IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

DEANDRE D. DEWITT,

:

Petitioner, Case No. 3:08-cv-409

:

-vs- Magistrate Judge Michael R. Merz

WANZA JACKSON, Warden, et al.,

:

Respondents.

DECISION AND ORDER

This habeas corpus action is before the Court for decision on the merits. Petitioner filed her Petition November 10, 2008 (Doc. No. 1). On the Court's Order, Respondent Warden filed a Return of Writ on February 19, 2009 (Doc. No. 7). Petitioner has not filed a reply within the time allowed by the Court. See Doc. No. 4 and Habeas Rule 5(e).

The parties have unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. § 636(c) and the case has been referred on that basis (Doc. No. 6).

Petitioner was convicted by a jury in the Montgomery County Common Pleas Court on three counts of aggravated robbery with firearm specifications on two counts (Petition, Doc. No. 1, ¶ 3). Represented by counsel, Petitioner appealed to the Montgomery County Court of Appeals, raising seven assignments of error, including the claims now made in this Court. The Court of Appeals affirmed the convictions. *State v. Dewitt*, 2007 Ohio 3437, 2007 Ohio App. LEXIS 3143 (Ohio App. 2nd Dist. June 29, 2007). Proceeding *pro se*, Petitioner sought review in the Ohio Supreme Court

on the same seven grounds, but that court declined to exercise jurisdiction. *State v. Dewitt*, 2007 Ohio 6140, 2007 Ohio LEXIS 2957 (2007).

Petitioner pleads two grounds for relief:

> **Ground One:** Petitioner was denied his right to Due Process of Law when the court denied his request for the appointment of an expert witness on the subject of eyewitness identification.
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> **Ground Two:** Petitioner was denied his right to Due Process of Law when over defense objection dog tracking evidence was admitted.

(Petition, Doc. No. 1).

The Court of Appeals summarized the evidence at trial as follows:

> [*P11] The present appeal stems from four robberies that occurred within a fifteen-day period in January of 2005. On January 12, 2005, Caitlin Jackson was robbed at gunpoint as she was entering her car outside of a friend's apartment building. Although it was approximately 8:30 p.m., Jackson testified that she was parked under a street lamp, which allowed her to clearly see the face and gun of her robber. She described him as a black male, approximately five-seven to five-eight, wearing a black and yellow jersey with black pants and black zip-up hoodie. The hood was not over his head at the time of the robbery. Jackson also described the suspect as having thick, full black hair pulled back in a ponytail. She described the gun as being a black revolver that was kind of worn. According to Jackson, the robbery lasted for one and one-half minutes, during which time she stood within one and one-half feet of her robber as he took her purse, her car keys, and three gold chains off of her neck.
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> [*P12] Jackson was presented with photo spreads of potential suspects on four separate occasions between January 24, 2005 and January 28, 2005, before identifying Dewitt as the man who robbed her. At trial, she testified that she immediately recognized the defendant upon seeing him in the last photo spread. She likewise identified Dewitt at trial.
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> [*P13] As an alibi witness, the defendant offered the testimony of Mary Forbes, a family acquaintance, who stated that Dewitt was at her home between 5:30 p.m. and 10:30 p.m. on the night of the Jackson robbery having his hair braided by Forbes' granddaughter.

[*P14] Next, at approximately 1:50 p.m. on January 19, 2005, Chris Jenks was robbed at gunpoint inside of a car at the Westbrook Village apartment complex as he waited for a colleague. Jenks testified that he saw a black male in his late teens, approximately five-nine, light skinned, and with a broad nose cross on the sidewalk in front of the car from Jenks' left to his right. The teen was wearing a black jacket with a hood that was only partially covering his head. According to Jenks, soon after he lost sight of the young man, his car door opened, he felt a gun pressed to his neck, and that same person told him to give him all of his money and jewelry. Jenks testified that he was able to clearly see the robber's face, for he stood approximately one and one-half feet away from Jenks' face, and the entire encounter lasted between five and six minutes. He also described the gun as being a dark silver revolver. Furthermore, Jenks stated that the young man reached around him to grab a black bag in the back of the car, in addition to searching through Jenks' pockets and his colleague's purse. As the robber walked away, Jenks said he continued to have a clear picture of his face until the teen turned behind the apartment complex.

