

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

TIMOTHY W. GOOD,	)	CASE NO. 3:15CV2389
	)	
Petitioner,	)	JUDGE JAMES G. CARR
	)	
v.	)	MAGISTRATE JUDGE
	)	KATHLEEN B. BURKE
WARDEN ROSS CORRECTIONAL INSTITUTION,	)	
	)	
	)	
Respondent.	)	<b><u>REPORT &amp; RECOMMENDATION</u></b>

Petitioner Timothy W. Good (“Petitioner” or “Good”) brings this habeas corpus action pursuant to [28 U.S.C. § 2254](#). Doc. 4. Good is detained at the Ross Correctional Institution, having been found guilty by a Putnam County, Ohio, Court of Common Pleas jury of one count of rape and one count of gross sexual imposition. Doc. 8-1, p. 23.<sup>1</sup> *State v. Good*, Case No. 2014 CR 3 (Putnam Cty. Common Pleas Ct., filed January 9, 2014). The trial court sentenced Good to life in prison without parole on the rape count and sixty months on the gross sexual imposition count, to be served concurrently, for an aggregate prison sentence of life in prison. Doc. 8-1, p. 24.

On November 17, 2015, Good filed his Petition for Writ of Habeas Corpus setting forth four grounds for relief. Doc. 4, pp. 4-10. This matter has been referred to the undersigned Magistrate Judge for a Report and Recommendation pursuant to Local Rule 72.2. As set forth more fully below, Good’s grounds are procedurally defaulted; additionally, Ground One is not cognizable and Grounds Two, Three and Four fail on the merits. Thus, the undersigned recommends that Good’s Petition for Writ of Habeas Corpus (Doc. 4) be **DISMISSED**.

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<sup>1</sup> Doc. page citations are to ECF Doc. page numbers.

## I. Background

In a habeas corpus proceeding instituted by a person in custody pursuant to the judgment of a state court, the state court's factual findings are presumed correct. [28 U.S.C. § 2254\(e\)\(1\)](#). The petitioner has the burden of rebutting that presumption by clear and convincing evidence. [28 U.S.C. § 2254\(e\)\(1\)](#); see also [Railey v. Webb](#), 540 F. 3d 393, 397 (6th Cir. 2008).

### A. State Court Action

#### 1. Underlying Facts

The following summary of underlying facts is taken from the opinion of the Putnam County Court of Appeals, Third Appellate District of Ohio:<sup>2</sup>

At trial, S.C. testified that in November of 2010, when she was nine, Good “made me suck his thing.” Trial Tr., p. 180. When asked what she meant by “thing,” S.C. testified, “Penis.” *Id.* She also testified that Good laid her on the floor, took her pants down, and “put his penis inside me[,] \* \* \* licked my vagina[, and] \* \* \* put his fingers [in] my butt.” *Id.* at p. 182. Others testified as to the events surrounding this incident, how it was reported, and why there was a delay between the police receiving the initial report and actually charging Good with the rape.

As to the gross sexual imposition charge, Carol, the mother of the victim, A.M., testified that she and her husband, Robert, drove Good to the store. Good sat in the back seat with A.M., who was five years old. Carol testified that, on the way home, she looked in a mirror and saw Good “stick his hand underneath my daughter’s butt.” *Id.* at p. 263. She yelled at him to stop and leave her daughter alone. Robert testified that while driving back from a store, his wife “started screaming and stuff said that [Good] touched my daughter.” *Id.* at p. 346. He admitted that he did not see the incident. Roy Sargent, a detective with the Putnam County Sheriff’s Office, testified that he interviewed A.M., who told him that Good touched her buttocks, but pointed at her vagina.<sup>1</sup> Good did not call any witnesses to testify.

[FN1] We note that A.M. was found not competent to testify.

Doc. 8-1, pp. 73-74; *State v. Good*, Case No. 12-14-05 (Ohio Ct. App. Feb. 23, 2015).

#### 2. Procedural History

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<sup>2</sup> Good has not demonstrated by clear and convincing evidence that the state court’s findings were incorrect. Accordingly, the state court’s findings are presumed correct. See [28 U.S.C. § 2254\(e\)\(1\)](#); see also [Railey](#), 540 F. 3d at 397.

