction on the lesser offense of murder. From a review of the record, one might infer that defense counsel did not specifically argue self-defense because counsel may have planned to direct the defense's case in response to how the State's case developed. Therefore, counsel's failure to specifically argue self-defense in his opening statement appears to be a trial tactic, and does not amount to deficient performance. Further, trial counsel's failure to specifically argue self-defense in opening statement did not foreclose counsel from raising it as an affirmative defense during trial, and Mr. Thomas testified that he shot Mr. Smith in self defense.

[¶ 13] Accordingly, Mr. Thomas's third assignment of error is overruled.

Thomas I, 2015 Ohio 2935, 2015 WL 4464893, at *2-3 (citations omitted).

Here, the Ninth District considered the strategy of Mr. Thomas's trial counsel and found that he "focused his opening statement on the element of intent" - not the self-defense argument Mr. Thomas now claims was appropriate - because "[i]f he were successful in his effort, the jury could either acquit on the aggravated murder count, or convict on the lesser-included offense of murder." *Id.* at *2. I note, as did the Ninth District, that this strategy was ultimately successful: "in fact, counsel's efforts in focusing the jury's attention on the element of intent resulted in the conviction on the lesser offense of murder." *Id.*; *see also* ECF #9-1, PageID 204. Thus, the Ninth District concluded trial counsel's alleged failure to raise self-defense in his opening argument was a trial strategy and did not foreclose him from raising it as an affirmative defense during trial. *Thomas I*, 2015 WL 4464893 at *2. Thus, it found *Strickland* was not satisfied and overruled this assignment of error. *Id.* at *2-3.

My review of the relevant parts of the trial transcript reveals the same. (*See* ECF #9-4, PageID 31-37). I see no *Strickland* error in the way Mr. Thomas's trial counsel presented his defense during the opening statement.

Where the defendant fails to overcome the presumption that the challenged conduct might be considered sound trial strategy, courts will not find ineffective assistance. *Strickland*, 466 U.S. at 689. Judicial scrutiny of counsel's performance is highly deferential. Mr. Thomas has not established that trial counsel's performance was constitutionally deficient, and therefore cannot meet the *Strickland* standard. Moreover, his lack of developed argumentation on this point does not demonstrate prejudice. Indeed, the Ninth District determined, and I concur, that trial counsel's strategy was effective for Mr. Thomas when he was convicted not of the original charge of aggravated murder, but of the lesser-included offense of murder. The Ninth District's decision on this issue does not unreasonably apply *Strickland*, nor does it unreasonably determine the facts.

Thus, I recommend the District Court **DENY** Mr. Thomas's eleventh ground for relief.

2. Grounds Fourteen and Fifteen

In his fourteenth and fifteenth grounds for relief, Mr. Thomas argues his trial counsel was ineffective for failing to investigate and develop evidence showing his low intelligence.

In Ground Fourteen, he avers: "Counsel is ineffective under the Sixth and Fourteenth Amendments of the federal Constitution by failing to investigate and present available evidence of Mr. Thomas's state of mind." (ECF #1, PageID 39) (cleaned up). He supports this ground for relief by pointing to Social Security records, school records, and a report from a psychologist, Dr. Webb, indicating that Mr. Thomas had multiple developmental issues and an IQ in the low 50s. (*Id.* at PageID 39-47; *see also* ECF #13, PageID 2689-98). He argues this evidence would have demonstrated his state of mind and bolstered his affirmative defense of self-defense. (*Id.*) Without this evidence, the jury was deprived of relevant information specific to Mr. Thomas's life because his defense counsel did not investigate or present evidence of his state of mind and low intelligence. (ECF #1, PageID 47-48; ECF #13, PageID 2696-98).

Ground Fifteen is similar. Mr. Thomas argues:

> Counsel was ineffective under the Sixth and Fourteenth Amendments of the federal Constitution when they failed to secure services of a mental health expert to testify concerning the stipulated exhibits and their impact on Mr. Thomas's state of mind and subjective elements of self-defense; Mr. Thomas was denied a complete defense as a result under the Sixth and Fourteenth Amendments.

