No. 19-___

In the Supreme Court of the United States

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Petitioner,

v.

VINCENT D. WHITE, JR.,

Respondent.

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

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 18-3277

VINCENT D. WHITE, JR.,

Petitioner-Appellant,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Ohio at Columbus.

No. 2:17-cv-00325—James L. Graham, District Judge.

Decided and Filed: October 8, 2019

Before: DAUGHTREY, GRIFFIN, and STRANCH, Circuit Judges.

COUNSEL

ON BRIEF: C. Mark Pickrell, Nashville, Tennessee, for Appellant. William H. Lamb, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Cincinnati, Ohio, for Appellee. Vincent D. White, Jr., Youngstown, Ohio, pro se.

OPINION

MARTHA CRAIG DAUGHTREY, CIRCUIT JUDGE. Petitioner Vincent White seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[1] He argues that he was deprived of his Sixth Amendment right to effective counsel when, unbeknownst to him, his trial attorney, Javier Armengau, represented him while also under indictment for several serious offenses. White contends that this situation created potential and actual conflicts of interest that denied him the effective assistance of counsel. He further asserts that he was prejudiced by the prosecutor and trial court's failure to alert him about Armengau's indictment. The record regarding Armengau's alleged conflicts is sparse because White has never received an evidentiary hearing during which he could develop facts in support of his allegations of ineffective assistance. The warden argues that, because White filed his motion for post-conviction relief in state court two years beyond the deadline, White has procedurally defaulted his claim and, accordingly, may not supplement the record in federal court. We find that due to procedural hurdles in Ohio state court and because White did not have the aid of an attorney in his post-conviction proceedings, he had no meaningful opportunity to raise his ineffective-assistance claim. In light of the Supreme Court's decision in *Trevino v. Thaler*, 569

[1] Following this panel's request for supplemental briefing, petitioner sought oral argument. We deem oral argument unnecessary in this case and deny petitioner's request.

U.S. 413 (2013), which expanded the Court's earlier ruling in *Martinez v. Ryan*, 566 U.S. 1 (2012), we find that White has cause to overcome his default. We therefore vacate the district court's denial of a writ and remand the case for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

Following a jury trial in Ohio state court, White was convicted of one count of aggravated burglary, three counts of aggravated robbery, four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, and one count of having weapons while under disability. He was sentenced to an aggregate term of life imprisonment without the possibility of parole.

As White was preparing for trial, his attorney, Javier Armengau, was indicted—by the same prosecutor's office as had charged White—for 18 counts of serious felony offenses related to, among other things, sexual misconduct, rape, and kidnapping involving his clients, relatives of his clients, and employees of his law office. *See State v. Armengau*, 93 N.E.3d 284, 292 (Ohio Ct. App. 2017). White alleges that his attorney, the prosecution, and the court all failed to inform him about Armengau's indictment or any issues it might have raised regarding his representation. As a result, Armengau continued to represent White throughout his trial and sentencing. Armengau was eventually tried and convicted on nine charges. *Id.* at 291.

As White tells it, he did not learn about Armengau's indictment until he began assembling his case for direct appeal. With this newfound

knowledge, and with the assistance of different counsel, White appealed his conviction and sentence to the Ohio Court of Appeals. He raised multiple claims, including the only relevant issue here: whether he suffered constitutionally ineffective assistance of counsel due to Armengau's actual and potential conflicts of interest resulting from the lawyer's indictment.[2] The court denied White's appeal and, in doing so, declined to consider his ineffective-assistance claim, explaining that the record lacked sufficient evidence to allow the court to fully adjudicate the merits. *State v. White*, No. 14AP-160, 2015 WL 9393518, at *3 (Ohio Ct. App. Dec. 22, 2015). The court further explained that, because it required factual development unavailable on direct appeal, a direct appeal was "not the vehicle" for White's claim, suggesting, but not explicitly stating, that he should raise the issue in a motion for post-conviction relief. *Id.* However, the Ohio Court of Appeals did not issue its ruling until December 22, 2015—almost four months *after* the deadline for White to file a post-conviction motion in state court. White sought review of his direct appeal in the Ohio Supreme Court, but the court declined to accept jurisdiction. *State v. White*, 49 N.E.3d 321 (Table) (Ohio 2016).

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[2] White's direct appeal and his state and federal habeas petitions raised multiple claims of ineffective assistance of counsel separate and distinct from his conflict-of-interest claim. For ease, and because the conflict-of- interest claim is the only ineffective-assistance claim in front of this panel, for the remainder of this opinion we refer to it simply as "the ineffective-assistance claim."

Proceeding *pro se*, White then timely filed a federal petition seeking a writ of habeas corpus. After initiating his federal habeas petition, but before receiving a decision, White filed a motion seeking post-conviction relief in state court, also *pro se*, but his filing came almost two years after the deadline to seek such relief. The trial court, unsurprisingly, dismissed White's motion as untimely. *State v. White*, No. 12CR-4418, slip op. (Franklin Cty. Ct. of Common Pleas, Nov. 30, 2017). His motion for leave to appeal that order was likewise dismissed as untimely.[3] *State v. White*, No. 18AP-158, slip op. (Franklin Cty. Ct. of Common Pleas, Apr. 4, 2018).

In the district court, the warden argued that White procedurally defaulted his ineffective-assistance claim because his appeal to the Ohio Supreme Court advanced a separate legal theory. The district court disagreed and proceeded to the merits. Applying the deferential standard laid out in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1)–(2), the court rejected White's ineffective-assistance claim but granted a certificate of appealability.[4]

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[3] In the district court, White moved for a stay so that he could continue pursuing his post-conviction appeals in state court. The district court denied that request, finding that such appeals would be fruitless and that the fact of White's assured denial sufficed to establish that he had exhausted his state court remedies.

[4] A panel of this court denied White's motion to expand the certificate of appealability.

STANDARD OF REVIEW

When considering a petition for a writ of habeas corpus, we review a district court's legal conclusions *de novo* and its factual findings for clear error. *Wilson v. Sheldon*, 874 F.3d 470, 474 (6th Cir. 2017). Petitions filed after 1996 are generally governed by AEDPA's exacting standard. *Id.* However, AEDPA applies "only to claims that were adjudicated on the merits in State court proceedings." *Bies v. Sheldon*, 775 F.3d 386, 395 (6th Cir. 2014) (internal quotation marks and citation omitted). Thus, contrary to the district court's decision, AEDPA does not control White's ineffective-assistance claim because no state court ever considered the merits.

The only time a state court addressed this claim was on direct appeal. There, the Ohio Court of Appeals overruled White's assignment of error because it "lack[ed] the necessary facts to fully consider" the claim. *White*, 2015 WL 9393518, at *3. Although the Supreme Court has explained that "it may be presumed that [a] state court adjudicated [a] claim on the merits," this presumption is limited to situations in which there is an "absence of any indication or state-law procedural principles to the contrary." *Harrington v. Richter*, 562 U.S. 86, 99 (2011). A dismissal of a claim explicitly acknowledging a court's procedural inability to sufficiently consider it constitutes an "indication" that the court did not adjudicate the claim on the merits. And, if there were any doubt about that, a review of Ohio law puts the uncertainty to rest. In *State v. Cooperrider*, 448 N.E.2d 452, 454 (Ohio 1983) (*per curiam*), the Ohio Supreme Court considered an

ineffective-assistance-of-counsel claim raised on direct review. There, the lower court had overruled the claim because it could not "determine on the record before [it] whether" counsel's assistance was ineffective. *State v. Cooperrider*, No. 81AP-939, 1982 WL 4121, at *2 (Ohio Ct. App. Apr. 22, 1982). Based on this language, the Ohio Supreme Court found it "clear that the court of appeals . . . did not adjudicate the issue," and that *res judicata* did not prevent the defendant from seeking an evidentiary hearing. *Cooperrider*, 448 N.E.2d at 454.

We likewise find it clear that the Ohio Court of Appeals did not adjudicate the merits of White's ineffective-assistance claim. Therefore, AEDPA does not apply here. The district court should have considered White's claim *de novo*, and we now apply that standard. *See Bies*, 775 F.3d at 396.

DISCUSSION

Federal courts may not consider a petitioner's claims in federal habeas proceedings unless he has exhausted his state remedies and "compl[ied] with state procedural rules in presenting his claim to the appropriate state court." *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). The district court determined, and we agree, that, despite the untimeliness of his post-conviction motion, White has satisfied the exhaustion requirement. *See Clinkscale v. Carter*, 375 F.3d 430, 438 (6th Cir. 2004) (holding that petitioner properly exhausted his ineffective-assistance claim by presenting it on direct appeal even though the court did not adjudicate the claim on the merits). A question remains, however, as to whether his untimeliness precludes his federal claim

because he did not "meet the State's procedural requirements for presenting his federal claims." *Coleman v. Thompson*, 501 U.S. 722, 732 (1991).

We engage in a four-part inquiry when determining whether a claim is procedurally defaulted:

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule. . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an adequate and independent state ground on which the state can rely to foreclose review of a federal constitutional claim. . . . [Fourth, the court must decide whether] there was cause for [the petitioner] to not follow the procedural rule and [whether] he was actually prejudiced by the alleged constitutional error.

Maupin v. Smith, 785 F.2d 135, 138 (6th Cir. 1986) (internal quotation marks and citations omitted). "To inform this inquiry, we look to the last explained state court judgment." *Stojetz v. Ishee*, 892 F.3d 175, 191 (6th Cir. 2018) (internal quotation marks and citations omitted).

The trial court's dismissal of White's motion for post-conviction relief easily satisfies the first three prongs of the *Maupin* test. Ohio law contains a statutory deadline for collateral relief, which requires petitioners to file a motion for post-conviction relief within one year of the filing of transcripts in the petitioner's direct appeal. Ohio Rev. Code §

2953.21(A)(2). The parties do not contest that White failed to meet this deadline or that his untimeliness was the basis of the trial court's rejection of his claim and the denial of his motion for leave to appeal. *See State v. White*, No. 12CR-4418, slip op. (Franklin Cty. Ct. of Common Pleas, Nov. 30, 2017). And, a denial of post-conviction relief based on the petitioner's untimeliness is an independent and adequate state ground to establish default. *See, e.g.*, *Walker v. Martin*, 562 U.S. 307, 317 (2011); *Hartman v. Bagley*, 492 F.3d 347, 357–58 (6th Cir. 2007).

In applying *Maupin's* fourth prong, we are left to consider whether White had cause for his non-compliance. It is well established that, generally, a claim of ineffective assistance of appellate counsel is unavailable as a means of showing cause for petitioners whose default occurs during post-conviction proceedings, as White's did here. *Coleman*, 501 U.S. at 752; *West v. Carpenter*, 790 F.3d 693, 697 (2015). Because the Constitution does not guarantee a right to an attorney in collateral proceedings, in most cases, defendants cannot rely on their *pro se* status to overcome a procedural default at the post-conviction stage. *West*, 790 F.3d at 697.

However, "[a] prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel." *Martinez*, 566 U.S. at 12. Thus, in *Martinez v. Ryan*, the Supreme Court announced a "narrow exception" to the general rule, available to petitioners who can meet four requirements. The petitioner must show that: (1) he has a "substantial" claim of ineffective assistance of trial counsel; (2) he had "no counsel or

counsel . . . was ineffective" in his collateral-review proceeding; (3) the collateral-review proceeding was the "initial" review of the claim; and (4) state law requires ineffective- assistance-of-trial-counsel claims to be raised in the first instance in a collateral-review proceeding. *Id.* at 9, 17.

The following year, considering Texas's appellate process, the Court extended the *Martinez* exception by modifying the fourth requirement. *See Trevino*, 569 U.S. at 429. *Trevino v. Thaler* applied the *Martinez* framework to any state where "by reason of its design and operation, [state procedure] makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Id.*

As an initial matter, White certainly meets the first three *Martinez* requirements. First, he raises a "substantial claim of ineffective assistance." *Id.* at 416 (quoting *Martinez*, 566 U.S. at 17). White's claim is not without "any merit" or "wholly without factual support." *Martinez*, 566 U.S. at 16. Although the record is limited, it does establish that Armengau was under indictment for significant, even shocking charges while serving as White's counsel. This court has recognized that "a conflict of interest may arise where defense counsel is subject to a criminal investigation." *Moss v. United States*, 323 F.3d 445, 472 (6th Cir. 2003). Furthermore, at least one of our sister circuits has found ineffective assistance in a comparable circumstance. *See United States v. DeFalco*, 644 F.2d 132, 136–37 (3d Cir. 1979). Other circuits have likewise acknowledged the possibility

that an attorney under investigation or indictment may face disqualifying conflicts of interest and, as a result, perform ineffectively. *See Reyes-Vejerano v. United States*, 276 F.3d 94, 99 (1st Cir. 2002) (deciding that counsel was not ineffective but recognizing that "[t]he argument is not frivolous that a defense lawyer within the sights of a targeted criminal prosecution may find his personal interests at odds with his duty to a client."); *Armienti v. United States*, 234 F.3d 820, 824–25 (2d Cir. 2000) (finding an ineffective-assistance claim "plausible" when defense lawyer was being criminally investigated by same prosecutors office as had charged defendant); *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) ("A situation of this sort (the criminal defendant's lawyer himself under criminal investigation) . . . can create a conflict of interest."). Second, the parties do not dispute that White was without counsel during his state collateral proceedings. And, third, the collateral-review proceeding would have been the "initial" review of his ineffective-assistance claim because, as we have already explained, the Ohio Court of Appeals deemed direct appeal an inappropriate forum for White's ineffective-assistance claim. *State v. White*, No. 12CR-4418, slip op. (Franklin Cty. Ct. of Common Pleas, Nov. 30, 2017).

That leaves the fourth requirement of the *Martinez-Trevino* test. Although "[w]e have held that *Martinez* does not apply in Ohio because Ohio permits ineffective-assistance-of-trial- counsel claims on direct appeal," a question remains regarding the applicability of *Trevino* to Ohio prisoners. *Williams v. Mitchell*, 792 F.3d 606, 615 (6th Cir. 2015). White

can only establish cause to overcome his procedural default if we determine that *Trevino* applies in his circumstances—that is, if we find that it was "highly unlikely" that a "meaningful opportunity" existed for the Ohio Court of Appeals to review his ineffective-assistance claim on direct review. *See Trevino*, 569 U.S. at 429.

"Ohio law appears to contemplate two kinds of ineffective assistance of counsel claims, those based only on evidence in the trial record and those based in part on evidence outside the record." *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 751 (6th Cir. 2013). The first type of ineffective-assistance claim is not relevant here, and we make no consideration or decision as to *Trevino*'s application to such claims. Instead, we focus on the second variety of ineffective-assistance claims—those that rely on facts outside of the record.

On direct appeal, Ohio law limits the reviewing court "to the record of the proceedings at trial." *Id.* (quoting *Morgan v. Eads*, 818 N.E.2d 1157, 1159 (Ohio 2004)). In *Trevino*, the Supreme Court recognized that "the need to expand the trial court record" is critical to ensuring meaningful review. 569 U.S. at 428. Ohio courts, too, have recognized this necessity and have refused to adjudicate ineffective-assistance claims on direct appeal because of the need for additional evidence. *See, e.g., State v. Smith*, 477 N.E.2d 1128, 1131 n.1 (Ohio 1985) (noting that *res judicata* may not bar post-conviction relief where a court rejected defendant's direct appeal based on the trial record alone); *Cooperrider* 448 N.E.2d at 454 (holding that when "it is impossible to determine

whether the attorney was ineffective in his representation of appellant where the allegations of ineffectiveness are based on facts not appearing in the record," defendants should avail themselves of post-conviction evidentiary hearing procedures). In these instances, Ohio effectively requires defendants to raise ineffective-assistance claims in post-conviction petitions. Indeed, the Ohio Court of Appeals did precisely this in White's case. *White*, 2015 WL 9393518, at *3. Practically speaking, then, Ohio law makes it "virtually impossible" for defendants to meaningfully raise an ineffective-assistance-of-trial-counsel claim on direct appeal if the claim relies on evidence outside the record. *Trevino*, 569 U.S. at 417.

"Ohio . . . appears to expect appellate counsel to recognize the [two] types of [ineffective- assistance] claims and follow the proper procedure." *McGuire*, 738 F.3d at 751. According to White, his appellate counsel assured him that the Ohio Court of Appeals would consider his ineffective-assistance claim on direct appeal, perhaps thinking that the claim was clear on its face, without further evidence. The record does not contradict White, nor do we have any other reason to doubt his assertion at this stage. Given this advice, it makes sense that White did not know that he needed to file a motion for post-conviction relief until *after* he received the decision in his direct appeal, but by then his filing was already untimely.

The severity of Ohio's filing deadline for collateral relief compounded White's procedural troubles. As already noted, under Ohio law, a post-conviction petition must be filed within one year of the filing of

transcripts in a defendant's direct appeal. Ohio Rev. Code § 2953.21(A)(2). A review of White's state court docket shows that his transcripts were filed on August 6, 2014. Ohio law, then, required that he file his post-conviction petition by August 5, 2015. But the Court of Appeals did not issue its decision alerting White to his need for a post- conviction petition, or clarifying which claims might be available to him in that forum, until more than four months after the deadline. *White*, 2015 WL 9393518, at *3. At that stage, White did not have the benefit of counsel, further contributing to his default. *See Martinez*, 566 U.S. at 12 ("The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law. . . . [And w]hile confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance.").

In *Martinez*, the Supreme Court explained that providing an avenue to overcome procedural default when a petitioner proceeds *pro se* in an initial-review collateral proceeding "acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel . . . may not have been sufficient to ensure that proper consideration was given to a substantial claim." *Id.* at 14. *Trevino* similarly recognized that procedural designs that "do[] not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal . . . will deprive the defendant of any opportunity at all for review of [that] claim." 569 U.S. at 428. The confluence of Ohio's general rule requiring the

presentation of ineffective-assistance claims on direct review *unless* the record lacks sufficient evidence, the incorrect advice from White's appellate counsel that his record *did* contain sufficient evidence, and the tight procedural timeline imposed by Ohio's post-conviction-relief statute left White without a "meaningful opportunity" to obtain review of his substantial ineffective-assistance claim. *See id.*

Ohio's procedural framework effectively "channel[ed] initial review of [White's] constitutional claim to collateral proceedings." *Id.* at 423. Accordingly, under the *Martinez-Trevino* framework, we find that White has cause to overcome his procedural default because: he raised a substantial ineffective-assistance claim; he was without counsel during his post- conviction proceedings; the post-conviction proceeding was the initial opportunity for a merits assessment of the claim; and the design and operation of Ohio procedural law rendered it "highly unlikely" his claim could be reviewed on direct appeal. Because we find that White has cause, he satisfies the fourth prong in *Maupin* and is not barred from raising his claim of ineffective assistance based on Armengau's conflict of interest. *See Maupin*, 785 F.2d at 138; *see also Detrich v. Ryan*, 740 F.3d 1237, 1246 (9th Cir. 2013) (*en banc*) (concluding that after finding cause under *Martinez*, the trial court can continue to the merits of a petitioner's ineffective-assistance-of-trial-counsel claims); *see also Workman v. Superintendent Albion SCI*, 915 F.3d 928, 940 (3d Cir. 2019) (same).