On February 14, 2014, a Putnam County Grand Jury indicted Good with two charges: a charge of rape, R.C. 2907.02(A)(1)(b), with a victim-under-10-years specification (Count One), and a charge of gross sexual imposition with a different victim, R.C. 2907.05(A)(4) (Count Two). Doc. 8-1, p. 4. Prior to trial, Good moved to sever the two counts, arguing that severance was appropriate because the incidents occurred 3 years apart and involved two different victims. *Id.* p. 125. The trial court denied Good's motion. *Id.*

The state gave notice of its intent to use Ohio Rule of Evidence 807 (a)(4) to elicit the testimony of the victim in Count Two through witnesses to whom she gave her statements. *Id.* p. 6. After holding a hearing and considering the parties' briefs, the trial court made a finding that an incident had occurred between Good and the victim and that the victim had made consistent statements to her mother, the police, and a county child advocate. *Id.* pp. 16-19. The victim was determined to have a severe speech disability that could make testimony unobtainable and she was unavailable to testify because she was 5 years old and presumed incompetent. *Id.* The court therefore granted the state's motion to admit the statements at trial pursuant to Ohio Rule of Evidence 807. *Id.* p. 20.

The case proceeded to trial and the jury found Good guilty on both counts. *Id.* pp. 21-22. On July 9, 2014, the trial court sentenced Good to life in prison without parole for Count 1 and sixty months in prison for Count 2, to be served concurrently, for an aggregate sentence of life in prison without parole. *Id.* pp. 23-24. The court also found him to be a Tier III sex offender. *Id.* p. 26.

### **B. Direct Appeal**

On July 9, 2014, Good, through new counsel, filed a notice of appeal with the Ohio Court of Appeals. *Id.* p. 30. In his brief, he raised the following assignments of error:

1. The convictions are not supported by the weight of the evidence.

2. The evidence was insufficient to sustain the convictions.
3. The defendant was prejudiced by the trial court's refusal to sever the counts for trial.
4. The defendant was denied effective assistance of counsel.

*Id.* p. 38. On February 23, 2015, the Ohio Court of Appeals affirmed the trial court's judgment.

*Id.* pp. 72-80. Good did not file a timely appeal with the Ohio Supreme Court.

### **C. Motion for Delayed Appeal**

On September 11, 2015, Good, *pro se*, filed an untimely notice of appeal and a motion to file delayed appeal with the Ohio Supreme Court. *Id.* pp. 81, 83. He argued that his filing was late because he did not learn of the state Court of Appeals' decision until one week after it was issued and he had limited access to the prison library. *Id.* On October 28, 2015, the Ohio Supreme Court denied his motion for delayed appeal and dismissed the case. *Id.* p. 96.

### **D. Federal Habeas Petition**

On November 17, 2015, Good, *pro se*, filed his Petition for a Writ of Habeas Corpus. Doc. 4. He listed the following grounds for relief:

**Ground One:** The convictions are not supported by the weight of the evidence.

**Ground Two:** The evidence was insufficient to sustain the convictions.

**Ground Three:** The defendant was prejudiced by the trial court's refusal to sever the counts for trial.

**Ground Four:** The defendant was denied effective assistance of counsel.

Doc. 4, pp. 4-7. On February 1, 2016, Respondent filed a Return of Writ. Doc. 8. Good did not file a Traverse; instead, he filed a Motion to Compel library records and supplemental documents pertaining to his Ohio Supreme Court appeal.<sup>3</sup> Doc. 14. In his Return of Writ, Respondent

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<sup>3</sup> Good's Traverse was originally due on March 17, 2016. *See* Doc. 7. On March 8, 2016, Good filed a Motion to Compel discovery and for a "continuance." Doc. 11. The undersigned denied his motion to compel and granted him an extension of time to file a Traverse, stating, "Petitioner's Traverse, originally due March 17, 2016, is now due May 23, 2016, forty-five days from the date of this Order." Doc. 13. Good filed a second Motion to Compel Library Records and attached documents he received from the Ohio Supreme Court explaining why the Supreme

argues that Good's grounds are procedurally defaulted; he also argues that Ground One is not cognizable and that Grounds Two, Three and Four fail on the merits. Doc. 8, pp. 8-23.