(ECF #1, PageID 47). He supports this ground by arguing that, due to his indigent status, he was entitled to experts who could assist his defense. (ECF #13, PageID 2698-99). He argues his counsel was deficient under *Strickland* for failing to investigate his low intelligence and obtain the services of a mental health expert to show his state of mind and the subjective component of self-defense. (*Id.*). He states briefly that he is prejudiced and that there is a reasonable probability of a different outcome if the jury had been aware of this information. (*Id.* at PageID 2699).

The State counters both grounds by arguing that the Ninth District correctly applied *Strickland* to these claims, and that *Cronic* is inapplicable. (ECF #9, PageID 131). Counsel was aware of Mr. Thomas's low IQ and the relevant records, but determined that introducing this evidence would open the door to evidence demonstrating that Mr. Thomas was impulsive, had anger management issues, and had been suspended from school for fighting. (*Id.* at PageID 137-39). Rather, defense counsel determined a preferable trial strategy was to elicit testimony from Mr. Thomas's grandmother that he was "slow" and that any person, regardless of IQ, would reasonably fear for their life when threatened by the victim, who was a member of a street gang and had a gun during the fight with Mr. Thomas. (*Id.* at PageID 137-38). Thus, the Ninth District found trial counsel's strategy was adequate under *Strickland*. (*Id.* at PageID 131-40).

In its decision on these issues, the Ninth District reasoned:

> [¶ 4] In his first assignment of error, Mr. Thomas argues that the trial court erred by denying his petition for post-conviction relief because his trial counsel rendered ineffective assistance when they failed to investigate and present available evidence regarding his "very low intelligence" and personal background, which was relevant to the subjective component of his claim for self-defense, and to the jury's assessment of his credibility. He argues that the jurors could not place themselves "in [his] shoes[,]" which deprived him of a complete defense. In his second assignment of error, Mr. Thomas argues that his trial counsel rendered ineffective assistance by not hiring a mental-

health expert to testify regarding the available records and their impact on his claim for self-defense. For the reasons that follow, this Court disagrees.

[¶ 5] This Court reviews a trial court's decision to grant or deny a petition for post-conviction relief under Revised Code Section 2953.21 for an abuse of discretion. Here, the trial court held that Mr. Thomas failed to establish a claim for ineffective assistance of counsel. "[I]n Ohio, a properly licensed attorney is presumed competent." To prove ineffective assistance of counsel, the defendant must establish that: (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. Counsel's performance is deficient if it falls below an objective standard of reasonable representation. To establish prejudice, "the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." If a defendant fails to prove one prong under *Strickland*, this Court need not address the other prong.

[¶ 6] Initially, we note that Mr. Thomas asserts that "[i]f the Court decides *Strickland* applies rather than *Cronic*, then [he] has met his burden of showing that there is a 'reasonable probability' that counsel's deficient performance prejudiced him." In *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L.

Ed. 2d 657 (1984), the United States Supreme Court "recognized that some circumstances are so likely to prejudice the defendant that no showing of prejudice is necessary." These circumstances include the complete denial of counsel at a critical stage of the trial, the complete failure of counsel to subject the prosecution's case to meaningful adversarial testing, counsel's active representation of conflicting interests, and where defense counsel was appointed only a few minutes before trial commenced. "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt."

[¶ 7] Aside from noting that "[i]t is not necessary to prove prejudice if Cronic is used instead of Strickland[,]" Mr. Thomas has not developed an argument - including citations to authority and the relevant portions of the record - as to why the U.S. Supreme Court's decision *Cronic* rather than *Strickland* applies. Notwithstanding, given this Court's reasoning and holding below, any argument in that regard would have lacked merit. We, therefore, will proceed with an analysis under *Strickland*.

[¶ 8] Mr. Thomas correctly argues that a defendant's state of mind in a self-defense case is crucial. His merit brief makes clear that he is not arguing diminished capacity, which is not a defense in Ohio, and he has not argued that his intellectual disabilities rendered him incompetent to stand trial. Instead, he asserts that is not necessary to label him with anything other than "very low intelligence with more testing recommended * * *."