Although, having determined that White has overcome his procedural default, we could proceed to

the merits of his ineffective-assistance claim, we decline to do so for two reasons. First, as explained above, in its initial review of White's claim, the district court applied an incorrect standard of review. We therefore think it best that the district court have the first chance to consider the claim *de novo*.

Second, White has not yet been able to develop a factual record in support of his ineffective-assistance claim. The "absence of factual development . . . hamstrings this court's ability to determine whether" his trial counsel was constitutionally ineffective. *Woolbright v. Crews*, 791 F.3d 628, 637 (6th Cir. 2015). In *Woolbright*, we faced a similar situation and found it appropriate to remand the matter to the district court for "full reconsideration" of the claims, including a determination of whether to conduct an evidentiary hearing. *Id.* This measured approach seems to us the best way forward here as well. *See Detrich*, 740 F.3d at 1247 (noting that petitioner demonstrating cause and availing himself of the *Martinez* exception is entitled to evidentiary hearing notwithstanding 28 U.S.C. § 2254(e)(2)).

CONCLUSION

For the reasons explained above, we conclude that White is not procedurally barred from raising his ineffective-assistance claim and that the district court erred by applying the incorrect standard of review. We deem it most appropriate for the district court to consider, in the first instance, White's claim *de novo*, including whether he is entitled to an evidentiary hearing in order to supplement the record. We therefore VACATE the district court's

ruling and REMAND this case for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:17-cv-325

Judge James L. Graham

Magistrate Judge Chelsey M. Vascura

VINCENT D. WHITE, JR.,

Petitioner,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Respondent.

OPINION AND ORDER

On January 8, 2018, the Magistrate Judge issued an *Order and Report and Recommendation* denying Petitioner's request for a stay and recommending that the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed. (ECF No. 13.) Petitioner has filed an *Objection* to the Magistrate Judge's *Order and Report and Recommendation*. (ECF No. 22.) Pursuant to 28 U.S.C. § 636(b), this Court has conducted a *de novo* review. For the reasons that follow, Petitioner's *Objection* (ECF No. 22) is **OVERRULED.** The *Order and Report and Recommendation* (ECF No. 13) is **ADOPTED** and **AFFIRMED**. Petitioner's request for a stay (ECF No. 12) is **DENIED**. This action is hereby **DISMISSED**.

The Court **GRANTS** the certificate of appealability, in part.

Petitioner is serving a sentence of life without the possibility of parole for his convictions after a jury trial in the Franklin County Court of Common Pleas on one count of aggravated burglary, three counts of aggravated robbery, four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, and one count of having weapons while under disability. He asserts that he was denied the effective assistance of counsel (claim one); that he was denied a fair trial because the judge issued an improper jury instruction and that he was denied the effective assistance of counsel because his attorney failed to object (claim two); that the trial court improperly instructed the jury on the State's theory of guilt and gave undue prominence to facts supporting the government's theory of guilt (claim three); that the trial court improperly issued extraordinary security measures, violating Petitioner's right to a fair trial by an impartial trial judge (claim four); and that he was denied the effective assistance of counsel based on his attorney's conflict of interest (claim five). Petitioner requested a stay pending exhaustion of the latter claim in state post-conviction proceedings. The Magistrate Judge denied Petitioner's request for a stay and recommended dismissal of Petitioner's claims as procedurally defaulted or without merit.

Petitioner objects to the Magistrate Judge's denial of his request for a stay. He states that he did not discover the factual basis for his claim of an alleged conflict on the part of trial counsel until the time of

the filing of his direct appeal, and he therefore could not earlier have raised the claim in state post-conviction proceedings. Petitioner also objects to the Magistrate Judge's recommendation of dismissal of this claim on the merits. He again argues that the trial court had a duty to remove defense counsel from his representation of the Petitioner or obtain a waiver from the Petitioner. Petitioner maintains that he suffered prejudice as a result of his attorney's actual conflict of interest, because his attorney failed to investigate or develop a defense or to object when the State required Petitioner to establish his innocence of the charges against him. He likewise objects to the Magistrate Judge's recommendation of dismissal of claim three as without merit. Petitioner objects to the Magistrate Judge's recommendation of dismissal of his claims as procedurally defaulted. He maintains that he presented all of his claims to the Ohio Supreme Court or could not do so, due to page limitations imposed under the Rules of Practice of the Ohio Supreme Court. Petitioner asserts, as cause for his procedural default of claim two, that he was denied the effective assistance of trial counsel based on his attorney's failure to object. Petitioner submits that this failure also demonstrates that he was prejudiced by counsel's conflict of interest.

These objections are not well-taken. The record does not indicate that a stay is warranted. *See Rhines v. Weber*, 544 U.S. 269, 278 (2005). The state trial court denied Petitioner's post-conviction petition as untimely. Moreover, Petitioner may now no longer file an appeal of that decision, as Ohio does not permit the filing of a delayed appeal in post-conviction proceedings. *See Inman v. Warden,*

Southeastern Correctional Institution, No. 2:12- cv-950, 2014 WL 1608390, at *6-7 (S.D. Ohio April 22, 2014) (citing *State v. Nichols*, 11 Ohio St.3d 40, 43 (Ohio 1984)) (other citations omitted). Therefore, a stay would not assist the Petitioner. Additionally, and for the reasons detailed in the Magistrate Judge's Report and Recommendation, Petitioner waived his allegations in claims one and four because he did not present them to the Ohio Supreme Court, where he raised only two propositions of law. He did not present any of his underlying claims of ineffective assistance of trial counsel or his claim that he was denied a fair trial and the right to an impartial judge in the Ohio Supreme Court. Page limitations did not prevent him from so doing. Petitioner waived claim two by failing to object to the trial court's jury instruction. The appellate court therefore reviewed the claim for plain error only. Further, the denial of the effective assistance of trial counsel cannot constitute cause for this procedural default, because Petitioner did not present this claim to the Ohio courts. *See Johnson v. Turner*, No. 2:14-cv-01908, 2017 WL 2633188, at *2 (S.D. Ohio June 19, 2017) (constitutionally ineffective counsel may constitute cause to excuse a procedural default, if it has been presented to the state courts) (citing *Edwards v. Carpenter*, 529 U.S. 446, 452 (2000)). Further, the appellate court indicated, that "both this court and the Supreme Court of Ohio have previously found that nearly identical instructions were not so improper as to require reversal[.]" *State v. White*, No. 14AP-160, 2015 WL 9393518, at *4 (Ohio App. 10th Dist. Dec. 22, 2015), *appeal not allowed*, 49 N.E.3d 321 (Ohio 2016). Therefore, the Court is not

persuaded that counsel's failure to object supports Petitioner's claim of prejudice.

Finally, and for the reasons already discussed in the Magistrate Judge's Report and Recommendation, this Court likewise remains unpersuaded that either of Petitioner's remaining claims provide him a basis for relief, particularly under the deferential standard of review required under the Antiterrorism and Effective Death Penalty Act. 28 U.S.C. § 2254(d). Although Petitioner complains that the trial court failed to conduct any inquiry into his attorney's conflict of interest or obtain a waiver from the Petitioner, the Supreme Court has rejected the argument that a trial court's failure to inquire into a conflict of interest compels automatic reversal. *Moss v. United States*, 323 F.3d 445, 471 (6th Cir.) (citing *Mickens v. Taylor,* 535 U.S. 162, 176 (2002)), *cert. denied*, 540 U.S. 879 (2003). "As Justice Kennedy clarified in his concurring opinion, '[t]he constitutional question must turn on whether trial counsel had a conflict of interest that hampered the representation, not on whether the trial judge should have been more assiduous in taking prophylactic measures.'" *United States v. Beasley*, 27 F. Supp. 3d 793, 809 (E.D. Mich. June 12, 2014) (citing *Mickens*, 535 U.S. at 179 (Kennedy, J. concurring)), *aff'd*, 700 F. App'x 394 (6th Cir.), *cert. denied*, 138 S. Ct. 285 (2017). Here, Petitioner has failed to establish that any purported conflict of interest adversely affected his attorney's performance.

For all of the foregoing reasons, and for the reasons discussed in the Magistrate Judge's *Order and Report and Recommendation*, Petitioner's

Objection (ECF No. 22) is **OVERRULED.** The *Order and Report and Recommendation* (ECF No. 13) is **ADOPTED** and **AFFIRMED**. Petitioner's request for a stay (ECF No. 12) is **DENIED**. This action is **DISMISSED**.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court now considers whether to issue a certificate of appealability. "In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court." *Jordan v. Fisher*, 135 S. Ct. 2647, 2650 (2015); 28 U.S.C. 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal). The petitioner must establish the substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This standard is a codification of *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (recognizing codification of Barefoot in 28 U.S.C. § 2253(c)(2)). To make a substantial showing of the denial of a constitutional right, a petitioner must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack*, 529 U.S. at 484 (quoting *Barefoot,* 463 U.S., at 893 n. 4).

Where the Court dismisses a claim on procedural grounds, however, a certificate of appealability "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*. Thus, there are two components to determining whether a certificate of appealability should issue when a claim is dismissed on procedural grounds: "one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Id*. at 485. The court may first "resolve the issue whose answer is more apparent from the record and arguments." *Id*.

This Court is not persuaded that reasonable jurists would debate whether Petitioner's claims should have been resolved differently or whether this Court was correct in its procedural rulings, except as to Petitioner's claim that he was denied the effective assistance of counsel based on his attorney's conflict of interest.

The Court certifies the following issue for appeal:

> Was the Petitioner denied the effective assistance of counsel based on his attorney's conflict of interest and the trial court's failure to conduct any inquiry on the issue?

The Clerk is **DIRECTED** to enter **FINAL JUDGMENT**.

IT IS SO ORDERED.

Date: March 12, 2018

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 2:17-CV-325

JUDGE JAMES L. GRAHAM

Magistrate Judge Chelsey M. Vascura

VINCENT D. WHITE, JR.,

Petitioner,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Respondent.

OPINION AND ORDER

On January 8, 2018, the Magistrate Judge issued an *Order and Report and Recommendation* granting Petitioner's *Motion to File a Reply to the Return of Writ,* denying the *Request for a Stay*, and recommending that the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be dismissed. (ECF No. 13.) No objections were filed, and on January 31, 2018, the Court issued an *Order* adopting and affirming the *Order and Report and Recommendation*, declining to issue a certificate of appealability, and entering final *Judgment* of dismissal. (ECF Nos. 15, 16.) On February 7, 2018, Petitioner filed a *Motion for Extension of Time to File Notice of Appeal*. (ECF No. 17.) Petitioner requests an extension of time to file an appeal or for reopening of the time to file an appeal pursuant to Rule

4(a)(5), (6).[1] He indicates that he only recently received notification of the Magistrate Judge's *Order and Report and Recommendation*, as on November 1, 2017, he was transferred to "CivicCore." Petitioner states that he is currently housed in segregation and without access to legal materials.

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[1] Rule 4(a)(5), (6) of the Federal Rules of Appellate Procedure provides:

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

However, Petitioner has waived his right to appeal by failing to file objections. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). As discussed, he states that he only recently received notification of the Magistrate Judge's *Order and Report and Recommendation*, due to his transfer in prison housing, and therefore was unable earlier to file objections. Therefore, the Court liberally construes Petitioner's motion as a request to be permitted to file objections to the *Order and Report and Recommendation*. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (documents filed by *pro se* prisoners must be liberally construed) (citing *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)); *see also Koon v. Warden, Madison Correctional Institution*, No. 2:16-cv-00950, 2017 WL 1106372, at *6-7 (S.D. Ohio March 24, 2017) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (the allegations of a *pro se* complaint are to be held to less stringent standards than formal pleadings drafted by lawyers).

In this regard, on January 8, 2018, Petitioner filed a *Motion for Stay and Reply to Respondent's Return of Writ*, which indicates that, at that time, he was housed at the Ross Correctional Institution. (ECF No. 14, PageID# 1529.) Additionally, the docket indicates that Petitioner received a copy of the Magistrate Judge's *Order and Report and Recommendation* at the Ross Correctional Institution, and did not earlier notify the Court of any change in his address. Nonetheless, in the abundance of caution, and so that Petitioner does not waive his right to an appeal due to potential

circumstances that were beyond his control, the Court **GRANTS** Petitioner's request.

The January 31, 2018, *Order* adopting and affirming the Magistrate Judge's *Order and Report and Recommendation* and *Judgment* of dismissal (ECF Nos. 15, 16), hereby are **VACATED.** The Petitioner must submit any objections to the *Order and Report and Recommendation* within twenty-one (21) days. Petitioner is advised that the failure to do so will result in the dismissal of this case.

IT IS SO ORDERED.

Date: February 12, 2018

s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 2:17-CV-325

JUDGE JAMES L. GRAHAM

Magistrate Judge Chelsey M. Vascura

VINCENT D. WHITE, JR.,

Petitioner,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Respondent.

ORDER and
REPORT AND RECOMMENDATION

Petitioner, a state prisoner, has filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the *Petition* and amendment to the *Petition*, Respondent's *Return of Writ*, Petitioner's *Reply*, and the exhibits of the parties. For the reasons that follow, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED**.

Petitioner's motion to file a *Reply* to the *Return of Writ* (*see* ECF No. 12) is **GRANTED**, and Petitioner's request for a stay of proceedings (ECF No. 12) is **DENIED**.

I. Facts and Procedural History

Petitioner challenges his convictions after a trial in the Franklin County Court of Common Pleas on one count of aggravated burglary, three counts of aggravated robbery, four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, and one count of having weapons while under disability. On January 21, 2014, the trial court imposed a term of life imprisonment without the possibility of parole. The state appellate court summarized the facts as follows:

> On August 30, 2012, a Grand Jury indicted White and an alleged coconspirator. The Grand Jury charged White with one count of aggravated burglary, three counts of aggravated robbery, four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, and one count of possessing a firearm while under disability. All counts (except the weapon under disability count) contained specifications for the use of a firearm.
>
> The counts in the indictment arose from a single incident. On July 29, 2012, four men were shot in a house located at 1022 East 17th Avenue in Columbus, Ohio. Keith Paxton (aka "Gutter") and Albert Thompson (aka "T") were killed in the attack. Juanricus Kibby and Miquel Williams suffered bullet wounds but recovered.
>
> The case went to trial on October 28, 2013. At the trial, both surviving victims identified White as one of the two shooters. In addition, another witness, Jeffrey Harris, testified that White had told him beforehand about White's plan to rob the

house and then afterwards offered Harris a share of the money. Kibby and Williams both had known White for a long time; yet, neither identified him the first time they spoke with police following the shooting. Harris, who was initially suspected of having some involvement in the crime, went to the police to clear his name, but he did not tell the police the story he told at trial about White telling him of his plan to rob the house.

White's co-defendant presented an alibi witness, who claimed that the codefendant was not present during the shooting. White admitted that he was at the house and shot some of the people there. However, he claimed that he shot in self-defense because, when he arrived to buy drugs, the four individuals who were subsequently deemed to be the victims, made him get on his knees at gunpoint and were robbing him. Forensic evidence regarding the direction and angles from which some of the victims were shot tended to contradict White's version of the events, as did the fact that White and the other shooter each fired at least six times and the four victims did not return fire. Thompson was shot as if he were getting up from a seated position, and Paxton was shot in the back shoulder. Only two guns were used in the shooting and neither were any of the guns in the possession of the house occupants.

On November 5, 2013, the trial concluded, and the jury began its deliberations. Two days later, the jury announced its verdict. The jury found White guilty on all counts. The trial court also

> found White guilty of having a weapon while under disability. The trial court held a sentencing hearing on January 22, 2014 and sentenced White to life in prison without parole.

State v. White, No. 14AP-160, 2015 WL 9393518, at *1-2 (Ohio App. 10th Dist. Dec. 22, 2015). Represented by new counsel, Petitioner filed a timely appeal. He raised the following assignments of error:

> [I.] THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION BASED UPON THE ACTUAL AND POTENTIAL CONFLICTS OF INTERESTS THE DEFENDANT'S TRIAL COUNSEL HAD IN THIS CASE.
>
> [II.] THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURORS THAT IT HAD TO FIND THE DEFENDANT NOT GUILTY OF AGGRAVATED MURDER BEFORE IT COULD CONSIDER THE DEFENDANT'S GUILT OF THE LESSER–INCLUDED OFFENSE OF MURDER, THE SO–CALLED "ACQUITTAL FIRST" INSTRUCTION THAT WAS HELD TO BE IMPROPER IN STATE V. THOMAS, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), AND FURTHER ERRED WHEN IT INSTRUCTED ON THE AGGRAVATED MURDER CHARGES IN COUNTS SEVEN AND EIGHT WITHOUT ALSO INSTRUCTING ON THE LESSER OFFENSE OF MURDER AND DEFENSE COUNSEL WAS

> INEFFECTIVE BY FAILING TO OBJECT TO THESE INSTRUCTIONS.
>
> [III.] WHEN THE STATE CLAIMED THAT THE DEFENDANT FLED THE SCENE DUE TO A CONSCIOUSNESS OF GUILT, WHILE THE DEFENDANT MAINTAINED THAT HE FLED THE SCENE OF THE SHOOTING OUT OF FEAR FOR HIS SAFETY, IT WAS PREJUDICIAL CONDUCT FOR THE JUDGE, OVER OBJECTION, TO PICK A SIDE AND INSTRUCT THE JURY ONLY WITH RESPECT TO THE STATE'S THEORY OF GUILT AND TO INSTRUCT ONLY ON THE INFERENCES REQUESTED BY THE STATE AND TO EMPHASIS [sic] AND GIVE UNDUE PROMINENCE ONLY TO THE FACTS THAT SUPPORTED THE STATE'S THEORY.
>
> [IV.] THE TRIAL COURT ERRED WHEN IT VIOLATED THE RULES AGAINST HAVING EX PARTE COMMUNICATIONS WITH THE STATE WHERE THE COURT WAS TOLD EXTREMELY PREJUDICIAL ALLEGATIONS CONCERNING THE DEFENDANTS WHICH SO FRIGHTENED THE COURT THAT IT ORDERED, WITHOUT A PROPER HEARING, EXTRAORDINARY SECURITY MEASURES FOR THE COURTROOM AND THE TRIAL, AND THE ALLEGATIONS WERE SO PREJUDICIAL THAT THEY AFFICETED [sic] THE RIGHTS OF THE DEFENDANT TO A FAIR TRIAL FROM AN IMPARTIAL JUDGE.