## II. Law

### A. Standard of Review under AEDPA

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996, [Pub.L. No. 104-132](#), 110 Stat. 1214 ("AEDPA"), apply to Good's habeas petition because he filed it after the effective date of AEDPA. [28 U.S.C. § 2254](#); [Stewart v. Erwin](#), 503 F.3d 488, 493 (6th Cir. 2007). Under AEDPA, a petitioner must meet certain procedural requirements in order to have his claims reviewed in federal court. [Smith v. Ohio Dep't of Rehab. & Corr.](#), 463 F.3d 426, 430 (6th Cir. 2006). "Procedural barriers, such as statutes of limitations and rules concerning procedural default and exhaustion of remedies, operate to limit access to review on the merits of a constitutional claim." [Daniels v. United States](#), 532 U.S. 374, 381 (2001). Although procedural default is sometimes confused with exhaustion, exhaustion and procedural default are distinct concepts. [Williams v. Anderson](#), 460 F.3d 789, 806 (6th Cir. 2006). Failure to exhaust applies when state remedies are "still available at the time of the federal petition." [Id. at 806](#) (quoting [Engle v. Isaac](#), 456 U.S. 107, 125 n.28 (1982)). In contrast, when state court remedies are no longer available, procedural default rather than exhaustion applies. [Williams](#), 460 F.3d at 806.

**Exhaustion.** A federal court may not grant a writ of habeas corpus unless the petitioner has exhausted all available remedies in state court. [28 U.S.C. § 2254\(b\)\(1\)\(A\)](#). A state defendant with federal constitutional claims must fairly present those claims to the state courts before raising them in a federal habeas corpus action. [28 U.S.C. § 2254\(b\), \(c\)](#); [Anderson v. Harless](#), 459 U.S. 4, 6 (1982) (per curiam); [Picard v. Connor](#), 404 U.S. 270, 275-76 (1971); *see*

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Court did not accept his filings. Doc. 14. The undersigned construes Good's second Motion to Compel (Doc. 14) as a Traverse.

also [Fulcher v. Motley](#), 444 F.3d 791, 798 (6th Cir. 2006) (quoting [Newton v. Million](#), 349 F.3d 873, 877 (6th Cir. 2003)) (“[f]ederal courts do not have jurisdiction to consider a claim in a habeas petition that was not ‘fairly presented’ to the state courts”). A constitutional claim for relief must be presented to the state’s highest court in order to satisfy the fair presentation requirement. See [O’Sullivan v. Boerckel](#), 526 U.S. 838, 845-48 (1999); [Hafley v. Sowders](#), 902 F.2d 480, 483 (6th Cir. 1990). In order to satisfy the fair presentation requirement, a habeas petitioner must present both the factual and legal underpinnings of his claims to the state courts. [McMeans v. Brigano](#), 228 F.3d 674, 681 (6th Cir. 2000). This means that the petitioner must present his claims to the state courts as federal constitutional issues and not merely as issues arising under state law. See, e.g., [Franklin v. Rose](#), 811 F.2d 322, 325 (6th Cir. 1987); [Prather v. Rees](#), 822 F.2d 1418, 1421 (6th Cir. 1987).

**Procedural Default.** Procedural default may occur in two ways. [Williams](#), 460 F.3d at 806. First, a petitioner procedurally defaults a claim if he fails “to comply with state procedural rules in presenting his claim to the appropriate state court.” *Id.* In [Maupin v. Smith](#), 785 F.2d 135, 138 (6th Cir. 1986), the Sixth Circuit provided four prongs of analysis to be used when determining whether a claim is barred on habeas corpus review due to petitioner’s failure to comply with a state procedural rule: (1) whether there is a state procedural rule applicable to petitioner’s claim and whether petitioner failed to comply with that rule; (2) whether the state court enforced the procedural rule; (3) whether the state procedural rule is an adequate and independent state ground on which the state can foreclose review of the federal constitutional claim and (4) whether the petitioner can demonstrate cause for his failure to follow the rule and that he was actually prejudiced by the alleged constitutional error. See also [Williams](#), 460 F.3d at 806 (“If, due to the petitioner’s failure to comply with the procedural rule, the state court declines to reach the merits of the issue, and the state procedural rule is an independent and

adequate grounds for precluding relief, the claim is procedurally defaulted.”) (citing [Maupin, 785 F.2d at 138](#)).

