

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

DAVID V. ROCK,)	Case No. 1:20-cv-255
)	
Petitioner,)	JUDGE SOLOMON OLIVER, JR.
)	
v.)	MAGISTRATE JUDGE
)	THOMAS M. PARKER
LASHANN EPPINGER, WARDEN,)	
)	
Respondent.)	<u>REPORT AND RECOMMENDATION</u> ¹
)	

On July 16, 2014, David Rock drove his car into a guardrail and fled the scene. When police caught up to him, he admitted taking Oxycontin and Prozac, and a breathalyzer test showed a blood alcohol content of .177. Rock pleaded guilty to operating a vehicle under the influence (“OVI”) and to an [Ohio Rev. Code § 2941.1413](#) specification for previously having been convicted of 5 OVI offenses in 20 years (“5 in 20 specification”). And he was sentenced to an aggregate seven-year sentence². Rock now seeks a writ of habeas corpus under [28 U.S.C. § 2254](#) ([ECF Doc. 1](#)), raising three claims:

Ground One: Rock’s conviction on the 5 in 20 specification was unconstitutional because two of the underlying OVI convictions were the result of uncounseled pleas ([ECF Doc. 1 at 5](#); [ECF Doc. 1-2 at 9-11](#));

¹ This matter is before me by an automatic order of reference under Local Rule 72.2 for preparation of a report and recommendation pursuant to Local Rule 72.1, as well as by an express order of referral. [ECF Doc. 6](#).

² Rock was originally sentenced to serve his prison terms consecutive to a sentence imposed in a different case by the Ashland County, Ohio Court of Common Pleas. After the Ohio Court of Appeals reversed the sentence because the trial court failed to make the requisite statutory findings for imposing a consecutive sentence, the case was remanded for resentencing. Upon further consideration, the trial court elected not to order Rock’s prison terms to be served consecutive to his Ashland County sentence. Nothing about that turn of events is raised as an issue in this action.

Ground Two: Trial counsel was ineffective for failing to investigate his prior OVI convictions and challenge them as unconstitutional for lack of counsel (ECF Doc. 1 at 7; ECF Doc. 1-2 at 11-13); and

Ground Three: The state withheld, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), evidence that two of Rock's prior OVI convictions were uncounseled (ECF Doc. 1 at 8; ECF Doc. 1-2 at 13-15).

Respondent Warden LaShann Eppinger filed a return of writ on June 1, 2020. (ECF Doc. 12).

And Rock filed a traverse on October 20, 2020 (ECF Doc. 18), to which Warden Eppinger has filed a reply (ECF Doc. 19).

Because all of Rock's claims are procedurally defaulted, I recommend that all of Rock's claims be DISMISSED and that his petition for writ of habeas corpus be DENIED. I further recommend that Rock not be granted a certificate of appealability.

I. Relevant State Court Proceedings

A. Trial Court

On November 12, 2014, a Lake County, Ohio, grand jury charged Rock with two counts of OVI and one count of leaving the scene of an accident. ECF Doc. 12-1 at 13-15. The OVI offenses each had a 5 in 20 specification attached, based on Rock's five prior OVI convictions, including his: (1) November 6, 1995 conviction in Willoughby Municipal Court Case No. 95C09727; and (2) May 22, 1997 conviction in Willoughby Municipal Court Case No. 97C03446. ECF Doc. 12-1 at 13-14. Rock pleaded not guilty. ECF Doc. 12-1 at 16.

On February 23, 2015, Rock changed his plea. ECF Doc. 12-5 at 4-5. After a plea colloquy, Rock pleaded guilty to one count of OVI and a 5 in 20 specification. ECF Doc. 12-5 at 7-38. The trial court accepted Rock's plea, found him guilty and dismissed the remaining charges.. ECF Doc. 12-5 at 38-39; ECF Doc. 12-1 at 32.

Rock expressed some doubt about the number of prior OVI convictions at his March 26, 2015 sentencing hearing. [ECF Doc. 12-5 at 60-62, 70](#). He confirmed his intention to plead guilty to the 5 in 20 specification but said counsel had advised him that – had they spoken sooner – counsel could have looked into his predicate OVI convictions. [ECF Doc. 12-5 at 72-73](#).

Counsel interjected to say:

Your Honor, I think what he's trying to explain to you is that when he entered the pleas on the priors, he's telling me after he entered the plea on this case that he didn't have an attorney and that the Court didn't advise him that he had voluntarily waived that right. And that's why I told him not to pursue that one.

[ECF Doc. 12-5 at 73-74](#). The court sentenced Rock to a 4-year mandatory prison term on the 5 in 20 specification and a consecutive 3-year prison term on the OVI charge. [ECF Doc. 12-1 at 32-33](#); [ECF Doc. 12-5 at 82](#).

B. Direct Appeal

On April 29, 2015, Rock timely appealed his convictions to the Ohio Court of Appeals. [ECF Doc. 12-1 at 46](#). Through new counsel, Rock filed a merits brief, arguing that: (1) the trial court failed to make the requisite statutory findings before imposing a sentence consecutive to another county's sentence; and (2) the court failed to consider the statutory factors in fashioning its sentence. [ECF Doc. 12-1 at 55-70](#). The state filed an appellee brief. [ECF Doc. 12-1 at 71-82](#). On November 9, 2015, the Ohio Court of Appeals sustained Rock's first assignment of error and reversed and remanded so that the trial court could make the findings needed to justify a consecutive sentence. [ECF Doc. 12 at 83-87](#); *State v. Rock*, [2015-Ohio-4639](#) (Ohio Ct. App. 2015).

On December 8, 2015, the trial court ordered that Rock's sentence be served concurrent to his Ashland County sentence. [ECF Doc. 12-1 at 91](#). On February 19, 2016, the Ohio Court of Appeals granted Rock leave to file a delayed appeal. [ECF Doc. 12-1 at 101-05, 112-13](#).

Through new counsel, Rock filed a merits brief, asserting three assignments of error, none of which is relevant to Rock's current petition. [ECF Doc. 12-1 at 118-35](#). The state filed an appellee brief. [ECF Doc. 12-1 at 136-45](#). On December 30, 2016, the Ohio Court of Appeals overruled Rock's assignments of error and affirmed Rock's convictions and sentences. [ECF Doc. 12-1 at 146-152](#); *State v. Rock*, [2016-Ohio-8516](#) (Ohio Ct. App. 2016). On May 14, 2017, Rock filed an untimely notice of appeal with the Ohio Supreme Court and a motion for leave to file a delayed appeal. [ECF Doc. 12-1 at 154-61](#). On May 17, 2017, the Ohio Supreme Court denied the motion. [ECF Doc. 12-1 at 171](#).