Id. On December 22, 2015, the appellate court affirmed the judgment of the trial court. *Id.* On May

4, 2016, the Ohio Supreme Court declined to accept jurisdiction of the appeal. *State v. White*, 145 Ohio St.3d 1460 (Ohio 2015).

On April 17, 2017, Petitioner filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He asserts that he was denied the effective assistance of counsel (claim one); that he was denied a fair trial when the judge issued an improper jury instruction and denied the effective assistance of counsel based on his attorney's failure to object (claim two); that the trial court improperly instructed the jury on the State's theory of guilt and gave undue prominence to facts supporting the government's theory of guilt (claim three); and that the trial court improperly issued extraordinary security measures, violating Petitioner's right to a fair trial by an impartial trial judge (claim four). *Petition* (ECF No. 3.) Petitioner also asserts that he was denied the effective assistance of counsel based on his attorney's conflict of interest. *Petitioner's Amendment to Petition for Writ of Habeas Corpus* (ECF No. 7.) It is the position of the Respondent that Petitioner's claims are procedurally defaulted or otherwise fail to present a basis for relief.

II. Motion for Stay

In claim five, Petitioner asserts that he was denied the effective assistance of trial counsel, because his attorney, Javier Armengau, faced pending felony charges during the time of his

representation of the Petitioner in this case.[1] Although Respondent argues otherwise, *see Return of Writ* (ECF No. 11, PAGEID #67), Petitioner plainly raised this same issue in the Ohio Court of Appeals.

Petitioner argued that he was denied his right to the effective assistance of counsel based on the actual and potential conflicts of interests of his attorney, because his attorney had been indicted on charges of rape, kidnapping, sexual battery, gross sexual imposition, and public indecency, and faced prosecution from the same entity. *Brief of Defendant-Appellant* (ECF No. 11-1, PAGEID ##143, 160.) Petitioner argued that the pending criminal charges created a potential conflict of interest, and that his attorney, the trial court, and the government had a duty to advise the Petitioner so that he could choose to proceed with different counsel or waive the potential conflict, unless an actual conflict existed. (PAGEID ##162-63.) Petitioner supported his claim by reference to *State v. Gillard*, 64 Ohio St.3d 304 (Ohio 1992), which in turn relies on federal law regarding the denial of the effective assistance of counsel based upon an alleged conflict of interest. *See Wood v. Georgia,* 450 U.S. 261 (1981); *Cuyler v. Sullivan*, 446 U.S. 335 (1980): *Holloway v. Arkansas*, 435 U.S. 475 (1978). Petitioner also referred to other

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[1] On July 7, 2014, Attorney Armengau was convicted after a jury trial in the Franklin County Court of Common Pleas on charges of public indecency, sexual battery, kidnapping, rape, and gross sexual imposition, and classified as a Tier III sex offender. *See Exhibit B* (Doc. 12-1, PAGEID #1489-1492); *State v. Armengau*, No. 14AP-679, 2017 WL 2687434 (Ohio App. 10th Dist. June 22, 2017).

federal cases in support of his claim. (PAGEID ##164-171; 179-180.)[2]

The state appellate court rejected the claim as follows:

> White asserts that, at the time of the trial, his trial attorney, Javier Armengau, was under indictment in Franklin County and facing very grave challenges to his own freedom, finances, and license to practice law. White argues that this situation created a conflict of interest.
>
> That is, White suggests that Armengau would have been conflicted over whether to devote time to preparing his own defense or that of his client; Armengau might have chosen to take a greater percentage of White's financial resources in fees to help finance his own defense rather than hire an investigator in White's case; and Armengau would have been reluctant to vigorously represent

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[2] Respondent also contends that Petitioner has waived this claim because he failed to raise it in the Ohio Supreme Court. *See Return of Writ* (ECF No. 11, PAGEID #64-67.) The record does not support this argument. In his appeal to the Ohio Supreme Court, Petitioner again argued that the State had an obligation to notify him of the actual or potential conflict of interest caused by the fact that his attorney had been under indictment on serious felony charges at the time of his representation of the Petitioner. (ECF No. 11-1, PAGEID #311-12.) Petitioner argued that the appellate court could have taken judicial notice of the pending criminal charges against defense counsel, and that the case should be remanded for a determination of whether Petitioner had been warned about the potential conflict. (*Id.*) He again referred to *State v. Gilliard*, 64 Ohio St.3d at 304, and other federal cases in support of his claim. (PAGEID #312-13.)

White for fear of angering the same prosecutor's office that was prosecuting him, or even, conversely, might have failed to engage in any plea-bargaining efforts in White's case out of an indignant or vengeful desire to gain a victory over the prosecutor's office.

White argues that there is nothing in the record to show that he was properly advised of the potential conflict of interest or that he waived this potential for conflict on the record or in writing. Plaintiff-appellee, State of Ohio, argues that there is no information in the record of this case regarding Armengau's indictment, conviction, or disciplinary proceedings.

"'A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.'" *Morgan v. Eads*, 104 Ohio St.3d 142, 818 N.E.2d 1157, 2004–Ohio–6110, ¶ 13, quoting *State v. Ishmail*, 54 Ohio St.2d 402, 377 N.E.2d 500 (1978), paragraph one of the syllabus. Though White's brief asserts facts about Armengau's difficulties, the record in this direct appeal contains no evidence or information whatsoever about Armengau's particular situation. Although White refers to the caption of Armengau's criminal case and the caption of his disciplinary case before the Supreme Court of Ohio, he does not expressly request that we take judicial notice of the same. Nevertheless, even if we were to take judicial notice of the fact that Armengau was indicted for a number of serious criminal offenses before

> White's trial and was convicted and imprisoned for them after White's trial, the record would still be devoid of any factual details regarding Armengau's licensure issues. Furthermore, there is nothing in the record of this direct appeal indicating White was unaware of Armengau's situation. In short, while we understand White's argument, that his counsel may have been distracted and conflicted by the fact that he was suffering severe legal and personal difficulties at the same time that he was engaged in litigating White's murder trial, we lack the necessary facts to fully consider such a matter in a direct appeal. A direct appeal, where the record is limited and where the record contains no mention of any of the relevant facts at issue, is not the vehicle to make such an argument.
>
> White's first assignment of error is overruled.

White, 2015 WL 9393518, at *2-3.

Petitioner requests a stay of proceedings in order to exhaust his claim regarding his attorney's alleged conflict of interest by filing a state post-conviction petition pursuant to O.R.C. § 2953.21. Respondent has not filed a response to Petitioner's request. Petitioner does not indicate the date of the filing of the post-conviction petition, nor has he provided a copy of this document; however, the docket of the Franklin County Clerk of Courts indicates that, on October 11, 2017, Petitioner filed a petition to vacate or set aside judgment of conviction or sentence in the state trial court. On November 30, 2017, the trial court denied the motion as untimely, because Petitioner filed the post-conviction petition

approximately two years late. The Court is unable to determine whether Petitioner has filed an appeal from that decision.

Before a federal habeas court may grant relief, a state prisoner must exhaust his available remedies in the state courts. 28 U.S.C. § 2254(b)(1); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Silverburg v. Evitts*, 993 F.2d 124, 126 (6th Cir. 1993). If a habeas petitioner has the right under state law to raise a claim by any available procedure, he has not exhausted that claim. 28 U.S.C. § 2254(b), (c). Moreover, a constitutional claim for relief must be presented to the state's highest court in order to satisfy the exhaustion requirement. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999); *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990).

Additionally, federal courts may not entertain "mixed petitions," *i.e.*, petitions that present both exhausted and unexhausted claims. *Rose v. Lundy*, 455 U.S. 509 (1982). Federal courts have the discretion to stay a mixed petition in order to permit a petitioner to present his unexhausted claim to the state courts, and then to return to federal court for review of all, now exhausted, claims. *Rhines v. Weber*, 544 U.S. 269 (2005). However, stays under these circumstances should be only sparingly used; stays are not appropriate, for example, when the unexhausted grounds are plainly meritless. *Id.* at 278. A petitioner seeking a stay to permit exhaustion of an unexhausted claim must demonstrate both good cause for having failed to exhaust his state court remedies and a potentially meritorious claim. *Id.* at 277–78.

Respondent does not argue that Petitioner's claim is unexhausted or procedurally defaulted based on his failure to pursue state post-conviction relief. Further, the time period for filing a post-conviction petition has now long since expired, and the record does not reflect that Petitioner will be able to meet the stringent requirements for consideration of his claim in an untimely post-conviction petition. To the contrary, the trial court dismissed Petitioner's post-conviction petition as untimely. Assuming that Petitioner has filed a timely appeal, it appears from the record that the state appellate court will affirm that decision under the provision of O.R.C. § 2953.23.[3] Under these circumstances, a stay of

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[3] O.R.C. § 2953.23 provides as follows:

(A) Whether a hearing is or is not held on a petition filed pursuant to section 2953.21 of the Revised Code, a court may not entertain a petition filed after the expiration of the period prescribed in division (A) of that section or a second petition or successive petitions for similar relief on behalf of a petitioner unless division (A)(1) or (2) of this section applies:

(1) Both of the following apply:

(a) Either the petitioner shows that the petitioner was unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief, or, subsequent to the period prescribed in division (A)(2) of section 2953.21 of the Revised Code or to the filing of an earlier petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right.

(b) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim

challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence.

(2) The petitioner was convicted of a felony, the petitioner is an offender for whom DNA testing was performed under sections 2953.71 to 2953.81 of the Revised Code or under former section 2953.82 of the Revised Code and analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case as described in division (D) of section 2953.74 of the Revised Code, and the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.

As used in this division, "actual innocence" has the same meaning as in division (A)(1)(b) of section 2953.21 of the Revised Code, and "former section 2953.82 of the Revised Code" has the same meaning as in division (A)(1)(c) of section 2953.21 of the Revised Code.

(B) An order awarding or denying relief sought in a petition filed pursuant to section 2953.21 of the Revised Code is a final judgment and may be appealed pursuant to Chapter 2953. of the Revised Code.

If a petition filed pursuant to section 2953.21 of the Revised Code by a person who has been sentenced to death is denied and the person appeals the judgment, notwithstanding any law or court rule to the contrary, there is no limit on the number of pages in, or on the length of, a notice of appeal or briefs related to an appeal filed by the person. If any court rule specifies a limit on the number of pages in, or on the length of, a notice of appeal or briefs described in this division or on a prosecuting attorney's response or briefs with respect to such an appeal and a person who has been sentenced to death files a notice of appeal or briefs that exceed the limit specified for the petition, the prosecuting

proceedings is not warranted. Further, Petitioner's claim is not potentially meritorious, as that term is defined under *Rhines* so as to justify a stay. *See Cauthon v. Warden, Marion Correctional Institution*, No. 2:17-cv-272, 2017 WL 3912724, at *8 (S.D. Ohio Sept. 7, 2017) (citing *Childers v. Warden, Chillicothe Correctional Institution*, No. 2:13-cv-991, 2014 WL 3828429, at *4 (S.D. Ohio Aug. 4, 2014) (citing *Toledo v. Banks,* No. 09–cv–614, 2010 WL 2620593, at *5 (S.D. Ohio June 25, 2010) (citing *Williams v. Thaler*, 602 F.3d 291 (5th Cir. 2010))); *Neville v. Dretke*, 423 F.3d 474, 480 (5th Cir. 2005); *Carter v. Friel*, 415 F. Supp. 2d 1314, 1321–22 (D. Utah 2006); *Scott v. Sheldon*, No. 3:08 CV 1837, 2009 WL 2982866 (N.D. Ohio September 11, 2009); *Sieng v. Wolfe*, No. 2:08-cv-0044, at *7, 2009 WL 1607769 (S.D. Ohio June 9, 2009); *Bailey v. Eberlin*, No. 2:08- cv-839, 2009 WL 1585006, at *7 (S.D. Ohio June 4, 2009)). In short, a stay of proceedings would not be warranted for Petitioner to pursue a motion that has little likelihood of success. *See id.*; *Battiste v. Miller*, No. 1:17-cv-128, 2017 WL 1907262, at *5 (N.D. Ohio April 18, 2017) (citation omitted) (where an unexhausted claim is likely procedurally defaulted, a stay and abeyance would be fruitless).

Therefore, Petitioner's request for a stay is **DENIED**.

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attorney may file a response or briefs that exceed the limit specified for the answer or briefs.

III. Procedural Default

Congress has provided that state prisoners who are in custody in violation of the Constitution or laws or treaties of the United States may apply to the federal courts for a writ of habeas corpus. 28 U.S.C. § 2254(a). In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state criminal defendant with federal constitutional claims is required to present those claims to the state courts for consideration. 28 U.S.C. § 2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present his claims, his petition is subject to dismissal for failure to exhaust state remedies. *Id.; Anderson v. Harless*, 459 U.S. 4, 6, 103 (1982) *(per curiam*) (citing *Picard v. Connor*, 404 U.S. 270, 275–78 (1971)). Where a petitioner has failed to exhaust his claims but would find those claims barred if later presented to the state courts, "there is a procedural default for purposes of federal habeas." *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991).

The term "procedural default" has come to describe the situation where a person convicted of a crime in a state court fails (for whatever reason) to present a particular claim to the highest court of the State so that the State has a fair chance to correct any errors made in the course of the trial or the appeal before a federal court intervenes in the state criminal process. This requires the petitioner to present "the same claim under the same theory" to the state courts before raising it on federal habeas review. *Pillette v. Foltz*, 824 F.2d 494, 497 (6th Cir.

1987)). One of the aspects of "fairly presenting" a claim to the state courts is that a habeas petitioner must do so in a way that gives the state courts a fair opportunity to rule on the federal law claims being asserted. That means that if the claims are not presented to the state courts in the way in which state law requires, and the state courts therefore do not decide the claims on their merits, neither may a federal court do so. In the words used by the Supreme Court in *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), "contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure" also cannot be resolved on their merits in a federal habeas case-that is, they are "procedurally defaulted."

In the Sixth Circuit, a four-part analysis must be undertaken when the state argues that a federal habeas claim is waived by the petitioner's failure to observe a state procedural rule. *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986). "First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule." *Id.* Second, the Court must determine whether the state courts actually enforced the state procedural sanction. *Id*. Third, the Court must determine whether the state procedural forfeiture is an adequate and independent state ground upon which the state can rely to foreclose review of a federal constitutional claim. *Id*. Finally, if the Court has determined that the petitioner did not comply with a state procedural rule and that the rule was an adequate and independent state ground, then the

petitioner must demonstrate cause for his failure to follow the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.* This "cause and prejudice" analysis applies to failures to raise or preserve issues for review at the appellate level. *Leroy v. Marshall*, 757 F.2d 94, 99 (6th Cir.), *cert. denied sub nom. Leroy v. Morris*, 474 U.S. 831 (1985).

In light of the fourth part of the *Maupin* analysis, in order to establish cause, petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). Constitutionally ineffective counsel may constitute cause to excuse a procedural default. *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000). In order to constitute cause, an ineffective assistance of counsel claim generally must "'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.'" *Id.* at 452 (quoting *Murray*, 477 U.S. at 479. That is because, before counsel's ineffectiveness will constitute cause, "that ineffectiveness must itself amount to a violation of the Sixth Amendment, and therefore must be both exhausted and not procedurally defaulted." *Burroughs v. Makowski*, 411 F.3d 665, 668 (6th Cir.), *cert. denied*, 546 U.S. 1017 (2005). Or, if the claim is procedurally defaulted, petitioner must be able to "satisfy the 'cause and prejudice' standard with respect to the ineffective-assistance claim itself." *Edwards*, 529 U.S. at 450–51. The Supreme Court explained the importance of this requirement:

We recognized the inseparability of the exhaustion rule and the procedural-default doctrine in *Coleman*: "In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases." 501 U.S., at 732, 111 S. Ct. 2546, 115 L. Ed.2d 640. We again considered the interplay between exhaustion and procedural default last Term in *O'Sullivan v.* Boerckel, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed.2d 1 (1999), concluding that the latter doctrine was necessary to "'protect the integrity' of the federal exhaustion rule." *Id*. at 848, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed.2d 1 (quoting id., at 853, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed.2d 1 (STEVENS, J., dissenting)). The purposes of the exhaustion requirement, we said, would be utterly defeated if the prisoner were able to obtain federal habeas review simply by "'letting the time run'" so that state remedies were no longer available. *Id*. at 848, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed.2d 1. Those purposes would be no less frustrated were we to allow federal review to a prisoner who had presented his claim to the state court, but in such a manner that the state court could not, consistent with its own procedural rules, have entertained it. In such circumstances, though the prisoner would have "concededly exhausted his state remedies," it could hardly be

> said that, as comity and federalism require, the State had been given a "fair 'opportunity to pass upon [his claims].' " *Id.* at 854, 526 U.S. 838, 119 S. Ct. 1728, 144 L.Ed.2d 1 (STEVENS, J., dissenting) (emphasis added) (quoting *Darr v. Burford*, 339 U.S. 200, 204, 70 S. Ct. 587, 94 L. Ed. 761 (1950)).

Id. at 452–53.

If, after considering all four factors of the *Maupin* test, the Court concludes that a procedural default occurred, it must not consider the procedurally defaulted claim on the merits unless "review is needed to prevent a fundamental miscarriage of justice, such as when the petitioner submits new evidence showing that a constitutional violation has probably resulted in a conviction of one who is actually innocent." *Hodges v. Colson*, 727 F.3d 517, 530 (6th Cir. 2013) (citing *Murray*, 477 U.S. at 495–96)), *cert. denied*, 135 S. Ct. 1545 (2015).

In claim one, Petitioner asserts that he was denied the effective assistance of counsel because his attorney did not listen to tape recordings of police witness interviews for cross-examination of prosecution witnesses with prior inconsistent statements; failed to request a mistrial or request an inquiry regarding a juror's disclosure during trial that she was related to the victim's family; failed to conduct adequate impeachment of prosecution witnesses; lacked knowledge regarding cross-examination; failed to object to instances of prosecutorial misconduct; and failed to object to issuance of an "acquittal first" jury instruction. *Petition* (ECF No. 3, PAGEID #24.) With the

exception of the last of these claims, Petitioner did not raise the foregoing issues on direct appeal, where he was represented by new counsel. Further, although Petitioner did assert on direct appeal that he was denied the effective assistance of counsel based on his attorney's failure to object to an "acquittal first" jury instruction, he thereafter failed to raise this same claim on appeal to the Ohio Supreme Court. He has thereby waived this claim for review in these proceedings. Likewise, in claim four, Petitioner asserts that the trial court violated rules against *ex parte* communications and improperly imposed extraordinary security measures during trial, thereby depriving Petitioner of his right to an impartial judge. *Petition* (ECF No. 3, PAGEID #30.) However, Petitioner did not raise this same claim in his appeal to the Ohio Supreme Court.