Second, “a petitioner may procedurally default a claim by failing to raise a claim in state court, and pursue that claim through the state’s ‘ordinary appellate review procedures.’” [Williams, 460 F.3d at 806](#) (citing [O’Sullivan, 526 U.S. at 848](#)). “If, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim, the claim is procedurally defaulted.” *Id.* While the exhaustion requirement is technically satisfied because there are no longer any state remedies available to the petitioner, *see Coleman v. Thompson, 501 U.S. 722, 732 (1991)*, the petitioner’s failure to have the federal claims considered in the state courts constitutes a procedural default of those claims that bars federal court review. [Williams, 460 F.3d at 806](#).

To overcome a procedural bar, a petitioner must show cause for the default and actual prejudice that resulted from the alleged violation of federal law or that there will be a fundamental miscarriage of justice if the claims are not considered. [Coleman, 501 U.S. at 750](#).

**Merits Review.** In order to obtain habeas relief under [28 U.S.C. § 2254\(d\)](#), a petitioner must show either that the state court decision (1) resulted in a decision contrary to, or involving an unreasonable application of, clearly established federal law as determined by the United States Supreme Court (“contrary to” clause); 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 proceedings (“unreasonable application” clause). *Id.*

“Under the ‘contrary to’ clause, a federal habeas court may grant a writ if the state court arrives at a conclusion opposite to that reached by the [United States Supreme] Court on a question of law or [based on] a set of materially indistinguishable facts.” [Williams v. Taylor, 529 U.S. 362, 412-413 \(2000\)](#). Under the “unreasonable application” clause, a federal habeas court

may grant the writ if the state court identifies the correct governing legal principle from th[e] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." [\*Id.\*](#) [at 413](#). "Clearly established federal law" refers to the holdings, not dicta, of the Supreme Court's decisions as of the time of the relevant state court decision, as well as legal principals and standards flowing from Supreme Court precedent. [\*Id.\*](#) [at 412](#); [\*Ruimveld v. Birkett\*, 404 F.3d 1006, 1010 \(6th Cir. 2005\)](#). A state court is not required to cite Supreme Court precedent or reflect an awareness of Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts" such precedent. [\*Early v. Packer\*, 537 U.S. 3, 8 \(2002\)](#); [\*Lopez v. Wilson\*, 426 F.3d 339, 358 \(6th Cir. 2005\)](#). If the Supreme Court has not addressed the petitioner's specific claims, a reviewing district court cannot find that a state court acted contrary to, or unreasonably applied, Supreme Court precedent or clearly established federal law. [\*Carey v. Musladin\*, 549 U.S. 70, 77 \(2006\)](#).

In determining whether the state court's decision involved an unreasonable application of law, the court employs an objective standard. [\*Williams\*, 529 U.S. at 409](#). "A state court's determination that a claim lacks merit precludes federal habeas review so long as 'fair-minded jurists could disagree' on the correctness of the state court's decision." [\*Harrington v. Richter\*, 562 U.S. 86, 101 \(2011\)](#) (citing [\*Yarborough v. Alvarado\*, 541 U.S. 652, 664 \(2004\)](#)); *see also* [\*Bray v. Andrews\*, 640 F.3d 731, 738 \(6th Cir. 2011\)](#). "A state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." [\*Harrington\*, 562 U.S. at 103](#).

### III. Claim Analysis

Good sets forth four grounds for relief in his Petition. Doc. 4, pp. 4-7. Respondent argues that Good's grounds are procedurally defaulted and that, additionally, Ground One is not cognizable and Grounds Two, Three and Four fail on the merits. Doc. 8, pp. 8-23.