C. First App. R. 26(B) Application to Reopen

Meanwhile, on February 8, 2016, Rock filed a pro se application to reopen his direct appeal pursuant to [Ohio App. R. 26\(B\)](#), alleging – as relevant here – that appellate counsel was ineffective for: (1) not investigating the predicate convictions that the state offered to support Rock's 5 in 20 specification; and (2) not raising trial counsel's failure to challenge his 5 in 20 specification. [ECF Doc. 12-1 at 172-75](#). In support of his first proposed issue, Rock argued that appellate counsel had failed to collaterally attack his November 16, 1995 OVI conviction as unconstitutional for lack of a waiver of counsel and his May 22, 1997 OVI conviction for non-compliance with [Ohio Crim. R. 22](#) and 44. [ECF Doc. 12-1 at 174](#). He further argued that appellate counsel had mailed him evidence showing that his 5 in 20 specification was unconstitutional. *Id.* In support of his second proposed issue, Rock argued – without elaboration – that trial counsel erroneously informed the trial court at sentencing about his uncounseled OVI convictions. [ECF Doc. 12-1 at 175](#).

Rock attached to his application to reopen a September 29, 2010 affidavit, stating that his November 16, 1995 OVI conviction was the result of a no contest plea made without counsel or

an explanation of his rights and consequences of entering a plea. [ECF Doc. 12-1 at 178](#). He stated his May 22, 1997 OVI conviction also was the result of a no contest plea without counsel and an explanation of his rights and consequences of his plea, but he had signed a “boilerplate waiver of counsel form.” *Id.* Rock also attached the judgment entry from his November 16, 1995 OVI conviction, adjudicating him guilty after a no contest plea. [ECF Doc. 12-1 at 179](#). At the top, the judgment stated, “Defendant appeared. Constitutional rights and pleas explained.” [ECF Doc. 12-1 at 179, 181](#). A separate, undated judgment entry stated that Rock pleaded not guilty and waived an attorney on November 2, 1995. [ECF Doc. 12-1 at 181](#).

And Rock attached the affidavit of Kenneth Sutherland (Chief Bailiff of the Willoughby Municipal Court) dated September 3, 2010. [ECF Doc. 12-1 at 180](#). An attorney had requested that Sutherland locate and produce any and all audio documentation related to Rock’s criminal proceeding in Case Nos. 95C09727 and 97C03446. *Id.* But the audio recordings of the proceedings were destroyed in the normal course of the court’s business and no longer existed. *Id.* Thus, Sutherland stated, the court could not establish that a plea colloquy occurred or that Rock voluntarily waived his right to counsel in either case. *Id.*

The state filed an opposition to Rock’s application to reopen. [ECF Doc. 12-1 at 186-95](#). On June 30, 2016, the Ohio Court of Appeals denied Rock’s application to reopen. [ECF Doc. 12-1 at 208-12](#). The court reasoned:

[Rock] had the opportunity to raise the issue of his prior uncounseled misdemeanor convictions on appeal in both Lake County Common Pleas Case No. 97CR000363 and ... Case No. 02CR000085. [Rock] did not file a direct appeal in Case No. 97CR000363. He filed a direct appeal in Case No. 02CR000085, but it was dismissed for failure to prosecute. In both cases [Rock] filed motions for postconviction relief, claiming that his misdemeanor convictions were uncounseled. Both motions were denied, with both decisions citing that his claims were barred by the doctrine of res judicata. [Rock] never raised the issue of his uncounseled prior convictions on direct appeal of his motions for postconviction relief, and those issues were barred by the doctrine of res judicata

from being raised at trial or on appeal in the present case. Therefore, appellate counsel was not ineffective for not investigating the allegedly uncounseled priors and for not raising the issue of ineffective assistance of trial counsel.

[ECF Doc. 12-1 at 210-11.](#)

On July 25, 2016, Rock moved for reconsideration of the denial of his application to reopen his direct appeal. [ECF Doc. 12-1 at 213-18.](#) The state filed a response in opposition. [ECF Doc. 12-1 at 219-222.](#) On August 15, 2016, the Ohio Court of Appeals denied Rock's motion for reconsideration as untimely and, alternatively, for failure to establish obvious error or oversight. [ECF Doc. 12-1 at 223-24.](#)

On September 26, 2016, Rock filed a notice of appeal to the Ohio Supreme Court. [ECF Doc. 12-1 at 224-27.](#) In his memorandum in support of jurisdiction, Rock largely reiterated the arguments he raised in his application to reopen. [ECF Doc. 12-1 at 228-39.](#) On January 25, 2017, the Ohio Supreme Court declined to accept jurisdiction over the case. [ECF Doc. 12-1 at 263.](#)

D. Petition for Postconviction Relief

While his first application to reopen was still pending with the Ohio Court of Appeals, Rock filed on June 10, 2016, a pro se petition for postconviction relief in the trial court, raising four grounds for relief, two of which are relevant to his current petition. [ECF Doc. 12-1 at 299-312.](#) First, Rock argued that trial counsel was ineffective when he told the trial court at sentencing that he had voluntarily waived his right to counsel. [ECF Doc. 12-1 at 301-02.](#) He argued that counsel failed to investigate evidence showing that he had no counsel and that there were no audio recordings of his plea colloquies in Case Nos. 95C09727 and 97C03446. *Id.* Had counsel investigated Rock's prior OVI convictions and withdrawn his guilty plea before sentencing, Rock argued that the state likely would have dismissed the 5 in 20 specification. *Id.*

Second, Rock claimed that the prosecutor engaged in prosecutorial misconduct when he signed an indictment charging Rock with a 5 in 20 specification while knowing that two of the five predicate convictions were uncounseled. [ECF Doc. 12-1 at 303-04](#). He argued that this information was not made available to the trial court; and, if it had it been, the specification would have been dismissed. [ECF Doc. 12-1 at 304](#).

The state filed a response in opposition. [ECF Doc. 12-1 at 341-49](#). On July 26, 2016, the trial court denied Rock's petition as untimely because the transcript was filed in the Ohio Court of Appeals on June 8, 2015, making the deadline for filing a petition for postconviction relief June 7, 2016. [ECF Doc. 12-1 at 350](#). Alternatively, the court found that the claims Rock raised therein would be barred by res judicata. *Id.*

On December 7, 2016, Rock filed an [Ohio Civ. R. 60\(B\)](#) motion for relief from the trial court's July 26, 2016 judgment. [ECF Doc. 12-1 at 400](#). He argued that he timely delivered his postconviction motion for mailing on June 3, 2016, but due to delays in the prison mail system, it was not mailed until June 6, 2016 and – consequently – not received by the court until June 10, 2016. [ECF Doc. 12-1 at 401](#). And a three-day extension to the due date, he argued, should be afforded under [Ohio App. R. 14\(C\)](#). *Id.* He also argued that a claim of ineffective assistance of counsel was not always barred by res judicata. *Id.*

The state filed a response. [ECF Doc. 12-1 at 404-07](#). On December 28, 2016, the trial court summarily denied Rock's motion. [ECF Doc. 12-1 at 408](#). On January 17, 2017, Rock filed a notice of appeal. [ECF Doc. 12-1 at 411](#). He filed a merits brief, arguing that the trial court should have applied [Ohio Civ. R. 6\(E\)](#) and add three days to the filing deadline for service effected by mail. [ECF Doc. 12-1 at 421-22](#). The state filed an appellee brief. [ECF Doc. 12-1 at 425-32](#).