Petitioner maintains that he presented all of his claims regarding the denial of the effective assistance of trial counsel on direct appeal, by including them as instances establishing that he had established prejudice from counsel's alleged conflict of interest. This Court is not persuaded that Petitioner has thereby preserved these issues as independent claims for relief in these proceedings.[4] Moreover, Petitioner did not raise these same issues on appeal to the Ohio Supreme Court. (ECF No. 11-1, PAGEID #311-16.)

Petitioner may now no longer present any of the foregoing claims to the state courts because of Ohio's

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[4] The Court will address these issues in conjunction with Petitioner's claim that his attorney suffered a conflict of interest.

doctrine of *res judicata*. *See State v. Cole*, 2 Ohio St. 3d 112, 115 (1982); *State v. Perry*, 10 Ohio St. 2d 175, 180 (1967) (claims must be raised on direct appeal, if possible, or they will be barred by the doctrine of *res judicata*.). The state courts were never given an opportunity to enforce this procedural rule due to the nature of Petitioner's procedural default.

Ohio's doctrine of *res judicata* is adequate and independent under the third part of the *Maupin* test. To be "independent," the procedural rule at issue, as well as the state court's reliance thereon, must rely in no part on federal law. *See Coleman*, 501 U.S. at 732–33. To be adequate," the state procedural rule must be firmly established and regularly followed by the state courts. *Ford v. Georgia*, 498 U.S. 411, 423 (1991). "[O]nly a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Id*. (quoting *James v. Kentucky*, 466 U.S. 341, 348– 351 (1984)); *see also Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964). The United States Court of Appeals for the Sixth Circuit has consistently held that Ohio's doctrine of *res judicata, i.e.*, the *Perry* rule, is an adequate ground for denying federal habeas relief. *Lundgren v. Mitchell*, 440 F.3d 754, 765 (6th Cir. 2006); *Coleman v. Mitchell*, 268 F.3d 417, 427–29 (6th Cir. 2001), *cert. denied sub nom. Coleman v. Bagley*, 535 U.S. 1031 (2002); *Seymour v. Walker*, 224 F.3d 542, 555 (6th Cir. 2000), *cert. denied*, 532 U.S. 989 (2001); *Byrd v. Collins*, 209 F.3d 486, 521–22 (6th Cir. 2000) *cert. denied*, 531 U.S. 1082 (2001); *Norris v. Schotten*, 146 F.3d 314, 332 (6th Cir.), *cert.*

denied, 525 U.S. 935 (1998). Ohio courts have consistently refused, in reliance on the doctrine of *res judicata*, to review the merits of claims because they are procedurally barred. *See Cole*, 2 Ohio St.3d at 112; *State v. Ishmail*, 67 Ohio St.2d 16, 18 (1981). Additionally, the doctrine *of res judicata* serves the state's interest in finality and in ensuring that claims are adjudicated at the earliest possible opportunity. With respect to the independence prong, the Court concludes that Ohio's doctrine of *res judicata* in this context does not rely on or otherwise implicate federal law. Accordingly, the Court is satisfied from its own review of relevant case law that the *Perry* rule is an adequate and independent ground for denying relief.

In claim two, Petitioner asserts that the trial court improperly issued an "acquittal first" jury instruction, advising the jury that it had to find Petitioner not guilty of aggravated murder before it could return a guilty verdict on the lesser-included offense of murder. *Petition* (PAGEID #26.) Petitioner raised this same claim on direct appeal; however, the appellate court reviewed the claim for plain error only, due to Petitioner's failure to object:

> B. Second Assignment of Error—Whether the Trial Court Gave an Impermissible Acquit First Instruction
>
> The Supreme Court of Ohio has held:
>
> If a jury is unable to agree unanimously that a defendant is guilty of a particular offense, it may proceed to consider a lesser included offense upon which evidence has been presented. The jury is not required to determine unanimously that the

defendant is not guilty of the crime charged before it may consider a lesser included offense.

State v. Thomas, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph three of the syllabus. The Supreme Court adopted this rule because, though the risk of coerced decisions may be present in any jury deliberation, an "acquittal first" instruction exacerbates such risk. *Id.* at 219-20. "'When the jury is instructed in accordance with the "acquittal first" instruction, a juror voting in the minority probably is limited to three options upon deadlock: (1) try to persuade the majority to change its opinion; (2) change his or her vote; or (3) hold out and create a hung jury.'" *Id.* at 220, 533 N.E.2d 286, quoting *State v. Allen*, 301 Ore. 35, 39, 717 P.2d 1178,

1180 (1986).

In this case, the trial court instructed on the offense of aggravated murder and then gave the following instruction:

> If you find the State has failed to prove prior calculation and design beyond a reasonable doubt, you must find the Defendant not guilty of Aggravated Murder and consider the lesser offense of Murder.

(Tr. 1012.) White argues that this constitutes a prohibited "acquit first" instruction in violation of Thomas. (Appellant's Brief, 39– 46.) Nonetheless, the state points out that both this court and the Supreme Court of Ohio have previously found that nearly identical instructions were not so improper as to require reversal, even though they

were poorly written and though better instructions would have incorporated the "inability to agree" language adopted by Thomas. *See, e.g., Thomas* at 220–21, 533 N.E.2d 286; *State v. Wright*, 10th Dist. No. 00AP–985 (Nov. 13, 2001); *State v. Greene*, 10th Dist. No. 90AP–646 (Mar. 31, 1998); *State v. Hawkins,* 10th Dist. No. 97AP–740 (Mar. 24, 1998); *State v. Roe*, 10th Dist. No. 92AP–334 (Sept. 22, 1992). As the Supreme Court outlined in *Thomas*, the preferred approach upon giving instructions to a jury under these circumstances would have been a holding that is easily adaptable to an instruction:

> [You, the] jury must unanimously agree that the defendant is guilty of [aggravated murder] before returning a verdict of guilty on that offense. If [you are] unable to agree unanimously that a defendant is guilty of [aggravated murder], [you] may proceed to consider [the] lesser included offense [of murder] upon which evidence has been presented. [You are] not required to determine unanimously that the defendant is not guilty of the crime [of aggravated murder] before [you] consider a lesser included offense.

Thomas at 220, 533 N.E.2d 286, quoting and adopting *State v. Muscatello*, 57 Ohio App.2d 231, 387 N.E.2d 627 (8th Dist.1977), paragraph three of the syllabus. Moreover, the Ohio Jury Instructions include their own version of what amounts to the *Thomas* instruction:

> If all of you are unable to agree on a verdict of either guilty or not guilty of (insert greater

> offense charged), then you will continue your deliberations to decide whether the state has proved beyond a reasonable doubt all the essential elements of the lesser included offense of (insert lesser offense).

Ohio Jury Instructions, CR Section 425.09 (Rev. May 2, 2015).

In this case, trial counsel failed to object to the trial court's instruction or to request a proper Thomas instruction. Thus, we cannot take notice of this error unless we find that it constituted plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim. R. 52(B). The Supreme Court of Ohio has recently reiterated that:

> [This rule places] "three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, i.e., a deviation from a legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim. R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial."

State v. Lynn, 129 Ohio St.3d 146, 950 N.E.2d 931, 2011–Ohio–2722, ¶13, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002); *see also State v. Noling*, 98 Ohio St.3d 44,

> 781 N.E.2d 88, 2002–Ohio–7044, ¶62. In this case, considering existing case law in which similar instructions to those given here were not reversed, we cannot say that this error is plain. Under these circumstances, we overrule White's second assignment of error.

White, 2015 WL 9393518, at *4-5.

Petitioner, therefore, has procedurally defaulted this claim for review in these proceedings. *See Norton v. Sloan*, No. 1:16-cv-854, 2017 WL 525561, at *12 (N.D. Ohio Feb. 9, 2017) (citing *Durr v. McLaren*, No. 15-1346, 2015 WL 5101751, at *2 (6th Cir. Aug. 28, 2015)). The United States Court of Appeals for the Sixth Circuit has held that Ohio's contemporaneous-objection rule constitutes an adequate and independent state ground to preclude federal habeas review. *Wogenstahl v. Mitchell*, 668 F.3d 307, 334-35 (6th Cir.) (citation omitted), *cert. denied sub nom. Wogenstahl v. Robinson*, 568 U.S. 902 (2012); *Awkal v. Mitchell*, 613 F.3d 629, 648-49 (6th Cir. 2010) *cert. denied*, 562 U.S. 1183 (2011). The state appellate court's plain error review does not constitute a waiver of the state's procedural default rules. *Keith v. Mitchell*, 455 F.3d 662, 673 (6th Cir. 2006), *cert. denied sub nom. Keith v. Houk*, 549 U.S. 1308 (2007).

Thus, Petitioner has waived claims one, two, and four. He may still secure review of these claims on the merits if he demonstrates cause for his failure to follow the state procedural rules, as well as actual prejudice from the constitutional violations that he alleges.

"[P]etitioner has the burden of showing cause and prejudice to overcome a procedural default." *Hinkle v.*

Randle, 271 F.3d 239, 245 (6th Cir. 2001) (citing *Lucas v. O'Dea*, 179 F.3d 412, 418 (6th Cir. 1999) (internal citation omitted)). A petitioner's *pro se* status, ignorance of the law, or ignorance of procedural requirements are insufficient bases to excuse a procedural default. *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir.), *cert. denied*, 543 U.S. 989 (2004). Instead, in order to establish cause, a petitioner "must present a substantial reason that is external to himself and cannot be fairly attributed to him." *Hartman v. Bagley*, 492 F.3d 347, 358 (6th Cir. 2007), *cert. denied sub nom. Hartman v. Bobby*, 554 U.S. 924 (2008). Petitioner has failed to do so here.

Petitioner states that he could not raise claim two or four in the Ohio Supreme Court because the Rules of Practice of the Ohio Supreme Court impose a fifteen page limit on the memorandum of jurisdiction. *See* Ohio S. Ct. Prac. R. 7.02(B)(1). Alternatively, Petitioner asserts the denial of the effective assistance of appellate counsel as cause for these procedural defaults. (ECF No. 12-1, PAGEID #1476.) However, page limitations did not prevent Petitioner from raising his claims in the Ohio Supreme Court as separate propositions of law. Moreover, attorney error cannot constitute cause for Petitioner's failure to raise an issue in the Ohio Supreme Court where Petitioner had no right to counsel in such proceeding. *See Barkley v. Konteh*, 240 F. Supp. 2d 708, 713-14 (N.D. Ohio Dec. 13, 2002) (citing *Coleman,* 501 U.S. at 751-53; *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987))(other citations omitted). Petitioner has failed to establish cause for his procedural defaults.

The United States Supreme Court has also held that a claim of actual innocence may be raised "to avoid a procedural bar to the consideration of the merits of [a petitioner's] constitutional claims." *Schlup v. Delo*, 513 U.S. 298, 326–27 (1995). "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496. In *Schlup,* the Supreme Court held that a credible showing of actual innocence was sufficient to authorize a federal court in reaching the merits of an otherwise procedurally-barred habeas petition. *Schlup*, 513 U.S. at 317. However, the actual innocence claim is "'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Id.* at 315 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)).

The actual innocence exception to procedural default allows a petitioner to pursue his constitutional claims if it is "more likely than not" that new evidence—not previously presented at trial—would allow no reasonable juror to find him guilty beyond a reasonable doubt. *Souter v. Jones*, 395 F.3d 577, 590 (6th Cir. 2005). The Court of Appeals for the Sixth Circuit explained this exception as follows:

> The United States Supreme Court has held that if a habeas petitioner "presents evidence of innocence so strong that a court cannot have

> confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup,* 513 U.S. at 316, 115 S. Ct. 851, 130 L. Ed. 2d 808. Thus, the threshold inquiry is whether "new facts raise[ ] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." *Id.* at 317, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808. To establish actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* at 327, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808. The Court has noted that "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). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324, 115 S. Ct. 851, 130 L. Ed. 2d 808. The Court counseled however, that the actual innocence exception should "remain rare" and "only be applied in the 'extraordinary case.'" *Id.* at 321, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808.

Souter, 395 F.3d at 589–90 (footnote omitted). Petitioner does not meet these standards here. After an independent review of the record, the Court does

not deem this to be so extraordinary a case as to relieve petitioner of his procedural defaults.

IV. Merits

A. Standard of Review

Because Petitioner seeks habeas relief under 28 U.S.C. § 2254, the standards of the Antiterrorism and Effective Death Penalty Act ("the AEDPA") govern this case. The United State Supreme Court has described AEDPA as "a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court" and emphasized that courts must not "lightly conclude that a State's criminal justice system has experienced the 'extreme malfunction' for which federal habeas relief is the remedy." *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013) (quoting *Harrington v. Richter*, 562 U.S. 86, 102 (2011)); *see also Renico v. Lett*, 559 U.S. 766, 773 (2010) ("AEDPA ... imposes a highly deferential standard for evaluating state- court rulings, and demands that state court decisions be given the benefit of the doubt.") (internal quotation marks, citations, and footnote omitted).

The AEDPA limits the federal courts' authority to issue writs of habeas corpus and forbids a federal court from granting habeas relief with respect to a "claim that was adjudicated on the merits in State court proceedings" unless the state court decision either

> (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 on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Further, under the AEDPA, the factual findings of the state court are presumed to be correct:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1)

Accordingly, "a writ of habeas corpus should be denied unless the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court, or based on an unreasonable determination of the facts in light of the evidence presented to the state courts." *Coley v. Bagley*, 706 F.3d 741, 748 (6th Cir. 2013) (citing *Slagle v. Bagley*, 457 F.3d 501, 513 (6th Cir. 2006)), *cert. denied sub nom. Coley v. Robinson*, 134 S. Ct. 513 (2013). The United States Court of Appeals for the Sixth Circuit has summarized these standards as follows:

> A state court's decision is "contrary to" Supreme Court precedent if (1) "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law[,]" or (2) "the

> state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives" at a different result. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). A state court's decision is an "unreasonable application" under 28 U.S.C. § 2254(d)(1) if it "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular ... case" or either unreasonably extends or unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context. *Id*. at 407, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389.

Id. at 748–49. The burden of satisfying the AEDPA's standards rests with the petitioner. *See Cullen v. Pinholster*, 563 U.S.170, 181 (2011).

B. Claim Three

In claim three, Petitioner asserts that he was denied a fair trial because the trial court issued an improper jury instruction regarding his flight from the scene, emphasizing the prosecutor's theory of guilt rather than advising the jury that if another motive prompted his conduct, or "if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose." (ECF No. 12-1, PAGEID #1481.)

The state appellate court rejected this claim as follows:

> C. Third Assignment of Error—Whether the Trial Court Erred in Instructing that Flight Could be Considered as Evidence of Guilt Where Defendant

Claimed Self–Defense and Presented Other Factual Explanations for his Flight

At trial, it was undisputed that White left the scene of the shooting on foot, disposed of the gun in the trash, checked into a hotel under someone else's name, and stayed there for several days, spending time with his daughter and consulting with an attorney before voluntarily turning himself in to police. The prosecution argued that this behavior was not the behavior of a person who had acted in self-defense and that it showed consciousness of guilt. The defense argued that White fled the scene initially because he was afraid for his life and that he stayed in the hotel under an assumed name to give himself the opportunity to retain and consult with a lawyer and spend some time with his daughter before surrendering himself. The trial court, over objection by the defense, instructed the jury as follows:

> In this case, there was evidence that the Defendant Vincent White fled from the scene. You are aware—I mean—you are instructed that you may not presume the Defendant guilty from such evidence. You may, however, infer a consciousness of guilt regarding the evidence of the Defendant's alleged flight. An accused's flight and related conduct can be considered evidence of consciousness of guilt and thus of guilt itself.

(Tr. 1021.)

White argues that it was error for the trial court to have given an instruction on flight in this case

because there were explanations for his behavior after the shooting other than consciousness of guilt and that the trial court, in giving such an instruction, was granting a judicial imprimatur of the prosecution's view of the facts. Essentially, White argues that, in giving that instruction and only that instruction, the judge picked a side and implicitly recommended a factual inference to the jury. The state responds that giving a flight instruction is a matter of discretion, and the word "may" in the instruction leaves open the possibility that the jury could have chosen not to infer "consciousness of guilt" and instead credit White's explanation. The determination of whether or not to give a flight instruction is a matter within the trial court's discretion. *See, e.g., State v. Hill*, 8th Dist. No. 98366, 2013–Ohio–578, ¶ 48–49. Under typical circumstances, as the state argues, if there is sufficient evidence to show that a defendant attempted to avoid apprehension, a flight instruction is proper. *Id.* at ¶ 49. However, White does not argue that there was insufficient evidence in the record to justify an instruction about flight; he argues that it was improper to give a flight instruction that endorsed only the inference preferred by the state where the facts supported more than one inference about his conduct, and each side argued for a different inference.

In support of his assignment of error, White cites cases regarding jury instructions about factual inferences that may be drawn from a refusal to take a breath test in an OVI case. (Appellant's Brief, 48– 53, citing *Maumee v. Anistik*, 69 Ohio

St.3d 339, 632 N.E.2d 497 (1994); *Columbus v. Maxey*, 39 Ohio App.3d 171, 530 N.E.2d 958 (10th Dist.1988).) The facts in these cases are not analogous to the facts in the case before us. Here, after shooting the victims, White left the scene, disposed of the gun, stayed in a hotel under another's name, and turned himself in.

More factually analogous to the case at bar is *State v. Shepherd*, 10th Dist. No. 07AP–223, 2007–Ohio–5405. In that case, the appellant was charged with robbery. The evidence presented at trial showed that the appellant and his passenger drove away from the scene after the passenger robbed a gas station. The appellant admitted that he was driving the car but that he had picked up the passenger on the side of the road and knew him only as "Willie." *Id.* at ¶ 3. On appeal, the appellant argued that the trial court erred when it instructed the jury on flight as evidence of guilt by giving the following instructions: "Flight or its analogous conduct may be considered by you as consciousness of guilt." *Id.* at ¶ 5. The appellant argued that the court should have given the instruction outlined in the Ohio Jury InstructionsFN1 at the time. This court determined, after comparing the given instruction to the instruction suggested by the appellant, that the trial court did not abuse its discretion. The court noted that, while the Ohio jury instruction is "more detailed and explicit, the instruction given by the trial court is not incorrect and does not conflict with the suggested OJI instruction." *Id.* at ¶ 8. The court further observed that the given jury instruction "substantially mirrors the

language from paragraph six of the syllabus in *State v. Eaton*, 19 Ohio St.2d 145, 160, 249 N.E.2d 897 (1969), in which the court stated that "'flight from justice, and its analogous conduct, have always been indicative of a consciousness of guilt.'" *Shepherd* at ¶ 18. The court also observed that: (1) the given instruction indicated that the jury "may" find flight demonstrated consciousness of guilt and left open the possibility that there may have existed other motivations to move appellant to leave the scene; and (2) jury instructions must be considered as a whole and the court had also instructed the jury that it was its sole function to judge the disputed facts.FN2 *Id*.