[¶ 9] The testimony from the post-conviction-relief hearing indicates that Mr. Thomas's trial attorneys knew that Mr. Thomas was "slow," and that it played a role in their trial strategy. Although they admitted that they did not investigate or present available records that would have supported their position that Mr. Thomas suffered from intellectual disabilities, they testified that their strategy was to demonstrate this through testimony from Mr. Thomas's grandmother. At trial, Mr. Thomas's grandmother testified that Mr. Thomas was born prematurely, and - because of his mother's drug use during pregnancy - addicted to cocaine. She testified that Mr. Thomas was "slow * * * in his classroom; he was slow at home. He didn't comprehend anything too fast." She further testified that Mr. Thomas had trouble understanding situations, and that he often needed things explained to him.

[¶ 10] Mr. Thomas testified on his own behalf, acknowledging his developmental delays and stating that he has trouble "understanding as quick and catching on as quick as * * * someone [whose] parent * * * didn't do drugs with them."

Mr. Thomas's trial counsel then addressed Mr. Thomas's "capabilities or lack thereof" during closing arguments, to which the State responded by arguing that "there is no evidence that [Mr. Thomas] is slow, other than him and his grandmother. We don't have any school records or anything like that. Nothing."

[¶ 11] Mr. Thomas's trial attorneys testified that the crux of their trial strategy was to emphasize the victim's involvement with a violent gang to demonstrate that Mr. Thomas shot the victim in self-defense, and that his doing so was reasonable under the circumstances. As part of this strategy, the defense team subpoenaed the former chief of police to testify regarding local gang activity and culture, "and in essence what it's like to be threatened or get into an altercation with a gang member, which [the victim] was." One of Mr. Thomas's attorneys testified that they pursued this strategy to appeal to the jury's sense of self-preservation, and to show that "it didn't matter if [Mr. Thomas was] slow or a genius, he understood the business end of a gun and that was the basis of our self-defense argument."

[¶ 12] While records documenting the extent of Mr. Thomas's intellectual disabilities may have bolstered the defense's position at trial, we cannot say that trial counsels' failure to investigate or present those records resulted in a deficient performance under these facts. We are mindful of Mr. Thomas's argument that the failure to investigate the extent of his intellectual disabilities could not have been a strategic choice. But "[s]imply because there was 'another and better strategy available' d[oes] not mean that counsel provided ineffective assistance." As previously noted, the record indicates that Mr. Thomas's trial counsel was aware that Mr. Thomas suffered from intellectual disabilities, and that their trial strategy was to establish this through his grandmother's testimony. The record further indicates that the crux of his trial counsels' strategy was to emphasize the victim's involvement with a violent gang, and to show that - regardless of someone's cognitive abilities or lack thereof - a reasonable person would have shot the victim to protect his or her own life. Notably, one of Mr. Thomas's trial attorneys testified that jurors could interpret evidence regarding a criminal defendant's IQ as an attempt to escape responsibility, and others could consider it as "just bologna[.]" His other attorney testified similarly, stating that evidence of Mr. Thomas's low IQ "could go the other way[,]" and that the defense team's "angle was, * * * [the victim] was going to kill [Mr. Thomas] and he knew that and that's why he acted the way he did."

[¶ 13] In light of the facts presented and the testimony regarding the defense team's strategy, we cannot say that Mr. Thomas's trial counsel was deficient for failing to investigate or present available records for the purpose of establishing that he has "very low intelligence[.]" We reach this conclusion having carefully examined Mr. Thomas's argument that the lack of this evidence prevented the jury from standing "in [his] shoes" with respect to his claim for self-defense, and may have affected the jury's assessment of his credibility. The jury heard Mr. Thomas's own account of the events that transpired, as well as his - and his grandmother's - testimony regarding his background and cognitive delays. It was then free to believe or disbelieve any or all of that testimony.