On August 2, 2017, the Ohio Court of Appeals affirmed, determining that Rock could not use a Rule 60(B) motion as a substitute for a timely appeal and he failed to demonstrate that the trial court would have granted his petition for postconviction relief had the Rule 60(B) motion been granted. [ECF Doc. 12-1 at 433-37](#).

On September 18, 2017, Rock appealed to the Ohio Supreme Court. [ECF Doc. 12-1 at 505-06](#). In his memorandum in support of jurisdiction and amended memorandum, he largely reiterated the arguments raised in his court of appeals merits brief. [ECF Doc. 12-1 at 508-10, 520-24](#). On January 31, 2018, the Ohio Supreme Court declined to exercise jurisdiction. [ECF Doc. 12-1 at 532](#).

E. Second App. R. 26(B) Application to Reopen

While his appeal from the denial of his Rule 60(B) motion was pending, Rock filed pro se on June 22, 2017 a second [Ohio App. R. 26\(B\)](#) application to reopen his direct criminal appeal and his appeal after remand. [ECF Doc. 12-1 at 264](#). Rock alleged that the prosecutor withheld exculpatory mitigating sentence, in violation of *Brady*: that 2 of the 5 in 20 specification OVI predicates were uncounseled misdemeanor convictions and therefore could not be used for enhancement purposes. [ECF Doc. 12-1 at 265](#). Rock argued that: (i) had the uncounseled nature of his prior convictions been brought to light, (ii) the prosecutor not misled the grand jury and the trial court, and (iii) the prosecutor not violated [Ohio Evid. R. 16.1](#), his counsel would have moved to strike the 5 in 20 specification. [ECF Doc. 12-1 at 266](#). In passing, Rock added that trial counsel should have investigated his prior OVI convictions. *Id.* Rock attached to his application the same judgment entries and affidavits he had attached to his first Rule 26(B) application. [ECF Doc. 12-1 at 267-70](#).

The state filed a response in opposition. [ECF Doc. 12-1 at 275-79](#). Rock filed a reply with new supporting evidence. [ECF Doc. 12-1 at 282-84](#). Among them was an August 2, 2016 letter from his appellate attorney in his post-remand appeal responding to Rock's request that she raise the issue of his uncounseled prior OVI convictions. [ECF Doc. 12-1 at 285-88](#). Counsel wrote that she could not raise the issue because it was not raised in the trial court. [ECF Doc. 12-1 at 285-86](#).

On July 21, 2017, the Ohio Court of Appeals denied Rock's second application to reopen as untimely and because he failed to demonstrate good cause for the late filing. [ECF Doc. 12-1 at 295-96](#). Rock did not further appeal the decision to the Ohio Supreme Court. Docket for Ohio App. Ct., 11th Dist. Case Nos. 2015-L-047, 2016-L-011.

F. Motion to Withdraw Guilty Plea

While his second application to reopen was pending, Rock filed on June 22, 2017 a pro se motion to withdraw his guilty plea pursuant to [Ohio Crim. R. 32.1](#), arguing that the prosecutor withheld evidence that two of his predicate OVI convictions were uncounseled and could not be used to enhance his sentence and that trial counsel was ineffective for not investigating the matter. [ECF Doc. 12-2 at 13-15](#). The state filed a response. [ECF Doc. 12-2 at 24-28](#).

On July 19, 2017, the trial court denied Rock's motion to withdraw his guilty plea, reasoning:

Here, [Rock's] exhibits include his own affidavit, dated September 29, 2010, averring that the two complained of prior convictions were uncounseled and that he was not properly advised of his rights. Thus, assuming arguendo that these prior convictions were uncounseled, the defendant was aware of that at least by September 29, 2010. Therefore, the defendant was aware of the information that forms the basis of his motion to withdraw his guilty plea and could have raised this issue in a motion to dismiss before this court, at trial, had he elected to try this case rather than plea, or on either of his two appeals. Thus, this issue is barred by res judicata.

ECF Doc. 12-2 at 31-32.

On July 31, 2017, Rock moved for reconsideration, reiterating the merits of his claims. ECF Doc. 12-2 at 50-51. On August 30, 2017, the trial court summarily denied the motion. ECF Doc. 12-2 at 61. Rock appealed. ECF Doc. 12-2 at 74-81. The state filed an appellee brief. ECF Doc. 12-2 at 86-94. On December 29, 2017, the Ohio Court of Appeals dismissed Rock's appeal, ruling that he could not appeal the denial of his motion for reconsideration because a motion for reconsideration of a final, appealable order (a motion to withdraw a guilty plea) is a nullity. ECF Doc. 12-2 at 95-97.

On January 31, 2018, Rock filed a motion for a delayed appeal of the order denying his motion to withdraw his guilty plea. ECF Doc. 12-2 at 111-13, 117-22. On March 14, 2018, the Ohio Court of Appeals granted Rock's motion. ECF Doc. 12-2 at 123-24.

Rock then filed a merits brief, raising three assignments of error, two of which are relevant to his current petition: (1) trial counsel was ineffective for not investigating his prior OVI convictions; and (2) the state committed prosecutorial misconduct by concealing from the grand jury, the trial court, and trial counsel the constitutionally infirm nature of his prior OVI convictions. ECF Doc. 12-2 at 141. In support, Rock largely reiterated his arguments that trial counsel should have investigated his prior OVI convictions and trial counsel's statements at sentencing were false. ECF Doc. 12-2 at 147, 148-49, 151. He added that trial counsel should also have objected, moved to suppress, moved to dismiss the indictment. ECF Doc. 12-2 at 151-52.

In support of his second argument, Rock contended that the state failed to properly present and explain the judgment entries of his 5 in 20 specification OVI predicates. ECF Doc. 12-2 at 153. He argued that when proof of a prior conviction was an element to an offense, Ohio

Rev. Code § 2945.75(B)(1) required a certified copy of the entry of judgment of the prior conviction and other evidence to identify the defendant in the prior case. ECF Doc. 12-2 at 149. But under § 2945.75(B)(2) and the best evidence rule, he argued, the state provided incomplete records that lacked sufficient information to the grand jury for them to determine whether his prior OVI convictions could be used in his current OVI charge. ECF Doc. 12-2 at 148-49.