In *Eaton*,FN3 the appellant was charged with first-degree murder during an attempted robbery. The appellant claimed the shooting was accidental. Evidence was presented that the appellant left the scene "without attempting to aid the person whom he claims was accidentally killed." *Id*. at 160. In considering whether the jury was properly instructed on the element of intent to commit homicide, the Supreme Court held that: "Flight from justice, and its analogous conduct, may be indicative of a consciousness of guilt." *Id*. at paragraph six of the syllabus. The Supreme Court noted that: " 'Flight from justice, and its analogous conduct, has always been indicative of a consciousness of guilt. It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of

consciousness of guilt, and thus of guilt itself.' " *Id*. at 160, quoting 2 Wigmore, Evidence, Section 276 (3 Ed.) at 111, and cases cited.

In *State v. Taylor*, 78 Ohio St.3d 15, 29–30, 676 N.E.2d 82 (1997), the appellant was charged with aggravated murder. Evidence was presented at the trial that, after shooting the victim, the appellant and an accomplice left the scene and while leaving, the appellant yelled out of the car window: "It was self-defense." The Supreme Court of Ohio considered whether the following instruction was given in error: "Flight, in and of itself, does not raise a presumption of guilt, but unless satisfactorily explained, it tends to show consciousness of guilt or a guilty connection with the crime." *Id*. at 27, 676 N.E.2d 82. The Supreme Court held that, despite the appellant's claims, the instruction was "neither arbitrary nor unreasonable, and did not create an improper mandatory presumption." *Id*. The Supreme Court quoted from *Eaton* in stating: "'Flight from justice * * * may be indicative of a consciousness of guilt.'" *Id*.

In consideration of our precedent in *Shepherd* and the Supreme Court's observations in *Eaton, Harris*, and *Taylor,* we cannot say that the trial court abused its discretion in giving this instruction. Accordingly, we overrule White's third assignment of error.

FN1: The Ohio Jury Instructions, Section 405.25 (2005), at the time provided:

CONSCIOUSNESS OF GUILT. Testimony has been admitted indicating that the defendant [fled

the scene]. * * * You are instructed that [flight] alone does not raise a presumption of guilt, but it may tend to indicate the defendant's (consciousness) * * * of guilt. If you find that the facts do not support that the defendant [fled], or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the defendant engaged in such conduct and if you decide that the defendant was motivated by (a consciousness) * * * of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crime[ ] charged. You alone will determine what weight, if any to give to this evidence.

Shepherd at ¶ 6.

Today, Ohio Jury Instructions, CR Section 409.13 (Rev. Aug. 17, 2005) reads:

CONSCIOUSNESS OF GUILT. Testimony has been admitted indicating that the defendant (fled the [scene] * * *. You are instructed that (describe defendant's conduct) alone does not raise a presumption of guilt, but it may tend to indicate the defendant's (consciousness) (awareness) of guilt. If you find that the facts do not support that the defendant [fled], or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the defendant engaged

> in such conduct and if you decide that the defendant was motivated by (a consciousness) (an awareness) of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crime(s) charged. You alone will determine what weight, if any, to give to this evidence.
>
> FN2: The trial court in the case at bar also instructed the jury that it was the function of the jury to judge the disputed facts. "You decide the disputed facts, and the court provides the instructions of law." (Tr. 989.) The court further instructed: "You are the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence." (Tr. 992.)
>
> FN3: In a more recent case, *State v. Harris*, 142 Ohio St.3d 211, 2015–Ohio–166, the Supreme Court of Ohio noted that "[c]onsciousness of guilt is no different from guilt itself." *Id.* at ¶ 34, citing *Eaton; Williams*.

White, 2015 WL 9393518, at *5-7.

However, errors in jury instructions are generally not cognizable in federal habeas corpus unless they deprive the petitioner of a fundamentally fair trial. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *see also Wood v. Marshall*, 790 F.2d 548, 551–52 (6th Cir. 1986), *cert. denied sub nom. Wood v. McMackin*, 479 U.S. 1036 (1987); *Thomas v. Arn*, 704 F.2d 865, 868–69 (6th Cir. 1983).

> Because jury instruction errors typically are matters of state law, the standard for demonstrating that a jury instruction caused

> constitutional error in a habeas proceeding "is even greater than the showing required to establish plain error on direct appeal." *Henderson*, 431 U.S. at 154, 97 S. Ct. 1730. A habeas petitioner's "burden is especially heavy [when] no [affirmatively] erroneous instruction was given. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Id. at 155, 97 S. Ct. 1730.

Stallings v. Bagley, 561 F. Supp. 2d 821, 855 (N.D. Ohio 2008). A habeas petitioner challenging jury instructions must establish that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). The record fails to reflect such circumstances here.

Moreover, the United States Court of Appeals for the Sixth Circuit, in an unpublished decision, *Drake v. Superintendent, Trumbull Correctional Inst.*, No. 95-4018, 1997 WL 14422 (6th Cir. January 14, 1997), has rejected the argument that instructing the jury that flight, "unless satisfactorily explained ... tends to show consciousness of guilt or a guilty connection with the alleged crime" and may be considered in determining guilt improperly shifts the burden of proof to the defendant in a criminal case, stating as follows:

> This instruction is constitutionally sound; it unambiguously states that flight, in and of itself, does not raise a presumption of guilt. The instruction clearly communicates that the jury "may" consider unexplained flight in determining guilt or innocence but is not required to do so. The

> jury is still free to disregard any evidence of flight in determining guilt. The instruction is consistent with Ohio law, in that a jury may consider flight as indicative of consciousness of guilt.

Id. at *7; *see also Taylor v. Mitchell*, 296 F. Supp. 2d 784, 809-10 (N.D. Ohio 2003), *declined to follow on other grounds by Williams v. Anderson*, 460 F.3d 789 (6th Cir. 2006).

Claim three fails to provide a basis for relief.

C. Claim Five

In claim five, Petitioner asserts that he was denied the effective assistance of counsel because his attorney suffered a conflict of interest in view of the pending felony charges against him. In support, Petitioner refers to his attorney's subsequent suspension from the practice of law and the motion for interim remedial suspension by the Columbus Bar Association. *See In re Armengau*, 140 Ohio St. 3d 1247 (2014); *Columbus Bar Assn. v. Armengau*, 139 Ohio St. 3d 1469 (2014). Petitioner argues that defense counsel, the trial court, and the prosecution had a duty to advise Petitioner regarding this conflict or potential conflict of interest, and absent Petitioner's waiver, reversal is required. Alternatively, Petitioner maintains that the record establishes that he has established prejudice from counsel's conflict of interest. (ECF No. 12-1, PAGEID ##1472-72.)

As discussed above, the state appellate court rejected Petitioner's claim and concluded that nothing in the record indicated that Petitioner was unaware of Armengau's situation and that it lacked

the necessary facts to fully address the issue on direct appeal. *White,* 2015 WL 9393518, at *2-3. "A direct appeal, where the record is limited and where the record contains no mention of any of the relevant facts at issue, is not the vehicle to make such an argument." *Id*. At *3. However, Respondent does not argue that Petitioner's claim is procedurally defaulted on this basis. *See Return of Writ* (ECF No. 11, PAGEID ##64-67.) "[P]rocedural default is an affirmative defense that must be asserted by a respondent at the earliest opportunity or it will be waived." *Ahmed v. Houk*, No. 2:07-cv-658, 2014 WL 2709765, at *28 (S.D. Ohio June 16, 2014) (citing *Trest v. Cain*, 522 U.S. 87, 89 (1997)); *see also Gray v. Netherland*, 518 U.S. 152, 166 (1996). In any event, the record reflects that Petitioner's claim lacks merit.

"In all criminal prosecutions," the Sixth Amendment affords "the accused . . . the right . . . to Assistance of Counsel for his defence." U.S. Const. amend. VI. "Only a right to 'effective assistance of counsel' serves the guarantee." *Couch v. Booker*, 632 F.3d 241, 245 (6th Cir. 2011) (citation omitted). The United States Supreme Court set forth the legal principles governing claims of ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 556 (1984). *Strickland* requires a petitioner claiming ineffective assistance of counsel to demonstrate that his counsel's performance was deficient and that he suffered prejudice as a result. 466 U.S. at 687. *See also Hale v. Davis*, 512 F. App'x 516, 520 (6th Cir.), *cert. denied sub nom. Hale v. Hoffner*, 134 S. Ct. 680 (2013). A petitioner "show[s] deficient performance by counsel by demonstrating 'that counsel's representation fell below and objective standard of

reasonableness.'" *Poole v. MacLaren*, 547 F. App'x 749, 755 (6th Cir. 2013) (citing *Strickland*, 466 U.S. at 687; quoting *Davis v. Lafler*, 658 F.3d 525, 536 (6th Cir. 2011), *cert. denied*, 566 U.S. 947 (2012))(internal quotation marks omitted), *cert. denied*, 135 S. Ct. 122 (2014). To make such a showing, a petitioner must overcome the "strong [ ] presum[ption]" that his counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 687. "To avoid the warping effects of hindsight, [courts must] 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Bigelow v. Haviland*, 576 F.3d 284, 287 (6th Cir. 2009) (quoting *Strickland,* 466 U.S. at 689).

> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' id., at 689; *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), and when the two apply in tandem, review is 'doubly' so, *Knowles,* 556 U.S., at 123, 129 S. Ct. at 1420. The Strickland standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at 123. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. "The question is whether there is any reasonable

> argument that counsel satisfied *Strickland*'s deferential standard."

Premo v. Moore, 562 U.S. 115, 122-23 (2011). "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable[;] [t]his is different from asking whether defense counsel's performance fell below *Strickland's* standard." *Harrington,* 562 U.S. at 101.

A criminal defendant has a Sixth Amendment right to conflict-free representation. *Gillard v. Mitchell*, 445 F.3d 883, 890 (6th Cir. 2006) (citing *Smith v. Anderson*, 689 F.2d 59, 62-63 (6th Cir. 1982)), *cert. denied*, 549 U.S. 1264 (2007). A claim that counsel labored under a conflict of interest is at base a claim governed by *Strickland*. *Ahmed*, 2014 WL 2709765, at *25 (citing *Brooks v. Bobby*, 660 F.3d 959, 963-64 (6th Cir.), *cert. denied*, 565 U.S. 1047 (2011)). In order to obtain relief, a petitioner must establish that his attorney "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Whiting v. Burt*, 395 F.3d 602, 617 (6th Cir. 2005) (citations omitted). In certain contexts, prejudice is presumed where counsel labored under an actual conflict of interest. *See Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 487–91 (1978). The presumption of prejudice applies only where the conflict arises from an attorney's representation of multiple concurrent or co-defendants in the same or separate proceedings. *See Ahmed*, 2014 WL 2709765, at *25 (citing *Mickens v. Taylor*, 535 U.S. 162, 174–76 (2002); *Satterwhite v. Texas*, 486 U.S. 249, 256–58 (1988); *Jalowiec v.*

Bradshaw, 657 F.3d 293, 314–15 (6th Cir. 2011), *cert. denied sub nom. Jalowiec v. Robinson*, 568 U.S. 828 (2012); *McElrath v. Simpson*, 595 F.3d 624, 630–31 (6th Cir. 2010); *Stewart v. Wolfenbarger*, 468 F.3d 338, 350–54 (6th Cir. 2006); *Gillard*, 445 F.3d at 890–91; *Whiting v. Burt*, 395 F.3d 602, 617–20 (6th Cir. 2005); *McFarland v. Yukins*, 356 F.3d 688, 705–09 (6th Cir. 2004); *Moss v. United States*, 323 F.3d 445, 460–61 (6th Cir.), *cert. denied*, 540 U.S. 879 (2003); *Smith v. Hofbauer*, 312 F.3d 809, 814–16 (6th Cir. 2002), *cert. denied*, 540 U.S. 971 (2003)).

That said, "[t]he argument is not frivolous that a defense lawyer within the sights of a targeted criminal prosecution may find his personal interests at odds with his duty to a client." *Reyes-Vejerano v. United States,* 276 F.3d 94, 99 (1st Cir.), *cert. denied*, 537 U.S. 985 (2002).

> A lawyer in these circumstance[s], while dealing on behalf of his client with the office that is prosecuting him personally may, consciously or otherwise, seek the goodwill of the office for his own benefit. A lawyer's attempt to seek the goodwill of the prosecutor may not always be in the best interest of the lawyer's client.

Armienti v. United States, 234 F.3d 820, 825 (2nd Cir. 2000). The United States Court of Appeals for the Sixth Circuit has held that "[i]t is well-established that a conflict of interest may arise where defense counsel is subject to a criminal investigation." *Moss*, 323 F.3d at 472 (citing *Taylor v. United States*, 985 F.2d 844, 846 (6th Cir. 1993)) (no actual conflict of interest where defense counsel faced state charges and defendant faced federal charges).

See also United States v. Gonzales, No. 5:08-cr-250, 2013 WL 6191363, at *3 (N.D. Ohio Nov. 26, 2013) ("A conflict of interest will exist if the client and his attorney are being investigated and prosecuted by the same office") (citing *Taylor*, 985 F.2d at 844).

> Other circuits that have found an actual conflict under analogous circumstances have also emphasized the fact that the same office was prosecuting or investigating both the attorney and client. *See, e.g., Levy,* 25 F.3d at 156 (2d Cir. 1994) (finding actual conflict for several reasons, including attorney's prosecution on unrelated charges by same office prosecuting defendant); *Thompkins v. Cohen*, 965 F.2d 330, 332 (7th Cir. 1992) (presuming that an actual conflict may arise when defendant's lawyer is under criminal investigation by the same prosecutor's office, but finding no adverse effect); *United States v. McLain*, 823 F.2d 1457, 1463–64 (11th Cir. 1987) (finding actual conflict where attorney was under investigation by the same United States Attorney's office prosecuting the defendant and attorney had interest in prolonging the trial to delay his own indictment), overruled on other grounds as recognized by *United States v. Watson*, 866 F.2d 381, 385 n. 3 (11th Cir. 1989).

United States v. Baker, 256 F.3d 855, 861-62 (9th Cir. 2001). However, the petitioner must establish that an actual conflict of interest adversely affected his defense. *Chester v. Horn*, No. 99-4111, 2013 WL 2256218, at *4 (E.D. Penn. May 22, 2013); *see also United States v. Beasley*, 27 F. Supp. 3d 793, 818-19 (E.D. Mich. June 12, 2014) (citing *Moss*, 323 F.3d at

471-73) (conflict of interest claim fails where the petitioner cannot demonstrate any adverse effect or prejudice as a result of the alleged conflict). In other words, Petitioner must "demonstrate that there was an adverse impact, which had a probable negative effect on his case." *Chester*, 2013 WL 2256218, at *4. "In doing so, Petitioner must show actual actions, or inactions, that counsel took or failed to take" based on the pending charges against him. *Id*. Petitioner has failed to do so here.

The record does not support Petitioner's claims that defense counsel failed to review summaries of police interviews with prosecution witnesses, conducted an inadequate cross-examination, or demonstrated a lack of knowledge regarding cross-examination, or that Petitioner was prejudiced by those actions or omissions. Notably, evidence of Petitioner's guilt was substantial. Additionally, the trial court removed the juror who disclosed that she might be related to some of the victims at counsel's request. *Transcript* (ECF No. 11-4, PAGEID #514.) Further, nothing in the record reflects that the juror at issue made any inappropriate statements based on her purported relationship to a person sitting in the audience prior to her removal, that counsel acted unreasonably in conducting further inquiry on that issue, or that Petitioner was prejudiced by the juror's temporary presence.[5] Likewise, the record does not

[5] The juror indicated that she noticed her cousin in the audience who she had only seen once previously. *Transcript* (ECF No. 11-3, PAGEID #503-04.)

demonstrate that Petitioner was prejudiced by his attorney's failure to object to Juanricus Kibby's testimony regarding his telephone conversation with the Petitioner. *Transcript* (ECF No. 11-4, PAGEID #666). It does not appear that such testimony would have been inadmissible, and Petitioner does not indicate otherwise. Similarly, the record does not reflect that Petitioner can establish prejudice based on Miquel Williams's testimony on re-direct that the only thing the prosecutor had ever asked him to do was to be honest and to be polite or the prosecutor's reference to this testimony during closing argument. (*See* ECF No. 11-5, PAGEID #873;[6] ECF No. 11-8,

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> My mom, she has a lot of family or people that she say is family, and sometimes we really aren't family, so that's the way I know Danielle, from my mother. I've seen her.
> I don't know where I seen you at years ago.
> I seen her – I'm not sure if it was a gathering or a cookout my mom had or something like that.

(ECF No. 11-3, PAGEID #506.) She denied that it would sway her opinion in the case, stating "I don't even really know which side she's on right now." (PAGEID #504.) She indicated that she could remain fair and impartial. (PAGEID #507.)

[6] Williams testified that he had been at the house on 1022 East 17th Avenue on the date at issue visiting with his friends, "chilling" and getting high on weed. *Transcript* (ECF No. 11-5, PAGEID ##830-32.) He had known Petitioner for a couple of years. (PAGEID #832.) Petitioner and the co-defendant entered through the back door. (PAGEID #835.) They asked for some weed, and then Petitioner asked to go to the bathroom. (PAGEID #838.) He came out shooting. (PAGEID #839.) Petitioner shot Albert Thompson, aka "T" in the chest. (PAGEID #839.) Williams was shot in the hip. (PAGEID #841.) When questioned by the police, Williams did not provide them with any information, because he intended to shoot the Petitioner. (PAGEID ##846-47.) A couple months later, after

PAGEID #1335).[7] The trial court overruled defense counsel's objection to the prosecutor's statement that prosecution witnesses had been "honest" during closing argument. (ECF No. 11- 8, PAGEID #1272.) Moreover, the state appellate court indicated that the trial court's jury instructions were appropriate under Ohio law. *White*, 2015 WL 9393518, at *4 ("both this court and the Supreme Court of Ohio have previously found that nearly identical instructions were not so improper as to require reversal, even though they were poorly written . . ."). Likewise, in view of the facts of this case, Petitioner cannot establish prejudice from trial counsel's elicitation of his testimony that he purchased drugs from Juanricus Kibby and supported himself by selling

---

Williams was arrested on other charges, he spoke with the prosecutor. (PAGEID ##858-59.) Williams acknowledged on cross-examination that his testimony differed from the statement(s) he had given to the police. (*See, e.g.*, PAGEID ##859-60.) On re-direct, Williams denied being made any promises by the prosecution in return for his testimony against the Petitioner and indicated that she had told him to be honest and polite. (PAGEID ##872-73.)