[*P15] Jenks was shown several photo spreads of suspects on three different occasions. On January 20, 2005, he identified a man in one of the photo spreads as one who looked like the man who robbed him, but specifically stated he was not the same individual. Later, on January 28, 2005, Jenks identified Dewitt as his robber in the same photo spread shown to Caitlin Jackson. He also identified the defendant at trial.

[*P16] In opposition to Jenks' testimony, Dewitt offered the testimony of Dr. Reva Cosby, a unit principal at Trotwood High School. Dr. Cosby testified that school records indicated Dewitt was in attendance at the time of the Jenks' robbery. Dr. Cosby also stated that she spoke to each of Dewitt's teachers regarding his attendance on January 19, and that they provided he was present. She noted this on the general attendance printout offered at trial. However, the records of these individual teachers were not presented into evidence. As a result, the written testimony as to what others told Dr. Cosby was redacted on hearsay grounds.

[*P17] The third robbery occurred on January 27, 2005, at approximately 8:20 a.m. Shirley Ivery testified that she had just returned from taking her son to school when she was approached at gunpoint in the corridor leading to her apartment. She described the suspect as a black male in his early twenties, light skinned, and

between five-seven and five-eight. He was wearing black jeans, a black coat and a black toboggan-type cap. According to Ivery, when the robber came at her with a gun, she screamed, ran into her apartment, and called the police. Although Ivery later identified Dewitt as the man who attempted to rob her, Officer Jonathan Emmel of the Trotwood Police Department testified that Ivery indicated during a police interview that she did not get a good look at the robber's face because she was running.

[*P18] Dewitt offered the testimony of Dr. Cosby and Maurice Douglas, the supervisor of Trotwood High School's in-school suspension program, also known as "RAP." Both witnesses testified that Dewitt was present during school hours that day, and, specifically, that he was under Douglas' supervision in RAP. The state presented the testimony of rebuttal witnesses who stated that it was common for students recorded as being present in the RAP program to actually not be in their assigned rooms.

[*P19] Following deliberation, the jury returned a verdict of Not Guilty as to the aggravated robbery charge involving Ivery.

[*P20] The fourth robbery also took place on January 27, 2005. At approximately 8:45 p.m., Misty McDowell and her nephew, Brandon, had just parked their car in the driveway of the home of Ms. McDowell's boyfriend's mother when they were robbed at gunpoint by two black males wearing masks - one black and one royal blue. McDowell described one of the robber's as being six-one and weighing approximately 198 to 200 pounds. He was wearing the black mask and a dark jacket. She described the second man as shorter, five-nine to five-ten, and weighing approximately 180 to 185 pounds. Although the robbery lasted over several minutes, McDowell testified that she could not identify the suspects in the subsequent photographic lineups because both had been wearing masks.

[*P21] McDowell's boyfriend immediately called 9-1-1. When the police arrived, McDowell gave them the foregoing description of the suspects and a description of their guns. She testified that the taller suspect carried a heavy-looking black handgun, while the shorter suspect had a gun with a silver clip. She also indicated in which direction the suspects had fled.

[*P22] Officer Jon Moeggenberg, the K-9 handler for the Trotwood Police Department, testified that he arrived on the scene shortly after the 9-1-1 call was made. There, McDowell pointed out a footprint in

the yard allegedly left by one of her robbers; consequently, Moeggenberg began to track the suspects with the police K-9, Lola. Within nine minutes, the track led to 425 Vaniman Avenue, the residence of Dewitt. Additional officers were called to the residence, where a perimeter was set up and the occupants told to come out. After approximately thirty minutes, five young men, including the defendant, exited the home.

[*P23] One of the individuals who came out of the house was Darrius Daniels. Pursuant to a plea agreement with the prosecuting attorney's office, Daniels testified at trial that he had been driving around the night of the robbery with Dewitt; the defendant's brother, Keith; Isaiah West; and Jesse Ogletree. According to Daniels, as the group was traveling up Stuckhardt Avenue toward Dewitt's home, Keith told him to follow McDowell's vehicle until it pulled into the driveway of 310 Stuckhardt. Daniels and the others traveled on until they came to a stop sign. At that point, [**9] the defendant and Ogletree got out of the car and headed toward where McDowell had just parked. Moments later, Ogletree and Dewitt came running back to the car, at which time Ogletree got in, but the defendant continued running. Daniels testified that he eventually picked Dewitt up approximately three houses from the residence on Vaniman Avenue.