The state filed an appellee brief. ECF Doc. 12-2 at 169-78. On October 15, 2018, the Ohio Court of Appeals affirmed the trial court's denial of Rock's motion to withdraw his guilty plea. ECF Doc. 12-2 at 179-83. The court reasoned:

{¶13} Attached to [Rock's] Crim. R. 32.1 motion was his own affidavit dated September 29, 2010. [Rock] averred that when he entered a plea of no contest in the 1995 case, he appeared without counsel, did not waive his right to counsel, and was not informed of the consequences of entering a plea of no contest. He further averred that when he entered a plea of no contest in the 1997 case, he appeared without counsel and signed a "boilerplate waiver of counsel form" but was not informed of his rights or of the consequences of entering a plea of no contest. [Rock] was therefore aware of the alleged uncounseled convictions since September 29, 2010. Further, the record reflects defense counsel raised in the trial court the issue of [Rock's] previous pleas. During [Rock's] sentencing hearing, defense counsel stated: "Your honor, I think what he's trying to explain to you is that when he entered the pleas on the priors, he's telling me after he entered the plea on this case that he didn't have an attorney and that the Court didn't advise him that he had voluntarily waived that right. And that's why I told him not to pursue that one." Thus, [Rock] could have raised the issues pertaining to ineffective assistance of counsel and the state's withholding exculpatory evidence in his direct appeal. He did not. *** Consequently, the issues are barred by res judicata.

ECF Doc. 12-2 at 182-83.

On October 26, 2018, Rock filed a motion for reconsideration, arguing that the Ohio Court of Appeals misapplied res judicata to preclude review of his claims because appellate counsel had been Rock's attorney in Case No. 97CR363, and she had a conflict of interest in raising her own deficient performance in that prior case. ECF Doc. 12-2 at 188. He also argued that a *Brady* claim could not be barred by res judicata. ECF Doc. 12-2 at 189.

The state filed an opposition to Rock's motion for reconsideration. [ECF Doc. 12-2 at 191-93](#). Rock filed a reply, reiterating the merits of his claims. [ECF Doc. 12-2 at 194-97](#). On December 10, 2018, the Ohio Court of Appeals denied Rock's motion, reaffirming its prior determination that res judicata barred consideration of Rock's claims. [ECF Doc. 12-2 at 199-200](#).

Meanwhile, on October 29, 2018, Rock filed a notice of appeal in the Ohio Supreme Court, seeking to appeal the Ohio Court of Appeals' October 15, 2018 decision. [ECF Doc. 12-2 at 201-02](#). In his memorandum in support of jurisdiction, he largely reiterated the same issues and supporting arguments he raised in his merits brief. [ECF Doc. 12-2 at 203-21](#).

On December 26, 2018, the Ohio Supreme Court declined to exercise jurisdiction. [ECF Doc. 12-2 at 232](#).

G. Motion to Vacate

While his motion to withdraw his guilty plea pending, Rock filed on December 6, 2017, a motion to vacate the trial court's judgment, under Ohio R. Civ. P. 60(B)(5) on the basis that his indictment was defective because two of his predicate OVI convictions were constitutionally infirm. [ECF Doc. 12-2 at 233-34](#). The state filed a response, and Rock filed a reply. [ECF Doc. 12-2 at 243-48](#). On December 28, 2017, the trial court summarily denied Rock's motion. [ECF Doc. 12-2 at 249](#). Rock filed a motion to reconsider, which was denied in a February 7, 2018 decision. [ECF Doc. 12-2 at 252-54, 256](#). Rock did not appeal. Docket for Lake Cnty. Ct. of Comm. Pl. Case No. 14CR525.

H. State Petition for Writ of Habeas Corpus

On March 21, 2018, Rock filed a pro se state petition for writ of habeas corpus, which was later dismissed pursuant to his notice of voluntary dismissal on April 23, 2018. [ECF Doc.](#)

12-3 at 13-42. On May 4, 2018, Rock filed a second pro se petition for writ of habeas corpus. ECF Doc. 12-3 at 43. He argued that the grand jury that issued the indictment in his May 22, 1997 case lacked probable cause to enhance his misdemeanor offense into a felony. ECF Doc. 12-3 at 44. He also argued that the trial court lacked jurisdiction to indict him on a 5 in 20 specification because two of his predicate OVI convictions were uncounseled and the result of improper plea colloquies. ECF Doc. 12-3 at 44-48. The state moved to dismiss. ECF Doc. 12-3 at 62-69. And Rock filed a reply. ECF Doc. 12-3 at 71-73.

On July 23, 2018, the Ohio Court of Appeals granted the state's motion to dismiss, because Rock previously could have challenged the validity of the indictment on direct or collateral review. ECF Doc. 12-3 at 80-82. On August 10, 2018, Rock filed a notice of appeal with the Ohio Supreme Court. ECF Doc. 12-4 at 13-14. In his supporting memorandum of law, Rock raised two propositions of law:

1st Proposition of Law: Was it an abus[e] of discretion and fraud upon the Court for [the] prosecutor to withhold documents and negate R.C.2945.75(B)(1) and R.C.2945.75(B)(3)?

2nd Proposition of [L]aw: Did the 11th Dist. abuse its discretion by dismissing [Rock's] petition where relief can be granted? And just as important did the judges dismiss their judicial duty of petitions Great Writ?

ECF Doc. 12-4 at 44. In support, he reiterated his jurisdictional challenge to the grand jury indictment, adding that the prosecutor withheld documents showing that his OVI predicate convictions were unconstitutional. ECF Doc. 12-4 at 50-51.

On October 19, 2018, the Ohio Supreme Court determined that the appeal should proceed as an appeal of right. ECF Doc. 12-4 at 71. Rock thereafter filed a merits brief, raising four propositions of law, three of which are relevant to his current petition:

1st Proposition of Law: “*Constitutionally infirm*” conviction(s) cannot be used for enhancement, as they are void from the start ***.

2nd Proposition of Law: Prosecutorial misconduct; *Brady* violation(s) as prosecutor used “*Constitutionally Infirm*” convictions to mislead the grand jury, commit Fraud Upon the Court and deceived the defense, all ethical violations and violation of criminal procedure(s).

3rd Proposition of Law: Ineffective assistance of counsel resulted from the failure to investigate and failure to suppress uncounseled convictions, thus violating [Rock’s] constitutional rights.