[¶ 14] Even assuming that Mr. Thomas's trial counsels' failure to investigate and present available records documenting the extent of his intellectual disabilities resulted in a deficient performance under *Strickland* , Mr. Thomas has failed to establish that he suffered prejudice, that is, a reasonable probability that the result of the trial would have been different. According to Mr. Thomas, the available records would have shown the jury that he suffered seizures at birth, had communicative issues and cognitive delays as a child, continues to have intellectual disabilities that are not readily apparent, has extremely low intelligence,[2] and has a history depression, self-doubt, and mood sensitivity. He also argues that available records would have shown that he was not homicidal, and that he had successfully completed an anger-management program. He concludes that "[a]ll of the records not presented support [his] reasonable and honest belief that he was about to be killed or receive great bodily harm."

[¶ 15] As the State points out, however, the records upon which Mr. Thomas relies also contain information that may have potentially undermined his claim for self-defense. For example, those records contain statements indicating that Mr. Thomas: "has a[ ] problem with bothering other children that [are] not messing with him"; "gets mad easily"; "loses [his] temper easily"; "blames others for his * * * mistakes or behaviors"; "pushes or shoves classmates"; "[c]an't get along with nobody"; "shows very little self control"; "constantly provokes [and] teases others"; "gets into arguments and fights and 'it is always someone else's fault'"; "needs to learn to control his anger"; "was suspended for fighting w/ a peer"; "has considerable trouble controlling his anger"; and "at times he has become overly vigilant[.]" While Mr. Thomas asserts that these statements would have been excluded at

2. [FOOTNOTE MISSING IN ORIGINAL]

trial under various Rules of Evidence, he has not developed any argument in support of that position. Even if he had, any argument in that regard would have been speculative as to what the trial court - which has broad discretion in determining whether to admit of exclude evidence - would have decided.

[¶ 16] In light of the foregoing, Mr. Thomas has not established that - but for his trial counsels' failure to investigate and present available records relative to the extent of his intellectual disabilities - the jury would have accepted his claim for self-defense and found him not guilty of murder. Accordingly, the trial court did not err by finding that Mr. Thomas failed to establish a claim for ineffective assistance of counsel. Mr. Thomas's first assignment of error is overruled. It, therefore, follows that his second assignment of error challenging his trial counsels' failure to hire a mental-health expert to testify relative to the available records is now moot. App.R. 12(A)(1)(c).

[¶ 17] Mr. Thomas's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Thomas III, 2019 Ohio 4247, 2019 WL 5212575, at *1-4 (citations omitted).

I first determine, as did the Ninth District, that *Cronic* does not apply and will analyze both grounds under the *Strickland* standard.

As noted above, *Strickland* requires a showing that counsel's performance was deficient, and then that the deficient performance prejudiced the defendant. 466 U.S. at 687. *Cronic* holds that *Strickland* prejudice is presumed if a defendant is completely denied counsel, if counsel is denied at a critical stage of trial, or if counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." 466 U.S. at 659-60. Courts apply *Cronic* where "counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25.

Cronic does not apply to Mr. Thomas's case. Mr. Thomas was not denied counsel, and I have elsewhere concluded that when the trial court responded to Question Three, he and his counsel were not absent during the type of "critical stage" contemplated in *Cronic*. Moreover, Mr. Thomas has not shown that counsel *entirely failed* to subject the prosecution's case to meaningful adversarial testing. I thus apply *Strickland* and its prejudice prong to his case.

Having done so, I find Mr. Thomas has not demonstrated that his counsel was deficient for failing to investigate his mental health history or low IQ, or that his counsel was required to obtain testimony from a mental health expert. As the Supreme Court has stated:

> *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*.

Wiggins v. Smith, 539 U.S. 510, 533, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (quoting *Strickland*, 466 U.S. at 689). As such, "[a] decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'" *Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 691).

Here, as the Ninth District observed, the post-conviction relief hearing revealed Mr. Thomas's trial attorneys knew of his intellectual deficits and that awareness played a role in their trial strategy. The attorneys admitted not investigating or presenting available records but did obtain testimony from his grandmother that he was born prematurely, his mother used drugs during her pregnancy (which contributed to his "slowness"), he had trouble understanding situations, and he needed things explained to him. The attorneys further explained that their trial strategy focused on the victim—because of the victim's involvement with violent gangs, it did not matter whether "Mr. Thomas were slow or a genius, he understood the business end of a gun" and reasonably acted to protect himself. *Thomas III*, 2019 Ohio 4247, 2019 WL 5212575, at *3.

The Ninth District concluded it was a reasonable trial strategy to show that "regardless of someone's cognitive abilities or lack thereof - a reasonable person would have shot the victim to protect his or her own life." *Id.* It also credited his counsels' testimony that they believed the jury could have interpreted IQ evidence the other way - as an attempt to escape responsibility or "just bologna." *Id.* Thus, the Ninth District found counsel's performance was not deficient under *Strickland* and demonstrated sound trial strategy. *Id.* It also determined he was not prejudiced by this strategy. Moreover, it noted that Mr. Thomas's school records contained numerous instances to him acting out in anger or having a lack of self control:

> "has a[ ] problem with bothering other children that [are] not messing with him"; "gets mad easily"; "loses [his] temper easily"; "blames others for his * * * mistakes or behaviors"; "pushes or shoves classmates"; "[c]an't get along with nobody"; "shows very little self control"; "constantly provokes [and] teases others"; "gets into arguments and fights and 'it is always someone else's fault' "; "needs to learn to control his anger"; "was suspended for fighting w/ a peer"; "has considerable trouble controlling his anger"; and "at times he has become overly vigilant[.]"

Id. at *4. Thus, the Ninth District determined Mr. Thomas had not demonstrated that, but for his counsel's performance, the jury would have accepted his claim of self-defense and found him not guilty of murder.

The Ninth District's analysis and determination after a post-conviction hearing that included testimony from trial counsel describing their trial strategy is not an unreasonable application of *Strickland*. I find no error sufficient to disturb the Ninth District's judgment. I therefore recommend the District Court **DENY** Grounds Fourteen and Fifteen.

III. Not Cognizable In Federal Habeas Corpus Review: Grounds Six, Eight, And Nine

A. Ground Six: Failure To Instruct The Jury On Other Lesser-Included Offenses

In Ground Six, Mr. Thomas argues "[t]he trial court erred in refusing to instruct the jury on Voluntary Manslaughter and Reckless Homicide and violated the Sixth and Fourteenth Amendments of the federal Constitution." (ECF #1, PageID 30). He supports this ground by arguing that an instruction for a lesser-included or inferior offense is warranted where there is sufficient evidence for a jury to reasonably reject the greater offense but might find him guilty of a lesser offense. (*Id.*) He goes on to claim he presented evidence that the victim produced the firearm during the fight and that he acted in fear of his life or in a sudden fit of passion; without additional jury instructions concerning lesser offenses, he was denied his right to a complete defense under the Sixth and Fourteenth Amendments. (*Id.* at PageID 30-31). He further argues that his due process rights were violated when the trial court refused to instruct the jury on his theory of the case. (ECF #13, PageID 2678-79).

The State replies that under Supreme Court precedent, a capital murder defendant has a constitutional right, in limited circumstances, to have the jury instructed on a lesser-included offense. (ECF #9, PageID 107) (citing *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)). In *Beck*, the Court held that where a jury has only two options - not guilty or guilty of capital murder - the risk of a conviction where reasonable doubt exists is too great, requiring instruction as to a lesser-included non-capital offense. *Id.* at 638. The State also points out that *Beck* does not apply to Mr. Thomas's case because the Court expressly declined to decide whether due process requires similar lesser-included offense instructions in non-capital cases. (ECF #9, PageID 107) (citing *Beck*, 447 U.S. at 635 n.7). Furthermore, the State argues the Sixth Circuit has declined to extend this requirement to non-capital cases. (ECF #9, PageID 157) (collecting cases). Thus, without the support of clearly established Supreme Court precedent, Mr. Thomas "cannot satisfy the AEDPA standard for merits relief." (*Id.* at PageID 112). But even if *Beck* applied, the State says the Ninth District's decision would be reasonable in the circumstances of Mr. Thomas's case. (*Id.* at PageID 109-13).