[*P24] Furthermore, Daniels testified that back at the defendant's house, Dewitt told him they had robbed the woman up the street. He also stated that he observed Dewitt and Ogletree going through a woman's purse and finding a couple of credit cards, an identification card, a billfold, and a cellular phone. Daniels further testified that the purse was hidden in the chimney and weapons were hidden in the heat ducts once the police arrived.

[*P25] After the young men exited the house and were taken to the police department, Detective Archie Swanson obtained consent from Dewitt's mother to search the residence. Inside, the officers found the contents of McDowell's purse in the bedroom shared by the defendant and his brother. The items found included a 20 dollar bill, a Kroger Plus card, a Chase Visa card on which appeared McDowell's name, a Books & Company membership card, and McDowell's cell phone. In addition, the officers found two black coats, described by McDowell as the coats being worn at the time of the robbery; some ammunition in the closet; and three guns hidden in the heat duct along the west wall of the bedroom. A subsequent search was made on January 31, 2005, during which a black ski mask was found behind a venetian blind on a windowsill also in the defendant's

bedroom.

State v. Dewitt, 2007 Ohio 3437, ¶¶ 11-27.

Ground One

In his first Ground for Relief, Petitioner asserts he was denied due process of law when the state trial court refused to appoint a psychologist to testify about the potential weaknesses of eyewitness identification testimony.

On direct appeal, Petitioner presented this claim as arising under the Sixth, as opposed to the Fourteenth, Amendment[1]. On this issue, the Court of Appeals ruled as follows:

> [*P66] In his sixth assignment of error, Dewitt asserts that the trial court abused its discretion when it denied his motion for an eyewitness identification expert. Specifically, Dewitt argues that he has a right under the Sixth Amendment of the United States Constitution to offer the testimony of an expert psychologist on the accuracy and reliability surrounding any eyewitness identification. According to the defendant, an eyewitness identification expert was necessary in the present matter to remedy the alleged confusion experienced by the jurors due to the complexity and length of the trial.
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> [*P67] The Ohio Supreme Court has held that expert testimony of an experimental psychologist concerning the variables or factors that may impair the accuracy of a typical eyewitness identification is admissible under the rules of evidence, unless the expert testifies regarding the credibility of a particular witness. *State v. Buell* (1986), 22 Ohio St.3d 124, 131, 22 OBR 203, 489 N.E.2d 795. The decision to admit the expert opinion testimony, however, is within the sound

[1]Based on this discrepancy, the State might have argued that the Fourteenth Amendment claim was procedurally defaulted because it had not been "fairly presented" to the state courts. See *Levine v. Torvik*, 986 F.2d 1506 (6th Cir. 1993); *Riggins v. McMackin,* 935 F.2d 790 (6th Cir. 1991). Instead, the State has defended this claim on the merits.

discretion of the trial court. Id. at 133. This court has found that it is not an abuse of discretion to deny expert testimony on factors affecting eyewitness identification where "the need for such assistance [is] obviated by the availability of other adequate means to challenge the state's eyewitness testimony." *State v. Hutchinson* (May 10, 1995), Montgomery App. No. CA 13993, 1995 Ohio App. LEXIS 1920, 1995 WL 276753, at *8. Such adequate means include vigorous cross-examination of the state's eyewitnesses, the opportunity by defense counsel to comment on their testimony during closing argument, and court instructions on factors jurors may consider in assessing eyewitness testimony. *Id.*

[*P68] Here, we do not find that the trial court abused its discretion in denying Dewitt's request for an expert on eyewitness identification. We turn our attention to the circumstances leading to Dewitt's conviction under counts one and two, for the state's evidence under these counts was based primarily on eyewitness testimony. First, we find that defense counsel had ample opportunity to cross-examine both Caitlin Jackson and Chris Jenks regarding their identification and to address the reliability of their testimonies during closing argument. At trial, both witnesses testified that they had the opportunity to clearly observe the defendant during the robbery. Jackson testified that her encounter with Dewitt occurred under a street lamp and lasted for over one minute, while Jenks testified that he observed Dewitt outside at 1:50 in the afternoon, and the robbery itself lasted five to six minutes. Furthermore, the common description of Dewitt as being a young black male, approximately five-eight to five-nine, demonstrates the attention given by the witnesses at the time of the robbery, as does each witnesses' individual yet detailed description including features such as the length of the defendant's hair, the shape of his nose, the color and style of his clothes, and the characteristics of the gun he used. Both witnesses also testified that they were shown several photo spreads by the police department before identifying Dewitt as the man who robbed them, and both identified the defendant at trial.

[*P69] Next, the trial court gave the following instruction to the jury regarding the factors they could consider in evaluating the credibility of the eyewitness testimony:

[*P70] "Some things you may consider in weighing the testimony of identifying witnesses are as follows: Number one, the capacity of the witness; that is, their age, intelligence and the opportunity of the witness to observe. Number two, the witness's degree of attention at

> the time he or she observed the offender. Number three, the accuracy of the witness's prior description or identification, if any. Number four, whether the witnesses had occasion to observe the defendant in the past. Number five, the interval of time between the event and the identification. Number six, all surrounding circumstances under which the witness has identified the defendant, including deficiencies, if any, in the photo display." (Tr. at 592-93.)
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> [*P71] In *Buell*, the court stated that "'[i]t is doubtless true that from personal experience and intuition all jurors know that an eyewitness identification can be mistaken, and also know the more obvious factors that can affect its accuracy, such as lighting, distance, and duration.'" 22 Ohio St.3d at 131. We recognize that a psychologist expert may have provided testimony on the factors affecting the eyewitness identification in this case that are beyond common experience. However, given Dewitt's opportunity to thoroughly cross-examine the state's eyewitnesses, his ability to question their reliability in closing argument, and the court's instructions on factors to consider in assessing eyewitness testimony, we do not find the trial court's decision to overrule Dewitt's motion requesting an expert witness to be an abuse of discretion.
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> [*P72] We also believe it is relevant that the jury acquitted Dewitt of the charge involving Shirley Ivery. Impliedly, this verdict illustrates the jury's ability to discern factors increasing or decreasing the reliability of the eyewitness identifications at issue in this matter.
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> [*P73] Accordingly, the sixth assignment of error is overruled.

State v. Dewitt, 2007 Ohio 3437, ¶¶ 66-73.

The Supreme Court has recently elaborated on the standard of review of state court decisions on claims later raised in federal habeas corpus:

> The Antiterrorism and Effective Death Penalty Act of 1996 modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas "retrials" and to ensure that state-court convictions are given effect to the extent possible under law. See *Williams v. Taylor*, 529 U.S. 362, 403-404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). To these ends, § 2254(d)(1) provides:
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> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be

> granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
> "(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."
>
> As we stated in *Williams*, § 2254(d)(1)'s "contrary to" and "unreasonable application" clauses have independent meaning. 529 U.S., at 404-405, 120 S.Ct. 1495. A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. *Id.*, at 405-406, 120 S. Ct. 1495. The court may grant relief under the "unreasonable application" clause if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. *Id.*, at 407-408, 120 S.Ct. 1495. The focus of the latter inquiry is on whether the state court's application of clearly established federal law is objectively unreasonable, and we stressed in *Williams* that an unreasonable application is different from an incorrect one. *Id.*, at 409- 410, 120 S.Ct. 1495. See also *id.*, at 411, 120 S.Ct. 1495 (a federal habeas court may not issue a writ under the unreasonable application clause "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly").

Bell v. Cone, 535 U.S. 685, 693-94, 122 S. Ct. 1843, 1849-50, 152 L. Ed. 2d 914 (2002).