[ECF Doc. 12-4 at 73](#). In support of his first proposition of law, Rock argued that his conviction on the 5 in 20 specification was void and unlawful because his predicate November 16, 1995 and May 22, 1997 OVI convictions were unconstitutional. [ECF Doc. 12-4 at 81-84](#). The November 16, 1995 conviction, he argued, was unconstitutional because it was the result of an uncounseled no contest plea for which he never waived the right to counsel. [ECF Doc. 12-4 at 81](#). The May 22, 1997 conviction, he argued, was unconstitutional because counsel was appointed and then vacated and then he entered a plea without a proper explanation of his rights and the consequences of a plea. [ECF Doc. 12-4 at 82](#). The rights waiver he did sign, he argued, was invalidated by the lack of adequate explanation of his rights and the consequences of a plea. [ECF Doc. 12-4 at 82-83](#).

In support of his second proposition of law, Rock argued that the state engaged in prosecutorial misconduct because the prosecutor knew two of his predicate OVI convictions were unconstitutional and yet brought the charge to the grand jury without providing them evidence of the deficiencies in his prior convictions. [ECF Doc. 12-4 at 84-85](#). He also faulted the prosecutor for continuing to withhold information of the deficient prior OVI convictions through discovery, the plea hearing, and at sentencing. [ECF Doc. 12-4 at 85-86](#).

In support of his third proposition of law, Rock argued that trial counsel was ineffective for not investigating his predicate OVI convictions and not moving to suppress them after he told counsel before sentencing of the deficiencies in those convictions. [ECF Doc. 12-4 at 86-89](#). He further stated that his attorney on direct appeal told him the issue was res judicata barred and refused to argue the issue. [ECF Doc. 12-4 at 89](#).

The state filed an appellee brief. [ECF Doc. 12-4 at 155-66](#). And Rock filed a reply. [ECF Doc. 12-4 at 167-83](#). On May 16, 2019, the Ohio Supreme Court affirmed the Court of Appeals' denial of Rock's state petition for writ of habeas corpus. [ECF Doc. 12-4 at 184-88](#); *Rock v. Harris*, 157 Ohio St.3d 6 (Ohio 2019). The Ohio Supreme Court reasoned:

{¶8} First, Rock makes three arguments challenging his OVI convictions: (1) a 1997 grand jury did not have probable cause to enhance a misdemeanor OVI charge to a felony, (2) he did not validly waive counsel in his 1995 and 1997 cases, thereby rendering those OVI convictions void, and (3) the prosecutor committed misconduct in the 2014 case. None of these claims are cognizable in habeas corpus. ***

{¶9} Rock also argues that his repeat-offender specification was improper because of the alleged deficiencies of his 1995 and 1997 convictions and also that his counsel in the 2014 case was ineffective for failing to argue that the prior convictions were void. Neither claim is cognizable in habeas. Rock could have challenged the specification on appeal from his 2014 conviction, especially given the fact that he challenged it in the trial court prior to pleading guilty in his 2014 case. And claims of ineffective assistance of trial counsel are not cognizable in habeas corpus.

[ECF Doc. 12-4 at 186](#).

II. Discussion

A. Ground One: Unconstitutional 5 in 20 specification

In his Ground One claim, Rock contends that the use of uncounseled OVI convictions renders his conviction and sentence on the 5 in 20 specification unlawful. [ECF Doc. 1 at 5](#). In his supporting memorandum of law, he asserts that his supporting exhibits show that two of his

prior OVI convictions are invalid for lack of counsel and lack of a voluntary waiver of his right to counsel. [ECF Doc. 1-2 at 9-11](#). These exhibits included the docket and judgment entries for Case Nos. 95C09727 and 97C03446, Sutherland's September 3, 2010 affidavit, and Rock's September 29, 2010 affidavit. [ECF Doc. 1-3 at 8-19](#).

Warden Eppinger responds that Rock's Ground One claim is not cognizable to the extent it alleges a violation of Ohio's Criminal Rules and Ohio's Rules of Evidence. [ECF Doc. 12 at 33-34](#). Warden Eppinger argues that Rock's Ground One claim is also noncognizable because his conviction is the result of a guilty plea that he has not established was involuntary. [ECF Doc. 12 at 34](#). Warden Eppinger alternatively argues that Rock's Ground One claim is procedurally defaulted because he failed to fairly present and properly exhaust a federal constitutional claim concerning the use of his prior OVI convictions in state court. [ECF Doc. 12 at 35-36](#). And, Warden Eppinger argues, Rock has not established cause, prejudice, or actual innocence to excuse his default. [ECF Doc. 12 at 36-37](#). Last, Warden Eppinger argues that Rock's Ground One claim is meritless. [ECF Doc. 12 at 37-41](#).

In his traverse, Rock maintains that he has exhausted all available state court remedies, noting his state petition for writ of habeas corpus. [ECF Doc. 18 at 2](#). Rock otherwise issues a blanket statement disputing Warden Eppinger's arguments. *Id.*

1. Cognizability

I disagree with Warden Eppinger's reading of Rock's Ground One claim. Warden Eppinger reads the claim as alleging violations of the Ohio Rules of Evidence during Rock's grand jury proceedings and underlying violations of [Ohio Crim R. 44](#) in two of his predicate OVI pleas. If that were the true extent of Rock's Ground One claim, the claim would not be cognizable because it would seek federal habeas relief for an alleged violation of state law.

Estelle v. McGuire, 502 U.S. 62, 67 (1991) (“[F]ederal habeas corpus relief does not lie for errors of state law.” (quotation marks omitted)).

As I read it, however, Rock’s Ground One claim, as stated in his § 2254 petition and elaborated on in his supporting memorandum, challenges instead the use of constitutionally defective guilty plea convictions to support to impose a punishment under a state recidivist statute. See ECF Doc. 1 at 5; ECF Doc. 1-2 at 9-11. Indeed, Rock cites and discusses Supreme Court precedent on that very issue. ECF Doc. 1-2 at 9-10 (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Burgett v. Texas*, 389 U.S. 109 (1967)). The Supreme Court has long held that the Sixth Amendment right to counsel was a fundamental right incorporated against the states through the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963). In *Burgett*, the Court held that a conviction obtained in violation of *Gideon* could not be used in a later case “to support guilt or enhance punishment.” 389 U.S. at 115. And in *Argersinger*, the Court extended the Sixth Amendment right to counsel to misdemeanor prosecutions that result in imprisonment. 407 U.S. at 36-37; see *Scott v. Illinois*, 440 U.S. 367, 369, 373-74 (1979) (limiting *Argersinger* to misdemeanor convictions that actually result in prison sentences). Taken in context with his cited precedent, Rock’s Ground One claim is best read as raising Sixth Amendment challenge to the use of his prior convictions, under *Burgett*, to support a later charge of violating Ohio’s recidivist statute (Ohio Rev. Code § 2941.1413). Such a claim is cognizable in federal habeas.