In *Keeble v. United States*, 412 U.S. 205, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973), the Court instructed: "it is now beyond dispute that the defendant is entitled to an instruction on a lesser-included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *Id.* at 208. Following *Keeble*, the Court "recognize[d] the value to the defendant of this procedural safeguard" because

> when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense—but leaves some doubt with respect to an element that would justify conviction of a capital offense—the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Beck, 447 U.S. at 637. Thus, the *Beck* Court held it unconstitutional to impose a death sentence after a jury verdict of guilt on a capital offense where the jury was not permitted to return a verdict for a lesser-included offense. 447 U.S. at 631-46. But *Beck*'s holding focused on cases where the defendant's life is at stake, because "there is a significant constitutional difference between the death penalty and lesser punishments." *Id.* (citing *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)).

Moreover, the Court has unequivocally stated that a lesser-included offense instruction may be given only where the evidence supports it:

> *Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included

> offense instruction be given *only* when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence.

Hopper v. Evans, 456 U.S. 605, 611, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1982) (emphasis original)

But the Court has stopped short of requiring such an instruction in every case: "[W]e have never held that a defendant is *entitled* to a lesser included offense instruction as a matter of due process ...." *Beck*, 447 U.S. at 637 (emphasis added). Indeed, the *Beck* Court explicitly stated: "We need not and do not decide whether the Due Process Clause would require the giving of such instructions in a noncapital case." *Id.* at 638 n.14. Neither has the Sixth Circuit required a lesser-included offense instruction in non-capital cases: "[W]e are not required to extend *Beck* to noncapital cases." *Bagby v. Sowders*, 894 F.2d 792, 797 (6th Cir. 1990) (explaining that *Beck* arises from Eighth Amendment concerns, not due process concerns under the Fourteenth Amendment, and thus is not applicable to noncapital cases). On this basis, the Sixth Circuit finds noncapital cases pursuant to *Beck* not cognizable in federal habeas corpus review. *Id.* ("[T]he failure to instruct on lesser included offenses in noncapital cases . . . is not an error of such character and magnitude to be cognizable in federal habeas corpus review ....").

As a final matter, I also note the trial court followed *Beck*'s requirement to provide instructions for lesser-included offenses. Although Mr. Thomas did not receive the instructions for either voluntary manslaughter or reckless homicide as he now requests,[4] the trial court did issue a lesser-included offense jury instruction for murder. As the Ninth District noted on direct appeal:

> The Summit County Grand Jury indicted Mr. Thomas for aggravated murder in violation of R.C. 2903.01(A) with an attendant firearm specification pursuant to R.C. 2941.145. The jury rejected Mr. Thomas' self-defense theory, *finding him guilty of the lesser included offense of murder* and the firearm specification. The trial court sentenced Mr. Thomas to fifteen years to life in prison on the murder conviction, and to three years of incarceration on the firearm specification, to be served consecutively.

Thomas I, 2015 Ohio 2935, 2015 WL 4464893, *1 (emphasis added).

Beck requires that trial courts instruct on appropriate lesser-included offenses so that juries are not left with an all-or-nothing choice resulting in an erroneous conviction where the evidence does not support the harsher offense. *See Schad v. Arizona*, 501 U.S. 624, 645, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (noting that *Beck* "repeatedly stressed the all-or-nothing nature of the decision with

4. I note that, at trial, Mr. Thomas only requested—and was denied—instruction on voluntary manslaughter. Not until his state court appeal did he request the reckless homicide instruction. *See Thomas I*, 2015 Ohio 2935, 2015 WL 4464893, at *5-7.

which the jury was presented") (abrogated on other grounds). Such lesser-included offense instructions must be supported by the evidence—*Beck* is not satisfied where the lesser-included offense instruction is "without any support in the record." *Id.* at 648; *see also Palmer v. Bagley*, 330 F. App'x 92, 98 (6th Cir. 2009).

Beck, however, does not require that the jury receive the defendant's choice of all potentially available lesser-included offense instructions. Rather, *Beck* requires the jury receive enough instruction that it is not faced with choosing between imposing the death penalty or freeing the defendant. *See Beck* 447 U.S. at 629, 630, 632, 634, 637, 642-43, and n.19; *see also Spaziano v. Florida*, 468 U.S. 447, 455, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984) ("The absence of a lesser included offense instruction increases the risk that the jury will convict, not because it is persuaded that the defendant is guilty of capital murder, but simply to avoid setting the defendant free.") (overruled on other grounds). "The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Spaziano*, 468 U.S. at 455. Thus, where the jury receives an evidence-supported lesser included offense instruction, the "central concern of *Beck* simply is not implicated . . . for petitioner's jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence." *Schad*, 501 U.S. at 647; *see also Palmer*, 330 F. App'x at 98-99 ("[P]etitioner's due process rights were not violated because the trial court did not confine the jury to an all-or-nothing choice between capital murder and acquittal").

Where the evidence adequately supports a conviction on the lesser-included offense, *Beck* is satisfied. *Id.* Because Mr. Thomas's jury had a third option of convicting for murder instead of aggravated murder and the evidence supported that decision, it was empowered to return the murder conviction; thus, the trial court's decision not to instruct the jury on other lesser-included offenses does not justify habeas relief from this Court. *See Schad*, 501 U.S. at 646-47 (1991) ("The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence.").

Thus, Ground Six is not cognizable. I therefore recommend the District Court **DISMISS** Ground Six.

B. Grounds Eight and Nine: Cumulative Error

In Grounds Eight and Nine, Mr. Thomas raises cumulative error claims. He argues in Ground Eight that "[d]efense counsel was ineffective throughout this case under *Strickland* and the cumulative effect of the ineffectiveness deprived Mr. Thomas of his Sixth and Fourteenth Amendment rights to counsel even if the errors individually did not do so." (ECF #1, PageID 33) (cleaned up). In Ground Nine, he argues "the cumulative errors violated Due Process under the Fourteenth Amendment of the federal Constitution." (*Id.*) (cleaned up).

Cumulative error is not cognizable on federal habeas review. *See Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006) (cumulative error not cognizable on federal habeas review because the U.S. Supreme Court has not spoken on the issue). Thus, Grounds Eight and Nine are not subject to review by this Court. Even if such claims were cognizable, if the individual claims making up the cumulative error claim are themselves procedurally barred or without merit, the cumulative error claim "must also fail." *Ramsey v. Phillips*, No. 20-3452, 2020 U.S. App. LEXIS 35002, 2020 WL 9423257, at *3 (6th Cir. Nov. 4, 2020). Because I have already recommended the District Court dismiss as procedurally defaulted or deny as meritless all other Grounds for Relief in this Petition, Grounds Eight and Nine necessarily also fail.

Thus, I recommend the District Court **DISMISS** Grounds Eight and Nine as not cognizable.

CERTIFICATE OF APPEALABILITY

A habeas petitioner may not appeal the denial of an application for a writ of habeas corpus unless a judge issues a certificate of appealability (COA) and specifies the issues that can be raised on appeal. 28 U.S.C. § 2253(c). "A certificate of appealability 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). Where a district court has determined a petitioner's constitutional claim to be without merit, the petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claim debatable or wrong" before receiving a COA. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). When the district court denies a habeas petition on procedural grounds without reaching the petitioner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Id.* A showing that the appeal would succeed on the claim is not required to grant a certificate of appealability. *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Mr. Thomas has not made a substantial showing of the denial of any constitutional right. Jurists of reason would not find it debatable whether the Grounds for Relief are valid claims of the denial of constitutional rights. Similarly, no procedural ruling appears to be in error. Therefore, I recommend the District Court **DENY** Mr. Thomas a Certificate of Appealability with respect to any ground.

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, I recommend the District Court:

- **DISMISS** Grounds for Relief One, Two, Three, Five, Seven, and Twelve of Mr. Thomas's Petition because they are procedurally defaulted;

- **DISMISS** Grounds for Relief Six, Eight, and Nine of Mr. Thomas's Petition because they are not cognizable on habeas review; and

- **DENY** Grounds for Relief Four, Ten, Eleven, Thirteen, Fourteen, and Fifteen because they are not supported on the merits.

I further recommend the District Court **DENY** a Certificate of Appealability for all Grounds for Relief.

Dated: December 8, 2023

/s/ Darrell A. Clay
DARRELL A. CLAY
UNITED STATES MAGISTRATE JUDGE