[7] The prosecutor stated as follows, in relevant part, during closing argument:

> Mr. Ireland wants you to believe that Miquel Williams is lying to get out of jail 12 days early. I would submit to you that that is ridiculous. The man told you he got a hundred-eighty-day sentence. He told you he didn't want to come out here and testify. We talked about the fact that I said I would talk to his judge if he did come out and testify. What were the two things I asked him to do? Tell the truth and be polite. For 12 days, you're going to frame two men for murder for 12 days in the workhouse? Ridiculous.

Transcript (ECF No. 11-8, PAGEID #1335.)

drugs during the time at issue. (ECF No. 11-7, PAGEID #1149.)

As noted by the state appellate court, the record does not indicate whether the Petitioner knew that his attorney was facing criminal charges during the time of his representation of the Petitioner. However, "there is no affirmative duty to inquire into a possible conflict of interest and [] a defendant must demonstrate that an actual conflict of interest adversely affected the adequacy of representation unless a trial court fails to afford the opportunity to do so." *Smith v. Anderson,* 505 F. Supp. 642, 651 (E.D. Mich. 1980). The United States Court of Appeals for the Sixth Circuit has rejected the argument that a trial court's failure to inquire into an alleged conflict requires automatic reversal of a conviction. *See Moss*, 323 F.3d at 470-71 ("the trial court's failure to inquire into a potential conflict of interest on the part of the defendant's attorney, about which the court knew or reasonably should have known, does not automatically require reversal of the conviction. . .") (citing *Mickens v. Taylor*, 535 U.S. 162 (2002)).

> [A] proposed rule of automatic reversal when there existed a conflict that did not affect counsel's performance, but the trial judge failed to make the *Sullivan* mandated inquiry, makes little policy sense . . . . The trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any way renders the verdict unreliable. Nor does the trial judge's failure to make the *Sullivan* mandated inquiry often make

> it harder for reviewing courts to determine conflict and effect, particularly since those courts may rely on evidence and testimony whose importance only becomes established at trial.
>
> *Mickens,* 122 S. Ct. at 1246, 122 S. Ct. 1237 [sic]. In sum, "the trial judge's failure to inquire into a suspected conflict is not the kind of error requiring a presumption of prejudice." *Mickens*, 122 S. Ct. at 1247, 122 S. Ct. 1237 [sic] (Kennedy, J., concurring).

Moss, 323 F.3d at 471. *See also United States v. Beasley*, 27 F. Supp. 3d 793, 808 (E.D. Mich. 2014) (citations omitted).

Claim five is without merit.

V. Recommended Disposition

Therefore, the Magistrate Judge **RECOMMENDS** that this action be **DISMISSED**.

Petitioner's motion to file a *Reply* to the *Return of Writ* (*see* ECF No. 12) is **GRANTED** and Petitioner's request for a stay of proceedings (ECF No. 12) is **DENIED**.

PROCEDURE ON OBJECTIONS

If any party objects to this *Report and Recommendation*, that party may, within fourteen days of the date of this Report, file and serve on all parties written objections to those specific proposed findings or recommendations to which objection is made, together with supporting authority for the objection(s). A judge of this Court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to

which objection is made. Upon proper objections, a judge of this Court may accept, reject, or modify, in whole or in part, the findings or recommendations made herein, may receive further evidence or may recommit this matter to the magistrate judge with instructions. 28 U.S.C. § 636(B)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to have the district judge review the *Report and Recommendation de novo,* and also operates as a waiver of the right to appeal the decision of the District Court adopting the *Report and Recommendation. See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

The parties are further advised that, if they intend to file an appeal of any adverse decision, they may submit arguments in any objections filed, regarding whether a certificate of appealability should issue.

/s/ Chelsey M. Vascura
CHELSEY M. VASCURA
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 18AP-158

(REGULAR CALENDAR)

12CR-4418

State of Ohio,

Plaintiff-Appellee,

v.

Vincent D. White, Jr.,

Defendant-Appellant.

JUDGMENT ENTRY

Appellant having failed to set forth a reasonable explanation for his failure to attempt to appeal from the trial court's November 30, 2017 judgment until more than ninety (90) days had elapsed, his March 7, 2018 motion for leave to appeal is denied.

/s/ Lisa L. Sadler
Judge Lisa L. Sadler

/s/ Jennifer Brunner
Judge Jennifer Brunner

/s/ Timothy S. Horton
Judge Timothy S. Horton

cc: Clerk, Court of Appeals
Clerk, Court of Claims
Court Assignment Commissioner

APPENDIX F

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

Case No. 12CR-4418

Judge Holbrook

STATE OF OHIO,

Plaintiff,

v.

VINCENT D. WHITE,

Defendant.

DECISION AND ENTRY

This matter came before the Court on Defendant's Petition to Vacate or Set Aside Judgment of Conviction or Sentence. The State has answered and filed a Motion to Dismiss.

Having reviewed the record, the Court dismisses Defendant's Petition. Defendant had until August 6, 2015 to file his Petition. His Petition was filed October 11, 2017, some two years late. For this reason, Defendant's Petition is dismissed.

IT IS SO ORDERED.

Copies to:

Assistant Prosecuting Attorney

Vincent D. White, #A697-564
Ross Correctional Institution
P.O. Box 7010
Chillicothe, OH 45601
Defendant, *pro se*

Franklin County Court of Common Pleas

Date:	11-30-2017
Case Title:	STATE OF OHIO -VS- VINCENT D WHITE
Case Number:	12CR004418
Type:	ENTRY/ORDER

It Is So Ordered.

/s/ Judge Michael J. Holbrook

APPENDIX G

THE SUPREME COURT OF OHIO

Case No. 2016-0184

State of Ohio

v.

Vincent D. White

FILED
May – 4 2016
CLERK OF COURT
SUPREME COURT OF OHIO

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Franklin County Court of Appeals; No. 14AP-160)

/s/ Maureen O'Connor
Maureen O'Connor
Chief Justice

APPENDIX H

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 14AP-160

(C.P.C. No. 12CR-4418)

(REGULAR CALENDAR)

State of Ohio,

Plaintiff-Appellee,

v.

Vincent D. White, Jr.,

Defendant-Appellant.

DECISION

Rendered on December 22, 2015

Ron O'Brien, Prosecuting Attorney, and *Laura M. Swisher*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

DORRIAN, J.

{¶ 1} Defendant-appellant, Vincent D. White ("White"), appeals from a final judgment of the Franklin County Court of Common Pleas that convicted him of, among other crimes, two counts of

aggravated murder and sentenced him to life in prison without the possibility of parole. The judgment followed a jury trial in which White and a co-defendant were found guilty of several offenses arising from a robbery. White argues that his trial counsel was ineffective due to a conflict, that the trial court gave improper instructions to the jury, and that ex parte communications between law enforcement and the trial court led to his being restrained during the trial in a way that denied him his right to a fair trial. We overrule all of White's assignments of error and affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} On August 30, 2012, a Grand Jury indicted White and an alleged co-conspirator. The Grand Jury charged White with one count of aggravated burglary, three counts of aggravated robbery, four counts of aggravated murder, two counts of attempted murder, two counts of felonious assault, and one count of possessing a firearm while under disability. All counts (except the weapon under disability count) contained specifications for the use of a firearm.

{¶ 3} The counts in the indictment arose from a single incident. On July 29, 2012, four men were shot in a house located at 1022 East 17th Avenue in Columbus, Ohio. Keith Paxton (aka "Gutter") and Albert Thompson (aka "T") were killed in the attack. Juanricus Kibby and Miquel Williams suffered bullet wounds but recovered.

{¶ 4} The case went to trial on October 28, 2013. At the trial, both surviving victims identified White as one of the two shooters. In addition, another

witness, Jeffrey Harris, testified that White had told him beforehand about White's plan to rob the house and then afterwards offered Harris a share of the money. Kibby and Williams both had known White for a long time; yet, neither identified him the first time they spoke with police following the shooting. Harris, who was initially suspected of having some involvement in the crime, went to the police to clear his name, but he did not tell the police the story he told at trial about White telling him of his plan to rob the house.

{¶ 5} White's co-defendant presented an alibi witness, who claimed that the co-defendant was not present during the shooting. White admitted that he was at the house and shot some of the people there. However, he claimed that he shot in self-defense because, when he arrived to buy drugs, the four individuals who were subsequently deemed to be the victims, made him get on his knees at gunpoint and were robbing him. Forensic evidence regarding the direction and angles from which some of the victims were shot tended to contradict White's version of the events, as did the fact that White and the other shooter each fired at least six times and the four victims did not return fire. Thompson was shot as if he were getting up from a seated position, and Paxton was shot in the back shoulder. Only two guns were used in the shooting and neither were any of the guns in the possession of the house occupants.

{¶ 6} On November 5, 2013, the trial concluded, and the jury began its deliberations. Two days later, the jury announced its verdict. The jury found White guilty on all counts. The trial court also found White

guilty of having a weapon while under disability. The trial court held a sentencing hearing on January 22, 2014 and sentenced White to life in prison without parole.

{¶ 7} White now appeals.

II. ASSIGNMENTS OF ERROR

{¶ 8} White advances four assignments of error:

> [I.] THE DEFENDANT WAS DEPRIVED OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION BASED UPON THE ACTUAL AND POTENTIAL CONFLICTS OF INTERESTS THE DEFENDANT'S TRIAL COUNSEL HAD IN THIS CASE.
>
> [II.] THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURORS THAT IT HAD TO FIND THE DEFENDANT NOT GUILTY OF AGGRAVATED MURDER BEFORE IT COULD CONSIDER THE DEFENDANT'S GUILT OF THE LESSER-INCLUDED OFFENSE OF MURDER, THE SO- CALLED "ACQUITTAL FIRST" INSTRUCTION THAT WAS HELD TO BE IMPROPER IN *STATE V. THOMAS*, 40 OHIO ST. 3d 213, 533 N.E.2d 286 (1988), AND FURTHER ERRED WHEN IT INSTRUCTED ON THE AGGRAVATED MURDER CHARGES IN COUNTS SEVEN AND EIGHT WITHOUT ALSO INSTRUCTING ON THE LESSER OFFENSE OF MURDER AND DEFENSE COUNSEL WAS

INEFFECTIVE BY FAILING TO OBJECT TO THESE INSTRUCTIONS.

[III.] WHEN THE STATE CLAIMED THAT THE DEFENDANT FLED THE SCENE DUE TO A CONSCIOUSNESS OF GUILT, WHILE THE DEFENDANT MAINTAINED THAT HE FLED THE SCENE OF THE SHOOTING OUT OF FEAR FOR HIS SAFETY, IT WAS PREJUDICIAL CONDUCT FOR THE JUDGE, OVER OBJECTION, TO PICK A SIDE AND INSTRUCT THE JURY ONLY WITH RESPECT TO THE STATE'S THEORY OF GUILT AND TO INSTRUCT ONLY ON THE INFERENCES REQUESTED BY THE STATE AND TO EMPHASIS [sic] AND GIVE UNDUE PROMINENCE ONLY TO THE FACTS THAT SUPPORTED THE STATE'S THEORY.

[IV.] THE TRIAL COURT ERRED WHEN IT VIOLATED THE RULES AGAINST HAVING EX PARTE COMMUNICATIONS WITH THE STATE WHERE THE COURT WAS TOLD EXTREMELY PREJUDICIAL ALLEGATIONS CONCERNING THE DEFENDANTS WHICH SO FRIGHTENED THE COURT THAT IT ORDERED, WITHOUT A PROPER HEARING, EXTRAORDINARY SECURITY MEASURES FOR THE COURTROOM AND THE TRIAL, AND THE ALLEGATIONS WERE SO PREJUDICIAL THAT THEY AFFICETED [sic] THE RIGHTS OF THE DEFENDANT TO A FAIR TRIAL FROM AN IMPARTIAL JUDGE.

III. DISCUSSION

A. First Assignment of Error – Whether White was Deprived of the Right to Conflict-Free Counsel in Violation of the Sixth Amendment

{¶ 9} White asserts that, at the time of the trial, his trial attorney, Javier Armengau, was under indictment in Franklin County and facing very grave challenges to his own freedom, finances, and license to practice law. White argues that this situation created a conflict of interest. That is, White suggests that Armengau would have been conflicted over whether to devote time to preparing his own defense or that of his client; Armengau might have chosen to take a greater percentage of White's financial resources in fees to help finance his own defense rather than hire an investigator in White's case; and Armengau would have been reluctant to vigorously represent White for fear of angering the same prosecutor's office that was prosecuting him, or even, conversely, might have failed to engage in any plea-bargaining efforts in White's case out of an indignant or vengeful desire to gain a victory over the prosecutor's office.

{¶ 10} White argues that there is nothing in the record to show that he was properly advised of the potential conflict of interest or that he waived this potential for conflict on the record or in writing. Plaintiff-appellee, State of Ohio, argues that there is no information in the record of this case regarding Armengau's indictment, conviction, or disciplinary proceedings.

{¶ 11} "'A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.'" *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, ¶ 13, quoting *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus. Though White's brief asserts facts about Armengau's difficulties, the record in this direct appeal contains no evidence or information whatsoever about Armengau's particular situation. Although White refers to the caption of Armengau's criminal case and the caption of his disciplinary case before the Supreme Court of Ohio, he does not expressly request that we take judicial notice of the same. Nevertheless, even if we were to take judicial notice of the fact that Armengau was indicted for a number of serious criminal offenses before White's trial and was convicted and imprisoned for them after White's trial, the record would still be devoid of any factual details regarding Armengau's licensure issues. Furthermore, there is nothing in the record of this direct appeal indicating White was unaware of Armengau's situation. In short, while we understand White's argument, that his counsel may have been distracted and conflicted by the fact that he was suffering severe legal and personal difficulties at the same time that he was engaged in litigating White's murder trial, we lack the necessary facts to fully consider such a matter in a direct appeal. A direct appeal, where the record is limited and where the record contains no mention of any of the relevant facts at issue, is not the vehicle to make such an argument.

{¶ 12} White's first assignment of error is overruled.

B. Second Assignment of Error – Whether the Trial Court Gave an Impermissible Acquit First Instruction

{¶ 13} The Supreme Court of Ohio has held:

> If a jury is unable to agree unanimously that a defendant is guilty of a particular offense, it may proceed to consider a lesser included offense upon which evidence has been presented. The jury is not required to determine unanimously that the defendant is not guilty of the crime charged before it may consider a lesser included offense.

State v. Thomas, 40 Ohio St.3d 213 (1988), paragraph three of the syllabus. The Supreme Court adopted this rule because, though the risk of coerced decisions may be present in any jury deliberation, an "acquittal first" instruction exacerbates such risk. *Id.* at 219-20. "'When the jury is instructed in accordance with the "acquittal first" instruction, a juror voting in the minority probably is limited to three options upon deadlock: (1) try to persuade the majority to change its opinion; (2) change his or her vote; or (3) hold out and create a hung jury.'" *Id.* at 220, quoting *State v. Allen*, 301 Ore. 35, 39, 717 P.2d 1178, 1180 (1986).

{¶ 14} In this case, the trial court instructed on the offense of aggravated murder and then gave the following instruction:

> If you find the State has failed to prove prior calculation and design beyond a reasonable doubt, you must find the Defendant not guilty of

> Aggravated Murder and consider the lesser offense of Murder.

(Tr. 1012.) White argues that this constitutes a prohibited "acquit first" instruction in violation of *Thomas*. (Appellant's Brief, 39-46.) Nonetheless, the state points out that both this court and the Supreme Court of Ohio have previously found that nearly identical instructions were not so improper as to require reversal, even though they were poorly written and though better instructions would have incorporated the "inability to agree" language adopted by *Thomas*. *See, e.g.*, *Thomas* at 220-21; *State v. Wright*, 10th Dist. No. 00AP-985 (Nov. 13, 2001); *State v. Greene*, 10th Dist. No. 90AP-646 (Mar. 31, 1998); *State v. Hawkins*, 10th Dist. No. 97AP-740 (Mar. 24, 1998); *State v. Roe*, 10th Dist. No. 92AP-334 (Sept. 22, 1992). As the Supreme Court outlined in *Thomas*, the preferred approach upon giving instructions to a jury under these circumstances would have been a holding that is easily adaptable to an instruction:

> [You, the] jury must unanimously agree that the defendant is guilty of [aggravated murder] before returning a verdict of guilty on that offense. If [you are] unable to agree unanimously that a defendant is guilty of [aggravated murder], [you] may proceed to consider [the] lesser included offense [of murder] upon which evidence has been presented. [You are] not required to determine unanimously that the defendant is not guilty of the crime [of aggravated murder] before [you] consider a lesser included offense.

Thomas at 220, quoting and adopting *State v. Muscatello*, 57 Ohio App.2d 231 (8th Dist.1977), paragraph three of the syllabus. Moreover, the Ohio Jury Instructions include their own version of what amounts to the *Thomas* instruction:

> If all of you are unable to agree on a verdict of either guilty or not guilty of (*insert greater offense charged*), then you will continue your deliberations to decide whether the state has proved beyond a reasonable doubt all the essential elements of the lesser included offense of (*insert lesser offense*).

Ohio Jury Instructions, CR Section 425.09 (Rev. May 2, 2015).

{¶ 15} In this case, trial counsel failed to object to the trial court's instruction or to request a proper *Thomas* instruction. Thus, we cannot take notice of this error unless we find that it constituted plain error. "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B). The Supreme Court of Ohio has recently reiterated that:

> [This rule places] "three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial

court's error must have affected the outcome of the trial."

State v. Lynn, 129 Ohio St.3d 146, 2011-Ohio-2722, ¶ 13, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002); *see also State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶ 62. In this case, considering existing case law in which similar instructions to those given here were not reversed, we cannot say that this error is plain. Under these circumstances, we overrule White's second assignment of error.

C. Third Assignment of Error – Whether the Trial Court Erred in Instructing that Flight Could be Considered as Evidence of Guilt Where Defendant Claimed Self-Defense and Presented Other Factual Explanations for his Flight

{¶ 16} At trial, it was undisputed that White left the scene of the shooting on foot, disposed of the gun in the trash, checked into a hotel under someone else's name, and stayed there for several days, spending time with his daughter and consulting with an attorney before voluntarily turning himself in to police. The prosecution argued that this behavior was not the behavior of a person who had acted in self-defense and that it showed consciousness of guilt. The defense argued that White fled the scene initially because he was afraid for his life and that he stayed in the hotel under an assumed name to give himself the opportunity to retain and consult with a lawyer and spend some time with his daughter before surrendering himself. The trial court, over objection by the defense, instructed the jury as follows:

> In this case, there was evidence that the Defendant Vincent White fled from the scene. You are aware – I mean – you are instructed that you may not presume the Defendant guilty from such evidence. You may, however, infer a consciousness of guilt regarding the evidence of the Defendant's alleged flight. An accused's flight and related conduct can be considered evidence of consciousness of guilt and thus of guilt itself.

(Tr. 1021.)