Next, as Warden Eppinger correctly observes, a guilty plea waives all non-jurisdictional constitutional claims based on pre-plea events. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). That includes a challenge to the propriety of the indictment or sufficiency of the evidence to convict the habeas petitioner, under which Rock’s challenge to the use of his prior convictions

would fall. *Broadway v. Stewart*, No. 2:15-CV-11917, [2016 U.S. Dist. LEXIS 53981](#), at *8 (E.D. Mich. Apr. 22, 2016); *Brooks v. Warden, S. Ohio Corr. Facility*, No. 1:10-cv-953, [2011 U.S. Dist. LEXIS 150608](#), at *11-12 (S.D. Ohio Dec. 8, 2011); *see also McMann v. Richardson*, [397 U.S. 759, 766](#) (1970) (stating that a guilty plea waives “the right to contest the admissibility of any evidence the State might have offered against the defendant”). A habeas petitioner in such an instance is limited only to attacking the voluntary and intelligent nature of his guilty plea. *Tollett*, [411 U.S. at 267](#). Although that would not render Rock’s Ground One claim noncognizable; it would limit the scope of our merits review. *Hunter v. Bowersox*, [172 F.3d 1016, 1022](#) (8th Cir. 1999) (“Whether a plea of guilty was constitutionally voluntary is a question of federal law.” (citation omitted)).

2. Procedural Default

Although Rock’s Ground One claim is cognizable to the extent it challenges the voluntary nature of his plea, it is, nevertheless, procedurally defaulted.

Procedural default is “a critical failure to comply with state procedural law,” *Trest v. Cain*, [522 U.S. 87, 89](#) (1997), resulting in a bar to federal habeas review unless the petitioner makes the requisite showing, *Coleman v. Thompson*, [501 U.S. 722, 750](#) (1991). Procedural default occurs when: (1) the state courts didn’t review the petitioner’s claim on the merits because he didn’t comply with some state procedural rule; or (2) he failed to fairly present the claim to the state courts while state court remedies were still available. *Williams v. Anderson*, [460 F.3d 789, 806](#) (6th Cir. 2006). The former occurs when: (1) the petitioner failed to comply with an applicable state procedural rule; (2) the state court actually enforced the rule; (3) the rule constituted an “adequate independent state ground;” and (4) the petitioner cannot overcome

his procedural default through cause and prejudice. *Coleman v. Mitchell*, 268 F.3d 417, 427 (6th Cir. 2001).

Rock's Ground One claim is procedurally defaulted because the Ohio Supreme Court applied a state procedural rule to preclude merits review of the claim. *Williams*, 460 F.3d at 806; ECF Doc. 12-4 at 186. Rock raised his Ground One claim in his state petition for writ of habeas corpus, both initially to the Ohio Court of Appeals and on appeal to the Ohio Supreme Court. ECF Doc. 12-3 at 44-48; ECF Doc. 12-4 at 81-83. But "[t]he availability of adequate remedies at law, even if those remedies were not sought or were unsuccessful, preclude a writ of habeas corpus." *Perry v. Sloan*, 149 Ohio St.3d 690, 690 (Ohio 2017). Rock could have challenged the use of the use of his prior convictions on direct appeal. *State v. Wood*, 2018-Ohio-875, ¶28 (Ohio Ct. App. 2018). He likewise could have challenged the validity/sufficiency of the indictment on direct appeal. *Luna v. Russell*, 70 Ohio St.3d 561, 562 (Ohio 1994).

The Ohio Supreme Court – the relevant decision for purposes of our procedural default analysis – denied the claim as noncognizable because it could have been raised on direct appeal, thereby actually enforcing the bar on claims raised in state habeas for which adequate remedies at law existed. ECF Doc. 12-4 at 186; *Coleman*, 268 F.3d at 427; see also *Haliym v. Mitchell*, 492 F.3d 680, 691 (6th Cir. 2007) ("[I]n determining whether a claim is procedurally defaulted, this Court must look to the last *explained* state court judgment." (emphasis in original)). And the bar against claims in a state habeas petition that could have been raised on direct review is an adequate and independent state ground for barring federal habeas review. *Gibson v. Haviland*, No. 5:17-cv-00008, 2017 U.S. Dist. LEXIS 216407, at *41-42 (N.D. Ohio Aug. 14, 2017).

Last, Rock cannot establish cause to overcome his procedural default. As the Ohio Supreme Court stated, Rock could have raised his Ground One claim on direct appeal but didn't.

Rock faults his appointed counsel for not arguing the issue on direct appeal. [ECF Doc. 1 at 6](#). Ineffective assistance of counsel *can* establish cause to excuse procedural default. *Joseph v. Coyle*, [469 F.3d 441, 459](#) (6th Cir. 2006). Under *Strickland v. Washington*, [466 U.S. 668](#) (1984), ineffective assistance “is deficient performance by counsel resulting in prejudice, with performance being measured against an objective standard of reasonableness of under prevailing professional norms.” *Moore v. Mitchell*, [708 F.3d 760, 776](#) (6th Cir. 2013) (quotation marks omitted). Because the Ohio Court of Appeals addressed a claim of ineffective assistance of appellate counsel on this very issue when it denied Rock’s [Ohio App. R. 26\(B\)](#) application to reopen, we must afford that decision deference under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). *Id.* at 777-78; [ECF Doc. 12-1 at 210-11](#). Thus, Rock can only establish cause if the state court’s decision finding no ineffective assistance of counsel: (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; or (2) was based on an unreasonable determination of the facts in light of the record before the state court. [28 U.S.C. § 2254\(d\)](#). The relevant question isn’t whether the state court got it right or wrong, but whether the state court’s determination was “unreasonable—a substantially higher threshold.” *Schriro v. Landrigan*, [550 U.S. 465, 473](#) (2007). The petitioner must show that the state court’s “decision was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, [562 U.S. 86, 102-03](#) (2011).

The Ohio Court of Appeals determined that appellate counsel was not ineffective for not raising Rock’s Ground One claim because the issue would have been barred by res judicata. Rock could have – but did not – assert constitutional challenges to his prior convictions on appeal of those prior convictions. [ECF Doc. 12-1 at 210-11](#). Rock’s failure to challenge his

prior convictions on the ground he was denied effective assistance of counsel doomed his ability to do so later. And the applicability of res judicata in such circumstances is an issue of state law; and we are required to defer to the state court's determination of such issues. *Van Tielen v. Robinson*, No. 1:13-cv-642, 2014 U.S. Dist. LEXIS 127384, at *24 (S.D. Ohio Sept. 10, 2014); *Estelle*, 502 U.S. at 67-68 ("It is not the province of a federal court to reexamine state-court determinations on state-law questions."). Thus, because Rock's proposed Ground One claim would have been barred by res judicata, the state court's conclusion that counsel was not ineffective for not raising Rock's proposed Ground One claim was not so lacking in justification that it was beyond any possibility for fair-minded disagreement. *Harrington*, 562 U.S. at 102-03. Rock has therefore failed to establish cause to overcome his procedural default. And failure to establish cause makes it unnecessary to consider prejudice. *Matthews v. Ishee*, 486 F.3d 883, 891 (6th Cir. 2007).