The Petition cites no United States Supreme Court case law which is alleged to clearly establish a right to expert psychological testimony on the fallibility of eyewitness identification testimony. Petitioner relies on a number of cases which do not support the right he claims

- In *Mason v. Mitchell*, 95 F. Supp. 2d 744 (N.D. Ohio 2000), the court held that there was in fact no constitutional right to an appointed eyewitness identification expert. "As long as the defendant has an adequate opportunity to cross-examine eyewitnesses, the exclusion of expert testimony on the reliability of eyewitness identification is not error. *Moore v. Tate*,

882 F.2d 1107, 1110-11 (6th Cir. 1989)[2]; *accord United States v. Hall,* 165 F.3d 1095, 1103 (7th Cir. 1999); *United States v. Harris*, 995 F.2d 532, 533 (4th Cir. 1993).

- In *State v. Broom*, 40 Ohio St. 3d 277, 533 N.E. 2d 682 (1988), the court held

> 2. The opinion of an experimental psychologist is not admissible regarding the credibility of a particular witness unless there is some special identifiable need for the testimony such as a physical or mental impairment which would affect the witness' ability to observe or recall details. Where no such need is shown we will not find an abuse of discretion by the trial court in denying the appointment of an expert on eyewitness identification pursuant to R.C. 2929.024, unless the defendant can make a showing of demonstrable prejudice.

Id. at syllabus, ¶ 2.

- In *State v. Buell*, 22 Ohio St. 3d 124, 489 N.E. 2d 795 (1986), the syllabus reads in its entirety:

> 1. The expert testimony of an experimental psychologist concerning the the variables or factors that may impair the accuracy of a typical eyewitness identification is admissible under Evid. R. 702.
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> 2. The expert testimony of an experimental psychologist regarding the credibility of the identification testimony of a particular witness is inadmissible under Evid. R. 702, absent a showing that the witness suffers from a mental or physical impairment which would affect the witness' ability to observe or recall events.

In *Buell*, the Ohio Supreme Court cited two federal cases upholding the admissibility of the type of evidence sought to be admitted in this case, *United States v. Smith*, 736 F.2d 1103 (6th Cir. 1984), and *United States v. Downing*, 753 F.2d 1224 (3rd Cir. 1985). However, the fact that evidence might be admissible does not imply that the State is obliged under the Fourteenth Amendment to

[2]In *Moore*, the Sixth Circuit reversed the undersigned who had held there was a federal constitutional right to present expert psychological testimony on the fallibility of eyewitness identification evidence.

make such evidence available to an indigent defendant. *See Ake v. Oklahoma*, 470 U.S. 68, 77 (1985)("the Court has not held that a State must purchase for the indigent defendant all the assistance that his wealthier counterpart might buy. . .")

The trial court's refusal to appoint an eyewitness identification expert did not render the trial unfair under the Fourteenth Amendment; the appellate court's decision to that effect was not an objectively unreasonable application of clearly established Supreme Court law. Therefore Petitioner is not entitled to habeas corpus relief on his first Ground.

Ground Two

In his second Ground for Relief, Petitioner claims he was denied a fair trial and therefore due process of law when the trial court admitted dog tracking evidence over his objection. Respondent asserts that this claim is barred by Petitioner's procedural default in presenting

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

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

Coleman v. Thompson, 501 U.S. 722, 749 (1991); *see also Simpson v. Jones*, 238 F. 3rd 399, 406 (6th Cir. 2000). That is, a petitioner may not raise on federal habeas a federal constitutional right he

could not raise in state court because of procedural default. *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982). Absent cause and prejudice, a federal habeas petitioner who fails to comply with a State's rules of procedure waives his right to federal habeas corpus review. *Boyle v. Million*, 201 F.3d 711, 716 (6th Cir. 2000); *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). *Wainwright* replaced the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391 (1963). it to the state courts.

The Sixth Circuit Court of Appeals requires a four-part analysis when the State alleges a habeas claim is precluded by procedural default. *Reynolds v. Berry*, 146 F.3d 345, 347-48 (6th Cir. 1998), citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986); *accord Lott v. Coyle*, 261 F.3d 594 (6th Cir. 2001).

> 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.
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> . . . .
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> Second, the court must decide whether the state courts actually enforced the state procedural sanction, citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 149, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).
>
> 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.
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> Once the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate under *Sykes* that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Maupin,785 F.2d, at 138. In a more recent formulation, the Sixth Circuit held:

> [The Sixth Circuit Court of Appeals] "applies a four-part test to determine whether a claim has been procedurally defaulted: (1) the court must determine that there is a state procedural rule with which the petitioner failed to comply; (2) the court must determine whether the state courts actually enforced the state procedural sanction; (3) the state procedural rule must have been an adequate and independent state procedural ground upon which the state could rely to foreclose review of a federal constitutional claim; and (4) if the court has determined that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate that there was cause for his failure to follow the rule and that actual prejudice resulted from the alleged constitutional error.

Hartman v. Bagley, 492 F.3d 347, 357 (6th Cir. 2007), *quoting Monzo v. Edwards*, 281 F.3d 568, 576 (6th Cir. 2002).

Petitioner raised his claim regarding the dog tracking evidence by filing in the trial court a motion in limine to exclude the evidence at trial. On appeal, he assigned as error the trial court's denial of that motion.

> [*P74] Dewitt contends in his seventh and final assignment of error that the trial court abused its discretion in denying his motion in limine to exclude evidence of dog tracking. The defendant mistakenly bases his argument on *People v. Willis* (Cal.App.2004), 115 Cal.App.4th 379, 9 Cal.Rptr. 3d 235, where the court found that dog scent and scent transfer unit ("STU") evidence failed to meet the test for reliability of scientific techniques involving novel devices or processes. Id. at 386. As noted by the California court, however, dog scent evidence is different from dog tracking evidence, and essentially less reliable, in that the former involves a dog being given a scent from a gauze pad some length of time after an alleged incident occurs and then being observed to see if the dog "shows interest" in various locations frequented by a defendant. Id. On the other hand, dog tracking involves trailing a suspect and giving "an unambiguous alert that the person has been located." *Id*. The court further stated that the main problem with using the dog scent technique to identify people in criminal investigations is that there is less scent with which to work compared to tracking cases.

[*P75] Cases throughout Ohio demonstrate that dog tracking is admissible, provided that the state establishes a proper foundation. *See State v. Pearson*, Montgomery App. No. 21203, 2006 Ohio 5585, at P11, citing *State v. Dickerson* (1907), 77 Ohio St. 34, 82 N.E. 969, 5 Ohio L. Rep. 453. To establish a proper foundation, the state must present evidence of the training and reliability of the dog, the qualifications of the person handling the dog, and the circumstances surrounding the trailing by the dog. Id. (citations omitted).

[*P76] Preliminarily, we note that an appellate court will not reverse the trial court's admission of evidence unless there was an abuse of discretion. *State v. Taylor*, Montgomery App. No. 20944, 2006 Ohio 843, at P58 (citation omitted). An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Brown*, Greene App. No. 2003-CA-69, 2004 Ohio 6787, at P9.

[*P77] Furthermore, the record indicates that Dewitt failed to renew his objection at trial to the admissibility of the dog tracking evidence. His failure to object constitutes a waiver of that issue on appeal, absent a finding of plain error. *See State v. Cephus*, 161 Ohio App.3d 385, 2005 Ohio 2752, 830 N.E.2d 433, at P34. Plain error does not exist unless it can be said that but for the plain error, the outcome of the trial would clearly have been different. *State v. Long* (1978), 53 Ohio St.2d 91, 97, 7 O.O.3d 178, 372 N.E.2d 804.

[*P78] Here, Officer Jon Moeggenberg testified extensively regarding his training as a K-9 handler and police officer and K-9 Lola's training as a police dog. He indicated that both he and Lola are certified as a team with the State of Ohio through the Ohio Police Officer's Training Academy. Officer Moeggenberg is also certified in Ohio to evaluate other police dogs as teams. Moreover, Officer Moeggenberg testified that he began his partnership with Lola in December of 2004 and that he maintains a weekly training program consisting of eight hours of tracking exercises. According to Officer Moeggenberg, Lola has not had any problems with tracking; instead, she has continued to improve over time.

[*P79] Officer Moeggenberg also gave a detailed account of the track that he and Lola followed on January 27, 2005, which led them to 425 Vaniman Avenue. He testified that a woman on the scene, i.e., Misty McDowell, pointed out a track in the snow that she indicated was left by one of the robbers. McDowell also stated that the young men ran off in a direction north of the driveway. Officer Moeggenberg provided that he led Lola to the footprint and gave her

> the command to begin tracking. She pulled him up Stuckhardt Avenue to the corner of Stuckhardt and Macmillan, and then she headed back toward Vaniman. Officer Moeggenberg further testified that he observed tracks along the way that eventually led up the sidewalk and toward the yard at 425 Vaniman. There, he ended the track.
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> [*P80] Upon review of Officer Moeggenberg's testimony, we find that the state established a proper foundation for the admission of the dog tracking evidence. There was substantial testimony demonstrating Officer Moeggenberg's qualifications as a police dog handler, his and the K-9 Lola's training and reliability, and the circumstances underlying the track that took place on January 27, 2005. The record also shows that the trial court properly cautioned the jury as to the probative value of dog trailing evidence. The court stated, "Dog-trailing evidence must be viewed with the utmost of caution. It is of slight probative value. It must be considered in conjunction with all of the testimony in the case and does not warrant a conviction absent some other direct or circumstantial evidence of guilt." (Tr. at 591.)
>
> [*P81] In conclusion, we find that the court did not abuse its discretion or commit plain error in admitting evidence of the dog track on January 27, 2005. The state presented a proper foundation, and the trial court appropriately cautioned the jury against giving the evidence undue weight. Accordingly, Dewitt's final assignment of error is overruled

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State v. Dewitt, 2007 Ohio 3437, ¶¶ 74-81.

Applying the *Maupin* analysis, the Court notes that Ohio does have a rule that objections to evidence made by motion in limine are waived unless renewed at trial for which the Court of Appeals cites its own prior decision in *State v. Cephus*, 161 Ohio App.3d 385, 2005 Ohio 2752, 830 N.E.2d 433 (Ohio App. 2nd Dist 2005). Recent Ohio Supreme Court case law confirms the existence of this rule. *State v. Diar*, 120 Ohio St. 3d 460 at ¶ 70 (2009), *citing Gable v. Gates Mills,* 103 Ohio St. 3d 449 ¶ 34, 2004 Ohio 5719, 816 N.E. 2d 1049 (2004), and enforcing the rule in a capital case.

Because Petitioner did not renew his objection at trial, the claim was deemed waived by the Court of Appeals, which reviewed the admission of the dog tracking evidence only for plain error.

In federal habeas law, plain error review is an enforcement of a procedural default, not a waiver of it. *Awkal v. Mitchell,* ___ F.3d ___, 2009 U.S.App. LEXIS 5357 (6th Cir. 2009), citing *Biros v. Bagley*, 422 F.3d 379, 387 (6th Cir. 2005); *White v. Mitchell*, 431 F.3d 517, 525 (6th Cir. 2005); *Hinkle v. Randle*, 271 F. 3rd 239 (6th Cir. 2001), citing *Seymour v. Walker*, 224 F. 3rd 542, 557 (6th Cir. 2000)(plain error review does not constitute a waiver of procedural default); *accord, Mason v. Mitchell,* 320 F.3d 604 (6th Cir. 2003).

The Ohio rule requiring renewal of in limine objections at trial is obviously independent of federal law and protects an important state interest of allowing correction of error when it can be done in time to prevent error at the trial level while requiring a criminal defendant to make clear what objections he truly relies on.

Petitioner has offered neither excusing cause for his failure to object at trial nor prejudice resulting from admission of the dog tracking evidence. As the Court of Appeals noted, Petitioner relies on *People v. Willis*, 115 Cal. App. 4th 379 (2004), where the court dealt with the unreliability of dog *scent* evidence, not dog tracking evidence. *State v. Dewitt*, 2007 Ohio 3437 ¶ 74.

Because Petitioner procedurally defaulted in presenting his second Ground for Relief in the Ohio courts, he cannot obtain merits review of that claim in this Court.

Conclusion

Based on the foregoing analysis, Petitioner is not entitled to habeas corpus relief. The Clerk will enter judgment dismissing the Petition with prejudice.

April 1, 2009.

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