{¶ 17} White argues that it was error for the trial court to have given an instruction on flight in this case because there were explanations for his behavior after the shooting other than consciousness of guilt and that the trial court, in giving such an instruction, was granting a judicial imprimatur of the prosecution's view of the facts. Essentially, White argues that, in giving that instruction and only that instruction, the judge picked a side and implicitly recommended a factual inference to the jury. The state responds that giving a flight instruction is a matter of discretion, and the word "may" in the instruction leaves open the possibility that the jury could have chosen not to infer "consciousness of guilt" and instead credit White's explanation. The determination of whether or not to give a flight instruction is a matter within the trial court's discretion. *See, e.g.*, *State v. Hill*, 8th Dist. No. 98366, 2013-Ohio-578, ¶ 48-49. Under typical circumstances, as the state argues, if there is sufficient evidence to show that a defendant attempted to avoid apprehension, a flight instruction is proper. *Id.* at ¶ 49. However, White does not argue

that there was insufficient evidence in the record to justify an instruction about flight; he argues that it was improper to give a flight instruction that endorsed only the inference preferred by the state where the facts supported more than one inference about his conduct, and each side argued for a different inference.

{¶ 18} In support of his assignment of error, White cites cases regarding jury instructions about factual inferences that may be drawn from a refusal to take a breath test in an OVI case. (Appellant's Brief, 48-53, citing *Maumee v. Anistik*, 69 Ohio St.3d 339 (1994); *Columbus v. Maxey*, 39 Ohio App.3d 171 (10th Dist.1988).) The facts in these cases are not analogous to the facts in the case before us. Here, after shooting the victims, White left the scene, disposed of the gun, stayed in a hotel under another's name, and turned himself in.

{¶ 19} More factually analogous to the case at bar is *State v. Shepherd*, 10th Dist. No. 07AP-223, 2007-Ohio-5405. In that case, the appellant was charged with robbery. The evidence presented at trial showed that the appellant and his passenger drove away from the scene after the passenger robbed a gas station. The appellant admitted that he was driving the car but that he had picked up the passenger on the side of the road and knew him only as "Willie." *Id.* at ¶ 3. On appeal, the appellant argued that the trial court erred when it instructed the jury on flight as evidence of guilt by giving the following instructions: "Flight or its analogous conduct may be considered by you as consciousness of guilt." *Id.* at ¶ 5. The appellant argued that the court should have

given the instruction outlined in the Ohio Jury Instructions[1] at the time. This court determined,

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[1] The *Ohio Jury Instructions*, Section 405.25 (2005), at the time provided:

> CONSCIOUSNESS OF GUILT. Testimony has been admitted indicating that the defendant [fled the scene]. * * * You are instructed that [flight] alone does not raise a presumption of guilt, but it may tend to indicate the defendant's (consciousness) * * * of guilt. If you find that the facts do not support that the defendant [fled], or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the defendant engaged in such conduct and if you decide that the defendant was motivated by (a consciousness) * * * of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crime[] charged. You alone will determine what weight, if any to give to this evidence.

Shepherd at ¶ 6.

Today, *Ohio Jury Instructions*, CR Section 409.13 (Rev. Aug. 17, 2005) reads:

> CONSCIOUSNESS OF GUILT. Testimony has been admitted indicating that the defendant (fled the [scene] * * *. You are instructed that (describe defendant's conduct) alone does not raise a presumption of guilt, but it may tend to indicate the defendant's (consciousness) (awareness) of guilt. If you find that the facts do not support that the defendant [fled], or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider this evidence for any purpose. However, if you find that the facts support that the defendant engaged in such conduct and if you decide that the defendant was motivated by (a consciousness) (an awareness) of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crime(s)

after comparing the given instruction to the instruction suggested by the appellant, that the trial court did not abuse its discretion. The court noted that, while the Ohio jury instruction is "more detailed and explicit, the instruction given by the trial court is not incorrect and does not conflict with the suggested OJI instruction." *Id.* at ¶ 8. The court further observed that the given jury instruction "substantially mirrors the language from paragraph six of the syllabus in *State v. Eaton*, 19 Ohio St.2d 145, 160 (1969), in which the court stated that "'flight from justice, and its analogous conduct, have always been indicative of a consciousness of guilt.'"" *Shepherd* at ¶ 18. The court also observed that: (1) the given instruction indicated that the jury "may" find flight demonstrated consciousness of guilt and left open the possibility that there may have existed other motivations to move appellant to leave the scene; and (2) jury instructions must be considered as a whole and the court had also instructed the jury that it was it's sole function to judge the disputed facts.[2] *Id.*

{¶ 20} In *Eaton*,[3] the appellant was charged with first-degree murder during an attempted robbery. The

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charged. You alone will determine what weight, if any, to give to this evidence.

[2] The trial court in the case at bar also instructed the jury that it was the function of the jury to judge the disputed facts. "You decide the disputed facts, and the court provides the instructions of law." (Tr. 989.) The court further instructed: "You are the sole judges of the facts, the credibility of the witnesses, and the weight of the evidence." (Tr. 992.)

[3] In a more recent case, *State v. Harris*, 142 Ohio St.3d 211, 2015-Ohio-166, the Supreme Court of Ohio noted that

appellant claimed the shooting was accidental. Evidence was presented that the appellant left the scene "without attempting to aid the person whom he claims was accidentally killed." *Id.* at 160. In considering whether the jury was properly instructed on the element of intent to commit homicide, the Supreme Court held that: "Flight from justice, and its analogous conduct, may be indicative of a consciousness of guilt." *Id.* at paragraph six of the syllabus. The Supreme Court noted that: " 'Flight from justice, and its analogous conduct, has always been indicative of a consciousness of guilt. It is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct are admissible as evidence of consciousness of guilt, and thus of guilt itself.' " *Id.* at 160, quoting 2 Wigmore, *Evidence*, Section 276 (3 Ed.) at 111, and cases cited.

{¶ 21} In *State v. Taylor*, 78 Ohio St.3d 15, 29-30 (1997), the appellant was charged with aggravated murder. Evidence was presented at the trial that, after shooting the victim, the appellant and an accomplice left the scene and while leaving, the appellant yelled out of the car window: "It was self-defense." The Supreme Court of Ohio considered whether the following instruction was given in error: "Flight, in and of itself, does not raise a presumption of guilt, but unless satisfactorily explained, it tends to show consciousness of guilt or a guilty connection with the

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"[c]onsciousness of guilt is no different from guilt itself." *Id.* at ¶ 34, citing *Eaton*; *Williams*.

crime." *Id.* at 27. The Supreme Court held that, despite the appellant's claims, the instruction was "neither arbitrary nor unreasonable, and did not create an improper mandatory presumption." *Id.* The Supreme Court quoted from *Eaton* in stating: " 'Flight from justice * * * may be indicative of a consciousness of guilt.' " *Id.*

{¶ 22} In consideration of our precedent in *Shepherd* and the Supreme Court's observations in *Eaton*, *Harris*, and *Taylor*, we cannot say that the trial court abused its discretion in giving this instruction. Accordingly, we overrule White's third assignment of error.

D. Fourth Assignment of Error – Whether the Trial Court Erred in Imposing Security Measures Upon Defendant Without a Hearing Based Upon Out-of-Court Communications from Jail Officials

{¶ 23} White argues that the trial court engaged in impermissible ex parte communications regarding the threat White and his co-defendant posed to courtroom safety, as well as communications about inappropriate social media (Facebook) posts by a relative of White. White argues that the trial court improperly used this information, without the benefit of a hearing to order that White and his co-defendant be shackled (leg irons only)[4] during the trial. White urges us to find that this shows that he did not receive a fair trial from an impartial judge, according to his right.

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[4] White's co-defendant was also required to wear a stun belt underneath his outer clothing.

{¶ 24} Rule 2.9 of The Code of Judicial Conduct states that a "judge shall not initiate, receive, permit, or consider ex parte communications." The state, citing Black's Law Dictionary, argues that communications from sheriff's deputies at the jail are not ex parte communications in the relevant sense. The current edition of Black's Law Dictionary defines "*ex parte* communication" as: "A communication between counsel and the court when opposing counsel is not present." Black's Law Dictionary (10th Ed.2014). However, notwithstanding Black's definition, the comments to Rule 2.9 suggest that the term is not to be read so narrowly in this context. Comment 3 to Jud.Cond.R. 2.9 reads: "The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this rule." We therefore cannot agree with the state. Sheriff's deputies stationed at the jail are in a unique position to gather information about persons in their custody. Were their communications beyond the reach of this rule, a deputy could overhear a confession or even a malicious rumor and relay that to the judge ex parte without any opportunity for the defense to challenge the matter (or even be aware of it). Law enforcement officers (who are associated with the state or government by their very nature) are not privileged to engage in substantive ex parte communications with a judge about pending cases any more than a defense attorney's secretary, paralegal, or investigator could do so.

{¶ 25} However, even though communications from sheriff deputies at the jail can be characterized as ex parte communications, there are specified exceptions within the rule that support communications to a judge by sheriff's deputies. One that we find relevant (and that will consistently be relevant to proper communications between a judge and courthouse or jail security) is this: "When circumstances require it, an *ex parte* communication for scheduling, administrative, or emergency purposes, that does not address substantive matters or issues on the merits, is permitted, provided the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication." Jud.Cond.R. 2.9(A)(1). Here, the communications in question were not about the merits of the case, they were about proper emergency or administrative security issues. Rather, the deputies overheard comments about taking over the courtroom or otherwise disrupting proceedings. Therefore, it was proper to bring these emergency/administrative concerns to the trial court's attention ex parte. Whether the court's response was appropriate is a different question.

{¶ 26} The usual practice is for a defendant to appear in court while free of shackles. *State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, ¶ 79, citing *State v. Woodards*, 6 Ohio St.2d 14, 23 (1966). This is the accepted procedure because the presence of restraints tends to erode the presumption of innocence. *Id.*, citing *State v. Carter*, 53 Ohio App.2d 125, 131 (4th Dist.1977). But it is widely accepted that a prisoner may be shackled where there is a danger of violence or escape. *Id.*, citing *Woodards* at

23. The decision to shackle is left to the sound discretion of the trial court. *Id.*, citing *State v. Richey*, 64 Ohio St.3d 353, 358 (1992).

{¶ 27} In this case, it is clear that, notwithstanding having received some information about the potential risk White and his co-defendant might have posed to the safety of the courtroom and persons present, along with recommended restraints as a precaution, the trial court was mindful of how implementing these recommendations might be viewed by the jury. The transcript reads in relevant part as follows:

> THE COURT: Okay. I was informed -- it was last Thursday -- that there had been some discussions by the two Defendants relative to the possibility of trying to hijack the courtroom. This was by a witness that was investigated by the sheriff's department. Don't know if those words were ever transposed [sic] between you guys, but I'm going to be up on utmost security because of it.
>
> At that point in time, I had a discussion with Corporal Davis from the sheriff's office. I've also had discussions with [the] Sheriff.
>
> * * *
>
> I have some concerns about security. We went though the various options. There's some precautions I took. It's my understanding that Mr. Boone currently has a belt on him * * *. Okay. Now, you guys will be manacled together underneath the table. * * *
>
> * * *

Now, we're going to leave the front rows empty, and basically everybody will be checked coming in, okay?

Now, Corporal Davis, did I misstate anything in what I put on the record?

CORPORAL DAVIS: No, Your Honor, you didn't.

THE COURT: Okay. Gentlemen, the question I have left is, do I handcuff you?

Now, we have to have an understanding here. It's the deputies' request that I handcuff you, but I want you to have a fair trial, okay? I won't do anything about the manacles. I've got two of you, so that's got to be between the two of you, okay? If I have any problems, the cuffs are going on, guys, okay?

[APPELLANT]: Yes, sir.

* * *

CORPORAL DAVIS: Just for the record, on behalf of the sheriff's department, Corporal Thomas Davis, I would like to formally request on behalf of the sheriff's office, due to both these individuals being in enough physical altercations and fights in the jail, that they've both been placed in administrative segregation, which is 23-hour lockdown because they don't get along safely with other people that are in the jail, when they're moved about, they're both moved by two deputy supervisors, handcuffs, leg irons, and with a marked chain, which is, what we call, a belly chain, on behalf of the sheriff's office, I would request that they both wear that. I know that

> Your Honor has his discretion to do whatever you want, but on the record for the sheriff's office, I would like to request that.
>
> THE COURT: Okay. Well, as of now, I expect them to act appropriately. If I have one inkling, I have no problem putting them on, okay?
>
> My job is to give you a fair trial, but, gentlemen, I'm not going to have anybody turn this courtroom upside down.

(Tr. 46-48.)

{¶ 28} The trial court did not abuse its discretion by engaging in permitted ex parte communications with the Sheriff's Office regarding emergency and administrative security matters or when it held a hearing at which it acted upon the advice of the Sheriff's Office by manacling the defendants' legs under the table in a way that would not have been obvious to the jury. White's fourth assignment of error is overruled.

IV. CONCLUSION

{¶ 29} For the foregoing reasons, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LUPER SCHUSTER, J., concurs.

BRUNNER, J., concurs in part and dissents in part.

BRUNNER, J., concurring in part and dissenting in part.

{¶ 30} I respectfully offer this opinion on matters discussed by the majority, concurring in judgment as to the first, second, and fourth assignments of error, and dissenting from the opinion of the majority on its resolution of appellant's third assignment of error. For ease of review, this separate opinion sets forth discussion according to the four assignments of error.

Concurring on the Majority's Opinion as to Appellant's First Assignment of Error

{¶ 31} I would augment the majority's discussion of the first assignment of error, in which appellant asserts that, as a defendant named in a criminal indictment and trial, he was deprived of his right to the effective assistance of counsel in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16, of the Ohio Constitution, based on the actual and potential conflicts of interests the defendant's trial counsel had in the case. I would acknowledge that a pending criminal case against a defense attorney by the same prosecutor's office or in the same jurisdiction as that which prosecutes the attorney's client can create a conflict of interest. *See, e.g.*, *State v. Dean*, 127 Ohio St.3d 140, 2010-Ohio-5070; *State v. Foster*, 10th Dist. No. 90AP-05 (Nov. 6, 1990); *United States v. Levy*, 25 F.3d 146 (2d Cir.1994); *United States v. McLain*, 823 F.2d 1457 (11th Cir.1987); *United States v. De Falco*, 644 F.2d 132, 138-39 (3d Cir.1979).

{¶ 32} For instance, in *Levy*, the conflict arose not only from the fact that the defense attorney was awaiting sentencing on his own offenses in the same district as the defendant, but also from the fact that

the defense attorney was a potential witness in the defendant's case, represented another client with interests possibly adverse to the defendant, and was under investigation for allegedly aiding a co-defendant in absconding to Israel. *Levy* at 150-52. In *McClain*, the appellate court analyzed the different treatment counsel gave his own situation compared to his defendant's case in concluding that an actual conflict existed. *McClain* at 1463-64. In *De Falco*, the appellate court considered the exact extent to which the client was aware of his attorney's legal troubles and the fact that the attorney appeared to have misled the client about the extent of the problems, their potential to affect the client's representation, and the potential that further fact development might or might not show waiver of the conflict by the client. *De Falco* at 134, 136-37. In *Dean*, it was not merely the fact of looming criminal contempt charges that required reversal, but the fact that the judge bringing the contempt charges (who was also the trial judge in that defendant's trial) had a personal bias against the defense attorneys involved. Similarly in *Foster*, it was not general or unrelated legal problems of defense counsel that created a problem. Rather *Foster* concerned allegations against defense counsel by the trial court and the prosecuting attorney in the defendant's trial that had an impermissible chilling effect on defense counsel's ability to vigorously litigate the trial. I agree with the majority that the cases cited by White do not support the argument that the mere fact of indictment or investigation per se creates a conflict requiring reversal. Rather, a detailed examination of the factual circumstances is necessary. We do not

have this in the record, and thus, I agree with the majority that appellant's first assignment of error should be overruled.

Concurring on the Majority's Opinion as to Appellant's Second Assignment of Error

{¶ 33} As to appellant's second assignment of error, I concur with the majority's resulting opinion but would add discussion to what is stated in the majority opinion (that the trial court erred when it instructed the jury that it had to find defendant not guilty of aggravated murder before it could consider lesser-included offenses, the so-called "acquittal first" instruction held improper in *State v. Thomas,* 40 Ohio St.3d 213 (1988),and further erred when it instructed on the aggravated murder charges in Counts 7 and 8 without also instructing on the lesser offense of murder, along with ineffectiveness of defense counsel in failing to object). I would note that, a jury in a criminal case cannot "find" anything by less than a unanimous number. Ohio Constitution, Article I, Section 5; Crim.R. 31(A). If there is no unanimity, the jury has not made a "finding" that the state "failed to prove" anything; rather, it is hung. It was impermissible for the jury to "find the State has failed to prove prior calculation and design" and then "find the Defendant not guilty of Aggravated Murder" with anything other than unanimity. Hence the trial court was implicitly instructing the jury that before considering the lesser offense of murder, its members needed to unanimously "find the Defendant not guilty." Or, to put it more simply, the trial court by its instruction guided the jury to acquit on aggravated murder

before considering murder, exactly as is prohibited by the rule in *Thomas*.

{¶ 34} The holdings that distinguished *Thomas* cited by the majority and offered by the state, such as *State v. Wright*, 10th Dist. No. 00AP-985 (Nov. 13, 2001); *State v. Greene*, 10th Dist. No. 90AP-646 (Mar. 31, 1998); *State v. Hawkins*, 10th Dist. No. 97APA06-740 (Mar. 24, 1998); *State v. Roe*, 10th Dist. No. 92AP-334 (Sept. 22, 1992), for nearly identical instructions held to be not so improper as to require reversal even though they were poorly written and though better instructions would have incorporated the "inability to agree" language adopted by *Thomas* are not to be disparaged. However, I believe it is time more trial courts begin to eschew the barely acceptable instructions that have been heretofore used to "scrape by" in assisting a jury to assess evidence and attempt to reach a verdict. Rather, I would prefer to see a jury embrace the instructions regarding the "inability to agree" that were expressly adopted and recommended by *Thomas* and that have been quoted by the majority in its opinion. The trial court should have given the *Thomas* instruction, either substantially as adopted by *Thomas* or as set forth in the Ohio Jury Instructions. Failure do so was error. However, I agree with the majority that, because appellant's trial counsel failed to object to the trial court's instruction or to request a proper *Thomas* instruction that we can only take notice of this if it is plain error; I agree with the majority that it was not plain error, and thus, that appellant's second assignment of error should be overruled.