Rock could attempt to overcome his procedural default under the fundamental miscarriage-of-justice exception. *Coleman*, 501 U.S. at 750. But he would have to produce new, reliable evidence establishing that he was actually innocent of the offense. *Schlup v. Delo*, 513 U.S. 298, 324 (1995); *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006). Actual innocence means "factual innocence," i.e., that the petitioner "did not commit the acts forming the basis for his conviction." *Ross v. Berghuis*, 417 F.3d 552, 555-56 (6th Cir. 2005). Rock's legal challenge to the use of his prior predicate OVI convictions does not qualify as a claim of factual innocence. *E.g.*, *United States v. Pettiford*, 612 F.3d 270, 283-84 (4th Cir. 2010); *Pope v. Butler*, No. 6:12-cv-2623, 2012 U.S. Dist. LEXIS 136064, at *11 (N.D. Ala. Aug. 8, 2012); *Webb v. Dir., Va. Dep't of corr.*, No. 7:05CV00654, 2006 U.S. Dist. LEXIS 24075, at *7 (W.D.

Va. Mar. 20, 2006). And Rock has not otherwise adduced any new, reliable evidence of his actual innocence.

I recommend that Rock's Ground One claim be DISMISSED as procedurally defaulted.

B. Ground Two Claim: Trial Counsel's Failure to Investigate or Suppress Uncounseled Predicate OVI Convictions

1. Parties' Arguments

In his Ground Two claim, Rock argues that trial counsel was ineffective for not investigating and moving to suppress his uncounseled predicate OVI convictions. [ECF Doc. 1 at 7](#). In his supporting memorandum of law, he adds that counsel misrepresented his prior no contest pleas to the trial court in this case when counsel said that the courts in the questioned OVI cases failed to advise Rock that he had voluntarily waived his right to counsel. Rock asserts that he did not voluntarily or intelligently waive his right to counsel in the 1995 or 1997 cases. [ECF Doc. 1-2 at 11-12](#).

Warden Eppinger responds that Rock's Ground Two claim is procedurally defaulted because Rock failed to properly exhaust the issue in state court, as he did not raise the issue through the direct review process, and the state courts on collateral review determined the claim was barred by res judicata. [ECF Doc. 12 at 42-43](#). Warden Eppinger argues that Rock cannot establish cause through a claim of ineffective assistance of appellate counsel because the Ohio Court of Appeals reasonably determined that appellate counsel wasn't deficient for not raising the issue in adjudicating his first application to reopen. [ECF Doc. 12 at 43](#). Warden Eppinger argues further that Rock cannot establish cause through ineffective assistance of appellate counsel because such a claim would be procedurally defaulted based on the Ohio Court of Appeals' denial as untimely of his second application to reopen. *Id.* Alternatively, Warden Eppinger argues the claim is meritless. [ECF Doc. 12 at 44-48](#).

2. Procedural Default

Rock's Ground Two claim is procedurally defaulted, because the Ohio Supreme Court enforced a state procedural rule to preclude merits review of the claim. As discussed above, a claim is procedurally defaulted if the state court declined to consider the merits of an issue because the petitioner failed to comply with a state procedural rule, or the claim was not fairly presented. *Williams*, 460 F.3d at 806. To briefly address fair presentment, Rock raised his Ground Two claim initially in his state petition for post-conviction relief, but he did not raise it again on appeal from the denial of his post-conviction relief petition either to the Ohio Court of Appeals or the Ohio Supreme Court. ECF Doc. 12-1 at 301-02, 421-22, 520-24. He attempted to raise the issue again in his second Ohio App. R. 26(B) application to reopen, but he did not appeal the denial of *that* application to the Ohio Supreme Court. ECF Doc. 12-1 at 266; *see* Docket for Ohio App. Ct., 11th Dist. Case Nos. 2015-L-047, 2016-L-011. If that had been the end of the matter, then Rock's Ground Two claim would have been procedurally defaulted because in both instances Rock failed to raise his Ground Two claim at every stage of Ohio's review process – all the way up to the Ohio Supreme Court. *Wagner v. Smith*, 581 F.3d 410, 418 (6th Cir. 2009).

But that's not where Rock's efforts to raise his Ground Two claim ended. He raised it again in his motion to withdraw his guilty plea, and pursued the claim all the way through the Ohio Court of Appeals and the Ohio Supreme Court. ECF Doc. 12-2 at 13-14, 150-51, 214-16. That was enough to meet his obligation to fairly present the claim at every state of Ohio's appellate process. *Wagner*, 581 F.3d at 418.

That being said, Rock's Ground Two claim is procedurally defaulted because the last state court decision to address his claim – the Ohio Supreme Court on appeal from denial of his

state habeas petition – applied a procedural rule to bar review of the claim on the merits. *See Haliym*, 492 F.3d at 691 *Dickson v. Sullivan*, No. 2:17-cv-08290, 2017 U.S. Dist. LEXIS 192946, at *2 (C.D. Cal. Nov. 20, 2017) (reviewing the state court’s procedural ruling on the “most recent round of state collateral review”). The Ohio Supreme Court declined to review the claim because “claims of ineffective assistance of trial counsel are not cognizable in habeas corpus.” ECF Doc. 12-4 at 186. The rule underlying that procedural ruling is that such claims could have been or were unsuccessfully raised on direct and post-conviction review. *Cornell v. Schotten*, 69 Ohio St. 3d 466, 467 (Ohio 1994). The Ohio Supreme Court’s determination on that issue was an adequate and independent ground upon which to preclude merits-based review in a federal habeas case. *Gibson*, No. 5:17-cv-00008, 2017 U.S. Dist. LEXIS 216407, at *41-42.

Rock cannot establish cause to overcome his procedural default. As with his Ground One claim, Rock faults his appellate counsel for not raising the issue on direct appeal. ECF Doc. 1 at 7. But the Ohio Court of Appeals determined that appellate counsel was not ineffective for not raising Rock’s Ground Two claim because the issue would have been barred by res judicata; the propriety of his prior OVI convictions could have been raised in direct or collateral review from those convictions. ECF Doc. 12-1 at 210-11. Giving deference to the state court’s determination on the applicability of res judicata in reviewing appellate counsel’s performance, the state court’s conclusion that counsel was not ineffective for not raising Rock’s proposed Ground Two claim was not so lacking in justification that it was beyond any possibility for fair-minded disagreement. *Harrington*, 562 U.S. at 102-03. Rock has therefore failed to establish cause to overcome his procedural default, and failure to establish cause makes it unnecessary to consider prejudice. *Matthews*, 486 F.3d at 891. And Rock cannot overcome his procedural default under

the fundamental miscarriage-of-justice exception because, as discussed above, a mere challenge to the use of his predicate OVI convictions does not qualify as a claim of factual innocence.

I recommend that Rock's Ground Two claim be DISMISSED as procedurally defaulted.

C. Ground Three Claim: Prosecutorial Misconduct

1. Parties' Arguments

In his Ground Three claim, Rock contends that the state committed prosecutorial misconduct by withholding, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), evidence showing the constitutionally infirm nature of his prior convictions. [ECF Doc. 1 at 8](#); [ECF Doc. 1-2 at 13-15](#).

Warden Eppinger responds that Rock's Ground Three claim is not cognizable to the extent that he alleges violations of state law and ethics rules, and any underlying due process challenge to the admission of evidence in state court would be procedurally defaulted as unexhausted. [ECF Doc. 12 at 49-53](#). Warden Eppinger argues that any constitutional claim was waived by the guilty plea. [ECF Doc. 12 at 49-50](#). Alternatively, Warden Eppinger argues that the Ohio Court of Appeals reasonably determined that the Ground Three claim was barred by res judicata, and that Rock failed to establish that his predicate OVI convictions were constitutionally infirm or that the state suppressed evidence. [ECF Doc. 12 at 53-57](#)

2. Cognizability

I disagree with Warden Eppinger's reading of Rock's Ground Three claim. It asserts – explicitly – a *Brady* claim. The Supreme Court held in *Brady* that the suppression of material, exculpatory evidence violates a criminal defendant's due process rights. *Brady*, 373 U.S. at 87. By asserting a *Brady* claim, Rock is asserting that he is being held in violation of his due process rights, because the state withheld exculpatory evidence concerning his prior OVI convictions.

Such a claim, if not procedurally defaulted, *is* cognizable in a federal habeas case. [28 U.S.C. § 2254\(a\)](#). Warden Eppinger is correct, however, that a properly entered guilty plea can waive a *Brady* claim. *Carley v. Hudson*, [563 F. Supp. 2d 760, 774](#) (N.D. Ohio 2008). As discussed above, however, such a finding would change – but not eliminate – our merits review. *Tollett*, [411 U.S. at 267](#); *Hunter*, [172 F.3d at 1022](#).

3. Procedural Default

Although cognizable, Rock’s Ground Three claim is procedurally defaulted, because the Ohio Supreme Court – the last state court to address his *Brady* claim – declined to review it on the merits after applying a state procedural to find the claim barred. *See Haliym*, [492 F.3d at 691](#); *Dickson*, No. 2:17-cv-08290, [2017 U.S. Dist. LEXIS 192946, at *2](#). The Ohio Supreme Court ruled that Rock’s *Brady* claim was not cognizable in a state habeas corpus case because the claim could have been raised on direct appeal or in a post-conviction proceeding. [ECF Doc. 12-4 at 186](#). *See Williamson v. Williams*, [103 Ohio St.3d 25, 25](#) (Ohio 2004); *Hayden v. Morris*, No. 93 CA 1974, [1994 Ohio App. LEXIS 1131, at *8](#) (Ohio Ct. App. Mar. 16, 1994). That was an adequate and independent ground upon which to preclude merits-based review in our court. *Gibson*, No. 5:17-cv-00008, [2017 U.S. Dist. LEXIS 216407, at *41-42](#).

Rock cannot establish cause to overcome the procedural default of his Ground Three claim. As with his Ground One and Ground Two claims, he faults appellate counsel for not raising the issue. [ECF Doc. 12-4 at 9](#). But that contention is itself procedurally defaulted because, although Rock raised the issue in his second application to reopen, he did not appeal the denial of that application to the Ohio Supreme Court, and he has not shown cause for failing to do so. *Edwards v. Carpenter*, [529 U.S. 446, 451](#) (2000); *Wagner*, [581 F.3d at 418](#); [ECF Doc. 12-1 at 265](#); Docket for Ohio App. Ct., 11th Dist. Case Nos. 2015-L-047, 2016-L-011. Failure to

establish cause makes it unnecessary to consider prejudice. *Matthews*, 486 F.3d at 891. Thus, Rock’s Ground Three claim is procedurally defaulted. *Coleman*, 268 F.3d 427. And as discussed above, the legality of his prior convictions does not pertain to his factual innocence.

I recommend that Rock’s Ground Three claim be DISMISSED as procedurally defaulted.

III. Certificate of Appealability

A. Legal Standard

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts provides that “[t]he district court must issue or deny a certificate of appealability (“COA”) when it enters a final order adverse to the applicant.” Rule 11(a), 28 U.S.C. foll. § 2254. The rule tracks the requirement of § 2253(c)(3) that any grant of a certificate of appealability “state the specific issue or issues that satisfy the showing required by § 2253 (c)(2),” Rule 11(a). In light of the Rule 11 requirement that the Court either grant or deny the certificate of appealability at the time of its final adverse order, a recommendation regarding the COA issue is included here.

Under 28 U.S.C. § 2253(c)(1)(A), this court will grant a COA for an issue raised in a §2254 habeas petition only if the petitioner has made a substantial showing of the denial of a federal constitutional right. *Cunningham v. Shoop*, 817 F. App’x 223, 224 (6th Cir. 2020). A petitioner satisfies this standard by demonstrating that reasonable jurists “could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quotation marks omitted); see also *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a claim is denied on procedural grounds, the petitioner must show “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.” *Slack*, 529 U.S. at 484.

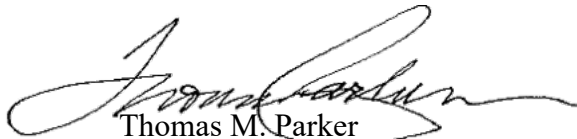
B. Analysis

If the Court accepts my recommendations, Rock will not be able to show that the Court’s rulings on his claims are debatable among jurists of reason. Rock’s Ground One, Ground Two, and Ground Three claims are procedurally defaulted. Because jurists of reason would not find debatable that habeas relief is not available for any of the claims raised in Rock’s petition, I recommend that no certificate of appealability issue in this case.

IV. Recommendation

Because all of Rock’s claims are procedurally defaulted, I recommend that Rock’s claims be DISMISSED and that his petition for writ of habeas corpus be DENIED. I further recommend that Rock not be granted a certificate of appealability.

Dated: September 8, 2021


Thomas M. Parker
United States Magistrate Judge

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days after being served with a copy of this document. Failure to file objections within the specified time may waive the right to appeal the District Court’s order. *See U.S. v. Walters*, 638 F.2d 947 (6th Cir. 1981). *See also Thomas v. Arn*, 474 U.S. 140 (1985), *reh’g denied*, 474 U.S. 1111 (1986).