**A. Good's grounds are procedurally defaulted**

Good's grounds are procedurally defaulted because he never filed a timely appeal on direct review to the Ohio Supreme Court. See [Williams, 460 F.3d at 806](#) (a claim is procedurally defaulted when a petitioner failed to raise it in state court and pursue it through the state's ordinary appellate review procedures and state law no longer permits the petitioner to raise the claim); [O'Sullivan, 526 U.S. at 848](#). Although he filed a delayed appeal to the Ohio Supreme Court, the Court denied his motion, thus enforcing a procedural bar. See [Bonilla v. Hurley, 371 F.3d 494, 497 \(6th Cir. 2004\)](#) (when the Ohio Supreme Court denies a motion for delayed appeal, it enforces the procedural bar that forecloses federal habeas relief).

To overcome the procedural bar, Good must show cause for his default and actual prejudice that resulted from the alleged violation of federal law or that there will be a fundamental miscarriage of justice if his claims are not considered. [Coleman, 501 U.S. at 750](#). To show cause, a petitioner must demonstrate that "some objective factor external to the defense" prevented the petitioner's compliance with a state procedural rule." [Bonilla, 370 F.3d at 498](#) (quoting *Murray v. Carrier*, 477 U.S. 478, 494-495 (1986)).

Good first argues that he did not know how to file an appeal until the Ohio Supreme Court sent him a pro-se guidebook. Doc. 14, p. 1. "[I]gnorance of the law and procedural requirements for filing a timely notice of appeal is insufficient to establish cause to excuse [a] procedural default." [Bonilla, 370 F.3d at 498](#). Moreover, the letters submitted by Good show that, after receiving the pro se guidebook from the Ohio Supreme Court, he still, at least twice, failed to comply with the filing requirements. See Doc. 14-1, pp. 1-4. The letters also informed

Good that the prison library at Good's facility contains a copy of the Rules of Practice of the Supreme Court of Ohio. *Id.* p. 4. To the extent that Good argues that his time in the prison library was limited, such an assertion does not demonstrate cause. See [Bonilla, 370 F.3d at 498](#) (limited time in the prison library insufficient to demonstrate cause to excuse a procedural default).<sup>4</sup>

Good does not argue prejudice or manifest injustice, i.e., that his is “an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent.” [Murray v. Carrier, 477 U.S. 478, 496 \(1986\)](#). Actual innocence means “factual innocence, not mere legal insufficiency.” [Bousley v. United States, 523 U.S. 614, 623 \(1998\)](#). “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 v. Delo, 513 U.S. 298, 324 \(6th Cir. 1995\)](#). Nowhere in his filings does Good claim to be actually innocent.

**B. Additionally, all Good's grounds are not cognizable or fail on the merits**

**1. Ground One is not cognizable**

In Ground One, Good argues that his convictions are not supported by the weight of the evidence. Federal habeas corpus relief is available only to correct federal constitutional violations. [28 U.S.C. § 2254\(a\)](#); [Wilson v. Corcoran, 562 US 1, 5 \(2010\)](#). A claim that a conviction is against the manifest weight of the evidence rests solely on state law and is not a cognizable claim in a federal habeas petition. See [Ross v. Pineda, 2011 WL 1337102, at \\*3](#)

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<sup>4</sup> In his Motion for Delayed Appeal, Good stated that he was unable to file a timely appeal because, in part, his attorney did not inform him of the Ohio Court of Appeals' decision until one week after that decision was issued. Doc. 8-1, p. 84. However, an appeal to the Ohio Supreme Court was due on April 9, 2015, and Good filed his Motion for Delayed Appeal on September 11, 2015, 155 days later. Thus, a seven-day delay did not cause his untimely filing.

[\(S.D. Ohio April 11, 2011\)](#) (“Whether a conviction is against the manifest weight of the evidence is purely a question of Ohio law,” citing *State v. Thompkins*, 678 N.E.2d 541 (Ohio 1997)).

## 2. Ground Two fails on the merits

In Ground Two, Good argues that the evidence was insufficient to sustain his convictions. In reviewing a claim that a petitioner’s conviction was not supported by sufficient evidence, the relevant inquiry is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” [Jackson v. Virginia, 443 U.S. 307, 319 \(1979\)](#) (emphasis in original). Under this standard, deference is due the jury’s determination. [Brown v. Konteh, 567 F.3d 191, 205 \(6th Cir. 2009\)](#). The standard is not whether the trier of fact made the correct guilt or innocence determination but, rather, whether it made a rational decision to convict or acquit. [Herrera v. Collins, 506 U.S. 390, 402 \(1993\)](#). Thus, in making a determination as to sufficiency of evidence, a court does “not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury.” [Brown, 567 F.3d at 205](#); see also [Matthews v. Abramajtyts, 319 F.3d 780, 788 \(6th Cir. 2003\)](#). “Circumstantial evidence alone is sufficient to support a conviction, and it is not necessary for the evidence to exclude every reasonable hypothesis except that of guilt.” [Johnson v. Coyle, 200 F.3d 987, 992 \(6th Cir. 2000\)](#) (internal quotations and citations omitted); see also [Durr v. Mitchell, 487 F.3d 423, 449 \(6th Cir. 2007\)](#) (“circumstantial evidence is entitled to equal weight as direct evidence”).

On federal habeas review, an additional layer of deference applies. [Brown, 567 F.3d at 205](#); [Snyder v. Marion Corr. Inst., Warden, 608 Fed. App’x 325, 327 \(6th Cir. 2015\)](#) (indicating that, where a petitioner’s “claims arise in the context of a § 2254 petition, [the court’s analysis] must be refracted through yet another filter of deference”) (citing *Coleman v. Johnson*, — U.S. —, 132 S.Ct. 2060, 2062, 182 L.Ed.2d 978 (2012) (per curiam) which reaffirmed that sufficiency

of the evidence claims under *Jackson* “face a high bar in federal habeas proceedings because they are subject to two layers of judicial deference”). Accordingly, even if this Court were to conclude that a rational trier of fact could not have found petitioner guilty beyond a reasonable doubt, the Court “must still defer to the *state appellate court’s* sufficiency determination as long as it is not unreasonable.” [Brown, 567 F.3d at 205](#) (emphasis in original); *see also* [White v. Steele, 602 F.3d 707, 710 \(6th Cir. 2009\)](#).

The Ohio Court of Appeals considered Good’s sufficiency claim:

In his first and second assignments of error, Good argues that his convictions are not supported by sufficient evidence and, in the alternative, are against the manifest weight of the evidence. We disagree.

When an appellate court reviews the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 47. Sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St. 3d 89 (1997). Accordingly, the question of whether the offered evidence is sufficient to sustain a verdict is a question of law. *State v. Wingate*, 9th Dist. Summit No. 26433, 2013- Ohio-2079, ¶ 4.

Under R.C. 2907.02(A)(1)(b), it is unlawful to engage in sexual conduct when “the other person is less than thirteen years of age, whether or not the offender knows the age of the other person.” Here, S.C. testified that when she was nine, Good forced her to perform oral sex, inserted his penis in her vagina, and inserted his fingers into her buttocks. This is sufficient evidence to support a rape conviction under the statute.

Under R.C. 2907.05(A)(4), it is illegal to engage in sexual contact with another who “is less than thirteen years of age, whether or not the offender knows the age of that person.” Here, Carol testified that she saw Good place his hand under her five-year-old daughter’s buttocks. This is sufficient evidence to support the conviction for gross sexual imposition under the statute.

Doc. 8-1, pp. 75-77.

The Ohio Court of Appeals applied the correct standard to Good’s sufficiency claim and its determination was not unreasonable. Good does not claim otherwise. Accordingly, Ground Two fails on the merits.

## 2. Ground Three fails on the merits

In Ground Three, Good argues that he was prejudiced by the trial court's refusal to sever the two counts brought against him at trial. Severance is governed by state law. [\*Hutchinson v. Bell\*, 303 F.3d 720, 731 \(6th Cir. 2002\)](#). State law trial errors will not warrant habeas relief unless the "error rises to the level of depriving the defendant of fundamental fairness in the trial process." *Id.* (quoting *Serra v. Michigan Dept. of Corr.*, 4 F.3d 1348, 1354 (6th Cir. 1993)). A criminal defendant is not entitled to severance merely because he or she might have had a better chance for acquittal in a separate trial. See [\*Zafiro v. United States\*, 506 U.S. 534, 540 \(1993\)](#). On federal habeas review, a petitioner must show that misjoinder "resulted in prejudice so great as to deny a defendant his ... right to a fair trial." [\*Davis v. Coyle\*, 475 F.3d 761, 777 \(6th Cir. 2007\)](#) (quoting *U. S. v. Lane*, 474 U.S. 438, 449 (1986)); [\*Coley v. Bagley\*, 706 F.3d 741, 753 \(6th Cir. 2013\)](#).

The Ohio Court of Appeals considered Good's argument that he was prejudiced by the trial court's refusal to sever the counts and rejected his claim, explaining,

Crim.R. 8 allows for joinder of offenses that are of the same or similar character. *State v. Houston*, 3d Dist. Shelby No. 17-10-06, 2010-Ohio-6070, ¶ 41. A defendant requesting that charges against him be severed for the purpose of trial must demonstrate that his rights will be prejudiced. *State v. Schaim*, 65 Ohio St.3d 51, 58 (1992). The claim of prejudice requires the trial court to determine "(1) whether evidence of the other crimes would be admissible even if the counts were severed, and (2) if not, whether the evidence of each crime is simple and distinct." *Id.* at 59. Evidence is simple and distinct where the fact finder would not confuse the two crimes and would not improperly consider evidence of one offense as corroborative of the other. *State v. Rollins*, 3d Dist. Paulding No. 11-05-08, 2006- Ohio-1879, ¶ 43.

Here, while the evidence of each crime would likely not be admissible in a trial for the other, the testimony was simple and distinct. The details of the rape provided by S.C.'s testimony differed dramatically from the details of the gross sexual imposition provided by Carol's testimony. There was nothing that would have confused the jury as to what detail was a part of which accusation. Further, the dissimilarities between the two crimes minimized the possibility that the jury used the evidence of one crime to corroborate the evidence from the other. As a result, the trial court did not abuse its discretion in denying the motion to sever.

Doc. 8-1, pp. 78-79.

Good has not demonstrated that the Ohio Court of Appeals' decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, [28 U.S.C. §2254\(d\)\(1\)](#); indeed, he fails to make any argument at all in support of his claim. Ground Three fails on the merits.

#### **5. Ground Four fails on the merits**

In Ground Four, Good argues that he was denied effective assistance of counsel, presumably when trial counsel failed to renew his motion for severance after evidence had been submitted at trial.<sup>5</sup> The Ohio Court of Appeals determined that, having found no merit to Good's claim that the trial court erred in not severing the two counts against him, Good's trial counsel was not ineffective for failing to renew a frivolous motion requesting severance of the counts. Doc. 8-1, p. 79. In other words, the Ohio Court of Appeals concluded that Good's trial counsel's representation did not fall below an objective standard of reasonableness and that he was not prejudiced by counsel's actions. *See* [Strickland](#), 466 U.S. 668, 688, 694 (1984). Good does not argue that the Ohio Court of Appeals' determination was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States. *See* [28 U.S.C. §2254\(d\)\(1\)](#). Ground Four fails on the merits.

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<sup>5</sup> Good does not provide supporting facts explaining his grounds for relief in his Petition. In his direct appeal, Good argued that trial counsel was ineffective for failing to renew his motion for prejudicial joinder at the close of the state's case. Doc. 8-1, pp. 38, 48.

#### IV. Conclusion and Recommendation

For the reasons stated above, the undersigned recommends that Good's habeas Petition be **DISMISSED** because all Good's grounds are procedurally defaulted. Additionally, Ground One is not cognizable and Grounds Two, Three and Four fail on the merits.

Dated: May 31, 2016



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Kathleen B. Burke  
United States Magistrate Judge

#### OBJECTIONS

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