Dissenting from the Majority's Opinion as to Appellant's Third Assignment of Error

{¶ 35} As to appellant's third assignment of error, I dissent from the opinion of the majority and would sustain appellant's third assignment of error. Appellant posits that the trial court erred in instructing that flight could be considered as evidence of guilt where appellant claimed self-defense and presented other, factual explanations for his flight. At trial, it was undisputed that White left the scene of the shooting on foot, disposed of the gun in the trash, checked into a hotel under someone else's name, and stayed there for several days, spending time with his daughter and consulting with an attorney before voluntarily turning himself in to police. The prosecution argued that this behavior was not the behavior of a person who had acted in self-defense and that it showed consciousness of guilt. The defense argued that White fled the scene initially because he was afraid for his life and that he stayed in the hotel under an assumed name to give himself the opportunity to retain and consult with a lawyer and spend time with his daughter before surrendering himself. The trial court, over objection by the defense, instructed the jury as follows:

> In this case, there was evidence that the Defendant Vincent White fled from the scene. You are aware – I mean – you are instructed that you may not presume the Defendant guilty from such evidence. You may, however, infer a consciousness of guilt regarding the evidence of the Defendant's alleged flight. An accused's flight

> and related conduct can be considered evidence of consciousness of guilt and thus of guilt itself.

(Tr. 2021.)

{¶ 36} White argues that it was error for the trial court to have given an instruction on flight in this case because there were explanations for his behavior after the shooting other than consciousness of guilt and that the trial court, in giving such an instruction, was granting a judicial imprimatur of the prosecution's view of the facts. Essentially White argues that, in giving that instruction and only that instruction, the judge picked a side and implicitly recommended a factual inference to the jury. White does not cite, nor was I able to find, a factually similar case sustaining his argument in the context of a flight instruction. However, White does cite cases regarding jury instructions about factual inferences that may be drawn from a refusal to take a breath test in an OVI case. (White's Brief, 48-53, citing *Maumee v. Anistik*, 69 Ohio St.3d 339 (1994); *Columbus v. Maxey*, 39 Ohio App.3d 171 (10th Dist.1988).) I would find these cases persuasive.

{¶ 37} In *Maxey*, the defendant was arrested for allegedly driving under the influence and he refused to take a breathalyzer based on his desire to seek the advice of counsel first. *Maxey* at 172. The trial court instructed the jury that "you may consider, as part of the evidence, that the defendant's refusal of the examination was because he believed that he was under the influence of alcohol at the time the refusal was made." *Id.* at 173-74. In reversing, this court pointed out that "a judge in instructing a jury should not single out parts of the testimony and instruct as

to the fact such testimony tends to prove. This places undue weight upon a part only of the evidence." *Id.* at 174, citing *Lambert v. State*, 105 Ohio St. 219 (1922); *Morgan v. State*, 48 Ohio St. 371 (1891). Then we concluded that, in instructing the jury, "the court failed to include the possibility that [Maxey] refused in good faith to take the test. Therefore, his instruction was incomplete and prejudicial to [Maxey]." *Id.*

{¶ 38} In *Anistik*, the Supreme Court of Ohio confronted a somewhat similar situation. The defendant there initially refused to take a breath test because she was concerned about whether medication she was taking for her kidneys would affect the results. *Anistik* at 343. Upon being assured that it would not, she agreed to take the test. *Id.* But then she withdrew her consent again after being denied access to the bathroom and speaking with her attorney. *Id.* Despite these explanations for her refusal, the trial court instructed the jury that "refusal may but it is not required to be considered by you as evidence that the defendant's refusal to submit to a chemical analysis was because the defendant believed she was under the influence of alcohol. You may consider this evidence along with all the other facts and circumstances in evidence if you wish." *Id.* At 341. In affirming the lower appellate court's reversal of the trial court, the Supreme Court reasoned as follows:

> [A]n instruction by a trial judge to a jury, with regard to a defendant's refusal to submit to a chemical test, must not be one-sided. It is, of course, permissible for a trial judge to instruct a

> jury that the defendant's refusal to submit to a chemical test is evidence of his or her intoxication at the time of the taking of the test. However, the trial judge should not invade the province of the jury. That is precisely what occurred in the instant case when the trial judge charged the jury that they could consider the fact that appellee refused to take the test "because the defendant believed she was under the influence of alcohol."
>
> The reason appellee refused to take the breath test is a disputed issue of fact to be resolved by the jury. As is apparent here, circumstances may exist where the refusal to submit to a chemical test by a person suspected of driving while under the influence of alcohol is not based on consciousness of guilt.

Id. at 343-44.

{¶ 39} In the case under review there are competing explanations for why White left the scene, disposed of the gun, stayed in a hotel under another's name, and turned himself in. The state argued that he did so to avoid capture because he knew he was guilty of murder. The defense argued that he left the scene, fleeing for his life after being robbed at gunpoint and having been forced to defend himself. The defense further argued that then, realizing that he might be in trouble for possessing the gun and buying drugs (and perhaps even being wrongly implicated as a murderer), White disposed of the gun and stayed in a hotel to avoid capture long enough to retain counsel and put his family affairs in order before embarking on an arduous attempt to clear his name. The state's view, that White was guilty and

attempting to evade capture, perhaps does a better job of explaining disposal of the gun. White's explanation, that he wanted to avoid potential retribution from associates of the people he shot and wanted a little breathing space to get a lawyer and put his affairs in order, perhaps does a better job of explaining why he voluntarily turned himself in. Both the state and White's explanations competently explain why White left the scene and stayed in a hotel under another person's name. In my view, it was not an abuse of discretion for the trial judge to have instructed on flight because there was evidence of flight. But I believe it was error for that instruction to have endorsed the state's preferred inference to the exclusion of White's.

{¶ 40} The Supreme Court, in *Anistik*, endorses a more factually neutral instruction:

> "Evidence has been introduced indicating the defendant was asked but refused to submit to a chemical test of his [or her] breath to determine the amount of alcohol in his [or her] system, for the purpose of suggesting that the defendant believed he [or she] was under the influence of alcohol. If you find the defendant refused to submit to said test, you may, but are not required to, consider this evidence along with all the other facts and circumstances in evidence in deciding whether the defendant was under the influence of alcohol."

Id. at syllabus, quoting 4 *Ohio Jury Instructions* 405, Section 545.25(10) (1993): A similarly balanced instruction should have been given in this situation.

The trial court should have instructed more neutrally, for example, as follows:

> Evidence has been introduced indicating the defendant fled the scene of the shooting, discarded his gun, and thereafter stayed in a hotel under another's name, spent time with his daughter, and hired a lawyer, before voluntarily turning himself in. If you find the defendant engaged in this conduct, you may, but are not required to, consider this evidence along with all the other facts and circumstances in evidence in deciding whether the defendant is guilty of the offenses charged.

This appropriately draws the jury's attention to all of White's behavior following the shooting and reminds the jury that there are inferences that may be drawn from such behavior without suggesting that the trial court prefers one side's inferences over the other's.[5]

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[5] I would also note that the Ohio Jury Instructions include a template for an instruction on consciousness of guilt that, unlike the instructions given in this case, explicitly alerts the jury to the possibility that other motivations for flight may exist.

> Testimony has been admitted indicating that the defendant (fled the [scene] [*describe jurisdiction*]) (escaped from custody) (resisted arrest) (falsified his/her identity) (changed appearance) (intimidated a witness) (attempted to conceal a crime) (*describe other conduct*). You are instructed that (*describe defendant's conduct*) alone does not raise a presumption of guilt, but it may tend to indicate the defendant's (consciousness) (awareness) of guilt. **If you find that the facts do not support that the defendant (*describe defendant's conduct*), or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the**

{¶ 41} In opposition to the reasoning above, the state argues that the word "may" in the instruction leaves open the possibility that the jury could have chosen not to infer "consciousness of guilt" and instead credit the defendant's explanation. (State's Brief, 35-36.) This court has held that the word "may" in a flight instruction appropriately preserves the jury's role to find that the defendant did or did not flee and that he did or did not have a guilty conscience. *State v. Bass*, 10th Dist. No. 12AP-622, 2013-Ohio-4503, ¶ 31; *State v. Shepard*, 10th Dist. No. 07AP-223, 2007-Ohio-5405, ¶ 8.

{¶ 42} However preserving the fact-finding role of the jury is not the concern White raises, nor is it the reason on which I would reverse. I agree that the word "may" in the trial court's instruction allowed the jury to decide whether or not to believe that White fled, and if he did, whether or not to believe that he had a guilty conscience. What I would find to be improper is that the trial court's instruction suggested only the prosecution's preferred inference. In both *Maxey* and *Anistik*, the original jury instructions included the word "may" at the relevant

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> **defendant's motivation was, then you should not consider this evidence for any purpose**. However, if you find that the facts support that the defendant engaged in such conduct and if you decide that the defendant was motivated by (a consciousness) (an awareness) of guilt, you may, but are not required to, consider that evidence in deciding whether the defendant is guilty of the crime(s) charged. You alone will determine what weight, if any, to give to this evidence.

(Bold emphasis added.) Ohio Jury Instructions, 2CR Section 409.13 (Rev. Aug. 17, 2005).

juncture, and yet, that did not solve the unfairness inherent in suggesting only the state's preferred factual inference to the jury. *Anistik* at 341, quoting the Jury Instructions (disapproving of an instruction that "refusal *may* but it is not required to be considered by you as evidence that the defendant's refusal to submit to a chemical analysis was because the defendant believed she was under the influence of alcohol. You *may* consider this evidence along with all the other facts and circumstances in evidence if you wish.") (emphasis added.); *Maxey* at 173-74 (disapproving of the instruction "you *may* consider, as part of the evidence, that the defendant's refusal of the examination was because he believed that he was under the influence of alcohol at the time the refusal was made"). (Emphasis added.) The word "may" does not disturb the conclusion that the jury instructions given in this case (where there were competing inferences about White's flight) impermissibly preferred the prosecution's inference to the exclusion of the defense's inferences.

{¶ 43} The state also argues that giving a flight instruction is a matter of discretion and that where the evidence supports such an instruction, reversal is inappropriate. The state is correct; whether or not to give a flight instruction is a matter within the trial court's discretion. *See, e.g.*, *State v. Hill*, 8th Dist. No. 98366, 2013-Ohio-578, ¶ 48. Under typical circumstances, if there is sufficient evidence to show that a defendant attempted to avoid apprehension, a flight instruction is proper. *Id.* at ¶ 49. However this argument misses the point. White does not argue that there was insufficient evidence in the record to justify an instruction about flight; rather, White

argues that it was improper to give a flight instruction endorsing only the inference preferred by the state where the facts supported and the parties argued more than one inference. None of the cases the state cites squarely addresses this same fairness issue. *State v. Taylor*, 78 Ohio St.3d 15, 27 (1997) (declining to find plain error in a flight instruction where the defendant testified and the instructions included consideration of the defendant's explanations for his flight); *Bass* at ¶ 2, 25-32 (overruling an argument that the flight instruction failed to permit the jury to consider other inferences besides guilty conscience where the defendant presented no other reasons for having led the "police on a seven or eight minute car chase"); *State v. Nichols*, 9th Dist. No. 24900, 2010-Ohio-5737, ¶ 7-13 (declining to find plain error or sustain an argument that a flight instruction told a jury that a fact essential to the conviction had been established by the evidence where the instruction considered other motives for the defendant's conduct); *State v. Jeffries*, 182 Ohio App.3d 459, 2009-Ohio- 2440, ¶ 78-83 (11th Dist.) (overruling an argument by a defendant that "there was no evidence of flight" and finding that the trial court did not abuse its discretion in giving a flight instruction); *Shepard* at ¶ 5-9 (overruling arguments that the flight instruction was too terse and confusing); *State v. Banks*, 10th Dist. No. 03AP-1286, 2005-Ohio-1943, ¶ 20 (declining to allow a defendant to reopen his appeal where the flight instruction was not arbitrary or unreasonable and did not create an improper mandatory presumption); *State v. Draper*, 10th Dist. No. 02AP-1371, 2003-Ohio-3751, ¶ 7-8, 30-33 (declining to find either plain

error or ineffective assistance of counsel in trial counsel's failure to object to a flight instruction that did not contemplate innocent explanations for flight where the defendant was combative at a traffic stop, admitted he fled the police, and apparently failed to offer any innocent explanation for his flight).

{¶ 44} Had White not explained his flight and offered alternative inferences for the jury's consideration, the trial court's flight instruction would have been proper. However, where there are competing inferences, such as are here, I would find that it is improper to instruct on only one side's suggested inference. Like the instructions in *Maxey* and *Anistik*, the instruction given by the trial court in this case suggested that the jury consider only the state's preferred factual inference. As such, like the instructions in *Maxey* and *Anistik*, it was improper and prejudicial, and I would sustain White's third assignment of error.

Concurring on the Majority's Opinion as to Appellant's Fourth Assignment of Error

{¶ 45} I concur with the majority as to its discussion and decision on appellant's fourth assignment of error.

APPENDIX I

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

Termination No. 5 By DP

Case No. 12CR-4418

Judge HOLBROOK

STATE OF OHIO,

Plaintiff,

v.

VINCENT D. WHITE,

Defendant.

JUDGMENT ENTRY
(Prison Imposed)

On October 28, 2013, the State of Ohio was represented by Assistant Prosecuting Attorneys George W. Wharton and Elizabeth A. Geraghty, and the Defendant was represented by Attorney Javier H. Armengau. The case was tried by a jury which returned a verdict on November 7, 2013, finding the Defendant:

GUILTY of **Count One** of the Indictment, to wit: **AGGRAVATED BURGLARY, WITH SPECIFICATION,** in violation of Section 2911.11 of the Ohio Revised Code, being a Felony of the First Degree;

GUILTY of **Count Two** of the Indictment, to wit: **AGGRAVATED ROBBERY, WITH**

SPECIFICATION, in violation of Section 2911.01 of the Ohio Revised Code, being a Felony of the First Degree;

GUILTY of **Count Three** of the Indictment, to wit: **AGGRAVATED ROBBERY, WITH SPECIFICATION,** in violation of Section 2911.01 of the Ohio Revised Code, being a Felony of the First Degree;

GUILTY of **Count Four** of the Indictment, to wit: **AGGRAVATED ROBBERY, WITH SPECIFICATION,** in violation of Section 2911.01 of the Ohio Revised Code, being a Felony of the First Degree;

GUILTY of **Count Five** of the Indictment, to wit: **AGGRAVATED MURDER, WITH SPECIFICATION,** in violation of section 2903.01 of the Ohio Revised Code, being an Unspecified Felony;

GUILTY of **Count Six** of the Indictment, to wit: **AGGRAVATED MURDER, WITH SPECIFICATION,** in violation of section 2903.01 of the Ohio Revised Code, being an Unspecified Felony;

GUILTY of Count Seven of the Indictment, to wit: **AGGRAVATED MURDER, WITH SPECIFICATION,** in violation of section 2903.01 of the Ohio Revised Code, being an Unspecified Felony;

GUILTY of Count Eight of the Indictment, to wit: **AGGRAVATED MURDER, WITH SPECIFICATION,** in violation of section 2903.01 of the Ohio Revised Code, being an Unspecified Felony;

GUILTY of Count Nine of the Indictment, to wit: **ATTEMPTED MURDER, WITH**

SPECIFICATION, in violation of section 2903.02 of the Ohio Revised Code, being a Felony of the First Degree;

GUILTY of Count Ten of the Indictment, to wit: **ATTEMPTED MURDER, WITH SPECIFICATION,** in violation of section 2903.02 of the Ohio Revised Code, being a Felony of the First Degree;

GUILTY of Count Eleven of the Indictment, to wit: **FELONIOUS ASSAULT, WITH SPECIFICATION,** in violation of section 2903.11 of the Ohio Revised Code, being a Felony of the Second Degree;

GUILTY of Count Twelve of the Indictment, to wit: **FELONIOUS ASSAULT, WITH SPECIFICATION,** in violation of section 2903.11 of the Ohio Revised Code, being a Felony of the Second Degree;

The Defendant waived his right to a trial by a Jury and elected to be tried by the Judge of this Court as to Count Thirteen. The Court found the Defendant **GUILTY** of **Count Thirteen** of the indictment, to wit: **HAVING WEAPON WHILE UNDER DISABILITY,** in violation of Section 2923.13 of the Ohio Revised Code, being a Felony of the Third Degree.

The Defendant on November 7, 2013, was informed of the aforestated verdict and his appellate review rights pursuant to Crim. R. 32.

On January 22, 2014, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Assistant Prosecuting Attorneys

George W Wharton and Elizabeth A. Geraghty, and the Defendant was represented by attorney Javier H. Armengau.

The Court afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording him an opportunity to make a statement on his own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors the Court has considered and weighed.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term **is** mandatory pursuant to R.C. 2929.13(F).

The Court hereby imposes the following sentence: **LIFE, without parole, as to Counts 7 and 8; FOUR (4) YEARS as to Counts 1, 2, 3, 4, 9 and 10 and THIRTY-SIX (36) MONTHS as to Count 13; plus an additional 3 consecutive years of actual incarceration for the firearm as to Counts 1, 2, 3, 4, 7, 8, 9 and 10. Counts 1, 2, 3, 4 and specifications on Counts 1, 2, 3 and 4 and Count 13 are to be served concurrently with each other but consecutive to Counts 7, 8, 9 and 10 and specifications on Counts 7, 8, 9 and 10** to be served at the Ohio Department of Rehabilitation and Correction.

Counts 5 and 6 merge into Counts 7 and 8, respectively and Counts 11 and 12 merge into Counts

9 and 10, respectively. Sentence in Counts 7 and 8 are Life without the possibility of parole.

The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby render judgment for the following fine and/or financial sanctions: **No fine imposed. Defendant shall pay court costs in an amount to be determined.**

The total fine and financial sanction judgment is **$0 plus costs.**

The Court **disapproves** of the Offender's placement in an intensive prison program or transitional control.

The Court finds that the Defendant has **five hundred thirty-two (532) days** of jail credit and hereby certifies the time to the Ohio Department of Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

cc: George W. Wharton/ Elizabeth A. Geraghty
Assistant Prosecuting Attorney

Javier H. Armengau, Counsel for Defendant

Franklin County Court of Common Pleas

Date:	01-27-2014
Case Title:	STATE OF OHIO -VS- VINCENT D WHITE
Case Number:	12CR004418

Type: SENTENCING ENTRY

It Is So Ordered.
/s/ Judge Michael J. Holbrook

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 18-3277

VINCENT D. WHITE, JR.,

Petitioner-Appellant,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Respondent-Appellee.

Before: DAUGHTREY, GRIFFIN, and STRANCH, Circuit Judges.

FILED
Nov 20, 2019
DEBORAH S. HUNT, Clerk

ORDER

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

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* Judge Murphy recused himself from participation in this ruling.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 18-3277

VINCENT D. WHITE, JR.,

Petitioner-Appellant,

v.

WARDEN, ROSS CORRECTIONAL INSTITUTION,

Respondent-Appellee.

Before: DAUGHTREY, GRIFFIN, and STRANCH, Circuit Judges.

FILED
Oct 08, 2019
DEBORAH S. HUNT, Clerk

JUDGMENT

On Appeal from the United States District Court for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Vincent D. White, Jr.'s petition for a writ of habeas corpus is VACATED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk